

STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO MAINE RULES OF CRIMINAL PROCEDURE

2008 Me. Rules 03

Effective: January 1, 2008

All the Justices concurring therein, the following amendments to the Maine Rules of Criminal Procedure are hereby adopted to be effective on January 1, 2008, as follows:

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

1. Rule 6, subdivisions (d) and (e) of the Maine Rules of Criminal Procedure are amended as follows:

(d) **Presence During Proceedings.** While the grand jury is taking evidence, only the attorneys for the state, the witness under examination, and, when ordered by the court, an interpreter or translator and a court reporter may be present. While the grand jury is deliberating or voting, only the jurors may be present.

(e) **General Rule of Secrecy.** A juror, attorney, interpreter, translator, court reporter, or any person to whom disclosure is made under this rule may not

disclose matters occurring before the grand jury, except as otherwise provided in these rules or when so directed by the court. No obligation of secrecy may be imposed upon any person except in accordance with this rule. In the event an indictment is not returned, any stenographic notes of an official court reporter and any transcriptions of such notes shall be impounded by the court. The court may direct that an indictment be kept secret until the defendant is in custody or has given bail, and in that event the court shall seal the indictment and no person may disclose the finding of the indictment except when necessary for the issuance or execution of a warrant or summons. Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and any vote of any juror, may be made to:

(1) an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws;

(2) such staff members of an attorney for the state as are assigned to the attorney for the state and are reasonably necessary to assist an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws; and

(3) another state grand jury by an attorney for the state in the performance of the duty of an attorney for the state to enforce the state's criminal laws.

Any person to whom matters are disclosed under paragraphs (1) or (2) of subdivision (e) of this rule may not utilize that grand jury material for any purpose other than assisting the attorney for the state in the performance of such attorney's duty to enforce the state's criminal laws.

Advisory Note - 2008

M.R.Crim.P. 6(d) and (e). The amendment adds the term "translator". *See* Advisory Note to M.R.Crim.P. 28.

2. Rule 11, subdivision (a), paragraph (2) of the Maine Rules of Criminal Procedure is amended as follows:

(2) Conditional ~~Guilty~~ Plea. With the approval of the court and the consent of the attorney for the state, a defendant may enter a conditional guilty plea of guilty or nolo contendere. A conditional ~~guilty~~ plea shall be in writing. It shall specifically state any pretrial motion and the ruling thereon to be preserved for

appellate review. If the court approves and the attorney for the state consents to entry of the conditional ~~guilty~~ plea of guilty or nolo contendere, ~~they~~ the parties shall file a written certification that the record is adequate for appellate review and that the case is not appropriate for application of the harmless error doctrine. Appellate review of any specified ruling shall not be barred by the entry of the conditional plea.

If the defendant prevails on appeal, the defendant shall be allowed to withdraw the plea.

Advisory Note – 2008

M.R.Crim.P. 11(a)(2). The amendment adds to the current conditional guilty plea, a conditional plea of nolo contendere. The same advantages to the parties and the court system in providing for a conditional guilty plea apply in the context of a nolo contendere plea. The amendment conforms Maine’s conditional plea to that of its federal counterpart. *See* M.R.Fed.P. 11(a)(2).

The Law Court recently, while pointing out that the current rule “provides for conditional pleas of guilty only and does not authorize the entry of a conditional plea of nolo contendere,” nonetheless addressed the merits of the issues raised in the context of a conditional plea of nolo contendere since “[t]he parties neither raised nor argued this point [the rule’s inapplicability].” *State v. Dion*, 2007 ME 87, ¶ 1, n. 1, 928 A.2d 746, 747. *See also State v. Bilynsky*, 2007 ME 107, ¶ 3, n. 1, 932 A.2d 1169, 1171 (“The State . . . concedes “that there appears to be no rationale for allowing conditional guilty pleas and disallowing conditional nolo contendere pleas”).

3. Rule 11A, subdivision (a) of the Maine Rules of Criminal Procedure is amended as follows:

(a) **In General.** The attorney for the state and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged crime or to a lesser or related crime, any or all of the following will occur:

- (1) The attorney for the state will dismiss other charges;
- (2) The attorney for the state will not oppose the defendant's requested disposition;
- (3) The attorney for the state will recommend a particular disposition; or
- (4) Both sides will recommend a particular disposition.

The court ~~shall not~~ may participate in the negotiation of the specific terms of the plea agreement at the request of or with the agreement of the parties.

Advisory Note – 2008

The amendment to M.R. Crim. P. 11A(a) clarifies the current limitation on a court participating “in the negotiation of the specific terms of the plea agreement” by making a positive statement regarding the court's capacity to participate in such

negotiations. The purposes of the amendment are to (1) avoid confusion with M.R. Crim. P. 11A(e) in which the court is required to disclose its view of an appropriate sentence in certain negotiated pleas, and (2) promote sound policy and good judicial case management practice, while retaining the protection of the due process rights of the defendant and the prosecutorial role of the attorney for the State as a member of the Executive Department.

The amendment supports maintenance of current judicial practices that encourage the parties, with participation of the court, to engage in meaningful plea negotiation discussions. Further, the amendment recognizes that a justice or judge may explore the current state of party pre-plea discussions, including the specific terms under consideration by the parties and may facilitate a plea agreement by suggesting or addressing a specific aspect of the pre-plea discussions when requested by the parties to do so.

The amendment contemplates that the court and the parties should continue to respect the core interests identified in *Matter of Cox*, 553 A.2d 1255, 1257-58 (Me. 1989) – namely, avoiding risk of coercion of the defendant; avoiding risk of coercion of the attorney for the state; promoting judicial efficiency; and preserving public respect for the judiciary. To avoid concerns about coercion, courts, in plea negotiation discussions, should (1) avoid suggestions to defendants or defense counsel that the refusal to enter a plea may lead to a higher sentence than otherwise may be appropriate if there is a conviction after trial, and (2) avoid suggestions to prosecutors that failure to agree to a plea may result in dismissal of a charge, a lower sentence than otherwise may be appropriate if there is a conviction after trial, or adverse consequences in other cases. These comments recognize that a trial is a live, dynamic event in which facts may be disclosed or observed that, if there is a conviction, may support a sentence very different from a sentence that may have been contemplated prior to trial. *See State v. Farnham*, 479 A.2d 887, 889-93 (Me. 1984).

4. Rule 28 of the Maine Rules of Criminal Procedure is amended as follows:

RULE 28. COURT-APPOINTED INTERPRETERS AND
TRANSLATORS

~~The court may appoint a disinterested interpreter of its own selection and may determine the reasonable compensation of such interpreter. The court may provide, or when required by administrative order or statute shall provide, to individuals eligible to receive court-appointed interpretation or translation services, an interpreter or translator and determine the reasonable compensation for the service when funded by the court.~~ Interpreters An interpreter or translator shall be appropriately sworn.

Advisory Note – 2008

M.R.Crim.P. 28. The amendment does two things. First, it adds the term “translator” to the existing term “interpreter”. No attempt is being made by this change to distinguish the services performed by either; rather the change is to ensure that all communication services, oral or written, needed by persons with limited English proficiency or individuals whose primary language is American Sign Language or individuals who are deaf or hard-of-hearing are included. Second, it brings the rule into conformity with current administrative order and statutory requirements. *See* Administrative Order JB-06-3, *Guidelines for Determination of Eligibility for Court-Appointed Interpretation and Translation Services*, effective October 11, 2006 (addressing persons with limited English proficiency in Maine’s state courts other than individuals who are deaf or hard-of-hearing); 5 M.R.S.A. § 48-A (Supp. 2006), entitled “Communication services for deaf persons and hard-of-hearing persons in court and other legal settings;” and 32 M.R.S.A. Chapter 22 [§§ 1521-1531] (Supp. 2006), entitled “American Sign Language, English Interpreters and Transliterations.”

5. Rule 47, subdivision (d) of the Maine Rules of Criminal Procedure is adopted to read as follows:

(d) Nontestimonial Hearings Using Audio or Video Equipment. The use of telephone, audio or video conference equipment is encouraged for nontestimonial hearings and scheduling matters. A party may request this use or the court may act upon its own initiative. The court shall direct the terms of use, and, except when only scheduling matters are to be discussed, the court shall attempt to assure that the hearing is recorded by the best practicable means.

Advisory Note – 2008

M.R.Crim.P. 47(d). The amendment adds a new subdivision (d) to Rule 47 addressing nontestimonial hearings conducted by telephone, audio or video equipment. The rule encourages the use of telephone, audio or video conference equipment for nontestimonial hearings and scheduling matters. This use should serve both to expedite the court's business and to enhance the convenience of the parties, goals already sought with respect to the resolution of motions in Rule 47(b). When employing telephone calls or audio or video conference equipment for nontestimonial hearings other than scheduling matters the court should attempt to assure recording by the best practicable means.

The rule does not address proceedings in which the defendant's presence is required by Rule 43. The inapplicability of this rule to proceedings in which the defendant's presence is required by Rule 43 does not suggest that the use of telephone, audio or video conference equipment is prohibited in such proceedings. Authorization for use of telephone, audio or video conference equipment for arraignments, trials and testimonial hearings must be found in the court's inherent authority to control the conduct of the proceedings or in other rules. *See, e.g., Maryland v. Craig*, 497 U.S. 836, 860 (1990); *State v. Twist*, 528 A.2d 1250, 1255-58 (Me. 1987); M.R. Crim. P. 5(a) & 5C(a); M.R. Evid. 611.

6. These amendments shall take effect January 1, 2008.

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

Dated: December 12, 2007

_____/s/_____
LEIGH I. SAUFLEY
Chief Justice

_____/s/_____
ROBERT W. CLIFFORD
Associate Justice

_____/s/_____
DONALD G. ALEXANDER
Associate Justice

_____/s/_____
JON D. LEVY
Associate Justice

_____/s/_____
WARREN M. SILVER
Associate Justice

_____/s/_____
ANDREW M. MEAD
Associate Justice

_____/s/_____
ELLEN A. GORMAN
Associate Justice