

STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO MAINE RULES OF CRIMINAL PROCEDURE

2009 Me. Rules 6

Effective: January 1, 2009

All the Justices concurring therein, the following amendments to the Maine Rules of Criminal Procedure are hereby adopted to be effective on the date indicated above.

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

1. Rule 6, subdivision (d) of the Maine Rules of Criminal Procedure is 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, or~~ operator of electronic recording equipment may be present. While the grand jury is deliberating or voting, only the jurors may be present.

Advisory Note – 2009

M.R.Crim.P. 6(d). The amendment adds “operator of electronic recording equipment” to accommodate the recording of grand jury proceedings by way of an electronic sound recording. Prior to this amendment, Rule 6 contemplated that only official court reporters would be used for taking evidence in grand jury proceedings.

However, with the recent substantial reduction in the number of official court reporters, their availability for purposes of taking evidence in grand jury proceedings has been correspondingly reduced, necessitating the recognition in Rule 6 of an electronic sound recording option.

2. Rule 6, subdivision (e) of the Maine Rules of Criminal Procedure is amended as follows:

(e) **General Rule of Secrecy.** A juror, attorney, interpreter, translator, court reporter, operator of electronic recording equipment, 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 and electronic backup, if any, of an official court reporter or tape or digital record of an electronic sound recording and any written record of information necessary for an accurate transcription prepared by the operator and any transcripts of such notes, tape or digital record 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 – 2009

M.R.Crim.P. 6(e). The amendment expands the rule of secrecy to include an "operator of electronic recording equipment." *See also* Advisory Note – 2009 to M.R.Crim.P. 6(d). Further, in the event of a no bill by a grand jury the items subject to a court order of impoundment is expanded by the amendment to include the "electronic backup" currently used by many official court reporters in addition to their stenographic notes and the "tape or digital record of an electronic sound recording as well as any written record of information necessary for an accurate transcription prepared by the operator." *See generally*, M.R.Civ.P. 76H and M.R.Crim.P. 27(c). An "electronic backup" or "digital record" may include, in addition to a tape, preservation of a record on a CD, DVD, Flash Drive or other device capable of storing electronic or digital files for later recall.

3. Rule 6, subdivision (f) of the Maine Rules of Criminal Procedure is amended as follows:

(f) Recording of Proceedings. Upon motion of the defendant or the attorney for the state, the court, in its discretion for good cause shown, may order that a court reporter or operator of electronic recording equipment be present for the purpose of taking evidence. No person other than a court reporter or operator of electronic recording equipment shall be permitted to record any portion of the proceeding.

Advisory Note – 2009

M.R.Crim.P. 6(f). The amendment adds “operator of electronic recording equipment” to provide for an electronic sound recording option in addition to using a court reporter to take evidence in grand jury proceedings. *See also* Advisory Note – 2009 to M.R.Crim.P. 6(d).

4. Rule 11, the heading and subdivisions (b) and (h) of the Maine Rules of Criminal Procedure are amended as follows:

**RULE 11. PLEAS; ACCEPTANCE OF A PLEA TO A
CHARGE OF A CLASS C OR HIGHER CRIME;
NOTICE AS TO POSSIBLE IMMIGRATION
CONSEQUENCES**

.....

(b) Prerequisites to Accepting a Plea of Guilty or Nolo Contendere to a Class C or Higher Crime. In all proceedings in which the crime charged is

murder or a Class A, Class B, or Class C crime, before accepting a plea of guilty or nolo contendere, the court shall insure:

(1) That the plea is made with knowledge of the matters set forth in subdivision (c); and

(2) That the plea is voluntary within the meaning of subdivision (d); and

(3) That there is a factual basis for the charge, as provided in subdivision (e); and

(4) That an unrepresented defendant has waived the defendant's right to counsel. and

~~(5) That a defendant who is not a United States citizen has been notified that there may be immigration consequences of the plea, as provided in subdivision (h). The court is not required or expected to inform the defendant of the nature of any consequences, but may consider a brief continuance to permit the defendant to make inquiry.~~

.....

(h) Immigration Consequences of the Plea. Before accepting a plea of guilty or nolo contendere for any crime, the court shall inquire whether the defendant is a United States citizen. If the defendant is not a United States citizen, the court shall ascertain from defense counsel whether the defendant has been notified that there may be immigration consequences of the plea. If no such

notification has been made, or if the defendant is unrepresented, the court shall notify the defendant that there may be immigration consequences of the plea and may continue the proceeding for investigation and consideration of the consequences by the defendant. The court is not required or expected to inform the defendant of the nature of any immigration consequences.

Advisory Note – 2009

M.R.Crim.P. 11 the heading (b) and (h). The amendment adds at the end of the current heading to Rule 11 “; NOTICE AS TO POSSIBLE IMMIGRATION CONSEQUENCES” for purposes of clarity. Further, it amends subdivision (h) in two respects. First, it adds the words “for any crime” in the first sentence to make clear that subdivision (h) applies to both felonies and misdemeanors since a plea to either may trigger immigration consequences. Second, it adds the words “by the defendant” at the end of the final sentence to make clear that the purpose for a trial court granting a continuance of the proceeding is for investigation and consideration by the defendant of any potential immigration consequences of the plea. With subdivision (h) amended to clarify that it applies to pleas to any class of crime, paragraph (5) of subdivision (b) becomes duplicative and is deleted. The sentence emphasizing that the court has no obligation to inform about or predict the nature of any possible immigration consequences of the plea is moved from paragraph (5) to subdivision (h).

5. Rule 11B of the Maine Rules of Criminal Procedure is adopted as follows:

RULE 11B. FILING AGREEMENTS

(a) In General. The attorney for the state and the defendant may enter into a written filing agreement respecting a pending indictment, information or

complaint. The filing agreement must establish a definite filing period of up to one year subject to the conditions, if any, set forth in the filing agreement.

(b) Court Approval Unnecessary. The approval of the court for the filing of a written filing agreement by the parties is unnecessary; however, a filing agreement is subject to the control of the court. If the agreement calls for the payment by the defendant of costs of prosecution such agreed-upon costs may be in any amount up to, but not exceeding, the maximum authorized fine amount for the particular crime based upon its sentencing class and need not reflect the actual costs of prosecution.

(c) Disposition During or at Expiration of Filing Period. Except where a filing agreement expressly provides otherwise as specified in subdivision (d), if the defendant has satisfied each of the filing agreement's conditions, if any, at the conclusion of the agreed upon filing period the defendant is entitled to have the filed indictment, information or complaint dismissed with prejudice. In this regard, unless the attorney for the state files a motion alleging a violation of one or more of the agreement's conditions by the defendant and seeking to have the criminal proceeding in which the indictment, information or complaint was filed reactivated by the court, at the expiration of the filing period the clerk shall enter a dismissal of the filed charging instrument with prejudice. In the event the attorney for the state files a motion during or at the end of the filing period alleging a

violation of one or more of the agreement's conditions, the attorney for the state is entitled to have the criminal proceeding reactivated by the court if, following a hearing on the motion, the court finds by a preponderance of the evidence that the defendant has violated one or more of the agreement's conditions.

(d) Special Reservations in the Filing Agreement. If the attorney for the state wishes to preserve the right to reinitiate a criminal proceeding after the filing period has fully run when no breach of conditions has occurred, or to preserve the right to initiate the same or additional criminal charges against the defendant arising out of the same event or conduct in a separate criminal proceeding while the filing period is running, the attorney for the state must expressly reserve such a right in the written filing agreement and the defendant must expressly agree to it.

Advisory Note – 2009

M.R.Crim.P. 11B. New Rule 11B comprehensively addresses filing agreements entered into by the attorney for the state and the defendant. It replaces current subdivision (c) of Rule 48. Unlike Rule 48(c) which focuses on a filing by the parties as a form of dismissal of a pending charging instrument, Rule 11B focuses on filing by the parties as a form of plea agreement in response to the Law Court's recent decision in *State v. Russo*, 2008 ME 31 942 A.2d 694. *Russo* thoroughly discusses party filings in this context.

Proposed Rule 11B is made up of four subdivisions. Subdivision (a) authorizes the parties to enter into written filing agreements respecting a formal charge, with or without conditions (including a condition requiring payment of costs of prosecution), for a definite filing period of no more than one year. The one year limitation is consistent with current Rule 48(c).

Subdivision (b) provides that approval of the trial court for the filing of a written filing agreement by the parties is unnecessary even in the context of agreed-upon payment of costs of prosecution. Thus subdivision (b) eliminates the current requirement of Rule 48(c) that costs of prosecution in excess of \$500 require a court finding that the costs “reflect the actual costs of prosecution.” It leaves to the parties to settle on an agreed-upon cost figure “in any amount up to, but not exceeding, the maximum authorized fine amount for the particular crime based upon its sentencing class and need not reflect the actual costs of prosecution.” However, even though court approval is unnecessary for the filing of a written filing agreement by the parties, including, agreed-upon costs, subdivision (b) further provides that a filing agreement is always subject to the control of the court.

Subdivision (c) provides, except with special reservations in the filing agreement, that at the conclusion of the agreed-upon filing period, if the defendant has satisfied each of the agreed-upon filing conditions, the defendant is entitled to have the filed charging instrument dismissed with prejudice rather than without prejudice as currently under Rule 48(c). The “with prejudice” consequence is consistent with the *Russo* decision. *Id.* It further provides that the attorney for the state may, during or at the end of the filing period, file a motion alleging a violation of one or more of the agreement’s conditions by the defendant and seeking reactivation of the criminal proceeding. At the subsequent hearing on that motion, subdivision (c) provides that the attorney for the state is entitled to have the criminal proceeding reactivated by the trial court if the court finds by a preponderance of the evidence that the defendant has violated one or more of the agreement’s conditions. Current Rule 48(c) does not address the role of the attorney for the state relative to reactivation other than to allude to “action [by the attorney for the state] to bring the indictment, information or complaint to the attention of the court during the period of filing.”

Subdivision (d) provides that if the attorney for the state wishes to preserve the right to reinitiate a criminal proceeding after the filing period has fully run when no breach of conditions has occurred, or to preserve the right to initiate the same or additional criminal charges against the defendant out of the same event or conduct in a separate criminal proceeding while the filing period is running, the attorney for the state must expressly reserve such a right in the written filing agreement and the defendant must expressly agree to it. These special reservations are not addressed in current Rule 48(c). They instead are addressed in the *Russo* decision. *Id.* ¶ 19, n.3, 942A.2d at 700.

6. Rule 16, subdivision (a), paragraph (1), subparagraph (D) of the Maine Rules of Criminal Procedure is amended as follows:

(D) ~~A statement describing the contents of any disclosure order issued~~ copy of any notification provided to the Superior Court by the attorney for the state pursuant to Rule 6(h) which that pertains to the case against the defendant.

Advisory Note – 2009

M.R.Crim. P. 16(a)(1)(D). Subparagraph (D) is amended to reflect the 1997 amendment to Rule 6(h). *See* Me.Rptr. 692-698 A.2d LXVII, LXXXI-LXXXII. Specifically, in 1997 Rule 6(h) was amended so as to eliminate the court-order requirement regarding a prosecutor's disclosure to law enforcement personnel of matters occurring before the grand jury and in its stead to provide for after-the-fact written notification to the Superior Court by the prosecutor as to whom disclosure was made and certification as to advising such person or persons of the obligation of secrecy under Rule 6. Subparagraph (D) is amended to require that a copy of any such notification that pertains to the case against the defendant be forwarded to the defendant.

7. Rule 16, subdivision (b), paragraph (2), subparagraph (C) of the Maine Rules of Criminal Procedure is amended as follows:

(C) The names and, except as provided in Title 17-A M.R.S. § 1176(4), the addresses of the witnesses whom the state intends to call in any proceeding;

Advisory Note – 2009

M.R.Crim.P. 16(b)(2)(C). P.L. 2007, ch. 475, § 13 repealed and replaced 17-A M.R.S. § 1176, effective June 30, 2008, relating to confidentiality of victims records. New subsection 4 of section 1176 provides:

4. Limited disclosure pursuant to discovery. Notwithstanding the provisions of the Maine Rules of Criminal Procedure, Rule 16, an attorney for the State may withhold the current address or location of a victim from a defendant, or the attorney or authorized agent of the defendant, if the attorney for the State has a good faith belief that such disclosure may compromise the safety of the victim.

The amendment to Rule 16(b)(2)(C) expressly incorporates the new statutory exception.

8. Rule 27, subdivision (a) of the Maine Rules of Criminal Procedure is amended as follows:

(a) In the Superior Court. ~~All jury proceedings in court shall be taken down by the court reporter, including, without limitation, jury selection, opening statements, bench conferences, testimony of witnesses, closing arguments, and instructions to the jury.~~ All other proceedings shall be electronically recorded or taken down by ~~the~~ a court reporter.

Advisory Note – 2009

M.R.Crim.P. 27(a). The amendment deletes the first sentence of the subdivision both to eliminate the current requirement that all jury proceedings in the Superior Court must be taken down by a court reporter and to eliminate, as unnecessary, the current references to specific portions of a jury proceeding that must be taken down. Jury proceedings, like all other proceedings in the Superior Court, may now either be electronically recorded or taken down by a court reporter. *See also* Advisory Note – 2009 to M.R.Crim.P. 6(d).

9. Rule 48, subdivision (c) of the Maine Rules of Criminal Procedure is abrogated.

Advisory Note – 2009

M.R.Crim.P. 48(c). Subdivision (c) of Rule 48 is abrogated. *See* Advisory Note to M.R.Crim.P. 11B.

10. These amendments shall be effective January 1, 2009.

Dated: December 12, 2008

_____/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