

STATE OF MAINE  
SUPREME JUDICIAL COURT  
AMENDMENTS TO  
THE MAINE RULES OF CIVIL PROCEDURE

**2011 Me. Rules 01**

Effective: January 14, 2011

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

1. Rule 26(b)(4) of the Maine Rules of Civil Procedure is amended to read as follows:

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to identify the data or other information considered by the witness in forming the opinions, any exhibits to be used as a summary of or support for the opinions, the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years, and the compensation to be paid for the study and testimony, provided however, that, unless otherwise ordered by the court, information relating to qualifications, publications and compensation need not be provided for experts who have been treating physicians of a party for any injury that is a subject of the litigation; (ii) ~~Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem~~

~~appropriate.~~ A party may take the testimony of each person whom another party has designated as an expert witness for trial by deposition pursuant to Rule 30 or Rule 31.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, ~~(i) the court shall require that the party seeking discovery of the expert pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert. at the deposition. Upon a showing of good cause, the court may award additional reasonable fees and expenses of the expert for expert discovery pursuant to this rule.~~

### **Advisory Committee Notes December 2010**

Rule 26(b)(4)(A)(ii) has been modified to allow the deposition of a party's retained expert as a matter of course, rather than on motion, consistent with common discovery practice in civil cases. This is also consistent with practice in Federal Court.

Rule 26(b)(4)(C) is amended to state more clearly the responsibility of a party seeking discovery to pay the expert's reasonable fee for time spent in a deposition. The amendment clarifies that the time for which compensation is to be paid is the time at the deposition. The Rule continues to allow parties to move the court for additional expert fees or expenses, if appropriate, upon a showing of good cause.

2. Rule 66 of the Maine Rules of Civil Procedure, when it references appeals, is amended (i) at subdivisions (b)(5) and (c)(5) to strike the references to the Maine Rules of Criminal Procedure and replace those references with references to the Maine Rules of Appellate Procedure; and (ii) at subdivision (d)(2)(G) to strike the reference to the Maine Rules of Civil Procedure and replace that reference with a reference to the Maine Rules of Appellate Procedure.

**Advisory Committee Note  
December 2010**

The amendment of the provisions of Rule 66(b)(5), (c)(5), and (d)(2)(G), relating to appeals, substitutes references to the Maine Rules of Appellate Procedure for the previous references to the Maine Rules of Criminal Procedure or the Maine Rules of Civil Procedure.

3. Rule 93, subdivisions (a) and (c), of the Maine Rules of Civil Procedure are amended to read as follows:

**RULE 93. FORECLOSURE DIVERSION PROGRAM**

This Rule shall govern operation of the Foreclosure Diversion Program.

**(a) Definitions.** As used in this Rule, the following terms shall have the following meanings:

(1) “*Commercial loan*” means a loan made to a borrower in which the proceeds of the loan are not used, in whole or in part, for personal, family or household purposes, and/or are not used to refinance a loan made in whole or in part for personal, family or household purposes.

(2) “*Foreclosure action*” means any civil action initiated pursuant to title 14, chapter 713 of the Maine Revised Statutes (14 M.R.S. §§ 6101-6325) to foreclose on a property subject to a mortgage or other note or bond secured by that property, other than a State mortgage pursuant to 14 M.R.S. §§ 6151-6153.

(3) “*Owner-occupant*” means an individual who is the mortgagor of a residential property that is that individual’s primary residence. The term may include: ~~(A) two or more individuals who are joint mortgagors of that residential property, and (B) a mortgagor of a residential property who resided at that~~

~~property as that individual's primary residence within 180 days prior to commencement of the foreclosure action and has not established primary residence at another property subject to a mortgage with that individual as the mortgagor.~~

(4) “*Primary residence*” means a residential property that is an individual’s principal place of abode.

(5) “*Residential property*” means a single residential real property including: (A) not more than four residential units owned by the mortgagor, or (B) a single condominium unit owned by the mortgagor within a larger residential condominium property.

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**(c) Foreclosure Diversion Program Participation Requirements.**

(1) *Answers: Request for Mediation.* Within 20 days after being served with a summons and complaint each defendant shall (i) serve an answer to the complaint on the plaintiff, and (ii) file a copy of that answer with the court. To answer foreclosure complaints and request mediation, defendants may use the one-page form approved and developed by the Department of Professional and Financial Regulations, Bureau of Consumer Credit Protection, or may file an answer that complies with M.R. Civ. P. 12(a) and also requests mediation. However, if a defendant appears or otherwise requests mediation in the action within 20 days after service of the summons and complaint, but does not file an answer to the complaint, mediation shall be scheduled in accordance with this Rule, and the deadline for filing an answer shall be extended until 20 days after a final mediator’s report is filed with the court or until 20 days after the court waives mediation or orders that mediation shall not occur.

(2) *Mediation.* The court will schedule a mediation session for each foreclosure action filed against a defendant who is an owner-occupant and who appears, answers, or otherwise requests mediation in the action within 20 days after service of the summons and complaint and attends an informational session, if ordered to attend by the court. It is within the court’s discretion whether to schedule mediation in actions in which the defendant fails to timely appear, answer, or otherwise request mediation, but has not been defaulted pursuant to M.R. Civ. P. 55, or fails to attend an informational session.

(3) *Informational Sessions.* The Foreclosure Diversion Program is authorized to design and implement informational sessions, and the court may, in its discretion, schedule informational sessions and order parties, counsel, and others to attend.

(4) *Financial Forms to be Provided.* In addition to the pleading requirements specified by statute and Court Rules, a plaintiff shall file and serve with the foreclosure complaint a set of financial forms requesting information from the defendant that would allow the plaintiff to consider or develop alternatives to foreclosure or otherwise facilitate mediation of the action. These forms may be forms designed by individual lenders or standardized forms developed by the federal government, a state agency, or some other group, provided that the forms sent by the plaintiff are the forms that it will use in considering or developing alternatives to foreclosure. With each set of financial forms served on a defendant, the plaintiff must include an envelope large enough to contain the forms. The envelope shall be addressed to the plaintiff's attorney, to whom this information will be sent.

(5) *Completion and Return of Forms.* Defendants shall send one set of copies of all of the completed financial documents to plaintiff's attorney AND one set of copies of all of the completed financial documents to the court no later than 21 days after the informational session, if one is held, or no later than 42 days after service of the complaint and summons, if no informational session is held. If plaintiff's attorney has not received the forms by the 23rd day after the informational session, if one is held, or by the 44th day after service of the complaint and summons, if no informational session is held, plaintiff's attorney shall notify the court in writing that the defendant has failed to comply with this requirement for mediation, and shall send a copy of this notice to the defendant. If the defendant has failed to attend a scheduled informational session and has failed to send the required paperwork to plaintiff's counsel on time, the court may order that mediation not occur and return the case to the regular court docket.

**Advisory Committee Note**  
**December 2010**

The first amendment eliminates the 180-day look back; the second would give judges the discretion to return cases to the regular docket if a defendant fails to attend an informational session.

With regard to the first amendment, M.R. Civ. P. 93(a)(3) as it currently reads, requires court staff to do extra work to find defendants who are not residing in the properties at issue. When this language was added, there was some concern that the mediation process be available to individuals who had moved out of their homes because they could no longer afford to pay the mortgage. With experience, it has become apparent that virtually the only unoccupied houses undergoing foreclosure in Maine are “second” homes, which do not qualify for the program. In Maine it appears that people who are not paying their mortgages on their primary residences, for whatever reason, are not moving out.

The second proposed amendment would allow judges to use their discretion to determine how to address cases when a defendant fails to appear for an informational session the defendant was ordered to attend. This amendment would conform the Rule to present practice in some courts.

4. These amendments shall be effective January 14, 2011.

Dated: January 3, 2011

FOR THE COURT<sup>1</sup>

          /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 Justices

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<sup>1</sup> This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.