

STATE OF MAINE
SUPREME JUDICIAL COURT
AMENDMENTS TO
THE MAINE RULES OF EVIDENCE

2012 Me. Rules 04

Effective: January 1, 2012

All of the Justices concurring therein the following amendments to the Maine Rules of Evidence 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 513(a) of the Maine Rules of Evidence is amended to read as follows:

(a) Comment or Inference Permitted. The claim of the a privilege against self-incrimination by a party in a civil action or proceeding, whether in the present proceeding or upon a prior occasion, is a proper subject of comment by judge or counsel. An appropriate inference may be drawn therefrom.

**Advisory Committee Note
November 2011**

Since the adoption of the Maine Rules of Evidence in 1975, Maine has been one of a small minority of jurisdictions that have generally permitted comment and inference in a civil case based on a party's invocation of an evidentiary privilege. In most jurisdictions that permit such comment and inference, it is limited to the privilege against self-incrimination. Practically all of the cases that have addressed this issue have been concerned with the privilege against self-incrimination. The Maine experience has been similar. To the extent that privileges such as the lawyer-client privilege are grounded on policies other than self-incrimination, there can be a question whether burdening the invocation of such privileges might affect these policies.

The proposed amendment, which will limit the potential for comment and inference to the invocation of the privilege against self-incrimination, will resolve potential confusion arising from the existing rule. *See Tanguay v. Asen*, 1998 ME 277, 722 A.2d 49.

2. Rule 804(b)(3) of the Maine Rules of Evidence is amended to read as follows:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

.....

(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule or disgrace, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a defendant or other person implicating both the declarant and the accused, is not within this exception.

Advisory Committee Note November 2011

This proposed amendment is designed to bring M.R. Evid. 804(b)(3) in line with its federal counterpart, as recently amended. The federal Advisory Committee recommended amendment of Fed. R. Evid. 804(b)(3) to harmonize the rule with several U.S. Courts of Appeals decisions that applied the corroboration requirement of Rule 804(b)(3) to statements of penal interest used against the accused as well as to those tending to exculpate the accused. The same policy considerations that support the corroboration requirement when statements against penal interest are offered to exculpate an accused also apply to such statements when offered by the prosecution as evidence of guilt. The policy considerations supporting the amendment of the federal rule apply with equal force within the State of Maine. These considerations and the desirability of maintaining substantial similarity between the federal and the Maine rules suggest that Maine

Rule of Evidence 804(b)(3) be amended to correspond with its federal counterpart. The amendment does not address the admissibility of statements against penal interest in civil cases.

3. These amendments shall be effective January 1, 2012.

Dated: December 13, 2011

FOR THE COURT¹

_____/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 with the Court, all Justices concurring therein.