

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

2014 Me. Rules 06

Effective: September 1, 2014

All of the undersigned Justices concurring therein, the following amendment to the Maine Rules of Civil Procedure is adopted to be effective on the date indicated above. The specific amendment is stated below. To aid in understanding of the amendment, an Advisory Note appears after the text of the 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 93 of the Maine Rules of Civil Procedure is 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 two or more individuals who are joint mortgagors of that residential property.

(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.

(b) Foreclosure Diversion Program Application and Administration.

(1) *Actions Covered.* This Rule shall govern all foreclosure actions filed after December 31, 2009, against a defendant who is an owner-occupant. This Rule shall also govern all foreclosure actions that are filed on or before December 31, 2009, against defendants who are owner-occupants, and who are ordered by the court to mediation pursuant to subsection (q) of this Rule.

(2) *Manager.* The Manager of the Foreclosure Diversion Program, under the direction of the State Court Administrator or designee, shall manage the Foreclosure Diversion Program and shall supervise the:

(A) ~~Establishment~~ Operation and support of the Foreclosure Diversion Program state-wide;

(B) Identification and qualification of persons to be mediators in the Program;

(C) ~~Training~~ Orientation and certification of individuals to be mediators pursuant to this Rule;

(D) Trial court clerks’ scheduling of mediations required or requested pursuant to this Rule;

(E) Payment of mediators for services pursuant to this Rule;

(F) Preparation and filing of reports about mediations conducted pursuant to this Rule and of such other reports and recommendations regarding the Foreclosure Diversion Program as may be required by the Supreme Judicial Court, or the State Court Administrator or designee; and

(G) Development and implementation of policies, procedures, and forms to manage, evaluate, and report about the Foreclosure Diversion Program.

(3) *Mediators.*

(A) Active Retired Justices or Judges may be assigned by the Chief Justice or Chief Judge of their courts to act as Foreclosure Diversion Program mediators after ~~receiving the required training~~ meeting program requirements; and

(B) Other persons eligible to be certified as mediators pursuant to this Rule shall:

(i) Be educated and experienced in the professions of law, real estate, accounting, banking, or mediation; have work experience that includes foreclosures, credit and collections work; or have done work on behalf of creditors or debtors in actions to collect on mortgages, notes, or debts;

(ii) Have successfully completed ~~training~~ orientation provided by the Foreclosure Diversion Program and continuing education necessary to remain on the active roster;

(iii) Have received a certificate of qualification to serve as mediators from the Foreclosure Diversion Program subject to such terms and conditions as deemed appropriate; and

(iv) Have a laptop computer that is compatible with court printers for use at all mediation sessions. In the alternative, mediators may use laptops or other portable computers and portable printers.

(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. A court may schedule mediation in an action in which the defendant has failed to timely appear, answer, or otherwise request mediation, and/or has failed to attend an informational session, but has not been defaulted pursuant to M.R. Civ. P. 55.

(2) *Informational Sessions.* The Foreclosure Diversion Program is authorized to design and implement informational sessions regarding foreclosure proceedings and the diversion process, and the court may, in its discretion, schedule informational sessions.

~~(23) *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. If the mailing address is a P.O. Box,

plaintiff's attorney's physical address will also be provided.

(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. Forms and any additional information required by a plaintiff to review a defendant's loan for a possible workout, shall be identified by the plaintiff at mediation and provided to the plaintiff's attorney and to the court by the defendant no later than 21 days after the first mediation session. If a defendant fails to meet this requirement, the plaintiff's attorney may file a written motion with the court, with a copy to the defendant, requesting that the case be returned to the regular docket because the defendant has failed to provide the requested information. If the defendant has failed to attend appear a scheduled at an informational session and/or mediation 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 without the filing of a motion by the plaintiff.~~

(d) Deferral of Dispositive Motions and Requests for Admissions.

(1) *Generally.* When a defendant, who is an owner-occupant, appears, answers, or otherwise requests mediation within 20 days after service of the summons and complaint in a foreclosure action filed after December 31, 2009, or when mediation in the Foreclosure Diversion Program is ordered by the court pursuant to subsections (e)(2) or (q), no dispositive motions or requests for admissions shall be filed until five (5) days after mediation is completed and a final mediator's report is filed with the court, or until the court orders that mediation shall not occur.

(2) *Exception for Commercial Loans.* In any actions where the mortgage acts as collateral given solely to secure a commercial loan, counsel for the plaintiff, or the plaintiff, if unrepresented by counsel, may file and serve with the complaint a motion requesting exemption from the deferral provided for in section (1). The motion shall be subject to Rule 11(a), and shall include both the assertion that the

loan is a commercial loan, as well as the factual basis for that assertion. The motion shall be accompanied by a proposed order setting forth the specific relief requested. In any proceeding to determine whether section (1) should apply, the plaintiff must establish, by a preponderance of the evidence, that the mortgage was given solely to secure a commercial loan. If the court determines that the plaintiff has met this burden, section (1) shall not apply unless the court concludes that its application is in the best interests of justice.

(e) ~~Timing~~ Notice of Informational Session and Mediation.

(1) ~~If the court requires a defendant or other party to attend an informational session before mediation~~ When a case enters the Foreclosure Diversion Program, the clerk shall send an informational session a scheduling order notice listing the date, time, and location of the informational session and first mediation session to the plaintiff, the defendant and any other party required to attend, and shall provide a copy of that order notice to the plaintiff all parties-in-interest.

~~(2) Not more than 7 days after the scheduled informational session that the defendant was notified to attend, the clerk shall send a foreclosure mediation scheduling order to all parties, unless the court orders that mediation not occur.~~

~~(3) When the court does not require the defendant to attend an informational session, the clerk shall send a foreclosure mediation scheduling order to all parties, so as to not delay the start of the mediation process.~~

(42) Unless the parties agree otherwise or unless the court extends the deadline pursuant to subsection (i), mediation shall be completed not later than 90 days after the clerk sends the mediation scheduling ~~order~~ notice to the parties.

(f) Contents of the Foreclosure Mediation Scheduling Order Notice.

The mediation scheduling ~~order~~ notice shall contain ~~a list of information scheduling information, and attached thereto any court forms~~ that the parties are required to file with the court, exchange with each other in advance, or bring to the mediation session(s).

(g) Mediation Issues.

The mediation shall address all issues of foreclosure, including but not limited to: (1) proof of ownership of the note and any assignments of the note; (2) calculation of the sums due on the note for principal, interest, and any costs or fees, reinstatement of the mortgage, and modification of the loan;—~~and~~ (3) restructuring of the mortgage debt; and (4) nonretention alternatives to foreclosure. Foreclosure mediations shall utilize the calculations, assumptions and forms established by the Federal Deposit Insurance Corporation and published in the Federal Deposit Insurance Corporation Loan Modification Program Guide, as set out on the Federal Deposit Insurance Corporation's publicly accessible website. In the alternative, foreclosure mediations may utilize a reasonably equivalent system of calculating the value of the loan modification in each case.

(h) Participation in Mediation.

(1) A mediator shall include in the mediation process any person the mediator determines is necessary for effective mediation, such as a potential contributor to the household, including a property lien holder, other creditor or party-in-interest whose participation is essential to resolution of issues in the foreclosure. Mediation and appearance in person is mandatory for:

(A) the defendant;

(B) counsel for the defendant, if represented;

(C) counsel for the plaintiff; and

(D) the plaintiff, or representative of the plaintiff, who has the authority to agree to a proposed settlement, loan modification, or dismissal of the action. When the plaintiff is represented by counsel who has authority to agree to a proposed settlement and is present, the plaintiff or its representative may participate by telephone or video.

(2) For persons who are not the plaintiff or the defendant in the pending civil action, or their attorneys, participation is voluntary and the mediation shall proceed in the absence of such a person if that person declines to participate in the mediation.

(3) When a plaintiff participates by telephone, plaintiff's counsel shall ensure the quality of the connection is sufficient to allow clear communication for the duration of the session. Plaintiff's counsel may be required to furnish a speakerphone for use in the mediation room, or elsewhere. When telephone equipment is available, the plaintiff's counsel shall make arrangements at plaintiff's expense for reaching the plaintiff at a toll free number or through the use of automated conference call services. Plaintiff will comply with all requests contained in the mediation scheduling order, including requests for information about telephone participation or video participation. Requests for video participation must be made at least 10 days before the scheduled mediation session.

(i) Multiple Sessions.

Mediators are authorized to schedule additional or follow-up sessions, if necessary. Such sessions will be conducted in the same manner as the original session, and will not extend the time limit to complete mediation set in subsection (e)(4) unless the parties agree to such an extension or unless the court finds that such an extension is necessitated by a plaintiff's delay.

(j) Good Faith Effort.

If a plaintiff or defendant or attorney fails to attend or to make a good faith effort to mediate, the mediator shall inform the court, and the court may impose appropriate sanctions. Sanctions may include, but are not limited to, the tolling of interest and other charges pending completion of mediation, assessment of costs and fees, assessment of reasonable attorney fees, entry of judgment, permitting dispositive motions and/or requests for admissions to be filed, entry of an order that mediation shall not occur, dismissal without prejudice, dismissal without prejudice with a prohibition on refiling the foreclosure action for a stated period of time, and/or dismissal with prejudice.

(k) Continuing or Canceling Mediation.

(1) If either party needs to have a mediation session continued, that party shall file a motion requesting such change with the court and serve a copy upon all opposing parties. If the motion is granted, the party requesting a continuance shall inform, in writing, all other parties and the mediator of any change approved.

(2) If the parties agree to a settlement, and have filed a dismissal of the action at least 48 hours before the scheduled mediation, mediation will be cancelled by the clerk.

(3) If the plaintiff or the defendant or the mediator appears at the original mediation date and time because the party requesting the continuance failed to timely advise all other parties or the mediator, the offending party or counsel may be sanctioned.

(l) Location of Mediation Sessions.

Mediation sessions will be held at court locations, whenever possible. The Foreclosure Diversion Program Manager may approve use of an alternate site if the parties and mediator agree upon a location, or if courthouse resources cannot accommodate mediation sessions. The original case file shall not leave Judicial Branch buildings.

(m) Waiver of Mediation.

A defendant may request that mediation be waived by filing a completed "motion to waive" form with the court. If the defendant files that motion, the court may waive mediation only upon a finding by the court that:

(A) there is good cause to waive mediation, and

(B) the defendant is making a free choice to waive mediation after being informed of the options and services that may be available through mediation.

(n) Mediator's Reports.

(1) Not later than 7 days following the mediation session, each mediator shall complete and file with the court a report for each mediation session, including follow-up sessions, conducted pursuant to this Rule.

(2) The mediator shall also ~~send~~ provide a copy of each mediator's report to the ~~Foreclosure Diversion Program and shall send or deliver copies of each report to the parties at the time of filing submission, and shall provide details of the mediator's report to the Foreclosure Diversion Program for purposes of data tracking and payment for mediation services.~~

(3) In the final mediator's report, the mediator shall indicate that the parties fully completed either the Net Present Value Worksheet found in the Federal Deposit Insurance Corporation Loan Modification Program Guide or another reasonable determination of net present value, or explain the reasons why the parties did not complete this ~~worksheet~~ analysis.

(4) If the final mediator's report indicates a failure to reach agreement or any result other than a settlement or dismissal of the case, the final report shall include the outcomes of the Net Present Value Worksheet in the Federal Deposit Insurance Corporation Loan Modification Program Guide or other reasonable determination of net present value and must note any points of agreement reached during the mediation.

(o) No Waiver of Rights.

No party waives any rights in the foreclosure action by participating in informational sessions or foreclosure mediation.

(p) Information and Confidentiality.

(1) Parties shall submit all information required by the Foreclosure Diversion Program or Foreclosure Diversion Program mediator.

(2) Admissibility of evidence of statements made or discussions occurring during mediation is subject to M.R. Evid. 408.

(3) Disclosures by a mediator of statements or actions occurring during mediation or of information acquired during mediation shall be subject to the same limitations as are stated in M.R. Civ. P. 16B(k) and M.R. Evid. 514. A mediator shall keep confidential and not disclose financial documents, worksheets and information received during the course of the mediation, except as such information may be used to facilitate the mediation session or as disclosure is otherwise authorized by court order.

(4) Except for financial information included as part of the foreclosure complaint or any answer or response filed by the parties, any financial statement or information provided to the court, a mediator, or to the parties during the course of mediation is confidential and is not available for public inspection. Any financial statement or information shall be made available, as necessary, to the court, the

attorneys whose appearances are entered in the case, the mediator assigned to the matter, and the parties to the mediation. Any financial statement or information designated as confidential under this subsection, if filed with the court, shall be sealed and kept separate from other court papers in the case and may not be used for any purposes other than mediation.

~~(5) Information needed for statistical purposes, and for the evaluation and improvement of the Foreclosure Diversion Program will be collected.~~

(q) Optional Availability of Mediation.

(1) In addition to those foreclosure actions for which mediation is mandatory pursuant to this Rule and 14 M.R.S. § 6321-A, a defendant who is an owner-occupant in any foreclosure action that was pending but had not yet resulted in final judgment as of January 1, 2010, may request by motion that the court order mediation pursuant to this Rule. The court may order mediation pursuant to this Rule if:

- (A) after consulting with the Foreclosure Diversion Program Manager, the court determines that mediation resources are available to perform the mediation; and
- (B) the court finds that mediation will not unduly delay the proceedings or result in prejudice to the plaintiff.

(2) When optional mediation is ordered pursuant to paragraph (1):

- (A) the court may order the plaintiff to send the financial forms described in subsection (c)(4) of this Rule to the defendant;
- (B) the court may order the parties to attend an informational session or seek the assistance of a housing counselor prior to mediation; and
- (C) the filing of dispositive motions and requests for admissions shall be deferred until five days after mediation is completed and a final mediator's report is filed with the court; and.
- ~~(D) in any action filed prior to June 15, 2009, the plaintiff shall pay the Mediation in Foreclosure action fee established in the Court Fees Schedule.~~

Advisory Note – June 2014

The language of section (b)(2)(A) is amended to reflect that the Foreclosure Diversion Program has been established and the manager is now charged with its operation.

Mediators are independent contractors, and to comply with 26 M.R.S. § 1043(11)(E) and 39-A M.R.S. § 102(13-A), the Judicial Branch does not train them. However, the Foreclosure Diversion Program does provide orientation as part of the certification process. Thus, the language of section (b)(2)(C) is modified to use the word “orientation.”

The language in section (b)(3)(A) is amended because all prospective mediators attend an orientation session, not a training session.

Section(b)(3)(B)(i) is amended to include real estate professionals because 14 M.R.S. § 6321-A has been amended to authorize those trained in mediation and relevant aspects of the law “related to real estate” to become Foreclosure Diversion Program mediators. *See* P.L. 2013, ch. 521, § F-1 (effective Aug. 1, 2014).

The language in section (b)(3)(B)(ii) is amended to comply with 26 M.R.S. § 1043(11)(E) and 39-A M.R.S. § 102(13-A).

Section (c) is reorganized to place the content regarding informational sessions in subsection (2) and the content regarding mediation sessions in subsection (3), whereas they were previously in the reverse order.

This reorganization is undertaken to reflect that informational sessions are scheduled in all cases that enter the mediation program statewide, and that first mediation sessions in those cases now occur following informational sessions on the same day. Defendants are still afforded 21 days to submit financial documents, if needed, but timelines for plaintiffs’ review of those forms are based on party agreement and applicable regulations, and are determined at mediation.

A scheduling notice for an informational session and mediation advises the parties of when to be at court and no longer includes sequential deadlines for filing documents. The requirement to attend a scheduled court event is implicit in this rule; consequently all references to scheduling “orders” for an informational session and for mediation have been amended to scheduling “notices” and no longer require judicial review and signature.

Section (c)(4) is modified to include the requirement that a plaintiff's attorney supply a physical address because some defendants wish to give financial documents to plaintiff's counsel in hand rather than by mail.

Section (c)(5) is amended to reflect that an informational session, followed by first mediation session on the same day, is now scheduled in every case entering the Foreclosure Diversion Program, and that, at the first mediation session, the plaintiff will identify the necessary documents to be submitted by defendants within 21 days.

Section (d)(1) is amended to omit references to sections (c) and (q). Scheduling of mediation pursuant to subsection (c) will no longer require a court order; parties will receive notice of informational sessions and mediation (see above). The possibility of a case entering the Foreclosure Diversion Program via court order is made more general, rather than limiting the basis of the order to mediate to subsection (q).

Section (e) is amended to replace all references to "scheduling orders" with references to "scheduling notices." In addition, because all first mediation sessions occur on the same day as the informational sessions, section (e)(2) is stricken. Section (e)(3) is also stricken because all cases are scheduled for informational sessions.

Section (f) is amended to clarify that the scheduling notice for an informational session and first mediation must be sent with certain forms attached.

Section (g) is amended to add a fourth example of a possible issue to be addressed at mediation. Nonretention alternatives to foreclosure sometimes require different action plans, but it is important to clarify that liquidation of the property is an alternative, and raises an issue of foreclosure to be addressed.

Recent amendments to 14 M.R.S. § 6321-A expanded the options available in foreclosure mediation for determining the value of loan modification in each case. *See* P.L. 2013, ch. 521, § F-2 (effective Aug. 1, 2014). The addition to subsection (g) captures the option to use a calculator that is the reasonable equivalent to the Federal Deposit Insurance Corporation Loan Modification Program Guide.

Section (h)(1) is amended to add "a potential contributor to the household"

as an example of a person who may be necessary for effective mediation.

Section (j) is amended to add “tolling of interest and other charges pending completion of mediation” as an example of a possible sanction for failure to make a good faith effort to mediate. This sanction addresses the effect of delay on any remaining options.


Section (n)(2) is amended to eliminate the requirement that a mediator provide a paper report to the Foreclosure Diversion Program because the Program currently tracks data and processes payment requests through an electronic system and no longer requires copies of reports for this purpose.

Subsections (3) and (4) of section (n) are revised to reflect the option resulting from recent legislative amendments to 14 M.R.S. § 6321-A for mediators to use a net present value analysis other than that found in the Federal Deposit Insurance Corporation Loan Modification Program Guide. *See* P.L. 2013, ch. 521, § F-2 (effective Aug. 1, 2014).

2. This amendment shall be effective September 1, 2014.

Dated: June 19, 2014

FOR THE COURT¹



DONALD G. ALEXANDER
WARREN M. SILVER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
Associate Justices

¹ This Rule Amendment Order was approved after conference of the Court, all listed Justices concurring therein. The Chief Justice did not participate in the development or approval of this Rule Amendment Order.