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**Evidence—Offers of Compromise Versus Admissions
Against Interest**

D contracted orally with *P* to design the mechanical and electrical work for a building project. *P* was to be paid on a commission basis. At first, *D* was satisfied with *P*'s work. Later, however, *D* became dissatisfied when he learned that the budget for the building project would not permit many of the proposed specifications set forth in *P*'s drawings. *D* maintained he did not owe *P* anything, resulting in *P*'s bringing an action for services rendered. It was disclosed at the trial that *D* had written *P*'s attorney stating that he felt that *P* should be compensated for the work he had done in preparing the drawings, but not to the extent of *P*'s billing. Accordingly, the letter further informed *P*'s attorney that *D* had requested a payment of \$1,000.00 be made to *P*. Significantly, the near closing lines of the letter read as follows: "I am sure that if we get together on my next visit to Wheeling, we can settle this problem amicably." The letter was admitted into evidence over *D*'s objections. Judgment was entered for *P* on the jury's verdict. *D*'s motion for a new trial, on the ground that the letter related to an unaccepted offer of compromise and was for that reason inadmissible, was overruled. *D* appealed. *Held*, affirmed. The letter in question was merely an expression of *D*'s opinion and was in no way connected with an offer for compromise. Consequently, the letter was admissible as an admission against interest.¹ *Shaffer v. Burton*, 155 S.E.2d 884 (W. Va. 1967).

The line between offers of compromise and admissions against interest is a hazy demarcation at best. Nonetheless, it is a line that must be defined so that future negotiations leading to private adjustments of conflicting claims may be properly conducted. If one believed each of his statements volunteered in private negotiations could be used as admissions of liability in future litigations, such negotiations would rarely produce agreement or even occur. The decision in *Shaffer* reflects the position of the West Virginia court as to the differentiation between offers of compromise and admissions against interest.

¹ It should be noted initially that there is a distinct difference between admissions against interest and declarations against interest. The main difference is that so called declarations against interest refer to statements made by one who is not a party to the proceeding whereas admissions against interests are statements made by a party-opponent. Both are exceptions to the hearsay rule. For a more thorough explanation of the matter see 5 WIGMORE, EVIDENCE § 1455 (3d ed. 1940); 58 HARV. L. REV. 1 (1944).

Courts unanimously hold that offers of compromise are inadmissible in evidence.² But this uniformity in result is deceptive in that the reasons courts give for this conclusion are fundamentally different.³ Therefore, it will contribute to the clarification of the question as to what constitutes compromise offers if one considers the various theoretical foundations for their exclusion.

The majority of courts predicate the exclusion of offers to compromise upon a relevancy theory.⁴ If the statement is such that its reception into evidence would affect the apparent probabilities of some issue of fact in the particular case, and would thereby enhance the search for the truth of the matter, the statement is relevant.⁵ But, the general rule is that a statement that is an offer neither admits nor ascertains any liability and is therefore irrelevant.⁶ In short, the offer is only illustrative of the offeror's desire to avoid litigation.⁷

The minority of courts base their decision of inadmissibility of offers on a privilege theory.⁸ Since public policy favors the settlement of disputes without invoking the aid of the overburdened courts, the communications that could effectuate such settlements are privileged.⁹ As a result, these communications are inadmissible into evidence. Under this theory, the probative value of the offer is not important; rather if these negotiations were not protected the

² 4 WIGMORE, EVIDENCE § 1062 (3d ed. 1940); Annot., 15 A.L.R.3d 13 (1967).

³ For a complete discussion of the various reasons courts advance for excluding offers of compromise from evidence see Bell, *Admissions Arising out of Compromise—Are They Irrelevant?*, 31 TEXAS L. REV. 239 (1953).

⁴ E.g., *Esser v. Brophy*, 212 Minn. 194, 3 N.W.2d 3 (1942). This case is particularly significant in that it is one of the few decisions that expressly acknowledges the different theories for excluding offers to compromise from evidence. Generally, one can ascertain a case's theoretical basis for the exclusion of offers to compromise only by carefully examining its particular language. Wigmore treats the matter of excluding some statements as offers of compromise as completely a matter of relevancy. 4 WIGMORE EVIDENCE § 1061 (3d ed. 1940). For discussions suggesting offers should be treated as privileged communications, see McCORMICK, EVIDENCE § 76, at 157 (1954); Bell, *Admissions Arising out of Compromise—Are They Irrelevant?*, 31 TEXAS L. REV. 239 (1953).

⁵ James, *Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689 (1941).

⁶ *Esser v. Brophy*, 212 Minn. 194, 3 N.W.2d 3 (1942); *Sanhorn v. Neilson*, 4 N.H. 501 (1825).

⁷ *Brickell v. Shawn*, 175 Va. 373, 9 S.E.2d 330 (1940). But, it may be argued that offers of compromise "are more apt to be made in cases in which the party making them is conscious that the cause of his adversary is well founded than in the opposite cases." *Rideout v. Newton*, 17 N.H. 71, 73 (1845); cf. McCORMICK, EVIDENCE, § 76 (1954).

⁸ 34 MICH. L. REV. 524 (1936).

⁹ *Hiltbold v. Stern*, 82 A.2d 123 (Mun. Ct. App. D.C. 1951); *Eckhardt v. Harder*, 160 Wash. 207, 294 P. 981 (1931).

possibility of private compromise would be slight indeed.¹⁰ This reasoning crystallizes in the opinion that a person is entitled to pursue a course that would result in compromise without the danger of being prejudiced in the event his efforts should fail.¹¹ The focus of purpose under the privilege theory then, is directed to the policy of preserving an atmosphere in which private settlements may flourish.

The English courts are the primary exponents of a third theory for excluding offers of compromise; this is commonly called the contract theory.¹² According to this theory, the essential question is whether or not the offeror stipulated that his statement was to be kept confidential. In order to signal the offeror's intent to keep the communication confidential, the most common practice is to preface the communication with the words "without prejudice." The effect of the saving words "without prejudice" is to render the statement inadmissible into evidence.¹³

It should be noted that the relevancy, privilege and contract theories are merely *reasons* for excluding offers of compromise from evidence; but before the reasons for excluding compromise offers become important it is only logical that one must first determine what statements will constitute offers of compromise. That is, even though a discussion of the theories involved will enhance one's understanding of the general rule of excluding offers of compromise, as a practical matter, the theories operate simply as rationales for

The court's language in *Hiltbold v. Stern*, *supra* at 126, aptly explains the essence of the privilege theory for excluding offers for compromise:

A mere offer of compromise is to be protected because a party to a controversy is permitted in the interest of peace to tender such terms as to him shall seem proper, and if rejected by the other party it would be unfair to make use of it as an admission of liability.

Compare this statement concerning the "fairness" of excluding offers of compromise *with* the decision reached in *Sanborn v. Neilson*, 4 N.H. 501 (1825).

¹⁰ *Bartels v. Schwake*, 153 Minn. 251, 190 N.W. 178 (1922). Discussing offers of compromise the court said at 252, "The law favors the settlement of disputed claims without litigation, and to encourage such settlements will not permit either party to use offers of settlement made by the other as evidence of an admission of liability." In *Patrick v. Crowe*, 15 Colo. 543, 554, 25 P. 985, 989 (1891) the court explained that, "If parties can be compelled . . . to detail offers made for the purpose of settling matters in dispute to avoid litigation, certainly no prudent person would feel safe in offering any concessions for the purpose of bringing about compromise."

¹¹ *Eckhardt v. Harder*, 160 Wash. 207, 211, 294 P. 981, 983 (1931).

¹² 4 WIGMORE, EVIDENCE § 1061 (3d ed. 1940); 34 MICH. L. REV. 524, 526 (1936).

¹³ *Cf. McCORMICK*, EVIDENCE § 251, at 541 (1954).

exclusion and do not serve as criteria in the particular case.¹⁴ As a result, certain tests have been employed to assist the courts in their initial differentiation between offers of compromise and admissions against interest.

The crucial test to distinguish offers of compromise from admissions against interest is to determine the intent of the particular individual making the overture.¹⁵ Practically, however, the party's intentions are operative only to the extent that they are manifest. Therefore, the courts have devised certain objective standards to evaluate the particular individual's intentions.¹⁶ The most common standard is to look to the form of the statement. Specifically, if the statement is in the form of a hypothetical assertion and is conditional in its terms on effecting a settlement, the statement is an offer of compromise.¹⁷ Conversely, if the statement is explicit and absolute in its terms it is an admission against interest.

The determination of the party's intent to make an offer of compromise is not limited to an examination of the statement itself. The form of the statement is to be considered in light of all the surrounding circumstances. First, there must have been an actual dispute between the parties at the time the particular overture was made.¹⁸

¹⁴This becomes even more obvious when one considers that in many cases the theories are not mutually exclusive. Often one finds a court employing concurrently the privilege and relevancy theories, for example, without acknowledging either as theories, or as separate rationales. *E.g.*, *T. M. Deal Lumber Co. v. Jones*, 137 Kan. 480, 21 P.2d 933 (1933).

¹⁵*People v. Forster*, 23 Cal. Rptr. 582, 58 Cal. App. 2d 257, 373 P.2d 630 (1962); *Hunter v. Totman*, 146 Me. 259, 80 A.2d 401, (1951); *Colburn v. Groton*, 66 N.H. 151, 28 A. 95 (1890); *Hendrickson v. Meredith*, 161 Va. 913, 170 S.E. 602 (1933); *Chesapeake and Ohio R.R. Co. v. Stock*, 104 Va. 97, 51 S.E. 161 (1905).

The court in *Colburn v. Groton*, *supra*, presents an excellent discussion of the law concerning the exclusion of offers of compromise from evidence.

¹⁶The question of intent and whether or not the statement will be admissible as an admission against interest is to be determined by the trial court as a preliminary question of fact. *Hunter v. Totman*, 146 Me. 259, 268, 80 A.2d 401, 406, (1951); *Gagne v. New Haven Rd. Constr. Co.*, 87 N.H. 163, 175 A. 818, 821 (1934). But, if the evidence is disputed as to whether a fact was admitted as true or whether the statement was made with the intention of effectuating a compromise, the question may be submitted to the jury with instructions to disregard it if it is the latter. *Colburn v. Groton*, 66 N.H. 151, 28 A. 95, 98 (1890).

¹⁷*Brown v. Hyslop*, 153 Neb. 669, 677, 45 N.W.2d 743, 748 (1951); *Keatley v. Hanna Chevrolet Co.*, 121 W. Va. 669, 675, 6 S.E.2d 1, 4 (1939); *Lovett v. West Virginia Central Gas Co.*, 73 W. Va. 40, 45, 79 S.E. 1007, 1009 (1913). See 31 C.J.S. *Evidence* § 285 (1964).

¹⁸*Wartell v. Novograd*, 49 R.I. 191, 141 A. 461 (1928). An offer to pay an admitted liability does not come within the general rule excluding offers of compromise. *Firestone Fire and Rubber Co. v. Hillow*, 65 A.2d 338 (Mun. Ct. App. D.C. 1949) (claim for damage to car advanced by a

Similarly, one is to consider whether or not there was an actual threat of litigation.¹⁹ In this respect, the time of the statement is just as important as its form. Moreover, some courts have asked whether or not a definite amount of money was offered at the time the statement was made.²⁰ Certainly an offer of a definite amount in order to effectuate a settlement of an existing dispute would indicate an intention to compromise. It appears that no one criterion is to be considered controlling; rather, each is to be examined and considered in light of the entire situation existing between the parties.

Once a statement has been characterized generally as an offer of compromise and, as such, inadmissible into evidence, it does not necessarily follow that each segment of the entire statement is likewise inadmissible. Independent statements of fact, although encompassed in an offer of compromise, are admissible in evidence as admissions against interest.²¹ The weight of authority takes this position.²² This, of course, may be just another way of saying independent facts are not offers of compromise. But, failure to realize this gradation could cause confusion in cases where one finds a court holding generally that a statement is inadmissible because it is an offer to compromise, while at the same time admitting into evidence parts of the same statement. The public policy favoring the private settlement of disputes is out-weighed by the stronger public policy which requires that material issues of fact be determined by the greatest amount of relevant nonprejudicial evidence.²³

The court in *Shaeffer* made the important distinction between reasons or theories for excluding offers of compromise and the general tests to be used to determine whether a statement is in fact an offer. Although it did not recognize them as such, it acknowledged both the

bailor against a parking station; defendant's agent offered to pay in full less salvage value); *McComas v. Clements*, 137 Kan. 681, 21 P.2d 895 (1933) (after car collision, defendant at scene of accident said he would take care of any bills).

¹⁹ *E.g.*, *Brown v. Hyslop*, 153 Neb. 669, 676, 45 N.W.2d 743, 748 (1951).

²⁰ *Id.*, *cf.* *Gagne v. New Haven Rd. Constr. Co.*, 87 N.H. 163, 168, 175 A. 818, 821 (1934).

²¹ *Hendrickson v. Meredith*, 161 Va. 913, 170 S.E. 602 (1923); *Keatley v. Hanna Chevrolet Co.*, 121 W. Va. 669, 6 S.E.2d 1 (1939); *Parkersburg and Marietta Sand Co. v. Smith*, 76 W. Va. 246, 85 S.E. 516 (1915).

²² *See* *Annot.*, 15 A.L.R.3d 13 (1967); 29 AM. JUR. 2d *Evidence* § 630 (1967); 31A C.J.S. *Evidence* § 287 (1964).

²³ *Gagne v. New Haven Rd. Constr. Co.*, 87 N.H. 163, 168, 175 A. 818, 821 (1934).

privilege and relevancy theories as the reasons for excluding compromise offers from evidence.²⁴ Without considering either the privilege or relevancy theories as controlling, it applied the tests to characterize the letter as either an offer or admission.

The court applied many of the standard tests to make this distinction: (1) whether or not the statement was in the form of a hypothetical assertion; (2) whether or not the statement was a part of an offer; and (3) whether the statement was made for the purpose of settlement or compromise.

The court's consideration of *D*'s purpose for sending the letter to *P*'s attorney was significant. The statement in the letter concerning the possibility of future settlement if the parties were to "get together" was dismissed by the court as merely an opinion of *D*. Thus the court seemed to be drawing a fine line indeed by differentiating offers of compromise and opinions. Significantly, this was an unnecessary distinction for the court to make. That is, assuming the statement concerning an amicable settlement was an offer to compromise, the admission by *D* that he owed *P* some amount would still have been admissible under the general rule that an admission of liability is admissible into evidence even though it is part of an offer of compromise.²⁵

The theories of exclusion provide merely rallying points for future argument. Presently, however, in West Virginia one would be well advised to give more attention to the particular tests employed by the court. Moreover, it would be prudent to frame any overtures for compromise in the form of hypothetical assertions with definite reference to settlement negotiations.

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²⁴ The pertinent language is:

The rule [for excluding offers] is based upon public policy which favors the settlement of disputed claims out of court and the courts treat such offer of compromise by a party as an effort to obtain peace rather than as an admission of liability or of the validity of the claim of the other party. *Shaeffer v. Burton*, 155 S.E.2d 884, 891 (W. Va. 1967) (emphasis added).

The first part of the sentence contains the public policy concept inherent in the privilege theory; the last half of the sentence explains why such offers are of no probative value and therefore irrelevant.

²⁵ *E.g.*, *Brown v. Hyslop*, 153 Neb. 669, 45 N.W.2d 743 (1951).