VIRGINIA LAWYERS WEEKLY

Evidence rule on admissions to track feds'

By: Peter Vieth November 12, 2015

Lawyers talking settlement may breathe a little easier next year with extra assurance that their words won't be used against them at a civil trial.

The Supreme Court of Virginia is closing what many saw as a loophole to protections against trial use of statements made in settlement talks.

The court is amending its evidence Rule 2:408, effective July 1, to remove language that would open the door to courtroom evidence of admissions of liability or statements of pertinent facts from negotiations.

The change announced Oct. 30 was a recommendation of the Boyd-Graves Conference which studies proposed reforms to the civil justice system. The court's Advisory Committee on Rules of Practice and Procedure then recommended the amendment. The Virginia Judicial Council added its blessing in May.

The amendment brings Virginia evidence rules closer to the Federal Rules of Evidence on settlement offers.

Richmond attorney David N. Anthony, who chaired a study panel, said the change does not favor either plaintiff or defendant in civil actions.

"All in all, people believe settlement is a good thing and you shouldn't be bitten by inconsistent rules on how the information can be used," Anthony said.

Exception to protection

The current rule generally bars "evidence of offers and responses concerning settlement or compromise of any claim which is disputed as to liability or amount."

The major exception comes in the second sentence:

"However, an express admission of liability, or an admission concerning an independent fact pertinent to a question in issue, is admissible even if made during settlement negotiations."

The exception was crafted from analysis in a 1995 Virginia Supreme Court ruling in a legal malpractice case. The court's new amendment appears to overrule that language in *Lyle, Siegel, Croshaw & Beale P.C. v. Tidewater Capital Corp.* (VLW 095-6-044).

The new rule closely tracks the language of Federal Rule of Evidence 408, except that the Virginia rule will expressly apply only to civil cases. A provision in the federal rule allowing some negotiation statements into evidence in criminal cases is not part of the new Virginia rule.

The new rule will read:

(a) *Prohibited Uses*. – Evidence of the following is not admissible on behalf of any party in a civil case – either to prove or disprove the validity or amount of a disputed claim, or to impeach by a prior inconsistent statement or by 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 any statements made during compromise negotiations about the claim.

(b) *Exceptions*. -The court may admit such evidence for another purpose, such as proving a witness's [sic] bias or prejudice, or negating a contention of undue delay.

(c) *Pre-existing documents or physical evidence*. – Otherwise admissible evidence that existed prior to the commencement of compromise negotiations, including pre-existing documents or electronic communications, is not excludable under this Rule merely because such evidence was disclosed, produced, or discussed by a party during such negotiations.

Avoiding a trap

The existing rule was labeled a "trap for the unwary" by College of William & Mary law Prof. Jeffrey Bellin.

"It is bad enough to have to tell your client that your efforts to settle the case did not succeed. Even worse is having to inform your client that your unfruitful efforts to settle generated evidence for your opponent to use against you at trial," Bellin wrote in an April blog post.

The court's rewrite, he said, is "unequivocally positive."

Bellin, author of a comparison of Virginia and federal evidence law, said the existing rule requires attorneys to engage in "verbal gymnastics" to protect their clients' interests during settlement discussions.

"That inhibits settlement talks and creates a trap for unwary attorneys who don't realize that Virginia law is unusual in permitting non-qualified admissions made during settlement discussions into evidence at a later trial. The amendment removes this trap for the unwary," Bellin said.

Richmond attorney Thomas W. Williamson Jr., who served on the Boyd-Graves review panel, agreed the amendment was a "salutary change."

"No longer will lawyers and their clients have to divine what is going to be a factual admission versus a protected settlement-related statement," he said.

Similarity between the state and federal rules also will make it easier to predict the admissibility of negotiation statements when lawyers do not know whether the controversy might land in federal or state court, Williamson said.

No criminal application

At the recommendation of the Boyd-Graves Conference, the court left out controversial language from the federal rule that could allow settlement concessions to be used against a defendant in a criminal trial.

The conference study committee was influenced by Regent University law Prof. James J. Duane who opposed the so-called "criminal case exception" in the federal rule.

Duane argued the exception benefited prosecutors only and undermined the objective of encouraging candid settlement discussions.

Concern about boundaries

Trying to determine when parties are engaged in settlement negotiations can be difficult in divorce proceedings, several judges observed at the May Judicial Council meeting.

The two sides "start shooting emails back and forth," one judge said.

Chief Justice Donald W. Lemons said at the time that – even though the new rule might not eliminate confusion about what family discussions are protected – adopting the new rule appeared to be better than ignoring problems with the current rule.

New language affects fees in divorce cases

The court on Oct. 30 also adopted changes in the rules regarding attorney fees in domestic relations cases.

The amendments – effective Jan. 1 – make it clear that fees on appeal should be requested in one of the designated briefs on appeal and that fees can be requested on appeal for work to enforce a prior fee award.

The changes affect Rules 5:35 and 5A:30.

The amendments also clarify that, in awarding fees, the Court of Appeals may consider "all the equities" of the divorce case, not just whether a party's position was frivolous or lacked merit.

The changes also spell out the factors to be considered by the trial court when an appeals court sends a case back for a fee award.

University of Virginia law Prof. Kent Sinclair, chair of the court's rules committee, explained in May that the changes were intended to spell out the mechanics of appellate fee awards in divorce cases, not to make a change in the law.

Additional reporting by Deborah Elkins.

Tagged with: BOYD-GRAVES CONFERENCE | RULES OF EVIDENCE | SUPREME COURT OF VIRGINIA NEWS