New York Family Law Monthly

June, 2009

IMPORTANT RULES OF EVIDENCE FOR FAMILY LAW ATTORNEYS

Part One of a Three-Part Article

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Matrimonial and family law attorneys who only try divorce and custody cases know that all issues besides the grounds for divorce are tried before the court without a jury. In such cases, the rules of evidence are often relaxed. While this can make for a more straightforward presentation of evidence, it can also leave family practice lawyers unfamiliar with new or little used rules of evidence. In this article we discuss some of those important rules that every family law practitioner should become familiar with.

CLIENT COMMUNICATIONS

Very often, a judge will ask attorneys a simple question regarding their clients, such as, "Was your client advised of the temporary restraining order?" or, "Did your client transfer the property?" The answers to such questions, if given, may make the attorney unwittingly guilty of violating the attorney/client privilege. The answers may also be considered by the court to constitute an admission by the client.

Civil Practice Law & Rules (CPLR) s 4501 provides that '[a]n attorney, who receives a confidential communication from the client in the course of professional employment, may not disclose, or be allowed to disclose the communication, nor shall the client be compelled to disclose the communication, in any action or hearing." A communication is considered confidential when the client intended to make it in confidence and had a reasonable expectation of confidentiality. People v. Osorio, 75 NY2d 80 (1989). In order to make a valid claim of privilege, it must be shown that the information sought to be protected from disclosure was a "confidential communication" made to the attorney for

the purpose of obtaining legal advice or services. Matter of Jacqueline F., 47 NY2d 215 (1979). Legal advice given by an attorney to a client is a privileged communication. Spectrum Systems v. Chemical Bank, 78 NY2d 371 (1991).

Counsel has an ethical obligation, in a situation like the one described above, to object when asked by the court to speak on behalf of a client, absent the consent of the client. Counsel has no right to reveal a client's confidences unless the client waives the privilege.

ADMISSIONS BY COUNSEL

Attorneys should always choose their words carefully when communicating with an adversary. Statements made by an attorney, while acting in the capacity as an attorney, are admissible against the client. Bellino v. Bellino Construction Co. Inc., 75 AD2d 630 (2d Dept., 1980). The statements must have been made by the attorney while acting in his authorized capacity. Burdick v. Horowitz, 56 AD2d 882 (2 Dept 1987); Treadwell v. Doncourt, 18 AD 219 (2 Dept. 1897).

SETTLEMENT COMMUNICATIONS

The common law rule in New York, enunciated in White v. Old Dominion S.S. Co., 102 NY 661, 662 (1886), was that admissions of fact, made during settlement negotiations, which were expressly stated to be made without prejudice, or of such a nature that it would not have been made except for the purpose of settlement, and under an agreement that could fairly be implied from the circumstances that it was not to be used afterwards, were not admissible. Thus, unqualified statements of fact made during settlement negotiations were admissible against the party who made the statements. Reid & Priest LLP v. Realty Asset Group Ltd., 250 AD2d 380 (1st Dep't 1998). However, admissions of fact explicitly or implicitly made "without prejudice" during settlement negotiations were protected from discovery pursuant to the public policy of encouraging and facilitating settlement. White v. Old Dominion S.S. Co., supra. Where the factual statements in a letter were prefaced with the words "without prejudice," the factual statements made in the course of the negotiations were inadmissible.

Enacted in 1998, CPLR "4547 provides that the settlement of a disputed claim or an offer to settle the claim is inadmissible to prove either liability, the invalidity of the claim or the amount of damages. The claim or its amount must be "disputed" at the time of the communication. Whether a "dispute" actually existed at the time of the communication is a question of fact for the court to decide.

CPLR" 4547 also provides that evidence of any conduct or statement made during compromise negotiations is also inadmissible. However, the provisions of this section do not require the exclusion of any evidence, which would otherwise be discoverable, solely because the evidence was presented during settlement negotiations. This evidentiary exclusion for settlement discussions does 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. For example, the rule would not exclude settlement evidence relative to the issue of credibility, such as evidence tending to show a witness's bias, hostility or motive to lie. Matter of Edward F., 154 AD2d 464 (2 Dept 1989); Hill v. Arnold,

226 AD2d 232 (1 Dept 1996).

It is a common practice for attorneys to send letters to their adversaries containing settlement offers. Although such letters, which may contain admissions, are not intended to be presented to the court, an unscrupulous attorney may attempt to offer the letters into evidence during the trial to demonstrate how much was offered as a settlement and rejected. For this reason, it is a good idea to indicate in any letter containing a settlement offer that it is being sent "for purposes of settlement only and without prejudice," so that the contents of the letter are excluded pursuant to CPLR" s 4547.

PRE-TRIAL WITNESS LIST

Some matrimonial judges require the parties to submit, in advance of the trail, a list of witnesses they intend to call to testify. Upon objection, such judges prohibit a party from calling as a witness a person who is not on their witness list. While CPLR s 3101(d) requires parties to disclose their expert witnesses, and 22 New York State Codes, Rules and Regulations (NYCRR) 202.16 (g)(2) requires the parties to disclose expert testimony, there is no provision in the Civil Practice Law and Rules or the court

rules for the submission of a list of the non-expert witnesses a party expects to call to testify. There is no case law or rule of evidence that permits a judge to prohibit a party from calling a witness merely because that person is not on their witness list.

ONLY ADMISSIBLE EVIDENCE MAY BE CONSIDERED BY THE TRIAL COURT

The law indulges in the presumption that a trial judge's decision rests only on competent evidence. People v. Quarles, 187 AD2d 200 (4 Dept 1993). Prince, Richardson on Evidence, 11th Edition, 1-103. Thus, when the case is tried before a judge, only evidence that may be considered by a jury may be considered by the court.

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