LAST OCTOBER, THE MAINE SUPREME JUDICIAL COURT ADDED M. R. EVID. 514 to the Maine Rules of Evidence, to become effective January 1, 2009, and in so doing put in jeopardy the state’s long-standing national leadership in mediation and alternative dispute resolution. The new rule establishes an explicit privilege for mediators, privileges communications within caucuses, and explicitly leaves the exchanges of parties in joint mediation sessions open for admissibility in litigation.

It is this latter provision of the Rule that is the primary focus of this article.

Under the cloak of adopting and adapting central elements of the Uniform Mediation Act and with a goal “to provide a privilege for confidential statements between parties or their representatives and mediators during the course of mediation,” this peculiar rule departs radically and problematically from the Act and its goals. M.R.Evid.514 reflects a profound misunderstanding of the nature of the mediation process and fundamentally undercuts appropriate and limited protections for the confidentiality of mediation, puts Maine’s privilege rule at odds with those in other jurisdictions and with other Court Rules, and threatens both to undermine and reshape mediation practice in Maine. Mediation in Maine has been far better off for thirty years with no privilege rule specific to mediation than it will be with M.R.Evid. 514.

In sharp contrast to the Uniform Mediation Act and to the 250 or more state statutes establishing a mediation privilege, M.R.Evid. 514 makes discussions in “caucus” confidential but defines those in joint sessions as not confidential and open to discovery and testimony in court. It does so through a narrow and idiosyncratic definition of “confidential communication” as “a statement, whether oral or written, between a mediating party or representative of a mediating party and a mediator made outside the presence of others during the course of mediation proceedings and that is not intended to be disclosed to third persons.” The Rule then goes on to give mediating parties a “privilege to refuse to disclose and to prevent any other person from disclosing such confidential communications [my italics] made between the mediating party or a representative of the mediating party and the mediator.” In essence, thus, parties may be compelled to testify to the content of communications during joint mediation sessions in subsequent judicial or administrative proceedings, but not to those communications during caucuses.

The mediator, by contrast, is accorded a privilege to keep “files, reports, interviews, case summaries, and notes” confidential and not to be compelled to disclose “any communication

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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." The Rule thus appears to provide far greater protections for mediators than for the parties to mediation.

At the same time, it protects the work of some mediators more than others—lawyer-mediators whose practices in Maine and elsewhere are much more likely to rely on a caucusing model. The rationale for M.R. Evid. 514 has no apparent connection either to the general goals of privilege—the protection of confidentiality in socially valued relationships—or to the concerns that constrain privilege rules—access to information relevant to truth-seeking in court or administrative processes. In addition, M.R. Evid. 514 suffers from a lack of clarity, or clarity from ambiguity, creates inconsistency and uncertainty in the context of other Maine Rules of Evidence, and works against uniformity among state laws and rules on privilege. Many of these concerns were raised during the consideration of this Rule, but they were left unaddressed at the time of its enactment.

The Inadequacy of the Rule’s Rationale

In the traditional debates about privileged communication, the application of a privilege rests on an analysis of whether or not the "benefit derived from protecting the relation outweighs the detrimental effect of the privilege on the search for truth." The absence of explicit articulation of these contending values in the Advisory Committee Notes makes it appear that establishing a mediation privilege is an end in itself rather than a means to other socially important goals. Without clear articulation to those goals, rule development has no clear anchor or reference point to ground later interpretations by the Law Court and to guide those affected by the Rule.

The Prefatory Note to the Uniform Mediation Act (UMA), by contrast, provides such guidance. It identifies three fundamental goals for that Act in addition to creating greater consistency within and across jurisdictions on the nature and limits of confidentiality in mediation:

- promote candor of parties through confidentiality of the mediation process…
- encourage the policy of fostering prompt, economical, and amicable resolution of disputes in accordance with principles of integrity of the mediation process, active party involvement, and informed self-determination by the parties;
- advance the policy that the decision-making authority in the mediation process rests with the parties.

Throughout the Reporter’s Notes, the UMA drafters attend also to the broader “interests of justice that might occasionally outweigh the importance of mediation confidentiality…” Apparent inattention to these broader goals in drafting M.R. Evid. 514 contributes to its key defects.

In drafting M.R. Evid. 514, the Advisory Committee appears to have focused not on this traditional analysis of the contending values of confidentiality in valued relationships and truth-seeking, but rather on a more narrow analysis of the structure of relationships in other Maine privilege rules. The result is the unique and apparently unprecedented approach it takes to restricting the mediation privilege for parties to those communications with the mediator in caucuses. The Committee explains rejection of “the broader coverage [in the UMA and other mediation privilege statutes] as artificial and inconsistent with the fundamental concept of a truly confidential communication between a single interest and a trusted confidant as is protected in the other privileges incorporated under the Rules of Evidence.” This approach ignores both the underlying reasons for protecting confidentiality in mediation and the broader social purposes of other privilege rules.

The UMA drafters, by contrast, explained in detail their reasons for viewing promotion of candor as a fundamental reason to buttress confidentiality in mediation:

… mediators typically promote a candid and informal exchange regarding events in the past, as well as the parties’ perceptions of and attitudes toward these events, and mediators encourage parties to think constructively and creatively about ways in which their differences might be resolved. This frank exchange can be achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and other adjudicatory processes.

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Unlike the M. R. Evid. 514 Advisory Committee, the UMA drafters view mediation as a whole and make no (artificial) distinctions between communications in caucuses and joint sessions. Indeed, the description "of candid and informal exchange" and of thinking "constructively and creatively about ways in which their differences might be resolved" applies more aptly to joint sessions than to caucuses in many mediations.

The M. R. Evid. 514 approach not only ignores the reasons for protecting the confidentiality of joint sessions in mediation, but it also appears to have little grounding in the long history of privilege in the common law and in statutes and court rules. Party-candor justifications for mediation confidentiality resemble those supporting other communications privileges. One article providing a comprehensive review of the development of protections for privileged communication in American and English law quotes Wigmore in identifying their traditional rationale: "the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties" and "the relation must be one which in the opinion of the community ought to be sedulously fostered." The value of the relationship must be weighed against the potential loss to truth seeking by a court. Thus, "When a privilege attaches to a confidential relationship, a normative choice has been made that society is better served by fostering the relationship even though this may deprive the court of valuable, or even conclusive, evidence." There is no evidence of the weighing of these issues in the Advisory Committee Notes.

The result of M. R. Evid. 514 is clearly to devalue one form (or aspect) of mediation while valuing a form based on caucuses. It is particularly disturbing to note that the caucus form of mediation is most common in civil court mediation done by attorneys for a fee. The use of joint sessions has been most common in community and family mediation (as well as in much administrative mediation), areas of practice where nonlawyers work alongside lawyers as mediators.

Even the M. R. Evid. 514 Drafting Committee's single interest test to determine when a confidential communication occurs fails to capture the nature of the mediation process. For the purposes of a mediation, parties are joining in a single interest in frank exchange and conversation about the possibilities for settlement. The very point of mediation is to create a setting where that frank exchange and conversation is possible, in contrast to settlement negotiation where considerable research evidence suggests that it is frequently lacking.

The Inconsistencies and Uncertainties of M. R. Evid. 514

M. R. Evid. 514 not only distorts and weakens the mediation process by confining privileged communication to caucuses in Maine, but it also throws a shadow of uncertainty over the process through the many ambiguities that it creates. Because of those uncertainties, the most certain result of implementing this Rule may be litigation about its meaning.

First, because it is so different from privilege rules and statutes in other states, M. R. Evid. 514 raises the possibility that privileged communications in mediations carried out in other jurisdictions could be introduced into a Maine court. "Inconsistently worded statutes create the most difficulty when applying privileges to disputes mediated in one state and subsequently litigated in another." Clearly, one of the reasons to adopt either the Uniform Mediation Act or a statute or Rule that closely mirrors its fundamental principles is to avoid such conflicts of law. By going its own way, Maine invites uncertainty about the confidentiality of mediation occurring in other states as well as litigation to resolve this question.

Second, how does this Rule accord with Rule 408 on Compromise and Offers to Compromise? That Rule asserts that "Evidence of conduct or statements by any party or mediator at a court-sponsored domestic relations mediation session is not admissible for any purpose" (Rule 408(b)). It also states that evidence of efforts to compromise a disputed claim is "not admissible to prove liability for, invalidity of, or amount of the claim or any other claim." Further, "[e]vidence of conduct or statements made in compromise negotiations in mediation is also not admissible on any substantive issue in dispute between the parties" (Rule 408(a)).

Third, if litigants provide contradictory testimony about the content of discussions in joint mediation sessions, could attorneys be called to testify about the discussions in sessions that they attended? Under such circumstances, and presuming that the mediator's privilege prevents his or her testimony, one of the parties might be tempted to call counsel to testify, because in many instances the lawyers present would be the only available tie-breakers. Is this communication "confidential" under the Lawyer-Client Privilege Rule 502(a)(5) or not?

Fourth, could mediators, in fact, be called to testify about discussions directly between the parties during a joint session? The language of the Rule only asserts that the mediator cannot be compelled to disclose "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."
(emphasis added). That language does not clearly encompass conversations and exchanges between the parties (not between the mediator and the participants) which emerge in many effective mediations when parties have the chance to take leadership in and guide the discussion without the input of the mediator.

Fifth, what is the status of contractual agreements that attempt to privilege communications in mediation in direct contradiction to M.R.Evid. 514? Mediator Jonathan Reitman advises parties to sign a "basic Agreement to Mediate" that includes a clause asserting that "All statements made during the mediation are in the nature of privileged settlement discussions and are not discoverable by either Party or admissible for any purposes in any proceeding." Can a contract override M.R.Evid. 514, for example, when a non-party to the mediation wants to depose the parties to mediation about their joint discussions? And what if one party to the contract changes his or her mind? The Prefatory Notes to the UMA warn that "Promises, contracts, and court rules or orders [regarding confidentiality] are unavailing, however, with respect to discovery, trial, and otherwise compelled or subpoenaed evidence. Assurance with respect to this aspect of confidentiality has rarely been accorded by common law."

Reitman, too, expresses caution, "Even with such an agreement, I think it is an open question as to whether you should advise parties in mediation that there is a greater degree of confidentiality when in caucus as opposed to a joint session."

Sixth, what, if any, are the consequences of the Rule's unusual distinction between caucuses and joint sessions and its blanket application to civil case, divorce mediation (both court-based and private), small claims mediation, labor mediation, school and workplace mediation, administrative agency mediation, community mediation, public policy mediation, victim-offender mediation? The Uniform Mediation Act makes explicit exclusions of coverage to prevent against unintended consequences. M.R.Evid. 514 does not.

Seventh, the definitions section of M.R.Evid. 514 fail to define mediation, taking for granted, apparently, that the meaning of that term is widely shared. It is not. This failure to identify the boundaries of an expansive concept is particularly troublesome given the breadth of the scope of the Rule with regard to mediating parties—"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 the proceeding is in litigation." (M.R.Evid. 514 (a)). In particular, how does it apply to the required Rule 16B "Alternative Dispute Resolution conferences" in civil cases? These are not defined as mediation in the Rule, but mediation occurs commonly in these conferences.

The Likely Consequences of M.R.Evid. 514

M.R.Evid. 514 will have immediate and profound consequences. Almost universally, mediators make explicit their expectations about confidentiality at the start of a session. As a result, changed expectations about confidentiality will have an immediate impact on the practices of mediators and, it is likely, on the behavior of mediation participants. In court-connected mediation, these participants frequently include attorneys. They are likely to advise their clients about the nature of the mediation privilege and the consequent limits of confidentiality in joint sessions. Even though the likelihood is remote that any single mediation will lead to an effort to introduce evidence from its joint sessions into court, the Rule will affect all mediations.

The June, 2008 letter of the Maine Association of Mediators to the Law Court highlighted concerns that this Rule would push participants away from direct negotiation with each other and toward a process focused on separate meetings (usually called the caucus format). The basic underlying strength of mediation is the empowerment of the participants through direct negotiation with each other [emphasis in the original] to reach a satisfactory resolution of their dispute. If statements made in the presence of "others" during the course of mediation proceedings are not "confidential communications," then the content of such direct negotiations will become more guarded and therefore less likely to result in full resolution of the dispute.

Indeed, the loss of meaningful and substantive joint sessions is profound for effective mediation. It is joint sessions that provide opportunities for exchange of ideas, airing of emotions, clarifying interests, giving opposing counsel a direct reading of the other party, and developing trust and mutual understanding. The spontaneous conversations in joint sessions can produce creative results that neither party anticipated. Joint sessions also provide greater transparency to the mediation process for all parties, but especially unrepresented parties.

Moreover, cautious attorney participants will discourage their clients from direct participation in mediation under M.R.Evid. 514. The less that parties participate, the more that their attorneys dominate mediation. Commentators note that lawyer domination in mediation diminishes party control, narrows participation and satisfaction of parties, makes it far
less likely that a wide range of interests will be dealt with, and reduces the efficiency of negotiation. 28 Nonetheless, caucus-focused and lawyer-dominated mediation appears nationally to be the most common model for court-connected civil case mediation. 29 This Rule appears designed to reinforce this limited and problematic form of mediation while undermining the dominant model of mediation in most other settings.

It is also important to note that in caucus-based mediation, mediators assume far more power than they would otherwise have in assisting parties to resolve disputes. Mediators are the only ones who are privy to information revealed in caucuses and are responsible for transmitting it (when permitted) to the other party. This form of communication is both limited and inevitably leads to selection and distortion no matter how careful mediators are. As a result, caucus-based mediation disempowers parties and reduces their capacity to articulate and achieve their interests through mediation.

Given all of these uncertainties and costs, what social value is advanced by this Rule? If this exception to privilege for joint sessions is intended to favor truth-seeking by courts and other tribunals, it will be ineffective. Parties and their lawyers can carry out the mediation (albeit less effectively), communicate privately and separately with the mediator and have their confidences protected by M.R.Evid. 514. Thus, this distinction provides no benefit for truth-seeking, but considerable loss for the process of mediation and for the parties to it.

Conclusion

M.R.Evid.514 will not kill mediation in Maine, but it will transform it profoundly and in ways that will certainly diminish its use, reduce party participation in the process, narrow the scope of issues discussed and limit party satisfaction. It will also certainly lead to litigation to address the many uncertainties left by M.R.Evid. 514. Many of these criticisms were raised during the consideration of the Rule, yet the Advisory Committee Notes provide no plausible rationale for adopting this version of a mediation privilege rule. Unfortunately, the Rule’s unintended consequence may be the demise of one of the most ambitious and effective court-based mediation systems in the United States and the debilitation of mediation in many other venues in the state where it has, to date, prospered. 26

1. The mediation community has also expressed concern about exception (d)(7) for Manifest Injustice. See, for example, Jonathan W. Reitman, "Bumps in the Road Of Maine’s New Rule of Evidence 514,” at http://www.mediate.com/articles/reitman.17.cfm
2. These statutes were in effect in 2001 at the time that the UMA was drafted. See UNIFORM MEDIATION ACT with Preliminary Note and Comments, 2001, at http://www.pos.harvard.edu/gnu/uma/ vi. I have not been able to locate a similar distinction among statutes and court rules in other states. See also Sarah Cole, Craig A. McEwen, Nancy H. Rogers, MEDIATION: LAW, POLICY AND PRACTICE, 2d ed.
4. The mediating party may claim the privilege as can “the mediating party’s guardian or conservator, the personal representative of a deceased mediating party, or the successor, trustee, or similar representative of a corporation, association or other organization, whether or not in existence. The person who was the mediator at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the mediating party,” M.R.Evid. 514 (c).
7. For a critique of the more balanced UMA as too favorable to mediators and less favorable to truth-seeking, see Scott H. Hughes, "The Uniform Mediation Act: To the Spoiled Go the Privileges," 89 MARQ. L. REV. 9 (2000).
9. A June 18, 2008 letter from the Maine Association of Mediators identified many of the concerns highlighted in this article as well as others relating to the exceptions to privilege. Letter on file with the author.
11. The Advisory Committee Notes do provide a general justification for a broad mediator privilege—to support the mediation profession “in maintaining their neutrality that transcends any particular dispute.” (at 9).
12. UMA Preliminary Note, at ll.
13. UMA at 56; see also Hughes, supra note 7, who criticizes the UMA for attending insuffiiciently to the broader interests of justice.
14. Maine Evidence Rule 502 marks out a lawyer-client privilege; Rule 503 establishes a privilege for patient-health care professional communication; Rule 504 creating a husband-wife privilege; and Rule 505 establishes a religious privilege.
16. Wigmore, quoted in Hughes supra note 7 at 1472.
17. Although the drafters assert that M.R.Evid. 514 aligns with existing Maine privilege rules, they miss clear parallels between, for example, Rule 503 that privileges communications between patients and those present in consultation with mental health professionals and counselors. Doesn’t the communication between a husband and wife in conflict and their licensed family therapist resemble that between a mediator and two parties in conflict? They share an interest in frank and open exchange for purposes of communication in that relationship.
18. See, for example, Robert H. Mnookin, Scott R. Peppet; and Andrew S. Tulumello, Beyond Winning: Negotiating to Create Value in Deals and Disputes (2000), 156–172.
20. "A communication is 'confidential' if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.”
22. Reitman, supra note 1.
23. UMA Preliminary Notes, supra note 3 at iv.
25. See chapter 1 in Cole, McEwen and Rogers, supra note 2.
28. See, for example, Riskin and Welsh, supra note 8.
29. Riskin and Welsh, supra note 8.

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