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Many lawyers believe that statements made during settlement negotiations will never come back to haunt them at trial. Relying on a bloated application of Rule of Evidence 408, they contend all settlement communications and negotiations are excluded from evidence. But are they really?

A common misconception exists that Rule of Evidence 408 (Texas and federal) absolutely prohibits the use of settlement communications and negotiations are excluded from evidence. For this reason, it is critical that a lawyer not get too relaxed in settlement discussions and make concessions or any admissions of weakness in a case. This could be especially dangerous in a complex case where a party may be negotiating to settle only part of the claims asserted or settle with only certain parties.

Rule 408 specifically provides that settlement negotiations may be admissible to prove bias, which is why “Mary Carter” agreements are admissible evidence. Rule 408 further provides that settlement negotiations are admissible to prove prejudice or to explain or excuse allegations of undue delay. And the exceptions do not end there. It is also clear that Rule 408 does not exclude settlement negotiations when they are used to show notice of a claim, waiver of notice of a claim or to rebut claims of lack of notice, such as when a default judgment is challenged.

Settlement negotiations have also been considered by courts when deciding a reasonable fee award. And settlement demands could be used to show “presentment” in connection with a claim for attorneys’ fees. A court may also consider what the plaintiff requested during settlement as compared to what was actually awarded as one indicator of the success of a case.

Courts have discretion to admit evidence of letters containing settlement negotiations for the purpose of showing a party’s understanding of its obligations under an agreement and to show that a demand for payment had been made. This exception also allows a party to show a jury when the opposing side failed to respond to reasonable demands or to negotiate at all. Evidence of offers and settlement conduct may be critical in a case involving sanctions or bad faith conduct.

Misrepresentations made or repeated by parties in negotiations, or a party’s state of mind created by a misrepresentation, can be admissible evidence. Similarly, Rule 408 will not protect fraudulent conduct that took place during settlement negotiations from disclosure in court, and evidence of misrepresentations made during settlement negotiations could still be used to show a continuing course of fraudulent conduct.

In applying Rule 408, some courts have even limited what they consider settlement negotiations at all. For instance, a court has allowed evidence of a defendant’s statement that it will institute bankruptcy proceedings if the plaintiff did not accept a specified sum, finding the statement to be more of an “ultimatum” than a bona fide offer.

It is also important to consider that while Rule 408 does offer some protection against the admissibility of settlement negotiations at trial, this protection is not necessarily extended to discovery. As a result, a party may be able to discover material and statements made during earlier settlements and this could lead to the discovery of other related, admissible evidence against a client.

Ultimately, the burden is on the party objecting to evidence under Rule 408 to show that the evidence was part of settlement discussions and is not admissible for another purpose. And failure to object at trial will most likely fail to preserve error on appeal. Rule 408 does provide some level of protection for settlement negotiations, but attorneys should tread carefully because information exchanged during settlement negotiations could still be brought before a jury.

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