COMMENTS TO PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE AND THE RULES OF SMALL CLAIMS PROCEDURE

I. Rule 7

A. Proposed Rule 7 (b)(1) adds a "Requests" procedure, requiring communication with the opposing party, correspondence with the court, and a conference. A designated list of rules are referenced that require this procedure: Rules 16(d)(4), 26B(g), 36(b), and 56(b)(1).

But the Rules reference many other "requests" in the context of a litigated matter:

1. Rule 7(g) - request for telephonic hearing
2. Rule 16(c) – request to change track
3. Rule 16A(d)(6) - request for advance ruling
4. Rule 16B(b)(4) - request for exemption from ADR
5. Rule 40(e) - request for protection
6. Rule 45(g)(2) - request to resolve objection to subpoena
7. Rule 45(h)(2) - request to resolve compliance deficiency
8. Rule 47(f)(2) - request for disclosure of juror names
9. Rule 55(c)(1) - request for clerk's entry of default judgment
10. Rule 55(g) - collections fee

11. Rule 56(b)(4) - request for summary judgment in certain collection actions

12. Rule 56(c) - request for alternate timing of motion for summary judgment

13. Rule 56(e) - request to exceed motion page length

14. Rule 56(e)(2)(A)(i) - request to exceed number of asserted facts

15. Rule 56(f)(i) - request to exceed opposition page length

16. Rule 56(f)(3)(A) - request to exceed number of asserted facts

17. Rule 56(g)(1) - request to exceed reply page length

18. Rule 80C(f)(2)(c) - request to modify contents of the record

19. Rule 93 - requests for mediation

20. Rule 110B - request to hold prehearing conference

21. Rule 117 - request for hearing

22. Rule 133(b) - request for discovery dispute conference[1]

B. Many of these references to "requests" involve a mere communication that is granted as a matter of course or does not involve the exercise of judicial

[1] In Rule 40(c), continuances are sought by motion. For the sake of consistency and continuity, the references to "request" in this sub-section should be changed to "motion". Similarly in Rule 80B(i)(1), a motion is required for an order specifying the future course of proceedings. The reference to "requesting" should be changed to "asking". Similarly in Rule 80C(e), a motion is required for additional evidence. The reference to "request" should be changed to "ask". See also Rule 80C(i)(1) re: changing "requesting" to "asking". Similarly in Rule 93(c)(5), a motion is required to return a case to the regular docket. The reference to "requesting" should be changed to "asking". See also Rule 93(d)(2) re: changing "requesting" to "seeking". See also Rule 93(k) with reference to "requesting" on a motion for continuance. See also Rule 93(a) referencing a "request" on a motion to waive mediation. See also Rule 93(q)(1) referencing a "request" on a motion to order mediation.

discretion, *e.g*. Rule 55(c)(1) and Rule 93. In this context, perhaps the terms "application" or "apply for" should be used. As a special case of this example, Rule 7(g) should be amended to describe a process where applications for telephonic conferences are granted as a matter of course, rather than merely "encouraged". There have been too many times when requests for telephonic conferences have been denied arbitrarily. To the extent a court has "good cause" to deny such an application, the "good cause" should be stated on the record.

Rule 16B(b)(4), as amended, greatly expands the number of "requests for exemption" from ADR that may, and will, be made. Such "requests" will be granted as a matter of course when the certification of damage amount box is checked on the Civil Case Information Sheet, without the exercise of judicial discretion. Since the request is a mere formality when the certification is made, Rule 16B(b)(4) should allow for the exemption simply upon the requisite certification, without reference to a "request" (as the "request" may be assumed).[2]

C. Other instances of the term "request" do involve the exercise of judicial discretion, but do not rise to the level of the Rule 7(b)(1) procedure. In such instances, the court will grant or deny the "request", often without explanation. Many of the rules with this type of "request" have long been a part of the Civil Rules of Procedure, and do not need any guidelines for the exercise of that discretion, *e.g*., Rule 40(e). However, some of these instances are new in the proposed rules, and deserve guidelines, either in the Rule itself or in the Notes thereto. See the discussion of Rule 56(b)(4), *infra*.

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[2] Given the broad reach of the cases subject to ADR, exemption should be allowed when the plaintiff, and when part of the case, a counterclaim plaintiff, cross-claimant, or third-party complaint plaintiff certifies on the Civil Case Information Sheet that the likely recovery of damages will not exceed $50,000.00.

D. Still other examples of "requests" under the proposed rules should be linked to Rule 7(b)(1).

1. Rule 16(c) allows a request to change the track assignment of any case. A conference processed is then triggered, and that process should conform to Rule 7(b)(1).

2. Rule 56(b)(1) is linked to Rule 7(b)(1), but Rule 56(b)(4) is not. It is certainly not obvious why this should be the case. There certainly is less of a need or occasion for summary judgment in Track A expedited cases that have no discovery except by court order. Rule 56(b)(4) collection actions are Track B cases subject to mandatory discovery disclosure, optional discovery procedures, and ADR. They are more deserving of a conference process on a "request" to file a motion for summary judgment, since a conference process will result in a ruling that weighs the issues and which may be reviewed for abuse of discretion. In arriving at such a ruling at conference, the court should have guidance to inform its discretion, but Rule 56 as proposed provides none. Unlike Rule 16(d)(4) (modification of scheduling order for good cause shown) and Rule 26B(g) (where the court draws upon the extensive jurisprudence governing discovery to decide disputes), Rule 56(b)(4) does not allow for a showing of good cause or if it did, does not indicate what good cause might be in this novel context. Will it matter that all parties are represented by counsel, or that the amount in controversy is sizeable, or that there are no genuine issues as to any material fact?

In the context of the limitation on summary judgment for the listed collection actions in Rule 56(b)(4), the Supreme Judicial Court [hereinafter "the Court"] should bear in mind that many so-called "credit card" collection cases are not actions to collect consumer debt, but are actions, commercial in nature, against a business entity. Businesses have and use credit cards. These actions should not be "lumped in" with the consumer credit collection actions, but to the extent the Court insists upon doing so, they should be exempted from the presumption against a motion for summary judgment.[3]

E. The disparate treatment of certain collection actions in Rule 56 is echoed in Rule 36(a)(last sentence). Commercial credit card cases are not distinguished from consumer credit card cases, and no requests for admission are allowed, without the option of requesting a conference under Rule 7(b)(1) to obtain permission for requests for admission beyond the authenticity of documents. Here the Court is ignoring *Midland Funding LLC v. Walton*, 2017 ME 24, ¶9, which noted the proper use of requests for admission in a consumer credit case, without any criticism whatsoever. My comments as to Rule 56 apply to this proposed Rule 36, if not more so. At least with Rule 56, the Court has allowed a party to the disfavored consumer collection actions to request permission to file a motion for summary judgment.

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[3] The Court does not discuss the distinctions that led to the treatment of certain collection actions differently from other lawsuits. Presumably the Court is trying to advance certain social justice objectives to protect consumers. The impetus for this did not come from the Advisory Committee of the Civil Rules, so the rationale will not be found in any Advisory Committee Notes or even the so-called Advisory Notes which do accompany the proposed rules and which mistakenly imply that the Advisory Committee had any significant role in their promulgation. Rather the Court should set forth clearly its rationale and a discussion of the issues in an Explanation of Amendments. Moreover, for each rule, the Explanation of Amendments should explain how the proposed rule advances the policy objective and does not unfairly treat the affected causes of action. In particular, with Rule 56, the Court should explain the reasons for the presumption that summary judgment will not be available.

F. Moving on, Proposed Rule 45 is discussed further *infra*, but it appears that the team that worked on this proposed Rule was not in communication with the team that worked on Rule 7(b)(1). For consistency, the conference provisions within both rules should be the same.

II. Rule 16[4]

A. Rule 16(a)(1) specifies that " residential mortgage foreclosures and collections [sic] actions" belong in Track A. Query whether these are mistaken designations. No type of mortgage foreclosure or collection action is listed as a Track A case in the draft Civil Case Information Sheet. Under Rule 80N(c)(2), the collection actions therein specified are referred to Track B once the Complaint passes initial screening that the initial filings are adequate.

B. The references to "settlement documents" at proposed Rule 16(d)(2)(A) and 16(d)(3)(B) should be changed to "settlement demands".

C. Rule 16(d)(2)(B) states, *inter alia*, that in Track B cases, the scheduling order " . . . may immediately assign the case for trial without further pretrial process if the court determines that such pretrial process is unnecessary." (I

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[4] Under the current Rule 16(a)(1), the Standard Scheduling Order in Superior Court is issued after the "filing of the answer." Under proposed Rule 16(b)(2)(A), a scheduling order in Track B cases issues after case assignment to Track B, and assignment occurs, under Rule 16(b)(2), when "an answer or other response is filed . . ." It would not be appropriate for the court to issue a scheduling order, especially one that set the case for immediate trial, if the response to the complaint were a motion for more definite statement, or other motion permitted under Rule 12. While current practice in the Superior Court allows the scheduling order to issue before an answer to a counterclaim is filed, or before a third-party has responded to a complaint, the better practice is to await completion of the pleadings. Certainly, a case management conference in Track C cases should await completion of the pleadings, or at least an appearances from each party.

assume that this language means that the scheduling order may assign the case for immediate trial.) How is the court to make this determination? At the scheduling order phase of a Track B case, all the court has before it is the Complaint and Answer. If the court is inclined to exercise this option it should obtain input from the parties, by setting a case management conference.

III. Rule 40

A. Since "conferences" are more particularly described as part of the "Request" procedure of Rule 7(b)(1), references to continuances in the rules should include "conference" as one of the events subject to a motion to continue, *i.e.*, Rule 7(b)(4) and 7(b)(5).

B. The proposal to amend Rule 40(c) makes the granting of continuances "the exception and not the rule" because the purpose and goal of the rules is to provide "predictable judicial action" and an "effective and efficient process for resolving disputes." Those may be the purpose and goal of the rules, but the experience has been, and will likely be, less than ideal.

Predictable judicial action may approximate the goal in Track A cases when the court has assigned the case for immediate trial, with a date certain, or in Track C cases where the scheduling order is required to "identify the date or *specific* time period for trial." Rule 16(d)(3)(B) (emphasis supplied). Presumably this means that the practice currently prevailing in the Business and Consumer Court will be applied to Track C cases, whereby the parties are told early on that trial will be held during a specific trial list during a particular month(s), or even during a particular week. But in Track B cases, the Rule provides only that the scheduling order "identity the date or time period specified for trial . . ." Rule 16(d)(2)(B).

The absence of the adjective "specific" in describing "time period specified for trial" means that a general forecast will suffice, *e.g.*, that trial will occur after the pre-trial conference as set by the court, as is the current practice. Current practice is what it is because of the significant constraints placed on dockets by caseloads, resources, and staffing issues, both judicial and clerical. For instance, it is not uncommon for a case in District Court not to appear on a trial list for several months after the pre-trial conference. These concerns will not disappear merely because the civil rules are amended.

While "predictable judicial action" may be the purpose and goal of the civil rules with respect to trials, that cannot be said about the other court events that may be subject of a motion to continue, hearings and conferences. Most of these events are not predictable at the inception of the case, as they follow the peculiarities of the litigation and the issues that emerge. A discovery dispute occurs, a conference is requested. The conference may be scheduled for the next day or in several days or even weeks. How can that be anticipated so as to place a burden of an "exceptional" showing to justify a continuance?

There are currently several hundred civil cases pending in the District and Superior Courts that have not had the benefit of the new tracking procedures and the "predictable judicial action" that will accompany them. Will the "exceptional" standard for a continuance be applied to them? That would appear not to be fair.

The absence of any Explanation of Amendment for this proposed rule means that the bench and bar have no examples of how the rule should be applied. Presumably if counsel for plaintiff suffers a medical emergency, that would meet the "exceptional" test. But what of the attorney's vacation, planned months ahead

with tickets purchased, that happens to be set for the period of a just-scheduled trial of a Track B case that has sat for months waiting its turn to be placed on a trial list. Attorney vacations are not exceptional, they are standard occurrences. Will the new rules mean the attorney is out of luck?

If not, what does "exceptional" actually mean. The proposed rule amendment makes no change to that portion of Rule 40(c) that states "Continuances should only be granted for substantial reasons." In this regard the Advisory Committee Note to the amendment to Rule 40 effective January 1, 2006 states:

> Substantial reasons may include, but are not limited to, conflicts arising from (1) another scheduled court event that is a higher priority case as determined by the priority of cases established by the Supreme Judicial Court; (2) another scheduled court event in another jurisdiction; (3) long-standing travel or vacation plans of a party or attorney; (4) unforeseen witness unavailability; (5) unexpected family-care responsibilities; and (6) other unforeseeable reasons such as illness or death.

How are these examples changed by the requirement of exceptionality?

As a final point, is this amendment really needed now? The amendment to Rule 40 effective January 1, 2006 also states:

> The amendments to the rule are designed to promote greater uniformity and predictability with respect to court event scheduling. A key determinant of event certainty in the courts is the application of uniform and predictable approaches to continuances and protections. The absence of uniformity and predictability results in more frequent postponements of scheduled court events that increase the time,

> expense, and clerical work associated with the resolution of disputes. The revised rule is intended to make the public and the courts more mindful of the long-term negative consequences that event uncertainty has on the public, judicial resources and, ultimately, the administration of justice.

If the frequency of postponement of scheduled court events continues to be a serious problem of court administration, why have the measures adopted more than a decade ago not worked, and should other actions be taken first before raising the standard for a continuance to "exceptional", such as allowing the tracking system to be implemented and tested before concluding that this change is in fact needed.

IV. Rule 41

The proposed amendment to Rule 41(b) (Involuntary Dismissal) allows for the dismissal of an action, after notice and hearing etc., on the court's own motion "for a plaintiff's failure to comply with these rules or any order of court." There is no Explanation of Amendment describing the circumstances when this action by the court may be appropriate. How is judicial discretion to be exercised in this context? Presumably, such action would only be taken for "serious" or "significant" failures to comply that amount to contumacious conduct or that undermine the administration of justice, but the proposed rule does not attempt to define the circumstances that might justify such action.

Why is this vague and broad grant of authority needed? Are judges and justices concerned that they do not have the requisite authority to sanction conduct? Isn't it preferable to grant such authority in the context of the specific rule or type of order involved?

V. Rule 45

Please see a marked up version of the proposed Rule, appearing at the end of these comments.

VI. Rule 55

The proposed amendment to Rule 55(a) seems designed to clear recently filed cases as stale if no "further action" is "taken" within 28 days after a written notice is "sent" by the clerk after an entry of default. It seems to assume that clerks will effectively monitor the 21-day answer/response period and will efficiently enter the appropriate defaults. That may in fact be the case, but the elimination of the current rule's language "and that fact is made to appear by affidavit or otherwise" should not be read to mean that a plaintiff may not spur a busy clerk to action by means of the aforementioned affidavit and would have to wait until the clerk acted, *sua sponte*, before moving ahead with case. In this regard, I recommend the addition of a second sentence to Rule 55(a) that would appear before the sentence beginning "Upon entering the default . . .": "A party may inform the clerk, by affidavit or otherwise, that an entry of default is appropriate."

In most actions that seek judgment for a "sum certain" these provisions will not come into play, because a plaintiff will timely seek the clerk's entry of default at the same time, and in the same document, that it seeks a clerk's entry of judgment pursuant to Rule 55(c)(1). In other actions, where judgment may only be granted by the court, the 28 day period will often be insufficient due to delays in serving the clerk's notice or the necessity of compiling supporting affidavits,

exhibits and memoranda. A more lengthy response period time, say to 42 days, will mean that fewer motions for enlargement of time are filed.

The SJC should be concerned that a clerk's zealous monitoring of the 21-day response period may disrupt a common courtesy among lawyers: the informal granting of an extension of time to answer or otherwise respond to a complaint. Plaintiff's counsel may receive a request from a defendant, or defendants counsel at the eleventh hour: An out-of-state defendant needs more time to find counsel in Maine, a local attorney needs more time to consult with her client and decide whether to take the case, a defendant's local counsel will not be back from vacation for a week, a *pro se* defendant needs time to respond. In these instances, there is not yet a local counsel to enter an appearance and request an enlargement of time or a pro se party is unfamiliar with the procedure. Yet, professional courtesy among attorneys, and common courtesy to unrepresented people, resolves the problem. However, a "premature" entry of default would add needless complexity to this situation. Solution? Require the clerk to forbear from entering a default if notified in writing that the parties have agreed to an informal extension of time to a date certain.

Language appears in Rule 55(a) that is undefined. The 28-day period begins to run after notice is "sent" by the clerk. Usually time periods run from the date of entry of the relevant document, *e.g.* the filing of a motion or the entry of judgment. The time period here should run from the date of entry of default, with the clerk to serve the requisite notice to the plaintiff pursuant to Rule 77(d) and to the defaulted defendant at the address shown on the civil case information sheet. On the other hand, a plaintiff has 28 days (presumably calculated with the aid of Rule 6) to take action after the notice is sent. Is the date of such action to be determined by the

date of filing of that action? If so, the rule should so state. If not, what is appropriate date?

Proposed Rule 55(a) inexplicably requires the plaintiff to send a copy of the clerk's 28-day notice to the defaulted person. The clerk should mail that notice at the same time the plaintiff is notified. That action will be docketed and be part of the record. Otherwise, is the plaintiff required to certify that it has complied with this rule at some point in the proceedings?

VII. Rule 76C

The proposed amendments to Rule 76C(a) add a new first sentence: "By electing to file a cause of action in the District Court, the plaintiff is deemed to have waived the right to remove the action to the Superior Court for jury trial." The scope of this new rule is unclear. Is it designed merely to clarify an ambiguity in the current rule or does it reach further. Will the amended rule bar a plaintiff from removing a case to Superior Court for jury trial where the plaintiff's action seeks a declaratory judgment (or other action not entitled to be tried to a jury) and is met with a counterclaim for damages? The proposed rule should be amended to clarify that, for purposes of the waiver provision, a plaintiff against whom a counterclaim is filed is deemed a defendant.

VII. Rule 80N and Rule 1 of the Rules of Small Claims Procedure

PL2017, c.216 enacted changes to the Maine Fair Debt Collections Practices Act, 14 M.R.S. c.109-A. In particular, Sec. 6 of c.216 enacted 32 M.R.S. §11019

which states, in pertinent part at Sec. 3, regarding a collection action by a debt buyer:

> **3. Requirements for judgment.** Regardless of whether the consumer appears in the action, the court may not enter a judgment in favor of a debt buyer in a collection action against a consumer, including an action brought in small claims court pursuant to Title 14, chapter 738, unless the debt buyer files with the court:
>
> A. A copy admissible under the Maine Rules of Evidence of the contract, application or other writing establishing the consumer's agreement to the debt and any contract interest or fees alleged to be owed. If a signed writing evidencing the original debt does not exist, the debt buyer must file a copy of a document provided to the consumer before charge-off demonstrating that the debt was incurred by the consumer or, for a revolving credit account, the most recent monthly statement recording the extension of credit for the purchase of goods or services, for the lease of goods or as a loan of money or the last payment or balance transfer;
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> B. Business records or other evidence admissible under the Maine Rules of Evidence to establish the amount due at charge-off;
>
> C. A copy admissible under the Maine Rules of Evidence of each bill of sale or other writing establishing transfer of ownership of the debt from the original creditor to the debt buyer. If the debt was assigned more than once, the debt buyer must file each assignment or other writing evidencing the transfer of ownership to establish an unbroken chain of ownership, beginning with the original creditor to the first debt buyer and each subsequent debt buyer; and
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> D. Notwithstanding any other law, if attorney's fees are sought under contract, a copy admissible under the Maine Rules of Evidence of the contract evidencing entitlement to attorney's fees.

(emphasis supplied).

This new requirement of an action in small claims court having to comply, in certain respects, to the Maine Rules of Evidence ran counter to Rule 6, Maine Rules of Small Claims Procedure, which provides as follows at section (b):

(b) Evidence. The rules of evidence, other than those with respect to privileges, shall not apply. The court may receive any oral or documentary evidence, not privileged, but may exclude any irrelevant, immaterial, or unduly repetitious
evidence.

Hence, the Court was faced with a dilemma: Should it amend the Rules of Small Claim Procedure to conform Rule 6 to the requirements of §11019? Or should it determine that §11019 was of "no force and effect", to the extent it requires that the Maine Rules of Evidence be applied in a small claims proceeding, because it conflicts with Rule 6[5].

The course chosen by the Court is seen in the proposed amendment to Rule 1, Maine Rules of Small Claim Procedure, and proposed Rule 80N, Maine Rules of Civil Procedure. As proposed, Rule 1 will read:

RULE 1. SCOPE OF RULES

These rules govern the procedure in all small claims actions in the District Court and on appeal in the Superior Court. Whether a claim may be brought as a small claim is limited by 14 M.R.S. § 7482, 32 M.R.S. § 11019, and Rule 80N[6] of the Maine Rules of Civil Procedure. ~~They~~ These rules shall be construed to secure the just, speedy, and inexpensive determination of every action in a simple and informal way.

As proposed, Rule 80N will read, in pertinent part:

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[5] Pending promulgation of Rules 1 and 80N, practice in small claims proceedings has conformed to the requirements of §11019.

[6] Rule 1 incorporates Rule 80N and complies with Rule 81(b)(2)(A), Maine Rules of Civil Procedure, which provides: (2) *District Court*. These rules do not apply to the beginning and conducting of the following actions and proceedings in the District Court: (A) Actions under the statutory small claims procedure except as incorporated expressly or by analogy in the Maine Rules of Small Claims Procedure.

RULE 80N. CREDIT CARD, STUDENT LOAN, AND DEBT BUYER COLLECTION ACTIONS

> (a) Applicability. This rule governs all collection actions brought to collect credit card and student loan debts, and to all collection actions brought by debt buyers as "debt buyer" is defined in 32 M.R.S. § 11002. This rule supersedes the general provisions of the Maine Rules of Civil Procedure only to the extent stated in this rule.

Together, these rule changes mean that credit card, student loan, and debt buyer collection actions may not be brought pursuant to 14 M.R.S. c.738, which provides for small claim proceedings.

This comment argues that the Court lacks the authority to promulgate Rules 1 and 80N, for two reasons: (A) The Rules Enabling Act with respect to small claims proceedings was superseded by the Act to Establish a Small Claims Court, and (B) to the extent the Rules Enabling Act has priority over the Act to Establish a Small Claims Court, Rules 1 and 80N violate the admonition of the Rules Enabling Act that the Rules not abridge the substantive rights of any litigant.

(A) The Rules Enabling Act with respect to small claims proceedings was superseded by the Act to Establish a Small Claims Court.

As part of the Herculean task of bringing Maine practice and procedure into modernity, PL1957, c.159 was enacted by 98th Maine Legislature to provide, *inter alia*, that the Supreme Judicial Court

> shall have the power to prescribe, by general rules, for the trial justices and for municipal and superior courts of Maine, the forms of process, writs, pleadings and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge nor

> modify the substantive rights of any litigant. They shall take effect 6 months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.[7]

This enactment, known as the Rules Enabling Act, allowed for the promulgation of the first version of Maine's Rules of Civil Procedure, issued June 1, 1959 and effective December 1, 1959. Coincidentally with the drafting of this first version of the Rules, involving substantial commitments of time from bench and bar, the Legislature was compiling a long list of affected statutes that needed to be amended or repealed and replaced[8]. PL1959, c.317 contained over 400 line items of such statutes. Those statutes that were not then amended, repealed or replaced and that were inconsistent with the Rules would be deemed superseded by the Rules[9].

Notably, the statutory small claims procedure, enacted by PL1945, c.307 and then found at RS1954, c.109, was unaffected. However, it is clear that the drafters of the Rules believed that they had the authority to modify the statutory small claims procedure, but chose not to. Small claims actions were brought in

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[7] This statutory language has remained essentially intact and may now be found at 4 M.R.S. §8.

[8] I am pleased to say that my sister's former father-in-law, Samuel H. Slosberg, Esq., as then Director of Legislature Research, gave "invaluable advice and assistance on all legislative problems." Foreword by Chief Justice Robert B. Williamson to Maine Civil Practice, Field & McKusick (1959).

[9] See Rule 81(e), which implemented the directive of the Rules Enabling Act that ". . . all laws in conflict [the Rules] shall be of no further force or effect". It read in 1959 as it does today: "(e) Terminology in Statutes. In applying these rules to any proceeding to which they are applicable, the terminology of any statute which is also applicable, where inconsistent with that in these rules or inappropriate under these rules, shall be taken to mean the device or procedure proper under these rules." See also Professor Richard H. Field's 1959 Reporters Notes to Rule 81(e): "Rule 81(e) is to cover the many instances where statutes couched in terms rendered obsolete by these rules have not yet been amended".

Municipal Court. The Court, pursuant to the Rules Enabling Act, promulgated the Municipal Court Civil Rules, also effective December 1, 1959. Rule 28 thereof stated, in pertinent part:

APPLICABILITY IN GENERAL

(a) To what proceedings inapplicable. These rules do not apply:
(1) To actions under the statutory small claims procedure.

Professor Field's Reporter's Note to this Rule stated:

> Rule 28(a) excludes from coverage of these rules various types of civil cases for which it seems desirable to preserve existing practice. RS1954, Chap. 109, provides a simplified small claims procedure which there is no reason to change.

This language from the Municipal Court Civil Rules when the District Court replaced the Municipal Court and the District Court Civil Rules were promulgated in 1962. As of 1981, District Court Civil Rule 81[10] stated:

APPLICABILITY IN GENERAL

(a) To What Proceedings Inapplicable.
These rules do not apply to the beginning and conducting of the following actions and proceedings in the District Court:
(1) Actions under the statutory small claims procedure except as to proceedings subsequent to the rendition of judgment.

In 1982, the 110th Legislature enacted PL1981, c.667, An Act to Establish a Small Claims Court, effective November 1, 1982. This bill repealed the prior

[10] Footnote 6, *supra*, states how Rule 81 reads today.

iteration of the small claims procedure, 14 M.R.S. §§7461-7475, and enacted 14 M.R.S. §§7481-7485. Sections 7481-7483 did not change prior law substantively (other than raising the "jurisdictional" limit of a small claim action to $1,000.00). However, §7484[11] was a rules enabling act for small claims procedure. It read:

> §7484. Procedures
> The procedures with respect to the commencement of the action, the fee, the notice to the parties, the settlement or hearing, the judgment, appeal and post judgment proceedings shall be set forth in rules of procedure promulgated by the Supreme Judicial Court. Such rules shall further provide that:
> 1. Notice to defendant. The clerk shall cause all notices given to the defendant in a small claims action, including, but not limited to, notice of the claim, date, time and place of the hearing and notice of any disclosure hearing, to be sent by postpaid registered or certified mail, addressed to the last known post office address of the defendant;
> 2. Rules of evidence. The rules of evidence shall not apply at the hearing and the court shall assist in developing all relevant facts;
> 3. Waiver of fees. The plaintiff may file an in forma pauperis application for waiver of fees;
> 4. Removal. There shall be no removal of small claims action to Superior Court; and

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[11] Section 7484 was repealed and replaced with §7484-A by PL1991, c.9, Part E, Sec. E-11 and E-12. Sec. 7484-A then read: "Procedures
1. Rules by Supreme Judicial Court. The procedures with respect to the commencement of the action, the fee, the notice to the parties, the settlement or hearing, the judgment, appeal and post judgment proceedings must be set forth in rules of procedure adopted by the Supreme Judicial Court.
2.Service of statement of claim and notice of disclosure. When requested by the plaintiff, the clerk shall cause the statement of claim and the notice of disclosure, including the notice of the place, date and time of hearing, to be served upon the defendant. A fee must be charged to the plaintiff for service. A plaintiff may elect to arrange for service of the statement of claim and the notice of disclosure, including the notice of the place, date and time of hearing, by someone other than the clerk."
Section 2 was repealed by PL1991, c.604, which also added a last sentence to Sec. 1: "Rules adopted under this section may not restrict the number of claims that may be filed in any given period."

> 5. Disclosure. There shall be a simplified enforcement of money judgment proceeding through which a judgment creditor may obtain the appearance of the judgment debtor at a disclosure hearing. The enforcement of money judgment proceeding shall be consistent with the provisions of chapter 502, except that the subpoena requirement may be met by another form of notice.

Pursuant to this authorization, the Court promulgated the Rules of Small Claims Procedure, also effective November 1, 1982. The order of these Rules followed, for the most part, the order of rule-making areas set by §7484: commencement of the action (Rules 2 & 3), the fee (Rule 2), the notice to the parties (Rule 4), the settlement or hearing (Rules 5, 6 & 7), the judgment (Rule 8), appeal and post judgment proceedings (Rules 9, 10 & 11).

Thus the question is posed: Do the restricted set of areas of rule-making established by An Act to Establish a Small Claims Court override the broader authority of the Rules Enabling Act? By familiar principles of statutory construction, the more specific statute controls the more general one. *Houlton Water Company v. Public Utilities Commission*, 2016 ME 168, ¶21, 150 A.3d 1284 (Me. 2016):

> As a familiar principle of statutory construction, specific statutes prevail over general ones when the two are inconsistent. *Fleet Nat'l Bank v. Liberty*, 2004 ME 36, ¶ 10, 845 A.2d 1183; *see also* 2B Singer & Singer, *Sutherland Statutory Construction* § 51:2 at 215 (7th ed. 2012) ("If an irreconcilable conflict does exist between two statutes, the more specific statute controls over the more general one . . . ."). Applying this principle to resolve the conflict between sections 1320 and 1321, we conclude that the more general provisions of section 1320, which covers many aspects of appellate procedure in an undifferentiated way, yield to the more specific terms of section 1321. As a result, notwithstanding Rule 3(b), section 1321 preserved to the Commission the authority to issue the amended order in August

2015, even though that administrative action revised an order that was the subject of a pending appeal.

Furthermore, the rule-making areas listed in §7484 (now §7484-A) exclude other areas of rule-making not listed, under the familiar principle of statutory construction *expressio unius est exclusio alterius*. *Musk v. Nelson*, 647 A.2d 1198, 1201-1202 (Me. 1994) (inclusion of one discovery rule exception to the statute of limitations for professional negligence implicitly denied the availability of other exceptions).

Taking these two rules of statutory construction together, the Act to Establish a Small Claims Court contained a rules enabling act for small claim procedures that specified the areas of rule-making within which the Court could promulgate rules. This specific rule-making authority is inconsistent with the broad and general rule-making authority of the Rules Enabling Act. Thus, it controls, and the Court may not deviate from the areas of rule-making authority delineated therein.

Proposed Rule 80N, Maine Rules of Civil Procedure, and proposed Rule 1, Rules of Small Claim Procedure purport to limit which "small claims" may be "brought" in a small claims proceeding by declaring that all credit card, student loan, and debt buyer collection actions must be brought in District or Superior Court. The scope of the small claims proceeding is defined by statute at 14 M.R.S. §§7481 and 7482[12], and the Court's proposal to modify that scope, or to

[12] "**§7481. SMALL CLAIMS ACT; JURISDICTION** There is established a small claims proceeding for the purpose of providing a simple, speedy and informal court procedure for the resolution of small claims. It shall be an alternative, not an exclusive, proceeding. The District Court shall have jurisdiction of small claims actions. The District Court shall have the power to

limit the applicability of §§7481 and 7482 is beyond the rule-making areas set out in §7484-A. Hence, the Court lacks authority to promulgate these proposed rules.

(B) To the extent the Rules Enabling Act has priority over the Act to Establish a Small Claims Court, Rules 1 and 80N violate the admonition of the Rules Enabling Act that the Rules not abridge the substantive rights of any litigant.

> The rules enabling act authorizes the regulation only of pleading, practice, and procedure. The rules "shall not abridge, enlarge, or modify the substantive rights of any litigant." The dividing line between substance and procedure is not always easy to draw. For example, the question whether an action is barred by a statute of limitations is a matter of substance; but the question as to when an action is considered to have been commenced so as to toll the statute of limitations is presumably procedural. Field & McKusick, Maine Civil Practice, §1.2 (1959).
>
> The United States Supreme Court has reaffirmed the language in which it construed the Federal Rules Enabling Act in *Sibbach v. Wilson*, decided in 1941 [312 U.S. 1]:
>
> > The test must be whether a rule really regulates procedure, - the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.
>
> Field, McKusick & Wroth, Maine Civil Practice, §1.2 (2nd Edition 1970).

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grant monetary and equitable relief in these actions. Equitable relief is limited to orders to return, reform, refund, repair or rescind."
In pertinent part, "**§7482. DEFINITION OF A SMALL CLAIM** Notwithstanding the total amount of a debt or contract, a "small claim" means a right of action cognizable by a court if the debt or damage does not exceed $6,000 exclusive of interest and costs. It does not include an action involving the title to real estate."

The question posed here is whether the small claims statutes, 14 M.R.S. §§7481 and 7482, are substantive law, or merely procedural. If the former, the Court may not abridge them by limiting the small claims remedy through a restriction of the types of cases that may be brought as small claims. If the later, the Court is free to make whatever Rules it chooses (subject to argument A above).

Certain hypotheticals help to focus the distinction: May the Court alter the small claim scheme by changing the "jurisdictional" amount? Currently set at $6,000.00, may the Court now change it to $35, the amount set in the original enactment of 1945? Or increase it to $30,000.00? May the Court alter the small claim scheme by promulgating a rule that allows a small claims action that involves title to real estate, provided that the value of that real estate is less than $75,000.00?

If you bristle at the suggestion that the Court may make such changes, you will tend to conclude that these statutory provisions are substantive. This visceral reaction, however, is bolstered by certain statutory language in §7482. Paragraph 2 thereof states:

> Effective July 1, 1997 and every 4 years after that date, the joint standing committee of the Legislature having jurisdiction over judiciary matters shall review the monetary limit on small claims actions and the Judicial Department shall periodically provide information and comments on the monetary limit on small claims actions to that committee.

By reserving to itself the power and duty to review periodically the monetary limit in small claim actions, the Legislature is recognizing that this aspect of the law is substantive. Otherwise, it would delegate this function to the Court.

If the monetary limit is substantive law, so is the scope of the actions, "cognizable by a court" which may be brought as small claims.

Under the Rules Enabling Act, the Court may not "abridge, enlarge, nor modify the substantive rights of any litigant". Proposed Rule 80N and Rule 1 do precisely that. Whether these rules are deemed to re-define what is a small claim, or only limit in which court certain small claims may be brought, the effect is the same. The substantive law contained in 14 M.R.S. c.738 will be abridged and certain of the claims that the Legislature has determined are small claims will be deprived of the "simple, speedy, and informal" remedy that the Legislature intended.

For these additional reasons, the Court does not have the authority to promulgate said proposed Rule 80N and Rule 1.

Respectfully submitted,

s/______________________

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RULE 45. SUBPOENA

(a) Scope.

(1) *Scope*. Subject to paragraph (a)(2) of this rule, a subpoena may command a person or entity to

(A) testify by deposition upon oral examination pursuant to Rule 30;

(B) testify by deposition upon written questions pursuant to Rule 31;

(C) testify at trial or hearing; and/or

(D) (i) produce and permit the party serving the subpoena, or someone acting on that party's behalf, to inspect and copy any designated documents (including writings, books, drawings, graphs, charts, photographs, electronically or digitally stored information, and other data compilations from which information can be obtained, translated, if necessary, by the subject of the subpoena through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of Rule 26B(b) and which are in the possession, custody or control of the person or entity upon whom the subpoena is served; or (ii) permit entry upon designated land or other property in the possession or control of the person or entity upon whom the subpoena is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26B(b).

(2) *Subpoenas Directed to Parties to the Action*. A subpoena shall not be used to command a party to the action to testify by deposition upon oral or written examination, to produce during discovery or pretrial proceedings documents or tangible things, or to permit entry upon land for inspection and other purposes. Rules 30, 31, and 34 shall govern for those purposes.

(b) Form.

(1) Every subpoena shall

(A) state the name of the court from which it is issued;

(B) state the title of the action, the name of the court in which it is pending, and its civil action number;

(C) command each person or entity to whom it is directed to perform or permit one or more of the acts set forth in paragraph (a)(1) of this rule at a specified time and place;

(D) comply with the notice and other requirements of Rule 30(c) and Rule 31(a), except as otherwise provided in this rule; and

(E) set forth the text of subsections (e) through (i) of this rule.

(2) A command to produce documents or tangible things or to permit entry upon land for inspection and other purposes, as set forth in subparagraph (a)(1)(D) of this rule, may be included in a subpoena to appear at trial, hearing, or deposition, or may be set out in a separate subpoena. It shall set forth the items to be inspected either by individual item or by category and shall describe each item and category with reasonable particularity. The subpoena may specify the form or forms in which electronically or digitally stored information is to be produced.

(c) Issuance. A subpoena for the Superior Court may issue from the court in any county and for the District Court from the court in any district. The clerk shall issue a subpoena that is signed but otherwise in blank to a party requesting it, who shall complete it before service. An attorney admitted to the Maine Bar also may issue and sign a subpoena as an officer of the court.

(d) Service; Notice to Other Parties.

(1) *Service; Manner*. A subpoena may be served at any place within the state and by any person who is not a party and who is not less than 18 years of age, including the attorney of a party. Subpoenas shall be served on a party to the action who is the subject of the subpoena in the manner prescribed by Rule 5(b) and on a non-party in the manner prescribed by Rule 4(d), whether or not represented by counsel, or by other means agreed to and confirmed in writing by the subject of the subpoena. If the person's or entity's attendance is commanded, then at the time of service of the subpoena the fees for one day's attendance and the mileage allowed by law shall be tendered.

(2) *Service; Timing*.

(A) *Discovery or Pretrial Proceedings*. A subpoena issued for purposes of discovery or pretrial proceedings, as set forth in subparagraph (a)(1)(A), (B), or (D) of this rule, shall be served on the subject of the subpoena at least 14 days prior to the response date set forth in the subpoena.

(B) *Trial or Hearing*. A subpoena issued for purposes of hearing or trial, as set forth in subparagraph (a)(1)(C), or that requests the production of tangible things at hearing or trial, as set forth in subparagraph (a)(1)(D)(i) of this rule, shall be served on the subject of the subpoena at least 14 days prior to the response date set forth in the subpoena or as soon as practicable if fewer than 14 days are available.

(3) *Notice to Other Parties*. A copy of a subpoena shall be served on each party to the action as soon as practicable after the serving party receives notice of the effective service made on the subject of the subpoena or, in discovery or pretrial proceedings, at least 10 days before the response date, whichever is earlier, but the court on an *ex parte* application and for good cause shown may prescribe a shorter notice.

(e) Duties in Issuing and Serving a Subpoena.

(1) *Undue Burden or Expense*. The party or the attorney responsible for the issuance and service of a subpoena shall take reasonable steps to comply with this rule and avoid imposing undue burden or expense on a person or entity subject to that subpoena.

(2) *Command to Produce Documents and Tangible Things or to Permit Entry Upon Land; Rights of Other Parties*. With respect to a command to produce documents or tangible things or to permit entry upon land for inspection and other purposes, as set forth in subparagraph (a)(1)(D) of this rule, the serving party shall take reasonable steps to ensure that each party to the action, or someone acting on that party's behalf, has the same opportunity to inspect, copy, test, sample, enter, measure, survey, and/or photograph the requested documents, tangible things, land, and/or property as the serving party. If the serving party allows the subject of the subpoena to provide copies of the requested documents in lieu of making the original documents available for inspection and copying, the serving party shall promptly provide each party to the action with copies of all documents provided by the subject of the subpoena, unless otherwise ordered by the court.

(3) *Privileged or Protected Documentary Evidence*. If a party issues a subpoena that it or its attorney knows seeks the production of documentary evidence that may be protected from disclosure by a privilege, confidentiality protection, or privacy protection under law, rule, or order, the party shall include with the subpoena a signed authorization for the release of the information or a court order allowing production. If there is no authorization or court order, then the issuing party, before or after serving the subpoena but before the time for response, shall confer in good faith with the subject of the subpoena in an attempt to reach agreement about production, and, if the agreement includes a court order, then the party who issued the subpoena shall submit the agreed, proposed order to the court for approval.

If no agreement is reached, the issuing party shall file a letter with the court pursuant to Rule 26B(g) to obtain a court order for the disputed evidence. The letter shall contain a statement of the basis for seeking production of the documentary evidence that may be privileged or protected and shall be accompanied by a copy of the subpoena. Upon receipt of the letter, the clerk shall set the matter for ~~hearing~~ in-person, video, or telephonic conference and issue a notice of ~~hearing~~ in-person, video, or telephonic conference. The notice shall state the date and time of the ~~hearing~~ in-person, video, or telephonic conference and direct the party from whom the documentary evidence is sought to submit the documentary evidence subject to the subpoena for *in camera* review by the court or to adequately explain in writing any reasons for a failure to submit the documentary evidence for *in camera* review. Following the clerk's issuance of a ~~hearing~~ conference notice, the serving party shall serve a copy of the notice and the letter, together with the subpoena if not already served, on the subject of the subpoena in the manner prescribed by this rule for serving a subpoena.

Upon receipt of the ~~hearing~~ conference notice, the person or entity to whom the subpoena is directed shall either submit the documentary evidence subject to the subpoena for *in camera* review by the court or provide, in writing, reasons for the failure to submit the documentary evidence for *in camera* review before the date of the ~~hearing~~ conference. After the ~~hearing~~ conference, the court may issue any order necessary to protect any person or entity's privileges, confidentiality protections, or privacy protections under law, rule, or order.

(f) Duties in Responding to a Subpoena.

(1) *Objections*. A person or entity responding to a subpoena may object to it pursuant to paragraph (g) of this rule on the grounds set forth in subparagraphs (f)(2)(D), (f)(2)(E), (f)(3)(A), (h)(3), or (h)(4) of this rule.

(2) *Command to Produce Documents and Tangible Things or to Permit Entry Upon Land*. With respect to a command to produce documents or tangible things or to permit entry upon land for inspection and other purposes, as set forth in subparagraph (a)(1)(D) of this rule, a responding person or entity:

(A) need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial;

(B) shall produce the requested documents or tangible things as they are kept in the usual course of business or shall organize and label them to correspond with the categories requested in the subpoena;

(C) shall produce electronically or digitally stored information in the form requested in the subpoena or in a form or forms in which the information is ordinarily maintained or that is reasonably usable;

(D) need not produce the same electronically or digitally stored information in more than one form unless ordered by the court;

(E) need not provide electronically or digitally stored information from sources that are not reasonably accessible because of undue burden or expense and may object to the subpoena on that basis. The person or entity from whom the electronically or digitally stored information is sought must show that it is not reasonably accessible because of undue burden or expense. If that showing is made, the court may nonetheless order production if the serving party shows a substantial need for the information in electronic form that cannot otherwise be satisfied without undue hardship, considering the limitations and remedies of Rule 26B(c). The court may specify reasonable conditions for the production and shall impose on the party that served the subpoena the reasonable expense of producing such electronically or digitally stored information; and

(F) shall permit each party to the action, or someone acting on that party's behalf, the same opportunity to inspect, copy, test,

sample, enter, measure, survey, and/or photograph the requested documents, tangible things, land, and/or property as the serving party.

(3) *Claiming Privilege or Protection.*

(A) *Information Withheld.* When information subject to a subpoena is withheld on the basis of privilege, immunity from discovery, trial preparation materials, confidentiality protection, or privacy protection under law, rule, or order, the objection shall be made expressly on those grounds and shall be supported by a description of the nature of the documents or tangible things not produced that is sufficient to enable the serving party to contest the objection. The objection shall be presented in the manner prescribed by paragraph (g) of this rule.

(B) *Information Mistakenly Produced.* If information produced in response to a subpoena is subject to a claim of privilege, immunity from discovery, trial preparation materials, confidentiality protection, or privacy protection under law, rule, or order, the person making the claim shall notify any party that received the information of the claim and the basis for it. After being notified, recipients shall promptly return, sequester, or destroy the specified information and any copies, as directed by the producing party; shall not use or disclose the information until the claim is resolved by agreement or by the court; and shall take reasonable steps to retrieve the produced information if disclosed before notification of the claim. The claim may be resolved by any party to the action or by the person making the claim in the manner prescribed by paragraph (g) of this rule. The subject of the subpoena who produced the information must preserve the information until the claim is resolved, regardless of who asserted the claim.

(g) Objection to a Subpoena.

(1) *Manner of Objection.* No written motion shall be filed objecting to a subpoena without prior approval of the court. In lieu of seeking permission to file a motion, the objecting person, entity, or party may, no later than 7 days after service of a subpoena on that person, entity, or party,

(A) serve a letter on the serving party setting forth the objection; and

(B) make a good-faith effort to confer in person or by telephone to attempt to resolve the objection by agreement.

If an objection is made to a subpoena served for purposes of pretrial or discovery proceedings, as set forth in subparagraphs (a)(1)(A), (B) or (D) of this rule, the subpoena shall not be enforced except pursuant to an order of a justice or judge under this rule.

If an objection is made to a subpoena issued for appearance or production at a hearing or trial, as set forth in subparagraphs (a)(1)(C) or (D)(i) of this rule, then the subject of the subpoena is required to attend and produce as commanded unless otherwise ordered by a justice or judge.

Objections made during deposition testimony that was compelled by subpoena shall be addressed as provided in Rule 30.

(2) *Court Involvement*. If the objection is not resolved by agreement, then the person or entity subject to the subpoena, the serving party, or any other party to the action may file a letter with the clerk of the court in which the action is pending requesting ~~a telephone conference or hearing~~ an in-person, video, or telephonic conference with a justice or judge.

(A) The letter shall identify the title of the action, the name of the court in which it is pending, and its civil action number; identify the particular appearance, production, or inspection commanded to which there is objection; state the objection and relief sought without argument or citation; and attach a copy of the subpoena at issue.

(B) The letter shall constitute a representation to the court, subject to Rule 11, that the required conference has taken place, but without success, or that a good faith effort to resolve the objection has been attempted unsuccessfully.

(C) The letter shall be served by delivering a copy to the person subject to the subpoena and all parties to the action as provided in Rule 5(b).

(D) The clerk shall direct the letter to the justice or judge who has been specially assigned to hear the action, or to any available justice or judge if the action has not been specially assigned or subject to single justice or judge management, except that a letter relating to a subpoena commanding appearance or production at a trial or hearing shall be directed by the clerk to the justice or judge presiding at such trial or hearing. The clerk shall inform the serving party of the manner, date, and time of the ~~hearing~~ in-person, video, or telephonic conference to address the objection or compliance deficiency, if any.

(E) The serving party shall provide prompt written notice of the ~~hearing~~ in-person, video, or telephonic conference to the person or

entity subject to the subpoena and to all other parties to the action as provided in Rule 5(b). If the ~~hearing~~ <u>conference</u> is to be conducted by telephone conference or video conference, the serving party shall connect all participants and shall initiate the telephone or video conference call to the court.

(h) Enforcement of a Subpoena. The procedure in this subdivision to compel compliance with a duly served subpoena is an alternative to contempt proceedings under subparagraph (i)(1) of this rule and Rule 66, which may be initiated by the serving party instead. No written motion other than a motion for contempt shall be filed seeking enforcement of a subpoena without prior approval of the court.

(1) *Alternative Enforcement Method*. To compel compliance with a duly served subpoena when a person or entity has failed to obey <u>and has not objected to the subpoena pursuant to subparagraph (g) of this rule</u>, the serving party may, within a reasonable time after the date for compliance with the subpoena or the receipt of an insufficient response, whichever is earlier,

(A) serve a letter on the subject of the subpoena demanding compliance; and

(B) make a good-faith effort to confer in person or by telephone to attempt to obtain compliance by agreement.

(2) *Court Involvement*. If the compliance deficiency is not resolved by agreement, then the person or entity subject to the subpoena, the serving party, or any other party to the action may file a letter with the clerk of the court in which the action is pending requesting ~~a telephone conference or hearing~~ <u>an in-person, video, or telephonic conference</u> with a justice or judge.

(A) The letter shall identify the title of the action, the name of the court in which it is pending, and its civil action number; identify the particular appearance, production, or inspection commanded for which enforcement is sought; state the basis for enforcement and relief sought without argument or citation; and attach a copy of the subpoena at issue.

(B) The letter shall constitute a representation to the court, subject to Rule 11, that the required conference has taken place, but without success, or that a good faith effort to resolve the compliance deficiency has been attempted unsuccessfully.

(C) The letter shall be served by delivering a copy to the person subject to the subpoena and all parties to the action as provided in Rule 5(b).

(D) The clerk shall direct the letter to the justice or judge who has been specially assigned to hear the action, or to any available justice or judge if the action has not been specially assigned or subject to single justice or judge management, except that a letter relating to a subpoena commanding appearance or production at a trial or hearing shall be directed by the clerk to the justice or judge presiding at such trial or hearing. The clerk shall inform the serving party of the manner, date, and time of the ~~hearing~~ in-person, video, or telephonic conference to address the ~~objection or~~ compliance deficiency, if any.

(E) The serving party shall provide prompt written notice of the ~~hearing~~ in-person, video, or telephonic conference to the person or entity subject to the subpoena and to all other parties to the action as provided in Rule 5(b). If the ~~hearing~~ conference is to be conducted by telephone conference or video conference, the serving party shall connect all participants and shall initiate the telephone or video conference call to the court.

(i) Court Action on Objection or Enforcement Letter. A justice or judge may issue an order on the basis of a letter filed pursuant to paragraph (g)(2) of this rule after conference. A justice or judge may issue an order on the basis of a letter filed pursuant to paragraph (h)(2) of this rule with or without a ~~hearing or telephone~~ conference, at the court's discretion.

(1) *Enforce*. If warranted, the justice or judge may order compliance pursuant to the terms specified in the subpoena.

(2) *Quash or Modify*. The justice or judge may quash or modify the subpoena in its discretion if it

(A) fails to allow a reasonable time for compliance;

(B) requires a resident of this state to attend a deposition outside the county wherein that person resides and to travel a distance of more than 150 miles one way from that person's residence;

(C) requires a nonresident of the state to attend a deposition outside the county wherein that person is served with a subpoena and to travel a distance of more than 150 miles one way from the place of service;

(D) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(E) subjects a person or entity to undue burden in complying with the subpoena.

(3) *Enforce with Protective Conditions*. If a subpoena

(A) requires disclosure of a trade secret or other confidential research, development, or commercial information;

(B) requires the testimony, documents, tangible things, or information of an expert witness who was not retained by a party to testify and that resulted from the expert's study, examination, or analysis performed other than at the request of a party and that do not describe events, occurrences, or facts in dispute;

(C) requires a resident of this state who is not a party to the action or an officer of a party to the action to incur substantial expense to attend trial outside the county wherein that person resides and to travel a distance of more than 150 miles one way from that person's residence; or

(D) requires a nonresident of the state who is not a party to the action or an officer of a party to the action to incur substantial expense to attend trial outside the county wherein that person is served with a subpoena and to travel a distance of more than 150 miles one way from the place of service, the justice or judge may order appearance or production upon protective conditions, but appearance or production upon protective conditions may be ordered only if the serving party (i) proves a substantial need for the testimony, inspection, documents, or tangible things that cannot otherwise be satisfied without undue hardship, and (ii) in appropriate circumstances, pays reasonable compensation to the person or entity served with the subpoena, which in the case of an expert witness is agreed by the expert witness or approved by the court.

(4) *Motions*. If the issues are not decided at the conference, the justice or judge may order a written motion and supporting memoranda to be filed under Rule 7 and may make such orders as are necessary to narrow or dispose of the dispute.

(i) Contempt and Sanctions.

(1) In the absence of an objection under subparagraph (g) of this rule, ~~F~~failure by any person or entity to obey a duly served subpoena may be deemed contempt of the court in the county or district where the action is

pending. Punishment for contempt under this paragraph shall be in accordance with Rule 66 and 16 M.R.S. § 102. Alternatively, the serving party may seek to enforce a subpoena pursuant to subdivision (h) of this rule.

(2) The court may impose an appropriate sanction upon a party, attorney, person, or entity in breach of the duties set forth in this rule, which may include, but is not limited to, lost earnings, reasonable attorney's fees, and other reasonable expenses incurred in seeking enforcement of the subpoena or protection from it.