

STATE OF VERMONT
VERMONT SUPREME COURT
_____ TERM 2011

Order Amending the Vermont Rules of Evidence

Pursuant to Chapter II, section 37 of the Vermont Constitution and V.S.A. § 1, it is hereby ordered:

1. That Rule 408 of the Vermont Rules of Evidence be amended as follows (deleted matter struck through; new matter underlined):

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, the invalidity of, or the amount of a claim that was disputed as to either validity or amount, or to impeach through a prior inconsistent statement or contradiction:

~~Evidence of (1) furnishing or offering or promising to furnish, -- or (2) accepting or offering or promising to accept, -- a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, the invalidity of, or the amount of the claim or any other claim.;~~

~~(2) Evidence of conduct or statements made in compromise negotiations, including mediation, is likewise not admissible regarding the claim.~~

(b) Permitted uses. This rule does not require exclusion of any if the evidence is offered for purposes not prohibited by subdivision (a). ~~otherwise obtainable from independent sources merely because it is presented in the course of compromise negotiations~~ Examples of permissible purposes include This rule also does not require exclusion if offered for another purpose, such as proving a witness's bias or prejudice ~~of a witness.;~~ negating a contention of undue delay.; ~~or~~ and proving an effort to obstruct a criminal investigation or prosecution.

(c) Other provisions governing compromises and offers to compromise. This rule governing compromise negotiations generally is subject to the more specific statute governing mediation (the Uniform Mediation Act, chapter 194 of Title 12 of Vermont Statutes Annotated) and the rule governing alternative dispute resolution (V.R.C.P 16.3).

Reporter's Notes - 2012 Amendment

The amendment is based on the 2006 amendment to F.R.E. 408. The amendment tracks the Federal Rule except that the Evidence Rules Committee declined to recommend adoption of the last clause of F.R.E. 408(a)(2). That clause would allow use of certain statements in criminal cases which had been made to a public office or agency. Commentators have been highly critical of the provision. But for this exception, the amendment conforms the Vermont rule to its Federal counterpart and promotes uniformity of practice.

The amendment was adopted because the amendment makes the rule easier to read, the amendment provides clarification of two important issues under the rule, and it provides an opportunity to apprise the bar of the need to consult the Uniform Mediation Act, chapter 194 of Title 12 of the Vermont Statutes Annotated and V.R.C.P. 16.3. The UMA provides a privilege for and inadmissibility of broadly defined “mediation communications.” V.R.C.P. 16.3(g), which governs confidentiality in alternative dispute resolution, has been amended to reflect the UMA. The Reporter's Notes to the 2011 amendment of V.R.C.P. 16.3(g) explain the impact of the UMA on that rule and V.R.E. 408. The Notes and the UMA should be consulted when the communication is made in a mediation context, a context broadly defined by the UMA. Section (c) was added to make it clear that the more general inadmissibility provision of V.R.E. 408 is subject to these related rules.

The reference to mediation in section (a)(2) was eliminated. As noted above, admissibility of “mediation communications” is now governed by provisions of the Uniform Mediation Act.

The first clause of (a) “makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations.” Federal Advisory Committee's Note to 2006 Amendment, penultimate paragraph. The Note goes on to explain that offering such a statement would likely reveal that the adversary had participated in negotiations, thereby in effect impermissibly waiving the adversary's right to preclude admissibility.

The last clause of (a) “prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction.” Advisory Committee's Note to 2006 Amendment, second to last paragraph. The Note points out that use for such impeachment would undermine the protection provided by the rule.

2. That these rules as amended and added, are prescribed and promulgated effective _____, 2011. The Reporter's Notes are advisory.

3. That the Chief Justice is authorized to report these amendments to the General Assembly in accordance with the provisions of 12 V.S.A. § 1, as amended.

Dated in Chambers at Montpelier, Vermont, this _____ day of _____, 2011.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

PROPOSED