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

2018 Me. Rules 09

Effective: August 1, 2018

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 the understanding of each amendment, an Advisory Committee Note appears after the text of each amendment. The Advisory Committee Note states the reason for recommending the amendment, but the Advisory Committee Note is not part of the amendment adopted by the Court.

1. Rule 801 of the Maine Rules of Evidence is amended to read as follows:

RULE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

. . . .

(d) Statements that are not hearsay. A statement that meets the following conditions is not hearsay:

(1) *A declarant-witness's prior statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition; or

(B) <u>Is consistent with the declarant's testimony and is offered:</u>

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) Identifies a person as someone the declarant perceived earlier.

~~A prior consistent statement by the declarant, whether or not under oath, is admissible only to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.~~

Advisory Committee Note – August 2018

This amendment affects both the admissibility and the probative effect of a prior consistent statement. It is designed to bring Maine Rule of Evidence 801(d)(1) into conformity with the corresponding federal rule as amended in 2014. With the change, a fact-finder can now consider an admissible prior consistent statement both for its rehabilitative and substantive effect.

Under former Maine Rule of Evidence 801(d)(1), a prior consistent statement could be admitted only to rebut an express or implied attack on witness credibility based on "recent fabrication or improper influence or motive." Under the new rule language, a prior consistent statement is admissible when relevant to rehabilitate a declarant's credibility when attacked on any ground.

In the past, a Maine jury could consider a prior consistent statement only as evidence of the credibility of the witness, and not as evidence of the truth of the underlying substantive matter. *See* M.R. Evid. 801 Advisers' Note to former M.R. Evid. 801 (February 2, 1976). On the other hand, Federal Rule of Evidence 801(d) has been construed to allow prior consistent statements to be considered as substantive evidence as well as rehabilitative of credibility.

The existing requirement that a prior consistent statement offered to rebut an attack on credibility based on recent fabrication or improper influence or motive must have been made prior to the time of the asserted fabrication or

improper influence or motive is not affected by this change. On the other hand, if the prior consistent statement is relevant to rebut an attack on credibility on some other ground, there is no absolute requirement that it antedate a prior inconsistent statement in order to be admissible under this Rule. It would be admissible under the amended Rule under any circumstances in which it would be relevant to rehabilitate the credibility of the witness.

The following excerpt from the Advisory Committee Note to the 2014 amendment to the Federal Rule also applies to the revised Maine rule:

> Though the original Rule 801(d)(1)(B) provided for substantive use of certain prior consistent statements, the scope of that Rule was limited. The Rule covered only those consistent statements that were offered to rebut charges of recent fabrication or improper motive or influence. The Rule did not, for example, provide for substantive admissibility of consistent statements that are probative to explain what otherwise appears to be an inconsistency in the witness's testimony. Nor did it cover consistent statements that would be probative to rebut a charge of faulty memory. Thus, the Rule left any prior consistent statements potentially admissible only for the limited purpose of rehabilitating a witness's credibility. The original Rule also led to some conflict in the cases; some courts distinguished between substantive and rehabilitative use for prior consistent statements, while others appeared to hold that prior consistent statements must be admissible under Rule 801(d)(1)(B) or not at all.
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> The amendment retains the requirement set forth in *Tome v. United States*, 513 U.S. 150 (1995): that under Rule 801(d)(1)(B), a consistent statement offered to rebut a charge of recent fabrication o[r] improper influence or motive must have been made before the alleged fabrication or improper influence or motive arose. The intent of the amendment is to extend substantive effect to consistent statements that rebut other attacks on a witness—such as the charges of inconsistency or faulty memory.
>
> The amendment does not change the traditional and well-accepted limits on bringing prior consistent statements before the factfinder for credibility purposes. It does not allow

impermissible bolstering of a witness. As before, prior consistent statements under the amendment may be brought before the factfinder only if they properly rehabilitate a witness whose credibility has been attacked. As before, to be admissible for rehabilitation, a prior consistent statement must satisfy the strictures of Rule 403. As before, the trial court has ample discretion to exclude prior consistent statements that are cumulative accounts of an event. The amendment does not make any consistent statement admissible that was not admissible previously—the only difference is that prior consistent statements otherwise admissible for rehabilitation are now admissible substantively as well.

2. Rule 803 of the Maine Rules of Evidence is amended to read as follows:

RULE 803. EXCEPTIONS TO THE RULE AGAINST HEARSAY—REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

. . . .

(6) Records of a regularly conducted activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) The record was made at or near the time by—or from information transmitted by—someone with knowledge;

(B) The record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) Making the record was a regular practice of that activity;

(D) All these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12), or with a statute permitting certification; and

(E) The opponent does not show that ~~neither~~ the source of information ~~n~~or the method or circumstances of preparation indicate a lack of trustworthiness.

Advisory Committee Note – August 2018

This amendment revises subdivision (6) of Rule 803 to follow a corresponding 2014 amendment to Federal Rules of Evidence 803(6) and to clarify that, while the proponent has the burden of establishing the foundational elements listed in sections (A)–(D), the proponent need not initially show that the source of information or circumstances of its preparation indicate a lack of trustworthiness. It is up to the opponent to show that the source of information or the method or circumstances of preparation of the record indicate a lack of trustworthiness.

This is not a substantive change. In practice, parties and courts seem to have assumed that the language "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness" in existing Rule 803(6) meant that the burden of demonstrating these contrary indications is with the opponent. Although this proviso has been applied in cases reviewed by the Law Court, *see, e.g.*, *Adamatic v. Progressive Baking Co., Inc.*, 667 A.2d 871 (Me. 1995), there are no known Law Court decisions discussing which party has either the burden of going forward or the risk of nonpersuasion.

The Advisory Committee Note to the 2014 Federal 803(6) amendment states:

> The Rule has been amended to clarify that if the proponent has established the stated requirements of the exception—regular business with regularly kept record, source with personal knowledge, record made timely, and foundation testimony or certification—then the burden is on the opponent to show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. While most courts have imposed that burden on the opponent, some have not. It is appropriate to impose this burden on the opponent, as the basic

admissibility requirements are sufficient to establish a presumption that the record is reliable.

The opponent, to meet its burden, is not necessarily required to introduce affirmative evidence of untrustworthiness. For example, the opponent might argue that a record was prepared in anticipation of litigation and is favorable to the preparing party without needing to introduce evidence on the point. A determination of untrustworthiness necessarily depends on the circumstances.

If lack of trustworthiness of a proffered business record is asserted by an opposing party on *voir dire*, by the proffer of evidence, or by argument, the court can take into account the parties' relative access to information in determining whether the objecting party has carried its burden of showing lack of trustworthiness.

Dated: June 29, 2018

FOR THE COURT,*

/s/
LEIGH I. SAUFLEY
Chief Justice

DONALD G. ALEXANDER
ANDREW M. MEAD
ELLEN A. GORMAN
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Associate Justices

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