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Proceed with Caution: Traps for the Unwary in Mediation or Other Settlement Discussions

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Attorneys and their clients often engage in mediation and other forms of settlement discussions assuming that all communications and other information shared in connection with those discussions are confidential, inadmissible in any subsequent proceeding, and will not otherwise see the light of day. It is often based on these assumptions that parties and their counsel make statements and exchange information that they would not otherwise even consider making or exchanging in the context of a litigation or other adversarial proceeding. The recent case of *Doe v. Proskauer Rose, LLP*, Case No. 17-cv-00901 (D.D.C.) is a cautionary tale for those who assume that everything that is said and done in mediation stays in mediation. Such assumptions can lead to unexpected consequences, as a party may find itself forced to contend with certain statements, conduct or documents exchanged in the course of mediation or other forms of settlement discussions that it might have presumed would disappear into the ether.

On May 18, 2017, a partner suing her law firm for gender discrimination and retaliation in *Doe* sought an emergency preservation order from the Court against the ADR service, JAMS, and one of its mediators, to preserve certain contemporaneous notes taken by the mediator during the parties' pre-litigation mediation session. The plaintiff stated expressly that she might seek to use the mediator's notes to support her then-pending claims—notwithstanding that the notes were created as part of a mediation session, and based on statements that were allegedly made during that session.

In this article, we discuss the *Doe* case to illustrate how the plaintiff has argued for the admissibility of certain alleged statements and notes taken during a mediation session. We then discuss generally the settlement privilege under Federal Rules of Evidence Rule 408 ("Rule 408"), and specific exceptions to the privilege that have been recognized by the courts. Lastly, we offer practical suggestions to attempt to minimize the risk of use in litigation of statements, conduct, or documents exchanged during mediation or in other settlement contexts.

Relevant Proceedings in *Doe v. Proskauer Rose, LLP*

The Complaint filed in *Doe* on May 12, 2017 alleges claims for gender discrimination and retaliation under the federal Equal Pay Act, the District of Columbia Human Rights Act, and the Maryland Equal Pay for Equal

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Work Law, discrimination and retaliation under the federal Family and Medical Leave Act and the District of Columbia Family and Medical Leave Act, and related common law claims for breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent misrepresentation, and unjust enrichment.[1] In February 2017, before the parties participated in any mediation (and before the plaintiff filed her Complaint), the plaintiff—through her attorneys—informed Proskauer's General Counsel that she had retained counsel to pursue claims of discrimination and retaliation against the firm.[2] The Complaint also alleges that shortly after the plaintiff informed the firm that she had retained employment counsel, the firm threatened to terminate her as a result of her complaints of gender discrimination.[3] The parties participated in mediation sessions in March 2017 and May 2017 in an effort to resolve the plaintiff's claims. The plaintiff now alleges that during the mediation session in March 2017, Proskauer (who was representing itself) allegedly communicated a "direct threat" to terminate the plaintiff because of her complaints of discrimination and retaliation. The plaintiff further claims that the statements by Proskauer were recorded, in words or substance, in the mediator's contemporaneous notes of that session.

After the parties' May 2017 mediation session, the plaintiff filed an emergency motion seeking a preservation order to prevent JAMS and the JAMS mediator from destroying the mediator's contemporaneous notes pursuant to JAMS's official policy. The plaintiff also served JAMS with a subpoena for the mediator's notes "to corroborate [the plaintiff's] claim that Proskauer made an unlawful retaliatory threat." Notwithstanding a purported mediation agreement with confidentiality obligations signed by both parties,[4] the plaintiff further argued that "[i]f the mediator is compelled to testify, the notes would likely be used as an aid in refreshing recollection—if not evidence in their own right" and further, that the mediator's notes and testimony "may well be the best, most credible evidence on this key disputed issue."

The same day the plaintiff filed her emergency motion, the Court ordered JAMS to preserve the mediator's notes pending further order of the Court, and further ordered only JAMS to respond to the plaintiff's motion. The Court made clear that its order should not be interpreted as an indication regarding whether the material will ultimately be found to be relevant or admissible.

JAMS and the JAMS mediator opposed the plaintiff's motion on the grounds that a preservation order was unnecessary because JAMS had notified all parties that "neither JAMS nor the mediator will destroy any documents that are currently in [their] possession." They also argued that consistent with JAMS's long-standing policies, both parties "explicitly agreed in writing, as a condition for JAMS's agreement to mediate the dispute, 'that neither the mediator nor JAMS [would be] a necessary party in any arbitral or judicial proceeding relating to the mediation or to the subject matter of the mediation.'" They further claimed that the plaintiff's subpoena and suggestion that the mediator be compelled to testify is "contrary to [the parties'] explicit agreement." Based on the representations from JAMS and the JAMS mediator that they would not destroy any documents in their possession, the Court vacated its interim order, but made no statements regarding the admissibility or relevance of the notes the plaintiff sought to preserve.

While the mediator's notes are not referenced or identified in, or attached to, the plaintiff's Complaint, the plaintiff does cite in the emergency motion (which was publicly filed) the specific statement that Proskauer allegedly made at the mediation session, and also references the threat in several places in the Complaint. What is not clear from the papers filed thus far is whether the plaintiff is trying to rely on the alleged threat to assert a distinct retaliation claim, or whether she intends to use the alleged threat as evidence to support her extant retaliation claims that she asserted even before the mediation. It is clear, however, that the plaintiff has already injected into the litigation the alleged statements from the mediation as well as the fact that the mediator has notes purportedly documenting these statements. That bell cannot be "un-rung".

Doe raises various questions concerning statements and conduct during, and documents generated or exchanged in connection with, mediation, including:

- Whether such occurrences are truly confidential and/or inadmissible—and to what extent—in legal proceedings in the face of Rule 408 (and its state analogs)?
- Even if confidential and inadmissible to prove the validity of a disputed claim, can these occurrences at mediation or in other settlement contexts be used for any other purpose in a legal proceeding (*e.g.*, refreshing a witness's recollection)?
- Are there distinctions for Rule 408 purposes between notes and other work product created by mediators versus statements, conduct and documents generated by the parties?
- Can agreements entered into at mediation further limit the exceptions to Rule 408?

The Settlement Privilege and its Policy Rationale

Generally, Rule 408 bars the introduction of evidence related to settlement, including offers, conduct and statements, so discussions as part of mediation generally fall squarely within the protections of Rule 408.[5] Specifically, evidence of the following is not admissible to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction: "(1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority."[6] Rule 408 is not limited to offers of compromise, and expressly includes evidence of conduct or statements. However, it does not expressly reference documents created or exchanged—whether by the parties or a mediator—in connection with compromise negotiations.

Rule 408 is designed to promote the public policy favoring the compromise and settlement of disputes and avoiding wasteful litigation, and acknowledges that certain information exchanged in an effort to resolve a dispute may be irrelevant because, for example, a settlement offer may be motivated by a desire for peace rather than from any concession of weakness of a position.[7] It recognizes that parties frequently approach mediations and other settlement discussion forums in a more open and candid fashion in an effort to reach an informed compromise of the dispute at issue.[8] As Judge Weinstein observed about settlement discussions:

> [t]o promote settlement of disputes, there must be full and frank disclosure by each party . . . and the facts on which he or she relies to sustain that position. It should be assumed that the law as written over the door of every such conference room [are] the words "ye who enter here do so without prejudice."[9]

In fact, many parties often choose mediation or other dispute resolution mechanisms based on such a mutual understanding, acknowledgement and agreement (whether written or not) that the process will be protected under the settlement privilege, and that all parties will fully respect the confidentiality of the process. Consistent with this notion, courts have recognized that:

> [s]ettlement discussions are typically treated as confidential, since their disclosure may impact on the parties' interest, either in business affairs or in ongoing litigation. The threat of disclosure would be a serious crimp in such discussion, since candor would likely give way to extreme caution in making disclosures that are often vital to the success of such negotiations.[10]

Exceptions to the Settlement Privilege

While the purpose of Rule 408 is to facilitate open and wide-ranging settlement discussions, it nevertheless is "not a blanket rule of inadmissibility for any and all statements in the settlement context."[11] Rule 408 provides that a court "may admit this evidence for another purpose, such as proving a witness's bias or

prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution." The Second Circuit has observed that the examples of exceptions to Rule 408 in the rule are merely illustrative, and not exhaustive.[12]

One of the most common exceptions to Rule 408 is where the conduct or statements made during compromise discussions establish an independent violation or some other wrong committed that is unrelated to the underlying claim which was the subject of the discussions. The plaintiff in Doe argued in her emergency motion that parties should not be able to use mediation or other settlement proceedings to shield alleged illegal conduct. However, evidence of the alleged retaliatory threat of termination in *Doe* may not fit neatly into this exception to the extent Proskauer can argue that the alleged threat does not establish a distinct, independent violation because the plaintiff had an existing retaliation claim that was the subject of the mediation.[13]

The recent case of *Cerni v. J.P. Morgan Securities LLC*, 208 F. Supp.3d 533 (S.D.N.Y. 2016) illustrates this exception. In *Cerni*, the defendant, on a motion to dismiss, argued that a certain e-mail could not be used to support the plaintiff's claim because it was a communication in connection with efforts to compromise the plaintiff's purported age discrimination claim. The court reasoned that if it were to analyze the defendant's evidentiary challenge on the merits, it would not exclude the evidence because

> Rule 408 does not exclude evidence of alleged threats to retaliate for protected activity when the statements occurred during negotiations focused on the protected activity and the evidence serves to prove liability either for making, or later acting upon, the threats.[14]

Other courts have similarly held that settlement evidence is not barred when a claim is based upon some independent wrong evidenced in the course of settlement discussions. *See Carney v. Am. Univ.*, 151 F.3d 1090, 1095 (D.C. Cir. 1998) (noting that settlement letters "can be used to establish an independent violation (here, retaliation) unrelated to the underlying claim which was the subject of the correspondence ([age] discrimination"); *Uforma/ Shelby Business Forms, Inc. v. NLRB*, 111 F.3d 1284, 1294 (6th Cir. 1997) (holding that threats of retaliation that occurred during settlement negotiations were admissible when "the evidence serves to prove liability either for making, or later acting upon, the threats"); *Williams v. Regus Mgmt. Grp., LLC*, 2012 WL 1890384 at *4 (S.D.N.Y. May 15, 2012) (holding that "statements made in the course of negotiations to settle the underlying discrimination claim" were admissible "to establish the retaliation claim"); *Carr*, 2001 WL 563722 at *4 (holding that statements from settlement negotiations were admissible "because they are being introduced not to prove liability for claims being settled, but for an entirely separate claim of retaliation")); *Scott v. Goodman*, 961 F. Supp. 424, 438 (E.D.N.Y. 1997), *aff'd. sub nom. Scott v. Meyers*, 191 F.3d 82 (2d Cir. 1999) ("Although Goodman's offer to settle would not be admissible as an admission of liability on the underlying anti-union claim, Rule 408's prohibition is 'inapplicable' where, as here, the waiver-of-rights claim is based upon an alleged wrong—*i.e.*, the conditioning of Scott's reinstatement on the waiver of her First Amendment right to commence a lawsuit—committed during the course of alleged settlement discussions. . . . Goodman's statements are the very source and substance of a different and independent First Amendment cause of action.").

Settlement evidence has also been admitted as "another purpose" on the following bases:

- **Proof of potential bias:** a court admitted, under Rule 408's bias exception, evidence of the Commissioner of Internal Revenue's settlement with a similarly situated taxpayer because it was deemed evidence of the commissioner's potential bias;[15]
- **Proof of potential bad faith:** a court admitted evidence of an insurer's conduct during a settlement conference because it was offered for "another purpose," namely evidence of bad faith where under state law, an insurer's attempt to condition settlement of a breach of contract claim on the release of a bad faith claim may be used as evidence of bad faith;[16]
- **Proof of whether an amount-in-controversy threshold has been met:** a court held that a

settlement demand was admissible to show whether the amount-in-controversy for federal diversity jurisdiction had been met, or to "show the stakes" in a litigation;[17]

- **Proof of when a statute of limitations may have begun:** a district court did not abuse its discretion by considering settlement negotiations for the purpose of proving when a plaintiff had knowledge of a causal connection between injuries and alleged abuse;[18]
- **Proof of degree of success for purposes of assessing request for attorneys' fees:** a district court did not err in reducing attorneys' fees from the lodestar amount based in part on the fact that the plaintiff rejected a certain settlement amount and then recovered far less;[19]
- **Proof of potential sanctions under Rule 11:** a district court properly admitted an affidavit that was obtained as part of settlement negotiations to determine Rule 11 liability where the attorney had offered the affidavit to the court, as the fact-finder, in support of the attorney's allegations of certain improprieties on the part of a law clerk;[20]
- **Proof of certain elements of a class certification motion:** a court relied on a spreadsheet that was shared during settlement negotiations which listed the defendant's non-exempt and tipped employees because it was being used by the plaintiffs to show whether a proposed class was sufficiently numerous for purposes of Rule 23 of the F.R.C.P.[21]

As illustrated above, the restrictions on the admissibility and use of settlement-related evidence under Rule 408 are not quite as broad as some would reasonably expect, and can lead to a trap for the unwary. Moreover, while Rule 408 does bar the introduction of settlement-related evidence "to impeach by a prior inconsistent statement or a contradiction,"[22] it only bars this one form of impeachment known as "specific contradiction".[23] It does not otherwise bar settlement-related evidence to impeach a witness by any other means, *i.e.*, by showing bias,[24] nor does it bar use of such evidence to refresh a witnesses' recollection at deposition or trial.[25]

Tips to Reduce Risk that Settlement-Related Statements, Conduct or Documents will be Used in Legal Proceedings

To be forewarned and forearmed is the first step towards reducing the risk that statements or conduct or documents exchanged during a mediation session or other settlement context will be used in a legal proceeding. Set forth below are several tips to reduce such risk:

- **Use an Appropriate Settlement Legend:** Any settlement-related document or communication should bear a legend such as "For Settlement Purposes Only; Inadmissible in Any Proceeding (under FRE 408); Not to Be Used for Impeachment Purposes". While such a legend from one party (without reciprocal acknowledgement by the other) will not offer binding protection from disclosure, there will be little dispute as to the intended purpose of the correspondence or document shared by the sending party.
- **Execute a Comprehensive Confidentiality Agreement:** In addition to relying on Rule 408 or a state analog, parties should enter into broad confidentiality agreements before any mediation sessions or other settlement discussions. Such an agreement should not only confirm the parties' (and the mediator's) understanding of Rule 408, but also provide *additional* protections to cover some of the loopholes in Rule 408. Such an agreement would protect against use or disclosure from third parties and *the court or an arbitrator*. For example, a confidentiality agreement in mediation should make clear that:
  - All matters associated with the entire mediation process are confidential.
  - All statements made during the mediation are privileged settlement discussions and are made without prejudice to a party's legal position, and are inadmissible *for any purpose* in any legal, arbitral or other proceeding, and may not be used for impeachment or refreshing a witness' recollection. This should apply to offers and promises, as well as documents

or correspondence generated by anyone for purposes of the mediation.

- The mediator shall not disclose any notes or other documents created or generated as part of the mediation, and no attempt shall be made to compel the mediator's testimony or such notes or other documents from the mediation for any purpose.
- The parties agree that the mediator is not a necessary party in any legal or other proceeding relating to the subject matters of the mediation or the mediation itself.
- The mediator agrees not to disclose any information for any purpose that a party informs the mediator is being conveyed to the mediator in confidence.
- The confidentiality obligations survive indefinitely the conclusion of the mediation process.

A telling example of the benefit of such a confidentiality agreement is *Deluca v. Allied Domecq Quick Service Restaurant*, 2006 WL 2713944 (E.D.N.Y. Sept. 22, 2006). In *Deluca*, the court found that a statement was not protected by Rule 408 or any other applicable confidentiality rule because the statement fell under the exception that Rule 408 is inapplicable when a claim is based upon some distinct wrong allegedly committed during the settlement. However, the parties had signed a separate confidentiality agreement that provided that "*all matters* discussed during the mediation are confidential . . . and cannot be used as evidence in any subsequent . . . judicial proceeding." *Id.* at *3. The parties had agreed that all matters would be kept confidential except threats of imminent physical harm or actual violence. The court found that the parties' confidentiality agreement was broader than the protections afforded under Rule 408 and other governing confidentiality rules, and found no compelling argument to support the plaintiff's contention that the court should not hold the parties to their agreement. *Id.*

- **Thoroughly Prepare Your Corporate Representative for Mediation:** No attorney would go into a deposition without thoroughly preparing a witness for testimony, and yet corporate representatives are often unprepared for mediation sessions, believing that the discussions that occur in that forum are somehow "safe havens." Such is not the case, and client representatives should be properly prepared for what they may encounter at mediation and the consequences of treating this forum as informal. Such preparation should include instructions to: (a) be cautious of their body language and gestures; (b) pause before responding to questions from the mediator to give counsel a chance to intervene; (c) be very literal and specific in their responses, as mediation is not a "casual conversation"; (d) review documents carefully before answering any questions from the mediator; and (e) maintain composure throughout the process. Companies should also thoroughly vet with counsel any settlement correspondence or other documentation to be exchanged. Much like the misconceptions associated with the protections of the attorney-client and attorney work product privileges, corporate representatives should be advised not to assume that anything said or done relating to efforts to compromise or settle is protected from disclosure under Rule 408 in litigation or other proceedings.
- **Minimize Settlement Discussions Between Business Principals:** Companies should encourage business principals to go through the legal department to engage in any settlement or compromise discussions to minimize several of the pitfalls discussed above, and to avoid inadvertently injecting problematic statements or documents into the mix that will not be protected by any settlement privilege or confidentiality agreement.
- **Mitigate Against Potential Retaliation Claims:** One of the significant risks, as evidenced by the cases discussed above, is that in the course of settling employment disputes, discussions about the possible departure of the employee can be used as evidence of a separate claim of retaliatory conduct, constructive discharge, or harassment. Corporate representatives and other business

principals should be advised, no matter how common it is to discuss a departure process as part of a settlement, to avoid, if possible, initiating or suggesting the possibility of separation of employment. The latter should only be broached when the door has unequivocally been opened on that issue by the employee, and that fact should be well-documented though contemporaneous notes.

- **Conduct Mediations through Legal Counsel:** Where possible, discussions during mediations or in other settlement contexts should be funneled through outside or in-house counsel—as opposed to the corporate representative—to mitigate against the adverse party using statements or conduct by the principals that occur during settlement as evidence in a litigation.
- **Be Crystal Clear with the Mediator:** Legal counsel should clearly instruct the mediator about what information can or should be shared with the other side, and what cannot and should not, under any circumstances, be shared. Counsel should also request, where appropriate, that the mediator not take any notes with respect to certain information disclosed so that the party is assured that there is no written record of the information.

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1. Plaintiff alleged that she would amend the Complaint to add a Title VII claim after receiving a right to sue letter.
2. *Doe* Complaint at ¶ 57.
3. *Id.* at ¶ 58.
4. Neither the mediation agreement nor the confidentiality rules of the mediation session were attached to or referenced in the plaintiff's emergency motion. A Proskauer spokesperson referenced a confidentiality agreement when declining to comment in the media regarding the allegation that any Proskauer attorney threatened retaliation during a mediation session.
5. *See* FED. R. EVID. 408. The New York state analog to Rule 408 is Rule 4547 of the New York Civil Practice Law and Rules, which states: "Evidence of (a) furnishing, or offering or promising to furnish, or (b) accepting, or offering or promising to accept, any valuable consideration in compromising or attempting to compromise a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of the claim or the amount of damages. Evidence of any conduct or statement made during compromise negotiations shall also be inadmissible. The provisions of this section shall not require the exclusion of any evidence, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proof of an effort to obstruct a criminal investigation or prosecution."
6. *See* FED. R. EVID. 408.
7. *See* Advisory Committee Notes to FED. R. EVID. 408; *see also Trebor Sportswear Co., Inc. v. The Limited Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989).
8. *See Carr v. Health Ins. Plan of Greater N.Y. Inc.*, 2001 WL 563722, *4 (S.D.N.Y. May 24, 2001) ("The purpose of Rule 408 is to facilitate open and wide-ranging settlement discussions").
9. *Sanders v. Madison Square Garden, L.P.*, 525 F. Supp.2d 364, 369 (S.D.N.Y. 2007) (citing Weinstein's Evidence ¶ 408.5[2], at 408-20 – 408-21).
10. *See S.E.C. v. Thrasher*, 1995 WL 552719, *1 (S.D.N.Y. Sept. 18, 1995).
11. *See* Carr, 2001 WL 563722 at *4.
12. *See United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984) ("The evidence [in dispute] was offered for a purpose other than one for which Rule 408 requires exclusion, and although that purpose is not one of the other purposes specifically named in Rule 408, the admission of the evidence is not barred by the Rule.").
13. *See Carr*, 2001 WL 563722.
14. *See Cerni*, 208 F. Supp.3d at 540-541.
15. *See Hudspeth v. Comm'r*, 914 F.2d 1207, 1213–14 (9th Cir. 1990).
16. *See Athey v. Farmers Ins. Exch.*, 234 F.3d 357, 362 (8th Cir. 2000).
17. *See, e.g., Grinnell Mut. Reinsurance Co. v. Haight*, 697 F.3d 582, 585 (7th Cir. 2012).
18. *See Kraft v. St. John Lutheran Church of Seward, Neb.*, 414 F.3d 943 (8th Cir. 2005).
19. *See Lohman v. Duryea Borough*, 574 F.3d 163, 167 (3d Cir. 2009).
20. *See Eisenberg v. University of New Mexico*, 936 F.2d 1131, 1134 (10th Cir. 1991).

21. *See Flores v. Anjost Corp.*, 284 F.R.D. 112, 124 (S.D.N.Y. 2012).
22. This addition was the result of 2006 Amendments to Rule 408, which previously did not include the express bar on settlement-related evidence for impeachment purposes. The Advisory Committee specifically explained, however, in justifying the 2006 amendment: "The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements."
23. 23 Fed. Prac. & Proc. Evid. § 5314.1 (1st ed.).
24. *Id.*
25. *See* FED. R. EVID. 408 (which excludes settlement-related evidence for impeachment by prior inconsistent statement or a contradiction but does not mention exclusion to refresh recollection).

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