STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO THE
MAINE RULES OF CIVIL PROCEDURE

2010 Me. Rules 06

Effective: July 1, 2010

All of the Justices concurring therein, the following amendments to the Maine Rules of Civil Procedure are hereby adopted to be effective on the date indicated above. The specific rules amendments are stated 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 it is not part of the amendments adopted by the Court.

1. Rule 4 subdivisions (d)(1) and (g) of the Maine Rules of Civil Procedure are amended to read as follows:

(d) Summons: Personal Service. The summons and complaint shall be served together. Personal service within the state shall be made as follows:

(1) Upon an individual other than a minor or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given. The court, on motion, upon a showing that service as

prescribed above cannot be made with due diligence, may order service to be made ~~by leaving a copy of the summons and of the complaint at the defendant's dwelling house or usual place of abode; or to be made by publication~~ pursuant to subdivision (g) of this rule.~~, if the court deems publication to be more effective.~~

. . . .

(g) Service by ~~Publication~~ Alternate Means; Motion Required.

(1) *When Service May Be Made.* The court, on motion upon a showing that service cannot with due diligence be made by another prescribed method, shall order service (i) to be made by leaving a copy of the order authorizing service by alternate means, the summons, and the complaint at the defendant's dwelling house or usual place of abode; or (ii) by publication ~~in an action described in subdivision (f) of this rule,~~ unless a statute provides another method of notice; or ~~when the person to be served is one described in subdivision (e) of this rule~~ (iii) to be made electronically or by any other means not prohibited by law.

Any such motion shall be supported by (i) a draft, proposed order to provide the requested service by alternate means, and (ii) an affidavit showing that:

(A) The moving party has demonstrated due diligence in attempting to obtain personal service of process in a manner otherwise prescribed by Rule 4 or by applicable statute;

(B) The identity and/or physical location of the person to be served cannot reasonably be ascertained, or is ascertainable but it appears the person is evading process; and

(C) The requested method and manner of service is reasonably calculated to provide actual notice of the pendency of the action to the party to be served and is the most practical manner of effecting notice of the suit.

(2) *Contents of Order.* An order for service by ~~publication~~ alternate means shall include (i) a brief statement of the object of the action; (ii) if the action may affect any property or credits of the defendant described in subdivision (f) of this rule, a description of any such property or credits; ~~and~~ (iii) the substance of the summons prescribed by subdivision (a) of this rule; and (iv) a finding by the court that the party seeking service by alternate means has met the requirements in subdivision (g)(l)(A)-(C) of this rule. If the order is one allowing service by publication pursuant to subsection (g)(1)(ii), it shall also direct its publication once a week for 3 successive weeks in a designated newspaper of general circulation in the county ~~where the action is pending~~ or municipality and state most reasonably calculated to provide actual notice of the pendency of the action to the party to be served; and the order shall also direct the mailing to the defendant, if the defendant's address is known, of a copy of the order as published. If the order is one allowing service by electronic or other alternate means pursuant to subsection

(g)(1)(iii), it may include directives about adequate safeguards to be employed to assure that service can be authenticated and will be received intact, with all relevant documents and information.

(3) *Time of Publication or Delivery; When Service Complete.* When service is made by publication pursuant to subsection (g)(1)(ii), t~~T~~he first publication of the summons shall be made within 20 days after the order is granted. Service by ~~publication~~ alternate means hereunder is complete on the twenty-first day after the first ~~publication~~ service or as provided in the court's order. The plaintiff shall file with the court an affidavit demonstrating that publication or compliance with the court's order has occurred ~~has been made~~.

Advisory Committee Note

Rule 4 has been amended to reflect the concerns expressed by the Law Court in *Gaeth v. Deacon* 2009 ME 9, 964 A.2d 621, that service by alternative means, including publication, afford due process to the person to be served in accordance with the Maine and United States Constitutions. In the course of that opinion the Court also addressed the limits of service by print publication in the electronic age.

The Constitution does not require any particular means of service of process, only that the method selected be reasonably calculated to provide actual notice and an opportunity to respond. *Lewien v. Cohen*, 432 A.2d 800, 804-05 (Me. 1981) (citing, *inter alia*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). Service of process serves the dual purposes of giving adequate notice of the pendency of an action, and providing the court with personal jurisdiction over the party properly served. *Gaeth,* 2009 ME 9, ¶ 20, 964 A.2d at 626 (citing *Brown v. Thaler*, 2005 ME 75, ¶ 10, 880 A.2d 1113, 1116). The allowable means for serving process are governed primarily by court rule. 14 M.R.S. § 701. Presently, service by publication may be ordered when the defendant is an individual residing either within, Rule 4(d)(1), or outside, Rule 4(e) & (f)(1), the state, or when a

person is a party to a Family Division action brought pursuant to Chapter XIII of these Rules, Rule 4(f)(2).

These amendments group together all forms of service that require a court order and, upon motion supported by affidavit that the party has been unable to effect service by any other means, that no other means of effecting service are practicable and that service by the method requested is reasonably calculated to provide actual notice of the suit, allow for service to be made:

(1) by leaving a copy of the summons and complaint at the defendant's dwelling house or usual place of abode [presently codified at Rule 4(d)(1)]; or

(2) by publication; or

(3) by other alternative means, including electronic means. The amendment makes clear that a court has the authority, in proper circumstances, to consider a request seeking to use an individual's usual place of "virtual abode," which might include Internet web sites with means of contact, email access, social networking sites, or any other alternative avenues where it is reasonably certain to provide a person with actual notice of the suit.

The motion for service by alternate means must be supported by a draft order making the necessary findings and specifying the proposed method of alternative service.

Before a party can obtain an order allowing service by any alternate means, that party must first demonstrate that he or she has exhausted all reasonable attempts to make service in one of the other ways prescribed by Rule 4 (or by applicable statute) that are designed to provide actual notice of the action to the party to be served. Whether attempts at locating a party are reasonable will of necessity depend on the situation; likewise, whether a search is limited to one jurisdiction or many may depend on the nature of the parties and claims. Within the framework of any given set of facts, a party seeking an order approving service by publication or other alternate means may seek to show which of the following actions s/he has taken in attempting to serve the party: checked *publicly available* databases (including computer databases) such as tax records, voting rolls, criminal history records, credit records, telephone directories, divorce or death records, utility records, post office records, and motor vehicle registry records in the jurisdiction where the defendant is most likely to be found. In addition to demonstrating that he has made a reasonable search of available *public* data, a

party seeking an order for publication or service by alternate means should also satisfy the court that he or she has made reasonable efforts to locate the current address of the party to be served by checking *private* sources: known relatives, former employers, former educational institutions, and former neighbors. Once the party seeking the order for publication or service by alternate means has shown, through affidavit, that he or she has demonstrated due diligence and exhausted all reasonable efforts to provide actual notice of the action to the party to be served, the court must still fashion an order which is reasonably calculated to provide actual notice of the pending proceeding.

The amended rule, consistent with *Gaeth*, recognizes that service by publication in a newspaper should be a last resort, used only after the party has exhausted other means more likely to achieve notice in this day and age. When considering an order for service by publication a court may potentially exclude the county where the suit is pending and/or where the plaintiff resides and instead focus upon the county or municipality (which may not even be within the State of Maine) where newspaper publication is most likely to provide actual notice to the defendant or to his family. Even if service by publication is permitted, the court may still require that notice be attempted or that notice of the publication be provided to the party to be served through other alternative means, including regular mail, certified mail or electronic mail sent both to the party to be served and even conceivably to relatives, employers, or educational institutions recently attended by the party.

2. Rule 76C(a) 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, 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 to a complaint or other pleading to which an answer is allowed under Rule 7(a) or reply to a counterclaim 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 to Rule 76C is intended to clarify that any party may remove an action to the Superior Court within the time allowed to respond to any pleading which is the first document to initiate a new claim. This change establishes that a plaintiff may remove an action after a counterclaim is filed in the District Court, an issue on which there has been uncertainty.

3. Rule 80B(e) of the Maine Rules of Civil Procedure is amended to read as follows:

(e) Record.

(1) *Preparation and Filing Responsibility.* Except where otherwise provided by statute or this Rule, (i) it shall be the plaintiff's responsibility to ~~insure~~ ensure the preparation and ~~submission to~~ filing with the Superior Court of the record of the proceedings of the governmental agency being reviewed, and ~~Except where otherwise provided by this Rule,~~ (ii) the record for review shall be ~~submitted~~ filed at the same time as or prior to the plaintiff's brief. Where a motion is made for a trial of the facts pursuant to subdivision (d) of this Rule, the moving party shall be

responsible to ~~insure~~ ensure the preparation and ~~submission~~ filing of the record ~~to the court~~ and such record shall be ~~submitted~~ filed with the motion.

(2) *Record Contents*. The parties shall meet in advance of the time for filing the plaintiff's brief or motion for trial of the facts to agree on the record to be ~~submitted~~ filed. Where agreement cannot be reached, any dispute as to the record shall be submitted to the court. The record shall include the application or other documents that initiated the agency proceedings and the decision and findings of fact that are appealed from, and the record may include any other documents or evidence before the governmental agency and a transcript or other record of any hearings. If the agency decision was based on a municipal ordinance, a state or local regulation, or a private and special law, a copy of the relevant section or sections from that ordinance, regulation, or private and special law, shall be included in the record. For appeals from decisions of a municipal agency, a copy of the section or sections of the municipal ordinance that establish the authority of the agency to act on the matter subject to the appeal shall also be included in the record. Copies of sections of the Maine Revised Statutes shall not be included in the record.

In lieu of an actual record, the parties may submit stipulations as to the record; however, the full decision and findings of fact appealed from, and the

applicable ordinances, regulations, or private and special laws as detailed above shall be included.

Advisory Committee Note

Rule 80B(e) is slightly reorganized and some wording, such as the substitution of "filed" for "submitted," is adjusted. The purpose of the substantive amendments to Rule 80B(e) is described in the Advisory Committee Note following the amendment to Rule 80C(f).

4. Rule 80C(f) of the Maine Rules of Civil Procedure is amended to read as follows:

(f) Record. The agency shall file the complete record of the proceedings under review as provided by 5 M.R.S.~~A.~~ § 11005. If the petitioner believes that the record filed by the agency either is incomplete or over-inclusive, the petitioner shall serve notice upon the agency within 10 days after the record is filed. This notice shall include specific proposals by the petitioner regarding additions to or deletions from the record filed by the agency. The parties shall attempt to agree on the contents of the record. If the parties cannot agree, the petitioner may request that the court modify the contents of the record. A copy of the agency's decision on appeal, whether written or transcribed, shall be included in the record. If the agency decision was based on or referenced a municipal ordinance, a state or local regulation, or a private and special law, a copy of the relevant section or sections from that ordinance, regulation, or private and special law, shall be included in the

record. Copies of sections of the Maine Revised Statutes shall not be included in the record.

Advisory Committee Note

The amendments to Rule 80B(e) and 80C(f) are similar to the requirements of Rule 8(h)(2) of the Maine Rules of Appellate Procedure and clarify that in appeals from State and municipal agency decisions, the decision appealed from, as well as any applicable state or local regulations, private and special laws or municipal ordinances, including the section or sections of the municipal ordinance that establish the authority of a municipal agency to act on the matter subject to the appeal, must be included in the record compiled for review. Copies of provisions of the Maine Revised Statutes should not be included in any record on appeal.

5. Rule 80K(k) of the Maine Rules of Civil Procedure is amended to read as follows:

(k) Alternative Dispute Resolution. Alternative Dispute Resolution, as agreed to by the parties or as required by law, shall be conducted pursuant to the processes specified in Rule 92(a)(3).

Advisory Committee Note

Implementation of M.R. Civ. P. 80K(k) has indicated the need for more clarity regarding the mediation processes that apply to Land Use Violation Cases. This amendment to the rules clarifies that when an alternative dispute resolution processes is agreed to by the parties or required by statute, the referral provisions of M.R. Civ. P. 92(a)(3) will apply. Pursuant to M.R. Civ. P. 92(a)(3)(A), when the referral to mediation is made through CADRES, the parties shall be subject to the administrative fee set out in the Court's Fee Schedule.

6. Rule 91(f) of the Maine Rules of Civil Procedure is amended to read as follows:

(f)(1) Appeal ~~From District or Superior Court~~. A party seeking to appeal to the Superior Court or the Law Court may file or renew an application for leave to

proceed without payment of fees or costs as provided in subdivision (a) of this rule. Subject to the requirements of subdivision (f)(2), if ~~If~~ the court from which the appeal is taken finds that the appeal is brought in good faith and is not frivolous and that the applicant is without sufficient funds to pay all or part of the costs of ~~entering~~ filing the appeal, it shall order all or part of those costs to be waived. The court may enter such orders limiting the record on appeal as it deems appropriate. The provisions of subdivision (e) of this rule apply to proceedings under this subdivision.

~~(f)(2) Copy of Electronic Recording. When the hearing that is subject to the appeal was electronically recorded, and the court finds that all or a portion of the transcript of the hearing is necessary to support the appeal, a copy of the recording of the hearing, in lieu of a paper transcript, shall be filed as part of the record pursuant to M.R. App. P. 6, except that a paper transcript shall be prepared for any child protective proceeding on appeal from the District Court. When the hearing that is subject to the appeal was recorded by an official court reporter, the court shall not pay for a transcript to support the appeal, and the court shall direct the parties to prepare and submit to it an agreed statement of the record pursuant to M.R. App. P. 5(f).~~

(f)(2) Transcript or electronic recording. If the court (i) waives all or part of the costs of taking the appeal pursuant to subdivision (f)(1), and (ii) finds that a transcript or recording of all or a portion of any recorded hearing is necessary to support the appeal, the court shall ensure that a record of the hearing is made part of the record on appeal pursuant to M.R. App. P. 5 as follows:

(A) In a child protection proceeding, involuntary commitment proceeding, proceeding for the appointment of a guardian for a minor, or proceeding to terminate parental rights as part of an adoption proceeding, the court shall order that a paper transcript be prepared at state expense;

(B) In any other proceeding, the court shall not pay for a paper transcript.

(i) If the proceeding was recorded electronically, the court may order that a copy of the recording of the hearing be provided at state expense in lieu of a transcript, or may direct the parties to prepare and submit for the court's approval a statement of the evidence in lieu of a transcript.

(ii) If the hearing was recorded by a court reporter, the court shall direct the parties to prepare and submit for the court's approval a statement of the evidence in lieu of a transcript. If the parties cannot agree on a statement of the evidence to submit for court approval, the appellant shall serve a proposed statement on the

appellee within 21 days after entry of judgment or 14 days after the filing of the notice of appeal, whichever occurs first. The appellee may file and serve objections or propose amendments thereto within 7 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the court for settlement and approval and, as settled and approved, shall be included in the record on appeal.

Advisory Note

M.R. Civ. P. 91(f)(1) is amended to clarify that when fees relating to an appeal are waived, the waiver of fees for a transcript or electronic recording of a hearing are limited as provided in Rule 91(f)(2). The words "From District or Superior Court" are removed from the title to avoid any confusion when the rule is applied in Probate Court proceedings pursuant to M.R. Prob. P. 91.

M.R. Civ. P. 91(f)(2) is amended to (1) clarify that the subdivision applies only if the court has waived fees on appeal, and (2) clarify the procedures for providing a record on appeal of any hearing in the trial court. There are several changes from former Rule 91(f)(2).

First, the rule clarifies that a paper transcript or copy of the electronic recording is provided at state expense only if the court has waived fees for the appeal pursuant to subdivision (f)(1).

Second, the rule changes the citation to the Maine Rules of Appellate Procedure from Rule 6 to Rule 5. Rule 5 of the Maine Rules of Appellate Procedure describes the contents of the record on appeal, including the transcript or statement in lieu of a transcript. Rule 6 merely provides the time in which a transcript must be filed.

Third, the rule lists in paragraph (A) those proceedings in which a paper transcript may be provided at state expense when the appellant qualifies for a waiver pursuant to Rule 91. The old rule authorized a transcript at state expense only in child protection proceedings. The new rule adds involuntary commitment proceedings, proceedings for the appointment of a guardian of a minor, and termination of parental rights proceedings that are part of adoption proceedings. The added proceedings, like child protection proceedings, require a transcript because they involve issues regarding fundamental rights to personal liberty, or to the care, custody and control of a minor.

Fourth, the rule expressly prohibits courts from ordering a paper transcript in any proceeding other than the proceedings listed in paragraph (A).

Fifth, in proceedings when a paper transcript is not provided at state expense, the rule permits, but does not require, the trial court to order that a copy of the electronic recording be provided in lieu of a paper transcript where the hearing was electronically recorded. The former rule required the filing of the electronic recording. As an alternative, the rule permits the trial court to order the parties to prepare and submit to it for approval a statement of the evidence in lieu of a transcript. The process for preparation of this statement would be similar to that authorized by M.R. App. P. 5(d) for those circumstances when no transcript can be prepared. As with M.R. App. P. 5(d), the statement in lieu of a transcript, even if prepared by agreement, must be submitted to and approved by the trial court.

Sixth, the words "official court reporter" were replaced with "court reporter" to cover appeals from Probate Court where private court reporters are used. See M.R. Prob. P. 91.

7. Rule 108(d) of the Maine Rules of Civil Procedure is amended to read as follows:

(d) Miscellaneous Requirements.

(1) *Forms for Filings.* Financial statements, child support affidavits and child support worksheets shall be filed on court-approved forms that are published by the court.

(2) *Signature Under Oath.* All child support affidavits and financial statements shall be signed by the party under oath.

(3) *Privacy of Financial Statements.* Any financial statement or child support affidavit filed shall be kept separate from other papers in the case and shall not be available for public inspection, but shall be available, as necessary, to the court, the attorneys whose appearances are entered in the case, the parties to the case, their expert witnesses, and public agencies charged with responsibility for the collection of support.

(4) *Updated Statements*. The parties shall update child support affidavits and financial statements 7 days before trial and file the updated statements with the court.

Advisory Committee Note

The seven-day updating requirement is moved from Rule 112(d) to become Rule 108(d)(4), where it is more appropriately placed. The updating requirement is not changed, except to clarify that the updated statements must be prepared and filed. Rule 108(d) is also amended to place a heading in each paragraph.

8. Rule 112 of the Maine Rules of Civil Procedure is amended to read as follows:

RULE 112. DISCOVERY

(a) Discovery Limitations. In any proceeding under this chapter, a party may obtain discovery on issues of spousal and child support, counsel and guardian ad litem fees, and disposition of property and debt as in any other civil actions. However, when financial statements are required under Rule 108(c), discovery may be initiated only after the parties have filed and exchanged the financial statements. If the exchange does not occur, the party who has filed a financial statement may serve discovery after the time period has expired as provided in Rule 108(c). On other issues, including parental rights and responsibilities, discovery may be served only by order of the court for good cause shown.

(b) Financial Statements. In any proceeding under this chapter upon motion of a party or its own motion, the court may order the parties to file and exchange financial statements or child support affidavits when the filing of these documents is not required under Rule 108. The court may also order the supplementation of financial statements or child support affidavits.

(c) Discovery Procedure. Where discovery occurs, discovery practice shall be governed by Rules 26 through 37. If a party fails to comply with discovery, compliance with discovery may be enforced by a judge or magistrate. A magistrate may impose sanctions for failure to comply with discovery, including but not limited to those set forth in Rule 37, but excluding any sanctions or penalties based upon a determination of contempt under Rule 66.

~~(d) Updated Statements. The parties shall update child support affidavits and financial statements 7 days before trial.~~

Advisory Committee Note

The provision in Rule 112(d) requiring preparation and filing of updated child support affidavits and financial statements is moved to become Rule 108(d)(4), where it is more appropriately placed. The provision in Rule 112(b) authorizing the court to require updating of financial statements and child support affidavits, as the court deems appropriate, remains in effect.

9. These amendments shall be effective on July 1, 2010.

Dated: May 25, 2010

FOR THE COURT[1]

/s/
LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
JON D. LEVY
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justice

[1] This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.