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Confidentiality in Settlement Negotiations

Three tips from an experienced mediator

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Can you be sure that what is said in settlement negotiations cannot be used against your client? Here are three tips for attorneys preparing for negotiations.

Keep in mind that there are important differences in confidentiality between mediated and non-mediated settlement negotiations.

The protection provided by Illinois Rule of Evidence 408 and its counterpart Federal Rule of Evidence 408 in non-mediated negotiations is quite limited.

Rule 408 provides, in essence, that offers and acceptances to compromise a claim, and statements in such negotiations, cannot be admitted as evidence "to prove liability for, invalidity of, or amount of" the claim. That leaves a lot unprotected.

Offers and acceptances made in non-mediated negotiations can be used to prove that an oral agreement was reached. See *Quinlan v. Stouffe,* 355 Ill. App. 3d 830, 837, 823 N.E.2d 597, 603 (2005).

Rule 408 "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations." Il. Evid. R. 408(b). Although the statements are inadmissible to prove liability on the underlying claim, they may be admitted for other purposes, such as rebuttal; impeachment; to show knowledge and intent; to show a continuing course of reckless conduct; to negate the defense of mistake; and to prove estoppel. *Bankcard Am., Inc. v. Universal Bancard Sys.,* 203 F.3d 477, 484 (7th Cir. 2000).

In *Wine & Canvas Dev., LLC v. Muylle,* 868 F.3d 534, 540 (7th Cir. 2017), plaintiff's statement in settlement negotiations that his goal was to "close [defendant's] door[ ] or [his] asshole attorney would close [it] for [him]" was admissible on defendant's counterclaim for abuse of process.

And calling a statement a "settlement communication" does not make it one. "[O]ne party's description of its communication as a 'settlement offer' does not automatically bar the communication under Rule 408." *Control Sols., LLC v. Elecsys,* 2014 IL App (2d) 120251, ¶ 38.

Tip #1: In non-mediated negotiations, get a confidentiality agreement in advance and be cautious about substantive discussions. Remember: Whether or not a statement is admissible, you can't "unring the bell."

In contrast, the Illinois Uniform Mediation Act, 710 ILCS 35/1 et seq., protects

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almost all "mediation communications" except a written settlement agreement.

The Mediation Act creates a privilege for mediation communications, whether written or oral, occurring during a mediation or made for purposes of considering, conducting, participating in, initiating, continuing or reconvening a mediation or retaining a mediator. 710 ILCS 35/2(2). Any party to the mediation and the mediator may assert the privilege to prevent discovery of a mediation communication or its admission into evidence. 710 ILCS 35/4.

There are some limited exceptions, such as a threat of violence. 710 ILCS 35/6. There is also a loophole, not yet developed through caselaw, when a judge, arbitrator or hearing officer determines after an in camera hearing that the need for the evidence outweighs the interest in confidentiality. 710 ILCS 35/6(b)

But as a practical matter, the only non-privileged mediation communication is "an agreement evidenced by a record signed by all parties to the agreement." 710 ILCS 35/6(a)(1). This means oral agreements made in a mediation are not enforceable. "The Uniform Mediation Act . . . contemplates that a signed, written agreement is admissible and enforceable following mediation and that oral communications generally are not." *Billhartz v. Billhartz,* 2015 IL App (5th) 130580-U, 2015 WL 2058961, at *8 (2015).

Tuscany Custom Homes, LLC v. Westover, 490 P.3d 1039, 2020 WL 7776136 (Colo. App. 2020), is a cautionary tale. At the conclusion of the mediation, the mediator had technical problems with his computer, and the parties concluded the mediation without signing any document memorializing an agreement. The mediator returned to his office and sent the parties an email listing the terms, adding, "I request that all counsel review the above and email their assent to the above terms of settlement."

The parties and the mediator exchanged emails over the next week. In those emails, Tuscany's counsel distributed a draft agreement including the terms from the mediator's email. Westover's counsel responded, "We don't have any changes. Provided there's no redlines, we'll get our clients to sign." But while Tuscany signed the draft agreement, Westover refused to sign. The Colorado Court of Appeals, applying the Colorado Dispute Resolution Statute (similar to the Uniform Mediation Act), held that the emails and draft agreement disclosed mediation communications and were inadmissible; therefore, there was no binding contract.

Accord Winegeart v. Winegeart, 2018 S.D. 32, ¶ 11 (S.D. 2018) (joining other states in holding that "only written agreements are enforceable under the [Uniform Mediation Act]").

Tip #2: It is critical that, at the end of a successful mediation, the parties sign a document setting out the material terms of the agreement. While there are no cases yet on electronic signatures, those are likely to suffice.

The Uniform Mediation Act has been enacted in 12 states and the District of Columbia. Other states, such as Colorado, Wisconsin and Michigan, have their own mediation laws, some significantly different from the Uniform Mediation Act.

The Illinois Mediation Act does not apply to settlement conferences conducted by a judge who might make a ruling on the case. 710 ILCS 35/3. Courts may have their rules for court-referred mediations. See, e.g., Northern District of Illinois Local Rule 83.5: Confidentiality of Alternative Dispute Resolution Proceedings.

Tip #3: Know what law applies to your mediation, and identify that law in your agreement to mediate.

When preparing a client for any settlement negotiation—mediated or not—counsel should know the limits of confidentiality under the applicable law. A pre-negotiation or mediation agreement will make the negotiations easier.

Disclaimer: The content is intended for general informational purposes only and should not be construed as legal advice. If you require legal or professional advice, please contact an attorney.

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