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

2012 Me. Rules 03

Effective: January 1, 2012

All of the Justices concurring therein, the following amendments to the Maine Rules of Appellate Procedure are adopted to be effective on the date indicated above. The specific amendments are stated below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Rule 2(c)(3) of the Maine Rules of Appellate Procedure is amended to read as follows:

(3) Cross-Appeals. When ~~both~~ more than one party~~ies~~ has~~ve~~ appealed, the party who first appeals shall, unless otherwise agreed by the parties or ordered by the Law Court, be treated as the appellant in applying these rules to such cross-appeals, and all other parties shall be treated as appellees, except that if both parents appeal from an order of the District Court or the Probate Court finding jeopardy to a child as to both parents, terminating both parents' parental rights to a child, awarding a guardianship over a child to a third person, or awarding a grandparent visitation rights, both parents shall be treated as appellants, unless otherwise agreed by the parties or ordered by the Law Court.

Advisory Note – November 2011

Rule 2(c)(3) is clarified to indicate that, unless the parties agree or it is ordered otherwise, the first party to file a notice of appeal is the "appellant" and all others are "appellees." The former rule referred to "both" parties, leaving uncertainty as to how to interpret the rule when there were more than two parties in the case. The rule is also amended to indicate that if both parents appeal from an order impacting both parents' parental rights in a child protection, guardianship, or

grandparents' visitation proceeding, both parents are treated as appellants, unless otherwise ordered.

2. Rule 5 (b)(1) of the Maine Rules of Appellate Procedure is amended to read as follows:

(b)(1) Transcript: Criminal Cases. Except as otherwise designated, the standard transcript on appeal shall include the testimony of the witnesses at trial, any bench conferences and the charge to the jury.

Appellant's counsel may add portions to, or delete portions from, this standard transcript by utilizing the requisite Judicial Branch form. Appellant's counsel shall delete from the standard transcript any portion not necessary for purposes of the appeal.

Within seven days of receipt of appellant's transcript order, appellee's counsel may order additional portions of the transcript by utilizing the requisite Judicial Branch form. A copy of the transcript order shall be filed with the Clerk of the Law Court and served on appellant's counsel.

In the case of an indigent appellant, the cost of the transcript shall be paid by the ~~court~~ Maine Commission on Indigent Legal Services. A nonindigent appellant shall make satisfactory financial arrangements with the court reporter or Electronic Recording Division within 7 days after filing the notice of appeal.

An indigent appellant is an appellant who has been determined indigent: (1) by the trial court before verdict pursuant to M.R. Crim. P. 44(b); (2) by the trial court after verdict pursuant to M.R. Crim. P. 44A(b); or (3) by a justice of the Supreme Judicial Court pursuant to M.R. Crim. P. 44A(c).

Advisory Note - November 2011

Rule 5(b)(i) addresses financial responsibility for transcript production. Upon the establishment of the Maine Commission on Indigent Legal Services, the funds allocated for the representation of indigent persons were transferred from the Judicial Branch to the Maine Commission on Indigent Legal Services. This amendment clarifies that transcripts produced for those indigent parties represented by court-appointed or court-assigned counsel are to be paid for by the Maine Commission on Indigent Legal Services.

3. Rule 7(a) of the Maine Rules of Appellate Procedure is amended to read as follows:

(a) Notice. Upon determining that the record on appeal is complete ~~docketing of the reporter's transcript and the trial court clerk's record~~, the Clerk of the Law Court shall send forthwith to each counsel of record and each party who is not represented by counsel a written notice stating the dates on which the appellant's and the appellee's briefs and the appendix are due to be filed, the date on which appellant's reply brief, if any, is due to be filed and the date after which the appeal will be in order for consideration. The due dates stated in the schedule for briefing and consideration notice are not affected by any later transcript order, procedural motion or court order unless the Law Court orders otherwise.

Advisory Note – November 2011

Rule 7(a) is amended to (1) establish the completion of the record as the trigger for issuing the briefing schedule, and (2) clarify that once the briefing schedule issues, the dates in it are firm and are not automatically changed by later filings. The reference to completion of the record replaces language stating that the schedule would be issued upon "docketing of the reporter's transcript and the trial court clerk's record." That language was incomplete because there are often multiple transcripts or a transcript and a statement in lieu of a transcript, and there may be alternatives to the clerk's record.

The amendment also adds a sentence providing that a briefing schedule is not affected by a later transcript order, to clarify that once the record is deemed complete, later additions to, or efforts to add to, the record on appeal do not affect the due dates for briefs and the appendix unless the Court otherwise indicates. In the past, some parties have assumed that when they order a new transcript, it means that the record is no longer complete and that the briefing schedule is no longer valid. Because the rules do not permit later additions to the record without leave of court, any untimely transcript order form does not affect the progress of the appeal absent Court order.

4. Rule 7(b) of the Maine Rules of Appellate Procedure is amended to read as follows:

(b) Time for Filing Briefs.

The appellant shall file the appellant's brief within 56 days (8 weeks) after the date ~~on which the record is filed~~ ~~in the Law Court~~ of written notice pursuant to Rule 7(a) that the record on appeal is complete. The appellee shall file the appellee's brief within 105 days (15 weeks) after the date on which the record is filed in the Law Court, and the appellant may file a reply brief within 14 days (2 weeks) after the date that the appellee's brief is due to be filed. With the extended time for filing briefs, no further extensions of time shall be granted except pursuant to Rule 12A(b)(1)(A) or upon a showing of a significant and unanticipated emergency that prevents a timely filing of a brief.

Advisory Note – November 2011

The amendment to Rule 7(b) changes the start of the running of the briefing schedule from the date on which the record is filed in the Law Court, a date that may not be apparent to the parties, to the date stated in the written notice sent to the parties to the appeal by the Clerk of the Law Court indicating that the record on appeal is complete.

5. Rule 9(a) of the Maine Rules of Appellate Procedure is amended to read as follows:

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases, statutes and other authorities cited.

(2) A statement of the facts of the case, including its procedural history.

(3) A statement of the issues presented for review.

(4) A summary of argument. The argument shall be preceded by a summary of the argument that includes the standard(s) of appellate review applicable to each issue presented for review.

(5) An argument. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons supporting each contention, with citations to the authorities and the particular ~~pages~~ documents or

exhibits in ~~of~~ the record relied on, with citation to page numbers when they exist. The brief of the appellant shall not exceed 50 pages without prior approval of the Law Court, which shall be granted only upon a showing of good cause.

Advisory Note-November 2011

The reference to "pages" of the record was an outdated reference from the time when the trial court clerks individually numbered each page of the record before forwarding the record to the Law Court pursuant to M.R. App. P. 6. To ease review of briefs, citations to the record should continue to be as precise as possible. Pursuant to the amendment, citations to the record must indicate the particular document or exhibit referenced, including page numbers when page numbers exist.

6. Rule 9(h) of the Maine Rules of Appellate Procedure is adopted to read as follows:

(h) Briefs in an Appeal Involving Multiple Appellants or Appellees.

In an appeal involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference another's brief or any part thereof. Parties may also join in reply briefs. Adoption of a brief or portion thereof may be by letter to the Clerk of the Law Court, with a copy to all other parties, if the adopting party does not otherwise file a brief. A party adopting another's brief or part thereof shall do so on or before the due date for that party's own brief.

Advisory Note – November 2011

Rules 9(h) is adopted to establish the proper procedure when one or more parties to an appeal elect to adopt another party's argument or brief. The first two sentences of Rule 9(h) are identical to Fed. R. App. P. 28(i). The last two sentences are added to provide a mechanism for adopting another party's brief when the adopting party is not otherwise filing a brief and to provide the due date for any adoption.

7. Rule 13(f) of the Maine Rules of Appellate Procedure is amended to read as follows:

(f) Sanctions. If, after a separately filed motion or a notice from the court, and a reasonable opportunity to respond, the Law Court determines that an appeal, motion for reconsideration, argument, or other proceeding before it, is frivolous, contumacious, or instituted primarily for the purpose of delay, it may award to the opposing parties or their counsel treble costs and reasonable expenses, including attorney fees, caused by such action.

Advisory Note– November 2011

This amendment changes the process for imposition of sanctions, reflecting the evolution of modern practice to allow notice and opportunity to be heard before sanctions are imposed. Thus, Rule 13(f) now provides that a party to the appeal may file a separate motion requesting sanctions, or the court may issue a notice or an order to show cause indicating that the court may consider sanctions, and the party or attorney at whom the motion or notice has been directed will be afforded a reasonable opportunity to respond. The Rule does not specify the method of response, which will be left to the discretion of the Court. When a party requests sanctions, the request for sanctions must be presented by a separate motion. As the Advisory Committee to the changes in the Federal Rules noted regarding 1994 amendments to Fed. R. App. P. 38:

> A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

The Rule is also amended to clarify that is may be applied to conduct occurring at oral argument and to any contumacious conduct.

8. Rules 19(a) and (d)(1) of the Maine Rules of Appellate Procedure are amended to read as follows:

(a) Appeals Covered. This rule covers criminal appeals, which are subject to preliminary review and full consideration as a matter of discretion by the Law Court, other than the appeals from sentences of a year or more ~~which~~ that are addressed by M.R. App. P. 20. The appeals covered by this rule include:

— An appeal from a ruling by the Superior Court, but not by the District Court, on a motion to correct or reduce a sentence, pursuant to M.R. Crim P. 35(a) or (c), ~~where~~ when the appeal is taken by the defendant;

— An appeal by a person whose probation is revoked by the Superior Court, but not by the District Court, ~~where~~ when the appeal is authorized pursuant to 17-A M.R.S. § 1207(2);

— An appeal by a person whose supervised release is revoked by the Superior Court, but not by the District Court, ~~where~~ when the appeal is authorized pursuant to 17-A M.R.S. § 1233;

— An appeal by a person determined to have inexcusably failed to comply with a court-imposed deferment requirement and thereafter sentenced, ~~where~~ when the appeal is authorized pursuant to 17-A M.R.S. § 1348-C;

— An appeal by a person whose administrative release is revoked by the Superior Court, but not by the District Court, ~~where~~ when the appeal is authorized pursuant to 17-A M.R.S. § 1349-F;

— An appeal from a final judgment in a post-conviction review proceeding pursuant to 15 M.R.S. § 2131(1) ~~where~~ when the appeal is taken by the petitioner;

— An appeal from a final judgment in an extradition proceeding pursuant to 15 M.R.S. § 210-A, ~~where~~ when the appeal is taken by the petitioner; and

— An appeal from an order on a motion to order DNA analysis, pursuant to 15 M.R.S. § 2138(6) ~~or a motion for a new trial based upon DNA analysis, pursuant to 15 M.R.S. § 2138(11)~~, when the appeal is taken either by the convicted person or the State; and

— An appeal from an order on a post-judgment motion seeking a court determination of factual innocence and correction of court records and related criminal justice records or a subsequent vacating of that determination and record correction, pursuant to 15 M.R.S. § 2184(1), when the appeal is taken by the person who filed a motion or on whose behalf the motion was filed.

. . . .

(d)(1) Duty of Reporter to Prepare and File Transcript of Proceeding Subject to Appeal. Unless the Law Court otherwise directs, within 56 days of receipt of a copy of the notice of appeal and transcript order form, the reporter shall prepare and file a transcript of the hearing that is the subject of the appeal in the event that a hearing on the matter was held and recorded. The transcript shall be filed in accordance with M.R. App. P. 6(c). Unless the Law Court orders otherwise, or a certificate of probable cause issues, no other transcript of any related proceeding shall be prepared pending ruling on the request for a certificate of probable cause. The hearings for which a transcript shall be prepared pursuant to this subdivision are:

(i) For an appeal from a ruling by the Superior Court on a motion for correction or reduction of sentence, the hearing, if any, on the motion for correction or reduction of sentence.

(ii) For an appeal from a ruling by the Superior Court on a motion for revocation of probation, the hearing on the motion for revocation of probation.

(iii) For an appeal from a ruling by the Superior Court on a motion for revocation of supervised release, the hearing on the motion for revocation of supervised release.

(iv) For an appeal from a ruling of inexcusable failure to comply with a court-imposed deferment requirement, the hearing on the motion for termination of the period of deferment or the hearing at the conclusion of the period of deferment.

(v) For an appeal from a ruling by the Superior Court on a motion for revocation of administrative release, the hearing on the motion for revocation of administrative release.

(vi) For an appeal from a final judgment in a post-conviction review proceeding, the hearing on the motion for post-conviction relief, if any.

(vii) For an appeal from a ruling on a motion to order DNA analysis, the hearing on the motion to order DNA analysis.

~~(viii) For an appeal from a ruling on a motion for new trial based upon DNA analysis results, the hearing on the motion for a new trial based upon DNA analysis results.~~

~~(ix)~~(viii) For an appeal from an order on a post-judgment motion seeking a court determination of factual innocence and correction of the court records and related criminal justice agency records, the hearing on the post-judgment motion.

~~(x)~~(ix) For an appeal from an order vacating the earlier order certifying a determination of factual innocence and modifying any record correction earlier made, the hearing relating to the fraud or misrepresentation.

Advisory Note – November 2011

Rules 19(a) and (d)(1) are amended to reflect statutory changes made to 15 M.R.S. §§ 2138(6) and (11) in the First Regular Session of the 125th Maine State Legislature, P.L. 2011, ch. 230, §§ 1, 2 (effective Sept. 28, 2011). Title 15 M.R.S. § 2138(6) as amended provides to the state a discretionary appeal from a court order granting a motion to order DNA analysis. Previously the state could not appeal from such an order. Title 15 M.R.S. § 2138(11) as amended provides to an aggrieved person an appeal as of right from a court decision denying a new trial. Previously the person's appeal was discretionary.

9. These amendments shall be effective and shall govern appeals filed on and after January 1, 2012.

Dated: December 13, 2011

FOR THE COURT [1]

/S/
LEIGH I. SAUFLEY
Chief Justice

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

[1] This Rules Amendment Order is approved after conference of the Court, all Justices concurring therein.