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### Compromise With Care: Admissions During Settlement Talks

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*Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.*<sup>1</sup> - Abraham Lincoln.

Courts, in an effort to encourage and foster parties to compromise, have held that an offer to compromise is not admissible as an admission of liability.

Under New York State law, this rule is honored more in its breach. Although the offer itself may not be admissible, an admission made pursuant to the offer may be. The attorney and client must understand that compromise negotiations should be undertaken with caution in order to ensure that facts which may be conceded during such discussions will not become admissible.

The following is a review of admissibility under New York State law and the Federal Rules of Evidence in civil cases.

An offer to settle a dispute is not an admission of liability.<sup>2</sup> The rule is well settled that no advantage can be taken by offers made by way of compromise; a party may, with impunity, attempt to buy his peace.<sup>3</sup>

There are several exceptions and variations which substantially limit this rule.

Some courts have held that an offer to settle made without addressing the existence of that party's liability may be construed as a tacit admission of liability and therefore rendered admissible.<sup>4</sup>

Should one therefore make sure to address the merits of a claim when discussing settlement? Only at one's own risk - admissions of fact made in the course of settlement discussions are admissible

unless such statements are made without prejudice or with similar language of limitation.<sup>5</sup>

The reason why the inadmissibility of offers of settlement has not been extended to statements of fact made in the course of such offers is not entirely clear. Some courts have held that offers of settlement and facts conceded pursuant to such offers are subject to a privilege which encourages parties to freely and openly discuss resolving disputes.<sup>6</sup>

However, some courts hold that offers to settle are not considered admissions of liability because the party is simply attempting to conveniently dispose of the dispute and is not admitting its merits.<sup>7</sup> Therefore, explicit statements of fact made pursuant to offers of settlement go beyond a mere desire to dispose of a dispute and may therefore constitute admissions.<sup>8</sup>

The Notes of the Committee on the Judiciary accompanying Federal Rule of Evidence 408 succinctly observes the pernicious effect created.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations are admissible.

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This [exception from inadmissibility] deprive[s] the rule of its salutary effect. The exception hamper[s] free communication between parties and thus constitute[s] an unjustifiable restraint upon efforts to negotiate settlements. Further, by protecting hypothetically phrased statements, it constitute[s] a preference for the sophisticated and a trap for the unwary.

#### *Attorney Comments*

Attorneys must beware of this trap. An admission made by attorneys on behalf of a client, while acting with the client's authorization, may be

admitted against the client.<sup>9</sup>

An admission of fact will not be admissible when made in the course of settlement negotiations if the party: (i) expressly states that the statements made during the settlement discussion are without prejudice; or (ii) does so in a context where it can be fairly implied that the statement was not to be thereafter used against the party making the statement.<sup>10</sup>

Statements made by a client to one party with the proper words of limitation also may be immune from disclosure when the statements are made without prejudice and with the express understanding that they are not to be used for any litigation purpose.<sup>11</sup>

Determining whether the circumstances imply that the statements were not to be used has been characterized as frequently difficult.<sup>12</sup>

Some court cases imply an intent not to make an admission dependent on whether the statement was made tentatively or hypothetically, rather than as obvious statement of fact.<sup>13</sup> In other words, if the party making the admission does so hypothetically merely for the sake of effectuating a settlement, the statement is not admissible.<sup>14</sup> On the other hand, if the party states that a fact exists, the statement may be used against the party.<sup>15</sup>

Perhaps the best elucidation of this rule was stated by Judge Irving Younger.

[I]f a party makes a statement that is not an acknowledgment that some fact is not as he now claims it to be, but rather is hypothetical, or conditional, or tentative in form, or acknowledges nothing but a desire for peace, or is made for the sake of argument, or uttered without prejudice, it is not an admission and cannot be received. But if a statement is not made with such reservations, and otherwise fulfills the definition of an admission, it is admissible without regard to the circumstance that it was made in the course of settlement.<sup>16</sup>

Statements subject to the exception must be made in an offer to settle; absent such an offer the statement is admissible.<sup>17</sup>

### *Federal Rule*

Federal Rule of Evidence 408 provides that:

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 or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Rule 408 also provides that evidence is not necessarily excluded if it is not offered to prove liability, but to prove bias or prejudice, undue delay or proving an effort to obstruct a criminal investigation.

Other common exceptions to exclusions are: (1) to impeach a witness; (2) to negate a contention of undue delay; (3) to prove wrongful acts during negotiations; (4) to prove the existence of or to block enforcement of an alleged settlement contract; and (5) to show the state of mind of a party.<sup>18</sup>

Note that Rule 408 provides that a party may not render evidence inadmissible by presenting it during settlement negotiations if the evidence is otherwise discoverable. In other words, a party seeking to immunize evidence may not do so merely by offering the evidence during settlement negotiations.

Accordingly, under Rule 408, the use of the words without prejudice and the like do not have the same critical function in New York when determining admissibility. Such language may be used, however, as evidence of the intent of the party making the statements when there is a dispute as to admissibility.<sup>19</sup>

To avoid admissibility under Rule 408, the statement must be made pursuant to a suggested compromise of an existing dispute.<sup>20</sup> For example, a statement from a party to another concerning the possible institution of litigation against a third party was held not to be excludable under 408.<sup>21</sup>

Some cases apply Rule 408 restrictively. For example, an employee seeking to recover back pay sought to admit the employer's offer to reinstate the employee made without prejudice to the employee's back pay claim. The offer was admitted in support of the employee's back pay claim on the ground that the offer was not made to compromise that claim.<sup>22</sup> Another case held that a statement was admissible where it was used not to prove liability or a claim, but to illuminate the parties' pre-litigation understanding of a contract.<sup>23</sup>

## Conclusion

Any statements of fact made in the course of settlement negotiations must be made with an express caveat that the offer and statements therein are without prejudice, solely for settlement purposes, with full reservation of rights, and are not to be used for any litigation purpose whatsoever.

Although the Federal Rules of Evidence ostensibly are more protective of settlement discussions, the same language should be used to insure the protection of the exception. The attorney should also take care to be sure that, prior to making any admissions, there is a dispute and that the statements are made pursuant to an offer of compromise.

With prudence, an attorney may act as a Lincolnesque peacemaker without compromising his client's case in the event the peacemaking efforts fail.

## Endnotes

1. *The Oxford Dictionary of American Legal Quotations*, p. 302 (1993).
2. *Smith v. Saterlee*, 130, NY 677 (1891); *Charles Hyman Inc. v. Olsen Industries Inc.*, 227 AD2d 270, 276, 642 NYS 2d 306, 310 (1st Dept. 1996).
3. *Tennant v. Dudley*, 144 NY 504, 507 (1895).
4. Farrell, *Prince, Richardson on Evidence*, 8-218, p. 528 (11 ed. 1995).
5. *Paine, Webber, Jackson & Curtis v. Alanthus Corp.*, 82 AD2d 877, 440 NYS2d 317, 318 (2d Dep't 1981).
6. Wigmore, *Evidence* 1061, at 34; 36, fn. 4; 39, fn. 5 (1972).
7. Wigmore, *Evidence* 1061, at 36 (1972).
8. Wigmore, *Evidence* 1061, at 39 (1972).
9. *Bellino v. Bellino Construction Corp.*, 75 AD2d 630, 427 NYS2d 303 (2d Dep't 1980).
10. *White v. The Old Dominion Steamship Co.*, 102 N.Y. 660 (1886). Some courts, unfortunately, have extended this rule by holding that admission made in the course of a settlement discussion is admissible. *Burnside v. Foglia*, 208 AD2d 1085, 1086, 617 NYS2d 921 (3d Dep't 1994); *Crow-Crimmins-Wolf & Munier v. County of Westchester*, 126 AD2d 696, 697, 511 NYS2d 117 (2d Dep't 1987); *Petition of Schaeffner*, 410 NYS2d 44, 48 (Surr. Ct., Nassau Co. 1978). As discussed, where a party qualified its statements as being without prejudice, admissions of fact should not be admitted.
11. *Crow-Crimmins-Wolf & Munier v. County of Westchester*, 126 AD2d 696, 697, 511 NYS2d 117, 118 (2d Dep't 1987).
12. Farrell, *Prince, Richardson on Evidence*, 8-218, p. 528 (11 ed. 1995).
13. *White v. The Old Dominion Steamship Co.*, supra.
14. *Gutkind v. Leuders & Co.*, 267 N.Y. 320, 329 (1935) (letters written admitting muddle in parties' office but denying fault were written in a spirit of compromise and should not be admitted as evidence of liability).
15. *White v. Old Dominion Steamship*, 102 N.Y. at 663 (citation omitted).
16. *White v. Empire Mutual Insurance Company*, 59 Misc2d 527, 529-30, 299 NYS2d 998, 1001-02 (Civ. Ct., New York Co. 1969) (citations omitted).
17. *Pennzoil Company v. Carlson*, 178 AD2d 1005, 1006, 579 NYS2d 784, 785 (4th Dep't 1991).
18. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 *Hastings Law Journal*, 955, 967 (1988).
19. *S. Leo Harmonay Inc. v. Binks Manufacturing Co.*, 597 F.Supp. 1014, 1023 (SDNY 1984), aff'd, 762 F2d 990 (1985).
20. *In re: B.D. International Discount Corp.*, 701 F2d 1071 (2d Cir. 1983) (statements made regarding schedule of payments to be made did not dispute amount and therefore were admissible); *S. Leo Harmonay Inc. v. Binks Manufacturing Co.*, 597 F.Supp. at 1023.
21. *S. Leo Harmonay Inc. v. Binks Manufacturing Co.*, 597 F.Supp. at 1023.
22. *Thomas v. Resort Health Related Facility*, 539 F.Supp. 630, 638 (EDNY 1982).
23. *Sage Realty Corp. v. Insurance Co. of North America*, 34 F3d 124, 128 (2d Cir. 1994); *Gestetner Holdings, PLC v. Nashua Corp.*, 784 F.Supp. 78, 83 (SDNY 1992).