Candor in the Mediation Process

By Hon. Victor B. Kenton (Ret.)

Federal practitioners must be familiar with FRE 408, which provides, (with some exceptions), that evidence of the "furnishing, promising or offering" of consideration to compromise a claim, and "conduct or statement[s] made during compromise negotiations about the claim" are inadmissible to prove the validity or amount of a disputed claim, or for impeachment by prior inconsistent statement.

Since the adoption of FRE 408, federal courts have almost universally incorporated mandatory alternate dispute resolution procedures in their local rules (*See, e.g.*, LR 16-15.1 to 15.9 in the Central District of California) FRE 408 has been the source of many reported decisions; for example, defining what are and are not "compromise negotiations." This article, however, will briefly address another issue: what involvement, if any, might a federal court have in adjudicating disputes over the honesty and candor of documented material statements of fact made by an attorney in the course of settlement negotiations?

Some courts have viewed the settlement process as subsumed within the litigation process, imposing the same requirements of candor and honesty in the context of material factual representations as are enforced in discovery, trial, and other judicially encompassed components of litigation.

An interesting discussion of this analysis is found in *Ausherman v. Bank of Am. Corp*., 212 F. Supp. 2d. 435 (D. Md. 2002). An attorney representing 25 plaintiffs in a credit hacking case offered to settle with the bank, indicating that, as a part of the settlement package, he would disclose to the bank the "kingpin" of the credit hacking scheme that had victimized his clients. The problem, it turned out, was that the attorney did not have this information. The attorney had specifically sent his settlement communication pursuant to FRE 408, thus attempting to shield it from court scrutiny. Nevertheless, the bank went to court seeking sanctions.

The court rejected the attorney's argument that his offer of information constituted "settlement bluster." Citing ABA Rule of Professional Conduct 4.1, the court referred the attorney to the court's disciplinary committee, observing that, "In the context of a settlement, 'justice' means a fairly negotiated resolution, based on candor and integrity with respect to all material representations." While the attorney in that case had amassed a litany of related discovery violations, and the misrepresentation in his settlement letter may have been the straw that broke the camel's back, nevertheless, the fact that the trial court entered the fray is instructive.

The settlement process inherently involves statements that may reasonably be viewed as less than completely accurate, such as posturing or puffing, vagueness regarding a party's "bottom line," and estimates of price or value, among other things. Counsel should, however, be cognizant that alternate dispute resolution has become enshrined as an integral part of federal civil litigation, so that the dividing line between what happens "in court" and what happens "out of court" may under certain circumstances become somewhat blurred. It would be prudent of counsel to approach the settlement process with the same candor in their factual representations as they would in court.

Victor Kenton was a trial lawyer from 1974 to 2001, at which time he became a Federal Magistrate Judge in the Central District of California. After leaving the bench in 2015, he has been a mediator, arbitrator, and court appointed referee for Judicate West.

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