AMENDMENTS TO MAINE RULES OF EVIDENCE
PROPOSED BY THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

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) Is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant fabricated such testimony 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 by evidence of a prior inconsistent statement or otherwise; 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 – ____ 2018

This amendment affects both the admissibility and the effect of a prior consistent statement.

First, proponents formerly could offer a prior consistent statement only to rebut an express or implied charge of recent fabrication or improper influence or motive. Under the new rule language, a prior consistent statement is admissible in order to rehabilitate a declarant's credibility when attacked on any ground.

Second, in the past, a jury could consider a prior consistent statement only as evidence of the credibility of a witness, and not as evidence of the truth of the underlying substantive matter. This distinction is eradicated, and a fact-finder can now consider a prior consistent statement both for its rehabilitative and substantive effect. This change brings the Maine rule into accord with Fed. R. Evid. 801(d)(1).

There is no particular requirement that the prior consistent statement antedate a prior inconsistent statement. It would be admissible under the amended rule under any circumstances in which it tends to rehabilitate the credibility of the witness.

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) Neither~~

Evidence that otherwise qualifies under this exception can be excluded if the opponent shows that the source of information ~~nor~~ or the method or circumstances of preparation indicate a lack of trustworthiness.

Advisory Committee Note
_____ 2018

Subdivision 6 of Rule 803 has been amended to clarify that, although the proponent has the burden of establishing the foundational elements listed in sections (A)–(D), the proponent need not show a lack of untrustworthiness in the source of information or circumstances of preparation. The burden falls on the opponent seeking to show that the source of information or the method or circumstances of preparation of the record indicates a lack of trustworthiness. This is not a substantive change.

3. Rule 807 of the Maine Rules of Evidence is adopted to read as follows:

Rule 807. Residual Exception

A hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804 if the court finds that the statement has equivalent circumstantial guarantees of trustworthiness and admitting it will best serve the purposes of these rules and the interests of justice.

Advisory Committee Note
____ 2018

When the Maine Supreme Judicial Court first adopted the Maine Rules of Evidence, effective November 2, 1976, it did not adopt the "residual" hearsay exception then embodied in Fed. R. Evid. 803(24) and 804(b)(5). The Advisory Committee Note to Rule 803 documented this decision in the following terms:

> The Court decided not to adopt any catch-all provision. It was impressed by the theoretical undesirability of foreclosing further development of the law of evidence on a case-by-case basis. It concluded, however, that despite the purported safeguards, there was a serious risk that trial judges would differ greatly in applying the elastic standards of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trail difficult. Nor would it be likely that the Law Court on appeal could effectively apply corrective measures. There would indeed be doubt whether an affirmance of an admission of evidence under the catch-all provision amounted to the creation of a new exception with the force of precedent or merely a refusal to rule that the trial judge had abused his discretion.
>
> Flexibility in construction of the rules so as to promote growth and development of the law of evidence is called for by Rule 102. Under this mandate, there will be room to construe an existing hearsay exception broadly I the interest of ascertaining truth, as distinguished from creating an entirely new exception based upon the trial judge's determination of equivalent trustworthiness, a guideline which the most conscientious of judges would find extremely difficult to follow.

In more than 40 years of experience with the "catch-all" in the Federal Rules of Evidence, there has been no evidence of the systemic pathologies that concerned the Maine Court in 1976. At the Federal level there is general acceptance of the catch-all as a useful tool to mitigate the otherwise rigid terms of the Hearsay Rule as codified in the Federal Rules of Evidence.

Of the 47 states which have adopted Rules of Evidence based on the Federal Rules, it appears that 29 have various forms of residual exception, most

patterned on Fed. R. Evid. 807 or upon the original version of the residual exception as adopted by the Supreme Court in 1972. There is no literature documenting any problems of lack of uniformity within the various jurisdictions or difficulty determining whether a ruling admitting hearsay under a residual exception should be treated like new common law.

Nor does the literature or the experience of other states that have residual hearsay exceptions support the concern that a state court residual exception would "open the floodgates" to irrelevant and cumulative secondhand "he said, she said" kind of evidence, particularly in domestic relations cases.

These circumstances suggest that the Maine Supreme Judicial Court may wish to reconsider the choice made in 1976 and adopt a residual exception crafted to allow some reasonable development of hearsay evidence law on a case-by-case basis. Proposed Maine Rule 807 would apply to all cases, jury and nonjury alike, and would permit the court to admit hearsay evidence not covered by one of the existing exceptions on a finding that the circumstances under which the statement was made furnish guarantees of trustworthiness equivalent to those enshrined in the existing exceptions of Rules 803 and 804 and that admission of the statement will serve the interests of justice. The rule envisions, as did the original Federal residual exceptions, Fed. R. Evid. 803(24) and 804(b)(5), an analysis similar to that of the court in *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), in applying the pre-rules common law.

The current form of Federal Rule 807 contains four elements that must be addressed when hearsay statements are offered but are not covered by one of the specified exceptions.

Two of them—that the statement possesses "equivalent circumstantial guarantees of trustworthiness," Fed. R. Evid. 807(a)(1), and that admission of the statement "will best serve the purposes of these rules and the interests of justice," Fed. R. Evid. 807(a)(4)—are incorporated in the proposed Maine Rule 807. The other requirements of the federal rule, namely that the statement be "offered as evidence of a material fact," Fed. R. Evid. 807(a)(2), and that the statement "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts," Fed R. Evid. 807(a)(3), were not deemed to add enough to the basic requirements to

be included in the Maine rule. By the same token, the requirement of Fed. R. Evid. 807(b) that a proponent of a statement offered under that rule must give the adverse party "reasonable notice of the intent to offer the statement," etc., does not appear to be practicable in most cases in state court, particularly those involving pro se litigants. Many of the states which have adopted residual rules have not adopted the Fed. R. Evid. 807 notice provision.

It should be noted that this residual exception would not authorize the admission of pure hearsay "he said, she said" evidence, because such evidence does not have equivalent circumstantial guarantees of trustworthiness. The ability of the court to screen out unreliable and time-consuming second-hand evidence will not be impaired by this new rule. Although the rule is worded broadly in terms of the potential circumstances in which evidence not covered by one of the existing exceptions may be admitted, it is anticipated that admission of evidence under this residual exception will be a rarity.

The Advisory Committee on Rules of Evidence submits that a residual exception as set forth above will provide additional flexibility and potential for growth in hearsay law.