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

2015 Me. Rules 16

Effective: September 1, 2015

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

1. Rule 6, subdivision (e) of the Maine Rules of Unified Criminal Procedure is amended to read as follows:

(e) General Rule of Secrecy. A juror, attorney, security officer, 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 transcriptions 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 by an attorney for the State to:

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

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

(3) any government personnel not otherwise addressed in this subdivision or subdivision (h) of this Rule that an attorney for the State considers necessary to assist in the performance of that attorney's duty to enforce the State's criminal laws; and

~~(3)~~ (4) another ~~state~~ 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~~ State's criminal laws.

Any person to whom matters are disclosed under paragraphs (1), ~~or~~ (2), or (3) 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~~ State's criminal laws. An attorney for the State who has made a disclosure pursuant to paragraph 3 of subdivision (e) of this Rule with respect to matters occurring before the grand jury shall promptly provide the court with the name of the persons and agencies to whom such disclosure has been made and shall certify that the attorney for the State has advised such persons of their obligation of secrecy under this Rule.

Advisory Note – July 2015

Rule 6(e) is amended to consistently capitalize "State." Rule 6(e) is additionally amended in the following respects:

(1) The words "by an attorney for the State" are added after the word "made" and before the word "to" in the sentence containing the listed exceptions in subdivision (e) to make clear that the exceptions pertain to the disclosure of secret grand jury matters without prior judicial approval by an attorney for the State.

(2) In paragraph (2) the "reasonably necessary" standard, permitting disclosure by an attorney for the State to some or all of that attorney's staff in order to assist that attorney in enforcing the State's criminal laws, is deleted and replaced by a "considers necessary" standard. The former phrase "reasonably necessary" was taken from former Rule 502(a)(5) of the Maine Rules of Evidence defining a

client's "confidential" communication in the context of the lawyer-client privilege. *See* M.R. Crim. P. 6 Advisory Committee's Note to 1997 amend., Me. Rptr. 692-698 A.2d LXXIX. At the same time the "reasonably necessary" standard was adopted relative to subdivision (e), paragraph (2), a differing standard of "deemed necessary" was adopted for subdivision (h) of Rule 6 addressing dissemination by an attorney for the State to law enforcement personnel for the same purpose as specified in paragraph (2). This "deemed necessary" standard was taken from then Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure addressing dissemination by an attorney for the government to all "government personnel" assisting the government attorney in performing that attorney's duty to enforce federal criminal law. M.R. Crim. P. 6 Advisory Committee's Note to 1997 amend., Me. Rptr. 692-698 A.2d LXXXI. As now amended, the two above-described inconsistent standards are replaced by the "considers necessary" standard, the current formulation employed in Federal Criminal Rule 6(e)(3)(A)(ii). The same "considers necessary" standard is also employed in the newly added paragraph (3) exception addressing government personnel not otherwise dealt with in paragraphs (1) and (2) of subdivision (e) and subdivision (h).

(3) In paragraph (2) nonsubstantive changes are made in order to both eliminate the awkward overuse of the term "attorney for the State" and to replace passive voice language with more readable active voice language.

(4) A new exception is added in paragraph (3) to subdivision (e) that includes "any government personnel not otherwise addressed in . . . [subdivision e] or subdivision (h)." In 1997, at the time the specific exceptions relating to government personnel were adopted in subdivisions (e) and (h), although a model creating an exception sufficiently broad to include "any government personnel" was already embodied in then Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) and known to the Advisory Committee, *see* M.R. Crim. P. 6 Advisory Committee's Note to 1997 amend., Me. Rptr. 692-698 A.2d LXXVIII], it chose instead to limit dissemination in the absence of a court order to specific categories of government personnel—namely, other attorneys for the State pursuant to paragraph (1) of subdivision (e), *see id.* at LXXVI-LXXVIII, staff members of an attorney for the State pursuant to paragraph (2) of subdivision (e), *see id.* at LXXVIII-LXXIX, and law enforcement personnel (including personnel of the United States, another state or territory, or a subdivision of such) pursuant to subsection (h), *see id.* at LXXXI-LXXXII. However, in the intervening eighteen years since subdivisions (e) and (h) were adopted, criminal investigations in Maine have taken on a degree of complexity not generally experienced or even perhaps contemplated in 1997. In

turn, the necessity to regularly share secret grand jury material with government personnel not included within the listed subdivisions (e) and (h) categories has also grown. Two examples illustrate this point.

Example 1:

Welfare fraud investigations conducted on behalf of the Maine Department of Health and Human Services often involve individuals who conceal or fail to accurately disclose the amount of income or assets available to them. Grand jury subpoenas are commonly used by the attorney for the State to obtain relevant bank and employment records of these individuals. If an individual is also receiving public assistance from another agency, such as the Maine State Housing Authority, the Social Security Administration, or a municipality (administering general assistance benefits), and the individual has not accurately reported the individual's financial information to that other agency, because the criteria for qualifying for public assistance varies by agency, personnel of that agency must determine if there is an overpayment in the agency's program. Commonly that determination requires a review of the financial records obtained by grand jury subpoena. However, agency personnel are not within the listed subdivisions (e) and (h) categories and thus dissemination to them by the attorney for the State requires prior judicial approval.

Example 2:

Crimes that involve computer or digital evidence, including harassing or threating messages and internet child pornography, are investigated by the Maine State Police Computer Crimes Unit. In addition to law enforcement officers, *see* 17-A M.R.S. § 2(17), staff members include civilian personnel—namely, investigative assistants, forensic analysts, and experts. Grand jury subpoenas are commonly used by the attorney for the State at the initial stage of the criminal investigation typically stemming from a so-called "Cyber Tip" from an electronic service provider such as Google, Yahoo, or Facebook or from a citizen complaint. The Cyber Tip or citizen complaint is first reviewed by an investigative assistant. Depending upon the review outcome, including in the case of a computer image confirmation that the image is child pornography, the investigative assistant then asks the attorney for the State to obtain from the electronic service provider the internet account or from an email provider, the holder of the account. Investigative assistants, forensic analysts and experts employed by the Maine State Police Crime Unit, unless they happen to be law enforcement officers as well, M.R. Crim. P. 6 Advisory Committee's Note to 1997 amend., Me. Rptr. 692-698 A.2d LXXXI, are not within the listed subdivisions (e) and (h) categories and thus dissemination to them by the attorney for the State requires judicial approval.

The new exception in paragraph (3) to subdivision (e) embraces the "any government personnel" approach now employed in the parallel Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure while, at the same time, retaining the added clarity afforded by the listing of specific categories of commonly occurring government personnel in subdivisions (e) and (h).

(5) Current paragraph (3) is redesignated paragraph (4).

(6) In the final paragraph of subdivision (e) two changes are made. First, a reference to new paragraph (3) is added in the first sentence in order to prohibit the use of grand jury material disclosed by an attorney for the State pursuant to paragraphs (3) except for the sole purpose of assisting the attorney for the State in the performance of that attorney's duty to enforce the State's criminal laws. Second, a new final sentence is added requiring an attorney for the State to both provide the court the name of the persons and agencies to whom disclosure of grand jury material has been made pursuant to paragraph (3), and to certify to the court that such persons and agencies have been advised of their obligation of secrecy under Rule 6.

2. Rule 6, subdivision (h) of the Maine Rules of Unified Criminal Procedure is amended to read as follows:

(h) Disclosure for Certain Law Enforcement Purposes. Disclosure otherwise prohibited by this Rule of matters occurring before the grand jury, other than its deliberations and any vote of any grand juror, may be made by an attorney for the State to ~~such~~ any law enforcement personnel (including personnel of the United States, another state or territory, or a subdivision of such) ~~as are deemed~~ who that attorney considers necessary ~~by an attorney for the State~~ to assist in the performance of ~~the~~ that attorney's duty ~~of an attorney for the State~~ to enforce the ~~state's~~ State's criminal laws. Any person to whom matters are disclosed under this subdivision may not utilize that grand jury material for any purpose other than assisting an attorney for the State in the performance of such attorney's duty to enforce the ~~state's~~ State's criminal laws. An attorney for the State who has made a disclosure pursuant to this subdivision with respect to matters occurring before the grand jury shall promptly provide the court with the names of the persons and agencies to whom such disclosure has been made, and shall certify that the attorney for the State has advised such persons of their obligation of secrecy under this Rule.

Advisory Note –July 2015

Rule 6(h) is amended in the first sentence in four respects. First, the words "by an attorney for the State" are added after the word "made" and before the word "to." *See also* M.R.U. Crim. P. 6(e) Advisory Note to July 2015 amend. Second, the "deemed necessary" standard is deleted and replaced by the "considers necessary" standard now employed in Rule 6(e)(2) and (3). *See* M.R.U. Crim. P. 6(e)(2), (3) Advisory Note to July 2015 amend. Third, nonsubstantive changes are made in order to both eliminate the awkward overuse of the term "attorney for the State" and to replace passive voice language with more readable active voice language. *See also* M.R.U. Crim. P. 6(e)(2) Advisory Note to July 2015 amend. Fourth, "State" is appropriately capitalized when the State of Maine is indicated.

3. Rule 15, subdivision (a) of the Maine Rules of Unified Criminal Procedure is amended to read as follows:

(a) When Taken. If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that the witness' testimony is material, and that it is necessary to take the ~~witness'~~ witness's deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment, information, or complaint may upon motion and notice to the parties order that the witness's testimony be taken by deposition and that any designated books, papers, documents, electronically stored information, photographs (including motion pictures and video tapes), or other tangible objects, not privileged, be produced at the same time and place.

Advisory Note – July 2015

Rule 15(a) is amended to add to the list of tangible objects "electronically stored information" and "photographs (including motion pictures and video tapes)" in light of M.R.U. Crim. P. 16(a)(2)(F) and 16A(b)(1). The rule is also amended to correct a clerical error in the possessive "witness's."

4. Rule 25A, subdivision (a), paragraph (4) of the Maine Rules of Unified Criminal Procedure is amended to read as follows:

(4) "Request for Protection" is defined as an informal, nondocketed written request that a case not be called for trial on one or more specified days of a trial list and that, if allowed, would not effectively remove a case from a trial list. A

request for protection shall only be acted upon by ~~a judge~~ the court and shall not take the place of or be treated as a motion for continuance.

Advisory Note – July 2015

Rule 25A(a)(4) is amended by replacing the words "a judge" with the words "the court" in order to make it consistent with subdivision (a)(1). *See also* M.R.U. Crim. P. 57(d).

5. These amendments to the Maine Rules of Unified Criminal Procedure shall be effective September 1, 2015.

Dated: July 30, 2015

FOR THE COURT*

LEIGH I. SAUFLEY
Chief Justice
DONALD G. ALEXANDER
ANDREW M. MEAD
ELLEN A. GORMAN
JOSEPH M. JABAR
JEFFREY L. HJELM
THOMAS E. HUMPHREY
Associate Justices

* This Rules Amendment Order was approved after conference of the Court, all Justices concurring therein.