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

2010 Me. Rules 01

Effective: January 1, 2010

The following amendments to the Maine Rules of Evidence are hereby adopted to be effective on the date indicated above. The specific rules amendments are stated below. To aid in understanding of the amendment to Rule 408 and new Rule 514, Advisory Notes appear after the text of the amendments. The Advisory Note states the reasons for recommending the amendment, but it is not part of the amendment adopted by the Court.

1. Rule 408 of the Maine Rules of Evidence is amended to read as follows:

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

(a) Settlement Discussions. Evidence of ~~(1)~~ furnishing or offering or promising to furnish, or ~~(2)~~ accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim ~~which was disputed as to either validity or amount,~~ is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations or in mediation is also not admissible on any substantive issue in dispute between the parties or to impeach a witness through a prior inconsistent statement or contradiction.

(b) Mediation. Evidence of conduct or statements by any party or mediator at a ~~court sponsored domestic relations~~ mediation session undertaken to comply with any statute, court rule, or administrative agency rule or in which the parties have been referred to mediation by a court, administrative agency, or arbitrator or in which the parties and mediator have agreed in writing or electronically to mediate with an expectation of confidentiality, is not admissible for any purpose other than to prove fraud, duress, or other cause to invalidate the mediation result in the proceeding with respect to which the mediation was held or

in any other proceeding between the parties to the mediation that involves the subject matter of the mediation.

Advisory Committee Note
December 2009

This amendment makes major changes in both Rule 408(a) and in Rule 408(b). Rule 408(a) is amended to follow a corresponding change in FRE 408 and to close a loophole in the prior version. The rule as amended provides that statements and conduct in settlement negotiations that are rendered inadmissible on any substantive issue between the parties may not be used to impeach a witness through prior inconsistent statement or contradiction. Such statements or conduct would not necessarily be inadmissible when offered for some other purpose.

Rule 408(a) continues to refer to mediation despite the expansion of Rule 408(b) in order to make clear that the fact that a statement is made during mediation does not deprive it of its character as a statement in compromise negotiations or affect its inadmissibility under Rule 408(a).

Rule 408(b) has been rewritten and expanded. The new Rule 408(b) applies not only to court ordered domestic relations mediations, but to all mediations undertaken to comply with any statute, court rule, administrative agency rule. It also covers mediations in which the parties have been referred to mediation by any court, administrative agency or arbitrator, regardless of whether such mediations are provided for by rule. Finally, it covers mediations in which the parties have agreed in writing or electronically (e-mail) to mediate with an expectation of confidentiality. These would include mediations covered by typical mediations agreements with confidentiality clauses.

Statements of either parties or mediator in all mediations covered by Rule 408(b) are inadmissible for all purposes other than to prove fraud or duress to invalidate the mediation result both in the proceeding being mediated and in any other proceeding between the parties to the mediation that involves the same subject matter. The rule is designed to encourage parties to speak openly and freely in mediation by assuring them that their statements will not be usable against them in the case being mediated or in any other case between the same parties with the same subject matter. On the other hand, revised Rule 408(b) does not render statements in mediation inadmissible in proceedings involving third parties, such

as criminal proceedings, or even in proceedings between the mediating parties that do not involve the subject matter of the mediation. Nor does it insulate statements in mediation from civil discovery.

2. Rule 514 of the Maine Rules of Evidence is adopted to read as follows:

RULE 514. MEDIATOR'S PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "mediating party" is a person who is participating in a mediation proceeding as a party or as a representative of a party, regardless of whether the subject matter of that proceeding is in litigation.

(2) A "mediation" is any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute, whether or not the dispute is the subject of litigation.

(3) A "mediator" is a neutral person conducting the mediation proceeding in the capacity of mediator.

This Rule shall be subject to provisions of state and federal statutes and regulations issued thereunder for mediations taking place pursuant to such statutory authority.

(b) Mediator Privilege. All memoranda and other work product, including files, reports, interviews, case summaries, and notes, prepared by a mediator shall be confidential and not subject to disclosure in any subsequent judicial or administrative proceeding involving any of the parties to any mediation in which the materials are generated; nor shall a mediator be compelled to testify in any subsequent judicial or administrative proceeding concerning a mediation or to any communication made between him or her and any participant in the mediation process in the course of, or relating to the subject matter of, any mediation.

(c) Exceptions. There is no privilege under this rule:

(1) *Mediated agreement.* For a communication that is in an agreement evidenced by a record signed by all parties to the agreement.

(2) *Furtherance of crime or fraud.* If the services of the mediator were sought or obtained to enable or aid anyone to commit or plan to commit or to what the mediating party knew or reasonably should have known to be a crime or fraud, or to conceal an ongoing crime or ongoing criminal activity.

(3) *Plan to inflict harm.* For threats or statements of an intention to inflict bodily injury or commit a crime.

(4) *Mediator misconduct.* For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator.

(5) *Party or counsel misconduct.* For communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation.

(6) *Welfare of child or adult.* For communications sought or offered to prove or disprove abuse, neglect, abandonment or exploitation in a criminal proceeding or a child or adult protective action.

(7) *Manifest injustice.* For communications that a court, administrative agency, or arbitrator finds, after a hearing in camera, that the disclosure of which is necessary in the particular case to prevent a manifest injustice, and that the necessity for disclosure is of a sufficient magnitude to outweigh the importance of protecting the general requirement of confidentiality in mediation proceedings.

Advisory Committee Note
December 2009

The purpose of this new Rule 514 is to provide a privilege for mediators not to be called as witnesses to statements or conduct of parties occurring during the course of mediation. There is no limitation on the subject matter or the circumstances of the mediation, nor is there a particular level of formality prescribed. The proposed rule is based on similar rules in other states and on the

Uniform Mediation Act (UMA), which has not been adopted in Maine. This privilege is subject to a number of exceptions.

The privilege only applies to mediation proceedings conducted by a neutral mediator. Thus, when a party's lawyer, a guardian *ad litem*, or other person with a particular point of view to represent attempts to function as "mediator" in settlement or other discussions, the privilege is not applicable. The privilege also does not apply to conferences with "settlement judges" or other judicial officials who may be acting in a meditative capacity because of the importance of transparency of public justice institutions.

The provisions of this Rule are explicitly made subject to any state or federal statute or regulations issued pursuant to such statutes governing mediations held pursuant to such statutes. In case of conflict such statutory provisions will govern.

Many states have made explicit exemptions to the privilege for information relating to administrative aspects of the mediation. This includes, for example, whether the mediation has occurred or has terminated, whether a settlement was reached, and attendance by the parties. Section 7(b) of the UMA accomplishes this objective.

The individual mediator and the mediation profession have an interest in maintaining their neutrality that transcends any particular dispute. Section (b) therefore establishes broad protection for the mediator. The first clause of this section makes the records of the mediator confidential and not subject to disclosure in subsequent proceedings that involve the mediating parties. The second clause gives the mediator a privilege from testifying about the mediation or disclosing any communication made between him or her and any participant in the mediation. The phrase "any communication," includes not only those communications made in private caucus but also those made with others present and all other communications.

This privilege belongs to mediators, not mediating parties. This Rule does not empower a party to prevent a mediator from testifying if the mediator chooses to do so. Prevailing ethical precepts generally prevent mediators from disclosing mediation communications unless ordered to do so by a court. *See, e.g.*, Maine Association of Mediators Code of Conduct, Standard V and Association for Conflict Resolution Code of Ethics, Section 3. These provisions would, in effect,

require a mediator to claim the privilege whenever applicable, unless the parties agreed otherwise.

Subsection (1) of the exceptions is based on the UMA § 6(a)(1) and permits evidence of a signed agreement to be introduced in subsequent proceedings. This includes agreements to mediate, agreements as to how the mediation will be conducted as well as agreements that memorialize the parties' resolution of the conflict. Consistent with the practice of most states, this exception does not include oral agreements made between the parties.

An exception for communications made during a mediation designed to further a crime or fraud, as established by subsection (2), is probably the most common single exception amongst the states that have adopted such privileges. The lawyer-client privilege established by these Rules also contains such an exception (Rule 502(d)(1)). The language of this exception draws on that used in Rule 502 as well as UMA § 6(a)(4), which extends the exemption to cover cases where the mediation is used to conceal an ongoing crime. This exemption does not apply to admissions of past crimes, which remains privileged.

Subsection (3) is based on UMA § 6(a)(3) and similar provisions have been adopted in many states.

Subsection (4) creates an exemption for cases in which professional misconduct by the mediator is alleged. Such a provision is increasingly common amongst states and is also present in UMA § 6(a)(5). As the UMA commentary notes, such disclosures may be necessary to promote mediator accountability by allowing grievances to be brought, and fairness requires that the mediator be able to defend himself or herself against such a claim.

Subsection (5) is adapted from the UMA § 6(a)(6). However, in the UMA, this exception does not apply to the mediator privilege. The UMA justifies retaining the mediator's privilege in such cases to maintain the integrity of the mediation process and impartiality of the mediator, which would be threatened if the mediator was frequently called into misconduct cases to be the tie-breaking witness. The exemption created in this Rule applies due to skepticism about the frequency in which such cases occur and the compelling need for evidence when such cases do arise.

Subsection (6) makes an exception to the privilege for information relevant to child and adult abuse and neglect. Such provisions are common in the domestic mediation confidentiality statutes of many states. Thus, a mediator could be required to testify in a criminal proceeding involving child or adult abuse or neglect as well as in a protective proceeding brought under 22 M.R.S., ch. 958A, 22 M.R.S., ch. 1071 or some similar statutory provision.

Subsection (7) is designed to allow for other, non-listed exceptions to the privilege on an ad hoc basis to prevent manifest injustice. A number of states, such as Ohio and Wisconsin, have adopted such provisions. UMA § 6(b) establishes an exception in certain cases, such as for the implementation of a mediated agreement, but only after it is determined, after an in camera hearing, that "the evidence is not otherwise available" and the need for the evidence "substantially outweighs" the interest in protecting confidentiality.

3. Rule 514, as adopted by 2009 Me. Rules 1, but stayed in effect, is withdrawn.

4. These amendments shall be effective January 1, 2010.

Dated: December 17, 2009

FOR THE COURT[1]

/s/
LEIGH I. SAUFLEY
Chief Justice

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 of the Court, all of the Justices, except Justice Alexander, concurring therein. A separate statement of Justice Alexander follows.

STATEMENT OF NON-CONCURRENCE BY JUSTICE ALEXANDER:

Maine's Attorney General has apparently expressed concern that the exceptions to privilege adopted by these rules should be expanded to: (1) allow testimony about threats or statements of intention to inflict harm, including emotional harm and financial injury, in addition to testimony about threats to inflict bodily injury, and (2) permit use of testimony about events occurring at mediations in protection from abuse proceedings. These requests by the Attorney General appear entirely reasonable, particularly considering the large number of domestic violence victims who can be forced to participate in mediation proceedings in the course of efforts to separate from their abusive partner. I believe that we should amend the rules submitted by the Advisory Committee on the Maine Rules of Evidence to address those concerns, or that we should at least allow the Attorney General to make suggestions for improvements to address her concerns before adopting these amendments. Thus I do not join in acting to approve these rules amendments at this time.