

Memorandum

Alaska Court System

820 W. 4th Ave., Anchorage, AK 99501
Phone: 264-8239 Fax: 264-8291

TO: Chief Justice Winfree
Justice Maassen
Justice Carney
Justice Borghesan
Justice Henderson

THROUGH: Stacey Marz, Administrative Director
Nancy Meade, General Counsel

FROM: Stacy Steinberg
Court Rules Attorney

DATE: November 22, 2022

SUBJ: SCO 1993: Criminal Rules 6 and 6.1 – Grand Jury (Investigative Role)
For Consideration at the November 29, 2022 Rules Conference

SCO 1993 (yellow) would clarify and set procedures for grand jury investigations.

The Supreme Court has been considering procedures for grand jury investigations into public welfare or safety issues. The Court wanted input the Criminal Rules Committee.

On November 8, I emailed to the Criminal Rules Committee members proposed changes to Criminal Rules 6 and 6.1.¹ Three members responded.

Judge Thomas Temple had substantive comments as well as punctuation changes.² He expressed concern that the rule changes were important and serious changes of a constitutional nature and should not be rushed through. He thought it would be better to discuss the proposal in a committee meeting rather than by email.³ He provided some suggested edits and posed some questions. He asked three substantive questions:

¹ See Attachment A, Steinberg email to committee members dated November 8, 2022.

² See Attachment D, Judge Temple comments dated November 10, 2022, with proposed edits attached.

³ The next committee meeting is scheduled for December 16.



1. Rule 6(o) – Questions to the Superior Court (currently labeled "Presentment"). Judge Temple asked whether the full grand jury is present when the foreperson makes a presentation under subsection (o) to the court.⁴

2. Rule 6.1(a)(1) – Authority to Investigate and Issue Reports. Regarding the requirement that the grand jury's investigation of a public welfare or safety issue must involve a "strong" state public policy, he questioned whether the policy must be "strong" and how would the grand jury tell the difference.⁵ He also noted this language is in the Commentary.

3. Rule 6.1(b)(1) – Grand Juror Requests to Investigate a Matter of Public Welfare or Safety. If an individual grand juror proposes investigating a matter of public welfare or safety, what is a reasonable period of time for the prosecuting attorney to describe the proposal to the full grand jury for consideration.⁶ Does the prosecuting attorney have to present the proposal to the same grand jury panel or a new one assigned a few weeks later?

Next, private defense attorney John Murtagh responded.⁷ The majority of his comments relate to confusion between the current proposal on the grand jury investigative procedures and separate amendments the committee proposed in 2016. In a follow up email, I explained the Court was asking for input on just the grand jury investigative procedures and the committee's previous 2016 recommended amendments were still alive and would be considered separately.⁸ Other than some overlap on Rule 6(o) presentments, almost all of the Rule 6.1 grand jury investigative procedures are new. And for the 2016 committee recommendations, the committee specifically declined to make any recommendation on whether the rule should include a provision for the grand jury to initiate a criminal charge based on a "presentment" and it did not address the grand jury's role to investigate the public welfare or safety.⁹

Last, Assistant Public Defender Doug Moody submitted a comment. He agreed with Judge Temple that the full committee should consider the proposed changes at a meeting.¹⁰ He also thought some of the Commentary could be clarified. For example, he says:

⁴ See Attachment D at 18, Judge Temple edits to Criminal Rule 6(o)(2).

⁵ See Attachment D at 20, Judge Temple edits to Criminal Rule 6.1(a)(1).

⁶ See Attachment D at 21, Judge Temple edits to Criminal Rule 6.1(b)(1).

⁷ See Attachment E, J. Murtagh comments dated November 10, 2022.

⁸ See Attachment A, Steinberg email to committee members dated November 10, 2022.

⁹ See Attachment F at 45, Requests for Comments (page 5).

¹⁰ See Attachment G, Asst. P.D. Doug Moody comments dated November 17, 2022.

The proposed commentary to Rule 6.1(a) state[s] that the prosecutor's decision not to prosecute a particular instance does not concern the public welfare. But, of course, the grand jury has the authority to investigate the prosecutor's misconduct and a pattern of failing to prosecute certain cases can be a matter of public concern.¹¹

No other committee members commented on the rule proposal.

Finally, the proposed effective date is December 1, 2022, so the grand jury procedures can be used right away.

¹¹ *Id.*

List of Attachments

Attachment A – S. Steinberg email 11/8/22 to Criminal Rules Committee with Criminal Rules 6 and 6.1 proposal.	1
Attachment B – J. Murtagh email 11/8/22 to S. Steinberg.....	11
Attachment C – S. Steinberg email reply 11/9/22 to J. Murtagh.....	13
Attachment D – Judge Temple email 11/10/22 with proposed edits.....	15
Attachment E – J. Murtagh email 11/10/22.....	26
Attachment F – S. Steinberg clarifying email 11/10/22 with rule proposal and 2016 Request for Comments	29
Attachment G – D. Moody email 11/17/22.....	65
Attachment H – Current Criminal Rules 6 and 6.1 (blue)	67



Chambers of
Daniel E. Winfree
Justice

Supreme Court
State of Alaska

101 Lacey Street
Fairbanks, Alaska
99701-4761

(907) 452-9301
FAX (907) 452-9343

August 16, 2022

Via email

Attorney General Treg Taylor
1031 W. Fourth Avenue, #200
Anchorage, AK 99501

Dear Attorney General Taylor 

Thanks for briefly chatting with me this morning about establishing procedures for grand jury investigations and reporting on matters concerning the public welfare or safety. This seems to be an issue of some concern to both the Alaska Court System and the Department of Law, and I appreciate your willingness to have your representatives meet with court system representatives to seek common ground we might agree on for addressing the issue.

I understand you likely will designate John Skidmore and Angie Kemp for the Department of Law. I'm designating Administrative Director Stacey Marz and General Counsel Nancy Meade for the Alaska Court System. Nancy Meade would be our contact person for logistical set up, so I would appreciate you designating a logistical contact person and having that person contact Nancy to get things moving.

Again, thanks. It's always a pleasure to speak with you.

Sincerely,



Daniel E. Winfree
Chief Justice

cc: Nancy Meade, General Counsel
Stacey Marz, Administrative Director

SCO DISTRIBUTION CHECKLIST

[For final, signed SCO's. File in rules file after completion.]

Supreme Court Order Number SCO 1993
Effective Date 12/1/2022
Rule Number(s) & Description Amending criminal rule 6 + 6.1 concerning grand jury

Upon Receipt of File from Court Rules Attorney

- Add /S/ to signature lines and convert leg & txt versions to PDF (ADA web compliant)
- Transfer electronic version of final SCO from "SCO Drafts" to "SCO Finals"
- Email (ADA web compliant) TXT&LEG versions to Help Desk/*Marinke* for website posting
- Update Access Rules Database *Sanjay*
- Update white "Supreme Court Orders" binder
- Note committee & court history on physical file cover
- Send original SCOs (LEG & TXT) to Assistant to Clerk of Appellate Court (*Cheryl-Jones*) *Mercedith Montgomery*
- Enter a "REMINDER" date in outlook re: "EFFECTIVE DATE" of future SCO's for court website
- Make copies Stacy's NEW Supreme Court Order email & final version (both TXT&LEG) of SCO for each Court Rules Attorney's files and put in the following folders:

Court Rules Attorney's Files:

- Rule Change File (colored)(rule & email)
- Rule History File(s) (first file of the rule files)(rule only) – write SCO# on front of history folder
- SCO Binder (rule only)
- "Next Publication Deadline" file (electronic folder)

Electronic Distribution (by Court Rules Atty): 12-1-22

- Tower Publishing
- Lexis-Nexis Publishing
- West Publishing (now known as Thompson Reuter)
- Judges – Appeals, Superior, District
- Clerks of Court / CMS Staff (included w/Clerks of Court group)
- Magistrates / Masters
- Senior Staff
- Legal Group
- Law Clerks
- Court of Appeals Staff Attorneys (COA Central Staff)
- Family Law Self-Help Center (included in senior staff)
- Area Court Administrators
- Webmaster (make sure Webmaster and Publisher get txt version too)
- CMS Staff (included in Clerks of Court)

NA Alaska Bar (AK Bar Rules & Rules of Professional Conduct Only):

NA Commission on Judicial Conduct (CJC only)

NA ACS Human Resources Director (Adm Rules Only)

NA NOTE: SCOs re committee appointments (i.e. Fish and Game Bail Forfeiture Schedule Advisory Committee) are not distributed for publishing; original given to asst to clerk of appellate court and copies filed in rule history file, SCO binder and rule change file

MEMBERSHIP OF ALASKA SUPREME COURT ADVISORY COMMITTEES
Court Rules and Pattern Jury Instructions

Criminal Rules Committee

Judge J. Patrick Hanley, Chair

Judge William B. Carey

Samantha Cherot

Judge Jason Gist

Judge Bethany Harbison

Robert Herz

Douglas Moody

John M. Murtagh

Gustaf Olson

Trina Sears

Sara Stanley

Judge Thomas I. Temple

Taylor Winston

Stacy Steinberg, Court Rules Attorney