

Last reviewed and edited July 24, 2015
Rules restyled and rewritten effective January 1, 2015
Includes amendment effective September 1, 2015

MAINE RULES OF EVIDENCE

With Advisory Notes

The Maine Rules of Evidence, the Maine Restyling Notes, and the Federal Advisory and Restyling Committee Notes appear in black type; **Advisory Notes to the former Maine Rules of Evidence appear in red type.**

[Effective January 1, 2015, the Maine Rules of Evidence have been restyled and completely replace the Maine Rules of Evidence in effect prior to January 1, 2015. Included below are a general note regarding the restyling, a table of the new Rules, the restyled Maine Rules of Evidence, Maine Restyling Notes, Federal Advisory and Restyling Committee Notes, and Advisory Notes to the former Maine Rules of Evidence. Footnotes and bracketed notations have been added to some of the Advisory Notes to the former Maine Rules of Evidence to better identify changes and updates over the years and indicate distinctions from the restyled Rules. When statutes referenced in Advisory Notes to the former Rules have been repealed, that fact is noted, though replacement statutes, if any, are often not indicated, as the replacement statute, if any, may have a different purpose or context than the repealed statute. The footnotes provide information that is current as of the effective date of the restyled rules: January 1, 2015. This document does not include references to any changes in the law or rules after that date.]

Advisory Committee on the Maine Rules of Evidence

Note: Proposed Restyled Rules of Evidence

The Maine Advisory Committee on Rules of Evidence proposed that the Maine Rules of Evidence be restyled as set forth below. The restyling project, which has taken place over the last two years, follows a similar project by the Federal Advisory Committee on Rules of Evidence to restyle the Federal counterparts to our evidence rules and similar projects for the Federal Rules of Civil and Criminal Procedure. The purpose of the restyling is to make the rules clearer and easier of application by adoption of simple and consistent language, style, and format conventions and elimination of ambiguous or obsolete terminology. The recommendations for restyling are intended to preserve the substance of the respective rules without change, but present the respective Maine

rules in the language and format consistent with their restyled counterparts in the Federal Rules of Evidence. Each rule is accompanied by a “Maine Restyling Note” and many also have the Federal Advisory Committee note on the Federal restyling.

In reviewing the work of the Maine Advisory Committee on Rules of Evidence in preparing to publish the Restyled Rules of Evidence, the Court has made some minor clarifications to improve language, and, as the Advisory Committee invited the court to consider, the Court has elected to continue the existing exemption of proceedings regarding probation, parole, administrative release, and deferred dispositions from the requirements of the Maine Rules of Evidence. Those proceedings remain subject to fundamental due process requirements. *See State v. James*, 2002 ME 86, ¶¶ 13-15, 797 A.2d 732.

The Biennial Report to the Court from Professor Deirdre Smith, Chair of the Advisory Committee on the Maine Rules of Evidence, dated October 14, 2014, included the following note regarding the Restyling Project:

Restyling Project

The Committee’s primary project during the past two years was the complete redrafting of the Maine Rules of Evidence (MREs) to conform to the restyling format incorporated into the Federal Rules of Evidence in 2011. As I explained in the memorandum I submitted to the Court this past summer with the Committee’s complete set of proposed restyled rules, the entire Committee took part in this project. The Committee’s Consultant, Prof. Peter Murray, assisted by our excellent Student Liaisons, Margaret Machiaek (2012-2013) and Kevin Decker (2013-2014), took the lead in drafting restyled versions of each rule. We worked through the proposed restyled rules in three “batches,” each of which was carefully reviewed by a subcommittee assigned to that “batch.” Our Judicial Liaison, Justice Donald Alexander, was closely involved with each step of the project and attended most of the subcommittee meetings. Once the subcommittee completed its review and revision of the proposed rules, that batch was distributed to the full Committee for review and discussion. We submitted the complete set of proposed rules to the Court on June 17, 2014. The Court made some minor revisions to the proposed rules and posted them for public comment. No comments were received other than some very helpful ones by Matthew Pollack, Clerk of the Maine Supreme Judicial Court. My understanding is that those comments have been incorporated, and the

rules are now ready for final approval by the Court. Although this was a lengthy and labor-intensive process, I think that it was one well worth undertaking. The revised rules are written with more contemporary language and are better formatted and therefore easier to learn and to use.

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MAINE RULES OF EVIDENCE

With Advisory Notes

The Maine Rules of Evidence, the Maine Restyling Notes, and the Federal Advisory and Restyling Committee Notes appear in black type; **Advisory Notes to the former Maine Rules of Evidence appear in red type.**

ARTICLE I. GENERAL PROVISIONS

RULE 101. APPLICABILITY; DEFINITIONS; TITLE

- (a) **Rules applicable.** Except as otherwise provided in (b), these rules apply to all actions and proceedings before:
- (1) The Supreme Judicial Court when not sitting as the Law Court;
 - (2) The Superior Court;
 - (3) The District Court; and
 - (4) The Probate Court.
- (b) **Rules inapplicable.** These rules—except for those governing privilege—do not apply to the following:
- (1) The court’s determination under Rule 104(a) of a preliminary question of fact governing admissibility;
 - (2) Grand jury proceedings;
 - (3) Juvenile proceedings under the Maine Juvenile Code other than
 - (A) Probable cause determinations in bindover hearings; or
 - (B) Adjudicatory hearings;
 - (4) Statutory small claims in the District Court;
 - (5) Proceedings on applications for warrants;

- (6) Sentencing proceedings;
 - (7) Proceedings regarding revocation, modification, or termination of probation, parole, administrative release or deferred disposition;
 - (8) Bail proceedings;
 - (9) Proceedings to determine probable cause;
 - (10) Contempt proceedings in which the court may act summarily; and
 - (11) Proceedings exempt from applicability of the Rules of Evidence by statute.
- (c) **Definitions.** In these rules:
- (1) “Civil case” means a civil action or proceeding;
 - (2) “Criminal case” includes a criminal proceeding;
 - (3) “Public office” includes a public agency;
 - (4) “Record” includes a memorandum, report, or data compilation;
 - (5) A “rule prescribed by the Supreme Judicial Court” means a rule adopted by the Maine Supreme Judicial Court under statutory or inherent authority; and
 - (6) A reference to any kind of written material or any other medium includes electronically stored information.
- (d) **Title.** These rules may be known and cited as the Maine Rules of Evidence.

Maine Restyling Note [November 2014]

The Maine Rules of Evidence Restyling Project follows a similar project by the Federal Advisory Committee on Rules of Evidence to restyle the federal counterparts to our evidence rules as well as similar projects for the Federal Rules of Civil and Criminal Procedure. The purpose of the restyling is to make the rules

clearer and easier to apply by adoption of simple and consistent language, style, and format conventions and elimination of ambiguous or obsolete terminology. Where the Maine Rule of Evidence is substantially identical in substance to the corresponding Federal Rule of Evidence, the Advisory Committee recommends that the Court adopt language identical to that in the Federal Rules, and we have included the Federal Advisory Committee's restyling note with the proposed amended Rule. Where a Maine Rule departs in substance from the corresponding Federal Rule, we have recommended revisions that follow the same restyling format as in the other Rules, as described in "The Style Project" in the Federal Advisory Committee Note to Rule 101.

The language of Maine Rule 101(c) closely tracks existing Federal Rule 101(b) in terms of the definitions (the proposed Maine restyling changes the references to Maine references and adds a reference to "or inherent" to "statutory authority" for rule-making). Otherwise, the proposed Maine Rule 101 differs significantly from the Federal Rule by setting forth, in sections (a) and (b), a complete description of the applicability of the Rules to proceedings in Maine courts. As part of the Restyling Project, the Advisory Committee recommends that the Court consolidate all references to applicability in the Rules, including those presently in Rules 104(a) and 1101, into one comprehensive provision in Rule 101. The Committee recommends adding references to deferred dispositions and administrative release in Rule 101(b)(7) as such dispositions are now common in criminal proceedings and are sufficiently analogous to probation proceedings to warrant consistent treatment. The Committee further recommends that the Court eliminate the final sentence of current Maine Rule 104(a) and repeal Rule 1101 entirely as part of this consolidation. Finally, the Committee has proposed that the reference to the title of the Rules be moved from Rule 1102 to a new section 101(d), eliminating the need for Rule 1102 as well.

The restyled Rule does not make specific reference to hearings on "motions to suppress evidence and the like," which are referred to in current Maine Rule 104(a) as not excepted from applicability of the Rules of Evidence. By failing to include an express "exception to the exception" the Committee does not intend to change Maine law to the effect that the Rules of Evidence do apply to hearings in proceedings addressing the suppression of evidence.

Federal Advisory Committee Note

The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more

easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The reference to electronically stored information is intended to track the language of Fed. R. Civ. P. 34.

The Style Project

The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.

1. General Guidelines.

Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules*, Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules*, in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure*, at page x (Feb. 2005) (available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure*, 12 Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence*, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).

2. Formatting Changes.

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. “Hanging indents” are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier

to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between “accused” and “defendant” or between “party opponent” and “opposing party” or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word “shall” can mean “must,” “may,” or something else, depending on context. The potential for confusion is exacerbated by the fact the word “shall” is no longer generally used in spoken or clearly written English. The restyled rules replace “shall” with “must,” “may,” or “should,” depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant “intensifiers.” These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. *See, e.g.*, Rule 104(c) (omitting “in all cases”); Rule 602 (omitting “but need not”); Rule 611(b) (omitting “in the exercise of discretion”).

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers.

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change.

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be “substantive” if any of the following conditions were met:

- a.* Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);
- b.* Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);
- c.* The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or
- d.* The amendment would change a “sacred phrase”—one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include “unfair prejudice” and “truth of the matter asserted.”

Advisers’ Note to Former M.R. Evid. 1101¹
(February 2, 1976)

Subdivision (a) makes these rules applicable to all actions and proceedings in the named courts with the exceptions provided in (b). They do not apply in

¹ The former Advisers’ Note to Rule 101 is now irrelevant because the Rule it references has been removed by the restyling, so its text is not included. The Advisers’ Notes to former Rule 1101 are now applicable to Rule 101, however, so the Advisers’ Notes to the former Rule 1101 have been included at this point. Caution: the subsections referenced do not always match up to the newly restyled subsections of Rule 101; some changes have been noted.

terms to the Administrative Court, which came into being under that name by P.L. 1973, c. 303. Previously the Administrative Code, 5 M.R.S.A. § 2301-52, had used the terms “Administrative Hearing Office” and “Hearing Commissioner”, which were changed to Administrative Court and Administrative Court Judge. The purpose was to dignify the office with more appropriate titles. The matter is not of great practical importance because § 2405 provides that “the rules of evidence as applied in the trial of civil cases in the State shall be observed whenever practicable.” This would incorporate these rules by reference. The permitted relaxation as to “facts not reasonably susceptible of proof under these rules” seems reasonable for this type of proceeding.²

Subdivision (b) lists the exceptions from the applicability other than those with respect to privilege. Subsection (1) excludes determination of preliminary questions of fact except as otherwise provided in Rule 104,³ which makes the rules applicable to hearings on motions to suppress evidence and the like.

Subsection (2) concerns proceedings before grand juries. This is in accord with Maine law. *State v. Douglas*, 150 Me. 442, 114 A.2d 253 (1955).

Subsection (3)⁴ excludes various miscellaneous proceedings. It clarifies but does not appear to change Maine law. The rules do not apply to proceedings on probation or parole violations. The Supreme Court has held that due process must be observed on hearings to determine whether a condition of probation or parole has been violated. *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973). Due process does not, however, mandate observation of the rules of evidence. The same principles apply to adjudications of juvenile delinquency.⁵

² The Administrative Code referenced in the first paragraph was repealed and replaced by P.L. 1977, ch. 551 (effective July 1, 1978), creating the Maine Administrative Procedure Act, 5 M.R.S. §§ 8001-11008 (2014). The standards of evidence to be applied in administrative proceedings are addressed in 5 M.R.S. 9057 (2014). The Administrative Court was abolished and its functions transferred to the District Court by P.L. 1999, ch. 547, § B-12 (effective March 15, 2001). *See* M.R. Civ. P. 80G.

³ Rule 104(a).

⁴ Now subsections (4)–(9).

⁵ This language has since been superseded, as the Maine Rules of Evidence now apply to juvenile adjudications.

Subsection (4)⁶ excludes contempt proceedings in which the court may act summarily. This power is confined to cases where the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. M.R.Crim.P. 42(a).⁷

These rules do not apply to proceedings before the Industrial Accident Commission.⁸ It would be beyond the authority of the Supreme Judicial Court to prescribe rules for hearings before the Commission. The Court in exercising its reviewing functions has commented upon the necessity of there being “competent evidence to warrant the Commissions’ findings.” See, e.g., Larrabee’s Case, 120 Me. 242, 113 A. 268 (1921); Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1958). Some of the cases speak of its being bad practice to admit hearsay but that when admitted without objection it can be given corroborating weight. In practice the Commission has heeded this advice.

Explanation of Amendment (October 1, 1976)

This amendment is a purely formal change to make it completely clear that the rules of evidence do not apply to small claims proceedings in the District Court. The statute, 14 M.R.S.A. §§ 7451-7457,⁹ calls for a “simple, speedy and informal procedure”¹⁰ in which “the technical rules of evidence shall not apply.”¹¹ It was never intended to alter this procedure, but the generality of Rule I 101(a)¹² making the rules applicable to all proceedings in the District Court warrants an express exclusion of coverage of small claims proceedings.

⁶ Now subsection (10).

⁷ M.R. Crim. P. 42 now states that contempt proceedings are governed by M.R. Civ. P. 66. Civil Rule 66(b)(2) best supports this sentence.

⁸ Now the Workers Compensation Board.

⁹ These statutes have been repealed; the information can now be found at 14 M.R.S. §§ 7481-7487 (2014).

¹⁰ At 14 M.R.S. § 7481 (2014).

¹¹ This language is no longer in the Small Claims statutes. Maine Rules of Small Claims Procedure 6(b) states that “[t]he rules of evidence, other than those with respect to privileges, shall not apply.”

¹² Rule 101(a)(3).

Advisory Committee Note
(February 15, 1988 Amendment)

This amendment of Rule 1101 makes the rules inapplicable to proceedings for the determination of probable cause. Traditionally in probable cause hearings, for bindover of a defendant pending grand jury indictment, the rules of evidence have not been strictly applied. Usually the primary facts supporting the charge are established by evidence admissible under the rules, but subsidiary points are often established by hearsay and other inadmissible evidence. Strict applicability of the rules of evidence to preliminary proceedings of this sort could lead to needless formality in preliminary proceedings, waste of time, and abuse of preliminary probable cause hearings to harass the prosecution.

Federal Rule 1101(3) exempts probable cause hearings from the applicability of the Federal Rules of Evidence.¹³

The amendment also makes clear what has already been accomplished by statute, namely that the Rules of Evidence do not apply to juvenile detention (analogous to probable cause or bindover hearings) but they do apply to juvenile adjudications. See Maine Juvenile Code, 15 M.R.S.A. § 3307(1).¹⁴

Advisory Committee Note
(December 29, 1994 Amendment)

This amendment conforms the Rules of Evidence to recent amendments in the Maine Juvenile Code, 15 M.R.S.A. §§ 3001 et seq. The Maine Juvenile Code, as presently applied, contemplates a bindover hearing in the District Court at which the court determines whether there is probable cause to believe that a juvenile crime has been committed and whether after consideration of the seriousness of the crime, the characteristics of the juvenile and the dispositional alternatives available to the Juvenile Court it is appropriate to prosecute the juvenile as an adult. 15 M.R.S.A. §3101. The Code provides that the Rules of Evidence shall apply

¹³ Federal Rule 1101(c) currently states that the Federal Rules of Evidence do not apply when issuing search/arrest warrants or criminal summons, or in “a preliminary examination in a criminal case.”

¹⁴ Subsection (1) of this statute has been repealed. Further, the entire sentence has been superseded by the 1994 amendment.

“only to the probable cause portion of the bindover¹⁵ hearing.” 15 M.R.S.A. §3101(4)(B). The Code also provides that the Rules of Evidence “shall apply in the adjudicatory hearing” (15 M.R.S.A. §3310(1)) but “shall not¹⁶ apply to dispositional hearings.” (15 M.R.S.A. §3312(1)). Current practice in the Juvenile Court follows the requirements of the Code. This amendment brings the express language of the Rules in line with the Code as well.

Advisory Committee Note
(June 5, 1995 Amendment)

This amendment is intended to clarify the recent amendment of Rule 1101 with respect to juvenile proceedings. The rules do not apply to any activities in the juvenile court, regardless of how described or denominated, other than the determination of probable cause in bindover proceedings and adjudicatory proceedings.

RULE 102. PURPOSE

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

Maine Restyling Note [November 2014]

Maine Rule 102 and Federal Rule 102 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Advisory Committee Note

The language of Rule 102 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

¹⁵ “. . . bind-over”

¹⁶ “Do not”

Advisers' Note to former M.R. Evid. 102
(February 2, 1976)

This generalized statement of purpose is comparable to [M.R. Civ. P.] 1 and M.R.Crim.P. 2. It sets the tone of flexibility and liberality in construing the rules to the end that truth may be ascertained. This negates the old-fashioned common-law rule that statutes—or rules—in derogation thereof are to be strictly construed. The rule is a guide as to the principles by which the judge is to exercise his discretion, but not of course a license to disregard the rules to reach a result he believes to be just.

RULE 103. RULINGS ON EVIDENCE

- (a) **Preserving a claim of error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
- (1) If the ruling admits evidence, a party, on the record:
 - (A) Timely objects or moves to strike; and
 - (B) States the specific ground, unless it was apparent from the context; or
 - (2) If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
- (b) **Court's statement about the ruling; directing an offer of proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.
- (c) **Preventing the jury from hearing inadmissible evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

- (d) **Taking notice of plain error.**¹⁷ A court may take notice of an obvious error affecting a substantial right, even if the claim of error was not properly preserved.
- (e) **Effect of pretrial ruling.** A pretrial objection to or proffer of evidence must be timely renewed at trial unless the court states on the record, or the context clearly demonstrates, that a ruling on the objection or proffer is final.

Maine Restyling Note [November 2014]

Maine Rule 103 is substantially similar to Federal Rule 103, with one small difference. Presently, Maine Rule 103(e) puts the burden on counsel to renew an objection or offer made in limine or otherwise before the evidence would be offered at trial, unless the trial judge or the circumstances make it clear that the previous ruling was indeed final. The Federal Rule (at the end of old subsection (a) and in new subsection (b)) makes the pretrial ruling final so that the objection or proffer need not be renewed at trial.

The Maine departure represents a policy choice for Maine. The proposed restyled Rule 103 embodies this policy choice by carrying over former Maine Rule 103(e) without a change in language.

Federal Advisory Committee Note

The language of Rule 103 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 103 (February 2, 1976)

This rule is declaratory of Maine law. In subdivision (d)¹⁸ the Federal Rule reads “plain error”, following F.R. Crim. P. 52(b). “Obvious” is used here to

¹⁷ The term “plain error” is derived from the Federal Rule. The term “obvious error” is used in State practice. See *State v. Dolloff*, 2012 ME 130, ¶ 35, 58 A.2d 1032.

¹⁸ Now subdivision (e) of Federal Rule 103.

conform to M.R. Crim. P. 52(b), which used that term instead of “plain”. M.R.C.P. 61 provides that error “which does not affect the substantial rights of the parties” must be disregarded.¹⁹ There are numerous cases in both Maine and federal courts in which the “obvious” or “plain” error rule has been invoked. There appears to be no difference in treatment by reason of the difference in wording. The power is exercised cautiously and only when necessary to prevent a clear miscarriage of justice. *State v. Chaplin*, 308 A.2d 873 (Me. 1973).

Advisory Committee Note
(April 1, 1998 amendment)

This amendment [adding sub-§ (c)]²⁰ is proposed to conform Maine Rule 103 to a 1997 amendment of the federal counterpart. It is believed that this amendment does not change existing law. See Field and Murray, *Maine Evidence* (4th ed.) §103.7 at p. 26, *State v. Knight*, 623 A.2d [1293] (Me. 1993).

RULE 104. PRELIMINARY QUESTIONS

- (a) **In general.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.
- (b) **Relevance that depends on a fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.
- (c) **Conducting a hearing so that the jury cannot hear it.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:
 - (1) The hearing involves the admissibility of a confession;
 - (2) A defendant in a criminal case is a witness and so requests; or
 - (3) Justice so requires.

¹⁹ M.R. Civ. P. 61 no longer contains the quoted language.

²⁰ Now subsection (e).

- (d) **Cross-examining a defendant in a criminal case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.
- (e) **Evidence relevant to weight and credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

Maine Restyling Note [November 2014]

Current Maine Rule 104 is slightly different from its former Federal counterpart. Federal Rule 104(b) has been restyled to make it very similar to Maine Rule 104(b). The language regarding applicability of the rules of evidence in preliminary determinations has been eliminated from Rule 104(a) as part of the restyling process to reflect that the proposed new Rule 101 sets forth all provisions regarding the applicability of the Rules. Maine Rule 104(a) previously included a reference to the inapplicability of the Rules on preliminary questions other than those arising in connection with Motions to Suppress “and the like.” There is no express reference to Motions to Suppress in the proposed revised Rule 101 as it was the determination of the Advisory Committee that Motions to Suppress, which generally consider whether evidence was obtained illegally such as in violation of a person's constitutional rights, are not preliminary determinations of admissibility under Rule 104. Under the revised language and consistent with well-settled Maine law and practice, the Maine Rules of Evidence will continue to apply during evidentiary hearings on such motions.

Federal Advisory Committee Note

The language of Rule 104 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 104
(February 2, 1976)

Subdivision (a) incorporates accepted Maine practice in declaring that preliminary questions of admissibility are for the court. The rule that the court is not bound by the rules of evidence in the determination of a preliminary question is made subject to one exception which requires the rules to be followed in hearings on motions to suppress evidence and the like.²¹ This exception is not in the Federal Rule. The United States Supreme Court has upheld the use of inadmissible hearsay on a motion to suppress evidence, supporting the proposition that the use of such out-of-court statements does not offend the defendant's constitutional right of confrontation under the Sixth Amendment and the due process clause. *United States v. Matlock*, 415 U.S. 164, 94 S.Ct. 988 (1974). However, when there is a serious factual dispute on an issue which may be decisive of the case, as on a motion to suppress, common fairness requires that the witness be present and subject to cross-examination under the rules of evidence. The words "and the like" are intended to embrace other questions, such as identification, where the rights of a criminal defendant may be seriously jeopardized if the issue is determined without opportunity for cross-examination of the witness with knowledge of the facts.²² It should be noted that a statement made by a person out of court which is relied upon by the witness in doing certain acts, such as search for evidence, is not hearsay since it is not introduced for the truth of the matter asserted. Rather it is evidence of the information the witness possessed and therefore of probable cause. Apart from this, the rule is that generally prevailing in Maine and elsewhere. There are numerous preliminary questions which the court has always determined without being bound by the rules of evidence. Examples are questions involving exceptions to the hearsay rule, such as whether conduct is intended as assertive, whether a statement was made for diagnostic purposes, whether a document is a business record, and whether a declarant is unavailable. There is no reason to alter this practice. The exception with respect to privileges, which is in the Federal Rule, means that a privilege may not be violated in a preliminary hearing to determine whether or not it exists.

²¹ The language that this part of the Advisers' Note references has been removed from Rule 104(a). The rule that the Rules of Evidence do not apply in determinations of preliminary questions has been moved to Rule 101(b)(1), and the Restyling Note discusses that the "exception to the exception" still applies for motions to suppress.

²² This language is no longer present in the Rules, but, as the Restyling Note to Rule 101 states, the "exception to the exception" rule has not changed simply because of the restyling.

Subdivision (b) is in accord with Maine law. It deals with the problem of conditional relevancy. When Item A and Item B considered separately are each irrelevant in absence of proof of the other, a relevancy objection may be interposed to whichever one is offered first. But a party must start somewhere. This rule requires the proponent merely to bring forward evidence from which the truth of Item A could be found, upon the representation that evidence of Item B will be offered. Evidence of the conditionally relevant Item B can then be shown. The dispute as to the truth of each is ultimately for the jury rather than the judge. But the order of proof is, as generally, for the judge. Rule 611 (a). He can decide whether to hear evidence of Item A or of Item B first. He may take into account the relative prejudice of having the jury hear one rather than the other if the proponent fails to offer evidence of one of them sufficient to warrant a finding of its truth. Whichever one he elects to hear first will be admitted conditionally or, in the traditional phraseology, *de bene*. If the proponent fails to make good on his representation to offer sufficient evidence of the second item, the evidence of the first will on motion be stricken and the jury instructed to disregard it. See *Lipman Bros. v. Hartford Acc. & Indem. Co.*, 149 Me. 199, 209 ff., 100 A.2d 246, 252 ff. (1953). It is the obligation of opposing counsel to make the motion to strike. The Federal Rule has no provision about discretion to admit evidence conditionally.²³ The reason for including it is to make it completely clear that the court's control of the order of proof, as provided in Rule 611 (a), is preserved.

Subdivision (c) considers when preliminary questions should be conducted out of the hearing of the jury. In a criminal case a hearing on the admissibility of a confession is constitutionally required to be conducted out of the jury's hearing. *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774 (1964). The Supreme Court has also held as a constitutional matter that the prosecution must at the preliminary hearing establish voluntariness of the confession by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 92 S.Ct. 619 (1972). The Law Court has gone beyond this minimum constitutional standard and required that the judge at the preliminary hearing determine voluntariness beyond a reasonable doubt. *State v. Collins*, 297 A.2d 620 (Me. 1972). On other preliminary matters the judge has discretion to decide whether the interests of justice require the hearing to be in the absence of the jury. This is the accepted Maine practice. In a criminal case when an accused is a witness, he is entitled on request to have any preliminary hearing conducted out of the jury's hearing.

²³ This is no longer accurate, as Federal Rule 104(b) has the same language as the Maine Rule.

Subdivision (d) allows an accused in a criminal case to testify on a preliminary matter, such as a motion to suppress evidence, without exposing himself to general cross-examination. There are no Maine cases on the point. The rule does not address itself to the question of subsequent use of testimony given by an accused on a preliminary hearing. As a constitutional matter, however, such testimony cannot be used at the trial as evidence of his guilt. *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968).

RULE 105. LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES

If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

In a criminal case tried to a jury, evidence inadmissible as to one defendant must not be admitted as to other defendants unless all references to the defendant as to whom it is inadmissible have been effectively deleted.

Maine Restyling Note [November 2014]

The language of the first sentence of Maine Rule 105 is identical to Federal Rule 105. Maine's second sentence is to implement Maine's version of the holding in *Bruton v. United States*, 391 U.S. 123, 126 (1968), which has been carried over into the restyled Rules.

Federal Advisory Committee Note

The language of Rule 105 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 105
(February 2, 1976)

This rule accepts for civil cases the long-standing practice of instructing the jury to consider evidence only on a particular issue or with reference to a particular party even though it has an obvious and perhaps a highly prejudicial bearing on some other issue or party. In criminal cases, however, the ineffectiveness of such a limiting instruction is recognized. In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620 (1968), the Court held that the constitutional right of confrontation forbids the use in a joint trial of an oral confession of one codefendant expressly implicating the other when the confessing codefendant does not take the stand and subject himself to cross-examination. The Court concluded that a jury would be unable to put out of mind “powerfully incriminating extrajudicial statements of a codefendant.” Long before *Bruton*, M.R.Crim.P. 14²⁴ authorized severance when it appeared that a defendant might be prejudiced by a joint trial. *Bruton* emphasizes that this potential for prejudice has constitutional force. The rule therefore compels the state to choose between severance and foregoing use of evidence admissible as to fewer than all defendants, with the single qualification that a statement may be admitted in a joint trial if all references to the defendant against whom it is inadmissible have been effectively deleted. This qualification is recognized in Maine. *State v. Wing*, 294 A.2d 418 (Me. 1972). It will often be apparent that effective deletion is impossible, in which case severance will be necessary.

The last sentence is not in the Federal Rule. For the reasons already stated, its inclusion seems called for by proper respect for the *Bruton* rule.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

If a party utilizes in court all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the time.

Maine Restyling Note [November 2014]

Maine Rule 106 is a little broader than its federal counterpart, in that it authorizes the introduction in evidence of a writing or other parts of a writing that is “utilized” in court, not just admitted. This is to allow a party to attempt to counteract potentially incomplete or misleading handling or reference to writings

²⁴ Now M.R. Crim. P. 8(d).

in court even if they are not formally offered in evidence. *See* Maine Advisers' Note to Rule 106. This policy choice has been carried over in the restyled Rule.

Federal Advisory Committee Note

The language of Rule 106 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 106 (February 2, 1976)

This rule codifies the familiar principle of “completeness”, which is already embodied in M.R.C.P. 32(a)(4) as to depositions. Its purpose is to enable the court to correct the misleading impression created by taking matters out of context. It applies to writings and recorded statements but not to conversations. When part of a writing or recording is introduced, an adverse party has the right to inspect it and move that any other part be put in evidence immediately after the incomplete portion has been introduced, so that its impact will not be lessened by the delay. The court obviously has a large measure of discretion in determining what in fairness should thus be contemporaneously considered. The words “utilized in court” are designed to permit the same procedure when a writing is silent on a point as when it is contrary to the testimony of a witness on the stand. A concession drawn from a witness that his written statement does not include a certain thing may be just as misleading as introduction of a part of a statement contrary to his testimony. The Federal Rule uses “introduced” instead of “utilized in court” and thus does not protect against the misleading effect which may result from the use of a statement without its introduction in evidence.

ARTICLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

- (a) **Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

- (b) **Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
 - (1) Is generally known within the trial court's territorial jurisdiction; or
 - (2) Can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.
- (c) **Taking notice.** The court:
 - (1) May take judicial notice on its own; or
 - (2) Must take judicial notice if a party requests it and the court is supplied with the necessary information.
- (d) **Timing.** The court may take judicial notice at any stage of the proceeding.
- (e) **Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.
- (f) **Instructing the jury.** The court must instruct the jury to accept the noticed fact as conclusive.

Maine Restyling Note [November 2014]

Maine Rule 201 is similar, but not identical to Federal Rule 201. In Maine there is no distinction between civil and criminal cases in the effect of judicial notice. In both cases the court instructs the jury that the fact noticed should be accepted as conclusive. This policy choice has been carried over into the restyled Rule. *See also* 16 M.R.S. §§ 401-406 (addressing judicial notice of laws of other jurisdictions).

Federal Advisory Committee Note

The language of Rule 201 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be

stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 201

(February 2, 1976)

This rule applies only to judicial notice of “adjudicative facts” as distinguished from “legislative facts”, a distinction which has caused some confusion. An adjudicative fact is the “what-happened”, “who-did-what-and-when” kind of question that normally goes to a jury. It seems reasonable to require, as the rule does, that a judicially noticed adjudicative fact must be one not subject to reasonable dispute. Legislative facts are those a court takes into account in determining the constitutionality or interpretation of a statute or the extension or restriction of a common law rule upon grounds of policy. They will often hinge on social, economic, or political facts not generally known by intelligent people or readily determinable by resort to sources of unquestioned accuracy. Subdivision (a) excludes legislative facts from the operation of the rule.

Subdivision (b) in stating the kinds of facts which can be judicially noticed is in accord with Maine case law. *Torrey v. Congress Square Hotel Co.*, 145 Me. 234, 242, 75 A.2d 451, 457 (1950). There are many Maine cases allowing judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See, e.g., *First National Bank v. Kingsley*, 84 Me. 111, 24 A. 794 (1891) (upon what day of the week a certain day of the month falls).

Subdivisions (c) and (d)²⁵ permit the court to take judicial notice without request and require proper judicial notice to be taken on request. Taking judicial notice without request reflects existing Maine practice, and it seems reasonable to require it in appropriate cases on request of a party.

Subdivisions (e), (f), and (g)²⁶ explain the procedural mechanics of judicial notice. As a matter of fairness, it assures a party of the right to be heard in opposition to the taking of judicial notice. At the hearing he can offer evidence

²⁵ Now only subdivision (c).

²⁶ Now subdivisions (d), (e), and (f).

and argument that the matter is reasonably subject to dispute. If he fails to convince the trial judge, his only remedy is by appeal. He cannot present contrary evidence to the jury because by hypothesis facts can be judicially noticed only if they are not subject to reasonable dispute. The court must instruct the jury to accept as established any judicially noticed fact. It would be absurd to allow jurors to consider, for example, on the basis of their individual recollection or speculation, whether December 4, 1972, actually fell on a Monday as the court had instructed them.

The rule does not distinguish between civil and criminal cases. Most of the criminal cases deal with matters of jurisdiction or venue. *State v. Bennett*, 158 Me. 109, 116, 179 A.2d 812, 816 (1962) (judicial notice that Hope is in Knox County). But the rule is not so limited. The constitutional right to trial by jury does not extend to matters which are beyond reasonable dispute. For instance, the Law Court has taken judicial notice that alcohol is intoxicating and overruled an exception based on lack of proof of that fact. *State v. Kelley*, 129 Me. 8, 149 A. 153 (1930).

Finally, this rule has nothing to do with judicial notice of foreign law, which is covered by 16 M.R.S.A. §§ 401–406 and M.R.C.P. 44A.

The Federal Rule adds a sentence in subdivision (g)²⁷ that in a criminal case the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noted. Since judicial notice is limited to facts not subject to reasonable dispute, there is no reason for not making it mandatory in criminal as well as in civil cases. It would be absurd in a criminal case as in a civil action to allow jurors to question the accuracy of the court's instruction as to what day of the week December 4, 1972, actually was.

It is essential to bear in mind that resort to judicial notice in any case, civil or criminal, is permissible only if the judicially noticed fact is not subject to reasonable dispute. The court must not accept as sufficient the absence of actual dispute over, for example, a scientific conclusion found in a text or treatise. Such a misuse of judicial notice would deprive a criminal defendant of his constitutional right to jury trial.

²⁷ Now subdivision (f).

ARTICLE III. PRESUMPTIONS

RULE 301. PRESUMPTIONS IN CIVIL CASES GENERALLY

- (a) **Effect.** In a civil case, unless a statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
- (b) **Prima facie evidence.** A statute providing that a fact or group of facts is prima facie evidence of another fact establishes a presumption within the meaning of this rule.
- (c) **Conflicting presumptions.** If two presumptions conflict with each other, the court must apply the presumption that is more strongly supported by policy and logic. If neither presumption is more strongly supported by policy and logic, both presumptions must be disregarded.

Maine Restyling Note [November 2014]

Maine Rule 301 is quite different from Federal Rule 301, in that the effect of a presumption is different and there are additional provisions dealing with the phrase “prima facie evidence” and conflicting presumptions. The proposed restyled Rule attempts to retain these distinctions in restyled format and language.

Federal Advisory Committee Note

The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers’ Note to former M.R. Evid. 301 (February 2, 1976)

The problems in dealing with presumptions are complex and difficult. First of all, the term has been used in very different senses by courts and legislatures. The generally prevailing view among the commentators is that the word presumption should be reserved for the convention that when a designated fact

called the basic fact exists, another fact called the presumed fact must be taken to exist in the absence of adequate rebuttal. It has that meaning in this rule. Laymen, and courts as well, frequently use it as a synonym for “inference” (“Dr. Livingston, I presume”), a matter of logic and experience, not of law. The trier of fact is free to adopt or reject the inference. The phrase “conclusive presumption” is not a presumption in any useful sense, but a rule of law that if one fact, the basic fact, is proved, no one will be heard to say that another fact, the presumed fact, does not exist. Nor is the “presumption of innocence” in criminal cases really a presumption at all, but rather a forceful way of saying that the prosecution must prove guilt beyond a reasonable doubt and that there is to be no inference against the defendant because of his arrest, indictment, or presence in the dock.

Giving presumption the meaning stated, if the only evidence relates to B, the basic fact, it is universally conceded that when B is established, P, the presumed fact, has to be taken as true. The trouble begins when evidence that P is not true is introduced. One view, still followed in the majority of states, is that the presumption places on the party against whom it is directed the burden of going forward with evidence but that when there is testimony to support a finding of the nonexistence of the presumed fact, the presumption disappears like a bursting bubble and the case proceeds as though there never had been a presumption. Another view is that the presumption continues despite contradictory evidence, and the burden of persuasion is shifted so that the party against whom the presumption is directed must show that the nonexistence of the presumed fact is more probable than its existence.

This rule adopts for civil actions the second of these views and shifts the burden of persuasion to the party against whom the presumption operates. This is a change in Maine law as enunciated in the landmark opinion by Justice Webber in *Hinds v. John Hancock Mut. Life Ins. Co.*, 155 Me. 349, 155 A.2d 721 (1959), where the Law Court took the position that a presumption persists “until the contrary evidence persuades the factfinder that the balance of probabilities is in equilibrium, or, stated otherwise, until the evidence satisfies the jury or factfinder that it is as probable that the presumed fact does not exist as that it does exist.” The *Hinds* rule appears to have worked with reasonable satisfaction, but there have been difficulties in explaining to the jury the concept of probabilities being in equilibrium. Moreover, it involves the logical impossibility of treating a presumption as evidence to be balanced against other evidence when it is not evidence at all but a rule about evidence. The difficulties with the *Hinds* rule are enhanced because it does not take into account the different types of presumptions. Most presumptions are grounded upon an inference; that is, a deduction of fact that

may logically and reasonably be drawn from another fact or group of facts. Evidence of these underlying facts can be balanced against evidence of contrary facts. It is not helpful, however, to say that the presumption persists to the point of equilibrium. On the other hand, some presumptions are not based upon rational inference but are created to reflect a desirable policy. An example is the presumption that goods received by the terminal carrier were in the same condition as, when delivered to the initial carrier. See *Ross v. Maine Central R.R.*, 114 Me. 287, 96 A. 223 (1915). Here there is nothing to balance against evidence that the goods came to the last carrier in damaged condition, and the Hinds rule is particularly ill-adapted to this situation.

The Federal Rule limits the effect of a presumption to fixing the burden of going forward, so that the presumption disappears when evidence is introduced which would support a contrary finding. Thus the offering of testimony which no one in the courtroom believes serves to drop the presumption out of the case. This gives too little weight to presumptions, especially those not based on rational inference.²⁸

In shifting the burden of persuasion this rule has the merit of making it unnecessary for the court ever to mention the presumption and making it possible to charge the jury in terms which it can readily understand. It may be thought to give too great an effect to some presumptions, but this seems preferable to the alternative of giving too little weight. In making its choice the Court has adopted the rule originally promulgated by the Supreme Court and incorporated in the newly approved Uniform State Law. It was also looked upon with favor in Justice Webber's opinion which finally settled upon the Hinds Rule.

It should be noted that the rule preserves any statute giving a presumption a different effect. One such statute is the Uniform Commercial Code, 11 M.R.S.A. § 1-201(31),²⁹ which defines a presumption in terms affecting only the burden of going forward.

There are numerous statutes which state that one fact is prima facie evidence of another fact. The purpose of subdivision (b) is to make it clear that such a

²⁸ This is no longer accurate, looking at the language of Federal Rule 301 and its 1974 Note.

²⁹ This statute has been repealed. 11 M.R.S. § 1-1206 (2014) provides that, when the UCC creates a presumption, "the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence."

statute creates a presumption within the meaning of this rule in a civil case. Rule 303(a) is to the same effect in a criminal case.

Subdivision (c) is designed to resolve the impasse when the court is confronted by inconsistent presumptions. It directs the application of the one founded upon weightier considerations of policy. If policy considerations are of equal weight, both presumptions are to be disregarded. The wording is taken from the Uniform Rules of Evidence approved in 1953 by the Commissioners on Uniform State Laws. The principal class of cases in which the problem has arisen is where rights are asserted under a second marriage but no direct evidence is available of a death or divorce terminating the first marriage before the second. Most courts say the presumption of innocence or of the validity of a marriage is stronger than the presumption of continuance of life or continuance of marriage.

RULE 302. PRESUMPTION OF LEGITIMACY

A child conceived by or born to a woman while she is lawfully married is presumed to be the child of the woman and her spouse unless the contrary is established by proof beyond a reasonable doubt.

Maine Restyling Note [November 2014]

Maine's version of Rule 302 is entirely different from Federal Rule 302, which is not necessary in Maine. The restyled Rule attempts to restate the Maine Rule in more succinct terms that resonate with the criminal burden of proof on which it is based. There is some question about whether this Rule continues to be necessary or appropriate in view of current developments that permit quick and easy determination of biological parentage.

Advisers' Note to former M.R. Evid. 302

(February 2, 1976)

This rule gives separate treatment to the presumption of legitimacy. Proof beyond a reasonable doubt is required, for reasons of social policy, to rebut this presumption. The rule had its origin in bastardy proceedings but the policy is equally applicable in any action involving legitimacy.

Federal Rule 302 deals with the effect of a presumption in a case where state law supplies the rule of decision, typically a diversity of citizenship case. It obviously has no place in a state code of evidence.

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

- (a) **Scope.** This rule governs the application of statutory and common law presumptions, including statutory provisions that certain facts are prima facie evidence of other facts or of guilt in criminal cases.
- (b) **Submission to jury.** The court may not direct a verdict against an accused based on a presumption or statutory provisions that certain facts are prima facie evidence of other facts or of guilt. The court may permit a jury to infer guilt or a fact relevant to guilt based on a statutory or common law presumption or prima facie evidence, if the evidence as a whole supports guilt beyond a reasonable doubt.
- (c) **Instructing the jury.** Whenever the existence of a presumed fact against the accused is submitted to the jury, the court in instructing the jury should avoid charging in terms of a presumption. The charge must include an instruction that the jurors may draw reasonable inferences from facts proved beyond a reasonable doubt and may convict the accused in reliance upon an inference of fact if they conclude that such inference is valid and if the inference convinces them of guilt beyond a reasonable doubt and not otherwise.

Maine Restyling Note [November 2014]

The Federal Rules of Evidence do not deal with presumptions in the context of criminal cases. The Maine Rule has been restyled in accordance with the federal restyling format.

Advisers' Note to former M.R. Evid. 303 (February 2, 1976)

Subdivision (a) makes it clear that Maine statutes using the phrase “prima facie evidence” or “prima facie proof” will be regarded as creating presumptions within the meaning of this rule.

Subdivision (b) recognizes that presumptions in criminal prosecutions pose problems not involved in civil cases. Since a verdict of guilty can never be directed, it follows that the court cannot direct the jury to find a presumed fact against the accused as to any element of the offense. The use of a presumption cannot take away from the jury any evidentiary issue, and the court can submit the existence of the presumed fact to the jury only if the jury could find guilt or the presumed fact beyond a reasonable doubt based on the evidence as a whole. This substantially reflects Maine law. *State v. O'Clair*, 256 A.2d 839 (Me. 1969).

Subdivision (c) incorporates the recommendation of the Law Court in *State v. Poulin*, 277 A.2d 493 (Me. 1971), that the trial judge should avoid charging the jury in terms of a presumption, which was thought to be confusing. It refers instead to the right to draw reasonable inferences from facts proved beyond a reasonable doubt, but makes it clear that the jurors are not required to accept the presumed fact. In other words, the presumption cannot be made conclusive.³⁰

ARTICLE IV. RELEVANCE AND ITS LIMITS

RULE 401. TEST FOR RELEVANT EVIDENCE

Evidence is relevant if:

- (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) The fact is of consequence in determining the action.

Maine Restyling Note [November 2014]

Maine Rule 401 and Federal Rule 401 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule. The restyled Rule breaks out the concepts of classical relevance and materiality in two subsections.

Federal Advisory Committee Note

³⁰ The current state of the law regarding use of presumptions or inferences in criminal cases is addressed in Alexander, *Maine Jury Instruction Manual*, § 6-13 at 6-23 (2014 ed.).

The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 401
(February 2, 1976)

This rule states traditional Maine law. See, e.g., *Perlin v. Rosen*, 131 Me. 481, 483, 164 A. 625, 626 (1933). The rule does not define relevancy in terms of materiality. Relevant evidence is defined as meaning evidence of any fact of consequence to the determination of the action. Materiality looks to the relation between the proposition for which the evidence is offered and the issues in the case. If the proposition is not probative of a matter in issue, it is immaterial. If the proposition is material, evidence which makes it more probable than it would be without the evidence is relevant evidence. Nothing would be gained by including in the rule any reference to materiality. The Supreme Court promulgated the rule in this form and the Advisory Committee Note said that the language “has the advantage of avoiding the loosely used word ‘material.’”

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE

Relevant evidence is admissible unless any of the following provides otherwise:

- A federal or state statute;
- These rules; or
- Other rules applicable in the courts of this state.

Irrelevant evidence is not admissible.

Maine Restyling Note [November 2014]

There are slight differences in language between the Maine and the Federal Rules. The Federal Rule lists the various other sources of authority. The existing and the restyled Maine versions merely make reference to statutes and “other rules applicable in the courts of this state,” which is intended to cover constitutional rules.

Federal Advisory Committee Note

The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 402 (February 2, 1976)

The general rule that all relevant evidence is admissible is declaratory of Maine law. See, e.g., *McCully v. Bessey*, 142 Me. 209, 49 A.2d 230 (1946); *Turgeon v. Lewiston Urban Renewal Authority*, 239 A.2d 173 (Me. 1968). These cases and many others emphasize the extent of the trial judge's discretion. The exceptions make it clear, however, that relevant evidence may be excluded by reason of a statute or a rule. Highly relevant evidence may be excluded by rules based on policy considerations, such as rules of privilege and rules against hearsay. Examples of constitutional limitations are evidence against an accused obtained by unlawful search and seizure and incriminating statements elicited in violation of his right to counsel. These limitations would be binding even if not stated in the rules. They are included for the sake of clarity.

RULE 403. EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Maine Restyling Note [November 2014]

Maine Rule 403 and Federal Rule 403 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Advisory Committee Note

The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 403 (February 2, 1976)

This rule reflects Maine law. See e.g., *State v. Berube*, 297 A.2d 884 (Me. 1972). The trial judge has broad discretion in determining whether the probative value of evidence is outweighed by the risk of unfair prejudice or confusion of issues or by sheer waste of time.

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

(a) Character evidence.

- (1) *Prohibited uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.
- (2) *Exception for a defendant in a criminal case.*** A defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.
- (3) *Exceptions for a witness.*** Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, wrongs, or other acts. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

Maine Restyling Note [November 2014]

Maine Rule 404 differs in some respects from its federal counterpart. The Maine Rule does not include any exception for evidence of the character of a

victim in a criminal case, or permitting the prosecution to use evidence of the defendant's character to rebut it. The Maine Rule also does not spell out the grounds for limited admissibility of evidence of other wrongs under Rule 404(b). This does not mean that such evidence is not admissible for limited "non-character" purposes. However, the Maine Rule does not list some permissible non-character uses lest it be inferred that these are the only non-character purposes for which the evidence may be admitted. These differences have been maintained in the restyled Rule.

Federal Advisory Committee Note

The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 404

(February 2, 1976)

This rule deals with the use of character evidence for the purpose of proving that a person acted in conformity with it on a particular occasion. The separate question of the method of proof, once it is established that character evidence in some form is admissible, is dealt with in Rule 405, and if the character is that of a witness in Rules 608 to 610.

Subdivision (a) states the general rule that character evidence is not admissible for this purpose. This has been Maine law since *Potter v. Webb*, 6 Me. 14 (1829), in civil cases. It is equally clear that the state in a criminal action cannot introduce initially evidence of the bad character of the accused. *State v. Tozier*, 49 Me. 404 (1862). This rule is not based on lack of relevancy but rather because the danger of prejudice ("he's a bad man, so he is probably guilty") outweighs the probative value.

Exception (1)³¹ applies only to criminal cases. An accused is allowed to produce evidence of his good character, but the state may then rebut it. *State v. Tozier*, supra.

Exception (2)³² simply refers to Rules 607 to 609, which deal with evidence of the character of a witness to impeach his credibility.

The rule does not include an exception allowing an accused to offer evidence of a pertinent trait of the character of the victim of a crime as proof that he acted in conformity therewith on the occasion in question. Examples would be character evidence to support a claim of self-defense to a homicide charge or consent in a case of rape. The Federal Rule allows such evidence, but it is omitted from this rule because it has slight probative value and is likely to be highly prejudicial, so as to divert attention from what actually occurred. Absence of this exception may change Maine law; it is unclear. It should be noted that this rule does not keep out the victim's reputation for violence, proved to have been known to the accused before the event, for the purpose of showing his reasonable apprehension of immediate danger.

Subdivision (b) deals with evidence of other crimes, wrongs, or acts. Such evidence is not admissible to prove character in order to show that a person acted in conformity therewith. The subdivision does not exclude the evidence when offered for another purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Maine law is in accord. *State v. Aubut*, 261 A.2d 48 (Me. 1970) (evidence of attempt to utter forged instrument of same tenor on same day admissible to show knowledge of forgery); *State v. Wyman*, 270 A.2d 460 (Me. 1970) (evidence of other crime of precisely similar nature admissible to show intent; jury must be carefully instructed as to limited purpose).

RULE 405. METHODS OF PROVING CHARACTER

(a) By reputation. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

³¹ This exception is now at (a)(2).

³² This exception is now at (a)(3).

- (b) **By specific instances of conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Maine Restyling Note [November 2014]

Existing Maine Rule 405 permits proof of character evidence only by reputation. This substantive difference between the Maine and Federal Rules is maintained in the restyled Rule.

Federal Advisory Committee Note

The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 405

(February 2, 1976)

This rule covers the allowable methods of proving character once character evidence has become admissible under Rule 404. Proof may be made by testimony of reputation. This is in accord with Maine law. See *Phillips v. Kingfield*, 19 Me. 375 (1841); *Bliss v. Shuman*, 47 Me. 248 (1859); *State v. Morse*, 67 Me. 428 (1877).

The rule does not follow the Federal Rule in allowing proof of character by the opinion of a witness. There is some justification for that approach, since the jury is likely to think that a witness who says that the defendant's reputation is good is in fact vouching for him. There is, however, the risk that wholesale allowance of opinion testimony would tend to turn a trial into a swearing contest between conflicting character witnesses.

The last sentence of subdivision (a) allows inquiry on cross-examination into relevant specific instances of conduct. Inquiry of a character witness, “Have you heard . . .” of a certain event was permitted in the leading case of *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213 (1948), in which the trial court guarded the practice from misuse by ascertaining out of the presence of the jury that the question related to an actual event and was not a random shot or a groundless question to “wait³³ an unwarranted innuendo into the jury box.” There are no Maine cases on the point, but the practice seems a desirable one.³⁴

Subdivision (b) allows inquiry into specific instances of conduct on direct examination when character is actually in issue; that is, when character or a character trait is an operative fact which under the substantive law determines the legal rights of the parties. This appears to be in accord with Maine law. *Smith v. Wyman*, 16 Me. 13 (1839).

RULE 406. HABIT; ROUTINE PRACTICE

- (a) Admissibility.** Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.
- (b) Method of proof.** Habit or routine practice may be proved by proof of a sufficient number of instances of conduct to support a finding that the habit existed or that the practice was routine.

Maine Restyling Note [November 2014]

Maine Rule 406(a) is identical with Federal Rule 406. Maine Rule 406(b) specifically authorizes the use of evidence of specific instances of conduct to prove

³³ “. . . waft”

³⁴ Update: In *State v. Shulikov*, 1998 ME 111, ¶¶ 16-17, 712 A.2d 504, the Law Court held that there was no manifest injustice when a prosecutor cross-examined two witnesses regarding specific instances of the defendant’s conduct, without the court having first determined outside of the jury’s presence whether there was a basis for the questions, because the State later demonstrated on the record it had a factual basis for asking the questions, the defendant acquiesced in the questioning and did not ask the State to demonstrate its foundation for the questions, and no further reference to the specific instance was made at trial.

habit or routine practice. The language of Maine Rule 406(b) has been carried over into the restyled Rule.

Federal Advisory Committee Note

The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 406 (February 2, 1976)

Subdivision (a) recognizes the relevancy of a person's habit or the routine practice of an organization in proving that conduct on a particular occasion was in conformity therewith. Rule 404 states the general rule that evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion. Why should habit be treated differently? The rationale is that habit describes one's regular response to a repeated specific situation so that doing the habitual act becomes semi-automatic. It is the notion of the invariable regularity that gives habit evidence its probative force. Evidence that one is a "careful man" or a "careful driver" is inadmissible as lacking the specificity of an act becoming semi-automatic; it goes to character rather than habit. Thus intemperate "habits" cannot be shown to prove drunkenness at the time of an accident. Evidence of other assaults is inadmissible to prove the instant one in a civil action for assault.

The cases have more readily admitted the routine practice of an organization than that of an individual. See, e.g., *Commonwealth v. Torrealba*, 316 Mass. 24, 54 N.E.2d 939 (1944) (custom of store to give sales slips with each purchase). But in Maine a notary has been permitted to state his usual course of proceedings and his customary habits of business on the issue of notice of dishonor to the indorsee of a note. *Union Bank v. Stone*, 50 Me. 595 (1862).

It is not clear to what extent this rule changes Maine law. There have been references in the cases to the general rule that prior habits are not admissible to prove the doing of a certain act on a specific occasion. See *State v. Brown*, 142

Me. 106, 48 A.2d 29, 33 (1966); *Duguay v. Pomerleau*, 299 A.2d 914 (Me. 1967). In neither of these cases, however, was the reference necessary to the result.

Subdivision (b) allows proof of habit or routine practice by testimony of a sufficient number of specific instances of conduct to add up to a habit or routine. The judge has considerable discretion on this point and may disallow proof of specific instances under the overriding provisions of Rule 403. Subdivision (b) is omitted from the Federal Rule. With it left out, the result would be to go back to Rule 402 and make admissible any relevant evidence as to habit. The inclusion of (b) has a desirable limiting effect.

RULE 407. SUBSEQUENT REMEDIAL MEASURES; NOTIFICATION OF DEFECT

(a) Subsequent remedial measures. When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- (1) Negligence;
- (2) Culpable conduct;
- (3) A defect in a product or its design; or
- (4) A need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.

(b) Notification of defect. Notwithstanding subdivision (a) of this rule, a manufacturer's written notification to purchasers of a defect in its product is admissible to prove the existence of the defect.

Maine Restyling Note [November 2014]

The bulk of Maine Rule 407(a) has been restyled in accordance with Federal Rule 407. Maine Rule 407(b), which has no federal counterpart, has been restyled.

Federal Advisory Committee Note

The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Advisers' Note to former M.R. Evid. 407

(February 2, 1976)

[Caution: Much of this Adviser's Note is not applicable to the Rule as amended effective July 1, 1996, following a statutory change. See below.]

Subdivision (a) is directly contrary to Maine law. See *Carleton v. Rockland, Thomaston & Camden St. Ry.*, 110 Me. 397, 86A. 334 (1913). It declares that evidence of repairs and the like after an event is admissible to prove negligence or culpable conduct. The public policy behind the rule against admissibility was that it would deter repairs. This rationale is unpersuasive today. In some instances subsequent repairs may be evidence of culpability. In other instances quite the contrary is the fact. Despite this departure from prior authority, it is still open to the trial judge under Rule 403 to exclude such evidence if he believes its probative value is substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury. A situation when the change is effectuated for reasons unrelated to the hazard would be a clear case for such exclusion. Moreover, evidence of subsequent repairs goes only to the proof of an existing defect. It has no relevancy to the question whether the condition had existed long enough before the accident in suit so that the defendant should have known of it. Indeed, evidence that the condition was promptly corrected when the defendant learned of it might be helpful to the defendant.

The exclusionary rule is already subject to numerous exceptions in Maine and elsewhere. See *Carleton v. Rockland, Thomaston & Camden St. Ry.*, supra (evidence of subsequent repairs admissible, not on the issue of negligence, but on whether it was the duty of the defendant or someone else to make the repairs).

It should be emphasized that although evidence of subsequent remedial measures is admitted, it remains for the jury to decide whether the standard of reasonable care has been satisfied. Proof that such measures were taken clearly does not compel a finding that the previous condition reflected culpable conduct.

Subdivision (b) is aimed at the increasingly common situation where a manufacturer sends a “recall letter” to purchasers notifying them of a defect in a product and asking its return for corrective measures. This is relevant as an admission of existence of the defect and would be receivable against the manufacturer under Rule 801(d)(2) unless excluded by reasons of policy. There appear to be no such reasons. A manufacturer of motor vehicles or tires is now required by statute to give notification of any safety-related defect. 15 U.S.C. §1402.³⁵ Manufacturers of other products would almost certainly give a similar notification. It would be in their enlightened self-interest to do so.

This problem has sufficient similarity to proof of subsequent remedial measures to warrant making it a separate subdivision of the rule. Actually the difference is substantial. Proof of subsequent remedial measures is not an admission of anything. Repairs made after damage related to the very property or chattel involved in an accident may warrant the inference of negligence. Similarly a change in design may warrant the inference that the previous design was faulty. A recall letter is an out-and-out admission of the existence of a defect. The case for allowing it in evidence is much stronger.

The recall letter should not of itself suffice to establish causation. For instance, if there is evidence that the steering gear of an automobile suddenly failed, a recall letter would be admissible as to the existence of a defect. If, however, there is no evidence that steering gear failure caused the accident, the claim would fail for lack of proof of causation.

³⁵ This statute has been repealed.

It would also seem that proof that a plaintiff received and did not heed the warning of a defect would be admissible on the question of his due care.

The Federal Rule follows the conventional doctrine that evidence of subsequent remedial measures is not admissible to prove negligence or culpable conduct and does not deal with the admissibility of recall letters.

Consultant's Note
(July 15, 1995 Amendment)

Caution: This note relates to a version of Rule 407(a) which has been largely superseded!

This amendment is designed to limit the effect of prior Rule 407. The new version of Rule 407(a) makes admissible subsequent remedial measures involving the design or condition of premises or a tangible thing to the extent such measures are logically relevant to an issue in the case. This formulation merely restates and clarifies the prior formulation of Rule 407(a) as that rule applied to premises and tangible things. The amended rule does not make admissible subsequent remedial measures not involving premises or a tangible thing. Thus, the revised rule would not support admissibility of changes in institutional practice, training, procedures, or instructions in cases based on allegedly negligent practice, procedures, training or instructions. The admissibility of post-event changes in cases of this kind is determined by the general rules of relevance, Rules 401-403. Presumably it would be permissible for the Law Court to construe these rules to re-erect a common law barrier to such evidence, at least in certain contexts.

The amendment also makes evidence otherwise admissible under Rule 407(a) nonetheless excludable if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. The inclusion of Rule 403 language in the text of Rule 407 is not intended to suggest that Rule 403 does not apply to evidence made admissible by other rules, but is to make it clear that the positive grant of admissibility in Rule 407(a) is always subject to the authority of the trial court to apply the policies of Rule 403.

Consultant's Note
(July 4, 1996 Amendment)

This amendment is designed to bring Rule 407(a) in conformity with Chapter 576 of the Public Laws of 1996 as enacted by the Maine Legislature on March 29, 1996.

The rule as amended follows Federal Rule 407 in making subsequent remedial measures inadmissible to prove negligence or culpable conduct, but potentially admissible for other purposes. The list of such other purposes for which such evidence may be admitted is not intended to be exhaustive, but includes the most common bases on which admission may be warranted in specific cases. Chapter 576 expressly states that it “applies to causes of action in which the harm or injury occurred on or after the effective date of this Act.” Non-emergency legislation of the 1996 legislative session becomes effective on July 4, 1996.

The amendment makes revised Rule 407 effective as of July 4, 1996 and would apply to trials and rulings occurring on or after its effective date regardless of the date of injury or of the date of commencement of the action. This provision on applicability of the new rule was chosen by the Law Court in preference to the corresponding provision of Chapter 576, in the interest of clarity and simplicity of application.

Advisory Committee Note
(April 1, 1998 Amendment)

This amendment is proposed to bring Maine Rule 407(a) in conformity with Federal Rule 407 as amended in 1997. The amendment makes clear that the operative date for “subsequent” is the date of the injury on trial, not the date a product was designed or manufactured, and not the date of some prior failure or other occurrence. The amendment also makes it clear that Rule 407 applies in cases of strict liability and “products liability” as well as traditional negligence.

RULE 408. COMPROMISE OFFERS AND NEGOTIATIONS

- (a) **Settlement discussions.** Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) Furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
 - (2) Conduct or a statement made during compromise negotiations or in mediation about the claim.
- (b) **Mediation.** Evidence of conduct or statements by any party or mediator at a mediation session:
- (1) Undertaken to comply with any statute, court rule, or administrative agency rule;
 - (2) To which the parties have been referred by a court, administrative agency, or arbitrator; or
 - (3) In which the parties and mediator have agreed in writing or electronically to mediate with an expectation of confidentiality;

Is not admissible 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 for any purpose other than to prove:

- Fraud;
- Duress;
- Other cause to invalidate the mediation result; or
- Existence of an agreement.

Maine Restyling Note [November 2014]

Maine Rule 408 has evolved to become quite different from Federal Rule 408 in form, if not in substance. The restyled Maine Rule brings the language and structure of the Maine Rule back to be more in conformity with the restyled Federal Rule. The proposed restyled Maine Rule follows the Federal Rule in referring to the validity or amount of a disputed claim rather than the prior Maine formulation of “any substantive issue in dispute between the parties.” The prior Maine language was inserted to deal with divorce cases and other matters that did not seem to involve monetary “claims.” The phrase has been clumsy and opaque

in practice, and the federal formulation seems clearer, particularly if “claim” is broadly read as any substantive legal position of a party. Rule 408(b) is unique to Maine and is the result of extended negotiations with the mediation community. Since there is no federal counterpart, and hence no need for Maine-Federal consistency, the proposed restyled version is the same as the existing version.

Federal Advisory Committee Note

The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The Committee deleted the reference to “liability” on the ground that the deletion makes the Rule flow better and easier to read, and because “liability” is covered by the broader term “validity.” Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

Advisers’ Note to former M.R. Evid. 408

(February 2, 1976)

This rule declares evidence of a compromise or offer to compromise or of compromise negotiations to be inadmissible on the issue of liability for or amount of a disputed claim. This goes somewhat beyond present Maine law. In *Hunter v. Totman*, 146 Me. 259, 80 A.2d 401 (1951), it was held that admissibility depends on intention; if the offer is intended to be an admission of liability coupled with an endeavor to settle, it is admissible to prove liability. The rule avoids the need of determining intention and makes the evidence inadmissible without qualification.

The purpose is to encourage settlement discussion and to do away with any need for the cautious lawyer to preface a statement with the words “without prejudice”.

Evidence of a compromise offer may be admissible for another purpose, such as tending to show bias or prejudice of a witness.

The Federal Rule omits the reference to “any other claim.”³⁶ It also includes the following sentence: “This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”³⁷ The meaning of this sentence is unclear; it seems to state what the law would be if it were omitted. The rule excludes “conduct or statements” made in compromise negotiations. Surely the presentation during negotiations of admissible evidence would not insulate such evidence from use at the trial, as for example when counsel displays a hospital record. If Congress meant “admissible” rather than “discoverable”, the sentence is needless. If it intended to refer to the regular discovery procedures, it seems equally needless. If “discoverable” means something that the adversary would not have learned about except for the settlement negotiations, as a layman might use the term, inclusion of the sentence would be indefensible.

Advisory Committee Note (1985 Amendment)

By 1985 amendment the applicability of Rule 408 to negotiations in domestic relations matters was made more clear by the amendment of the second sentence of Rule 408(a) to refer to “any substantive issue in dispute.”³⁸ The purpose of this amendment was to negate any implication that “compromise negotiations” referred only to the kinds of claims mentioned in the first sentence of the rule, but included any kind of litigable claim, demand, or defense.

Because of the strong public policy favoring free negotiations and free expression of the parties during court-sponsored mediation in domestic relations cases, statements or conduct by any party (including the mediator) occurring

³⁶ The current Maine Rule also omits the reference.

³⁷ This language is no longer present in the Federal Rule.

³⁸ This language has since been removed—see the Restyling Note for explanation.

during the course of a court-sponsored mediation session are made inadmissible for any purpose.

Advisory Committee Note
(February 15, 1993 Amendment)

It has been suggested by a variety of sources that conduct and statements made in the course of mediation and other alternative dispute resolution procedures should not be admissible in evidence based upon policies fostering the use of mediation and other alternative dispute resolution procedures. Much of what is said and done by the parties during the course of mediation is protected under Rule 408(a) as it existed prior to the 1992 amendment inasmuch as mediation can be regarded as merely a structured form of compromise negotiations. On the other hand, in view of the high level of interest in mediation confidentiality it may be helpful to make it clear that mediation is entitled to the same level of protection as negotiations carried on directly between the affected parties without the participation of a third party facilitator.

It should be noted that this proposed rule revision does not confer any kind of mediator's "privilege."³⁹ At the time of the enactment of the Rules the Committee restricted its codification of privileges to those which had existed at common law or by statute as of that time. The Committee is reluctant to propose new privileges in the absence of some clear legislative or Court policy indication that such privileges are warranted.

Nor does the amendment create an absolute ban on the use of statements or conduct in mediation for all purposes. Thus, statements or conduct in mediation could be admissible where relevant on some nonsubstantive issues such as bias or prejudice of a witness, credibility of a witness and the like.⁴⁰ Statements and conduct in court-sponsored compulsory divorce mediation continue to be subject to a broader protection under Rule 408(b).

The proposed amendment does not address the discoverability of statements or conduct during mediation, nor does it seek to impose any sort of obligation of confidentiality upon any participant in the mediation process. The scope of

³⁹ The language of this paragraph is outdated. The Rules now include a mediator's privilege (Rule 514).

⁴⁰ Inadmissible statements are no longer allowed for impeachment purposes.

discovery is within the purview of the civil and criminal rules committees. Confidentiality is an issue for the Legislature or an authority regulating mediators and is not a proper issue for the Evidence Rules Committee.

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 [Federal Rule of Evidence] 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.⁴¹ The rule is designed to encourage parties to speak openly and

⁴¹ The Rule now allows for the use of statements to prove fraud, duress, or something else that would invalidate the mediation result, or to prove existence of an agreement.

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.

RULE 409. OFFERS TO PAY MEDICAL AND SIMILAR EXPENSES

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Maine Restyling Note [November 2014]

Maine Rule 409 and Federal Rule 409 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Advisory Committee Note

The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 409

(February 2, 1976)

This rule is generally in accord with Maine law. *Lyle v. Bangor & Aroostook Ry.*, 150 Me. 327, 331, 110 A.2d 584, 587 (1954). The rule does not supersede or conflict in any way with 24-A M.R.S.A. § 2426, which provides that no payment on account of bodily injury or death or property damage shall constitute an admission of liability or waiver of defense, or be admissible in evidence in an action unless pleaded as a defense; and that any such payment shall be credited upon any settlement or judgment in an action against the payor or his insurer.

RULE 410. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

In a civil or criminal case, evidence of the following is not admissible against the person who made the plea or participated in the plea discussions:

- (a) A guilty plea that was later withdrawn;
- (b) A nolo contendere plea;
- (c) A statement made in connection with a guilty or nolo contendere plea or during a proceeding on either of those pleas under Maine Rule of Criminal Procedure 11 or a comparable Federal or state procedure; or
- (d) An offer to plead guilty or nolo contendere.

Maine Restyling Note [November 2014]

Maine's Rule 410 is structurally much simpler and less comprehensive than the current version of the federal counterpart. The proposed restyled Maine Rule attempts to adopt the federal structure but retain the smaller and simpler scope of the Maine Rule. The various exceptions in the Federal Rule and the references to plea negotiations appear to go substantively beyond the Maine Rule. Even though they may have merit, consideration of such changes is beyond the scope of the restyling project.

Federal Advisory Committee Note

The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 410 (February 2, 1976)

There is no Maine case dealing with the admissibility of a withdrawn plea. In Massachusetts a guilty plea to drunken driving was later withdrawn and the

defendant was acquitted at trial, but the guilty plea was held admissible in an action for personal injuries. *Morrissey v. Powell*, 304 Mass. 268, 23 N.E.2d 411 (1939). Cases elsewhere are in conflict.

Exclusion of offers to plead guilty makes plea bargaining in a criminal case somewhat easier.

This rule is concerned only with withdrawn pleas. An accepted plea of *nolo contendere* is not admissible in a civil action. *State v. Fitzgerald*, 140 Me. 314, 37 A.2d 799 (1944).

The Federal Rule adds a final sentence reading: “This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.”⁴² The primary reason for not including it is that the use of such a statement “for impeachment” raises again the ineffectiveness of a limiting instruction. The jury would almost certainly consider it as an admission of guilt.

RULE 411. LIABILITY INSURANCE

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.

Maine Restyling Note [November 2014]

Maine Rule 411 is substantially identical with the first sentence of Federal Rule 411. The second sentence of the original Federal Rule 411 was omitted in the Maine rule as redundant and unnecessary. *See, e.g.*, Rule 404(b). *But see* Rule 407. The proposed restyled Maine Rule follows the first sentence of the restyled Federal Rule.

Federal Advisory Committee Note

The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and

⁴² This language has changed, and the Federal Rule does not appear to allow impeachment use anymore. Federal Rule of Criminal Procedure 11 and its notes do not seem to clarify the situation.

terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

Advisers' Note to former M.R. Evid. 411
(February 2, 1976)

The exclusion of evidence of liability insurance or the lack of it on the issue of fault is in accord with Maine law. *St. Pierre v. Houde*, 269 A.2d 538 (Me. 1970). The inference that an insured person would on that account drive carelessly is too weak. The Maine policy against injection of the fact of insurance into an action is a strong one. See M.R.C.P. 17(a) which, despite the requirement that an action must be prosecuted in the name of the real party in interest, allows a subrogated insurer to sue in the name of the assured. See also *Allen v. Pomroy*, 277 A.2d 727 (Me. 1971). Numerous cases apply the general rule that evidence of insurance in negligence cases is “immaterial, prejudicial, and inadmissible.” *Deschaine v. Deschaine*, 153 Me. 401, 407, 140 A.2d 746, 749 (1958). See also *Downs v. Poulin*, 216 A.2d 29, 33 (1966); *Duguay v. Pomerleau*, 299 A.2d 914 (Me. 1973) (stating the general standard that reference to insurance is to be avoided unless extraordinary circumstances require it). The rule does not compel the exclusion of evidence of insurance against liability when it is relevant for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.

RULE 412. SEX-OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

(a) Prohibited uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1) Evidence offered to prove that an alleged victim engaged in other sexual behavior; or
- (2) Evidence offered to prove an alleged victim's sexual predisposition.

(b) Exceptions.

- (1) *Criminal cases.* The court may admit the following evidence in a criminal case:
 - (A) Evidence of specific instances of an alleged victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
 - (B) Evidence of specific instances of an alleged victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
 - (C) Evidence whose exclusion would violate the defendant's constitutional rights.
- (2) *Civil cases.* In a civil case, the court may admit evidence of specific instances of sexual behavior by an alleged victim offered to prove an alleged victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.

Maine Restyling Note [November 2014]

Maine's Rule 412 has generally followed its federal counterpart, but has differed in some respects in both structure and substance. The main differences are the ban on reputation and opinion evidence in the Maine Rule and the omission in the Maine Rule of any special procedure to determine admissibility. The proposed restyled version follows the federal version more closely, and deals with the prohibition of reputation and opinion evidence by making it clear that the only kind of evidence of sexual behavior that can be admitted under the Rule is evidence of specific acts that meets the requirements of subsection (b). The restyled Maine

Rule follows the existing Rule in omitting any special procedure for determining admissibility.

Federal Advisory Committee Note

The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisory Committee Note (February 1, 1983)

This Rule prohibits any evidence of reputation or opinion of a victim's character in a prosecution for rape and other serious sexual offenses. It also severely restricts the use of evidence of specific instances of a victim's prior sexual behavior when offered by the defense. The rule is subject to the policy of Rule 402 on evidence constitutionally required to be admitted.

The rule is patterned on new Federal Rule 412 which was enacted by Congress to curb perceived abuses in the use of evidence concerning the past sexual behavior of a victim of rape or sexual abuse. In some courts, wide latitude has been allowed defense counsel to introduce such evidence to show:

- A. Lack of overall credibility of the victim, particularly on the issue of consent; and
- B. An actual inference that the victim did consent on the specific occasion for which the defendant is charged.

This does not seem to have been a serious problem in Maine where such testimony has been generally excluded. Some of the Maine cases, however, contain dicta that could be read to support admissibility of reputation evidence on credibility and perhaps on consent. See, e.g., *State v. McFarland*, 369 A.2d 227 (Me. 1977); *State v. Dipietrantonio*, 152 Me. 41 (1956); *State v. Flaherty*, 128 Me. 141 (1929). The danger in the admission of such evidence is the likelihood that it will provoke moral and emotional reactions in the trier of fact increasing the risk of unfair prejudice. For this reason, Federal Rule 412 has provided for an elaborate

procedure designed to assess the risk of unfair prejudice before admission of such evidence, even to the extent permitted by the rule. In Maine it is not necessary to provide any specific procedure in light of the trial judge's power to control the presentation of the proof so as to minimize prejudice and the overall requirements of Rule 403. Prosecutors, defense counsel, and trial judges should be alert to the fact that Rule 403 does apply even to evidence made specifically admissible by Rule 412 (or any other rule). Where the prejudicial effect of such evidence outweighs the probative value, such evidence must be excluded under Rule 403.

“Sexual behavior” is not specifically defined in the rule, but would include the behavior described by 17-A M.R.S.A. Section 251 (B,⁴³ C and D).

The word “past” in Rule 412 refers to occasions prior to trial and other than the occasions involved in the charges, whether prior or subsequent thereto in time.

Rule 412(b)(1) would not affect the result in *State v. Henderson*, 158 Me. 364 (1958), upholding the admissibility of evidence of the victim's prior intercourse with persons other than the accused to attack “corroborating” evidence of the victim's pregnancy offered by the prosecution.

Rule 412(b)(2) only applies to criminal prosecutions where consent of the victim is an issue.

Rule 412 does not prohibit evidence of a statement by the victim about her past sexual conduct when the statement is relevant as a statement for impeachment or some other proper purpose. See, e.g., *State v. Nelson*, 399 A.2d 1327 (Me. 1979) (rape victim's prior inconsistent statements about her past sexual relations admissible to impeach).

The prosecution may also “open the door” to evidence otherwise inadmissible under this rule by offering evidence of the victim's lack of sexual experience or chastity on direct. See *State v. Gagne*, 343 A.2d 186 (Me. 1975).

[Note change by 1995 Amendment⁴⁴] Rule 412 does not automatically render admissible evidence of prior sexual behavior in prosecutions for unlawful sexual contact, other criminal prosecutions, or civil cases. Admissibility of such

⁴³ Subsection (B) of 17-A M.R.S. § 251 has been repealed.

⁴⁴ Also, note the change by the 2000 Rules amendment.

evidence is governed by the other rules on relevancy and impeachment. See *State v. Davis*, 406 A.2d 900 (Me. 1979) (unlawful sexual contact-evidence of complainant's preoccupation with pulling down the pants of others was relevant to the complainant's state of mind and to rebut the inference that a child of her tender years would be too innocent of sexual matters to fabricate a charge).

Obviously Rule 412 applies to the prosecution as well as to the defense. Thus unless a victim's lack of chastity is properly raised by the defense, the prosecution may not introduce evidence of the victim's chastity to support an inference of lack of consent.

Advisory Committee Note
(1995 Amendment)

This amendment is to conform the terms of the Rules to changes in definition of crimes in the Maine Criminal Code. By 1989 amendment, the crimes of rape and gross sexual misconduct, as earlier defined by the Maine Criminal Code (17-A M.R.S.A. §§ 252, 253) were redefined and combined into the crime of gross sexual assault (17-A M.R.S.A. §253). The policies which made Rule 412 applicable to the crimes as earlier defined remain valid with respect to the redefined and renamed offense.

This amendment also amends Evidence Rule 412 to cover prosecutions for unlawful sexual contact.

Advisory Committee Note
(June 16, 2000 Amendment)

The amendment to Rule 412 is designed to broaden the rule to cover civil as well as criminal cases. The formulation of the rule follows the current Maine Rule 412 rather than the new Federal Rule 412 because 1) the Maine rule has worked well to date, and 2) the structure of the Maine rule seems to lend itself better to application to civil as well as criminal cases.

The amended rule would apply to any case, civil or criminal "in which a person is accused of sexual misconduct toward an individual." Cases involving sexual misconduct but not directed toward an individual (pornography?) would not be covered by either the language or the rationale of this rule. The term "sexual misconduct" is intended to include all forms of civil or criminal misconduct which involve sexual activity or verbal references to intimate sexual activity including

sexual harassment, exposure, telephone sexual harassment, intentional infliction of emotional distress. It is not intended to include misconduct not involving sexual activity or verbal references to intimate sexual activity but which is directed at members of a sexually defined group such as some forms of “hate crimes.”

“Sexual behavior” is intended to include all forms of intimate sexual activity, whether or not consensual, as well as intimate conversation involving a sexual relationship or sexual gratification.

In both civil and criminal cases reputation or opinion evidence of the sexual character of an alleged victim would be forbidden. There does not seem to be any more reason for this kind of evidence in civil cases than there is in criminal cases.

In criminal cases the rule on evidence of specific instances of conduct would remain “as is.” Evidence “constitutionally required” to be admitted (e.g. [State v.] Jacques, 558 A.2d 706 (1989)) is now included among the enumerated exceptions as is the case with the corresponding federal rule.

Subdivision (c)⁴⁵ proposes a somewhat broader rule for civil cases, requiring that the proponent of the evidence satisfy the judge that the probative value of the evidence on a controverted issue outweighs the danger of unfair prejudice, etc. Both the weight (probative value) and the focus (on a controverted issue) would be involved in the determination of admissibility. To cover the possibility that in a civil case an individual whose prior sexual conduct would be protected by this rule might not be the other party, the concept of “unwarranted harm to the individual” has been included in the balancing formula.⁴⁶ This formulation erects a meaningful threshold to the use of this kind of evidence in civil cases, but does not forbid it entirely or restrict its use to artificial categories or for specific inferences. The threshold of admissibility under Rule 412 specifies that the evidence can only be admitted if the court find that the probative value of the evidence exceed the danger of unfair prejudice. This is contrasted to the threshold under Rule 403 whereby relevant evidence is admitted unless the danger of unfair prejudice substantially outweighs the probative value.

⁴⁵ Now subsection (b)(2).

⁴⁶ The language is now “the danger of harm to any victim and of unfair prejudice to any party.”

The same kind of reasoning employed by the Law Court in administering the “constitutionally required” exception to criminal Rule 412 could be applied to administering Rule 412(c) in civil cases. Thus, where the proponent of evidence of prior sexual behavior of a victim could articulate an inference from the prior sexual behavior of the victim which would have a logical bearing directly on a controverted issue in the case, the evidence would be likely admissible in the absence of serious prejudice, confusion, etc. The court would ordinarily be expected to articulate the relevant inference for which the evidence would be admissible and how the evidence supported the inference. Such evidence can also be admitted in both civil and criminal cases if the opposing party “opens the door.”

This rule applies in civil cases to issues of both liability and damages. Rule 403 continues to give the court power to exclude evidence subject to Rule 412 based on considerations such as unnecessary presentation of cumulative evidence and waste of time.

This rule would not restrict evidence of sexual activity of a party to a case other than one in which a person is accused of “sexual misconduct” toward an individual. Thus it would not apply to the defense of truth in a libel case or to proof of character in a custody case. These cases would continue to be governed by Rules 403-405.

The proposed revised rule, as the current Maine Rule 412, does not spell out a special procedure for admissibility determinations. Confiding this matter to the good sense of court and counsel has worked well to date.

RULE 413. PROTECTION OF PRIVACY IN COURT PROCEEDINGS

- (a)** Evidence of the identity, address, employment or location of any person must be excluded if such person requests the exclusion of such evidence and:
 - (1)** The court is notified that there is a court order in effect that prohibits contact between such person and another person; or
 - (2)** It is alleged under oath, orally or in writing, that such person’s health, safety or liberty would be jeopardized by the disclosure of such information, and the court determines that disclosure of such information would jeopardize such person as alleged unless the court

finds that such evidence is of a material fact essential to the determination of the proceeding.

- (b) The court must conduct all proceedings to determine the admissibility of evidence under this rule in a manner so as not to disclose the information sought to be excluded, unless the court finds that a party's right to due process and a fair hearing would be violated if the information is not disclosed.
- (c) If the court determines that information otherwise inadmissible under this Rule must be admitted as evidence of a material fact essential to the determination of the proceedings, the court must receive such evidence *in camera*. In child protective proceedings pursuant to Title 22, Chapter 1071 of the Maine Revised Statutes, such evidence must also be received outside of the presence of any person, and the attorney of any person, who:
 - (1) Is subject to a court order prohibiting contact with the person requesting exclusion of the evidence; or
 - (2) Constitutes a risk to the health, safety, or liberty of the person requesting exclusion of the evidence.
- (d) Persons who may object to the admission of evidence under this rule include:
 - (1) Parties to the proceeding;
 - (2) Parties' attorneys;
 - (3) A guardian ad litem;
 - (4) Any person called as a witness;
 - (5) A juror; and
 - (6) Any person, who, although not a witness or party, is a subject of the proceeding, such as a child or a protected person.

Maine Restyling Note [November 2014]

Federal Rules 413–415 have not been adopted in Maine. In place of Federal Rule 413, Maine has adopted Maine Rule 413 pursuant to legislative directive. Because there is no Federal Rule with which to maintain consistency, restyling has been limited to applying the federal restyling conventions to the Maine Rule as adopted.

Advisory Committee Note 2007

Rule 413 implements the legislative directive of 4 M.R.S. § 8-B and 22 M.R.S. § 4007(1A)⁴⁷ enacted by Chapter 351 of the Public Laws of 2007. The Rule makes evidence of the identity, employment, address, or location of any person inadmissible when there is alleged to be a court order in existence prohibiting contact between that person and another person, or when the court determines that disclosure of the identifying information might jeopardize the person's health, safety, or liberty, unless the court finds that the evidence is necessary to determine the issues in the proceeding.

The court is required to conduct proceedings to determine admissibility under the rule in such a manner so as not to disclose the information at issue unless such disclosure is necessary as a matter of due process.

Even if the court determines that the evidence should be admitted as necessary to determine an issue in the proceeding, the information is to be received in camera, and, in the case of child protective proceedings, outside the presence of the party or person from whom harm is feared, and outside the presence of his or her attorney.

Objection may be raised under this rule by parties, witnesses, their attorneys, and other persons affected by the proceedings.

Further prohibitions on disclosure, recordkeeping, etc. are the province of others.

⁴⁷ Now at 22 M.R.S. § 4007(1-A) (2014).

ARTICLE V. PRIVILEGES

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED BY LAW

Unless an applicable state or federal constitution, statute, or rule provides otherwise, no person has a privilege to:

- (a) Refuse to be a witness;
- (b) Refuse to disclose any matter;
- (c) Refuse to produce an object or writing; or
- (d) Prevent another from testifying as a witness, from disclosing any matter, or from producing an object or writing.

Maine Restyling Note [November 2014]

The Federal Rules of Evidence do not set forth privileges, except for the Attorney-Client Privilege in Federal Rule 502, and therefore the Maine Rules of Evidence 501–514 are entirely different from Article V of the Federal Rules. The Maine Rules in this Article have each been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor nonsubstantive changes to clarify the Rules.

Maine Rule 501 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 501

(February 2, 1976)

This rule limits privileges to those provided by Constitution or statute or by rules promulgated by the Supreme Judicial Court. This means that common law privileges, such as that between attorney and client, must be included in these rules. On the other hand, a privilege created by statute is preserved without any need to deal with it. No attempt is made to incorporate the constitutional provisions relating to admission or exclusion of evidence. They do not readily lend themselves to codification, and the best point of reference is the provisions

themselves and the decisions construing them. The most familiar constitutional privilege is the privilege against self-incrimination. Other concepts having constitutional dimension are the required exclusion of involuntary confessions, confessions made by one deprived of the right to counsel, and the fruits of unlawful search and seizure. There are also various federal and state immunity statutes to protect persons compelled to testify. A degree of secrecy of grand jury deliberations is provided by M.R. Crim. P. 6(e).

The Court did not use its rulemaking power to create new privileges. Most evidentiary rules relate to what happens in the courtroom and are designed to facilitate ascertainment of the truth. Privileges, on the other hand, are designed to shut out the truth so as to protect relationships of sufficient social importance to assure their confidentiality. This judgment based on social policy is one which is best made by the elected representatives of the people.

Where there is a common law privilege, the Court has felt free in codifying it to fill gaps for which there is no precise Maine authority. Similarly, with respect to statutory privileges, such as the clergyman-penitent privilege, the Court has altered the statutory wording to fit the format of the rules and prescribed details not in the statute but consistent with the legislative policy.

The changes that have been made are set forth in the Notes to the several privileges that follow.

The Federal Rules confine the treatment of privilege to Rule 501, which provides (1) that in federal cases privileges shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience (the language⁴⁸ of F.R.Crim.P. 26); and (2) that in actions where state law supplies the rule of decision privileges shall be determined in accordance with state law.

The rules that follow are based in a large measure on the rules with respect to privilege promulgated by the Supreme Court, with some changes made in the Uniform State Law.

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) Definitions. As used in this rule:

⁴⁸ Former language.

- (1) A “client” is:
- (A) A person;
 - (B) A public officer;
 - (C) A corporation;
 - (D) An association; or
 - (E) Any other organization or entity, public or private;

To whom a lawyer renders professional legal services, or who consults with a lawyer with a view toward obtaining professional legal services from the lawyer.

- (2) A “representative of the client” is a person who has authority on behalf of the client to:
- (A) Obtain professional legal services; or
 - (B) Act on advice rendered as part of professional legal services.
- (3) A “lawyer” is:
- (A) A person authorized to practice law in any state or nation; or
 - (B) A person whom the client reasonably believes to be authorized to practice law in any state or nation.
- (4) A “representative of the lawyer” is a person who is employed by the lawyer to assist the lawyer in the rendition of professional legal services.
- (5) A communication is “confidential” if it is made to facilitate the provision of legal services to the client and is not intended to be disclosed to any third party other than those to whom the client revealed the information in the process of obtaining professional legal services.

(b) General rule. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of any confidential communication:

- (1)** Between the client or client's representative and the client's lawyer or lawyer's representative;
- (2)** Between the lawyer and the lawyer's representative;
- (3)** By the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in that pending action concerning a matter of common interest in a pending action;
- (4)** Between the client's representatives, or between the client and his or her representative; or
- (5)** Among the client's lawyers and those lawyers' representatives.

(c) Who may claim the privilege.

- (1)** The privilege may be claimed by:
 - (A)** The client;
 - (B)** The client's guardian or conservator;
 - (C)** The client's personal representative, if the client is deceased; or
 - (D)** An officer, manager, trustee, or other agent authorized to act on behalf of a legal entity—such as a corporation, limited liability company, partnership, or trust—in legal matters or in obtaining the services of, or communicating with, an attorney for the entity, whether or not the entity still exists.
- (2)** There is a presumption that the person who was the lawyer or lawyer's representative at the time of the communication in question has authority to claim the privilege on the client's behalf.

- (d) **Exceptions.** The lawyer-client privilege is subject to the following exceptions:
- (1) *Furtherance of Crime or Fraud.* The lawyer-client privilege does not apply if the client sought or obtained the lawyer's services to help a person plan or commit what the client knew or reasonably should have known was a crime or fraud.
 - (2) *Claimants Through Same Deceased Client.* The lawyer-client privilege does not apply to any communication relevant to an issue between parties who claim through the same deceased client.
 - (3) *Breach of Duty by Lawyer or Client.* The lawyer-client privilege does not cover any communication relevant to an issue of the lawyer's breach of a duty to the client, or of the client's breach of a duty to the lawyer.
 - (4) *Document Attested by Lawyer.* The lawyer-client privilege does not apply to a communication relevant to an issue about a document to which the lawyer is an attesting witness.
 - (5) *Joint Clients.* When a communication is offered in an action between clients who were represented jointly by the lawyer, the lawyer-client privilege does not protect that communication if it is relevant to a matter of common interest between clients, and if the communication was made by any one of the clients to the lawyer retained or consulted as part of a joint representation.
 - (6) *Public Officer or Agency.* The lawyer-client privilege does not apply to communications between a public officer or agency and its lawyers. However, if the court determines that disclosure will seriously impair the public officer's or agency's ability to process a claim or carry out a pending investigation, litigation, or proceeding in the public interest, the lawyer-client privilege will apply to communications concerning the pending investigation, claim, or action.

Maine Restyling Note [November 2014]

Maine Rule 502 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.⁴⁹

Advisers' Note to former M.R. Evid. 502 (February 2, 1976)

There is nothing in this rule that is believed to be contrary to any Maine decision, but there are several matters on which Maine case law is silent.

Subsection (a)(2) defines “representative of the client” as one having authority to obtain legal services and⁵⁰ to act on advice rendered pursuant thereto on behalf of the client. This is an adoption of the so-called “control group” test. It narrows the privilege, confining it to communications by persons of sufficient authority to make decisions for the client. It would not protect communications from lower-level employees to lawyers to enable them to advise a decision-making superior. To illustrate by an example, if a bank teller seeks advice from the bank’s attorney whether to accept as sufficient a particular endorsement, the communication would presumably be privileged because the teller would have authority to act on the advice. If, however, he gave the attorney a statement about a customer slipping on a foreign object as he was presenting a check to be cashed, there would be no privilege. This would be true even though his decision-making superiors directed him to make the statement.

The distinction between a privilege and the work product rule embodied in M.R.C.P. 26(b)(3) should be emphasized. If there is a privilege, disclosure cannot be required either in discovery proceedings or at trial. The work product rule gives a qualified protection to unprivileged information prepared in anticipation of trial,

⁴⁹ When a Rule 502 question is addressed as an ethical issue or obligation, Rule 1.6 of the Maine Rules of Professional Conduct (Confidentiality of Information) should also be reviewed.

⁵⁰ The restyled version of the Rule, as well as the most recent former version of the Rule, utilizes “or” rather than “and.” This difference seems inconsistent with the paragraph. The 1983 Amendment Note says the control group test is maintained, so it is unclear when or why the word “or” was substituted for “and,” and whether it changes the meaning of this part of the Rule.

which can be overcome by a showing of substantial need. It has nothing to do with admissibility at trial.

Subsection (d)(6) denies a privilege between public officers or agencies and their lawyers unless the communication concerns a pending matter and the court determines that disclosure would seriously impair the conduct of the proceeding in the public interest.⁵¹ No Maine law on the subject has been found.

Advisory Committee Note
(February 1, 1983)

In *Upjohn v. U.S.*, 449 U.S. 383, 101 S.Ct. 677 (1981), the United States Supreme Court disapproved of the “control group test” in federal court. The Court declined to attempt to delineate any substitute. Although the control group test is law in a minority of jurisdictions, it appears that there is no consensus in the other jurisdictions as to the best rule to govern the scope of the attorney/client privilege as applied to corporate clients. After carefully reconsidering the matter in 1982, the Advisory Committee has recommended retention of the control group test without change.⁵²

It should be reemphasized that the privilege conferred by Rule 502 is independent of the “work product” doctrine which gives discovery protection to certain kinds of material developed by or under the supervision of an attorney in preparation for litigation. In many cases informational communications from employees outside the control group can be protected from civil discovery by the work product doctrine.

**RULE 503. HEALTH CARE PROFESSIONAL, MENTAL HEALTH
PROFESSIONAL, AND LICENSED COUNSELING
PROFESSIONAL PATIENT PRIVILEGE**

(a) Definitions. As used in this rule:

⁵¹ Rule 502(d)(6) has since been amended to provide exceptions to the “no privilege” statement. Rule 502(d)(6) presently states: “The lawyer-client privilege does not apply to communications between a public officer or agency and its lawyers. However, if the court determines that disclosure will seriously impair the public officer’s or agency’s ability to process a claim or carry out a pending investigation, litigation, or proceeding in the public interest, the lawyer-client privilege will apply to communications concerning the pending investigation, claim, or action.”

⁵² See footnote above about “or” versus “and” language.

- (1) A “patient” is a person who consults, is examined by, or is interviewed by:
- (A) A health care professional;
 - (B) A mental health professional; or
 - (C) A licensed counseling professional.

(2) A “health care professional” is:

- (A) A person authorized to practice as a physician;
- (B) A licensed physician’s assistant; or
- (C) A licensed nurse practitioner;

Under Maine law, or under substantially similar law of any other state or nation, while that person is practicing the health care profession for which he or she is licensed.

(3) A “mental health professional” is:

- (A) A health care professional engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction;
- (B) A person licensed or certified as a psychologist or psychological examiner under Maine state law or under substantially similar law of any state or nation while practicing as such;
- (C) A person licensed as a clinical social worker under Maine state law or under substantially similar law of any state or nation while practicing as such.

(4) A “licensed counseling professional” is:

- (A) A “licensed professional counselor”;

- (B) A “licensed clinical professional counselor”;
- (C) A “licensed marriage and family therapist” or;
- (D) A “licensed pastoral counselor”;

Who is licensed to diagnose and treat mental health disorders, intra- and inter-personal problems, or other dysfunctional behavior of a social and spiritual nature under 32 M.R.S. §13858, or under a substantially similar law of any other state or nation, while that person is practicing the counseling profession for which he or she is licensed.

- (5) A communication is “confidential” if it was not intended to be disclosed to any third persons, other than:
 - (A) Those who were present to further the interests of the patient in the consultation, examination, or interview;
 - (B) Those who were reasonably necessary to make the communication; or
 - (C) Those who are participating in the diagnosis and/or treatment under the direction of the health care, mental health, or licensed counseling professional. This includes members of the patient’s family.

(b) **General rule.** A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of diagnosing or treating the patient’s physical, mental, or emotional condition, including alcohol or drug addiction, between or among the patient and:

- (1) The patient’s health care professional, mental health professional, or licensed counseling professional; and
- (2) Those who were participating in the diagnosis or treatment at the direction of the health care, mental health, or licensed counseling professional. This includes members of the patient’s family.

- (c) **Criminal defendant's privilege.** When the court orders that the defendant's mental condition be examined in order to determine criminal responsibility, the defendant has a privilege to refuse to disclose, and to prevent others from disclosing, any communication made during that examination that concerns the offense charged.
- (d) **Who may claim the privilege.**
- (1) The privilege may be claimed by:
 - (A) The patient;
 - (B) The patient's guardian or conservator; or
 - (C) The patient's personal representative, if the client is deceased.
 - (2) There is a presumption that the person who was the health care, mental health, or licensed counseling professional at the time of the communication in question has authority to claim the privilege on behalf of the patient.
- (e) **Exceptions.** The privilege for communications between a patient and a health care professional, a mental health care professional, or a licensed counseling professional is subject to the following exceptions:
- (1) *Proceedings for hospitalization.* The privilege under this rule does not apply to communications relevant to an issue in proceedings to hospitalize the patient for mental illness if the professional has determined in the course of diagnosis or treatment that the patient needs to be hospitalized.
 - (2) *Examination by order of court.* If the court orders an evaluation of a patient's physical, mental, or emotional condition, whether the patient is a party or a witness, the privilege does not apply to communications made during the course of that evaluation, unless the court orders otherwise. However, a criminal defendant's communications during the course of a court-ordered evaluation or examination are still privileged to the extent provided by section (c) of this rule.

- (3) *Condition an element of claim or defense.* The privilege under this rule does not apply to communications relevant to an issue of a physical, mental, or emotional condition of the patient if:
- (A) The condition is an element of the patient’s claim or defense; or
 - (B) The condition is an element of the claim or defense of:
 - (i) Any party claiming through or under the patient;
 - (ii) Any party claiming because of the patient’s condition;
 - (iii) Any party claiming as a beneficiary of the patient; or
 - (iv) Any party claiming through a contract to which the patient is or was a party.
- (4) *After the patient’s death.* The privilege does not apply after the patient’s death in any proceeding in which any party puts the patient’s physical, mental, or emotional condition in issue.

Maine Restyling Note [November 2014]

Maine Rule 503 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers’ Note to former M.R. Evid. 503

(February 2, 1976)

There was no doctor-patient privilege at common law. There is at the present time a statutory privilege. P.L. 1973, c. 625, § 218. It is a dubious protection to the confidentiality of the relationship, since disclosure would be required “when a court in the exercise of sound discretion deems such disclosure necessary to the proper administration of justice.” Under this formulation no clear assurance to the patient could be given before the communication was made that it would not be ordered to be disclosed.

The rule as promulgated by the Supreme Court did not provide a general doctor-patient privilege, but did define “psychotherapist” so as to include any physician while engaged in the diagnosis or treatment of a mental or emotional condition. The American Medical Association objected to the rejection of the privilege at hearings on the House bill. It did not advocate an unrestricted privilege. It was satisfied that no protection should be given to communications relevant to the patient’s condition in an action where the condition was an element of his claim or defense. The Court has adopted a physician-patient privilege in the limited form recommended by the AMA. This is comparable to the exception in the Maine statute of actions “when the physical or mental condition of the patient is at issue.” Elimination of the open-ended denial of the privilege at the discretion of the court does not sacrifice any value of importance to the administration of justice, and it relieves the uncertainty in the statute as to the extent of the confidentiality. The rule incorporates the statutory privileges of the psychologist or psychological examiner, 32 M.R.S.A. § 3815,⁵³ added by P.L. 1968, c. 544, § 82, and the psychiatrist, 16 M.R.S.A. § 60,⁵⁴ added by P.L. 1973, c. 481. It has omitted the statutory requirement that a psychiatrist must be “board certified”. In fact, board certification is not required as a condition of a psychiatrist’s right to practice. The statute on psychologists and psychological examiners has no such requirement. There is no apparent justification for the distinction, nor does it seem right to put upon the patient the burden of discovering whether the psychiatrist is board certified in order to know whether his communications are privileged.

Other changes from the statutes in the rule correct statutory deficiencies (1) declaring “communications” privileged without reference to confidentiality, (2) not including communications to a person reasonably believed to be a psychotherapist, (3) not including the right of a guardian, conservator, or personal representative to claim the privilege or in terms giving a psychotherapist authority to claim it on behalf of the patient, and (4) not including the exceptions listed in the rule. These changes flesh out the legislative intent and are consistent with that intent.

The definition of confidentiality in subdivision (a)(4)⁵⁵ and the statement in subdivision (b)⁵⁶ of the general rule of privilege are broad enough to include the

⁵³ This statute has been repealed.

⁵⁴ This statute has been repealed.

⁵⁵ Now subsection (a)(5).

increasingly common use of group therapy where other patients are present during the communication. Such persons would be participating in the diagnosis or treatment under the direction of the psychotherapist.

Subdivision (c) gives separate treatment to an examination ordered by the court to determine the criminal responsibility of an accused in a criminal proceeding. The purpose is to ensure protection against disclosure of any communication made to the examiner concerning guilt or innocence. It preserves the rule enunciated in *State v. Hathaway*, 161 Me. 255, 211 A.2d 558 (1965). The exception in subdivision (d)(2)⁵⁷ excludes from its operation communications privileged under subdivision (c).

Advisory Committee Note
(July 2008)

This amendment would expand the coverage of the physician-psychotherapist privilege in Rule 503 to include communications between certain described mental health professionals and their patients or clients.

When various pre-existing, common-law, and statutory privileges were codified in the Rules of Evidence in 1975, the Advisory Committee and the Maine Supreme Judicial Court followed the lead of the original United States Supreme Court version of the Federal Rules of Evidence and took a relatively conservative view of the scope of the physician-psychotherapist privilege. Maine Evidence Rule 503 as originally adopted limited the evidentiary privilege to communications to or from licensed physicians (or persons reasonably believed to be such) and licensed psychologists and psychological examiners. Although then, as now, a wide variety of counseling and mental health professionals treated and consulted with clients and patients on a confidential basis, coverage of the privilege was deliberately kept relatively narrow, largely out of a concern that a broader definition might lead to evidentiary unavailability of statements rendered in a variety of situations that could be characterized as counseling or therapeutic in one way or another.

⁵⁶ Now subsection (b)(2).

⁵⁷ Now subsection (e)(2).

This does not mean that there has been no protection of confidentiality for patients and mental health professionals. In many cases the statutes under which different groups of mental health professionals or counselors are licensed have imposed duties of confidentiality and have established statutory privileges for members of the licensed groups. In many cases these statutory privileges authorize disclosure by court order when necessary for the sound administration of justice.

Over the three decades since original promulgation of the Rules of Evidence the number and scope of activity of many different kinds of mental health professionals and counselors have greatly increased. There has been a frequent and often insistent call for stronger protection of the relationships of these therapists and counselors to their patients in the form of extension of the statutory privilege.

The impetus toward extension of the psychotherapist privilege beyond the traditional holders was increased by the Supreme Court decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). There the Supreme Court ruled as a matter of federal common law of evidence that communications between a clinical social worker and her patient were absolutely privileged from disclosure despite their likely relevance to the issues in a civil action. The Supreme Court applied the absolute privilege despite the existence of conditional protection under the laws of the state under which the social worker was licensed.

Today evidence rules, statutes, and common law among the American jurisdictions vary widely in the scope of the psychotherapist privilege, although it appears that the trend is toward a more expansive privilege in terms of mental health and counseling professionals covered. The Uniform Rules of Evidence have been recently amended in 1999 to include an alternative proposal extending the psychotherapist privilege to a “mental health provider,” namely “a person licensed or reasonably believed by the patient so to be while engaged in the diagnosis or treatment of a mental or emotional condition including alcohol or drug addiction.”

The pressure for increased coverage appears to be coming mainly from two groups: (1) various clinical social workers and licensed mental health professionals who provide therapy for mental or emotional disease including drug and alcohol addiction; (2) a broader group of professional counselors who provide various kinds of counseling services, but who do not necessarily treat mental or emotional diseases or addictions.

The proposed amendment would extend the absolute evidentiary privilege to licensed nurse practitioners and licensed physician’s assistants when treating patients. The privilege would also encompass licensed clinical social workers when treating emotional and mental conditions and four defined classes of licensed counseling professionals, “licensed professional counselors,” “licensed clinical professional counselors,” “licensed marriage and family therapists,” and “licensed pastoral counselors,” when performing their counseling functions. Valid and complete licensure would be a prerequisite for the privilege.

Clinical social workers are licensed under 32 M.R.S. §§ 7051 et seq. Of the various kinds of social workers covered by state licensing requirements, those designated and licensed as “clinical social workers” seem best to fit the traditional role of psychotherapist as contemplated by the privilege. *See Jaffee v. Redmond, supra.*

The licensed counseling professionals proposed to be covered by the privilege are now licensed under 32 M.R.S. §§ 13851 et seq. These licensed counselors provide different forms of psychotherapy in at least some circumstances. Such professionals are currently covered by a conditional privilege which permits disclosure of client communications “when a court in the exercise of sound discretion determines the disclosure necessary to the proper administration of justice.” 32 M.R.S. § 13862. The rule does not cover professionals not licensed but referred to in 32 M.R.S. § 13856.

This proposal does not cover communications to and by unlicensed mental health professionals and counselors or by persons licensed to provide specialized counseling, such as guidance counseling. The Committee is of the view that a generic definition that is not tied to some kind of clear requirement of state licensure would make the privilege administratively unworkable. For the same reason the Committee has not recommended that the privilege attach to persons “reasonably believed to be” licensed clinical social workers or licensed counselors. The privilege would extend to persons not licensed in Maine, but licensed in analogous categories with substantially similar legal requirements by other states or nations.

RULE 504. SPOUSAL PRIVILEGE

(a) Definition. A communication by a married person is confidential if:

(1) The person makes it privately to the person’s spouse, and

- (2) The person making it does not intend for it to be disclosed to any other person.
- (b) **General rule.** A married person has a privilege to prevent the person's spouse from disclosing the contents of any confidential communication between the person and the spouse.
- (c) **Who may claim the privilege.** The person who made the communication can claim the privilege. The spouse also has presumptive authority to claim the privilege on the person's behalf.
- (d) **Exceptions.** The spousal privilege is subject to the following exceptions:
- (1) The spousal privilege does not apply in a proceeding in which one spouse is charged with a crime against the person or property of:
- (A) The other spouse;
 - (B) A child of either spouse;
 - (C) Any person residing in either spouse's household; or
 - (D) Any third person, if the crime against that person or property occurred in the course of committing a crime against the other spouse, a child of either spouse, or any person residing in either spouse's household.
- (2) The spousal privilege does not apply in a civil proceeding when the spouses are adverse parties.

Maine Restyling Note [November 2014]

Maine Rule 504 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 504
(February 2, 1976)

This rule preserves 15 M.R.S.A. § 1315, which makes the spouse of an accused a competent witness in a criminal proceeding except in regard to “marital communications”. This phrase has been § 1315, which makes the spouse construed to mean confidential communications. *State v. Benner*, 284 A.2d 91 (1971) (where the court assumed without deciding that the privilege comprehends conduct other than verbal exchanges). The rule also preserves the common law privilege recognized in Maine case law. *Walker v. Sanborn*, 46 Me. 470 (1859). The basis of the privilege was stated to be principles of public policy to preserve the peace of domestic life. It does not apply when the parties are hostile to each other and are living apart under articles of separation when the communication is made. *Holyoke v. Holyoke's Estates*, 110 Me. 469, 87 A. 40 (1913).

Subdivision (d) gives no privilege if one spouse is charged with a crime against the other, a child of either, any person residing in the household of either, or a third person committed in the course of committing a crime against any of them. Nor is there any privilege in civil proceedings between the parties, such as divorce. The rule appears to be consistent with Maine law, although there are some points not covered by decisions.

The rule as promulgated by the Supreme Court was markedly different. It recognized a privilege of an accused in a criminal proceeding to keep his or her spouse off the witness stand (with the exceptions later listed). It did not recognize any privilege for confidential communications between the spouses either in a criminal case, if the accused does not exercise the privilege to prevent the spouse from testifying, or in a civil action.

RULE 505. RELIGIOUS PRIVILEGE

(a) Definitions. As used in this rule:

- (1)** A “member of the clergy” is an individual who has been ordained or accredited as a spiritual advisor, counselor, or leader by any religious organization established on the basis of a community of faith and belief, doctrines, and practices of a religious character, or an individual reasonably believed so to be by the person consulting that individual.

- (2) A communication is “confidential” if:
 - (A) It is made privately; and
 - (B) It is not intended for disclosure other than to other persons present in furtherance of the purpose of the communication.
- (b) **General rule.** A person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made to a member of the clergy who was acting as a spiritual adviser at the time of the communication.
- (c) **Who may claim the privilege.** The privilege can be claimed by:
 - (1) The person who made the communication;
 - (2) The person’s guardian or conservator; or
 - (3) The person’s personal representative, if the person is deceased.

The person who was a clergy member at the time of the communication also has presumptive authority to claim the privilege on behalf of the person who made the communication.

Maine Restyling Note [November 2014]

Maine Rule 505 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule. Among the changes recommended for the Maine privileges was to Rule 505. The definition of “member of the clergy” has been revised to be inclusive of all religions, but the language remains restrictive in ensuring that the privilege may not be applied to communications with members of the clergy who are not specifically certified or ordained by a religious community. Thus, communications involving lay practitioners who participate in teaching or advisory roles, for example, would not fall under the privilege.

Advisers' Note to former M.R. Evid. 505
(February 2, 1976)

There is a statutory privilege for penitential communications to clergymen. 16 M.R.S.A. § 57,⁵⁸ added by P.L. 1965, c. 117. This rule accepts the privilege but modifies it slightly to conform to the style of the other privilege rules. The definition of clergyman is changed to include a person reasonably believed to be one by the person consulting him. The privilege protects a communication to a clergyman in his professional character as spiritual adviser but does not require, as the statute does, that it be “made in the course of the discipline or practice of the church or religious denomination or organization of which the penitent is a member.” There seems to be no good reason not to include within the privilege a confidential communication made to a spiritual adviser as such even though the penitent was not a member of his church or denomination. The rule is designed to protect the confidentiality of communications on a wide variety of ethical and moral issues.

RULE 506. POLITICAL VOTE

- (a) **General rule.** Every person has a privilege to refuse to disclose his or her own vote at a political election conducted by secret ballot.
- (b) **Exceptions.** The privilege does not apply if the court:
 - (1) Finds that the vote was cast illegally; or
 - (2) Determines that the disclosure should be compelled pursuant to state election laws.

Maine Restyling Note [November 2014]

Maine Rule 506 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

⁵⁸ This statute has been repealed.

Advisers' Note to former M.R. Evid. 506
(February 2, 1976)

A privilege not to disclose the tenor of one's vote appears to be universally recognized although there are no Maine cases on the point. The privilege is not applicable if the vote was cast illegally. Of course, the privilege against self incrimination would be available under appropriate circumstances.

RULE 507. TRADE SECRETS

(a) General rule. A person has a privilege to refuse to disclose, and to prevent any other person from disclosing, a trade secret that the person owns.

(b) Who may claim the privilege. The privilege may be claimed by:

- (1)** The person who owns the trade secret;
- (2)** The person's agent; or
- (3)** The person's employee.

(c) Exceptions. The trade secrets privilege does not apply if it will conceal fraud or otherwise work injustice. If the court directs that the trade secret be disclosed, it must take measures to protect the interests of the trade secret's owner, the other parties, and justice.

Maine Restyling Note [November 2014]

Maine Rule 507 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 507
(February 2, 1976)

This privilege is widely recognized. No Maine case has been found, but M.R.C.P. 26(c) allows the judge in discovery proceedings to make any order which justice requires including an order "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." This evidence rule extends the underlying policy from

the discovery stage into the trial. The difference in circumstances between the two stages may well be enough to require a different ruling at trial.

The privilege is a limited one. Patents and copyrights secure ample protection when they are obtainable. The need for protection of trade secrets without resort to public registration is relatively rare, and Wigmore says the presumption should be against their propriety. The rule allows the privilege only if it will not tend to conceal fraud or otherwise work injustice.

The last sentence of the rule gives room for judicial ingenuity in evolving protective measures to achieve some control over disclosure. Perhaps the most common is simply to take the testimony in camera.

RULE 508. SECRETS OF STATE AND OTHER OFFICIAL INFORMATION; GOVERNMENTAL PRIVILEGES

- (a) **Privilege.** If the federal or Maine constitution, or a federal or Maine statute, creates a governmental privilege, a person may claim the privilege pursuant to the applicable provision of law. There is no other governmental privilege.
- (b) **Effect of sustaining a claim of governmental privilege.** If the court sustains a claim of governmental privilege and thereby appears to deprive another party of material evidence, the court must make any orders required by the interests of justice. These orders may include:
 - (1) Striking the testimony of a witness;
 - (2) Declaring a mistrial;
 - (3) Making a finding on an issue as to which the evidence was relevant;
or
 - (4) Dismissing the action.

Maine Restyling Note [November 2014]

Maine Rule 508 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 508
(February 2, 1976)

Most of the problems in this field arise in federal litigation, and this rule reflects a decision to steer as clear of the problem as possible. It recognizes, as it must do, a privilege created by federal law to the extent that the Constitution requires and says that it may be claimed as provided by federal law. No other governmental privilege is recognized except as created by the Constitution or a statute of this state.

RULE 509. IDENTITY OF INFORMANT

(a) Rule of privilege and definitions.

(1) *Rule of privilege.* The United States, a state or subdivision thereof, or any foreign country has a privilege to refuse to disclose the identity of an informant.

(2) *Definitions.* As used in this rule, an “informant” is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to:

(A) A law enforcement officer conducting an investigation; or

(B) A member of a legislative committee or its staff conducting an investigation.

(b) Who may claim the privilege. An authorized representative of the public entity that received the information may claim the privilege.

(c) Exceptions. The privilege of the identity of an informant does not apply if:

(1) The informant’s identity or his or her interest in the investigation has already been revealed to those who might resent the communication; or

(2) The informant appears as a witness for the state.

(d) Testimony on relevant issue. If it appears that an informant may be able to give relevant testimony in a civil or criminal case to which a public entity is

a party, the public entity may invoke the privilege. If the public entity invokes the privilege:

- (1)** The court may give the public entity an opportunity to show, in camera and on the record, whether the informant can, in fact, supply the relevant testimony. The showing may be in the form of affidavits or, if the court finds that the matter cannot be satisfactorily resolved with affidavits, through testimony.
- (2)** If the court finds that there is a reasonable probability that the informer can give relevant testimony, the court may, either on its own or on motion of a party, enter an order requiring the public entity to disclose the identity of the informant within a specific time and providing relief to other parties in the event the public entity elects not to disclose the identity of the informant within the time specified.
 - (A)** In a criminal case, the relief may include one or more of the following:
 - (i)** Granting the defendant additional time or a continuance;
 - (ii)** Relieving the defendant from making disclosures otherwise required;
 - (iii)** Prohibiting the prosecution from introducing certain evidence; and
 - (iv)** Dismissing the charges.
 - (B)** In a civil case, the court may provide any relief required in the interests of justice.
 - (C)** When ordering relief, the court shall ensure that:
 - (i)** Evidence submitted to the court must be sealed and preserved for appeal;
 - (ii)** A docket entry specifying the form, but not the content, of the evidence must be made; and
 - (iii)** All counsel and parties may be present at every stage of the proceedings under this rule, except that, at a showing in camera, only counsel for the public entity may be

present.

Maine Restyling Note [November 2014]

Maine Rule 509 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 509 (February 2, 1976)

The privilege of the state to refuse to disclose the identity of an informer is well settled in Maine as elsewhere. *State v. Fortin*, 106 Me. 382, 76 A. 896 (1910). It reflects a recognition that effective use of informers in law enforcement compels protection of their anonymity. It is only the identity of the informer that need not be revealed. The content of what he says is not privileged except to the extent necessary to conceal his identity. The reference to “any foreign country” is designed especially to preserve the privilege of Canadian police officials not to disclose the identity of an informer.

The exceptions to the privilege set forth in subdivision (c)⁵⁹ seem entirely reasonable although there is no Maine case law dealing with them. When the informer’s identity has been disclosed to “those who would have cause to resent the communication”, a phrase from *Roviaro v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 627 (1957), there is no longer a reason for the privilege. The same is true if the informer appears as a witness. Subsection (c)(2)⁶⁰ is built chiefly from the teachings of *Roviaro v. United States*, *supra*, the leading case. The informer privilege cannot be used to suppress the identity of a witness when the right of the accused to prepare his defense outweighs the public interest in protecting the flow of information. The rule lays out a procedure for determining whether the informer can supply relevant testimony, including proceedings *in camera* at the state’s request, with a provision for sealing and preserving evidence so as to make it available in event of an appeal. An appeal in which the appellant cannot know

⁵⁹ Now subsections (c) and (d), and including more in (c)(2) as part of the restyling.

⁶⁰ Now subsection (d).

what the sealed evidence is poses obvious practical difficulties, but there is at least some possibility of effective review. The rule further prescribes what happens when the state elects not to disclose the informer's identity. The usual result in a criminal case would be a dismissal of the charges, but there are other options open to the court.

Advisory Committee Note
(February 1, 1983)

The procedure set forth in Rule 509(c)(2)⁶¹ applies when the informer may be able to give testimony relevant to any issue in a criminal case, including suppression of evidence. See *State v. Chase*, 439 A.2d 526 (Me. 1982).

RULE 510. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

(a) General rule. A person who has a privilege under these rules waives the privilege if the person or the person's predecessor while holding the privilege voluntarily discloses or consents to the disclosure of any significant part of the privileged matter.

(b) Exception. This rule does not apply if the disclosure is itself privileged.

Maine Restyling Note [November 2014]

Maine Rule 510 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 510
(February 2, 1976)

The proposition that a privilege is waived by voluntary disclosure is universally recognized.

⁶¹ Now subsection (d).

**RULE 511. PRIVILEGED MATTER DISCLOSED UNDER
COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM
THE PRIVILEGE**

A privilege is not waived by a disclosure that was:

- (a) Compelled erroneously; or
- (b) Made without opportunity to claim the privilege.

Maine Restyling Note [November 2014]

Maine Rule 511 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 511
(February 2, 1976)

When disclosure of privileged matter has been erroneously compelled or has been made without an opportunity for the holder to claim it, the confidentiality cannot be restored. This rule gives, however, the remedy of excluding the evidence if later offered in evidence against the holder. It may be argued that the holder should stand his ground when the privilege is wrongly denied him, refuse to answer, take the consequences including a judgment of contempt, and exhaust all his legal remedies. But, in the words of the Federal Advisory Committee, "this exacts of the holder greater fortitude in the face of authority than ordinary individuals are likely to possess, and assumes unrealistically that a judicial remedy is always available." It is well settled in self-incrimination cases that a disclosure erroneously compelled cannot be used in a subsequent criminal prosecution against the holder. The principle is equally sound when applied to other privileges.

Illustrations of disclosure without opportunity to claim the privilege are disclosure by an eavesdropper, by a person used in the transmission of a privileged communication and by a person participating in group therapy under the direction of a psychotherapist. The rule deals only with disclosure of privileged matter. It does not affect the determination of what is or is not privileged. The law is in a state of flux as to whether this prohibition against disclosure of a communication from attorney to client or from one spouse to the other extends to persons who

obtain knowledge of it by overhearing it either by eavesdropping or accidentally. The traditional view is that the communication is not privileged since the means of preserving secrecy are largely of the person making the communication. Wigmore, Evidence, § 2326 (attorney-client), § 2339(1) (husband-wife). The Uniform Rules of Evidence (1953) couch the attorney-client privilege so as to apply it if knowledge of the communication came to the witness in a manner not reasonably to be anticipated by the client. There are no Maine decisions on the subject. In any event, this rule is inapplicable if the matter is not privileged. If it is privileged, the holder has the right to prevent disclosure, and the evidence is inadmissible against the holder, provided, of course, that he objects when it is offered at trial.

RULE 512. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE IN CRIMINAL CASES; INSTRUCTION

- (a) **Comment or inference not permitted.** The claim of a privilege is not a proper subject of comment by either a judge or counsel in a criminal case, regardless of whether the privilege was claimed in the present proceeding or on a prior occasion. The fact finder may not draw any inference from the claim of privilege.
- (b) **Claiming privilege outside the hearing of the jury.** In criminal jury trials, proceedings shall be conducted, to the extent practicable, so as to allow privilege claims to be made outside of the hearing of the jury.
- (c) **Jury instruction.** Unless waived, any criminal defendant who has claimed a privilege is entitled to an instruction that no inference may be drawn from the claim of privilege.

Maine Restyling Note [November 2014]

Maine Rule 512 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule and make it consistent with Maine precedent. See *State v. Libby*, 410 A.2d 562, 564 (Me. 1980); Alexander, *Maine Jury Instruction Manual* § 6-8 at 116 (2014 ed.).

Advisers' Note to former M.R. Evid. 512
(February 2, 1976)

This rule is consistent with Maine law so far as the privilege against self-incrimination is concerned. It is provided in 15 M.R.S.A. § 1315 that the fact an accused does not testify in his own behalf shall not be taken as evidence of guilt, and that the accused is entitled to an instruction to that effect. If a claim of privilege is not a proper subject for comment or inference, it follows that proceedings for making the claim should, to the extent practicable, not be conducted in the presence of the jury. It is especially important not to allow the jury to hear a claim of privilege by a nonparty witness. An inference against a party from a claim of privilege over which he has no control is clearly unfair. This is also in accord with Maine law. In *State v. Robbins*, 318 A.2d 51, 57 (Me. 1974), the Law Court said: “It is desirable that a witness’ invocation of the privilege before the jury is to be avowed, though it is not per se prejudicial.” Usually it is ascertainable in advance whether a privilege will be claimed, but unforeseen situations are bound to arise. Much must be left to the discretion of the trial judge and the professional responsibility of counsel. Since opinions will differ as to whether a jury instruction not to draw an adverse inference will be helpful or harmful, subdivision (c) leaves it to the judgment of counsel for the accused whether to request it. It is a matter of right if requested.

RULE 513. CLAIM OF PRIVILEGE IN CIVIL CASES

- (a) **Comment permitted.** In a civil action, a party’s claim of the privilege against self-incrimination is a proper subject of comment by a judge or by counsel, regardless of whether the party claimed the privilege in the present proceeding or on a prior occasion.
- (b) **Inference permitted.** In a civil action, the fact finder may draw an appropriate inference from a party’s claim of the privilege against self incrimination.
- (c) **Claim of privilege by a nonparty witness.** Rule 512 governs a nonparty witness’s claim of privilege in a civil action or proceeding.
- (d) **Claim of privilege other than the privilege against self-incrimination.** Rule 512 governs any party’s or witness’s claim of any privilege other than the privilege against self-incrimination in a civil action or proceeding.

Maine Restyling Note [November 2014]

Maine Rule 513 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

Advisers' Note to former M.R. Evid. 513

(February 2, 1976)

This rule allows an adverse inference from a claim of privilege by a party in a civil case and permits comment upon it by the judge or counsel. It is not clear under Maine law whether such inference and comment are permissible. There is a suggestion in *Hinds v. John Hancock Mut. Life Ins. Co.*, 155 Me. 349, 374, 155 A.2d 721, 735 (1959), that an inference is improper. The majority of the surprisingly few cases in other jurisdictions dealing with the question allow inference and comment. See *Kaye v. Newhall*, 356 Mass. 300, 249 N.E.2d 583 (1969).

Since the rule allows an adverse inference from the claim, the procedure under Rule 512 for making the claim out of the jury's hearing would be wholly inappropriate. Indeed, the failure to ask in the hearing of the jury a question to which a privilege claim could be raised might itself lead to an inference against the party who did not ask it.

Subdivision (b)⁶² recognizes the difference between a claim a party in a civil case and a claim by a nonparty witness. It treats a nonparty witness the same in a civil case as in a criminal proceeding and does not allow inference or comment.

The rules as promulgated by the Supreme Court made no distinction between civil and criminal cases and did not allow adverse comment or inference in either.

⁶² Now subsection (c).

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.

RULE 514. MEDIATOR'S PRIVILEGE

(a) Definitions. As used in this rule:

- (1)** A "mediating party" is a person who is participating in mediation as a party or as a party's representative, regardless of whether the subject matter of the mediation 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, regardless of whether the dispute is the subject of litigation.
- (3)** A "mediator" is a neutral person conducting the mediation proceeding.

This rule is subject to any state and federal statutes and regulations of mediations taking place pursuant to such statutory authority.

(b) General rule.

- (1)** A mediator has a privilege to refuse to testify in any proceeding concerning a mediation or any communication between the mediator and a participant in the mediation that was made during the course of, or that related to the subject matter of, any mediation.
- (2)** All memoranda and other work product—including files, reports, interviews, case summaries, and notes—prepared by a mediator are confidential and are not subject to disclosure in any judicial or administrative proceeding involving any of the parties to the mediation in which the materials were generated.

(c) Exceptions. The mediator’s privilege does not apply:

- (1)** *Mediated agreement.* To a communication in an agreement evidenced by a record signed by the parties to the agreement.
- (2)** *Furtherance of crime or fraud.* If the mediating party who made the communication sought or obtained the mediator’s services to enable or aid anyone to plan, commit or conceal what the mediating party knew or reasonably should have known to be a crime or fraud.
- (3)** *Plan to inflict harm.* To threats or statements of intention to inflict bodily injury or commit a crime.
- (4)** *Mediator misconduct.* To communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice by the mediator.
- (5)** *Party or counsel misconduct.* To communications sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice by a mediation party, nonparty participant, or a party’s representative based on conduct that occurred during a mediation.
- (6)** *Welfare of child or adult.* In a criminal proceeding or a child or adult protective action, to communications sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation.

- (7) *Manifest injustice.* If, after a hearing in camera, a court, administrative agency, or arbitrator finds that the disclosure of a communication is necessary in a particular case to prevent a manifest injustice, and that the need for disclosure outweighs the importance of protecting the general requirement of mediation confidentiality.

Maine Restyling Note [November 2014]

Maine Rule 514 has been restyled in accordance with the federal restyling conventions, and, as part of this process, the Committee has proposed some minor, nonsubstantive changes to clarify the Rule.

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 section⁶³ makes the records of the mediator confidential and not subject to disclosure in subsequent proceedings that involve the mediating parties. The second clause⁶⁴ 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

⁶³ Now specifically at (b)(2).

⁶⁴ Now specifically at (b)(1).

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.

ARTICLE VI. WITNESSES

RULE 601. COMPETENCY TO TESTIFY IN GENERAL

- (a) Every person is competent to be a witness unless these rules provide otherwise.
- (b) A person may not be a witness if the court finds that:
 - (1) The person cannot communicate about the matter so that the judge and jury can understand, either directly or through an interpreter;
 - (2) The person cannot understand the duty, as a witness, to tell the truth;
 - (3) The person had no reasonable ability to perceive the matter; or
 - (4) The person has no reasonable ability to remember the matter.

Maine Restyling Note [November 2014]

Maine's Rule 601 departs fairly significantly from its federal counterpart in establishing specific criteria for competency as a witness in the rule itself. These specific requirements have been carried over into the restyled version.

Federal Restyling Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisory Note – June 2015

This amendment deletes subdivision (c) of Rule 601 as redundant and unnecessary. The qualification and swearing of an interpreter as a witness is explicitly covered by Rule 604. There does not appear to be any good reason to provide in Rule 601 as well that an interpreter is subject to the rules relating to witnesses.

Advisers' Note to former M.R. Evid. 601
(February 2, 1976)⁶⁵

This rule eliminates all grounds of incompetency except those specifically recognized in the rules that follow. The only significant change is the abolition of the Dead Man's Act. 16 M.R.S.A. § 1 et seq. The reason behind the exclusion of a survivor's testimony concerning a transaction of a decedent when offered against the latter's estate was that "where death has closed the mouth of one party, the law seeks to make an equality by closing the mouth of the other." *Wilson v. Wilson*, 157 Me. 119, 123, 170 A.2d 679, 682 (1961). The rule reflects the belief that this surviving relic of the common law disqualification of parties as witnesses leads to more miscarriages of justice than it prevents. The Act manifests the cynical view that a party will lie when he cannot be directly contradicted and the unrealistic assumption that jurors, knowing the situation, will believe anything they hear in these circumstances. It has already been eroded by exceptions. 16 M.R.S.A. § 1, exceptions 1 through 6, and most important, 16 M.R.S.A. § 59, added by P.L. 1967, c. 406, which made the disqualification inapplicable in actions for personal injury or wrongful death. This eliminated one of the most controversial aspects of the Act. This rule does away with the rest of it.

Subdivision (b) is declaratory of Maine law.⁶⁶ *State v. Brewer*, 325 A.2d 26 (Me. 1974). It allows the trial judge to decide as a preliminary question whether a proposed witness is capable of expressing himself understandably and of understanding the duty to tell the truth. The trend is increasingly to resolve doubts in favor of letting the jury hear the evidence and appraise its credibility.

The Federal Rule is the same as subdivision (a) except that it provides for competency of a witness to be determined in accordance with state law in civil actions in which state law applies the rule of decision. This follows the same pattern as the Federal Rules on privilege. Subdivision (b) has no counterpart in the Federal Rule.

⁶⁵ All of the statutes referenced in this Adviser's Note have been repealed.

⁶⁶ This paragraph of the Advisers' Note has been superseded by the 1990 amendment—see the 1990 Advisory Committee Note herein.

Advisory Committee Note
(April 1990 Amendment)

Under former Rule 601 as construed by the Law Court in *State v. Hussey*, 521 A.2d 278 (Me. 1987) the competency of a proposed witness is established by a finding by the trial judge that the witness (a) can express himself understandably, and (b) understands the duty to tell the truth. On appeal the trial court's finding is reviewable for clear error.

Prior to the adoption of the Rules, a trial judge's determination of the competency of a witness to testify was reviewable for abuse of discretion. Presumably if the trial judge thought under all the circumstances that the proposed witness's testimony would not be reliable, he could refuse to let him or her testify at all. Under Rule 601 as construed in *Hussey*, a proposed witness could be disqualified from testifying only if the trial court made the finding that the witness either could not express himself or could not understand the duty to tell the truth.

If testimonial competency is to be determined by a simple preliminary finding, the threshold requirements for testimony should include the ability to perceive and remember. Certainly perception and memory are vital to a witness's ability to bear testimony. These abilities or lack of them are often the subject matter of attacks on witness credibility. The rule as amended will screen out a witness who had no reasonable ability to perceive facts and reliably remember them. It is not intended to permit the trial judge to rule on the credibility of a witness in advance by not permitting the witness to testify.

At the time Rule 601 was enacted the Advisory Committee did not believe it was changing Maine law. The Advisor's Notes to Rule 601 as originally enacted reads:

Subdivision (b) is declaratory of Maine law. *State v. Brewer*, 325 A.2d 26 (Me. 1974). It allows the trial judge to decide as a preliminary question whether a proposed witness is capable of expressing himself understandably and of understanding the duty to tell the truth. The trend is increasingly to resolve doubts in favor of letting the jury hear the evidence and appraise its credibility.

The then leading case, *State v. Ranger*, 149 Me. 52, 56 (1953) specifically refers to the ability to perceive and articulate in the following terms:

The proposed child witness should know the difference between truth and falsehood, and apparently must be able to receive accurate impressions of facts, and be able to relate truly the impressions received. The child witness should have sufficient capacity to understand, in some measure, the obligation of an oath; or to realize that it is wrong to falsify, and that if he does tell an untruth he is likely to be punished.

Although Rule 601 applies to all witnesses, it will be most frequently applied to children as proffered witnesses. The younger the potential witness, the more conscious should be the inquiry into whether the witness is able to perceive and relate sufficiently reliably so as to be a conduit for information into the courtroom.

Although the trial court may generally conduct voir dire on the competence of a witness outside the presence of the jury, that should not preclude a party from addressing the credibility and weight of the witness' testimony by similar questions on cross examination.

The proposed amendment deletes the reference to interpreters from Rule 601.⁶⁷ Interpreters are specifically regulated by Rule 604.

RULE 602. NEED FOR PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

Maine Restyling Note [November 2014]

Maine Rule 602 and Federal Rule 602 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

⁶⁷ Interpreters are now the subject of Rule 601(c), as well as Rule 604.

Federal Restyling Committee Note

The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 602 (February 2, 1976)

This rule is universally accepted. The burden of laying a foundation that the witness had an adequate opportunity to observe is on the proponent of the testimony. By failing to object the opponent waives the preliminary proof but not the substance of the requirement. If it later appears that the witness did not actually observe a fact as to which he testified, the testimony will be stricken on motion. The reference to Rule 703 is designed to avoid any possibility of conflict between this rule and the rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

RULE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

Before testifying, a witness must give an oath or affirmation to testify truthfully. The oath or affirmation must be in a form designed to impress that duty on the witness's conscience.

Maine Restyling Note [November 2014]

Maine Rule 603 and Federal Rule 603 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Restyling Committee Note

The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be

stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 603
(February 2, 1976)

This rule is in accord with Maine law 16 M.R.S.A. § 55 (no incompetency on account of religious belief; atheist may testify under solemn affirmation and is subject to pains and penalties of perjury);⁶⁸ 1 M.R.S.A. § 72(1)⁶⁹ (a person conscientiously scrupulous of taking an oath may affirm).

RULE 604. INTERPRETERS

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Maine Restyling Note [November 2014]

Maine Rule 604 and Federal Rule 604 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Restyling Committee Note

The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

⁶⁸ This statute has been repealed.

⁶⁹ Now at 1 M.R.S. § 72(1-A) (2014).

Advisers' Note to former M.R. Evid. 604
(February 2, 1976)

This rule implements M.R.C.P. 43(1) and M.R. Crim. P. 28(b), both of which provide for the appointment and compensation of interpreters.

RULE 605. JUDGE'S COMPETENCY AS A WITNESS

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

Maine Restyling Note [November 2014]

Maine Rule 605 and Federal Rule 605 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Restyling Committee Note

The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 605
(February 2, 1976)

This broad rule of a judge's incompetency as a witness in a trial at which he is presiding is plainly sound if the highly unlikely occasion for its use should arise. The automatic objection in the last sentence makes an actual objection unnecessary so that an objector's rights are preserved without the possible risk of antagonizing the judge before whom the trial would continue.

RULE 606. JUROR'S COMPETENCY AS A WITNESS

(a) **At the trial.** A juror may not testify as a witness before any jury drawn from the panel of which the juror was a member. If a juror is called to

testify, the court must give any party an opportunity to object outside the jury's presence.

(b) During an inquiry into the validity of a verdict or indictment.

(1) *Prohibited testimony or other evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about:

- (A)** Any statement made or incident that occurred during the jury's deliberations;
- (B)** The effect of anything on that juror's or another juror's vote; or
- (C)** Any juror's mental processes concerning the verdict or indictment.

The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) *Exceptions.* A juror may testify about whether:

- (A)** Extraneous prejudicial information was improperly brought to the jury's attention; or
- (B)** An outside influence was improperly brought to bear on any juror.

Maine Restyling Note [November 2014]

Maine Rule 606 is substantially similar to Federal Rule 606, except that the Maine Rule includes language broadening the contexts in which a juror may not be called as a witness. Also, Maine has not adopted an exception to 606(b)(2) for testimony about a mistake in entering the verdict on a verdict form.⁷⁰ These distinctions have been carried over as part of the restyling process.

⁷⁰ See *State v. Hurd*, 2010 ME 118, ¶¶ 31-45, 8 A.3d 651; *Taylor v. Lapomarda*, 1997 ME 216, ¶¶ 5-10, 702 A.2d 685.

Federal Restyling Committee Note

The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 606 (February 2, 1976)

Subdivision (a) is based upon considerations similar to the rule declaring the trial judge to be incompetent as a witness.

Subdivision (b) is in accord with Maine law. *Patterson v. Rossignol*, 245 A.2d 852 (Me. 1968).

RULE 607. WHO MAY IMPEACH A WITNESS

Any party, including the party that called the witness, may attack the witness's credibility.

Maine Restyling Note [November 2014]

Maine Rule 607 and Federal Rule 607 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Restyling Committee Note

The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 607
(February 2, 1976)

This rule departs from traditional Maine practice. *State v. Fournier*, 267 A.2d 638 (Me. 1970). The policy reason for not allowing a party to impeach a witness he has called was that he vouches for the credibility of his own witnesses. This is unrealistic since a party does not have a free choice in selecting witnesses. There has been a recent trend to abandon the old rule either by statute or, occasionally, by judicial decision. It is widely supported by the commentators. This rule goes along with that trend.

Under present law a party who is surprised by unfavorable testimony may inquire about prior contradictory statements. *Hartford Fire Ins. Co. v. Stevens*, 123 Me. 368, 123 A. 38 (1924). Such contradictory statements may be used, however, only for impeachment and not as affirmative evidence. This rule provides an effective weapon for dealing with a turncoat witness who changes his story and deprives the party calling him of essential testimony. Under Rule 801(d)(1) the prior statement, if under oath, can be used as substantive evidence of its truth, as will be explained in the Note to that rule.

RULE 608. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

- (a) **Reputation evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness. Evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.
- (b) **Specific instances of conduct.** Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. The court may, on cross-examination, allow a party to inquire into specific instances of a witness's conduct if they are probative of the character for truthfulness or untruthfulness of:
 - (1) The witness; or
 - (2) Another witness about whose character the witness being cross-examined has testified.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

Maine Restyling Note [November 2014]

Maine Rule 608 is very similar to its federal counterpart, but does not allow opinion evidence of character for truthfulness, only reputation. The Maine restyled version changes references to “credibility” to “character for truthfulness” to follow the federal version.

Federal Restyling Committee Note

The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee is aware that the Rule's limitation of bad-act impeachment to “cross-examination” is trumped by Rule 607, which allows a party to impeach a witness on direct examination. Courts have not relied on the term “on cross-examination” to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

Advisers' Note to former M.R. Evid. 608

(February 2, 1976)

In allowing reputation evidence of the character of a witness, this rule is consistent with Rule 405(a). The limitation confining this evidence to character for veracity instead of evidence of character generally is in accord with the weight of authority. It avoids surprise, waste of time, and confusion and makes the task of being a witness somewhat less unpleasant. Allowing character evidence in support of the credibility of a witness only after his character has been attacked is a limitation imposed at common law. It saves an enormous amount of time.

Subdivision (b) gives the court discretion to allow inquiry on cross-examination into specific instances of conduct bearing upon the credibility of a

witness. It is in accord with Maine law. *State v. Whitehead*, 151 Me. 135, 116 A.2d 618 (1955).

It is unclear whether limiting cross-examination to matters probative of truthfulness or untruthfulness changes Maine law. It does not seem to be spelled out in Maine cases and the rule in other jurisdictions varies. In any event, the limitation seems a reasonable one.

RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION

- (a) **In general.** Evidence of a criminal conviction offered to impeach a witness's character for truthfulness must be admitted if its probative value outweighs its prejudicial effect on a criminal defendant or on any party in a civil action if the criminal conviction is:
- (1) For a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year; or
 - (2) For any crime if the court can reasonably determine that establishing the elements of the crime required proving—or the witness admitting—a dishonest act or false statement.
- (b) **Time limit.** Evidence of a conviction is admissible under this rule only if:
- (1) Less than 15 years has passed since the conviction; or
 - (2) Less than 10 years has passed since the witness was released from confinement for the conviction.
- (c) **Effect of a pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure.
- (d) **Juvenile adjudications.** Evidence of a juvenile adjudication in a public proceeding is admissible under this rule. Evidence of a juvenile adjudication in a proceeding that was closed to the public is admissible only in juvenile proceedings that are also closed to the public.

Maine Restyling Note [November 2014]

Maine Rule 609 differs in a number of respects from its federal counterpart. Maine Rule 609 requires all convictions to pass a “reverse Rule 403” test, i.e. they can be admitted only if their probative value as to credibility outweighs any danger of unfair prejudice to a criminal defendant or any civil party. There are minor differences in time limits and the Maine time bar is absolute. The proposed restyled Rule maintains the substantive differences as they are now.

Federal Restyling Committee Note

The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers’ Note to former M.R. Evid. 609 (February 2, 1976)

Subdivision (a), in making conviction of a crime admissible if punishable by imprisonment for one year or more, is essentially the same as 16 M.R.S.A. § 56,⁷¹ as amended by P.L. 1973, c. 295, which speaks in terms of “conviction of a felony”. Under Maine law any crime that may be punished by imprisonment for one year or more is a felony. “May be punished” means “punishable”; the punishment that may be imposed, not that which is imposed, determines whether or not the offense is a felony. *Smith v. State*, 145 Me. 313, 326, 75 A.2d 538, 545 (1950). The sentence actually imposed governs whether imprisonment shall be in the State Prison. 15 M.R.S.A. § 1703.⁷² Since the rule permits the use of convictions in other states, where the distinction between felonies and misdemeanors may no longer prevail, it is preferable to speak in terms of the duration of possible punishment. Cf. proposed Maine Criminal Code, 107th Legislature, L.D. 314. If the crime involved dishonesty or false statement, the evidence is admissible regardless of the punishment. This approximates the

⁷¹ This statute has been repealed.

⁷² This statute has been repealed.

provision of 16 M.R.S.A. § 56⁷³ which allows evidence of a conviction for “any larceny or any other crime involving moral turpitude”. It has the advantage of avoiding the latter troublesome phrase. See *State v. Jenness*, 143 Me. 380, 62 A.2d 867 (1948); *State v. Peaslee*, 287 A.2d 588 (Me. 1972). The subdivision includes a discretionary factor, taken from the Federal Rule, under which the court will exclude the evidence unless it determines that its probative value outweighs its prejudicial effect.

Subdivision (1b)⁷⁴ preserves the time limitations of the statute which exclude evidence of convictions deemed to be too old to warrant admission. Subdivision (c) renders inadmissible convictions which have been the subject of a pardon, annulment or certificate of rehabilitation. The latter two are included although unknown to Maine practice because convictions in other states come within the rule. Subdivision (d), making juvenile adjudications inadmissible, is in accord with 15 M.R.S.A. § 2606.⁷⁵

The rule in subdivision (a) follows the Federal Rule closely. The Federal Rule has the trivial difference of using the phrase “in excess of one year”⁷⁶ rather than “one year or more”. It also limits the discretionary factor to crimes set forth in clause (1) rather than applying to the entire subdivision.⁷⁷ It further includes in subdivision (b) an additional discretionary factor which may in the interests of justice permit the showing of a conviction older than the normal time limits allow (ten years in the Federal Rule).

There is also a provision in subdivision (a) of the Federal Rule that evidence of a conviction “shall be admitted if elicited from him or established by public

⁷³ This statute has been repealed.

⁷⁴ Now subsection (b).

⁷⁵ This sentence is superseded by the 1985 amendment—see Note herein.

⁷⁶ Now “for more than one year.”

⁷⁷ The continued accuracy of this sentence is unclear. Federal Rule 609(1) is discretionary in that subsection (a) is subject to Rule 403 and subsection (b) is subject to the so-called reverse 403 test. However, the entire Rule 609 would be subject to Rule 403 analysis, even though it does not explicitly say so in subsection (2).

record during cross-examination”.⁷⁸ This appears to produce a result Congress could not have intended. It is plain that, as under present law, a witness can be asked if he is the so-and-so who on a stated date was convicted of the crime of such-and-such. If the answer is yes, there is no problem. If it is no, the state is put to its proof. It must not only have a certified copy of the conviction but a person who can identify the witness as the person convicted. This cannot be done “during cross-examination”, as the rule seems to require, except perhaps by suspending the cross-examination and putting on the identifying witness. This might be deemed to be “during cross-examination”. Nothing but harm and confusion could come from including this clause.

Subdivision (c) of the Federal Rule makes a conviction the subject of a pardon and the like inadmissible only if based on a finding of either rehabilitation or innocence. This is inappropriate, for Maine at least, because ordinarily the reason for a pardon is not a matter of record.

Subdivision (d) of the Federal Rule departs from this rule by allowing in a criminal case evidence of a juvenile adjudication of a witness other than the accused if it would be admissible to attack the credibility of an adult and the court makes the finding that its admission is necessary for a fair determination, thus attempting to balance the harm to the juvenile against the gain in the fair administration of justice.

The Federal Rule has a subdivision (e), which allows a conviction to be shown despite the pendency of an appeal.

1978 Amendment Note (April 6, 1978)

This amendment replaced the word “and” in Rule 609(b) of the Maine Rules of Evidence as originally promulgated with the word “or”. In its order adopting the amendment, the Supreme Judicial Court stated:

The Court had dispensed with the requirements for notice and opportunity to comment on the ground that the public interest so

⁷⁸ This language was removed from the Federal Rule in 1990—there is a Note under the Federal Rule regarding the amendment.

requires because unless it is amended the rule reaches an unintended and unreasonable result.

Advisory Committee Note
(January 31, 1985 Amendment)

Subsection (d) makes evidence of a juvenile adjudication generally admissible under Rule 609 only if the adjudication results from a proceeding open to the public. See 15 M.R.S.A. § 3307(2)(A). Otherwise, such adjudications are admissible under this rule only in other nonpublic juvenile cases.

Advisers' Note
(April 16, 1990 Amendment)

The foregoing amendment [adding the references to witness credibility and to the criminal defendant or any civil party] is for the purpose of further stressing that the only legitimate basis for admission of a prior criminal conviction under this rule is the inference that a person convicted of crime or of specific kinds of crimes might not be truthful in testimony. The rule does not support or permit the admission of prior convictions to sustain an inference of substantive guilt, innocence or liability with respect to any issue in the case.

The amendment also makes it clear that before admitting a criminal conviction of any witness under this provision, the court must balance the probative value of the conviction on the credibility of the witness against any unfair prejudice to a criminal defendant or any civil party. The state in a criminal case is not entitled to the protection of the balancing test contained in Rule 609. However if the danger of unfair prejudice, confusion of the issues, misleading the jury or waste of time substantially outweighs the probative value of a proffered conviction, it can be excluded under Rule 403 on motion of any party, including the prosecution.

The rule is applied most often to protect a criminal defendant who testifies in his own behalf. It also is designed to screen out unfair prejudice in civil cases. In each case the proffered conviction must qualify as to type under paragraph a) and recency under paragraph b). The trial judge must then weigh the probative value of the particular conviction offered on the credibility as a witness of the person convicted against the unfair prejudice from other inferences that may be drawn from the conviction or any emotional reaction evoked by it.

One instance in which the Court should give particular consideration to the risk of unfair prejudice is where a criminal defendant would be impeached with a prior conviction so similar to the offense charged that the jury might draw the improper inference that the defendant merely repeated prior criminal conduct. Prior convictions for sex offenses tend to evoke strong emotional reactions. Such convictions could be excluded under this rule. Convictions of offenses which have little probative force on testimonial credibility would be subject to exclusion on a lesser showing of unfair prejudice than convictions of offenses highly relevant to a witness' truthfulness on the stand.

Frequently the determination of the admissibility of convictions under this rule is crucial to the defendant's election to testify in his own behalf. In many cases this election will affect the entire trial strategy of the defense. The trial court should generally entertain a motion in limine to determine the admissibility of any prior convictions of the defendant before the trial or, at the latest, before the opening statements. See, *State v. Pottios*, 564 A.2d 64, fn. 1 (Me. 1989). If examining counsel has any question about the admissibility of a prior conviction under this rule, opposing counsel should be given an opportunity to object before the question is posed in front of the jury.

Advisory Committee Note
(June 1, 1992 Amendment)

The purpose of adding the word "specific"⁷⁹ in Rule 609(a) is to make it clear that evidence that is admissible under this rule is evidence of a specific crime, not a generic "serious" crime, "felony," "misdemeanor" or other substitute. This requires the trial court to balance the potential of unfair prejudice from evidence of the specific crime of which the witness was convicted against the probative value of evidence of conviction of that crime on issues of credibility.

To permit evidence of a generic "serious crime," "felony" or other substitute would permit the jury to speculate about the crime of which the witness was convicted and perhaps draw inferences, which could be unfair to the witness.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

⁷⁹ The restyling removed the word "specific" but did not intend to change the effect of the Rule (see the Restyling Note), so the comment as a whole is still relevant.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

Maine Restyling Note [November 2014]

Maine Rule 610 and Federal Rule 610 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Federal Restyling Committee Note

The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 610 (February 2, 1976)⁸⁰

This rule is directly contrary to 16 M.R.S.A. § 55, which allows a person's religious belief to be shown to affect his credibility. The statute traces back to P.L. 1847, c. 34, which was a substitute for P.L. 1833, c. 58. The earlier statute made a person who did not believe in a Supreme Being incompetent as a witness. In doing away with the incompetency rule the legislature made the concession with respect to impeachment. The present statute is in fact a dead letter and it should be done away with.

⁸⁰ The entirety of the Note is outdated, as the statute it discusses has been repealed. The Note is included for historical context.

RULE 611. MODE AND ORDER OF EXAMINING WITNESSES AND PRESENTING EVIDENCE

- (a) **Control by the court; purposes.** The court must exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
- (1) Make those procedures effective for determining the truth;
 - (2) Avoid wasting time; and
 - (3) Protect witnesses from harassment or undue embarrassment.
- (b) **Scope of cross-examination.** Cross-examination may address matters relevant to any issue in the case, including the credibility of any witness. The court may limit cross-examination about matters that were not addressed on direct examination.
- (c) **Leading questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
- (1) On cross-examination; and
 - (2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. A hostile witness or a witness identified with an adverse party may be cross-examined by the adverse party, but only as to matters that the witness testified to during his or her examination in chief.
- (d) **Cross-examination relating to signatures.** If a witness's examination in chief addresses only the signature to or execution of a paper, cross-examination must be limited to that signature or execution.

Maine Restyling Note [November 2014]

Maine Rule 611 is similar to its federal counterpart, but does not limit cross-examination to the subject matter of direct unless the witness was the adverse party, was identified with the adverse party, or testified only to the signature to or

execution of a paper. This distinction has been carried over in the restyling process.

Federal Restyling Committee Note

The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 611 (February 2, 1976)

This rule states Maine law. It preserves the wide-open rule permitting cross-examination on any issue in the case, subject to a discretionary right to limit it in the interests of justice. *Falmouth v. Windham*, 63 Me. 44 (1873). The trial of a multi-count indictment might present a suitable occasion for exercising a discretionary limitation. The reference to “direct and cross-examination” is designed to emphasize the scope of the court’s control over the order of proof.⁸¹ This rule is contrary to that in the federal courts and many state courts which limits cross-examination to the subject matter of the direct examination. The Federal Rule retains the traditional federal view limiting cross-examination to the scope of the direct.⁸²

Subdivision (c) incorporates the rule laid down in M.R.C.P. 43(b)⁸³ on examination of hostile witnesses. The third sentence of the Federal Rule reads: “When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.” This rule has a greater degree of precision.⁸⁴

⁸¹ The restyling changed this language but the effect of the Rule remains the same (see the Restyling Note).

⁸² The Federal Rule authorizes the court to allow inquiry into matters outside the scope of direct on cross-examination.

⁸³ This Rule has been abrogated.

⁸⁴ The Federal and Maine Rules are the same on this issue now.

This subdivision in merely stating that leading questions should not be used on direct examination except as may be necessary to develop the testimony lacks the precision of most of the rules. In taking it from the Federal Rule the Court was aware of this imprecision but concluded that it was unwise to set out all the exceptions to the rule against leading questions that came to mind. In practice objection on this ground is rarely made to preliminary stage-setting questions and is given short shrift if it is made. Leading questions when the memory of the witness has been exhausted are permissible as “necessary to develop his testimony.” In short, the generalization that leading questions “should not be used” (not, it is to be noted, a flat prohibition of the use) is not to be taken as changing the areas where leading has traditionally been permitted.

RULE 612. WRITING USED TO REFRESH A WITNESS’S MEMORY

- (a) While testifying.** If a witness uses a writing or object to refresh his or her memory while testifying, the adverse party is entitled to production of the writing or object at the time.
- (b) Before testifying.** If a witness uses a writing or object to refresh his or her memory before testifying, the court may require production of the writing or object in the interests of justice.
- (c) Terms and conditions.**
 - (1)** If a party is entitled to production of a writing or object under this rule, that party may inspect it, cross-examine the witness about it, and introduce relevant parts of it in evidence.
 - (2)** If a party claims that the writing contains material that is irrelevant to the witness’s testimony, the court must examine the writing in camera, remove any irrelevant portions, and order production of the rest of the writing.

The court must preserve any portion of the writing that is withheld under this subsection, and must provide it to the appellate court if there is an appeal.

- (d) Failure to produce or deliver the writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if

the state does not comply in a criminal case, the court must strike the witness's testimony or may—if justice so requires—declare a mistrial.

Maine Restyling Note [November 2014]

Maine Rule 612 is somewhat different from its federal counterpart. The proposed restyled Rule maintains those differences.

Federal Restyling Committee Note

The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 612

(February 2, 1976)

Subdivision (a) deals with refreshing the recollection of a witness while testifying, as is presently permitted under Maine law. *Cope v. Sevigny*, 289 A.2d 682 (Me. 1972).

Subdivision (b) gives the court a discretionary power in the interests of justice to require production of a writing used by a witness to refresh his memory before testifying. There appears to be no precedent for this in Maine case law but it should be an aid to bringing out the truth.

Subdivision (c) covers the terms and conditions of production and use of a writing produced under the rule. The reference to the preservation for appeal of portions of a writing excised after examination in camera is derived from 18 U.S.C. § 3500 (the Jencks Act). There appear to be no reported federal cases dealing with such an appeal.

The Federal Rule is different in wording but not greatly different as a substantive matter. It does not include “object” as well as “writing”. This rule, following the Uniform State Law, is a clearer statement.

RULE 613. WITNESS'S PRIOR STATEMENT

When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

Maine Restyling Note [November 2014]

Maine Rule 613 is somewhat similar to its federal counterpart. However, the requirement in the Federal Rule that the witness be given an opportunity to explain a prior inconsistent statement is not maintained in the Maine Rule. The restyled version continues this distinction.

Federal Restyling Committee Note

The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 613 (February 2, 1976)

This rule abolishes the old English requirement under which a cross-examiner before questioning a witness about his own prior written statement must first show it to the witness. It was changed by statute in England long ago but is still widely followed in this country. There is no reported decision in Maine either accepting or rejecting the rule, but in day-to-day practice in the trial courts it is not required. It is obvious that cross-examination may be more effective if the witness is not given a chance to see his statement before committing himself. The provision for disclosure on request to opposing counsel is to prevent unwarranted insinuations that a statement has been made when the fact is to the contrary.

The Federal Rule includes a subdivision (b) barring extrinsic evidence of a prior inconsistent statement unless the witness has been given an opportunity to explain or deny it. This is the general rule but the Maine practice has been to the contrary since *Ware v. Ware*, 8 Me. 42 (1931). See *Currier v. Bangor Ry. & Elec. Co.*, 119 Me. 313, 111 A. 333 (1920). Often counsel decides as a matter of tactics

to confront the witness with the statement, but it has not been compulsory. No such requirement is included because the prevailing practice has worked well.

RULE 614. COURT'S CALLING OR EXAMINING A WITNESS

- (a) **Calling.** The court may call a witness on its own, or at a party's request. Each party is entitled to cross-examine the witness.
- (b) **Examining.** The court may examine a witness regardless of who calls the witness.
- (c) **Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity out of the hearing of the jury.

Maine Restyling Note [November 2014]

Maine Rule 614 is similar with its federal counterpart. The restyled version maintains the minor differences.

Federal Restyling Committee Note

The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 614

(February 2, 1976)

This rule is consistent with Maine law. *State v. Dupuis*, 159 Me. 100, 188 A.2d 688 (1963) (judge may, after state rests, recall witness for purpose of eliciting basis of stated conclusions previously given without objection); *State v. Haycock*, 296 A.2d 489 (Me. 1972) (judge may interrogate witness so long as he does not assume posture of advocate or retreat from position of judicial impartiality); *State v. Hunnewell*, 334 A.2d 510 (Me. 1975) (to the same effect).

Subdivision (c) gives an opportunity to object to the judge's conduct without the embarrassment of doing so in the hearing of the jury. A bench conference which the jury can observe but not hear is a compliance with the rule. "Next available opportunity" is to be interpreted reasonably. An instant demand for a bench conference is not required, but the delay should not be protracted.

Although the rule recognizes the power of the court to call a witness on its own motion, the use of the words 'when necessary in the interests of justice' is designed to emphasize that the power ought to be exercised very rarely, especially in criminal cases.⁸⁵ A situation may occasionally arise where the prosecution, or possibly the defense, discloses to the court that a witness it is unwilling to sponsor could offer highly relevant testimony. A request that this witness be called as the court's witness and all parties be free to cross-examine might well be granted. This is quite different from the court's calling a witness without a suggestion of either prosecution or defense on the basis of the court's own knowledge or investigation.

The Federal Rule does not include "when necessary in the interests of justice"⁸⁶ in subdivision (a) and in subdivision (c) reads "when the jury is not present".

RULE 615. EXCLUDING WITNESSES

At a party's request or on the court's own initiative, the court may order witnesses excluded so that they cannot hear other witnesses' testimony. But this rule does not authorize excluding:

- (a)** A party who is a natural person;
- (b)** An officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or
- (c)** A person whose presence a party shows to be essential to presenting the party's claim or defense.

⁸⁵ This language has been removed in the restyling, but the effect of the Rule remains unchanged (see the Restyling Note).

⁸⁶ Neither does the current Maine Rule.

Maine Restyling Note [November 2014]

Maine Rule 603 is similar to its federal counterpart. The minor differences in the proposed restyled Rule preserve the substantive differences.

Federal Restyling Committee Note

The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 615 (February 2, 1976)

This rule makes exclusion of witnesses from the courtroom while other witnesses are testifying wholly discretionary, reversible only for abuse. *State v. Miller*, 253 A.2d 58 (Me. 1969). In practice the court routinely grants a request for exclusion. The Federal Rule makes exclusion mandatory on request.

RULE 616. ILLUSTRATIVE AIDS

- (a) Otherwise inadmissible objects or depictions may be used to illustrate witness testimony or counsel's arguments.
- (b) The court may limit or prohibit the use of illustrative aids as necessary to avoid unfair prejudice, surprise, confusion, or waste of time.
- (c) Opposing counsel must be given reasonable opportunity to object to the use of any illustrative aid prepared before trial.
- (d) The jury may use illustrative aids during deliberations only if all parties consent, or if the court so orders after a party has shown good cause.

Illustrative aids remain the property of the party that prepared them. They may be used by any party during the trial. They must be preserved for the record for appeal or further proceedings upon the request of any party.

Maine Restyling Note [November 2014]

Maine Rule does not have a federal counterpart. It has been revised in accordance with the conventions of the federal restyling.

Advisers' Note to former M.R. Evid. 616 (February 2, 1976)

This rule is intended to authorize and regulate the use of “illustrative aids” during trial.

Objects, including papers, drawings, diagrams, the blackboard and the like which are used during the trial to provide information to the finder of fact can be classified in two categories. The first category, admissible exhibits, are those objects, papers, etc., which in themselves have probative force on the issues in the case and hence are relevant under Rule 401. Such objects are admissible in evidence upon laying the foundation necessary to establish authenticity and relevancy and to avoid the strictures of the hearsay rule and other evidentiary screens. Usually the jury is permitted to take these objects with them to the jury room, to study them and to draw inferences directly from them relating to the issues in the case.

The second class of objects are those objects which do not carry probative force in themselves, but are used to assist in the communication of facts by a lay or expert witness testifying or by counsel arguing. These may include blackboard drawings, pre-prepared drawings, video recreations, charts, graphs, computer simulations, etc. They are not admissible in evidence because they themselves have no relevance to the issues in the case. Their utility lies in their ability to convey relevant information which must be provided directly from some actual evidentiary source, whether that source be witness or exhibit which is admissible in evidence. The ultimate credibility and scope of the information conveyed is that of the source, not that of the illustrative media.

This latter group of objects can be referred to as “illustrative aids.” Sometimes they have been referred to as “demonstrative exhibits” or even “chalks.”

Frequently voluminous evidentiary data is summarized in tabular, or even graphic form, and is offered as a summary under Rule 1006. A summary which

presents the data substantially in its original form would be admissible in evidence. A summary which presents the data in a tabular or graphic form to “argue” the case or support specific inferences would be an illustrative aid and would be governed by this rule.

While such aids do not have evidentiary force in themselves, they can be extremely helpful in assisting the trier of fact to visualize evidentiary material which is otherwise difficult to understand. For the same reason, illustrative aids can also be subject to abuse. Sometimes the form of the illustrative may be grossly or subtly distorted to “improve” upon the underlying testimony, to oversimplify, or to provide subliminal messages. The opportunity for inventiveness and creativity in illustrative aids may exaggerate the effect of disparities in financial resources between parties.

The proposed rule addresses some of the most common issues associated with the use of illustrative aids.

First of all, Rule 616(a) permits the use of illustrative aids for the purpose of illustrating the testimony of witnesses or the arguments of counsel. In the case of witness testimony, the foundation for the use of an illustrative aid would be testimony to the effect that the aid would assist the witness in illustrating her testimony. It is clear that the object need not be admissible in evidence to be useful as an illustrative aid. Thus there is no need to establish the authenticity of an illustrative aid or even its accuracy as long as it has no probative force beyond that of illustrating a witness’s testimony.

Paragraph (b) of the proposed rule makes clear, however, that the court retains the discretion to condition, restrict or exclude the use of any illustrative aid in order to avoid the risk of unfair prejudice, surprise, confusion or waste of time. This is similar to the discretion exercised by the court under Rule 403 in dealing with objects which are admissible in evidence. Because of the multiplicity of potential problems which may be encountered, it is deemed wiser to allow the court a measure of discretion in applying general standards rather than to establish a legal test for utilization of these media.

Some of the problems associated with the use of illustrative aids can include the following:

1. Cases where the illustrative aid is so crafted as to have probative force of its own. Few people would attribute much probative force to a

blackboard drawing which is used to illustrate a witness's testimony. However, with a precisely drawn chart, or even more a computer video display, the perceived quality of the media may impart to the information conveyed a degree of authority, accuracy and credibility much greater than the source from which the information originally came. If the court finds that the use of illustrative aids results in a "dressing up" of testimony to a level of perceived dignity, accuracy or quality greater than it deserves and this works an unfair prejudice, the aid could be limited or excluded under Rule 616(a).⁸⁷

2. Sometimes illustrative aids are used to take advantage of and heighten a disparity in economic resources. The entertainment quality of certain media may give an edge to a wealthy litigant which is entirely unjustified by the actual facts.

3. There is risk that the jury may draw inferences from the illustrative aids different from those for which the illustrative aid was created and offered. This is especially likely to be a risk if the jury takes the aids with them in the jury room to experiment with or scrutinize.

4. Use of illustrative aids often makes a more informative visual presentation which is difficult to capture on an oral record. Problems of ownership and control of the aids may make it impossible to document in the transcript a meaningful record on appeal.

5. Ordinary discovery procedures concentrate on the actual information possessed by the witnesses and known exhibits. Illustrative aids as such are not usually subject to discovery and often are not prepared far enough in advance of trial. Their sudden appearance at trial may not give sufficient opportunity for analysis, particularly if they are complex, and may cause unfair surprise.

Illustrative aids may themselves become issues in the case leading to waste of time quibbling over the fairness of the illustrative aid, or battles between opponents marking up each other's illustrative aid, and the like.

One of the primary means of safeguarding and regulating the use of the illustrative aids is to require advance disclosure. The rules proposes that

⁸⁷ Now Rule 616(b).

illustrative aids prepared before use in court be disclosed prior to use so as to permit reasonable opportunity for objection. The rule applies to aids prepared before trial or during trial before actual use in the courtroom. Of course, this would not prevent counsel from using the blackboard or otherwise creating illustrative aids right in the courtroom.

“Reasonable opportunity” for objection means reasonable under the circumstances. In a case where the aid is simple and is generated shortly before or even during trial, disclosure immediately before use would allow reasonable opportunity for the opponent to check out the aid. On the other hand counsel proposing to use a computer simulation or other complex illustrative media should be expected to make the aid and any information necessary to check its accuracy available sufficiently far in advance of use so as to permit a realistic appraisal and understanding of the proposed aid. The idea is to permit opposing counsel the opportunity to raise any issues of fairness or prejudice with the court out of the presence of the jury and before the jury may have been tainted by the use of the illustrative aid. This requirement of prior disclosure should be applied to both prosecution and defense in criminal cases consistent with constitutional rights of criminal defendants. The rule also provides that illustrative aids are not to go to the jury room unless all parties agree or unless the court orders. In many cases, it is likely that the parties will agree that certain illustrative aids might go to the jury room to aid the jury in their understanding of the issues. In other cases, it is possible that, despite the protest of one party, the court may determine that the jury’s consideration of the issues might be so aided by an illustrative aid used during the trial that it should go with the jury to the jury room. But in the absence of such agreement or specific order, the residual rule would be that illustrative aids may be used in the courtroom only.

A recurrent problem with the use of illustrative aids arises from the fact that these are often proprietary items prepared by a particular party to give that party an advantage in the courtroom presentation. However, when a witness has relied heavily on an illustrative aid in giving her testimony, it is often impossible to cross-examine that witness effectively without the use of the same illustrative aid. Similarly, if an illustrative aid has been important in the presentation of one side, the other side ought to have access to that illustrative aid in meeting the testimony illustrated. “Use” of an illustrative aid does not mean despoiling it. Mutual courtesy and respect, reinforced if necessary by court supervision and aided by mylar overlays and the like, should suffice to preserve each party’s illustrative aids from detracting markings by opposing counsel or witnesses.

The authorization here provided for the use of non-admissible “illustrative aids” does not prevent a party from using an actual probative exhibit also as an illustrative aid. For instance, a witness might be asked to indicate by marking on a photograph the location of an object which was not present at the time the photograph was taken. The photograph, as an exhibit, would be probative in itself. The jury could draw inferences directly from it. But the marks added by the witnesses would be a visual form of witness testimony. The preservation of that particular testimony in visual form for later inspection by the jury during deliberations might give that testimony undue weight and durability under the circumstances. Thus the court would have the discretion under this rule to withhold from the jury room an exhibit to which illustrative markings had been added if the markings would give undue weight to a witness’s testimony on a disputed issue or otherwise would have some unfairly prejudicial effect.

The court would also have the discretion under this rule to restrict or prohibit marking on an evidentiary exhibit if the effect would be to remove the exhibit from the jury room during deliberations. Thus, if a counsel wishes to mark or to enhance an admitted exhibit or add additional material as an illustrative aid, it probably should be done on another counterpart of the exhibit or with a mylar overlay or some other suitable removable means so that the exhibit could be considered in the jury room in its original state.

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If a witness is not testifying as an expert, opinion testimony is limited to opinions that are:

- (a)** Rationally based on the witness’s perception; and
- (b)** Helpful to clearly understanding the witness’s testimony or to determining a fact in issue.

Maine Restyling Note [November 2014]

Maine Rule of Evidence 701 is similar to its federal counterpart. Maine has not adopted the final subparagraph (c) of Federal Rule 701 and that omission is carried through in the restyled Rule.

Federal Restyling Committee Note

The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Advisers’ Note to former M.R. Evid. 701 (February 2, 1976)

This rule is declaratory of Maine law. Clause (a) is the familiar requirement of firsthand knowledge or observation. See, e.g., *Wiles v. Connor Coal & Wood Co.*, 143 Me. 250, 60 A.2d 786 (1948) (estimate of speed inadmissible when no adequate opportunity to observe). Clause (b) limits testimony in the form of opinions or inferences to those helpful in resolving issues. Often the only way to convey what the witness observed is in the form of opinion or inference. Speed is an obvious example; identity is another. Courts admit such testimony out of necessity, often referring to it as a “short-hand rendering of facts.” *Stacy v. Portland Publishing Co.*, 68 Me. 279, 285 (1878). The opinion or inference of a witness is not “helpful” under this provision if relating what he observed would put the jury in the position to come to its own conclusion. Hence such an opinion would be rejected.

RULE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if such testimony will help the trier of fact to understand the evidence or to determine a fact in issue.

Maine Restyling Note [November 2014]

Maine Rule of Evidence 702 is similar to its federal counterpart. Maine did not adopt the final subparagraphs of Federal Rule of Evidence 702 and that omission is carried through in the restyled Rule.

Federal Restyling Committee Note

The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 702 (February 2, 1976)

This rule is also declaratory of Maine law. The concluding phrase allowing the expert to testify “in the form of an opinion or otherwise” is designed to allow an expert to give an exposition of relevant scientific or other principles in the form of statements of fact. Cf. *State v. Thomas*, 299 A.2d 919 (Me. 1973) (objection to expert’s testimony “presented as a statement of fact” as opposed to being “only an opinion and not an observed fact” overruled; “a hypertechnical exercise in semantics”, said the court).

RULE 703. BASIS OF AN EXPERT’S OPINION TESTIMONY

An expert may base an opinion on facts or data in the case that the expert has been made aware of or has personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, the facts or data need not be admissible for the opinion to be admitted.

Maine Restyling Note [November 2014]

Maine Rule of Evidence 703 is similar to its federal counterpart. Maine did not adopt the final subparagraph of Federal Rule 703, an omission that is carried through in the restyled Rule.

Federal Restyling Committee Note

The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Advisers’ Note to former M.R. Evid. 703 (February 2, 1976)

An expert may base his opinion (1) on firsthand observation, as by a physician treating a patient; (2) on presentation at the trial, as by the familiar hypothetical question or by having the expert attend the trial and hear the testimony establishing the facts relied on; or (3) presentation of data to the expert outside of court and other than by his own direct perception. The key provision is the final sentence allowing opinion on facts or data not admissible in evidence. This is supported by *Warren v. Waterville Urban Renewal Authority*, 235 A.2d 295 (Me. 1967), although there are earlier cases looking the other way. The plain intention of the rule is to bring judicial practice into line with the practice of experts themselves when not in court. For example, a physician in his own practice bases his diagnosis on information from a variety of sources such as hospital records, X-ray reports, statements by patients, and reports from nurses and technicians. Most of these could be presented in the form of admissible evidence, but only through a time-consuming process of authentication. The test is whether the facts or data are of a type reasonably relied upon by experts. As the Federal Advisory Committee said: “The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.”

The question whether facts or data are of a type reasonably relied upon is a preliminary one for the court. A statement by the witness that he, or experts generally, found facts or data of a given type reliable in forming an opinion is not

controlling upon the court. The Federal Advisory Committee, to allay the fear that enlargement of permissible data might break down the rules of exclusion unduly, stressed the reasonable reliance requirement and gave the opinion of an “accidentologist” as to the point of impact based on statements of bystanders as an example of a situation where it was not satisfied.

RULE 704. OPINION ON AN ULTIMATE ISSUE

An opinion is not objectionable merely because it is an opinion on an ultimate issue.

Maine Restyling Note [November 2014]

Maine Rule of Evidence 704 is similar to its federal counterpart. The Maine Rule does not contain reference to a special treatment of opinions in criminal cases. This difference was carried over in the restyled Rule.

Federal Restyling Committee Note

The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Advisers’ Note to former M.R. Evid. 704 (February 2, 1976)

The old rule, here abolished, forbidding an opinion on an ultimate issue to be decided by the jury has been in growing disfavor in recent years. This does not lower the bars to admit all such opinions. Under Rules 701 and 702 opinions must be helpful to the trier of fact and Rule 403 provides for exclusion of time-wasting

evidence. A lay opinion, for example, that the defendant was negligent would surely be rejected.

RULE 705. DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

- (a) **Disclosure of underlying facts.** Unless the court orders otherwise, an expert may state an opinion—and give the reasons for it—without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.
- (b) **Objection.** A party may object to an expert witness's testimony on the ground that the expert lacks a sufficient basis for expressing an opinion. Before the expert gives an opinion, counsel may be allowed to examine the expert about the facts or data underlying the opinion outside of the jury's presence. If there is evidence sufficient to support a finding that the expert lacks a sufficient basis for the opinion, the opinion is inadmissible, unless the party who called the expert witness first establishes the underlying facts or data.

Maine Restyling Note [November 2014]

Maine Rule of Evidence 705 is similar to its federal counterpart. The Maine version sets forth a procedure to test the factual basis for expert testimony before it is admitted, which has been included in the restyled version.

Federal Restyling Committee Note

The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an “inference” on the grounds that the deletion made the Rule flow better and easier to read, and because any “inference” is covered by the broader term “opinion.” Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

Advisers' Note to former M.R. Evid. 705

(February 2, 1976)

Subdivision (a) is designed to eliminate the necessity of a hypothetical question in eliciting expert testimony. Wigmore has said: "The hypothetical question, misused by the clumsy and abused by the clever, has in practice led to intolerable obstruction of truth." 2 Wigmore, Evidence § 686. The remedy is to allow the opinion to be given without prior disclosure of the underlying facts or data. The provision that prior disclosure of the underlying facts is not required does not mean that the expert is forbidden to disclose them on direct examination. The rule permits him to do so, even though facts not admissible in evidence may be included, as Rule 703 allows. The rule supersedes statements to the contrary in *Warren v. Waterville Urban Renewal Authority*, 235 A.2d 295 (Me. 1967).

The court has discretion to require prior disclosure of the underlying facts, either on an objection that an inadequate foundation has been laid or for other reasons. In any event disclosure may be required on cross-examination. Tactically, of course, a party may prefer to disclose these facts on direct examination.

Subdivision (b) reflects the awareness that a potential for serious abuse exists in the use of the technique permitted in subdivision (a). An expert may predicate his opinion on unreliable data and its weakness may not be revealed on direct examination. This may put the adverse party at a tactical disadvantage, forcing him to engage in blind cross-examination. Moreover, once the opinion is heard by the jury, it may well be that nothing done on cross-examination or by the court can eliminate the resulting prejudice. In civil cases if counsel has engaged in the pretrial discovery permitted by M.R.C.P. 26(b)(4), he should be equipped to challenge the basis of the opinion. This subdivision allows the alternative, however, of a voir dire examination before the opinion is admitted, so as to give a basis for its exclusion in an appropriate case.

Advisory Committee Note

(February 15, 1993 Amendment)

This amendment merely clarifies the language of Rule 705(a) that the disclosure of underlying facts referred to by the rule is disclosure in prior testimony in court, not pretrial disclosure during the course of discovery. The rule permitting an expert to give an opinion without first testifying to the underlying

facts and data is not intended to limit or define the scope of required or permitted pretrial discovery of expert testimony.

RULE 706. COURT-APPOINTED EXPERT WITNESSES

- (a) **Appointment process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.
- (b) **Expert's role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:
- (1) Must advise the parties of any findings the expert makes;
 - (2) May be deposed by any party;
 - (3) May be called to testify by the court or any party; and
 - (4) May be cross-examined by any party, including the party that called the expert.
- (c) **Compensation.** The expert is entitled to reasonable compensation, as set by the court. Unless provided otherwise by law, the parties must pay the expert's compensation in whatever proportion the court directs, at a time chosen by the court. Thereafter, the expert's compensation may be charged in the same manner as other costs.
- (d) **Disclosing the appointment to the jury.** The court may authorize disclosure to the jury that the court appointed the expert.
- (e) **Parties' choice of their own experts.** This rule does not limit a party in calling its own experts.

Maine Restyling Note [November 2014]

Maine Rule of Evidence 706 is similar to its federal counterpart. The Maine Rule sets forth a different procedure for assigning the costs for compensation of the expert witness. This difference was carried over in the restyled Rule.

Federal Restyling Committee Note

The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Advisers' Note to former M.R. Evid. 706 (February 2, 1976)

Court-appointed experts are provided for in M.R. Crim. P. 28(a).⁸⁸ There is no broad statutory provision or rule for such appointments in civil cases. Under 19 M.R.S.A. §§ 277-279,⁸⁹ added by P.L. 1967, c. 325, § 2, the court may in paternity cases appoint qualified experts to perform blood tests. The experts are to be called as court witnesses, subject to cross-examination, and to be paid as the court orders. This rule generalizes the procedures under the statute.

This rule is identical⁹⁰ to the Federal Rule. Although it recognizes that the power of the trial judge to appoint an expert of his own choosing should exist, the Court shares the view of the Advisory Committee that exercise of power in civil cases should be resorted to only in exceptional situations. The Committee said: “In any jury case the opinion of an expert known to be court-appointed and hence presumably impartial would almost surely be given decisive weight. In a case tried without jury the judge who selected the expert could scarcely be expected by the parties not to adopt his opinion. The use of a court-appointed expert in personal

⁸⁸ Rule 28 the Maine Rules of Criminal Procedure and the Maine Rules of Unified Criminal Procedure applies only to court appointment of interpreters and translators.

⁸⁹ This statute has been repealed.

⁹⁰ The Federal and Maine Rules are no longer identical—see the Restyling Note to the Maine Rule.

injury cases seems especially unwise. The Committee recommends the rule in this form because it could not devise any satisfactory limitation to prevent potential abuse.”

ARTICLE VIII. HEARSAY

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

- (a) **Statement.** “Statement” means a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.
- (b) **Declarant.** “Declarant” means the person who made the statement.
- (c) **Hearsay.** “Hearsay” means a statement that:
 - (1) The declarant does not make while testifying at the current trial or hearing; and
 - (2) A party offers in evidence to prove the truth of the matter asserted in the statement.
- (d) **Statements that are not hearsay.** A statement that meets one of 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) 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.

- (2) *An opposing party's statement.* The statement is offered against an opposing party and:
- (A) Was made by the party in an individual or representative capacity;
 - (B) Is one the party manifested that it adopted or believed to be true;
 - (C) Was made by a person whom the party authorized to make a statement on the subject, but was not made to the principal or employer;
 - (D) Was made by the party's agent or employee on a matter within the scope of that relationship and while it existed, but was not made to the principal or employer; or
 - (E) Was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C), the existence or scope of the relationship under (D), or the existence of the conspiracy or participation in it under (E).

Maine Restyling Note [November 2014]

Maine Rule 801 is substantially similar Federal Rule 801, except that the Maine Rule is structured somewhat differently with respect to the admissibility of prior consistent statements. Also, Maine excludes from Rule 801(b)(2) "in-house" statements made by an agent, employee, or authorized person. These distinctions have been carried over as part of the restyling process.

Federal Committee Restyling Note

The language of Rule 801 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as “admissions” in the title to the subdivision. The term “admissions” is confusing because not all statements covered by the exclusion are admissions in the colloquial sense—a statement can be within the exclusion even if it “admitted” nothing and was not against the party’s interest when made. The term “admissions” also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

Advisers’ Note to former M.R. Evid. 801
(February 2, 1976)

The definitions in this rule pose some problems and bring about some changes in Maine law. Subdivision (a) excludes from the operation of the hearsay rule all evidence of conduct not intended as an assertion. In addition to verbal assertions, “statement” includes nonverbal conduct, such as pointing at someone, which is assertive in nature. (“That’s the man!”) When an assertion is intended is a preliminary question for the court, and often a difficult one.

Subdivision (c) embodies in the definition of “hearsay” a statement, as defined in (a), other than one made on the witness stand, offered to prove the truth of the matter asserted. This is familiar law. See, e.g., *Rockland & Rockport Lime Co. v. Coe-Mortimer Co.*, 115 Me. 184, 98 A. 657 (1916). Where the fact that the words were spoken is relevant, as words of offer and acceptance in a contract action or slanderous words in a defamation case, there is no hearsay problem. The witness on the stand can be cross-examined as to what was said and its truth is not in issue.

Subdivision (d) expands what is not hearsay. The importance of excluding a statement from the definition of hearsay is that it becomes admissible as substantive evidence. Subsection (1) changes the Maine law with respect to prior inconsistent statements of a witness. Traditionally, evidence of such a statement has been admissible only to impeach the testimony of the witness on the stand and not for its truth. *State v. Fournier*, 267 A.2d 638, 640 (Me. 1970). An instruction to this effect is, however, hard for the jury to comprehend. Under this rule when the declarant actually testifies as a witness, the jury can judge his demeanor and his credibility can be tested by cross-examination. If the prior inconsistent statement was previously given under oath subject to the penalty of perjury at a trial or other

proceeding, it becomes admissible for its truth and not merely to impeach. When the jury decides whether the truth is what the witness now says in court or what he swore to before, it is still deciding from what it sees and hears in court. As originally proposed by the Supreme Court, the rule did not require the prior statement to be under oath in order for it to be admissible as substantive evidence. The Federal Rule as enacted by Congress does require an oath, and the Court accepts this requirement as desirable. While the sanctity attributed to the oath is less than it once was, a sworn statement is a solemn undertaking, subject to the perjury penalty, and inherently much more credible than a mere unsworn statement. If there were no requirement for an oath, it would be possible to get a case to the jury when the only evidence of an essential fact was a casual out-of-court statement which the declarant repudiates in court under oath. Any prior inconsistent statement not under oath is still admissible for the purpose of impeachment, as it is under present law. The concluding sentence limiting a prior consistent statement, whether or not under oath, to use in rebuttal of a claim of recent fabrication or improper influence or motive states the present Maine law. Although probably unnecessary, it is included here for the sake of clarity. One reason for including it is to emphasize the difference from the Federal Rule, which makes a prior consistent statement substantive evidence.⁹¹

Subsection (2) deals with admissions by a party-opponent. There has been a learned dispute over whether a party's admissions are admissible as an exception to the hearsay rule or are not classified as hearsay at all. This rule takes the latter view. In either event, they are admissible. A party's own statement is the classic example of an admission. It is often confused with a statement against interest, a hearsay exception covered in Rule 804(b)(3). An admission may be made only by a party. It need not be of his own knowledge, it need not be contrary to his interest when made, and it is not necessary that the party be unavailable at trial. A statement against interest need not be, and usually is not, made by a party. It must be contrary to the declarant's interest when made, and the declarant must be unavailable at trial.

Subsection (2)(B), covering adoptive admissions, is in accord with Maine law. Adoption may be manifested by words or by silence. Silence may be a tacit admission of facts stated in ones hearing under circumstances such as naturally call for a reply if no admission is intended. *Gerulis v. Viens*, 130 Me. 378, 156 A. 37 8

⁹¹ Federal Rule 801 only allows prior consistent statements to rebut an express or implied charge of recent fabrication or improper motive, to rehabilitate credibility once attacked, or if it was a statement of identification of someone.

(1931). The party must have heard and understood the statement and have been at liberty to reply.

Subsection (2)(C) makes admissible statements made by a person authorized by a party to make a statement to a third person concerning the subject. Statements made by the agent to the principal are not admissions of the principal. This is in accord with Maine law. *Warner v. Maine Central R. R.*, 111 Me. 149, 88 A. 403 (1913).

Subsection (2)(D) makes admissible an out-of-court statement of an agent or servant concerning a matter within the scope of his employment, but not to his principal or employer, made during the existence of the relationship. The traditional rule has been to apply the usual agency test and determine whether the statement was authorized by the principal. The difficulty with this is that very rarely is an agent employed to make damaging statements. The truck driver is hired to drive, not to talk. The subsection at least formally changes Maine law. In practice, however, another basis for admissibility has frequently been found, such as a spontaneous statement, part of the *res gestae* and the like, often by stretching those concepts to or beyond the breaking point.

Subsection (2)(E) making admissible the statements of a co-conspirator of a party during the course and in furtherance of the conspiracy is in accord with Maine law. See *State v. Vetrano*, 121 Me. 368, 117 A. 460 (1922). It is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulwitch v. United States*, 336 U. S. 440, 69 S.Ct. 716 (1949).

There are three departures from the Federal Rule. One already mentioned is the difference in treatment of a prior consistent statement. The other two are in subdivision (d)(2)(C) and (D), in both of which statements made by an agent or servant to his employer are not admissions against the employer, as they are under the Federal Rule.

Explanation of Amendment

(October 1, 1976)

The purpose of this amendment was to exclude from the category of hearsay a statement of prior identification of a person made by a declarant who testifies at the trial and is subject to cross-examination. It restores a provision in the Tentative Draft of the rules which was in the Supreme Court's proposed rule and in the bill

as it passed the House of Representatives. When the Tentative Draft was submitted to the Bar, no adverse comments on the rule were received. The provision was deleted by Congress in the final version of the rule in the face of a threatened filibuster which jeopardized passage of the bill. The Court on recommendation of the Evidence Rules Committee also deleted it solely to conform to the Federal Rule as enacted by Congress. Congress restored the provision on October 16, 1975, so the reason for its deletion from the Maine rule no longer exists.

Advisory Committee Note
(April 1, 1998 Amendment)

This amendment is proposed to bring Maine Rule 801(d)(2) into conformity with its federal counterpart as amended in 1997. The amendment resolves a previously unresolved issue in Maine, namely whether a hearsay statement can be used to prove its own foundation as a vicarious admission. See Field and Murray, *Maine Evidence* (4th Ed.) §§ 801.7 and 801.8. Under the rule as amended, the hearsay statements could be used to prove the foundation for the vicarious admissions, but would not alone be sufficient proof of such foundation without some independent evidence.

RULE 802. THE RULE AGAINST HEARSAY

Hearsay is not admissible unless any of the following provides otherwise:

- A statute;
- These rules; or
- Other rules prescribed by the Maine Supreme Judicial Court.

Maine Restyling Note [November 2014]

The restyled rule leaves out the definition of “as provided by law” inserted in Maine Rule 802 in favor of the federal approach of listing the alternative sources of hearsay exceptions.

Advisers' Note to former M.R. Evid. 802
(February 2, 1976)

The proposition that hearsay is not admissible except as provided by these rules requires no comment.

**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:

- (1) **Present sense impression.** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.
- (2) **Excited utterance.** A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.
- (3) **Then-existing mental, emotional, or physical condition.** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.
- (4) **Statement made for medical diagnosis or treatment.** A statement that:
 - (A) Is made for—and is reasonably pertinent to—medical diagnosis or treatment; and
 - (B) Describes medical history; past or present symptoms or sensations; their inception; or their general cause.
- (5) **Recorded recollection.** A record that:
 - (A) Is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

- (B) Was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) Accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(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), Rule 902(12) or with a statute permitting certification; and
- (E) Neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) **Absence of a record of a regularly conducted activity.** Evidence that a matter is not included in a record described in paragraph (6) if:

- (A) The evidence is admitted to prove that the matter did not occur or exist;
- (B) A record was regularly kept for a matter of that kind; and
- (C) Neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

- (8) **Public records.** A record or statement of a public office if:
- (A) It sets out:
 - (i) The office's regularly conducted and regularly recorded activities;
 - (ii) A matter observed while under a legal duty to report; or
 - (iii) Factual findings from a legally authorized investigation.
 - (B) The following are not within this exception to the hearsay rule:
 - (i) Investigative reports by police and other law enforcement personnel;
 - (ii) Investigative reports prepared by or for a government, a public office or an agency when offered by it in a case in which it is a party;
 - (iii) Factual findings offered by the state in a criminal case;
 - (iv) Factual findings resulting from special investigation of a particular complaint, case, or incident; and
 - (v) Any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.
- (9) **Public records of vital statistics.** A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.
- (10) **Absence of a public record.** Testimony—or a certification under Rule 902—that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:
- (A) The record or statement does not exist; or
 - (B) A matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

- (11) **Records of religious organizations concerning personal or family history.** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.
- (12) **Certificates of marriage, baptism, and similar ceremonies.** A statement of fact contained in a certificate:
- (A) Made by a person who is authorized by a religious organization or by law to perform the act certified;
 - (B) Attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
 - (C) Purporting to have been issued at the time of the act or within a reasonable time after it.
- (13) **Family records.** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
- (14) **Records of documents that affect an interest in property.** The record of a document that purports to establish or affect an interest in property if:
- (A) The record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;
 - (B) The record is kept in a public office; and
 - (C) A statute authorizes recording documents of that kind in that office.
- (15) **RESERVED.**
- (16) **Statements in ancient documents.** A statement in a document that is at least 20 years old and whose authenticity is established.
- (17) **Market reports and similar commercial publications.** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in learned treatises, periodicals, or pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

- (A)** The statement is called to the attention of an expert witness on cross-examination; and
- (B)** The publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation concerning personal or family history. A reputation among a person's family by blood, adoption, or marriage—or among the person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of the person's personal or family history.

(20) Reputation concerning boundaries or general history. A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation concerning character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a previous conviction. Evidence of a final judgment of conviction if:

- (A)** The judgment was entered after a trial or guilty plea;
- (B)** The conviction was for a crime punishable by death or by imprisonment for more than a year;
- (C)** The evidence is admitted to prove any fact essential to the judgment; and

- (D) When offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.
- (23) **Judgments involving personal, family, or general history, or a boundary.** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:
- (A) Was essential to the judgment; and
- (B) Could be proved by evidence of reputation.

Maine Restyling Note [November 2014]

Restyled Rule 803 preserves the substantive differences between the Maine and the Federal Rules. Maine does not have any residual hearsay exception.⁹²

Advisers' Note to former M.R. Evid. 803 (February 2, 1976)

The framework of this and the following rule is to separate statements made by a declarant even though he is available as a witness from those made by a declarant who is unavailable. For the most part, the exceptions in this rule from the prohibition against hearsay evidence are those evolved on a case-by-case basis by the common law and presently recognized in Maine. The differences will be discussed under the separate subdivisions.

Subdivisions (1) and (2) overlap somewhat, although they are based on different theories. The theory of (1) is that a statement substantially contemporaneous to the event being described is most unlikely to be a deliberate or conscious misrepresentation. There is no requirement that the event be an exciting one, although it usually will be, since unexciting events are not likely to evoke comment. The theory of (2) is that witnessing a startling event produces a state of excitement which for the time being stills the reflective faculties and negatives a purpose to fabricate evidence. It differs from (1) in that a greater lapse of time is allowable. The crucial question is how long the state of excitement may be found to last. This is a preliminary question for the judge. The principle is well

⁹² See Rule 807 of the Federal Rules of Evidence.

established by Maine case law. See *State v. Ellis*, 297 A.2d 91 (Me. 1972), where admissibility was denied, and *State v. Lafferty*, 309 A.2d 647 (Me. 1973), where the statements were admitted.

Subdivision (3) makes admissible statements of the declarant's then existing state of mind, such as intent, plan, motive, and the like. The principle is illustrated by Maine cases. *Colby v. Tarr*, 139 Me. 277, 29 A.2d 749 (1943); *State v. Trask*, 223 A.2d 823, 826 (Me. 1966). The rule excludes in general statements of memory or belief to prove the fact remembered or believed. This, as the Federal Advisory Committee said, is necessary to avoid the virtual destruction of the hearsay rule which would result from allowing state of mind, provable by an out-of-court statement, to serve as a basis for inference of the happening of the event which produced the state of mind. A prime example of this danger is *Shepard v. United States*, 290 U. S. 96, 54 S.Ct. 22 (1933). There the statement that "Dr. Shepard has poisoned me" was held inadmissible despite the argument that it showed the victim's state of mind—a will to live—in order to rebut evidence of intent to commit suicide. It preserves the result in the notorious case of *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909 (1892), where a letter from one Walters that he intended to go to Crooked Creek with Hillmon was held admissible, his statement of present intent making it more probable that he went and went with Hillmon. A statement of then existing state of mind eliminates the memory risk inherent in a statement reflecting a past state of mind.

The subdivision also removes from the generalization excluding statements of memory or belief to prove the fact remembered or believed statements relating to the execution, revocation, or identification of the terms of the declarant's will, thus making such statements admissible. The Federal Advisory Committee said that this represents an ad hoc judgment, resting on practical grounds of necessity and expediency rather than logic. This rule does not affect the Maine cases holding that oral testimony of the testator's intentions is inadmissible. *Bryant v. Bryant*, 129 Me. 251, 151 A. 429 (1930); *First Portland Nat'l Bank v. Kaler-Vaill*, 155 Me. 50, 151 A.2d 708 (1959).

Subdivision (4) recognizes an exception to the hearsay rule statements made for the purpose of medical diagnosis or treatment. Such statements are now admissible under Maine law, not as proof of the facts stated but only as they might support or explain the doctor's diagnosis or opinion. *Goldstein v. Sklar*, 216 A.2d 298 (Me. 1966). This subdivision admits the statements for their truth. The justification is the patient's strong motivation to be truthful. Furthermore, it is unrealistic to assume that the lay juror is capable of making the nice discrimination

between admissibility for truth and for the other purposes allowable under present law.

The words “insofar as reasonably pertinent to diagnosis or treatment”⁹³ are broad enough to cover statements as to the cause of an injury (“I was struck by a car”) but not statements of fault (“The car went through a red light”).

The statement need not have been made directly to a physician in order to be admissible, but would include statements to an ambulance driver, emergency room attendants (interns, nurses, orderlies and the like), or to members of the family. “Medical treatment” is not broad enough, however, to include a statement by a child to its mother for administration of a home remedy such as a dose of aspirin or soaking of a bruised hand.

Subdivision (5) recognizes the familiar hearsay exception for past recollection recorded. *Cope v. Sevigny*, 289 A.2d 682 (Me. 1972). The rule is silent as to whether exhibits are to be sent to the jury room, thus giving the court the same discretion as at present. Customarily the written memorandum is not allowed to go to the jury room because it may impart “an aura of veracity and accuracy not normally attached to the spoken words.” *Morgan v. Paine*, 312 A.2d 178, 185 (Me. 1973).

Subdivision (6) covers the hearsay exception for records of a regularly conducted business. It gives somewhat broader coverage to business records than present Maine law. It would not admit personal check stubs, held inadmissible in *Supruniuk v. Petriw*, 334 A.2d 857 (Me. 1975), and like individual financial records nor a personal diary concerning daily weather conditions, regularly kept as a hobby, held inadmissible under the old “shopbook” rule in *Arnold v. Hussey*, 111 Me. 224, 88 A. 724 (1913). It should be noted that records not admissible under this exception may get in through some other route, such as admissions, statements against interest, past recollection recorded, and so on.

Subdivision (7) is a necessary complement to subdivision (6). It provides that the absence of an entry is admissible to prove nonoccurrence or nonexistence of the matter. Compare M.R.C.P. 44(b), dealing with proof of lack of official record.

⁹³ The language is now “is made for—and is reasonably pertinent to—medical diagnosis or treatment,” but the Note is still accurate otherwise.

Subdivision (8) creates a hearsay exception for various types of public records and reports. There is a common law exception for public records and there are numerous Maine statutes facilitating the admission of specified official records. This subdivision is largely a generalized statement of the provisions found in these statutes. The justification is the assumption, by no means an inevitable one, that a public official will perform his duties properly. There is an escape clause in (B)(v) providing for exclusion if there are circumstances indicating lack of trustworthiness. The corresponding Federal subdivision is substantially different in form and in some respects in substance also. The chief substantive difference is that the Federal Rule excludes from matters as to which there was a duty to report “[i]n criminal cases matters observed by police officers and other law enforcement personnel.”⁹⁴ Note, however, sub-paragraph (B) of the Maine rule, which excludes from this exception investigative reports by police and other law enforcement personnel. The formulation of the subdivision, which is taken from the Uniform State Law, seems more readily understandable.

Subdivision (9) makes admissible records of vital statistics. It is written so that it is sufficient if the report is made to a public office pursuant to requirements of law (not necessarily by a public officer). Thus certificates of ministers or physicians are admissible. The subdivision does not make the record admissible as to cause of death. In this respect it is like 22 M.R.S.A. § 2707. Under Maine case law the certificate is not admissible for that purpose. *Barton v. Beck’s Estate*, 159 Me. 446, 195 A.2d 63 (1963).

Subdivision (10) is similar to subdivision (7) in permitting proof of nonoccurrence of an event by evidence of nonexistence of a public record that would ordinarily be made of its occurrence. Thus this mode of proof may be used in connection with matters referred to in subdivisions (8) and (9), just as can be done under subdivision (7) with respect to subdivision (6).

Subdivision (11) may overlap somewhat subdivision (6). It makes admissible statements from records of churches and religious societies concerning births, marriages, divorces, deaths and other similar facts of personal or family history. Many of these could come in under the business records exception in subdivision (6). That subdivision, however, requires that any person supplying the

⁹⁴ The language in the Federal Rule has changed: “but not including, in a criminal case, a matter observed by law-enforcement personnel.” Otherwise the Note is still accurate on this point.

recorded information have a duty to do so,⁹⁵ thus following the leading case of *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) (police report incorporating information obtained from a bystander inadmissible). The present subdivision does not include such a requirement, on the theory that there is every reason to repose trust in the data submitted to a religious organization, such as the age of a child for inclusion in a baptismal certificate.

Subdivision (12) provides for admission of statements of fact in a marriage, baptismal, or similar certificate. It duplicates in part subdivision (8) for public records, but it is broader, including baptism and confirmation. It applies to the certificate given to the parties by the clergyman or like person who performs the ceremony.

Subdivision (13) conforms to the traditional approach, making records of family history in Bibles and the like admissible. It covers inscriptions on family portraits, tombstones and other types of record, even though the author may not be identifiable.

Subdivision (14) creates a hearsay exception for the record of a deed as proof of the content of the document and its execution and delivery. This is a slight change in Maine law. Under 16 M.R.S.A. § 452⁹⁶ an attested copy from the registry may be used in evidence without proof of execution when the party offering it is not the grantee in the deed, nor claiming as his heir, nor justifying as his agent. This subdivision makes such a record admissible without limitation. It is to be noted that the record is merely made admissible without giving it presumptive force. If there is a genuine controversy, more persuasive evidence should be sought.

The Federal Rule contains a subdivision (15) recognizing a hearsay exception for statements in documents affecting an interest in property. The Court accepted subdivision (14) for the record of a document affecting an interest in property as proof of its content, execution, and delivery but declined to extend the exception to statements contained in such a document.

⁹⁵ Subsection (6) does not expressly require the supplier of the recorded information to have a duty to supply it. Subsection 8(A)(ii), however, does include the “duty” language.

⁹⁶ This statute has been repealed.

Subdivision (16) makes admissible statements in a document in existence twenty years or more if its authenticity has been established. Authentication may be achieved by showing that a document is “ancient” pursuant to Rule 901(b)(8). But authentication does not resolve the question of admissibility of assertive statements in the document. A hearsay exception is also necessary, and this subdivision provides it. It also reduces the thirty-year time period of the common law tradition, recognized in *Landry v. Giguere*, 128 Me. 382, 147 A. 816 (1929), to twenty years.

Subdivision (17) creates an exception to the hearsay rule for market quotations, directories or other published compilations used and relied upon by the public or by persons in particular occupations. Maine now provides in 11 M.R.S.A. § 2-724, the Uniform Commercial Code, that when goods are traded in an established market, market reports in official publications, trade journals, or newspapers are admissible. There are decisions from other jurisdictions admitting stock market quotations, city directories, telephone directories, and the like.

Subdivision (18) changes Maine law by making learned treatises called to an expert’s attention on cross-examination and established as authoritative admissible as substantive evidence. Hitherto admission of a learned treatise over objection has been forbidden except to impeach an expert witness who relies upon such authority for the opinion he has expressed. *Goldthwaite v. Sheraton Restaurant*, 154 Me. 214, 145 A.2d 362 (1958). This subdivision, as in the case of other rules, implicitly accepts the proposition that jurors are unlikely to understand and follow limitations on the purpose for which evidence is admitted, such as the difference between use for impeachment and as substantive evidence. It is to be noted that the expert himself need not even recognize the treatise as authoritative so long as its authoritativeness is somehow established, such as by testimony of another expert or, conceivably, by judicial notice. Thus the possibility is avoided that the expert may block cross-examination by denying either reliance or authoritativeness.

There is nothing in this subdivision to prevent the use for impeachment of any writing, authoritative or not, as can be done at present.

The Federal Rule makes admissible a learned treatise relied upon by an expert on direct examination as well as one called to his attention upon cross-examination. It seems undesirable to allow an expert to bolster his direct testimony by use of a supporting treatise as substantive evidence. The Federal Advisory Committee’s statement that the chance of misunderstanding and

misapplication of the treatise is avoided because the expert is on the stand and available to explain it is unimpressive.

Subdivision (19) recognizes and broadens one of the oldest exceptions to the hearsay rule, evidence of reputation concerning personal or family history. Marriage has always been considered a proper subject of proof by evidence of community reputation, but there has been a split as to birth, death, legitimacy, adoption and relationship. This exception extends to all of these matters. The rule allows evidence of reputation in the community or among associates as well as in the family. The Federal Advisory Committee said: “This world [in which the reputation may exist] has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated.” The rule does not require that the declarations be made before the controversy leading to the litigation developed, nor is it necessary to show that the declarant is unavailable. It must be emphasized that reputation in the community means more than mere gossip.

Subdivision (20) makes admissible evidence of reputation in a community, arising before the controversy, as to boundaries affecting lands in the community. It allows such evidence with respect to both public and private boundaries. This is the general rule in the United States, but Maine has limited its application to public boundaries. *Chapman v. Twitchell*, 37 Me. 59 (1853). The rule also admits reputation evidence as to matters of general history. This aspect of the rule is in accord with Maine law. *Piper v. Voorhees*, 130 Me. 305, 155 A. 556 (1931) (Maine Historical Society Map in the History of Scarborough admissible without extrinsic evidence of authenticity).

Subdivision (21) makes admissible evidence of reputation of a person’s character among his associates or in the community. This has long been the subject of a hearsay exception. This subdivision is merely a restatement, in the hearsay context, of Rule 405(a) which outlines the methods of proving character.

Subdivision (22) makes evidence of a conviction of a crime punishable by imprisonment for one year or more admissible for the purpose of proving any fact essential to the judgment (but not a judgment against a person other than the accused when offered by the state to prove any such fact). The traditional rule denies admissibility, but there is no Maine case law on the point.

There is an increasing tendency to hold a judgment of conviction of a crime conclusive against the accused in a subsequent civil case, as when a person convicted of arson seeks to recover on the fire insurance policy covering the burned property. This subdivision has nothing to do with this use of res judicata or collateral estoppel. However desirable it would be to have such a rule, it is a matter of substantive law beyond the scope of rules of evidence. Failing that, the half-way measure of making evidence of a conviction admissible but not conclusive seems desirable. Adoption of the subdivision should not be taken as foreclosing the Court from holding that res judicata principles make the conviction conclusive.

Subdivision (23) makes admissible a prior judgment involving matters of personal, family or general history or boundaries, if the same would be provable by reputation evidence. It seems reasonable to conclude that the process of inquiry and scrutiny which is relied upon to render reputation reliable is present to as great or greater degree in the process of litigation. The number of cases dealing with the issue is very small. In the leading case, *Patterson v. Gaines*, 47 U.S. (6 How.) 550 (1848), a prior judgment of legitimacy was received as prima facie evidence in a later civil action.

The Federal Rule contains a subdivision (24), a catch-all provision⁹⁷ which would allow the court to admit evidence “having equivalent circumstantial guarantees of trustworthiness” to the listed exceptions. This reflects the judgment of Congress that it is undesirable to freeze the hearsay exceptions so as to prevent the ordinary and rational development of the law of evidence without the necessity of amending the rules to respond to a situation which has arisen in a given trial. Such an amendment would of course be too late to affect the result of that trial. The rule as enacted by Congress plainly evinces concern lest too much uncertainty be injected in the law of evidence and a fear that trial judges would exercise in widely different ways their judgment as to what constituted “equivalent circumstantial guarantees of trustworthiness.” The rule incorporates safeguards designed to minimize this hazard. It requires a determination by the trial court that the statement is offered as evidence of a material fact, that it is more probative on the point than any other evidence reasonably available, and that the interests of justice will best be served by its admission. Moreover, notice of the intention to offer the statement must be given sufficiently in advance of trial to provide a fair

⁹⁷ This has been transferred to Federal Rule 807, the residual exception. Subsection 803(24) now reads: “[Other Exceptions.] [Transferred to Rule 807.]”

opportunity to prepare to meet it. The notice must give the particulars of the statement, including the name and address of the declarant. The court will be expected to give the opponent a full and adequate opportunity to contest the admission of the statement. Moreover, the Senate Committee Report emphasized the exceptional nature of the use of the provision saying: “It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions.”

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 standard of equivalent trustworthiness. The result would be a lack of uniformity which would make preparation for trial 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 in 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.

Advisory Committee Note
(July 1, 2002 Amendment)

These amendments are intended to ease the process of admission of records of regularly conducted activity covered by Rule 803(6). Rule 803(6) excepts from the Hearsay Rule records certified in accord with Rules 902(11) and 902(12). The new subsections of Rule 902 provide for certification of records of regularly conducted activity by domestic entities in both civil and criminal cases, and for

certification of records of foreign entities in civil cases only. The certificate establishes the foundational facts required for admissibility under Rule 803(6). The new rules apply both to records of parties as well as records of non-party entities.

The proposed amendment parallels a recent amendment to the Federal Rules of Evidence. Like the Federal version, the Maine version requires advance notice of intention to offer evidence under this provision.⁹⁸ The Maine version goes a little beyond the Federal version in expressly authorizing the trial court to decline to accept the certification in the interests of justice,⁹⁹ thus requiring the party offering the certificate to provide the foundation by other evidence, in most cases testimony complying with Rule 803(6). To the extent feasible objection to a certified record must be made in a timely manner to permit the proponent opportunity to procure any necessary foundation testimony.

For the purpose of this rule, the term “domestic” refers to the 50 United States of America, not just the State of Maine. A domestic record would be a record of an entity doing business in a domestic jurisdiction.

The changes in the rules do not affect the scope of Rule 803(6), which is intended to cover records of entities and activities other than governmental records covered by Rule 803(8).

RULE 804. EXCEPTIONS TO THE RULE AGAINST HEARSAY—WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

- (a) **Criteria for being unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
- (1) Is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies;

⁹⁸ Neither Rule specifically requires advance notice at the present time.

⁹⁹ Now, the Maine Rule admits the evidence if the source of the information and the method of preparation do not indicate a lack of trustworthiness, while the Federal Rule admits the evidence if the *opponent of the evidence does not show* that the source and method lack trustworthiness. This indicates that the Maine Rule allows courts to exercise more discretion, but there is no express language about the interests of justice.

- (2) Refuses to testify about the subject matter despite a court order to do so;
- (3) Testifies to not remembering the subject matter;
- (4) Cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
- (5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure the declarant's attendance.

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

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

(1) *Former Testimony.* Testimony that:

- (A) Was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
- (B) Is now offered against a party who had—or, in a civil case, whose predecessor in interest had—an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) *Statement under the belief of imminent death.* A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) *Statement against interest.* A statement—except, in a criminal case, for a statement or confession made by a defendant or other person implicating both the declarant and the accused that is offered against the accused—that:

- (A) A reasonable person in the declarant's position would have made only if the person believed it to be true because, when

made, it was so 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; and

(B) Is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) *Statement of personal or family history.* A statement about:

(A) The declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

(B) Another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

Maine Restyling Note [November 2014]

Restyled Maine Rule 804 preserves the substantive differences between the Maine and Federal Rules.

Advisers' Note to former M.R. Evid. 804

(February 2, 1976)

This rule covers hearsay exceptions when the declarant is unavailable. Subdivision (a) defines unavailability. Subsection (1), providing that a successful claim of privilege satisfies the unavailability requirement, is in accord with Maine law. *State v. Robbins*, 318 A.2d 51 (Me. 1974). Subsection (2) provides that one who simply refuses to testify despite an order to do so is unavailable. No Maine case on the point has been found, but the great weight of authority is in accord. McCormick, *Evidence* (2d ed.) 612; *United States v. Mobley*, 421 F.2d 345 (5th Cir. 1970).

Subsection (3) provides that one who testifies to a lack of memory of the subject matter of his statement is unavailable. Again, no Maine case has been found and the cases elsewhere are few and conflicting. The claimed lack of memory must be established through the testimony of the witness at the trial and subject to cross-examination on his memory and his motives. On this preliminary question, the court may disbelieve the testimony of the declarant as to his lack of memory. See *United States v. Insana*, 423 F.2d 1165, 1169-70 (2d Cir. 1970).

Subsection (4) provides that death and then existing mental illness or infirmity are grounds for a finding of unavailability. Death is an obvious and longstanding basis for this finding. *Dwyer v. State*, 154 Me. 179, 145 A.2d 100 (1958). Physical or mental illness or infirmity is also generally accepted. Compare M.R.C.P. 32(a)(3) (use of deposition if witness dead or unable to attend or testify because of age, illness, or infirmity); M.R. Crim. P. 15(e) (to same effect—death, sickness, or infirmity). In Maine even a temporary disability has been held sufficient. *Chase v. Springvale Mills Co.*, 75 Me. 156 (1883). Most cases involving temporary disability are, however, handled by a continuance.

Subsection (5) provides that a declarant is unavailable if his presence cannot be secured by legal process or if he simply cannot be found. There is no requirement that an attempt be made to depose the declarant. The Federal Rule is to the contrary. The proponent must have been unable to procure the attendance or testimony of the witness by process or other reasonable means.¹⁰⁰ This imposes a needless and impractical complication. Depositions are expensive and time-consuming and the Civil and Criminal Rules are not well adapted to implementing this requirement. No purpose is served unless the deposition, if taken, may be used as evidence. Under M.R.C.P. 32(a)(3) and M.R. Crim. P. 15(e) a deposition may not be admissible and under M.R. Crim. P. 15(a) obstacles exist to even taking a deposition. The existing deposition procedure remains available to those who wish to use it.

Subdivision (a) concludes with the pronouncement that a witness is not “unavailable” if the circumstances which would otherwise constitute unavailability

¹⁰⁰ The sentence is essentially correct as is, but for clarification: If the testimony falls under (b)(2), (3), or (4) of the Federal Rule, the sentence is correct. The testimony requirement does *not* apply to testimony already given under oath ((b)(1)), or statements offered against a party who procured the declarant’s unavailability ((b)(6)), the second of which is not part of the Maine Rule.

are due to the procurement or other wrongdoing of the proponent of the declaration. Cf. M.R.C.P. 32(a)(3) (“ . . . unless it appears that the absence of the witness was procured by the party offering the deposition”); M.R. Crim. P. 15(e) (same).¹⁰¹

Subdivision (b)(1) covers the hearsay exception for former testimony. It is in accord with present Maine law in admitting prior testimony only if the party against whom it is offered or, in a civil case, a predecessor in interest, had an opportunity and similar motive to develop the testimony. *Ellsworth v. Waltham*, 125 Me. 214, 132 A. 423 (1926). In a criminal case, *State v. Budge*, 127 Me. 234, 142 A. 857 (1928), the state was allowed to introduce upon a second trial the testimony at the first trial of a witness who had left the state so that his attendance could not be compelled. This was held to be a proper exception to the hearsay rule and not a violation of the constitutional right of confrontation.

It is also the Maine law, as it continues to be under the rule, that the testimony is admissible if offered against a party who called the witness at a prior trial. Direct and redirect examination is the equivalent of an opportunity for cross-examination. *Dwyer v. State*, 154 Me. 179, 145 A.2d 100 (1958).

Subdivision (b)(2) covers the familiar common law exception to the hearsay rule for dying declarations. *State v. Chaplin*, 286 A.2d 325 (Me. 1972). It expands the common law somewhat by making these declarations admissible concerning the cause or circumstances of what the declarant believed to be his impending death without limitation as to type of case. At common law the declaration of the victim was admissible only if offered in a criminal homicide case. Death is not the only form of unavailability under this subdivision. If the declarant believed death was imminent when he spoke and if he is unavailable at the time of trial, the declaration is admissible if in fact the declarant is not dead when the case is tried. The Federal Rule limits this exception to prosecutions for homicide and civil actions, thus eliminating it from criminal prosecutions other than for homicide.

Subdivision (b)(3) covers declarations against interest. It applies to declarations by nonparties; if a statement is that of a party, offered by an adverse party, it is an admission under Rule 801(d)(2), which provides that an admission of a party opponent is not hearsay. The familiar common law declaration against

¹⁰¹ That language appears to have been removed, but M.R. Crim. P. 15(e) and M.R.U. Crim. P. 15(e) include the qualification: “so far as otherwise admissible under the rules of evidence.”

interest exception was confined to declarations against pecuniary or proprietary interest. Maine has long recognized this exception. *Consolidated Rendering Co. v. Martin*, 128 Me. 96, 106, 145 A. 896, 900 (1929). It is required that the statement be against interest at the time it was made. *Small v. Rose*, 97 Me. 286, 54 A. 726 (1903). The subdivision adds declarations subjecting the declarant to criminal or civil liability, including tort liability. It also adds declarations tending to make the declarant an object of hatred, ridicule, or disgrace. The justification is that the motivation here to tell the truth is as strong as when financial interests are at stake. It is a preliminary question for the court whether a given statement would tend to make the declarant an object of hate, ridicule, or disgrace. The Federal Rule does not include a provision for this last type of declaration.

Subdivision (b)(4) deals with the hearsay exception for statements of personal or family history. It drops some of the conditions imposed by *Northrop v. Hale*, 76 Me. 306 (1884), the leading Maine case, in an effort to ensure reliability. These conditions on admissibility of declarations concerning pedigree were: (1) there must be evidence outside the declaration that the declarant was lawfully related by blood or marriage to the person or family whose history the facts concern; (2) the declarant must be dead when the declaration is offered; and (3) the declaration must have been made before commencement of the litigation. Under this subdivision the ante litem motam requirement is eliminated, the time of the declaration with reference to the institution of the lawsuit going to its weight, not its admissibility. Under (A) it is not required that the declarant have firsthand knowledge of the facts of his own pedigree. Obviously, he would have no firsthand knowledge of the date of his birth. Under (B) the declarant qualifies as a consequence of intimate association with the family of the person whose pedigree is in issue. This is contrary to a dictum in *Northrop*. The subdivision also goes beyond *Northrop* in allowing other bases of unavailability besides death.

The Federal Rule contains a catch-all provision like that in Rule 803(24).¹⁰²

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

¹⁰² The “catch-all” provision, formerly Federal Rule 803(24), has been transferred to Federal Rule 807, the residual exception.

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.

RULE 805. HEARSAY WITHIN HEARSAY

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

Maine Restyling Note [November 2014]

Maine Rule 805 and Federal Rule 805 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 805 (February 2, 1976)

This rule covers hearsay within hearsay, sometimes called “totem pole” hearsay. It provides for a two-stage approach. If each part of the combined statement conforms to some hearsay exception it is all admissible. The Federal Advisory Committee gives as an example a dying declaration which incorporates a declaration against interest by another out-of-court declarant. In contrast, a declaration itself within an exception cannot include a statement of another declarant which does not fall within an exception. An example is *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930) (information from a bystander incorporated in a police report not admissible; the bystander’s statement was inadmissible hearsay).

RULE 806. ATTACKING AND SUPPORTING THE DECLARANT'S CREDIBILITY

When a hearsay statement—or a statement described in Rule 801(d)(2)(C), (D), or (E)—has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

Maine Restyling Note [November 2014]

Maine Rule 806 and Federal Rule 806 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 806 (February 2, 1976)

This rule gives the factfinder the widest opportunity to assess the credibility of a hearsay declaration. It allows an attack by any evidence which would be admissible if the declarant had testified as a witness. For example, his bias or prejudice, his conviction of a crime, or his inconsistent statements may be shown. This seems no more than common fairness requires.

Classification of admissions by a party-opponent as not being hearsay under Rule 801(d)(2) might have the consequence of not allowing the declarant's credibility to be attacked under this rule if the reference to such admissions were not included. Plainly an employer should be allowed to impeach an employee or an alleged conspirator to impeach a co-conspirator so as to weaken the effect of their out-of-court statements.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. AUTHENTICATING OR IDENTIFYING EVIDENCE

- (a) **In general.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- (b) **Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement:
- (1) *Testimony of a witness with knowledge.* Testimony that an item is what it is claimed to be.
 - (2) *Nonexpert opinion about handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
 - (3) *Comparison by an expert witness or the trier of fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.
 - (4) *Distinctive characteristics.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
 - (5) *Opinion about a voice.* An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.
 - (6) *Evidence about a telephone conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:
 - (A) A particular person, if circumstances, including self-identification, show that the person answering was the one called; or

- (B) A particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.
- (7) *Evidence about public records.* Evidence that:
 - (A) A document was recorded or filed in a public office as authorized by law; or
 - (B) A purported public record or statement is from the office where items of this kind are kept.
- (8) *Evidence about ancient documents or data compilations.* For a document or data compilation, evidence that it:
 - (A) Is in a condition that creates no suspicion about its authenticity;
 - (B) Was in a place where, if authentic, it would likely be; and
 - (C) Is at least 20 years old when offered.
- (9) *Evidence about a process or system.* Evidence describing a process or system and showing that it produces an accurate result.
- (10) *Methods provided by a statute or rule.* Any method of authentication or identification allowed by a rule of the Maine Supreme Judicial Court or by a statute or as provided in the Maine Constitution.

Maine Restyling Note [November 2014]

The restyled Rule preserves the substantive differences between the Maine and Federal Rules. The proposed restyled Rule adopts the language of the Federal Rule 901(b)(3) in providing that one method of authentication is a comparison by the “trier of fact” of the item of evidence with an authenticated original. The use of the term “court” in lieu of “trier of fact” in the current Maine Rule may cause some confusion in a jury trial as it is clear that the Rule is intended to permit comparison by the trier of fact.

Advisers' Note to former M.R. Evid. 901
(February 2, 1976)

The rule implements Rule 104(b), which requires authentication of evidence as a condition of its admissibility. Authentication is an aspect of relevancy. For instance, the relevancy of a letter of acceptance in a contract case against a corporation depends upon its having been written by someone with authority, real or apparent, to do so. Absent such authentication it is just as irrelevant as if it bore on an immaterial topic. Similarly, a telephone conversation may be irrelevant because the speaker has not been identified; in other words, the conversation has not been authenticated.

Subdivision (a), requiring authentication or identification as a condition precedent to admissibility, is universal law.

Subdivision (b) provides a nonexclusive list of ten examples of authentication or identification. Most of them are noncontroversial and reflect generally existing law.

Example (1) describes the most obvious method of authentication—testimony of a witness with direct knowledge that a matter is what it purports to be; e.g., “I wrote this document”; “I saw X sign it”; or “I found this gun at the scene”. The witness might also be one to account for the custody of the gun from the seizure to the time of trial.

Example (2) is in accord with customary practice regarding nonexpert handwriting identification. Anyone with a sufficient familiarity with another’s handwriting may testify. This may come from having seen the asserted author write, or from a bank clerk or teller. It is obvious that a lay person’s attempted distinction between a genuine writing and a skilled forgery is essentially valueless, and it is only good sense to obtain the testimony of a bona fide handwriting expert if the matter is of serious consequence. It is to be noted that the nonexpert cannot give testimony based on familiarity acquired for the purpose of the litigation, although the expert can.

Example (3) allows a handwriting expert to express an opinion on the basis of a comparison between a questioned document and an authenticated genuine specimen. This is the accepted practice. It also allows the court to make the comparison. The question of authentication is a matter of conditional relevancy

depending upon fulfillment of a question of fact, which is governed by Rule 104(b).

Example (4) is rather vague in its wording, but it stands for the self-evident proposition that an item of evidence may sometimes be authenticated by its own special characteristics, viewed in the context of the case. An example is the familiar reply doctrine to the effect that the arrival by mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed is sufficient evidence of genuineness to go to the jury. *Whelton v. Daly*, 93 N.H. 150, 37 A.2d 1 (1944), is a leading case. Similarly, a communication may be authenticated as coming from a particular person if it discloses knowledge of facts known peculiarly by that person. Cf. *Perley v. McGray*, 115 Me. 398, 99 A. 39 (1916) (proof that copy of account was sent to defendant from fact that defendant acted on it a few days later by return of goods included in the account).

Example (5) allows voice identification, heard firsthand or by electronic transmission, by opinion based on familiarity obtained either before or after the speaking in question. Plainly such testimony may lack credibility, but this goes to its weight and not its admissibility.

Example (6) deals with outgoing rather than incoming telephone calls. A call from the blue by a person identifying himself as X requires additional proof of his identity, which may be by the techniques suggested in (b)(4) or (b)(5). The calling of a number listed by the telephone company (see Rule 803(17) for the hearsay exception for the listing) supports the assumption that the number is the one reached. If the telephone number is that of a business, the listing is a holding out of willingness to conduct business by telephone, the person answering and purporting to speak for the concern is presumed to have authority to do so, and a person to whom such a call is transferred is likewise presumed to have authority to speak for the concern with respect to matters within its ordinary course of business.

This example also provides that circumstances, which may include the self-identifying statement of the person answering the outgoing call, may suffice. See *Palos v. United States*, 416 F.2d 438 (5th Cir. 1969) (informer dials listed number, asks for defendant and receives answer, "This is he," held sufficient to authenticate); *United States v. Benjamin*, 328 F.2d 854 (2nd Cir. 1964) (to same effect). But the cases on this point are not unanimous.

Example (7) is in accord with standard practice. Public records have long been subject to authentication by proof of production from proper custody. The

inclusion of “data compilation” is sufficient to cover information retrieval by computer.

Example (8) provides for authentication of ancient documents. Their admissibility as a hearsay exception has been dealt with in Rule 803(16). This subdivision is unorthodox in two respects. (1) It extends the rule to computerized data, and (2) it reduces the time period from thirty years to twenty years. This would change the Maine law enunciated in *Landry v. Giguere*, 128 Me. 382, 147 A. 816 (1929).

Example (9) faces up to present-day problems where the accuracy of a result depends upon the process or system that produces the result. The use of a computer printout would be covered, as would a reading on radar equipment, upon evidence showing that the system produces an accurate result. The Federal Advisory Committee pointed out that the rule is not intended to foreclose judicial notice of the accuracy of the system where appropriate.

Example (10) makes it clear that methods of authentication provided by statute are not superseded by the rule. An example of a Maine statute that would not be superseded is 13-A M.R.S.A. § 1306¹⁰³ (various corporate records certified under oath of clerk, secretary or an assistant secretary of the corporation admissible). There are many others.

RULE 902. EVIDENCE THAT IS SELF-AUTHENTICATING

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

- (1) Domestic public documents that are sealed and signed.** A document that bears:
 - (A)** A seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

¹⁰³ This statute has been repealed.

- (B) A signature purporting to be an execution or attestation.
- (2) **Domestic public documents that are not sealed but are signed and certified.** A document that bears no seal if:
- (A) It bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
 - (B) Another public officer who has a seal and official duties within that same entity certifies under seal—or its equivalent—that the signer has the official capacity and that the signature is genuine.
- (3) **Foreign public documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country’s law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester—or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document’s authenticity and accuracy, the court may, for good cause, either:
- (A) Order that it be treated as presumptively authentic without final certification; or
 - (B) Allow it to be evidenced by an attested summary with or without final certification.
- (4) **Certified copies of public records.** A copy of an official record—or a copy of a document that was recorded or filed in a public office as authorized by law—if the copy is certified as correct by:
- (A) The custodian or another person authorized to make the certification; or
 - (B) A certificate that complies with Rule 902(1), (2), or (3) or a federal or state statute.

- (5) **Official publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) **Newspapers and periodicals.** Printed material purporting to be a newspaper or periodical.
- (7) **Trade inscriptions and the like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- (8) **Acknowledged documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
- (9) **Commercial paper and related documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
- (10) **Presumptions created by law.** A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
- (11) **Certified domestic records of a regularly conducted activity.** The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Maine Supreme Judicial Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record—and must make the record and certification available for inspection—so that the party has a fair opportunity to object to the authenticity of the record or on the basis of hearsay. In the event of an adverse party’s objection to a record offered under this paragraph, the court may in the interests of justice refuse to accept the certification under this paragraph and require the party offering the record to provide appropriate foundation by other evidence.
- (12) **Certified foreign records of a regularly conducted activity.** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying

with a statute or Maine Supreme Judicial Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

Maine Restyling Note [November 2014]

The restyled Rule preserves the substantive differences between the Maine and Federal Rules.

Advisers' Note to former M.R. Evid. 902 (February 2, 1976)

This rule covers various kinds of evidence the authenticity of which is sufficiently apparent to allow their introduction without use of extrinsic evidence. Such evidence is said to be self-authenticating. The rule enumerates ten categories¹⁰⁴ of this type, most of which reflect present practice. It is to be emphasized throughout this rule that admissibility is a separate question from authentication.

Subdivision (1) deals with the self-authentication of domestic public documents under seal. This is a separate question from their admissibility in evidence as an exception to the hearsay rule, covered in Rule 803(8). Under present Maine law a public record kept in Maine may be proved by a copy attested by a person purporting to be the officer having legal custody thereof without further proof. A public record kept outside Maine but within the United States requires that the copy be accompanied by a certificate under seal by a specified public officer. M.R.C.P. 44(a), M.R. Crim. P. 27.¹⁰⁵ This subdivision would eliminate the necessity of “double certification” if the record is “domestic” in the sense that it is kept within the United States as distinguished from a foreign country. It would make the procedure now available for Maine records equally applicable to those from other states. The justification is that the overwhelming majority of these records will be genuine and the rare forgery easily detected. If

¹⁰⁴ Now twelve categories, two of which are discussed at the very end of the Note.

¹⁰⁵ M.R. Crim. P. 27 and M.R.U. Crim. P. 27 address recording and transcription of proceedings and do not seem to be relevant to the sentence at present.

there is a genuine dispute, a challenge can of course be made, but otherwise a good deal of needless lawyers' work will be saved.

Subdivision (2) deals with a purported official signature on a document not officially sealed. Here the safeguard of authentication by an officer who has a seal is provided because forgery is a more distinct possibility. The subdivision does not apply to notaries public, covered in subdivision (8).

Subdivision (3) deals with the problem of subdivision (1) as applied to the public document of a foreign country. It is essentially the same as present Maine law as set forth in M.R.C.P. 44(a) and incorporated by reference in M.R.Crim.P. 27,¹⁰⁶ but it applies to foreign "public documents" whereas the present Maine law is limited to "official records".

Subdivision (4) provides for authentication of copies of public records or of documents recorded or filed pursuant to authorization by law or by certification of the custodian or other person authorized to make the certification (the custodian not necessarily being the authorized person). The certification itself qualifies as a public document and is admissible as authentic if it conforms to (1), (2), or (3) above.

Subdivision (5) provides for self-authentication of books, pamphlets, or other publications purporting to be issued by public authority. These are most commonly statutes, court reports, rules, and regulations. This generalizes a rule covered by numerous statutes. For example, 1 M.R.S.A. §§ 361-363 self-authenticates the Maine Revised Statutes and their supplements if the book carries a printed certificate of the Secretary of State.

Subdivision (6) allows self-authentication of printed materials purporting to be newspapers and periodicals. The Federal Advisory Committee said: "The likelihood of forgery of newspapers or periodicals is slight indeed." The Federal Committee may not have been exposed to the convincing-looking faked newspapers, complete with embarrassing headlines, that practical jokers can buy for a modest sum. But it is probably true that the risk of use of a faked paper in litigation is slight. Again, it must be emphasized that admissibility of the authenticated paper is a wholly separate matter from authentication.

¹⁰⁶ See footnote 105. Rule 44 of the Maine Rules of Civil Procedure generally addresses authentication and proof of official records.

Subdivision (7) does away with the need of proof of authenticity of mercantile labels and the like purportedly affixed in the course of business and indicating ownership, control, or origin. This would definitely overturn the well known case of *Keegan v. Green Giant Co.*, 150 Me. 283, 110 A.2d 599 (1954), which held that the label on a can of peas indicating that they came from the Jolly Green Giant was not sufficient authentication. The dissent in that case would thus become law. The continuing authority of *Keegan* was cast in doubt by *State v. Rines*, 269 A.2d 9, 14-15 (Me. 1970).

Subdivision (8) provides for self-authentication of documents accompanied by a certificate of acknowledgment under the hand and seal of a notary public or other officer authorized to take acknowledgments. This may be somewhat broader than present Maine statutory law.

Subdivision (9) governs questions of authenticity of commercial paper as provided by general commercial law. The general commercial law is in effect the Uniform Commercial Code. 11 M.R.S.A. §§ 1-202,¹⁰⁷ 3-307,¹⁰⁸ and 3-510¹⁰⁹ are the relevant authentication provisions of the Code. They deal respectively with documents authorized or required to be issued by a third party, signatures on a negotiable instrument, and protest and dishonor.

Subdivision (10) deals with signatures, documents, or other matter declared by any state or federal statute to be presumptively genuine. There are many Maine statutes of this type. Examples are 22 M.R.S.A. §§ 1183, 1188¹¹⁰ (certificate of examining physician admissible on appeal from denial of marriage license); 12 M.R.S.A. § 3404(4)¹¹¹ (adoption of regulations of Commissioner of Sea and Shore Fisheries provable by certificate of appropriate official; 16 M.R.S.A. § 457 (copies of register or enrollment of vessel or other custom house records certified by consul, etc., admissible). Federal statutes include 26 U.S.C. § 6064 (signature on

¹⁰⁷ Now at 11 M.R.S. § 1-1307 (2014).

¹⁰⁸ Now at 11 M.R.S. § 3-1308 (2014).

¹⁰⁹ Now at 11 M.R.S. § 3-1505 (2014).

¹¹⁰ Both statutes have been repealed.

¹¹¹ This statute has been repealed.

tax return prima facie genuine); 10 U.S.C. § 936¹¹² (signature without seal prima facie evidence of authenticity of acts of certain military personnel who are given notarial powers).

[See the Advisory Committee Notes to Rule 803 for discussion of the July 1, 2002 amendment to Rule 902 adding sub §§ (11) and (12).]

RULE 903. SUBSCRIBING WITNESS'S TESTIMONY

A subscribing witness's testimony is necessary to authenticate a writing only if required by statute.

Maine Restyling Note [November 2014]

The restyled Rule preserves the substantive differences between the Maine and Federal Rules.

Advisers' Note to former M.R. Evid. 903 (February 2, 1976)

The common law required that attesting witnesses be produced or accounted for. These requirements have generally been abolished unless the law governing the validity of the writing otherwise requires. This rule takes the modern approach. It does not affect the method of proving a will in Maine. 18 M.R.S.A. §§ 103-106.¹¹³ See *In re Knapp's Estate*, 145 Me. 189, 74 A.2d 217 (1950).

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE

In this article:

¹¹² Presently 10 U.S.C. § 936 addresses authority to administer oaths and act as a notary but does not discuss signatures nor prima facie evidence.

¹¹³ With enactment of the Probate Code, Title 18-A M.R.S., this statute was repealed.

- (a) A “writing” consists of letters, words, numbers, or their equivalent set down in any form.
- (b) A “recording” consists of letters, words, sounds, numbers, or their equivalent recorded in any manner.
- (c) A “photograph” means a photographic image or its equivalent stored in any form.
- (d) An “original” of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, “original” means any printout—or other output readable by sight—if it accurately reflects the information. An “original” of a photograph includes the negative or a print from it.

Maine Restyling Note [November 2014]

The restyled Rule preserves the substantive differences between the Maine and Federal Rules, including the exclusion of a definition of “duplicate” to reflect Maine’s decision not to adopt Federal Rule 1003 regarding the admissibility of duplicates.

Advisers’ Note to former M.R. Evid. 1001 (February 2, 1976)

This rule is a modernized version of the misleadingly named “best evidence rule,” more accurately to be called the “original writing rule”, as the definitions in this rule of the terms used later in the article show. Subdivision (1) defines writings and recordings. Today, “writings” alone would be too narrow, and the rule includes sophisticated methods of data compilation, storage, and retrieval. It also includes electronic recording devices, now in wide use (as in recording “Miranda warnings,” for example). Since inarticulate voices as well as words and figures may have evidentiary value, the rule adds “sounds” to the definition.

Subdivision (2) is self-explanatory.

Subdivision (3) defines an “original.” The nature of an original is not always clear. The definition covers some particularized examples. Inclusion of

any counterpart intended to have the same effect makes it clear that if a contract states that two or more copies are to be executed and treated as original, each of them is an original under this definition. The same is true, the Federal Advisory Committee pointed out, of a sales ticket carbon copy given to a customer. Although strictly speaking the negative is the true original of a photograph, common usage and common sense treat any print as an original also, and so does this subdivision. A computer printout or other output readable by sight is defined as an original.

The Federal Rule gives a definition of a “duplicate.” It is omitted here because the Maine rule gives no special status to duplicates.

RULE 1002. REQUIREMENT OF THE ORIGINAL

An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise.

Maine Restyling Note [November 2014]

The restyled Rule preserves the substantive differences between the Maine and Federal Rules.

Advisers’ Note to former M.R. Evid. 1002

(February 2, 1976)

This rule is the familiar one requiring production of the original writing to prove its contents, expanded to include recordings and photographs as defined in Rule 1001. It applies only when offered to prove the content. There are some events with legal significance that can only occur in writing; for example, a will. In proving that sort of event the original must be produced or its absence accounted for under Rule 1004. Many situations arise where the parties choose to perform the event in writing although the law does not require it. For example, a contract may be made or a notice given in writing. Here also the original must be produced or accounted for. An event may be proved without resort to a writing, such as payment without producing the written receipt which was given or earnings without producing the books of account in which they are entered. It is only when a party voluntarily seeks to make proof by the writing that the rule applies.

Usually a photograph is not offered to prove its content. Typically a witness identifies a photograph as a fair representation of something he saw (unless it is shown to be a fair representation of something germane to the case, it is irrelevant). The photograph is admissible to illustrate his testimony. This is not an attempt to prove the content of the picture and the rule does not apply. Sometimes, however, the content is sought to be proved. The Federal Advisory Committee offers an automatic photograph of a bank robber as one having independent probative value. Here the rule with respect to the original applies.

There are some situations where the contents of a writing or a photograph are directly in issue. Examples would include libel and copyright cases, cases of invasion of privacy by photograph, and X-rays. Note, however, that with respect to X-rays, an expert may give an opinion based on matters not in evidence. Rule 703.

The reference to exceptions provided by these rules or by statute preserves whatever such exceptions there may be. See, for example, 16 M.R.S.A. § 356 (original entry of transcribed account need be produced only if court so requires).

RULE 1003. RESERVED.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENT

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) All the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) An original cannot be obtained by any available judicial process;
- (c) The party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) The writing, recording, or photograph is not closely related to a controlling issue.

Maine Restyling Note [November 2014]

Maine Rule 1004 and former Federal Rule 1004 are substantially identical, and there is no reason to depart from the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 1004 (February 2, 1976)

This rule is largely declaratory of the circumstances under the traditional best evidence rule where production of the original is excused. Loss or destruction of the original, unless the result of the proponent's bad faith, and inability to obtain it from a third person by judicial procedure are obvious grounds. Subdivision (3)¹¹⁴ provides that a notice to produce is sufficient when the original is in the control of an opposing party. This is not a rule of discovery. It gives the opponent an opportunity to produce but does not compel it. If the opponent does not produce, the proponent will under this subdivision be allowed to offer secondary evidence of the contents of the original. If he does not have any secondary evidence, he must use discovery procedures like M.R.C.P. 34 in order to learn before trial what the original contains. He can then compel production at trial by use of a subpoena duces tecum. The fact that the original is produced pursuant to notice does not make it admissible. *Paradis v. Lewiston, Augusta & Waterville St. Ry.*, 113 Me. 125, 93 A. 56 (1915). It is also now true that the producing party cannot get it admitted merely because it was produced and examined by the opponent. *Morgan v. Paine*, 312 A.2d 178, 185 (Me. 1973) (overruling prior decisions to the contrary).

The rule does not recognize degrees of secondary evidence so as to require the "second best" evidence when the original is not available. It has the virtue of simplicity, and the practical motivation to get the most satisfactory evidence possible lest an adverse inference be drawn tends to prevent abuse. This is the English approach, followed in some American cases, but most of the courts in this country do set up orders of preference, such as preferring a written copy to oral testimony.

The rule gives no special status to "duplicates"; that is, counterparts produced by a method so accurate as to eliminate the possibility of error. The

¹¹⁴ Now subsection (c).

Federal Rule makes a duplicate admissible to the same extent as an original unless in the circumstances it is unfair or unless a “genuine question” is raised as to the authenticity of the original. The determination of what constituted a genuine question might well impose great difficulties, as for example when counsel objects to the duplicate on the plausible ground that he does not know about the authenticity of the original and wishes to put his opponent to his proof. It appears that special treatment of duplicates would cause more trouble than it is worth. Naturally a duplicate will still be admissible as secondary evidence when production of the original is excused under this rule.

When it comes to a motion for a new trial or on appeal, an asserted error in admitting secondary evidence may be classed as harmless. The purpose of the best evidence rule is to secure the most reliable information as to the contents of a document when its terms are disputed. The rule is not an end in itself. Consequently if complaining counsel is asked whether there is an actual dispute as to the terms of the writing and he cannot give assurance that such a good faith dispute exists, any deviation from the rule should be harmless error.

RULE 1005. COPIES OF PUBLIC RECORDS TO PROVE CONTENT

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

Maine Restyling Note [November 2014]

Maine Rule 1005 and former Federal Rule 1005 are substantially identical, and there is no reason to depart from the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 1005
(February 2, 1976)

This rule exempts public records from the requirement of production of the original under Rule 1002, since their removal from public custody is not feasible. Contrary to the approach in Rule 1002, which makes no distinction between kinds of secondary evidence, this rule expresses an absolute preference for certified or compared copies. Cf. 16 M.R.S.A. § 456 (copy by photographic, photostatic, or microfilm process or the like is admissible in evidence as original).

RULE 1006. SUMMARIES TO PROVE CONTENT

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Maine Restyling Note [November 2014]

Maine Rule 1006 and former Federal Rule 1006 are substantially identical, other than the Federal Rule's reference to "duplicates," and there is no reason to depart from the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 1006
(February 2, 1976)

This rule is in accord with Maine law. *State v. Huff*, 157 Me. 269, 276, 171 A.2d 210, 214 (1961).

RULE 1007. TESTIMONY OR STATEMENT OF A PARTY TO PROVE CONTENT

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

Maine Restyling Note [November 2014]

Maine Rule 1007 and Federal Rule 1007 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 1007 (February 2, 1976)

This rule dispenses with accounting for nonproduction of the original when the contents are proved by opponent's testimony, deposition, or written admission. The risk of inaccuracy is substantial and the rule is somewhat inconsistent with the underlying purpose of preferring originals, but it seems reasonable in an adversary situation such as this. The limitation to testimony or a written admission wisely prevents evidence of an oral admission out of court, which may be suspect.

RULE 1008. FUNCTIONS OF THE COURT AND JURY

The court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005.

Maine Restyling Note [November 2014]

Maine Rule 1008 and Federal Rule 1008 are substantively identical, and therefore the Advisory Committee recommends adoption of the language of the restyled Federal Rule.

Advisers' Note to former M.R. Evid. 1008 (February 2, 1976)

The ultimate decision in these matters of conditional relevancy is of course for the jury. *State v. Chaplin*, 286 A.2d 325 (Me. 1972).

ARTICLE XI. MISCELLANEOUS RULES

Abrogated January 1, 2015.

Maine Restyling Note [November 2014]

In light of the significant revision to Rule 101 to incorporate the substance of Rules 1101 and 1102, the Advisory Committee Recommends deletion of both of these Rules entirely.¹¹⁵

***** End of document *****

¹¹⁵ The Advisers' Notes to former Rule 1101 have been moved to Rule 101. Former Rule 1102 had no accompanying notes; it now appears as Rule 101(d).