

University of Missouri School of Law Scholarship Repository

Faculty Publications

2018

Rethinking the Law of Legal Negotiation: Confidentiality Under Federal Rule of Evidence 408 and Related State Laws

Richard C. Reuben

University of Missouri School of Law, reubenr@missouri.edu

Follow this and additional works at: <https://scholarship.law.missouri.edu/facpubs>

 Part of the [Dispute Resolution and Arbitration Commons](#)

Recommended Citation

Richard C. Reuben, Rethinking the Law of Legal Negotiation: Confidentiality Under Federal Rule of Evidence 408 and Related State Laws, 59 *Boston College Law Review* 523 (2018).

Available at: <https://scholarship.law.missouri.edu/facpubs/697>

This Article is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

RETHINKING THE LAW OF LEGAL NEGOTIATION: CONFIDENTIALITY UNDER FEDERAL RULE OF EVIDENCE 408 AND RELATED STATE LAWS

RICHARD C. REUBEN

INTRODUCTION	526
I. THE HISTORY AND TRANSFORMATION OF FEDERAL RULE 408	529
<i>A. Preliminary Matters</i>	529
1. Clarifying Compromise	529
2. The Meaning of Confidentiality	531
<i>B. Common Law Origins of Rule 408 and the Policies That Support It</i>	533
<i>C. The Codification Process</i>	535
1. The Original Version in 1975	535
2. The 2006 Amendments	540
3. The 2011 Amendments	544
<i>D. Synthesis: The Substantive Transformation of Rule 408</i>	546
1. Result Under the 1975 Version of Rule 408	548
2. Result Under the 2006 Amendments to Rule 408	549
3. Result Under the 2011 Version of Rule 408	549
<i>E. Rule 408 in the States</i>	550
II. JUDICIAL TREATMENT OF RULE 408 AND RELATED STATE LAWS	551
<i>A. Methodology for Analyzing Federal and State Court Cases</i>	552
<i>B. Statutory Exceptions</i>	552
1. Technical Statutory Exceptions	553
2. Bias or Prejudice	554
3. Criminal Exceptions	556
<i>C. Common Law Exceptions</i>	557
1. Proof of State of Mind or Knowledge	558
2. Proof of Independent Facts	560
3. Otherwise Discoverable Evidence	561
4. Mutuality of Concessions	563
<i>D. Miscellaneous Exceptions</i>	565
1. Attorney's Fees	565
2. Jurisdiction	565
<i>E. Synthesis and Conclusion: A Porous Rule</i>	566
III. THE CHANGED ENVIRONMENT OF LEGAL NEGOTIATIONS	567
<i>A. The Paradigm Shift in Legal Negotiation</i>	567

1. From Positions to Interests.....	568
2. From Less Disclosure to More Disclosure.....	571
<i>B. The Shift in the Structure of Legal Negotiation.....</i>	<i>572</i>
1. From Face-to-Face to Texts and Social Media.....	572
2. From Judges to Facilitators of Settlement.....	573
<i>C. An Anachronism Emerges.....</i>	<i>575</i>
IV. RETHINKING RULE 408 AND RELATED STATE LAWS.....	576
<i>A. A Perfect Storm.....</i>	<i>576</i>
<i>B. Rewriting the Rule as a Full Privilege.....</i>	<i>578</i>
1. Privilege as a Doctrine of Evidentiary Exclusion.....	578
2. Rule 408 as a “Quasi-Privilege”.....	580
3. The Uniform Mediation Act.....	582
CONCLUSION.....	587

RETHINKING THE LAW OF LEGAL NEGOTIATION: CONFIDENTIALITY UNDER FEDERAL RULE OF EVIDENCE 408 AND RELATED STATE LAWS

RICHARD C. REUBEN*

Abstract: Federal Rule of Evidence 408 and related state laws are among the most important rules to implement the national policy favoring the settlement of legal disputes. These rules bar the introduction of statements made during negotiations leading to the resolution of legal disputes. However, comprehensive analysis of the rule's text, doctrinal history, and modern context demonstrates that the rule no longer meets its noble goals. Rather, the rule has evolved textually from a remarkably narrow and complex categorical presumption of inad-

© 2018, Richard C. Reuben. All rights reserved.

* James Lewis Parks Professor of Law and Journalism at the University of Missouri School of Law. This Article was several years in the making, and could not have been achieved without significant support by many whose contributions I am pleased to acknowledge and thank.

I am most thankful for the strong support that my deans—R. Lawrence Dessem and Gary Myers, successively—have given this research, both personally and financially by providing support from: The David W. Beckerman Faculty Research Fellowship, Keith A. Birkes Faculty Research Fellowship, Robert W. Bosslet Faculty Trial Advocacy Research Award, Don M. Downing Faculty Research Award, Maurice B. Graham Faculty Fund, Sam K. and June S. Hamra Faculty Research Fund, John K. Hulston General Fund, Thomas L. Patton Research Fellowship, Lewis A. and Verne H. Snyder Faculty Research Fellowship, Forrest L. Thompson Faculty Achievement Award, Donald P. Thomasson Faculty Research Fellowship, John R. Whitmore Faculty Research Fellowship, and David F. Yates Research Fellowship. Without their financial support, this Article simply could not have been researched or written.

I am truly honored to have been served by several extraordinary and committed Research Assistants at the Missouri School of Law, who passed the baton year by year to provide diligent and painstaking research on the legislative history of Rule 408 and how state and federal courts have interpreted it: Zachary Crowell, Danielle Eldred, Greg Goodwin, Danielle Hofman, Emmalee Miller, Robert Mace, Lindsay Ponce, Brittany Pflieger, Kevin Stockmann, and Ross Valore. Their contributions were worth far more than they were paid.

I am also deeply appreciative of the time, effort, and good will of many professional colleagues who took the time to read drafts or help me think through significant issues, including Frank Bowman, Richard Carelli, Jonathan Cohen, Edward J. Immwinkelried, Carrie Menkel-Meadow, Ben Trachtenberg, and participants at the 2013 Association of American Law Schools Section of Dispute Resolution Works-in-Progress Conference. Their encouragement and contributions kept me on track, honest, and (I believe and hope) accurate.

Finally, I thank and dedicate this Article to Nancy Rogers and Frank E.A. Sander, two mentors who introduced me to the challenge of confidentiality in dispute resolution processes, inspired me with their intellectual rigor and dedication to service, and in so many ways helped me transition from journalism to the legal academy. I remain in your debt.

I take full responsibility for any errors, oversights, or omissions.

missibility with limited exceptions to a simpler rule that gives courts considerable deference to admit such evidence when they deem it appropriate. Doctrinally, both federal and state courts have interpreted its limitations narrowly and its exceptions broadly as they have sought to do justice in particular cases. These statutory and doctrinal problems are exacerbated by the changing nature of legal negotiations. When Rule 408 was enacted in 1975, the dominant model of legal negotiation was positional and adversarial bargaining, in which lawyers guarded information closely, and settlement largely focused on the economic value of the dispute. Today, however, the emerging norm of legal negotiation is more interest-based problem-solving, in which lawyers are encouraged to disclose their clients' needs, concerns, preferences, and other sensitive information. Though helpful in problem-solving, this information might also be detrimental to the client in subsequent proceedings if the negotiation fails. The result is a perfect storm that threatens to undermine the efficacy and legitimacy of modern legal negotiation as more lawyers become aware of the limitations of Rule 408 and more courts expand upon the permissive doctrinal foundation now in place. Such a result not only defies Congress's clear and unambiguous intent to promote settlement when it enacted Rule 408, but it is also unacceptable given the American legal system's need for the private settlement of cases as a matter of institutional efficiency, as well as the capacity of settlement to produce better outcomes for the parties. This situation needs to be fixed, and this Article details both the contours of the problem and proposes that it may be remedied by elevating Rule 408 from its current status as a "quasi-privilege" to a full and formal privilege at the federal level and then passing conforming legislation in the states.

INTRODUCTION

Every day, the nation's more than 1.3 million lawyers engage in countless legal negotiations as part of the litigation process.¹ A lawyer in New York negotiates with a bank in an attempt to avoid bankruptcy by his client.² A lawyer in California mails a letter on behalf of his client offering to settle the plaintiff union's claims.³ A lawyer in Oklahoma tries to settle a personal injury claim.⁴ Although the lawyers in each of these actual cases are almost surely strategic about what they disclosed in their negotiations, it is reasonable to presume they also feel they could engage in the negotiations with some degree of candor—or, at least, without worry about statements made in the negotiation being introduced later in court if the negotiation failed. This is the

¹ *ABA National Lawyer Population Survey*, AM. BAR ASS'N (2017), https://www.americanbar.org/content/dam/aba/administrative/market_research/Total%20National%20Lawyer%20Population%201878-2017.authcheckdam.pdf [<https://perma.cc/F46Z-FHMQ>].

² *E.g.*, *In re Portnoy*, 201 B.R. 685, 691–92 (Bankr. S.D.N.Y. 1996).

³ *See Moving Picture Mach. Operators Union Local No. 162 v. Glasgow Theaters, Inc.*, 86 Cal. Rptr. 33, 36 (Ct. App. 1970).

⁴ *Archer v. Kelly*, 271 F. Supp. 2d 1320, 1322–23 (N.D. Okla. 2003).

promise of Federal Rule of Evidence 408⁵ (“Rule 408”) and similar state rules that have been adopted to some extent in all fifty states.⁶ Yet, in each of these three cases, the evidence from the legal negotiation was admitted over a Rule 408 objection.⁷ There are many more examples.

This outcome may seem counterintuitive because the practical logic of the rule—that parties will not disclose the information necessary to settle if they believe that what they say can be used against them later in court if the negotiation fails—creates a widely held assumption that legal negotiations are “confidential,” and that “what’s said in this room stays in this room.”⁸

Unfortunately, like many hardened beliefs, this assumption is simply wrong—or perhaps more accurately, it is greatly overstated. Rather, a rigorous analysis of Rule 408 and related state laws⁹ reveals that Rule 408’s facade obscures a complex thicket of statutory constraints, judicially created limitations and exceptions, and other traps for the unwary¹⁰ that are available to circumvent restrictions by litigants who push hard against the rule’s thin veneer.

Revisions to the federal rule have only made matters worse, shifting its language from a rule of presumptive inadmissibility with limited exceptions to one of presumptive admissibility with limitations. Because the majority of state laws are based on the original 1976 version of Rule 408, rather than the 2011 amended version,¹¹ there is now a great disparity of coverage between the federal law and the state laws that purport to mirror it, as well as significant coverage variations among states.¹²

Finally, even as modified in 2011, Rule 408 no longer squares with modern legal negotiations, which emphasize the disclosure of party interests, needs, preferences, and concerns over mere bargaining positions—the very kind of information that would be most damaging to a client if the negotiation fails.

⁵ See FED. R. EVID. 408.

⁶ See *infra* notes 139–150 and accompanying text.

⁷ *Archer*, 271 F. Supp. 2d at 1322–23; *Portnoy*, 201 B.R. at 691–92; *Moving Picture*, 86 Cal. Rptr. at 36, 39; see also *infra* notes 151–258 and accompanying text.

⁸ Cf. Richard C. Reuben, *The Sound of Dust Settling: A Response to Criticisms of the UMA*, 2003 J. DISP. RESOL. 99, 110–11 [hereinafter Reuben, *Dust Settling*] (discussing current mediator disclosure practices).

⁹ The rule is often called the “offers of compromise” rule. See *infra* notes 22–64 and accompanying text.

¹⁰ See Robert A. Weninger, *Amended Federal Rule of Evidence 408: Trapping the Unwary*, 26 REV. LITIG. 401, 408 (2007) (“Except for statements made by the unrepresented or unwary, the amendment may fail to accomplish its objective of providing evidence to the government to aid in the prosecution of crime.”).

¹¹ See *infra* notes 128, 137 and accompanying text.

¹² See *infra* notes 139–258 and accompanying text.

Descriptively and prescriptively, the confidentiality doctrine for legal negotiations is a disaster that must be fixed. Despite some academic concerns,¹³ settlement is a crucial part of the American system of justice.¹⁴ Both civil and criminal courts in the state and federal spheres have chronically heavy caseloads,¹⁵ and without negotiated settlements the tide of legal cases would surely overwhelm the system, paralyzing case flow and leading to interminable delay, costs, and uncertainty for litigating parties. It would also deny parties the autonomy to resolve their legal disputes according to their own preferences rather than the imposition of external rules—that is to say, by private ordering rather than public ordering.¹⁶ If institutionalized, such gridlock could give rise to the kind of corruption commonly seen in less developed countries with less efficient judicial systems, thus undermining the rule of law itself.¹⁷

This is a systemic problem that needs to be recognized and addressed, and this Article hopes to begin that discussion. Part I details the history of Rule 408, as well as its codification and amendments in the federal sphere.¹⁸ It also discusses how the states have enacted at least theoretically conforming

¹³ See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that settlement is not necessarily “preferable to judgment” and “should be treated . . . as a highly problematic technique for streamlining dockets”); see also Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 2 (1986) (“[A]rguing that the current campaign to obtain a blanket mediation privilege rests on faulty logic, inadequate data, and short-sighted professional self-interest.”); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 OHIO ST. J. ON DISP. RESOL. 1, 7–10 (1993) (detailing the many critical perspectives of the alternative reform movement).

¹⁴ See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 (1994) (“As the legal system has grown, the settlement component has increased in prominence while the portion of cases that run the whole course to trial has shrunk.”).

¹⁵ See, e.g., FED. R. CIV. P. 26 advisory committee’s note to 1983 amendment (noting the “already overburdened system”); Colin T. Reardon, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2178 (2010) (noting the “perception of a ‘litigation explosion’”); see also Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262 (2011) (describing overworked prosecutors and public defenders).

¹⁶ See Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 NEV. L.J. 271, 272 (2007) [hereinafter Reuben, *Process Purity*] (“[T]he displacement of finality with substantive judicial review, if codified, will greatly undermine the arbitration process . . .”). See generally Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 680–81 (1976) (discussing the benefits and disadvantages of different methods of negotiation).

¹⁷ See, e.g., Marc Galanter & Jayanth K. Krishnan, *Debated Informalism: Lok Adalats and Legal Rights in Modern India*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 96, 126 (Erik G. Jensen & Thomas C. Heller eds., 2003) (discussing the challenges facing India’s legal system and unsuccessful attempts to restore a more effective rule of law).

¹⁸ See *infra* notes 22–150 and accompanying text.

legislation. Part II describes how and why federal and state courts have undermined the general rule, interpreting the general rule of inadmissibility narrowly, applying the exceptions broadly, and creating a broad range of exceptions and limitations of their own to further weaken the rule.¹⁹ It is based on an analysis of all federal and state appellate cases reported through January 1, 2017, in which a Rule 408 claim was rejected, in order to identify trends, common exceptions, and other considerations courts actually use in deciding these cases.

Part III then contextualizes the problem in light of the evolution of legal negotiation—from traditional positional bargaining before the enactment of Rule 408 to today’s more principled style of interest-based negotiation.²⁰ In so doing, it demonstrates how the model of legal negotiation for which Rule 408 was designed is fundamentally inconsistent with modern legal negotiation practice, which encourages disclosure as it promotes settlement and private ordering rather than public ordering.

Finally, Part IV argues that Rule 408 must be redrafted as a full privilege to remedy the problems previously identified, to realign Rule 408 with congressional intent, and to return Rule 408 to its noble historical goals in light of legal and judicial practice today.²¹

I. THE HISTORY AND TRANSFORMATION OF FEDERAL RULE 408

Legal protections for the confidentiality of settlement discussions have been a fixture of Anglo-American jurisprudence for centuries. This Part traces that history, as well as its modern codification in the federal and state systems in the United States.

A. Preliminary Matters

1. Clarifying Compromise

By its terms and title, “Compromise and Offers to Compromise,” Rule 408 and related state laws apply only to “compromise” discussions and not to other aspects or types of legal negotiations. Black’s Law Dictionary defines a compromise as “[a]n agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to

¹⁹ See *infra* notes 151–258 and accompanying text.

²⁰ See *infra* notes 260–302 and accompanying text.

²¹ See *infra* notes 305–364 and accompanying text.

the other.”²² As this Article shows, the courts have defined compromise in terms of the surrender of economic value by the parties.²³

Although a compromise discussion seems similar to a settlement discussion, they are not the same. Black’s Law Dictionary defines a settlement as “[a]n agreement ending a dispute or lawsuit”—which, on its face, is considerably broader than compromise.²⁴ It potentially encompasses any number of possible outcomes, whereas compromise discussions are limited to discussions about the exchange of value.²⁵

Legal negotiation is an even broader term. Black’s Law Dictionary defines it as “[a] consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter.”²⁶ This definition, though helpful, appears narrower than it actually is because of its use of the term “dispute.” Many legal negotiations, such as transactional negotiations, involve conflict in the sense that the parties may have competing interests,²⁷ but that conflict often does not rise to the level of a formal dispute, much less one that has been legalized through the hiring of lawyers or the filing of a lawsuit.²⁸ The conflict simply needs to be worked through to reconcile the competing interests of the parties.

Compromise discussions, settlement discussions, and legal negotiations are similar in that they are integrative processes in which both parties try to reach an outcome that at least minimally satisfies, or integrates, both of the parties’ interests.²⁹ Compromise and settlement discussions can, and often do, occur during the course of legal negotiations, particularly those relating to more complex problems involving multiple parties and multiple issues.

These processes differ fundamentally, however, in the scope of interests subject to integration. With compromise, the scope is narrowly focused on the identification of a number that represents economic value.³⁰ Settlement discussions are broader in that they also include non-economic interests affecting the dispute that are subject to negotiation and agreement, including, for example, the relationship between the parties.³¹ Legal negotiations are even broader because they can include all issues, even ones not closely tethered to

²² *Compromise*, BLACK’S LAW DICTIONARY (10th ed. 2014).

²³ See *infra* note 30 and accompanying text.

²⁴ *Settlement*, BLACK’S LAW DICTIONARY, *supra* note 22.

²⁵ Compare *id.*, with *Compromise*, *supra* note 22.

²⁶ *Negotiation*, BLACK’S LAW DICTIONARY, *supra* note 22.

²⁷ A leading treatise on conflict defines conflict as “perceived divergence of interest, a belief that the parties’ current aspirations are incompatible.” DEAN G. PRUITT & SUNG HEE KIM, SOCIAL CONFLICT: ESCALATION, STALEMATE, AND SETTLEMENT 7–8 (3d ed. 2004).

²⁸ For a discussion of the important distinction between conflict and disputes, see LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 10–11 (2d ed. 1997).

²⁹ See DICTIONARY OF CONFLICT RESOLUTION 97, 314, 392 (Douglas H. Yarn ed., 1999).

³⁰ See *id.* at 97.

³¹ See *id.* at 392.

a particular dispute,³² such as a business interest shared by the parties but which is not subject to the dispute at hand.

As legal negotiation practice has evolved, so have other ways to achieve an integrative solution besides compromise, such as value creation (or “expand[ing] the pie”),³³ nonspecific compensation,³⁴ logrolling,³⁵ and even yielding.³⁶

Rule 408 and its state progeny apply only to compromise discussions—however, that is a relatively small slice of the now robust process of legal negotiation.³⁷ As a result, rules of privilege and professional ethics provide the only protections against the admissibility of communications arising from these other parts of the negotiation process—by far the most significant portion of the legal negotiation process.³⁸

Those protections, however, are quite limited. For example, Model Rule of Professional Conduct 1.6, governing the attorney’s duty of confidentiality, has many exceptions, including “compl[iance] with other law[s] or . . . court order[s].”³⁹ Similarly, the attorney-client privilege only applies to communications between the attorney and client, not communications between opposing counsel.⁴⁰ It is the limited scope of these ethics and privilege rules that give rise, in part, to the need for Rule 408 and related state laws.

2. The Meaning of Confidentiality

Just as the concept of legal negotiation is layered and nuanced, so too is the concept of confidentiality.

As in other areas of dispute resolution, confidentiality must be understood to include two component parts, each of which is typically treated differently by the law: the “privacy” of the compromise discussion, and the “admissibility” of evidence disclosed within the compromise discussion.⁴¹

³² See *id.* at 314.

³³ ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 12–13 (2000); PRUITT & KIM, *supra* note 27, at 194.

³⁴ PRUITT & KIM, *supra* note 27, at 195.

³⁵ *Id.* at 196.

³⁶ *Id.* at 38–39.

³⁷ See *infra* notes 260–285 and accompanying text.

³⁸ See Russell Korobkin et al., *The Law of Bargaining*, 87 MARQ. L. REV. 839, 843–45 (2004) (discussing how abiding by professional codes of conduct, such as privilege and ethical obligations, can constrain conduct during negotiations).

³⁹ MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(6) (AM. BAR ASS’N 2017).

⁴⁰ FED. R. EVID. 501–502.

⁴¹ See Richard C. Reuben et al., *Ombuds*, in DEVELOPMENTS IN ADMINISTRATIVE LAW AND REGULATORY PRACTICE: 2003–2004, at 383, 392–93 (Jeffrey S. Lubbers ed., 2004) [hereinafter Reuben, *Ombuds*] (summarizing new ABA ombuds standards); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260 (2006) [hereinafter Reuben, *Confidentiality*] (explaining the difference “between the ‘privacy’ of the arbitra[ti]on proceeding

The “privacy” of a legal negotiation refers to the ability of uninvited third parties—such as business partners, former spouses, and the media—to access and observe the negotiation without the consent of the disputing parties.⁴² Privacy also refers to the ability of the disputing parties, the arbitrator, witnesses, and others who attended the settlement discussion to disclose publicly statements made in the proceeding, documents tendered in the proceeding, or observations of conduct by parties, witnesses, and other participants during the course of the proceeding.⁴³ These kinds of third-party disclosures include a wide range of possibilities—from disclosures to spouses, family members and friends, to business partners and competitors, and students in classrooms and training sessions. Because these disclosures are in the private realm, the law historically has expected parties to regulate them through the law of contract, and that law is generally well developed and broadly accepted.⁴⁴

In contrast, the “admissibility” of legal negotiations refers to the ability of parties, witnesses, and other participants in the negotiation to testify about those communications in judicial, legislative, administrative, or other governmental hearings. Disclosures in the context of these formal legal proceedings can take many forms. Examples include disclosure pursuant to a deposition or in response to a discovery request; testimony during a trial; and work by other public bodies, such as investigations and hearings by administrative agencies, legislatures, and grand juries. Though disclosures to third persons, in general, affect private interests, disclosures occurring during the course of formal legal proceedings affect public interests.⁴⁵ In particular, disclosures in formal legal proceedings implicate “the public’s interest in accessing . . . information pursuant to governmental fact-finding, adjudication, or policy development and legal regulation.”⁴⁶

The admissibility of these disclosures in formal legal proceedings are the focus of Rule 408 and related state laws, and the subject of this Article. This

and the ‘confidentiality’ of the proceeding”); Richard C. Reuben & Nancy H. Rogers, *Major Step Forward: Proposed Uniform Mediation Act Goes Public for Comments*, DISP. RESOL. MAG., Summer 1999, at 18, 18 (discussing the proposed Uniform Mediation Act and the two key aspects of the Act: the confidentiality provisions and exceptions).

⁴² For further discussion, see Reuben, *Process Purity*, *supra* note 16, at 283, 295–96.

⁴³ Observation evidence is more controversial than verbal or written statements in that an observation generally is not considered a statement unless intended as a statement. See FED. R. EVID. 801(a) (defining “statement” for purposes of the hearsay rule); see also MODEL CODE OF EVID. r. 501 (AM. LAW INST. 1942) (providing model definition of “statement” for the purposes of the hearsay rule).

⁴⁴ See Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1234 (2006) (noting that confidentiality documents are frequently drafted during arbitration).

⁴⁵ Reuben, *Confidentiality*, *supra* note 41, at 1261.

⁴⁶ *Id.*

Article gives the terms legal negotiations, settlement discussions, and compromise discussions their precise meaning, rather than using them interchangeably. This is done mindful of the fact that this Article is concerned with the larger subject of legal negotiations, whereas Rule 408 is concerned with the narrower form of the compromise discussion. Indeed, this is a critical part of the problem addressed herein.

B. Common Law Origins of Rule 408 and the Policies That Support It

The English roots of Rule 408 can be traced as far back as 1716,⁴⁷ and its migration to the United States as early as the 1800s.⁴⁸ According to Wright and Graham, “[t]he common law rule . . . was based on the distinction between ‘express’ and ‘implied’ admissions.”⁴⁹ Courts were willing to accept express admissions but reluctant to receive an implied admission—such as might be inferred by an offer of compromise—because the offer may bear no relationship to the offeror’s belief in the correctness of their legal position.⁵⁰ Over time, the rule has been supported by as many as four policy rationales: relevance, contract, fairness, and extrinsic policy.⁵¹

English courts relied on a contract rationale,⁵² generally holding that the offer of a compromise proposal that included “the magic words ‘without prejudice’ . . . created a unilateral implied contract that the offer and related matter was not to be used in evidence.”⁵³

Dean John Henry Wigmore rejected this view in favor of a relevance rationale to justify the common law rule.⁵⁴ Wigmore argued that compromise evidence is logically irrelevant because it merely expresses the desire to avoid

⁴⁷ See *Harman v. Vanhatton* (1716) 23 Eng. Rep. 1071, 1071 (holding that a defendant’s previous offer to deliver a bond, conditioned upon whether the plaintiff recovered on an insurance policy, was but a *nudum pactum*, or, naked promise).

⁴⁸ See DAVID P. LEONARD, *THE NEW WIGMORE: A TREATISE ON EVIDENCE: SELECTED RULES OF LIMITED ADMISSIBILITY* § 3.3.1 n.17 (Richard D. Friedman ed., rev. ed. 2002) (explaining the American adoption of the English version of the modern-day Rule 408); see also Weninger, *supra* note 10, at 409, 415 (discussing the pre-Rule 408 chaos).

⁴⁹ 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5302 (1st ed. 1980).

⁵⁰ See *id.* (noting that Wigmore’s general rule was that “[a]n offer by one party to the other,” if it comes “from a desire to end the controversy and not from a concession of the correctness of . . . [an] opponent’s case, is . . . an implied admission” and thus inadmissible; an express admission, however, would be admissible).

⁵¹ See *id.*

⁵² See, e.g., *Harman*, 23 Eng. Rep. at 1071 (describing a pretrial offer as a contract); see also David Vaver, “Without Prejudice” Communications—Their Admissibility and Effect, 9 U.B.C. L. REV. 85, 87–88 (1974) (describing how early courts viewed settlement proceedings as contractual agreements).

⁵³ WRIGHT & GRAHAM, *supra* note 49, § 5302.

⁵⁴ See JOHN HENRY WIGMORE, *WIGMORE’S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW* § 999 (3d ed. 1942); see also WRIGHT & GRAHAM, *supra* note 49, § 5302.

litigation and its costs, and “does not . . . imply a specific belief that the adversary’s claim is well founded.”⁵⁵

Although Wigmore’s relevance theory was widely accepted during his lifetime, some courts also cited a fairness argument in using the rule to exclude evidence.⁵⁶ Under this rationale, the private settlement of disputes is a salutary goal that the law should promote, and it would be unfair—especially to the initial proponent of a settlement proposal—to punish an involved party for doing what the law favored by making evidence of that compromise proposal subsequently admissible in a court of law.⁵⁷

Finally, the policy rationale, found in the English cases as early as 1852,⁵⁸ is the rationale Congress relied upon when it adopted Rule 408.⁵⁹ This rationale holds that compromise evidence ought to be excluded as a matter of policy to encourage the resolution of disputes outside the courts.⁶⁰ The policy rationale further recognizes that each time a court admits compromise evidence, future parties will be less likely to resort to alternatives to litigation.⁶¹ Wright and Graham suggest that the original compromise evidence rationale was similar to that of subsequent remedial repairs, finding the compromise evidence irrelevant because of the extrinsic policy favoring party resolution of their disputes.⁶²

⁵⁵ See 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1061 (James H. Chadborn ed., 3d ed. 1972).

⁵⁶ LEONARD, *supra* note 48, § 3.3.4.

⁵⁷ See, e.g., *In re The Exxon Valdez*, 229 F.3d 790, 798 (9th Cir. 2000) (holding that it “was prejudicial error to inform a jury deliberating on an award of punitive damages that the defendant would be indemnified”) (citing *Larez v. Holcomb*, 16 F.3d 1513, 1518–21 (9th Cir. 1994)); *Doon v. Ravey*, 49 Vt. 293, 296 (1877) (holding that party admissions made for the purpose of attempted settlement are privileged and cannot be used against that party if the dispute goes to trial); see also LEONARD, *supra* note 48, § 3.3.4 (discussing the fairness rationale to exclude compromise evidence); WRIGHT & GRAHAM, *supra* note 49, § 5302 (noting that a litigant “who attempts to settle . . . [his] claim . . . is likely to feel . . . it is . . . [un]fair . . . [if] his opponent . . . [is] permitted to introduce evidence of his good deed to” imply that his claim is baseless).

⁵⁸ See, e.g., *Jones v. Foxall* (1852) 15 Beav. 388, 396–97 (Eng.) (noting that the court did not take into consideration any of the settlement offers or negotiations between the parties, explaining that if such notice were allowed, no party would ever attempt to settle a dispute); LEONARD, *supra* note 48, § 3.3.3.

⁵⁹ See FED. R. EVID. 408 advisory committee’s note to 1975 amendment (stating that the dual reasons for Rule 408 were, (1) irrelevance of the offer, because it may have been “motivated by a desire for peace rather than from . . . [a] weakness [in legal] . . . position,” and, (2) promotion of compromise and settlement as a way of resolving conflicts).

⁶⁰ *Id.*

⁶¹ See LEONARD, *supra* note 48, § 3.3.3 (promoting the exclusion of compromise evidence in order to encourage settlement conduct, with a view that our adjudication system “could not survive” if there was a substantial increase of tried cases).

⁶² See WRIGHT & GRAHAM, *supra* note 49, § 5302 (explaining that the oldest justification for the rule on evidence of compromise was that it was irrelevant, and noting that a “strong public policy favoring negotiated resolution of disputes” weighs heavily in favor of the exclusion of such evidence). For a treatment of the earliest common law cases, see Vaver, *supra* note 52, at 86–88.

This smorgasbord of rationales is a significant contributing factor to Rule 408's current state of doctrinal disarray, giving courts a wide variety of standards in the case law to use to assess claims to exclude legal negotiation evidence. But as this Article demonstrates, Congress's decision to choose this rationale is significant, especially as to the remedy for the problems in the Rule 408 jurisprudence proposed in Part IV: redrafting Rule 408 to make it a full evidentiary privilege,⁶³ instead of a mere "quasi-privilege[]." ⁶⁴

C. The Codification Process

The federal courts have long embraced the English common law rule, and, thus, it was a strong candidate for codification during the drafting of the first Federal Rules of Evidence in the early 1970s.⁶⁵ The rule has since been amended twice, most recently in 2011, each time becoming more permissive in terms of receiving evidence drawn from compromise discussions.⁶⁶

1. The Original Version in 1975

a. Legislative History

The Judicial Conference of the United States began codifying what would become the Federal Rules of Evidence in 1969.⁶⁷ The usual fault lines of purpose, scope, and effect quickly emerged in the discussions of the Judicial Conference Advisory Committee's ("Advisory Committee") consideration of the compromise discussion rule.⁶⁸ More specifically, codifying the rule forced the Advisory Committee to confront hard questions regarding the compromise discussion's rationale, the effect of the chosen rationale, and the structure for implementing its policy choice.⁶⁹

The Advisory Committee's debate on the rationale reflected the circuit courts' fragmented use of the various rationales for the rule previously dis-

⁶³ See *infra* notes 305–364 and accompanying text.

⁶⁴ WRIGHT & GRAHAM, *supra* note 49, § 5423.

⁶⁵ See Weninger, *supra* note 10, at 414 (noting "[t]he first sentence of Rule 408 . . . codified the law that almost all American courts had [already] agreed upon").

⁶⁶ Reasonable minds can differ on whether the presumption is against the admissibility of such evidence, or in favor of it. For further discussion, see *infra* notes 117–127 and accompanying text.

⁶⁷ CHRISTOPHER B. MUELLER ET AL., EVIDENCE: PRACTICE UNDER THE RULES § 1.2 n.7 (4th ed. 2012).

⁶⁸ See *id.* § 1.2 (discussing the composition of the Judicial Conference Advisory Committee and the atmosphere surrounding the codification of the Federal Rules of Evidence, most notably "claims of executive privilege by President Nixon").

⁶⁹ See FED. R. EVID. 408 advisory committee's notes on proposed rules.

cussed.⁷⁰ The Committee ultimately settled on the policy rationale as the fundamental principle upon which to craft its rule.⁷¹

Agreement on the rationale only went so far, as the drafters also had to consider the implications of that choice, both substantively and procedurally.

i. The Fundamental Tension

Substantively, choosing the extrinsic policy rationale, rather than a concern about the integrity or utility of the evidence, forced the drafters to confront the fundamental tension that admissibility in alternative dispute resolution (“ADR”) processes presents. This tension is between the legal system’s need for access to “every man’s evidence,”⁷² and an ADR process’s need to preclude access to information disclosed during the dispute resolution process in order to facilitate candor and communication.⁷³

At a minimum, the extrinsic policy rationale required the drafters to preclude some evidence in order to fulfill their chosen policy preference. But precisely how much to preclude would reflect a choice as to how this fundamental tension would be balanced. Three options illustrate the difference and the range of possibilities.

The first option would have been to make compromise discussions potentially admissible, thus simply leaving its actual admissibility to the court through a motion *in limine* about its legal relevance or other technical device.⁷⁴ This would have been a value-neutral approach to the fundamental tension, favoring neither the litigation nor the compromise process, and in-

⁷⁰ See Weninger, *supra* note 10, at 414 (discussing how the adoption of Rule 408 “ended division” amongst the courts by “promoting negotiations” as the driving force behind the bar on settlement evidence).

⁷¹ See FED. R. EVID. 408 advisory committee’s notes on proposed rules (noting promotion of settlement discussions is “a more consistently impressive ground”); see also Weninger, *supra* note 10, at 414 n.31 (noting the five main reasons presented by courts explaining the exclusion of compromise evidence). *But see* Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Comments on H.R. 5463 Dealing with Federal Rules of Evidence as Said Bill Passed the House of Representatives (May 22, 1974) [hereinafter Standing Committee Comments], http://www.uscourts.gov/sites/default/files/fr_import/ST09-1974.pdf [<https://perma.cc/TB4L-RK5Z>] (suggesting the only considered rationale was that “[t]he common law recognized a strong public policy favoring the out-of-court settlement of disputes”).

⁷² See *Trammel v. United States*, 445 U.S. 40, 50 (1980) (“[T]he public . . . has a right to every man’s evidence.”) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

⁷³ For a discussion of this principle in other dispute resolution processes, see Reuben, *Confidentiality*, *supra* note 41, at 1257 (discussing confidentiality in arbitration process); Reuben, *Ombuds*, *supra* note 41, at 385–86 (summarizing new ABA ombuds standards); Reuben, *Dust Settling*, *supra* note 8, at 107 (examining confidentiality in the mediation process).

⁷⁴ “[L]egal relevance . . . refers to the process of weighing the probative value of the evidence against the dangers to the opposing party of unfair prejudice, confusion of the issues, undue delay, waste of time, cumulativeness, or violations of confidentiality.” *Jackson v. Mills*, 142 S.W.3d 237, 240 (Mo. Ct. App. 2004).

stead simply flagging the evidence for the court as potentially problematic. The second option would have been to tilt the scale in favor of compromise discussion process needs by making it presumptively inadmissible—that is, unless there was, at some level, a need for the evidence sufficient to overcome the policy of exclusion. The third option would be to go the other way and tilt the scale in favor of the judicial process by making such evidence presumptively admissible unless there was a need for preclusion sufficient to override the general policy favoring admissibility.

ii. The “Quasi-Privilege” Compromise

The Advisory Committee ultimately chose the second option, favoring the compromise process by creating a categorical rule of inadmissibility with exceptions—categorical in the sense that if the evidence was derived from a compromise discussion and was about the compromise, the evidence was excluded unless an exception applied. The draft rule left little room for judicial discretion.

The Advisory Committee finally had to determine the formal structure of the rule. Because the Committee had rejected the relevance theory, its policy choices could not simply be implemented through a particular application of that doctrine. Rather, the Committee needed to establish a way to articulate the rule and chose what is referred to as a “species of privilege.”⁷⁵

If it was a “species of privilege,” an evolutionary doctrinalist might suggest that the final articulation of the compromise discussion rule was generations removed from its ancestral predecessor in doctrine.⁷⁶ According to *The New Wigmore*, “privileges are the evidentiary rules that allow a person who communicated in confidence or who possesses confidential information to shield the communication or information from compelled disclosure during litigation. So defined[,] . . . a privilege is distinct from a broader power to disqualify a potential witness altogether.”⁷⁷

The final articulation of Rule 408 is readily distinguishable from a privilege in a few critical respects. First, rather than limiting its applicability to specific holders of the privilege, Rule 408 generally operates as a rule of court, one that is self-executing and does not need to be invoked. Similarly, privileges generally permit holders to waive the privilege if they so desire. Not so with Rule 408: it is always in place and may not be waived.

⁷⁵ See 2 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE 277 n.33 (1978).

⁷⁶ For further discussion, see *infra* notes 312–333 and accompanying text. For a discussion of the traditional elements of privilege, see EDWARD J. IMWINKELRIED, THE NEW WIGMORE: EVIDENTIARY PRIVILEGES § 1.3 (2d ed. 2009) (“Distinguishing Privileges from Other Doctrines”).

⁷⁷ *Id.* § 1.1 (footnote omitted).

On the other hand, Rule 408 as drafted does meet certain other criteria that *The New Wigmore* identifies as distinguishing privileges from other evidentiary doctrines. For one, it is a procedural rule rather than a substantive rule.⁷⁸ More importantly, it is driven by extrinsic concerns promoting settlement rather than institutional concerns about the integrity of the evidence or the proper function of the adversarial system.⁷⁹ Finally, it applies only in judicial proceedings and does not apply in other formal contexts, such as grand jury proceedings, administrative hearings, or arbitrations.⁸⁰

Because some elements of privilege clearly apply to the evidentiary exclusion for compromise discussions while others do not, evidence scholarship often term the compromise discussion rule as a “quasi-privilege.”⁸¹ As is often the case with committee compromises, the result is strained, contorted, and at times arguably incoherent, as the struggle over the fundamental tension permeated the final draft of the 1975 rule.

b. The Statutory Text

As enacted, the 1975 version of the rule reads as follows:

Rule 408. Compromise and Offers to Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.⁸²

The rule is widely acknowledged for being “poorly drafted.”⁸³ The first and second sentences contain the basic categorical rule of inadmissibility; the

⁷⁸ *Id.* § 1.3.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See* WRIGHT & GRAHAM, *supra* note 49, § 5423.

⁸² Act of Jan. 2, 1975, Pub. L. No. 93-595, Rule 408, 88 Stat. 1926, 1933 (codified as the Federal Rules of Evidence at 28 U.S.C. app. (1982)).

⁸³ Letter from Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure (Dec. 5, 2002), <http://>

first speaks to written and verbal communications, and the second addresses conduct that has the effect of communication, such as the nodding of one's head. However, one can see the fundamental tension at work in the rule's almost bizarre complexity.

Upon close inspection, the general rule can be divided into at least three parts: the act of communication, the topic of communication, and the purpose for which the communication is being tendered into evidence. A communication is covered by the rule, and thus precluded from admissibility, only if it "furnish[es]" or "accept[s]" the communication of "valuable consideration" in order to "compromise" the "validity or amount" of a "disputed" "claim."⁸⁴ Even then, the evidence is precluded only if it is being offered to prove liability for a claim or the amount due.⁸⁵

House and Senate conferees split on a few particularly contentious issues. Several federal agencies—including the Department of the Treasury, Justice Department, and Equal Employment Opportunity Commission—voiced concerns that the rule would serve as a shield to preclude them access to compromise discussion evidence that was verified by independent evidence.⁸⁶ The conferees ultimately decided to make clear that the rule did not preclude the admissibility of otherwise admissible evidence,⁸⁷ stating in the third sentence: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."⁸⁸

The fourth and final sentence reflected the significant additional limitations of the rule. It stated, "[t]his rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."⁸⁹ By its plain language, this sentence underscores the limited nature of the evidentiary exclusion by making clear that compromise communication evidence can be used for purposes other than the narrow prohibited use. The exception then offers three broad examples of situations in which such compromise discussion evidence can be admitted—proving bias, non-delay, and obstruction of crime—and indicates

www.uscourts.gov/sites/default/files/fr_import/EV12-2002.pdf [https://perma.cc/A2TP-2ZXA] [hereinafter Smith Evidence Letter]; see also BRYAN A. GARNER ET AL., *THE REDBOOK: A MANUAL ON LEGAL STYLE* 539 (3d ed. 2013) ("As with almost all other writing, legislative drafting has as its touchstones clarity, accuracy, and brevity—clarity being foremost.")

⁸⁴ Rule 408, 88 Stat. at 1933.

⁸⁵ *Id.*

⁸⁶ See Standing Committee Comments, *supra* note 71, at 17–19.

⁸⁷ See Rule 408, 88 Stat. at 1933.

⁸⁸ *Id.*

⁸⁹ *Id.*

that this is not an exclusive list by introducing them with the word “including.”⁹⁰

As drafted then, Rule 408 was extraordinarily narrow, limited to a very specific type of communication—evidence of compromise—offered for a very particular purpose: to prove liability for, or the amount of, the claim. Even then, it was subject to major exceptions for impeachment and criminal matters. All other communications derived from settlement discussions were freely admissible under the rule.

2. The 2006 Amendments

Rule 408 remained unchanged until April 2002, when the Advisory Committee on Evidence agreed to consider whether it should be amended with respect to its applicability in criminal cases.⁹¹ By October, the Committee expanded its scope to include whether statements made in settlement negotiations should be admissible for purposes of impeachment for prior inconsistent statements, and whether offers to settle could be introduced into trial by the offering party.⁹² The Committee’s scope continued to expand when it came to realize the significant questions about the intent and scope of the rule as previously drafted.⁹³

The amendment process for Rule 408 took several years. The Advisory Committee released its first draft for public comment in 2004, addressing

⁹⁰ HILLEL Y. LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE 209 (2014).

⁹¹ See Letter from Honorable Milton I. Shadur, Chair, Advisory Comm. on Evidence Rules, to Honorable Anthony J. Scirica, Chair, Standing Comm. on Rules of Practice & Procedure (May 1, 2002), http://www.uscourts.gov/sites/default/files/fr_import/EV5-2002.pdf [<https://perma.cc/QZV7-5YPQ>] (indicating that the Advisory Committee deemed it necessary to consider the admissibility of compromise evidence in “related criminal litigation”). Compare *United States v. Arias*, 431 F.3d 1327, 1336 (11th Cir. 2005) (finding that Rule 408 applies in a criminal trial), with *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (holding that Rule 408 is “inapplicable in the criminal context”).

⁹² Smith Evidence Letter, *supra* note 83. Compare *Hernandez v. State*, 52 P.3d 765, 769 (Ariz. 2002) (allowing “evidence obtained in the course of compromise negotiations . . . for impeachment purposes”), with *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1546 (10th Cir. 1991) (upholding a decision not to admit evidence obtained in settlement negotiations for impeachment purposes).

⁹³ Smith Evidence Letter, *supra* note 83 (describing the issue of scope along three questions: “a) whether evidence of a civil compromise is admissible in subsequent criminal litigation; b) whether statements made during settlement negotiations can be admitted to impeach a party for prior inconsistent statement; and c) whether an offer to settle can be admitted in favor of the party who made the offer”). Although the underlying memorandum the committee relied on in reaching these conclusions is not archived, others have noted these areas contained “extensive case law.” E.g., Gregory B. Collins & Andrew F. Halaby, *Of “Purposes Not Prohibited”*: *New Federal Rule of Evidence 408(B)*, 40 CREIGHTON L. REV. 679, 684–85 (2007) (noting that the committee’s intent in adding the amendment was to preserve the rich case history).

“[a]dmissibility in criminal cases,”⁹⁴ the “[s]cope of the ‘impeachment’ exception,”⁹⁵ evidence offered by the party who made the offer,⁹⁶ and the rule’s organization “to make it easier to read and apply.”⁹⁷ This version of the rule was rejected after harsh public criticism to the proposed criminal context changes.⁹⁸ There were five key lines of criticism:

- 1) the rule would deter settlement discussions;
- 2) it would create a trap for the poorly counseled and the otherwise unwary, who might not know that statements of fault made in a settlement of a civil case might later be used against them in a criminal case;
- 3) it would allow private parties to abuse the rule by threatening to give over to the government alleged statements of fault made during private settlement negotiations;
- 4) it would result in attorneys having to become witnesses against their civil clients in a subsequent criminal case, as a lawyer may be called to testify about a statement that either the lawyer or the client made in a settlement negotiation; and
- 5) it would raise a problematic distinction between protected offers and unprotected statements and conduct—a distinction that was rejected as unworkable when Rule 408 was originally enacted.⁹⁹

The Advisory Committee released its second draft addressing those concerns on April 12, 2006.¹⁰⁰ This version was finally adopted and became effective on December 1, 2006, reading as follows:

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount,

⁹⁴ See Letter from Honorable Jerry E. Smith, Chair, Advisory Comm. on Evidence Rules, to Honorable David F. Levi, Chair, Standing Comm. on Rules of Practice & Procedure (May 15, 2004), http://www.uscourts.gov/sites/default/files/fr_import/EV5-2004.pdf [<https://perma.cc/E8L6-M6XL>] (proposing that statements of fault made during settlement negotiations be admitted in a subsequent criminal case, but not allowing offers or acceptances of civil settlements to be admitted, “in deference to the Justice Department’s arguments that such statements can be critical evidence of guilt”).

⁹⁵ See *id.* (stating that in order to be consistent with the goals of the rule, statements made in settlement negotiations would not be admissible in trial for impeachment purposes to show contradiction or a prior inconsistent statement).

⁹⁶ See *id.* (“The proposed amendment would bar a party from introducing its own statements and offers . . . to prove the validity, invalidity, or the amount of the claim.”).

⁹⁷ *Id.*

⁹⁸ Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 28th, 2005, at 3–5, http://www.uscourts.gov/sites/default/files/fr_import/EV04-2005-min.pdf [<https://perma.cc/D2MQ-E767>].

⁹⁹ *Id.* at 4.

¹⁰⁰ See Weninger, *supra* note 10, at 402–03 n.1 (describing the process by which the rule was adopted).

or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.¹⁰¹

Though it was scarcely noticed and drew little commentary,¹⁰² the 2006 amendments rewrote the rule significantly. First, they simplified the rule by changing its structure from a categorical rule of exclusion with limited exceptions to a rule consisting of two classes of uses of compromise discussion evidence: that which is excluded from admission (“Prohibited Uses”), and that which is admissible (“Permitted Uses”).¹⁰³ The core principle remained embodied in the first part of the rule, which had become 408(a), which again stated that if the evidence is of a certain category—drawn from a compromise discussion and used to establish liability, the amount of a dispute, or a “prior inconsistent statement”—it is inadmissible barring an exception.¹⁰⁴ There is no room for judicial discretion.

The second part of the rule, 408(b), provides the exceptions to the general categorical rule.¹⁰⁵ Although the specifically enumerated exceptions largely track the language of the 1975 draft, the title for this section—“Permitted Uses”—suggests a more permissive attitude toward the evidence than the 1975 draft's mere acknowledgement that “[t]his rule also does not require exclusion when the evidence is offered for another purpose”¹⁰⁶ This shift in language shifted the tone of the rule, and gave attorneys a stronger basis for

¹⁰¹ FED. R. EVID. 408 (2006) (amended 2011).

¹⁰² See Weninger, *supra* note 10, at 402 (detailing an empirical study of attorneys' reactions to the amendment of Rule 408). This is believed to be the only article published on the 2006 version of Rule 408.

¹⁰³ FED. R. EVID. 408 (2006) (amended 2011).

¹⁰⁴ *Id.* 408(a).

¹⁰⁵ *Id.* 408(b) (“Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.”).

¹⁰⁶ See Act of Jan. 2, 1975, Pub. L. No. 93-595, Rule 408, 88 Stat. 1926, 1933 (codified as the Federal Rules of Evidence at 28 U.S.C. app. (1982)).

arguing compromise discussion evidence was admissible because it was recognized as affirmatively admissible rather than a mere exception to a general rule of exclusion.

The 2006 amendments also engrafted a new exception into Rule 408(a)(2) for actions involving government agencies¹⁰⁷—further evidence of a more relaxed attitude toward the admissibility of the evidence. As noted above, prosecutorial concern about the effect of the compromise evidence bar on criminal and regulatory prosecutions was one of the primary drivers for the reformulation of Rule 408 in 2006.¹⁰⁸ Rather than including it as an “other purposes” exception, however, the drafters chose to incorporate it specifically in 408(a)(2)’s definition of the general rule.¹⁰⁹ In so doing, the drafters also broadened the scope of the rule beyond compromise discussions, extending it to statements “offered in a criminal case and the negotiations related to a [government] claim.”¹¹⁰

The 1975 rule also permitted compromise discussion evidence to be used for “proving bias or prejudice of a witness.”¹¹¹ The 2006 version of 408(a) placed some limitations on this use, however, thus appearing to respond to what the practice community considered to be a significant loophole in the general rule in 1975. In particular, the 2006 version expressly disallowed the use of compromise evidence for purposes of “impeach[ment] through a prior inconsistent statement or contradiction.”¹¹² Still, the 2006 rules did not completely bar the use of compromise discussions for purposes of impeachment because 408(b) specifically incorporated the language from the 1975 version permitting use of the evidence to prove bias or prejudice.¹¹³ Thus, although compromise discussion evidence cannot be used to prove that a witness is lying or mistaken, it can be used to show that the witness is biased.¹¹⁴ This remains a significant loophole in the rule.

Finally, the revision certainly was more comprehensible than the word salad of the 1975 rule. However, it still left ample room for confusion by the uninitiated. For example, the labels “permitted uses” and prohibited uses”

¹⁰⁷ FED. R. EVID. 408(a)(2) (2006) (amended 2011) (excepting conduct or statements “when offered in a criminal case and the negotiations relate[] to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority”).

¹⁰⁸ FED. R. EVID. 408 advisory committee’s note to 2006 amendment.

¹⁰⁹ See FED. R. EVID. 408(a) (2006) (amended 2011) (“Evidence of the following is not admissible:] . . . conduct or statements made in compromise negotiations regarding the claim, *except* when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.”) (emphasis added).

¹¹⁰ *Id.*

¹¹¹ Rule 408, 88 Stat. at 1933.

¹¹² FED. R. EVID. 408(a) (2006) (amended 2011).

¹¹³ Compare *id.* (“proving a witness’s bias or prejudice”), with Rule 408, 88 Stat. at 1933 (“proving bias or prejudice of a witness”).

¹¹⁴ FED. R. EVID. 408(b) (2006) (amended 2011).

refer to uses of the evidence, but could easily be read to refer to uses of the rule of exclusion. Similarly, subsection (a) states four particular uses narrowing the rule of inadmissibility—to prove liability for, invalidity of, sum of disputed amounts or prior inconsistent statements—*before* using sixty-six words to describe the evidence that is subject to the rule.¹¹⁵ Finally, subsection (b), too, describes permitted uses in terms of the double negative “does not require exclusion.”¹¹⁶ Though improved, the revised rule remained mind-bending.

3. The 2011 Amendments

The most recent revision of Rule 408, part of the major 2011 revision of the Federal Rules of Evidence, was held out to be “stylistic only,” with “no intent to change.”¹¹⁷ Indeed, the Advisory Committee agreed to consider the project only so long as no substantive changes would be made.¹¹⁸ In fact, the language of the rule continued to become more permissive and its structure came to resemble a presumption of admissibility rather than a categorical rule of inadmissibility with exceptions. This was due, in part, to an enhanced role that the 2011 amendments gave the courts. Stylistic changes sometimes have substantive effects, even if unintentional, and many courts prefer to rely on a statute’s text, without further analysis into statutory history or legislative purpose.¹¹⁹

As enacted, the 2011 amendments,¹²⁰ still in effect as of this writing, appear as follows:

¹¹⁵ *Id.* 408(a).

¹¹⁶ *Id.* 408(b).

¹¹⁷ FED. R. EVID. 408 advisory committee’s note to 2011 amendment.

¹¹⁸ Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 24–25, 2006, at 12, http://www.uscourts.gov/sites/default/files/fr_import/EV04-2006-min.pdf [<https://perma.cc/8384-YTC4>].

¹¹⁹ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624 (1990) (comparing the Supreme Court’s traditional textual approach, where ambiguity is resolved by legislative history, to one championed by the late Justice Scalia, who famously decried legislative history); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 424 (2005) (arguing that even the strictest of textualists believe in intent as a construct that invariably inures itself into the text). Justice Scalia stated, “I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.” *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

¹²⁰ The timetable for the rules was as follows: In November 2007, the committee established a timeline for the project. Advisory Comm. on Evidence Rules, Minutes of the Meeting of November 16, 2007, at 6–7, http://www.uscourts.gov/sites/default/files/fr_import/EV11-2007-min.pdf [<https://perma.cc/HDQ7-FEEY>]. A proposed version of the reworded version of Rule 408 was nearly unanimously approved during the May 2008 meeting. Letter from Robert L. Hinkle, Chair,

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either 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.

(b) Exceptions. The 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.¹²¹

The 2011 amendments retained the basic structure of the 2006 revision but made subtle changes to Rule 408(b) that loosened the rule further to allow greater admissibility of compromise discussion evidence. The key battleground was the first sentence in 408(b).¹²² The two previous versions had stated that the rule did not “*require exclusion.*”¹²³ The final 2011 version, however, states: “The court *may admit* this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue

Advisory Comm. on Evidence Rules, to Honorable Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice & Procedure 3 (May 12, 2008) [hereinafter Hinkle Letter], www.uscourts.gov/sites/default/files/fr_import/EV06-2008.pdf [<https://perma.cc/H6UQ-TB8Q>]. The restyled rules were approved by the U.S. Judicial Conference in the fall of 2011, which then transmitted them to the Supreme Court. Advisory Comm. on Evidence Rules, Minutes of the Meeting of April 1, 2011, at 2, http://www.uscourts.gov/sites/default/files/fr_import/2011-04-Evidence-Minutes.pdf [<https://perma.cc/M3XS-ZM43>]. The Court recommended restoring the “in compromising or attempting to compromise the claim” language. *Id.* at 2–3. The committee agreed with the proposal. *Id.* at 4. Later that month, the Supreme Court approved the rules. Letter from Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States, to John A. Boehner, Speaker of the House of Representatives (Apr. 26, 2011), <http://www.supremecourt.gov/orders/courtorders/frev11.pdf> [<https://perma.cc/BDB2-L7MB>]. Congress declined to act and the rules took effect on December 1, 2011.

¹²¹ FED. R. EVID. 408.

¹²² *Id.* 408(b). Interestingly, the “may be admitted” language was hotly disputed when it was suggested during discussions on Rule 407, but it was adopted. Similar arguments were swiftly rejected during discussions concerning Rule 408. FED. R. EVID. 407 advisory committee’s notes on proposed rules.

¹²³ FED. R. EVID. 408(b) (2006) (amended 2011) (emphasis added); Act of Jan. 2, 1975, Pub. L. No. 93-595, Rule 408, 88 Stat. 1926, 1933 (codified as the Federal Rules of Evidence at 28 U.S.C. app. (1982)) (emphasis added).

delay, or proving an effort to obstruct a criminal investigation or prosecution.”¹²⁴

Proponents of the change had argued that it avoided double negatives, “achieve[d] the same result in practice,” and maintained consistency with the other rules that use that phrase.¹²⁵ Dissenters, however, led by the Reporter of the Advisory Committee, Daniel Capra of Fordham Law School, contended the new wording “provided a positive grant of admissibility.”¹²⁶

This was more than a mere academic concern. Unlike the 2006 version, the 2011 exceptions are described in terms of *admissibility* instead of *exclusion* and explicitly insert authority for judicial discretion into the text for the first time.¹²⁷ This completed the conversion of the text of Rule 408 from one of a categorical rule of exclusion to a rule of presumptive admissibility subject to specific exceptions that would be applied with judicial discretion.

D. Synthesis: The Substantive Transformation of Rule 408

The changes drafted into Rule 408 in 2006 and 2011 have had readily discernible substantive effects, as the following hypothetical demonstrates.¹²⁸ Assume Apple sues Google, alleging numerous similarities between Google’s “Android” software and Apple’s “iOS” software, both of which are loaded on mobile phones.¹²⁹ Although Google is responsible for the core version of

¹²⁴ FED. R. EVID. 408(b) (emphasis added).

¹²⁵ Hinkle Letter, *supra* note 120; see FED. R. EVID. 408 advisory committee’s note to 2011 amendment (“Rule 408 previously provided that evidence was *not excluded* if offered for a purpose *not* explicitly prohibited by the Rule [I]t now provides that the court *may admit evidence*” (emphasis added)); see also FED. R. EVID. 103(c), 201(b), 201(c)(1), 403, 405 (promulgating rules in permissive fashion, rather than utilizing double negatives); Advisory Comm. on Evidence Rules, Minutes of the Meeting of May 1–2, 2008, http://www.uscourts.gov/sites/default/files/fr_import/EV2008-04.pdf [<https://perma.cc/CR4N-GSDA>] (noting “the change was stylistic rather than substantive”).

¹²⁶ Minutes of the Meeting of May 1–2, *supra* note 125 (noting “the change was stylistic rather than substantive”).

¹²⁷ See FED. R. EVID. 408(b) (“The court *may* admit this evidence”) (emphasis added).

¹²⁸ The following is a “test suite” as described in EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* 21–31 (3d ed. 2007).

¹²⁹ This hypothetical is inspired by litigation between Apple and Samsung, including the U.S. case, *Apple, Inc. v. Samsung Elecs. Co.*, 695 F.3d 1370, 1372–73 (Fed. Cir. 2012). Apple and Samsung were involved in similar suits in Japan and South Korea. See, e.g., Leigh Kamping-Carder, *Apple Hits Samsung with Smartphone IP Suit*, LAW360 (June 24, 2011, 3:41 PM), <http://www.law360.com/articles/253669/apple-hits-samsung-with-smartphone-ip-suit> [<https://perma.cc/R723-H5HJ>] (describing Apple’s allegations of patent infringement by Samsung in the Seoul Central District Court); Jonathan Randles, *Apple Loses Japan Appeal over Samsung Synch Tech*, LAW360 (June 25, 2013, 2:56 PM), <https://www.law360.com/articles/452789/apple-loses-japan-appeal-over-samsung-synch-tech> [<https://perma.cc/WAM4-4D4P>] (describing Japan’s Intellectual Property High Court ruling against Apple).

“Android,” once the software is released, other manufacturers may make their own alterations to the software.¹³⁰

Assume further that Apple has also taken an aggressive litigation strategy and filed suit against phone manufacturers Samsung, Motorola Solutions, and LG Corporation as joint defendants (collectively “the Manufacturers”).¹³¹ Thus, there will be two trials: one between Apple and Google, and later a second trial between Apple and the Manufacturers. Both Google and the Manufacturers are aware of the other suit.

For purposes of this hypothetical, assume Apple and Google engaged in unsuccessful compromise discussions before trial. Assume further that during the Apple-Google negotiations, Google’s representative furnished written statements showing communications between Google and the Manufacturers indicating that the Manufacturers knew the phones could be altered to avoid potentially infringing upon Apple’s patents, but decided against taking this step because it would be too costly.

In the hypothetical trial between Apple and Google, Apple seeks to introduce two statements furnished by Google during the failed compromise discussion. The first statement is about Google’s awareness of the potentially infringing similarities between Apple’s iPhone software and its own Android software. This may be termed the “Google Infringement Statement.”

The second statement is about the Manufacturers’ knowledge about the potential to avoid infringing on Apple’s patent. Apple will seek to introduce this statement in the Google trial to show the Manufacturers’ state of mind—that the Manufacturers willfully disregarded Apple’s patent. This may be termed the “Manufacturers’ Willfulness Statement.”

¹³⁰ Android is an “open source” program that is editable by downstream consumers. This practice results in different “flavors” of Android, widely called “fragmentation.” See *About the Android Open Source Project*, ANDROID, <https://source.android.com> [<https://perma.cc/9EN7-LLN5>] (providing an overview of the open source process by which developers can create content); *Open Wonder: Introducing Android 8.0 Oreo™*, ANDROID, <https://www.android.com/versions/oreo-8-0/> [<https://perma.cc/Z36V-JPM7>] (describing the latest flavor as “oreo”); *The Many Faces of a Little Green Robot*, OPENSIGNAL (Aug. 2012), <https://opensignal.com/reports/fragmentation.php> [<https://perma.cc/5YV9-YB3D>] (explaining the strengths and weaknesses of fragmentation).

¹³¹ In this hypothetical, each of these lawsuits has satisfied the requirements for federal jurisdiction. Additionally, please note “Motorola” was later split into “Motorola Mobility” and “Motorola Solutions.” Jennifer Rooney, *A Year Post-Split from Motorola Mobility, How Motorola Solutions Is Marketing Its Brand*, FORBES (Jan. 23, 2012, 9:34 AM), <https://www.forbes.com/sites/jenniferrooney/2012/01/23/a-year-post-split-from-motorola-mobility-how-motorola-solutions-is-marketing-its-brand/#3f925f4c667e> [<https://perma.cc/73SC-42M2>]. Motorola Mobility is owned by Google, but Motorola Solutions remains independent and is the successor corporation. *Id.*; Elizabeth Woyke, *Motorola Solutions CEO on the Google-Motorola Merger, Patents and Brand*, FORBES (Oct. 19, 2011, 6:13 PM), <https://www.forbes.com/sites/elizabethwoyke/2011/10/19/motorola-solutions-ceo-on-the-google-motorola-merger-patents-and-brand/#4727acad74e4> [<https://perma.cc/E3M5-397H>].

Assume the hypothetical *Apple v. Google* trial will be before the *Apple v. Manufacturers* trial. Assume further that Samsung will intervene as a matter of right in the first trial to object to the introduction of the Manufacturers' Willfulness Statement, because of the potential damage in Apple's later trial against the Manufacturers if the statement is admitted in the Google trial and becomes a public record.¹³²

Because the analytical approach of Rule 408 does not differ between trials, this section's focus is only on the first trial.

A threshold question is whether Rule 408 even applies, because the facts described clearly meet the rule's fundamental requirement that the proposed compromise discussion was, in fact, about compromise in the sense contemplated by the rule in terms of the exchange of economic value. Many statements made in a settlement negotiation of this nature will not be about the economic value exchange, and those statements would not qualify for the protection of the rule and therefore be readily admissible. For purposes of analyzing the differences between the different versions of Rule 408, one could further assume that the particular statements were made in the context of the compromise of economic value, thus meeting that initial criteria.

1. Result Under the 1975 Version of Rule 408

In the *Apple v. Google* trial, a court using the 1975 version of the rule could admit the Google Infringement Statement but not the Manufacturers' Willfulness Statement.

Apple would seek to introduce the Google Infringement Statement after a proffer by Google that it was unaware of the potential for infringement. Apple thus would argue that the purpose of introducing this evidence is to impeach the credibility of Google's testimony, reasoning that this falls within the ambit of the bias or prejudice exceptions because they are forms of impeachment. Although it is a close case, a court could plausibly rule in favor of Apple and admit this evidence.

However, a court would be more likely to reject Apple's effort to introduce the Manufacturers' Willfulness Statement in the trial against Google to show its state of mind. In construing the 1975 version of Rule 408, the court would recognize that the rule establishes a general prohibition on the introduction of compromise discussion evidence, subject to specifically enumerated exceptions, and that state of mind evidence does not fall within the ambit

¹³² See FED. R. CIV. P. 24(a). The Advisory Committee contemplated such an eventuality and opined that the rule applies even to settlement discussion evidence between a litigant and a third party. See FED. R. EVID. 408 advisory committee's note on proposed rules; see also *In re MSTG, Inc.*, 675 F.3d 1337, 1344 (Fed. Cir. 2012) (allowing a party to object to introduction of settlement discussion evidence involving a settlement to which it was not a party).

of any of them. The court would therefore look to the purpose of the default rule and preclude the evidence so as to encourage future compromise discussions.

2. Result Under the 2006 Amendments to Rule 408

The results would be different under the 2006 amendments. Apple again will seek to introduce the Google Infringement Statement over Google's objection. The court would clearly reject this proffer under the 2006 rules, however, because the rules expressly preclude the introduction of evidence for purposes of impeachment through prior inconsistent statements.

The court would also reject Apple's attempt to introduce the Manufacturers' Willfulness Statement, as it would have under the 1975 rules. The 2006 rules, however, call for a different analysis. The evidence again is being offered to show Google's state of mind: it knew its software infringed Apple's patent. The court would first look at the text of the new rule and decide if the proffered "state of mind" evidence is "prohibited" or "permitted." The court would likely conclude initially that the statement is prohibited under Rule 408(a)(2) because it was "made in [a] compromise negotiation[]." ¹³³

It would then look to Rule 408(b) to see if the proffer is nonetheless a permissible use of the compromise discussion statement because it is being introduced for another purpose not prohibited by subdivision (a). ¹³⁴ Such an inquiry is possible because, unlike the 1975 rule, the 2006 rule introduces the list of permitted uses with the word "including," thus indicating the list is not exclusive. ¹³⁵ Because the "state of mind" evidence is not akin to "proving a witness' bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution," the court would likely apply the doctrine of *noscitur a sociis* and find the evidence is not admissible. ¹³⁶

3. Result Under the 2011 Version of Rule 408

Under the 2011 amendments, the court's analysis of the Google Infringement Statement does not change, and the statements would be expressly precluded by the statute.

¹³³ FED. R. EVID. 408(a)(2) (2006) (amended 2011).

¹³⁴ See *id.* 408(b) ("This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible uses include . . .").

¹³⁵ See 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:01 (6th ed. 2000) ("[t]he plain meaning rule").

¹³⁶ See *id.* § 47:16 ("Associated words"); see also FED. R. EVID. 408. The doctrine of *noscitur a sociis* means "it is known from its associates," and allows for the clarification of the meaning of a word by referring to "associated words." SINGER, *supra* note 135, § 47:16.

The court, however, would likely reach a different result on the Manufacturers' Willfulness Statement. The 1975 rules would bar its introduction because state of mind was not one of the specifically enumerated exceptions. Under the 2006 rules, the state of mind evidence would likely have been rejected as too far removed from the ambit of the specifically enumerated exceptions, causing the court to rely instead on the general default rule of inadmissibility. The 2011 rules, however, shift the default from a presumption that compromise discussion evidence is inadmissible unless there is ample reason to admit it, to a presumption that such is admissible unless there is ample reason to exclude it.

In this situation, then, the Manufacturers' Willfulness Statement would be presumptively admissible unless it falls within the realm of exceptions. The court would have considerable discretion to admit the evidence because Rule 408(b) provides that a court "may admit this evidence for another purpose," and then introduces the exceptions with the phrase "such as" to indicate the list is exemplary and not exclusive.¹³⁷ Because it has already been demonstrated that the "Manufacturer's Willfulness Statement" does not fall within the list of exceptions, the court could rely on the general default rule of admissibility and permit the introduction of the evidence.

To summarize, then, the different versions of Rule 408 can lead to different results that can have significant impacts on judicial proceedings. The 1975 version was the one that most states used to model their own rules regarding compromise, and it is to that issue this Article now turns—mindful of the fact that most of the state versions modeled on that version are now inconsistent with the 2011 version of Federal Rule 408.

*Figure 1*¹³⁸

Statement	Purpose	Result		
		1975	2006	2011
Google Infringement	Impeachment	Admitted	Excluded	Excluded
Manufacturers' Willfulness	State of Mind	Excluded	Excluded	Admitted

E. Rule 408 in the States

Until the modern era, most evidence rules at the state level were controlled by the common law, including the compromise discussion rule.¹³⁹ The

¹³⁷ See FED. R. EVID. 408(b).

¹³⁸ This Figure is permanently available at <http://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/59-2/reuben-graphics-A1b.pdf> [<https://perma.cc/F2X7-4PFR>].

¹³⁹ See *supra* notes 47–64 and accompanying text.

compilation of evidence rules into a single code, as part of a larger codification effort, most notably began in 1942 with the American Law Institute's *Model Code of Evidence*.¹⁴⁰ Later, the National Conference of Commissioners on Uniform State Laws proposed the *Uniform Rules of Evidence*.¹⁴¹ Although four states initially adopted these uniform rules,¹⁴² only Kansas has retained them in the modern era.¹⁴³

After the adoption of the Federal Rules of Evidence in 1975, many states quickly moved to conform their evidence rules to the new federal standard. Within a year after codification, five states had adopted the federal rules.¹⁴⁴ By 1983, that number increased by another twenty-two states,¹⁴⁵ and, by the fall of 2010, forty-three states had formally adopted rules modeled after Rule 408.¹⁴⁶ Currently, over forty states have codified rules that are “identical” or similar to some version of Rule 408.¹⁴⁷ As of this writing, twenty-eight states have rules based on the 1975 version,¹⁴⁸ whereas four states have updated their rules to track the 2006 version,¹⁴⁹ and Delaware, Indiana, Iowa, Maine, Mississippi, New Mexico, North Dakota, South Dakota, Texas, Utah, and West Virginia have adopted the restyled rule.¹⁵⁰

II. JUDICIAL TREATMENT OF RULE 408 AND RELATED STATE LAWS

The foregoing discussion has focused exclusively on the compromise discussion rule as a matter of positive statutory law. Even then, this Article

¹⁴⁰ Barbara C. Salken, *To Codify or Not to Codify—That Is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641, 655 (1992).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See KAN. STAT. ANN. § 60-452 (West 2017).

¹⁴⁴ Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255, 256 (1984).

¹⁴⁵ *Id.*

¹⁴⁶ Tom Lininger, *Should Oregon Adopt the New Federal Rules of Evidence?*, 89 OR. L. REV. 1407, 1408 (2011).

¹⁴⁷ DAVID P. LEONARD, *THE NEW WIGMORE: SELECTED RULES OF LIMITED ADMISSIBILITY* (rev. ed. Supp. 2018), Westlaw. Footnotes 148–150 are based roughly on Leonard's *The New Wigmore*.

¹⁴⁸ ALASKA R. EVID. 408; ARK. R. EVID. 408; CONN. CODE EVID. § 4-8; FLA. STAT. ANN. § 90.408 (West 2017); GA. CODE ANN. § 24-4-408 (West 2017); HAW. R. EVID. 408; IDAHO R. EVID. 408; KY. R. EVID. 408; LA. CODE EVID. ANN. art. 408 (West 2017); MD. R. EVID. 5-408; MICH. R. EVID. 408; MINN. R. EVID. 408; MISS. R. EVID. 408; MONT. R. EVID. 408; NEB. REV. STAT. ANN. § 27-408 (West 2017); NEV. REV. STAT. ANN. § 48.105 (West 2017); N.H. R. EVID. 408; N.J. R. EVID. 408; N.C. R. EVID. 408; OHIO R. EVID. 408; OKLA. STAT. ANN. tit. 12, § 2408 (West 2017); OR. R. EVID. 408; R.I. R. EVID. 408; S.C. R. EVID. 408; TENN. R. EVID. 408; WASH. R. EVID. 408; WIS. STAT. ANN. § 904.08 (West 2017); WYO. R. EVID. 408.

¹⁴⁹ ALA. R. EVID. 408; COLO. R. EVID. 408; PA. R. EVID. 408; VT. R. EVID. 408.

¹⁵⁰ DEL. R. EVID. 408; IND. R. EVID. 408; IOWA R. EVID. 5.408; ME. R. EVID. 408; MISS. R. EVID. 408; N.M. R. EVID. 11-408; N.D. R. EVID. 408; S.D. CODIFIED LAWS § 19-19-408 (2017); TEX. R. EVID. 408; UTAH R. EVID. 408; W. VA. R. EVID. 408(b).

has already shown that there is a great disparity between the popular understanding of the rule as generally barring the introduction of legal negotiations evidence and its literal wording as a narrow evidentiary exclusion for certain aspects of compromise discussions under certain conditions, and even then under limited circumstances. This Part looks at the case law that has developed under the rule in both state and federal courts. As with the drafting, one can see the power of the fundamental tension in the willingness of courts to sacrifice Rule 408's principle of inadmissibility to the immediate needs of justice in the cases before them by allowing parties access to the evidence they need to prove their cases.

A. Methodology for Analyzing Federal and State Court Cases

The methodology for this analysis was straightforward. Through a collaborative effort with several research assistants over a period of several years, this study analyzes every case, identified through the Westlaw database, in which a Rule 408 claim was rejected by an appellate court.¹⁵¹ The study focused on rejected Rule 408 claims because this Article's primary interest was not in situations in which the promise of Rule 408 was fulfilled by the court, but rather where the court rejected the claim in order to ascertain trends, commonly accepted exceptions, and other considerations such analysis may identify.

As a result, these findings are not to be considered representative of how federal or state courts treat Rule 408 claims generally, nor do they provide any indication of insight into the frequency by which such claims are accepted or rejected. Nor do they provide any insight into how a particular Rule 408 claim might be treated by a particular court. Rather, the analysis is meant only to demonstrate what exceptions, limitations, and other conditions courts have placed on the ability to claim the confidentiality—that is, the inadmissibility—of legal negotiation evidence under Rule 408 and related state laws.

Although all states have some form of Rule 408, states vary widely in terms of exceptions they recognize. Three categories of exceptions emerged: statutory exceptions, common law exceptions, and miscellaneous exceptions.

B. Statutory Exceptions

Throughout its evolution, Rule 408 has specifically enumerated some exceptions that have largely remained the same: “proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to ob-

¹⁵¹ Each member of the research team was given a state to analyze. They read and categorized each case, and then swapped cases among themselves to identify any problems in the initial categorization. The task was completed when all members of the team agreed with the meaning of the case and its categorization. This was not difficult in most cases, just time-consuming.

struct a criminal investigation or prosecution.”¹⁵² The 2006 amended version added another specifically enumerated exception for statements “offered in a criminal case,” when such claims were “related to a claim by a public office or agency.”¹⁵³ Because nearly all states have adopted some form of Federal Rule 408, most states have these same statutory exceptions, many of which have been fleshed out by the courts.

1. Technical Statutory Exceptions

In addition, each of these state versions of the rule also contains exceptions to the general rule of inadmissibility in the form of scope limitations. These include limitations as to what constitutes a compromise discussion, which communications are about valuable consideration, how “disputed claims” are defined, and when a communication is offered to prove amount or validity. Depending upon the wording of the state rule, the general rule may also be limited to evidence that is not otherwise discoverable or offered to impeach by prior inconsistent statement.¹⁵⁴

These scope exceptions are significant in that they cover much of what goes on in today’s litigation practice—that is, discussion beyond the numbers of compromise and the narrow claims in dispute, as well as all conversation about the context in which a dispute over numbers takes place.¹⁵⁵

The formal “dispute” requirement provides a good example of this class of exceptions.¹⁵⁶ Because Rule 408 and its state counterparts refer to evidence of settlement of “a disputed claim,” and evidence of attempts to settle “the claim,” Rule 408 claims can be rejected when a court determines there was no active dispute when the communication was made, or when those claims occur in relation to other claims or disputes.¹⁵⁷

¹⁵² FED. R. EVID. 408(b).

¹⁵³ FED. R. EVID. 408(a)(2) (2006) (amended 2011).

¹⁵⁴ More than thirty states allow evidence of a settlement discussion to be admitted when it pertains to otherwise discoverable evidence. *E.g.*, ALA. R. EVID. 408(b); ALASKA R. EVID. 408; DEL. R. EVID. 408; HAW. R. EVID. 408; IDAHO R. EVID. 408; KY. R. EVID. 408; LA. CODE EVID. ANN. art. 408 (West 2017); MD. R. EVID. 5-408(b); MICH. R. EVID. 408; MINN. R. EVID. 408; MO. ANN. STAT. § 435.014 (West 2017); MONT. R. EVID. 408; NEB. REV. STAT. ANN. § 27-408 (West 2017); N.H. R. EVID. 408; N.J. R. EVID. 408; N.Y. C.P.L.R. § 4547 (McKinney 2017); N.C. R. EVID. 408; N.D. R. EVID. 408(b); OHIO R. EVID. 408; OKLA. STAT. ANN. tit. 12, § 2408 (West 2017); PA. R. EVID. 408; R.I. R. EVID. 408; S.C. R. EVID. 408; TENN. R. EVID. 408; UTAH R. EVID. 408(b); WASH. R. EVID. 408; W. VA. R. EVID. 408(b); *see* IOWA R. EVID. 5.408; N.M. R. EVID. 11-408; S.D. CODIFIED LAWS § 19-19-408 (2017); TEX. R. EVID. 408; VT. R. EVID. 408.

¹⁵⁵ *See infra* notes 260–302 and accompanying text.

¹⁵⁶ RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 742–44 (4th ed. 1997).

¹⁵⁷ FED. R. EVID. 408(a); *see* CARLSON ET AL., *supra* note 156, at 742–44.

To illustrate, in one case parties in an employment relationship signed a form outlining severance pay and terms of separation.¹⁵⁸ The form purported to release the employer from further related claims.¹⁵⁹ The release form was admitted into evidence over a Rule 408 objection because the “claim for severance pay was not disputed” at the time the form was signed.¹⁶⁰

2. Bias or Prejudice

The rationale for the bias or prejudice exception is not tied to the extrinsic policy rationale endorsed by Congress for Rule 408, but rather draws on concerns about the integrity of the proffered evidence.¹⁶¹ The purpose of impeachment by demonstrating bias or prejudice is to undermine the credibility of a witness.¹⁶² In the context of Rule 408, the purpose of the impeachment exception is to permit a party to prove that a witness said one thing during a compromise discussion and something different at trial, or to use compromise discussion statements to prove the party’s bias, motive, or lack of credibility.¹⁶³

After being revised, Rule 408 prohibits compromise discussion evidence from being used to provide prior inconsistent statements for the purpose of demonstrating that a witness is lying. But it still explicitly permits compromise discussions to be used to prove bias or prejudice,¹⁶⁴ and the cases suggest the courts give the exception a broad read. In 1988, in *Allen-Myland, Inc. v. International Business Machines Corp.*, decided under the 1975 rule and providing a straightforward example in the federal context, the U.S. District Court for the Eastern District of Pennsylvania held that the plaintiff’s statement made in settlement discussions, which contradicted his statement made at trial, was admissible.¹⁶⁵ The plaintiff in *Allen-Myland* rejected defendant IBM’s compromise offer because it would result in only a 1.87% return and the proceeds would be insufficient to continue operating.¹⁶⁶ However, at trial, the plaintiff testified that his company would have realized a 1.2% return and

¹⁵⁸ *Kestell v. Heritage Health Care Corp.*, 858 P.2d 3, 9 (Mont. 1993).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See Lynne H. Rambo, *Impeaching Lying Parties with Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 WASH. L. REV. 1037, 1056–57 (2000) (“Legal commentators are likewise split . . . and their division mirrors the courts’ difficulty in deciding whether Rule 408’s purpose limitations, or the policy behind the Rule, should govern [impeachment by prior inconsistent statement].”).

¹⁶² MUELLER ET AL., *supra* note 67, § 6.18.

¹⁶³ LEONARD, *supra* note 48, § 3.8.2.

¹⁶⁴ FED. R. EVID. 408(b).

¹⁶⁵ 693 F. Supp. 262, 284 & n.48 (E.D. Pa. 1988), *vacated on other grounds*, 33 F.3d 194 (3d Cir. 1994).

¹⁶⁶ *Id.* at 284 n.48.

that the settlement would have been “a viable business opportunity.”¹⁶⁷ The court admitted the earlier statement made during compromise discussions because it could be used to impeach the plaintiff by prior inconsistent statement.¹⁶⁸

Courts in nine states—Alabama, Arkansas, Georgia, Idaho, Illinois, Kentucky, Nebraska, Vermont, and Virginia—have recognized the bias or prejudice exception.¹⁶⁹ For example, in 2001, in *HealthSouth Rehabilitation Corp. v. Falcon Management Co.*, the Supreme Court of Alabama held that a letter constituting an offer to compromise was admissible to impeach a HealthSouth witness who had testified contrary to the letter’s terms.¹⁷⁰

Two states—Idaho and Vermont—permit bias or prejudice evidence if it satisfies judicial balancing. For example, in 1987, in *Davidson v. Beco Corp.*, the Supreme Court of Idaho noted that although a trial judge may admit statements contained in settlement negotiations for the purpose of impeaching contrary testimony at trial, the judge may do so only if the probative value of such evidence outweighs its prejudicial effect.¹⁷¹ Therefore, Idaho requires the trial judge to engage in a two-prong analysis.¹⁷² First, a trial judge must

¹⁶⁷ *Id.* at 284.

¹⁶⁸ *Id.* at 284 n.48.

¹⁶⁹ See *HealthSouth Rehab. Corp. v. Falcon Mgmt. Co.*, 799 So. 2d 177, 187 (Ala. 2001) (holding that a letter sent to the defendant “constituted an offer of compromise,” but was admissible to rebut the testimony of the defense witness); *Mo. Pac. R.R. Co. v. Ark. Sheriff’s Boys’ Ranch*, 655 S.W.2d 389, 394–95 (Ark. 1983) (“Although the statement made during settlement negotiations is inadmissible in the plaintiff’s case-in-chief, upon retrial the statement would be admissible in a specific situation—if offered to impeach the direct testimony of the railroad.”); *Holbrook Contracting, Inc. v. Tyner*, 354 S.E.2d 22, 24 (Ga. Ct. App. 1987) (“[W]e agree with appellant that the trial court erred by excluding the settlement negotiation evidence, which was admissible for the limited but permissible purpose of rebutting appellee’s testimony about the unconditional offer.”); *Davidson v. Beco Corp.*, 753 P.2d 1253, 1256 (Idaho 1987) (“[W]e hold a trial may allow the use of statements contained in settlement negotiations for the purpose of impeaching witnesses who give contrary testimony at trial.”); *Niehuss v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 492 N.E.2d 1356, 1360 (Ill. App. Ct. 1986) (explaining that an offer to compromise is generally inadmissible, but a “statement, written or not, made by a party or in his behalf which is inconsistent with his present position may be introduced in evidence against him”) (quoting *Lipschultz v. So-Jess Mgmt. Corp.*, 232 N.E.2d 485, 489 (Ill. App. Ct. 1967)); *Miller ex rel. Monticello Banking Co. v. Marymount Med. Ctr.*, 125 S.W.3d 274, 280–82 (Ky. 2004) (concluding that a trial judge did not abuse his discretion when admitting evidence of settlement for the purpose of impeaching witnesses’ credibility); *Lund v. Holbrook*, 46 N.W.2d 130, 139 (Neb. 1951) (“Obviously, [settlement] statements made . . . should, when properly offered, be admitted for impeachment purposes.”), modified by *Chlopek v. Schmall*, 396 N.W.2d 103, 108, 110 (Neb. 1986); *Quirion v. Forcier*, 632 A.2d 365, 368 (Vt. 1993) (“[C]ourts have recognized the admissibility of settlement evidence to attack credibility”); *Anchor Co. v. Adams*, 124 S.E. 438, 439 (Va. 1924) (explaining that compromise letters admitted into evidence “were not admitted for any other purpose than to contradict the testimony of one of the witnesses for the defendant,” and thus the defendant was not prejudiced).

¹⁷⁰ *HealthSouth Rehab.*, 799 So. 2d at 187.

¹⁷¹ *Davidson*, 753 P.2d at 1256.

¹⁷² *Id.*

determine whether the evidence at issue even qualifies as a prior inconsistent statement.¹⁷³ Second, if it does, the judge must ensure that its probative value outweighs its prejudicial effect.¹⁷⁴ Vermont uses the same hybrid approach when applying the exception.¹⁷⁵

3. Criminal Exceptions

The courts have interpreted the criminal exceptions broadly because these exceptions reflect the policy determination that the effective prosecution of criminal cases is simply more important than promoting settlement, and the exceptions are included in all versions of Rule 408.¹⁷⁶ Their purpose is to enable statements, often made by criminal suspects or defendants, to be admitted at a criminal trial regardless of when or to whom they were made.¹⁷⁷

As an example on the federal side, in 1994, in *United States v. Hauert*, the Seventh Circuit Court of Appeals affirmed the district court's decision to admit evidence of the defendant's civil settlement in a tax case.¹⁷⁸ The defendant was convicted of tax evasion and appealed his conviction in part on the ground that the government wrongly introduced evidence of a 1984 civil settlement with the Internal Revenue Service.¹⁷⁹ This evidence included the defendant's statements and conduct that supported his civil case but contradicted his "good faith" defense at his criminal trial.¹⁸⁰ The court allowed the evidence pursuant to the 1975 version's "another purpose" clause.¹⁸¹

Most states also permit the introduction of compromise negotiation evidence in criminal cases. Again, there is some variation as to scope. At least forty-one states follow the federal rule explicitly allowing evidence of a settlement discussion to be admitted when the evidence proves an effort to compromise or obstruct a criminal investigation or prosecution.¹⁸² California

¹⁷³ *See id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Quirion*, 632 A.2d at 368.

¹⁷⁶ *See* LEONARD, *supra* note 48, § 3.7.3 (stating that Rule 408 reflects the position that there is no situation in which the interests of society or the victim encourage compromise efforts in a criminal case).

¹⁷⁷ *See id.*

¹⁷⁸ 40 F.3d 197, 199–200 (7th Cir. 1994).

¹⁷⁹ *Id.* at 198–99.

¹⁸⁰ *Id.* at 199.

¹⁸¹ *Id.* at 200.

¹⁸² ALA. R. EVID. 408; ALASKA R. EVID. 408; ARIZ. R. EVID. 408; ARK. R. EVID. 408; COLO. R. EVID. 408; CONN. CODE EVID. § 4-8; DEL. R. EVID. 408; HAW. R. EVID. 408; IDAHO R. EVID. 408; IND. R. EVID. 408; IOWA R. EVID. 5.408; KY. R. EVID. 408; LA. CODE EVID. ANN. art. 408 (West 2017); MD. R. EVID. 5-408; MASS. GUIDE EVID. 408; MICH. R. EVID. 408; MINN. R. EVID. 408; MISS. R. EVID. 408; MONT. R. EVID. 408; NEB. REV. STAT. § 27-408 (West 2017); N.H. R. EVID. 408; N.M. R. EVID. 11-408; N.Y. C.P.L.R. § 4547 (McKinney 2017); N.C. R. EVID. 408; N.D. R. EVID. 408; OHIO R. EVID. 408; OKLA. STAT. ANN. tit. 12, § 2408 (West 2017); OR. R. EVID. 408; PA. R. EVID. 408; R.I. R. EVID. 408; S.C. R. EVID. 408; S.D. CODIFIED LAWS § 19-19-

permits the evidence to prove an effort to obstruct a criminal investigation, so long as there is a limiting instruction.¹⁸³ Missouri and New Jersey courts have tied this exception to statutes that are more context-specific than the general statutes of other states, permitting offers of payment or restitution to a victim in exchange for dropping criminal charges, even absent an express admission of guilt.¹⁸⁴

This exception has been interpreted broadly. For example, in 1975, in *State v. Tash*, the Missouri Court of Appeals found that an offer of compromise made to avoid criminal charges is admissible even without an express admission of guilt.¹⁸⁵ After being apprehended by officers for the theft of a coonhound, the defendant told the owner of the dog that he would pay four hundred dollars in order to avoid prosecution for the theft.¹⁸⁶ Ultimately, the court admitted the dog owner's testimony that the defendant made the offer because it was an attempt to avoid criminal charges.¹⁸⁷

C. Common Law Exceptions

Federal and state courts have been willing to carve out their own exceptions to Rule 408 as well. Many of these exceptions center on the reason for proffering the evidence rather than the nature of the evidence itself.¹⁸⁸ Most jurisdictions recognize multiple common law exceptions, but there is considerable inconsistency between jurisdictions as to which common law exceptions have been adopted. The federal courts tend to be more consistent, but that is only relative to the states.

An analysis of the cases powerfully demonstrates the combined effect of vestigial rationales for Rule 408—especially relevance—that remain good precedents in the case law, even though they do not reflect the rationale chosen by Congress. Pursuant to the fundamental tension, judges have often felt

408 (2017); TENN. R. EVID. 408; TEX. R. EVID. 408; UTAH. R. EVID. 408; VT. R. EVID. 408; WASH. R. EVID. 408; WIS. STAT. ANN. § 904.08 (West 2017); WYO. R. EVID. 408; *State v. Tash*, 528 S.W.2d 775, 781 (Mo. Ct. App. 1975); see N.J. R. EVID. 408; see also CAL. EVID. CODE §§ 355, 1152 (West 2017) (stating that offers of compromise are inadmissible to prove liability, but can be admissible for another purpose).

¹⁸³ See CAL. EVID. CODE §§ 355, 1152 (providing that, when offers to compromise are admissible for another purpose, the court “shall restrict the evidence to its proper scope and instruct the jury accordingly”).

¹⁸⁴ See *State v. Alexander*, 499 S.W.2d 439, 441 (Mo. 1973) (adopting majority rule that such evidence is admissible without express admission of guilt); *Tash*, 528 S.W.2d at 781 (“An offer of compromise or restitution to avoid a criminal charge may be received in evidence, and an express admission of guilt is not required.”); *State v. Romero*, 231 A.2d 830, 834 (N.J. Super. Ct. App. Div. 1967) (stating that offers of payment to drop criminal charges are admissible as evidence).

¹⁸⁵ *Tash*, 528 S.W.2d at 781.

¹⁸⁶ *Id.* at 779.

¹⁸⁷ *Id.* at 781.

¹⁸⁸ See LEONARD, *supra* note 48, § 3.8.

an obligation to provide the litigants before them with access to the evidence they need to prove their cases and draw on Rule 408 cases decided on older rationales to admit compromise discussion evidence, even when it is inconsistent with the extrinsic policy rationale adopted by Congress.¹⁸⁹

The primary common law exceptions found include proof of state of mind, proof of independent facts, otherwise discoverable evidence, mutuality of concessions, and attorney's fees.

1. Proof of State of Mind or Knowledge

This judicial exception permits the admission of compromise discussion evidence to establish the intent of a party, terms of a contract, or an admission of liability.¹⁹⁰ This exception is not rooted in the extrinsic policy rationale Congress adopted for Rule 408, but rather is borrowed from the law of relevance—in particular, the so-called “state of mind” exception to the hearsay rule.¹⁹¹ In that context, this exception permits the admission of hearsay evidence of a declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health) because, as the declarant's own statement, it is likely to be sufficiently trustworthy to permit a jury to hear it.¹⁹² A showing of necessity is also required.¹⁹³

This exception is well-developed at the federal level. For example, in 1996, in *In re Portnoy*, the United States Bankruptcy Court for the Southern District of New York held that a debtor's statements during a settlement negotiation were admissible in evidence to show the debtor's intent.¹⁹⁴ The debtor had made certain statements during settlement attempts, including statements about his allegedly low monthly salary and his total lack of assets other than real estate.¹⁹⁵ Over the debtor's objections, these statements were introduced

¹⁸⁹ Although this may sound like a harsh critique of the courts, it is not intended as such. Rather, it is simply a recognition that the cases that rest on rationales other than the extrinsic policy rationale are out there and available to employ if and when courts determine there is a need for the evidence. Indeed, one may well reasonably suggest that many courts are not even aware that Congress rejected the relevancy and other rationales in favor of the extrinsic policy rationale.

¹⁹⁰ See, e.g., *York v. Chandler*, 109 So. 2d 921, 924–25 (Ala. Ct. App. 1958) (finding that statements made that “amount to a tacit admission of liability . . . are admissible”); *Office Elecs., Inc. v. Grafic Forms, Inc.*, 390 N.E.2d 953, 957 (Ill. App. Ct. 1979) (stating that offers of compromise “are admissible to prove . . . [a] contract”).

¹⁹¹ FED. R. EVID. 803(3); see also 30B MICHAEL H. GRAHAM, FEDERAL PRACTICE AND PROCEDURE 429–42 (interim ed. 2006) (discussing the rationale for Rule 803(3) and how it operates).

¹⁹² GRAHAM, *supra* note 191, at 430.

¹⁹³ *Id.*

¹⁹⁴ *In re Portnoy*, 201 B.R. 685, 690, 692 (Bankr. S.D.N.Y. 1996).

¹⁹⁵ *Id.* at 690.

by creditors to show Portnoy's state of mind, namely that he was attempting to dishonestly hide assets from the creditors.¹⁹⁶

Nearly a dozen states—Alabama, Arizona, Colorado, Illinois, Massachusetts, Missouri, Montana, New Jersey, New Mexico, and Wisconsin—also allow evidence of a settlement discussion to be admitted when it is offered to prove state of mind or the prior knowledge of a party.¹⁹⁷ These courts have applied the exception broadly, using the exception, for example, to admit compromise discussion statements that reflect “tacit admission[s] of liability,”¹⁹⁸ terms of an unclear agreement,¹⁹⁹ and statements determining the intent of the parties.²⁰⁰ Similarly, in 1958, in *York v. Chandler*, the Court of Appeals of Alabama held that an admission of liability could be *inferred* by the jury from the appellant's statement to the appellee about obtaining estimates from an automobile accident and admitted the compromise discussion evidence.²⁰¹

On the other hand, at least one court—the Massachusetts Supreme Judicial Court—requires a balancing analysis to determine whether to admit evidence of settlement discussions.²⁰² That court upheld an admission of com-

¹⁹⁶ *Id.* at 692.

¹⁹⁷ See *York v. Chandler*, 109 So. 2d 921, 924–25 (Ala. Ct. App. 1958) (finding that statements made during compromise are admissible to show knowledge of liability); *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1322 (Ariz. 1988) (finding no error in compromise negotiations being admitted as evidence demonstrating “knowledge and state of mind”); *Am. Guarantee & Liab. Ins. Co. v. King*, 97 P.3d 161, 169 (Colo. App. 2003) (stating that “settlement communications may be admitted to prove a defendant's knowledge”); *Office Elecs., Inc. v. Grafic Forms, Inc.*, 390 N.E.2d 953, 957 (Ill. App. Ct. 1979) (finding that, in Illinois, statements made during settlement are admissible to prove knowledge or state of mind in regard to proving the existence of a contract); *Dahms v. Cognex Corp.*, 914 N.E.2d 872, 880 (Mass. 2009) (finding no error in admitting settlement statements for the purpose of demonstrating “state of mind”); *Ullrich v. CADCO, Inc.*, 244 S.W.3d 772, 780 (Mo. Ct. App. 2008) (finding that settlement communication is admissible to demonstrate intent or state of mind of a party); *In re Estate of Stukey*, 100 P.3d 114, 124 (Mont. 2004) (finding no error in admitting negotiation communications to demonstrate knowledge of the negotiating parties); *State v. Romero*, 231 A.2d 830, 834 (N.J. Super. Ct. App. Div. 1967) (allowing an offer of compromise to be admitted to show defendant's guilty state of mind); *Fin. Indem. Co. v. Cordoba*, 271 P.3d 768, 771 (N.M. Ct. App. 2011) (finding that settlement statements can be admitted to show a party's state of mind or that they intended to act in bad faith); *Aspen Servs., Inc. v. IT Corp.*, 583 N.W.2d 849, 853, 857 (Wis. Ct. App. 1998) (holding that evidence of a settlement discussion was admissible in a sanctions proceeding).

¹⁹⁸ *York*, 109 So. 2d at 924–25.

¹⁹⁹ See *Brown v. Brown*, 537 A.2d 1343, 1343–45 (N.J. Super. Ct. Ch. Div. 1987) (resolving to reform a property settlement agreement given in divorce on evidence that the terms of that agreement were unclear and inequitable).

²⁰⁰ *Sapir v. Ewing*, 320 P.2d 751, 754 (N.M. 1958).

²⁰¹ *York*, 109 So. 2d at 925; see also *Bradshaw*, 758 P.2d at 1322–23 (holding that trial court had not erred in admitting evidence of an insurer's settlement negotiations on behalf of an insured in a personal injury case into evidence in a subsequent malicious prosecution case brought by the insured against the insurer where the jury could have inferred that the insurer knew, in the underlying case, that the insured was liable).

²⁰² *Dahms*, 914 N.E.2d at 880.

promise discussion statements into evidence where the trial court had “carefully weighed the benefits and potential prejudice” and concluded that such evidence was properly admitted to demonstrate the defendant’s state of mind.²⁰³ The court below also attempted to diminish the prejudicial impact of the evidence without revealing the settlement negotiations by prescribing special jury instructions.²⁰⁴ These instructions informed the jury that statements made during discussions could not be automatically considered to be unconditional statements as a matter of law.²⁰⁵

2. Proof of Independent Facts

This exception is one of two that reflect historical concerns about excluding evidence that would be admissible but for the settlement discussion; the other is the exception for otherwise discoverable facts, discussed further below.²⁰⁶ Like the state of mind exception, the independent facts exception appears to be borrowed from the law of relevance—specifically, again, the hearsay rule²⁰⁷—rather than the extrinsic policy rationale chosen by Congress for Rule 408.

The proof of independent facts exception permits the admissibility of any fact—for example, the street was wet—that can be proved with evidence *other than* statements made during settlement discussions, such as through eyewitness testimony.²⁰⁸ For example, in 1983, in *Vulcan Hart Corp. v. NLRB*, the Eighth Circuit Court of Appeals held that facts pertaining to a compromise discussion were admissible as independent facts.²⁰⁹ In *Vulcan Hart Corp.*, a dispute arose over Vulcan’s practices during a strike.²¹⁰ Before the strike, Vulcan and its workers had entered into several collective bargaining agreements.²¹¹ After the breakdown of discussions, the union filed a petition with the National Labor Relations Board and later won a judgment in district court from which Vulcan appealed to the U.S. Court of Appeals for the Eighth Circuit.²¹² Among the issues at trial was Vulcan’s attempt to force

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See *infra* notes 219–223 and accompanying text.

²⁰⁷ FED. R. EVID. 802. A residual exception is available to admit a statement not covered by a hearsay exception that “is offered as evidence of a material fact,” and that satisfies other requirements. FED. R. EVID. 807(a)(1)–(4).

²⁰⁸ MICHAEL H. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS, AND PROBLEMS 457 (1983).

²⁰⁹ 718 F.2d 269, 277 (8th Cir. 1983).

²¹⁰ *Id.* at 272–73.

²¹¹ *Id.* at 272.

²¹² *Id.* at 273.

a union leader out of his position.²¹³ In the subsequent actions, certain findings of fact were admitted over Vulcan's objections because those findings resulted from "reinstatement" discussions.²¹⁴ The Eighth Circuit acknowledged that the reinstatement negotiations could be considered compromise discussions.²¹⁵ It allowed the facts to be admitted, however, because they were merely "an independent admission of fact[s]" and thus within the "another purpose" exception of Rule 408.²¹⁶

At least twenty-one states—Alabama, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Virginia, and Wisconsin—and the District of Columbia admit evidence of a settlement discussion when it is offered to prove an independent fact.²¹⁷ This exception is not heavily litigated in the states that recognize it; the majority of cases are from 1994 or earlier.²¹⁸

3. Otherwise Discoverable Evidence

This exception is similar to the independent facts exception but differs in the nature of the evidence it admits. The independent facts exception applies to facts introduced into a compromise discussion that may also be gathered outside the compromise discussion.²¹⁹ In contrast, the otherwise discoverable evidence exception focuses on other types of evidence that would be discoverable but for the fact it was disclosed during the compromise discussion.

²¹³ See *id.* at 277.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ CAL. EVID. CODE § 1152 (West 2017); CONN. CODE EVID. § 4-8(b)(2); *York v. Chandler*, 109 So. 2d 921, 924 (Ala. Ct. App. 1958); *Cunningham v. Davis*, 159 S.W.2d 751, 753 (Ark. 1942); *Rose v. Rose*, 44 P. 658, 658 (Cal. 1896); *Pyne v. Jamaica Nutrition Holdings*, 497 A.2d 118, 128 (D.C. Cir. 1985); *Mut. Benefit Health & Accident Ass'n v. Bunting*, 183 So. 321, 326 (Fla. 1938); *Austin v. Long*, 63 S.E. 640, 641 (Ga. Ct. App. 1909); *Khatib v. McDonald*, 410 N.E.2d 266, 276–77 (Ill. App. Ct. 1980); *Suntken v. Suntken*, 272 N.W. 132, 138 (Iowa 1937); *Lord v. State Auto. & Cas. Underwriters*, 491 P.2d 917, 919 (Kan. 1971); *Kohlman v. Witherell & Dobbins Co.*, 98 So. 756, 759 (La. 1924); *Beaudette v. Gagne*, 33 A. 23, 23–24 (Me. 1895); *Kalus v. Bass*, 89 A. 731, 734 (Md. 1914); *Gerrish v. Sweetser*, 21 Mass. (4 Pick.) 374, 375–78 (1826); *Vogt v. Emmons*, 181 S.W.3d 87, 94–95 (Mo. Ct. App. 2005); *Gagne v. New Haven Rd. Constr. Co.*, 175 A. 818, 821 (N.H. 1934); *Jesko v. Stauffer Chem. Co.*, 558 P.2d 55, 58–59 (N.M. Ct. App. 1976); *Arben Corp. v. N.Y. State Thruway Auth.*, No. M-74568, 2008 WL 509089, at *2, *3 n.1 (N.Y. Ct. Cl. Feb. 26, 2008); *Kunkel v. Rattray*, 231 P. 541, 544 (Okla. 1924); *Rochester Mach. Corp. v. Mulach Steel Corp.*, 449 A.2d 1366, 1370–71 (Pa. 1982); *Fenter v. Norfolk Airport Auth.*, 649 S.E.2d 704, 708 n.3 (Va. 2007); *Boyle v. Pine Beach Club*, No. 93-1171, 1994 WL 162403, at *5–6 (Wis. Ct. App. May 3, 1994); see OR. R. EVID. 408.

²¹⁸ Only the cases decided in Missouri, New York, Virginia, and Wisconsin were decided in or after 1994. See *Vogt*, 181 S.W.3d at 94–95; *Arben Corp.*, 2008 WL 509089, at *2, *3 n.1; *Fenter*, 649 S.E.2d at 708 n.3; *Boyle*, 1994 WL 162403, at *5–6.

²¹⁹ GRAHAM, *supra* note 208, at 457.

Again, the exception does not derive from the extrinsic policy rationale for Rule 408, but, rather, it is borrowed from Federal Rule of Civil Procedure (“FRCP”) 26, which requires litigants to produce in discovery documents that are “otherwise discoverable.”

As with Rule 26, the purpose of the exception in the Rule 408 context is to prevent parties from hiding evidence in compromise discussions—that is, using the compromise discussion to shield from admissibility evidence that would have been discoverable but for the fact that it was produced in the compromise discussion.²²⁰ Thus, a tax return given by a defendant to the plaintiff would be an otherwise discoverable document subject to admission under this exception, while a list of costs associated with a dispute and prepared for the settlement would not.

The otherwise discoverable evidence exception is so broadly accepted by the federal courts that the Advisory Committee removed it from Rule 408 in 2006, contending that the case law had rendered the provision “superfluous.”²²¹ As a result, most of the recent litigation over this exception relates to attempts to prevent the disclosure of damaging evidence during the discovery process—because most courts, and, implicitly, most parties, recognize that once such evidence is disclosed, it will likely be admissible.²²²

At least thirty states—Alabama, Alaska, Delaware, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia—have adopted the otherwise discoverable exception, either by statute or through common law, in an attempt to conform their evidentiary rules to the 1975 federal codification.²²³

²²⁰ FED. R. EVID. 408 advisory committee’s note to 2006 amendment.

²²¹ *Id.*

²²² See, e.g., *Phoenix Sols. Inc. v. Wells Fargo Bank*, 254 F.R.D. 568, 585 (N.D. Cal. 2008) (recognizing the advisory committee’s rationale and the general principle behind the rule).

²²³ See FED. R. EVID. 408; ALA. R. EVID. 408(b); ALASKA R. EVID. 408; DEL. R. EVID. 408; HAW. R. EVID. 408; IDAHO R. EVID. 408; IOWA R. EVID. 5.408; KY. R. EVID. 408; LA. CODE EVID. ANN. art. 408 (West 2017); MD. R. EVID. 5-408(b); MICH. R. EVID. 408; MINN. R. EVID. 408; MISS. R. EVID. 408(b); MO. STAT. ANN. § 435.014 (West 2017); MONT. R. EVID. 408; NEB. REV. STAT. § 27-408 (West 2017); N.H. R. EVID. 408; N.J. R. EVID. 408; N.M. R. EVID. 11-408; N.Y. C.P.L.R. § 4547 (McKinney 2017); N.C. R. EVID. 408; N.D. R. EVID. 408(b); OHIO R. EVID. 408; OKLA. STAT. ANN. tit. 12, § 2408 (West 2017); PA. R. EVID. 408(b); R.I. R. EVID. 408; S.C. R. EVID. 408; S.D. CODIFIED LAWS § 19-19-408 (2017); TENN. R. EVID. 408; TEX. R. EVID. 408; UTAH R. EVID. 408(b); VT. R. EVID. 408; WASH. R. EVID. 408; W. VA. R. EVID. 408(b). Although this exception can be found directly within many state statutes, it is highly likely that all states recognize this exception even if their statute is otherwise silent.

4. Mutuality of Concessions

Though the independent facts and otherwise discoverable exceptions are both common and familiar, several states have developed the more novel requirement that the compromise discussion evidence entail mutual concessions for the general rule of compromise discussion inadmissibility to apply. At least seventeen states now recognize this exception, including California, Georgia, Hawaii, Illinois, Indiana, Kentucky, Michigan, Minnesota, Missouri, Nevada, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas, Washington, and West Virginia.²²⁴

In 1970, in *Moving Picture Machine Operators Union v. Glasgow Theaters, Inc.*, a California Court of Appeals discussed the mutuality of concessions exception, and provides an example of how this exception operates.²²⁵ In that case, the defendant's attorney mailed a letter to the plaintiff.²²⁶ The letter indicated that the defendant owed the plaintiff a sum of money and offered to pay the full amount in order to settle the dispute.²²⁷ After the plaintiff rejected the offer, the defendant attempted to exclude the letter from being admitted as evidence on the grounds that it was an inadmissible offer of compromise.²²⁸ The threshold question for the California Court of Appeal was whether the letter was made "in contemplation of *mutual concessions*" ²²⁹ In its analysis, the court explicitly stated that a compromise does not exist where the party intends to "secure relief against . . . liability" or if "the party making the proposal . . . intended to make *no concessions* but to exact all that he deemed himself entitled to" ²³⁰

²²⁴ *Moving Picture Mach. Operators Union Local No. 162 v. Glasgow Theaters, Inc.*, 86 Cal. Rptr. 33, 37–38 (Ct. App. 1970); *Pac. Nat'l Fire Ins. Co. v. Beavers*, 73 S.E.2d 765, 769 (Ga. Ct. App. 1952); *Sylvester v. Animal Emergency Clinic of Oahu*, 825 P.2d 1053, 1056–57 (Haw. 1992); *Collection Prof'ls, Inc. v. Logan*, 695 N.E.2d 1344, 1348 (Ill. App. Ct. 1998); *Forker v. Berkes*, 38 N.E.2d 296, 299 (Ind. Ct. App. 1941); *Hines v. Thomas Jefferson Fire Ins. Co.*, 267 S.W.2d 709, 711 (Ky. 1953); *Thirlby v. Mandeloff*, 90 N.W.2d 476, 479 (Mich. 1958); *In re Buckmaster*, 755 N.W.2d 570, 577–78 (Minn. Ct. App. 2008); *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 660–61 (Mo. Ct. App. 1991); *Morris DeLee Family Trust v. Cost Reduction Eng'g, Inc.*, 705 P.2d 161, 163 (Nev. 1985); *Russell v. Bennett*, 617 P.2d 877, 878 (Okla. 1980); *Dalk v. Lachmund*, 70 P.2d 558, 560 (Or. 1937); *Rochester Mach. Corp. v. Mulach Steel Corp.*, 449 A.2d 1366, 1368 (Pa. 1982); *Lambert v. Cate*, No. 03A01-9404-CV-00120, 1994 WL 669511, at *3 (Tenn. Ct. App. Dec. 1, 1994); *In re In the Interest of J— T— H—*, 630 S.W.2d 473, 477–78 (Tex. App. 1982); *Newsom v. Miller*, 258 P.2d 812, 814 (Wash. 1953); LOUIS J. PALMER, JR. ET AL., *HANDBOOK ON EVIDENCE FOR WEST VIRGINIA LAWYERS* § 408.03 (6th ed. 2017), Lexis.

²²⁵ *Glasgow Theaters*, 86 Cal. Rptr. at 36–38.

²²⁶ *Id.* at 36.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 37 (emphasis added) (internal quotation marks omitted).

²³⁰ *Id.* (emphasis added) (internal quotation marks omitted).

The rationale for this exception arises from the definition of compromise.²³¹ All of the adopting states use language similar to *American Jurisprudence*'s analysis of whether a valid compromise exists: "A compromise or settlement is supported by good consideration if it is based upon a disputed or unliquidated claim, and the parties make or promise mutual concessions as a means of terminating the dispute[]"²³² For example, the Hawaii and Illinois courts define a compromise as "an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith or unliquidated."²³³ By adopting this definition, these states are giving arguably the narrowest possible interpretation of the general rule of inadmissibility.

The trend in states requiring this threshold inquiry is to use a definition of "compromise" to determine whether the exclusionary rule for compromise discussions applies.²³⁴ In effect, the insistence that each side must make concessions during the settlement discussions becomes an additional requirement for invoking this rule.²³⁵ As a result, calling this doctrine an exception is a bit of a misnomer in that courts treat it more like a predicate requirement. That is to say, if the evidence does not prove that mutual concessions were made, the court will go no further with its analysis and will conclude that the exclusionary rule does not apply because, by definition, no compromise had been made. Thus, in 1991, in *Maugh v. Chrysler Corp.*, the Missouri Court of Appeals found that a car manufacturer's newspaper ad offering to replace certain vehicles was not an offer to compromise because the advertisement did not invoke mutual concessions.²³⁶ As a result, the exhibit of the newspaper ad was admissible in court.²³⁷

²³¹ See *Compromise*, *supra* note 22.

²³² 15B ANNE KNICKERBOCKER, AM. JUR. 2D *Compromise and Settlement* § 20, Westlaw (database updated Feb. 2018) (footnotes omitted); see *supra* note 224 and accompanying text (listing states that have adopted this language).

²³³ E.g., *Sylvester v. Animal Emergency Clinic of Oahu*, 825 P.2d 1053, 1056 (Haw. 1992) (footnote omitted); *Collection Prof'ls, Inc. v. Logan*, 695 N.E.2d 1344, 1348 (Ill. App. Ct. 1998).

²³⁴ See *Moving Picture Mach. Operators Union Local No. 162 v. Glasgow Theaters, Inc.*, 86 Cal. Rptr. 33, 37 (Ct. App. 1970) (defining compromise as requiring the existence of mutual concessions); *Logan*, 695 N.E.2d at 1348 ("A compromise is an agreement to terminate, by means of mutual concessions, a claim which is disputed in good faith"); *Forker v. Berkes*, 38 N.E.2d 296, 299 (Ind. Ct. App. 1941) (holding that an "instrument, as to the release of claims, [that] did not disclose any settlement as to compromise of such claims by mutual concession[s]" was not a compromise); *Thirlby v. Mandeloff*, 90 N.W.2d 476, 479 (Mich. 1958) (finding that the "notion of mutual concession is implicit" in a compromise).

²³⁵ See, e.g., *Maugh v. Chrysler Corp.*, 818 S.W.2d 658, 660–61 (Mo. Ct. App. 1991) (providing an example of a compromise that was held to be invalid due to a lack of mutual concessions by each party).

²³⁶ *Id.*

²³⁷ *Id.*

D. Miscellaneous Exceptions

1. Attorney's Fees

Two federal courts have begun to recognize an exception for attorney's fees in order to simplify the process of determining the correct amount of such fees to be distributed after a case has been resolved. Specifically, these courts admit total amounts of individual settlement offers to better determine the value of the action and more intelligently calculate attorney's fees.

Currently, only the Third and Ninth Circuits have recognized attorney's fees as an exception to Rule 408. To illustrate, in 2009, in *Lohman v. Duryea Borough*, the Third Circuit Court of Appeals held that evidence relating to settlement negotiations could be admissible to determine the amount of attorney's fees.²³⁸ In *Lohman*, petitioner Lohman prevailed at jury trial only to have his total award reduced by the trial court.²³⁹ In making this reduction, the trial court relied, in part, on the fact that Lohman rejected a settlement offer of \$75,000.²⁴⁰ Although Lohman argued that permitting the settlement discussion evidence to reduce the attorney's fee award would negatively impact the attorney's ability to negotiate, the court disagreed.²⁴¹ In fact, the court suggested that admitting this evidence would improve the settlement process.²⁴² In 2011, the Ninth Circuit relied in part on *Lohman* in reaching a similar result in *Ingram v. Oroudjian*.²⁴³

2. Jurisdiction

Finally, a small but growing number of federal courts consider the content of settlement discussions in order to determine if the parties have, or can, satisfy jurisdictional requirements.

In 2003, in *Archer v. Kelly*, the Northern District of Oklahoma held that statements made by the plaintiff during compromise discussions would satisfy the amount in controversy requirement.²⁴⁴ The plaintiff had issued a "demand letter" to all of the defendants and offered to settle the case for

²³⁸ 574 F.3d 163, 167–68 (3d Cir. 2009).

²³⁹ *Id.* at 165–66 ("The jury found for Lohman on one of the three claims Lohman moved for attorney's fees and costs The Court calculated a lodestar of \$62,986.75, but concluded that the award should be reduced for limited success.").

²⁴⁰ *Id.* at 165.

²⁴¹ *Id.* at 168.

²⁴² *Id.*

²⁴³ *Ingram v. Oroudjian*, 647 F.3d 925, 927 (9th Cir. 2011) ("In *Lohman*, the defendants made three settlement offers after the trial began The plaintiff rejected the offers and was awarded \$12,205 by the jury. . . . When considering the plaintiff's motion for attorney fees, the district court reduced the lodestar from \$62,986.75 to \$30,000 based on the plaintiff's limited success.") (citation omitted).

²⁴⁴ 271 F. Supp. 2d 1320, 1324 (N.D. Okla. 2003).

\$1,000,000.²⁴⁵ The complaint, however, sought \$10,000.²⁴⁶ After refusing the settlement offer, one defendant sought removal to federal court, in part on the basis of the \$1,000,000 claim.²⁴⁷ The court received the demand letter into evidence because “the situations mentioned in the rule are ‘illustrative’ and [do] not foreclose offering ‘compromise’ evidence for other purposes.”²⁴⁸

In 2011, the Seventh Circuit Court of Appeals applied that reasoning to similar facts in *Carroll v. Stryker Corp.*²⁴⁹ In *Carroll*, the plaintiff’s counsel sent an e-mail reducing the plaintiff’s initial offer from at least \$100,000 to \$60,000 “plus certain nonmonetary relief.”²⁵⁰ Citing prior Circuit precedent, the Seventh Circuit held that the e-mailed settlement discussion evidence was admissible for purposes of considering removal²⁵¹ and allowed the case to proceed in federal court.²⁵² The Ninth²⁵³ and Tenth²⁵⁴ Circuit Courts of Appeal have used similar reasoning to admit settlement discussion evidence for purposes of removal.

On the other hand, at least one federal court has ruled that admitting settlement discussion evidence in order to establish minimum contacts to establish personal jurisdiction would “contravene the [public] policy” undergirding the settlement discussion rule.²⁵⁵

E. Synthesis and Conclusion: A Porous Rule

Despite Rule 408’s promise of inadmissibility, the text of Rule 408 was drafted narrowly to exempt only compromise discussions rather than the entirety of the legal negotiations process, and how it evolved in subsequent re-drafts from a rule of presumptive inadmissibility to a rule of presumptive ad-

²⁴⁵ *Id.* at 1323.

²⁴⁶ *Id.* at 1321–22.

²⁴⁷ *Id.* at 1322–23.

²⁴⁸ *Id.* at 1323.

²⁴⁹ 658 F.3d 675, 681–82 (7th Cir. 2011).

²⁵⁰ *Id.* at 681.

²⁵¹ *Id.* at 682.

²⁵² *Id.* The Seventh Circuit reasoned that, for purposes of removing a case to federal court, the removing party “ha[d] established that what the plaintiff hopes to get out of the litigation[] . . . was well over \$75,000.” *Id.* (citation and internal quotation marks omitted).

²⁵³ See, e.g., *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (affirming removal in a trademark infringement suit in which the settlement letter “show[ed] that [the plaintiff] value[d] his trademark rights—the object of the litigation—as worth more than \$100,000”).

²⁵⁴ See, e.g., *McPhail v. Deere & Co.*, 529 F.3d 947, 956–57 (10th Cir. 2008) (reasoning that “documents that demonstrate plaintiff’s own estimation of its claim are a proper means of supporting . . . removal” in finding “several emails and letters that show[ed] . . . the value of the claim” sufficient).

²⁵⁵ *Mesa Airlines, Inc. v. Uslan*, No. CV07-00178-PHX-JAT, 2007 WL 1821298, at *2 (D. Ariz. June 25, 2007) (noting, however, that Rule 408 does not expressly disallow use of such evidence) (citing *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998)).

missibility.²⁵⁶ Additionally, the great variation in similar rules in the states that were intended to conform to federal law have actually become more at odds with the federal rule as the rule itself has evolved.

Further, the foregoing Part analyzes how the federal and state courts treat those rules, only to find that they have carved out many exceptions to Rule 408's general rule of inadmissibility.²⁵⁷ Some of these exceptions are the results of the rule's bizarre and complex textual language, such as the requirement of mutuality of concessions recognized by some courts. Others are due to the policy choice that the need for compromise discussion evidence in certain types of cases outweighs the general policy barring their admissibility, such as the broad read courts give the criminal exceptions. A few have emerged to prevent abuse, such as the exceptions for proof of independent facts and otherwise discoverable evidence. Finally, other exceptions have simply been drawn from the dustbins of history, providing justifications for departures from that general rule of inadmissibility—even though they have been superseded by Congress's singular embrace of the extrinsic policy rationale for Rule 408 as a vehicle to promote settlement through the creation of a safe space in which those discussions occur.

Taken together, the textual and doctrinal analysis uncovers a thick, thorny bramble bush of law worthy of Karl Llewellyn's sobering appellation.²⁵⁸ As illustrated in the next Part, this is particularly troubling, given the changing nature of legal negotiations and law practice more generally.²⁵⁹

III. THE CHANGED ENVIRONMENT OF LEGAL NEGOTIATIONS

At the same time as the federal and state rules have become more permissive in admitting legal negotiations evidence, the practice of legal negotiation has become more open to disclosure of sensitive information. Indeed, the basic model of legal negotiation has changed fundamentally since the adoption of Rule 408 in 1975, at least as taught in U.S. law schools.

A. The Paradigm Shift in Legal Negotiation

The emergence of modern negotiation as the primary means by which legal disputes are resolved has profound implications for Rule 408, several of which are discussed below.

²⁵⁶ See *supra* notes 22–150 and accompanying text.

²⁵⁷ See *supra* notes 151–255 and accompanying text.

²⁵⁸ See generally K.N. LLEWELLYN, *THE BRAMBLE BUSH* (2d ed. 1951) (providing an introduction to the study of law).

²⁵⁹ See *infra* notes 260–302 and accompanying text.

1. From Positions to Interests

To be sure, negotiation has always been a part of the litigation landscape.²⁶⁰ The legal negotiations of today, however, are far different from the legal negotiations for which the compromise discussion rule was drafted in 1975. Indeed, at that time, legal negotiation was viewed as a strictly adversarial process, in which the negotiators used whatever leverage they had to try to win the negotiation in the zealous representation of their clients.²⁶¹ The parties would state their positions, defend them with law and facts, and try to convince the other side that their own position was right, or, at minimum, that the other side was wrong.²⁶² Disclosure was minimal and guarded, and negotiation technique largely consisted of tricks like extreme bargaining positions, “take it or leave it” offers, tightly scaled concession patterns, and unvarnished intimidation.²⁶³ This approach to negotiation emphasized the positions of the parties, and is often called positional, adversarial, or distributive bargaining.²⁶⁴

This began to change in the mid-1970s, when two Harvard Law School professors began what has become the modern Alternative Dispute Resolution movement (the “ADR movement”). First, in 1976, Professor Frank E.A. Sander gave a speech to an important legal conference hosted by Chief Justice Warren Burger that came to be known as the Pound Conference.²⁶⁵ The speech called for different ways of resolving legal disputes besides trial, including mediation, which like negotiation is a consensual process rather than

²⁶⁰ See Galanter & Cahill, *supra* note 14, at 1340 (recognizing that our judicial system has long encouraged settlement through negotiation).

²⁶¹ For a general discussion of what she termed the “traditional adversarial” model of negotiation, see Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 762–83 (1984).

²⁶² See Gary Goodpaster, *A Primer on Competitive Bargaining*, 1996 J. DISP. RESOL. 325, 342–43 (describing strategy and techniques employed in the “competitive bargaining” process).

²⁶³ See *id.* at 349–57 (presenting a multitude of negotiation techniques for use by practitioners).

²⁶⁴ Alternative dispute resolution commentators and practitioners disagree over the name best attributed to this negotiation approach. For an example of use of the term “adversarial” negotiation, see RISKIN & WESTBROOK, *supra* note 28, at 149–50. For an example of use of the phrase “positional bargaining,” see ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN passim* (Bruce Patton ed., 3d ed. 2011). For an example of a use of the phrase “[d]istributive negotiation[],” see DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 141 (1986).

²⁶⁵ Frank E.A. Sander, *Varieties of Dispute Processing*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 65 (A. Leo Levin & Russell R. Wheeler eds., 1979). The conference derived its name from the conclave it was modeled after, Harvard Law School Dean Roscoe Pound’s turn-of-the-century Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. See *Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 F.R.D. 79, 83, 134 (1976).

an adversarial one.²⁶⁶ Sander's speech is widely credited with planting the seeds of the modern ADR movement.

Negotiation was a key part of this revolution. In 1981, a colleague of Sander's at Harvard Law School, Professor Roger Fisher, together with a student of his, William Ury, wrote the seminal work on modern negotiation: *Getting to Yes*.²⁶⁷ It was an immensely popular book, written for lay audiences—without a single footnote—and offered a different approach to negotiation than the traditional adversarial model.²⁶⁸

Fisher and Ury called the approach “principled negotiation,” and encouraged negotiators to abandon the traditional positional bargaining of the past and instead focus on their underlying interests, concerns, beliefs, and preferences, and then work toward a mutually satisfying settlement of the dispute based on those interests.²⁶⁹ Eschewing the grudging disclosure of positional bargaining, principled negotiation was a high disclosure model because the information necessary for agreement—the underlying interests, concerns, and preferences of the parties—generally would not be known without affirmative party disclosure.²⁷⁰ Two decades later, Harvard Law Professor Robert H. Mnookin and his co-authors pushed this concept a step further by demonstrating how negotiators could create additional value for both

²⁶⁶ See Sander, *supra* note 265, at 68–72 (presenting a range of available alternatives for resolving legal disputes outside of adjudication).

²⁶⁷ ROGER FISHER & WILLIAM URY, *GETTING TO YES* (Bruce Patton ed., 1st ed. 1981). For another highly influential approach to dispute resolution, which considers the intellectual, philosophical, and practical differences among parties, see generally Menkel-Meadow, *supra* note 261.

²⁶⁸ In all fairness, *Getting to Yes* was not the first work to suggest this approach to negotiation. See, e.g., RICHARD E. WALTON & ROBERT B. MCKERSIE, *A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM* 144–48 (1st ed. 1965) (discussing techniques to employ in “integrative bargaining situations”). But such earlier works were largely confined to the ivory towers of academia. In contrast, Fisher—who helped negotiate the Camp David Accords between Egypt and Israel—put it in plain language, peppered it with examples drawn from his vast experience in international negotiations, and brought this concept to the masses. Leslie Kaufman, *Roger D. Fisher, Expert at ‘Getting to Yes,’ Dies at 90*, N.Y. TIMES (Aug. 27, 2012), http://www.nytimes.com/2012/08/28/world/americas/roger-d-fisher-expert-getting-to-yes-dies-at-90.html?_r=0 [https://perma.cc/H3AW-J5AX].

²⁶⁹ See FISHER & URY, *supra* note 264, at 12–15. Other important works include, in chronological order: DEAN G. PRUITT, *NEGOTIATION BEHAVIOR* (1981); HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); Menkel-Meadow, *supra* note 261 (published in 1984); JEANNE M. BRETT ET AL., *THE MANAGER AS NEGOTIATOR AND DISPUTE RESOLVER* (Robert M. Jones ed., 1985); LAX & SEBENIUS, *supra* note 264 (published in 1986); LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987); KENNETH J. ARROW ET AL., *BARRIERS TO CONFLICT RESOLUTION* (Kenneth J. Arrow et al., eds., 1995); DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* (1999); *THE HANDBOOK OF NEGOTIATION AND CULTURE* (Michele J. Gelfand & Jeanne M. Brett eds., 2004); G. RICHARD SHELL, *BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE* (2d ed. 2006).

²⁷⁰ FISHER & URY, *supra* note 264, at 51.

parties by taking advantage of “potential sources of value creation,” such as differences in risk preferences and economies of scale.²⁷¹

Although the revolution in negotiation theory would be slow to come to the practice community, and is still underway in many respects, the influence of Fisher’s approach in *Getting to Yes* is beyond question. Since the book’s publication, hundreds of thousands of experts in law, business, and other professions from across the world have been trained in some variation of what has come to be known generally as “interest-based”²⁷² or “problem-solving”²⁷³ negotiation.²⁷⁴ Today, nearly every law school and business school offers at least part of a course in negotiation and uses the interest-based model as the primary mode of instruction.²⁷⁵ Interest-based negotiation has become so deeply engrained in modern legal culture that there is even a movement in the practice community toward “collaborative law,” especially in the family arena, where the commitment to interest-based settlement is so strong that parties contract for full disclosure and the attorneys agree to withdraw if they cannot resolve the matter.²⁷⁶

Due in part to these changes, the number of legal cases decided by a court or a jury has dropped dramatically, “from 11.5[%] . . . in 1962” to 1.8% in 2002.²⁷⁷ In his landmark study, Professor Marc Galanter famously termed this phenomenon “the vanishing trial.”²⁷⁸ According to Galanter, although there are many possible reasons for the increasing scarcity of trials, the rising popularity of interest-based negotiation is clearly one of them.²⁷⁹

²⁷¹ MNOOKIN ET AL., *supra* note 33, at 14–16.

²⁷² *See id.* at 240 (“Negotiating at the Interest-Based Table”).

²⁷³ *Id.* at 12.

²⁷⁴ For example, Karrass, one of the most prominent commercial providers of negotiation training, promotes alternative types of negotiation. *See Seminars*, KARRASS, <http://www.karrass.com/seminars> [<https://perma.cc/7UUB-NS5L>].

²⁷⁵ *See, e.g., Search the ABA Directory*, UNIV. OR. SCH. LAW, <https://law.uoregon.edu/01/explore/aba-search/> [<https://perma.cc/3ZWX-JW7W>] (providing access to a database of schools with ADR courses and organizations).

²⁷⁶ Pauline H. Tesler, *Collaborative Law Neutrals Produce Better Resolutions*, 21 ALTERNATIVES TO HIGH COSTS LITIG., Jan. 2003, at 1, 9–10; *see also* Rebecca Aviel, *Counsel for the Divorce*, 55 B.C. L. REV. 1099, 1118 (2014) (noting that “collaborative law . . . [encourages] negotiated settlement”). For a critique, *see* John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L.J. 1315, 1357–60 (2003) (discussing “[p]olicy . . . [considerations] [r]egarding [c]ollaborative [l]aw [d]isqualification [a]greements” in relation to “client autonomy and . . . protection).

²⁷⁷ Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004).

²⁷⁸ *Id.* at 515.

²⁷⁹ *See id.* at 514 (“One of the most prominent explanations of the decline of trials is the migration of cases to other forums.”).

2. From Less Disclosure to More Disclosure

As shown in Part II, Rule 408 and its state progeny were written and adopted before the advent of interest-based negotiation, mediation, and other consensual processes, at a time when legal negotiations and settlements were dominated by the adversarial model.²⁸⁰ Given a model where disclosure is guarded and outcomes are narrowly focused on a dollar amount, it makes sense to have a rule that protects only the specific negotiation over the dollar amount—that is, the compromise discussion. There is no need to protect the surrounding discussions because the parties' lawyers already are safeguarding information they want to keep away from their adversaries. In this model, it would be unfair to make the actual compromise discussions subject to later discovery and admissibility because of the possibility of exploitation of the compromising party's willingness to reduce their demand to settle the matter.²⁸¹ In this environment, the Rule 408 of 1975 is entirely proper as a rule of evidentiary exclusion because it is narrowly tailored to bar from admissibility just the evidence that is necessary to facilitate the compromise.

But this is not today's negotiation environment, at least not with the direction it is heading. Rather than being guarded, attorneys and parties are encouraged to disclose more freely information about their interests, concerns, preferences, and anything else that may be remotely relevant to the controversy.²⁸² Armed with this information, the attorneys can work together to brainstorm different ways of resolving the problem before settling on a particular course of action. Solutions are often highly integrated with non-economic components, such as apologies, restructured relationships, or even new and expanded opportunities.²⁸³

In this model, the dollar amount for which the parties ultimately settle may be the least significant aspect of the final settlement. For example, attorneys in an interest-based negotiation may find that a dispute over how much *A* owes *B* in the dissolution of a partnership is much more about their relationship—such as lack of appreciation, unclear lines of authority and autonomy, or an unworkable business structure²⁸⁴—than it is about an amount in

²⁸⁰ *Supra* notes 151–258 and accompanying text; see FED. R. EVID. 408 advisory committee's notes to the 2006 amendment (discussing the rule's effect of protecting information in an adversarial system).

²⁸¹ This recalls the earlier fairness rationales embraced by early English and U.S. courts. See *supra* note 57 and accompanying text.

²⁸² See FISHER & URY, *supra* note 264, at 52–53 (noting that being open with one's interests allows for a constructive discussion "without getting locked into rigid positions"); STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION 174–75 (1st ed. 2001) (noting the same proposition).

²⁸³ MNOOKIN ET AL., *supra* note 33, at 14–16; Jennifer K. Robbenolt, *Attorneys, Apologies, and Settlement Negotiation*, 13 HARV. NEGOT. L. REV. 349, 350 (2008).

²⁸⁴ A popular role play exercise for law students, The PowerScreen Negotiation, provides a good example of this kind of situation. See *Business and Commercial Dispute Negotiation Role*

dispute. Indeed, in such a negotiation it is entirely possible that the matter will settle without any value exchange whatsoever, even though that is what the parties were originally pursuing.

Most judges and lawyers would probably agree that this kind of settlement is good for the legal system, just as it is for the parties. The parties are able to conclude their matter without the need for judicial resources—and with an arguably better result—thereby conserving judicial resources for exceptional cases that require judicial resolution. Most lawyers and judges would also likely agree that the law should promote this kind of discussion by barring the admission of evidence from those discussions, because the exchange of information in those discussions is necessary to achieve an integrated result. They would also probably be surprised and dismayed, however, to learn that most of the legal negotiations leading to this outcome were fully subject to disclosure and admissibility because Rule 408 and its state progeny cover only the compromise of valuable consideration, and, even then, are subject to the many exceptions and other limitations identified in Part II.²⁸⁵

B. The Shift in the Structure of Legal Negotiation

The foregoing dynamic is made exponentially worse given the changes in the structure of legal negotiations since Rule 408 was first enacted in 1975.

1. From Face-to-Face to Texts and Social Media

When Rule 408 was enacted in 1975, most legal negotiations were face-to-face encounters. They were literally held between the lawyers, and sometimes clients, in a law firm conference room. Such face-to-face negotiations may have been, and often were, supplemented by letters, phone calls, and maybe an occasional teletype. This was the technology of the time, but it gave the process a certain formality that complemented the dominant adversarial model of negotiation. Legal negotiations were generally confined to a specific format and topic—distribution of value—and the spatial boundaries of the negotiation were clear.

This is still true today, but to a much lesser extent given the changing nature of technology. There are still lawyer letters and meetings, but there are also texts, e-mails, and, in some cases, blog posts and other forms of social media persuasion. For example, lawyers today frequently use texts as a means of back-channel communication with their counter-parts—before, dur-

Play: Powerscreen Problem, HARVARD LAW SCH., <http://www.pon.harvard.edu/shop/powerscreen-problem/> [<https://perma.cc/P3JZ-PBDX>].

²⁸⁵ See *supra* notes 37–40 and accompanying text.

ing, and after the negotiation—as well as with others who may have information that may become immediately pertinent in a negotiation.

Lawyers, of course, will approach such communications in the context of a specific negotiation with care and diligence. But changes in communications force us to expand our understanding of when legal negotiation is taking place—especially for purposes of applying Rule 408 and related state laws—and to consider how a protective rule of confidentiality needs to apply more broadly than to simply compromise discussions over value.

2. From Judges to Facilitators of Settlement

Structural changes affecting negotiation can be seen inside the courthouse as well, as judges have increasingly become involved in the negotiation process. FRCP 16 is an important driver of this phenomenon because it expressly authorizes federal judges to hold pretrial conferences for the purposes of “facilitating settlement.”²⁸⁶

A related factor has been the judicial embrace of mediation. As noted above, the rise of the modern ADR movement—arguably the most significant development in civil litigation since the liberalization of federal discovery rules in 1938—came after the promulgation of Rule 408 in 1975.²⁸⁷ As ADR has evolved,²⁸⁸ mediation has become the most significant of the alternative processes—especially in courts.²⁸⁹ It is a consensual process and therefore does not raise the kinds of constitutional questions posed by judicially compelled arbitration.²⁹⁰ Judges appreciate the ability of mediation to provide for better and more flexible outcomes, as well as for outcomes that are more durable and less likely to be the subject of appeal. As a result, most federal and state courts have instituted mediation programs, often at both the trial and

²⁸⁶ FED. R. CIV. P. 16(a)(5). For a critique of this development, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 379–80 (1982) (noting that judges are overworked, and that “managerial judging . . . provides litigants with fewer procedural safeguards to protect them from abuse of . . . authority”).

²⁸⁷ See KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES AND PRACTICE* 1 (3d ed. 2004).

²⁸⁸ The earliest days of the movement emphasized arbitration, perhaps because of its familiarity to the bench and the bar as an adversarial process. See Richard C. Reuben, *The Lawyer Turns Peacemaker*, A.B.A. J., Aug. 1996, at 54, 57–58 (discussing why arbitration was so “faddish” in the 1980s).

²⁸⁹ See RISKIN & WESTBROOK, *supra* note 28, at 313 (noting the rapid increase in the use of mediation). For an example of an early case discussing the constitutionality of judicially compelled arbitration, see *Southland Corp. v. Keating*, 465 U.S. 1, 10–11 (1984) (holding that federal law making arbitration provisions enforceable was binding on the states). See also Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 21–22 (“Today most courts enthusiastically enforce statutes, rules, and even agreements for consensual ADR.”).

²⁹⁰ See RISKIN & WESTBROOK, *supra* note 28, at 313 (“Unlike a judge or arbitrator, the mediator lacks authority to impose a solution.”).

appellate level.²⁹¹ Sometimes these programs are voluntary, but more often they are mandatory for particular cases, either by legislation or court rule.²⁹²

Judicial acceptance of mediation is a salutary development for the parties and the courts, but it is complicated for purposes of understanding the legal confidentiality of the proceedings. Historically, there have been a wide variety of mediation programs in the courts.²⁹³ But with court funding declining at both the state and the federal levels, courts have fewer funds for employees whose primary responsibility is the mediation of litigated cases.²⁹⁴ The private bar is able to help pick up some of this slack through pro bono roster programs, but, often, the rest is picked up by the judges themselves under the rubric of FRCP 16 settlement conferences.²⁹⁵

Thus, the question arises: are these judicial proceedings settlement conferences or mediations for purposes of their confidentiality? Some judges admit that they are not sure.²⁹⁶ Clearly, the judges are facilitating settlement in a manner consistent with mediation. But, as a formal matter, the proceeding is a Rule 16 settlement conference. The difference is crucial for purposes of the confidentiality of the proceedings because the law treats settlement conferences differently than mediations.

If they are deemed settlement conferences, then Rule 408 applies, and there is very little protection against the subsequent admissibility of statements made in the course of the settlement, as shown in Parts II and III above.²⁹⁷ On the other hand, if they are deemed mediations, they would be covered by that jurisdiction's mediation confidentiality rules. Yet even that provides little comfort. As the drafters of the Uniform Mediation Act ("UMA") found, there are more than 250 different state mediation confidentiality laws.²⁹⁸ Some states' mediation confidentiality laws apply to all media-

²⁹¹ See SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY, PRACTICE* app. B (2016–2017 ed. 2016).

²⁹² Mandatory mediation has been, and continues to be, controversial within the dispute resolution community. See RISKIN & WESTBROOK, *supra* note 28, at 466–67 (discussing mandatory mediation).

²⁹³ See Robert A. Baruch Bush, *Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades*, 84 N.D. L. REV. 705, 714 (2008).

²⁹⁴ RESOLUTION SYS. INST., *ECONOMIC DOWNTURN AND THE USE OF COURT MEDIATION* 1–2 (2012), <https://web.archive.org/web/20150922114403/http://www.aboutrsi.org/pfimages/CourtADRBudgetcuts.pdf>.

²⁹⁵ For an early discussion of this problem, see Menkel-Meadow, *supra* note 261, at 831–32.

²⁹⁶ For an empirical study, see Peter Robinson, *Adding Judicial Mediation to the Debate About Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335, 355–59 (discussing the extent to which judges label settlement proceedings as mediation).

²⁹⁷ See *supra* notes 151–302 and accompanying text.

²⁹⁸ Unif. Mediation Act prefatory note (Nat'l Conference Comm'rs on Unif. State Law 2003).

tions, but many other states offer confidentiality protections only to mediations of certain types under that state's governing statute or court rule.²⁹⁹

The drafters also found that the "privilege structure" is the most common form of protection for mediation communications, regardless of whether the mediation confidentiality protection is found in a rule that applies to all mediations or just specific types of mediations.³⁰⁰ The UMA was drafted in part to correct this problem, but even then it has been adopted in only about a dozen jurisdictions.³⁰¹ Although this is actually good from the perspective of the history of state passage of uniform laws,³⁰² that is little comfort to parties in non-UMA states. For them, the law is unclear. Their communications could be treated as settlement discussions, in which case they are often inadmissible for the reasons previously discussed. Or they could be treated as mediations, which, under state law, may not be confidential at all.³⁰³

C. An Anachronism Emerges

Rule 408 was born into a culture of legal negotiation that was largely positional and adversarial, but now finds itself an anachronism in a legal culture continuing to evolve toward a more open and interest-based norm of legal negotiation.

Like a square peg and a round hole, the fit is no longer there between the rule and the situation to which it is applied. With the benefit of research, experience, and hindsight, it is time to pivot to the future and reconstruct the rule so that it more effectively meets the needs of the present and emerging legal environment.

The following Part proposes that this can be accomplished simply by elevating the current Rule 408 from the quasi-privilege that the Advisory Committee drafted in 1975 to the full privilege that Congress intended when it grounded the rule in the extrinsic policy of encouraging the private settlement of legal disputes.³⁰⁴

²⁹⁹ *Id.*

³⁰⁰ *See id.* § 4 cmt. 2(a) (noting that the "privilege structure" is the "primary means by which communications are protected at law").

³⁰¹ The UMA has been enacted in Idaho, Iowa, Illinois, Nebraska, New Jersey, Ohio, South Dakota, Utah, Vermont, Washington, and the District of Columbia. *Mediation Act*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Act.aspx?title=Mediation%20Act> [<https://perma.cc/44PK-UWRY>].

³⁰² *See* James J. Brudney, *Mediation and Some Lessons from the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 809–12 (1998) (noting that it is not always the best practice "to measure a uniform or model act's success" simply by considering how many states have adopted it).

³⁰³ *See supra* notes 152–258 and accompanying text.

³⁰⁴ *See infra* notes 305–364 and accompanying text.

IV. RETHINKING RULE 408 AND RELATED STATE LAWS

A. *A Perfect Storm*

Congress enacted Rule 408 in 1975 for reasons of extrinsic policy—to foster the private settlement of legal disputes by assuring that communications made during those discussions are not later held against the speaker in a court of law.³⁰⁵ This is one time that Congress may have actually been prescient and ahead of its time, as the significance of the rule, and the rationale it deliberately chose among competing options, has become more important and relevant with the rise of interest-based negotiation and other consensual dispute resolution processes.

As drafted, amended, and judicially interpreted, however, the rule is far too narrow to meet that goal in the modern practice of law.³⁰⁶

This is especially problematic given the movement in legal negotiation away from the grudging release of information that historically characterized the positional bargaining anticipated by Rule 408 and toward a more modern, interest-based model resulting in disclosure of more and more information. Unfortunately, this is the very kind of information that an aggressive lawyer might seek if he or she thought it was potentially available.³⁰⁷

The net effect of this confluence of dynamics is a perfect storm that poses a grave threat to one of the most significant components of the U.S. legal system: the settlement of civil cases. As more practicing lawyers realize just how limited Rule 408's protections actually are, it is reasonable to expect that they will begin to take advantage of the opportunities the rule creates, as revised and interpreted, to gain access to legal negotiation evidence previously believed to be protected by the compromise discussion rule. They will be able to do this in their own cases, as well as by intervening in other cases with similar parties or issues that could yield or prevent the production of helpful evidence for their own cases.

The changing nature of legal negotiation gives attorneys every incentive to be aggressive in pursuit of compromise discussion evidence because the interest-based model of negotiation encourages the disclosure of more and more information about the parties' interests, needs, concerns, preferences, and other underlying issues. This disclosure could be devastating to the disclosing party if the negotiation fails and the legal negotiation evidence is introduced in later proceedings.

As courts are asked to consider these issues, it is reasonable to expect more jurisdictions will embrace the various narrowing approaches already

³⁰⁵ See *supra* notes 58–64 and accompanying text.

³⁰⁶ See *supra* notes 65–137 and accompanying text.

³⁰⁷ See *supra* notes 260–302 and accompanying text.

accepted by the courts in jurisdictions that have acted on these issues. This is the trend toward admissibility documented in Part II.³⁰⁸ To the extent courts continue this trend, the protections the rule provides become less and less meaningful. To the extent future courts reject these interpretations, they only create more complexity—circuit splits at the federal level that could require repeated interventions by the U.S. Supreme Court, and state splits that could encourage forum shopping by sophisticated multi-state actors.

The emerging norm of interest-based legal negotiation calls upon the law to provide more protection, not less; yet, as has been seen, the law is providing less protection, not more. As this divergence between law and the process needs of negotiation continues to broaden and deepen, it is reasonable to foresee retreat on disclosure by attorneys in the trenches of individual cases. Indeed, their ethical duty to zealously advocate for the best interests of their clients would seem to compel them to do so.³⁰⁹

Perfect storms bring great disasters, and this one would be no different. A worst-case scenario might look something like this: doctrinally, all states and the federal courts would adopt the limiting interpretations of Rule 408 and related state laws that are now recognized by some, if not many, jurisdictions. Worse yet, they would continue to draw upon the older rationales to develop other approaches for admitting legal negotiation evidence, given the invitation to permissiveness offered by the textual transition of the rule from one of presumptive inadmissibility to presumptive admissibility. At the end of the day, in the vernacular, the rule would be swallowed by its exceptions.

Realizing settlement discussion evidence is actually more available than previously believed, zealous attorneys would make it a practice to consider how to find such evidence, either in their own cases or in other cases involving the same or, in some cases, similar parties. The vast terrain of settled cases would become a hunting ground for potential evidence.

Such a development would defeat the rule's ultimate purpose of promoting settlement. Settlement would be discouraged because, as seen from the rise of modern interest-based negotiation, mediation and other consensual settlement processes that settlement—as distinguished from triumph—requires at least the minimal mutual satisfaction of party interests. The satisfaction of party interests requires disclosure of the parties' needs, concerns, and preferences. As Professor Susskind has reminded us many times, "You can't have shared problem-solving without sharing the problem."³¹⁰ Both le-

³⁰⁸ See *supra* notes 151–258 and accompanying text.

³⁰⁹ See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 2017) ("Competence"); *id.* r. 1.3 ("Diligence").

³¹⁰ Personal communications with Professor Susskind. See Email from Lawrence Susskind, Professor of Envtl. & Urban Planning, MIT Dep't of Urban Planning, to Richard C. Reuben, Professor of Law & Journalism, Univ. of Mo. Sch. of Law (Apr. 17, 2016) (on file with author).

gal ethical rules and common sense compel the conclusion that disclosure of party interests in a legal negotiation requires the assurance that such disclosures will not be used against the party in a subsequent legal proceeding if the negotiation fails.

The natural consequences of such a development are potentially catastrophic. Without that assurance, there will be no disclosure; and without disclosure, there will be no interest-based negotiation. Without interest-based negotiation, there will be no problem-solving in litigation; without problem-solving in litigation, there will be fewer settlements and more litigation.

Such an outcome is precisely the opposite of what Congress intended when it enacted Rule 408. It brings us back to the future, to the mode of adversarial legal negotiation that was in place when Congress enacted Rule 408 in 1975. It is difficult to imagine a more absurd result.³¹¹

B. Rewriting the Rule as a Full Privilege

These structural, institutional, and doctrinal problems can be remedied by elevating the rule from its current status as a “quasi-privilege” to a full and formal privilege.³¹² The mediation privilege of the UMA, enacted in 2001 with an understanding of modern negotiation and other settlement practices, provides a secure, politically tested, and judicially embraced model for making this transition. The argument begins with a deeper understanding of the law of privilege.

1. Privilege as a Doctrine of Evidentiary Exclusion

At its essence, the law of evidence begins with the proposition that “the legal system ‘has a right to every man’s evidence.’”³¹³ From there, centuries of experience have carved out many exceptions to this basic rule of admissibility for many different reasons.³¹⁴

³¹¹ See *Church of the Holy Trinity v. United States*, 143 U.S. 457, 461 (1892) (articulating the well-established doctrine that a statute shall not be interpreted so as to produce an absurd result).

³¹² For an earlier approach to dealing with the problems associated with Rule 408, see Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 965 (1988) (“To maximize the odds that communications will be protected by rule 408, an attorney should either (1) file suit before beginning negotiations (a move [that] may not be conducive to constructive discussions) or (2) announce, as a preface to communications, that he is invoking the protections of rule 408, that communications already completed between the parties establish that they have a dispute, that his client fears the dispute could lead to litigation, and that the purpose of his communication is to present an offer of compromise and to contribute to negotiations looking toward a settlement agreement.”).

³¹³ IMWINKELRIED, *supra* note 76, § 2.1.

³¹⁴ See *id.* § 2.1–.3 (providing a brief history of the evolution of evidentiary exclusions, beginning with the cumbersome practice of precluding certain witnesses from testifying at all to

In most cases, the exception arises because of concerns about the integrity of the evidence or the proper functioning of the judicial system—hereinafter referred to as “institutional concerns.”³¹⁵ Rules of hearsay and relevance are common examples of these rules, which are rules of limited admissibility in that they allow the evidence to be received in some circumstances but not others.³¹⁶ Under the law of hearsay, a potential heir’s testimony about what the decedent told him regarding distribution of his estate ordinarily would be inadmissible in a will dispute under the hearsay rule if offered as proof of the potential heir’s share because of obvious concerns about the reliability of the proffer.³¹⁷ The potential heir may be able to get the out-of-court statement into evidence, however, to establish the decedent’s affection for him under the “state of mind” exception to the hearsay rule.³¹⁸

In some cases, evidence is excluded for reasons of “extrinsic social policy”—that is, a policy determination that the evidence should be excluded because it would interfere with other goals that are more important to society than the admission of the evidence.³¹⁹ These exclusions for reasons of extrinsic social policy are now known as the rules of privilege, and they are very different than the other traditional bases for exclusion.³²⁰

Rather than rules of limited admissibility, privileges are absolute barriers to admissibility: If the evidence meets the requirements of the privilege, and a recognized exception does not apply, the evidence is excluded.³²¹ Thus, if the heir in a will dispute sought to call the deceased’s lawyer to testify about what the decedent told the lawyer about his share under the will, the lawyer could assert the attorney-client privilege as a complete bar to the testimony for any purpose (absent an applicable exception).

There are other differences as well. Challenges based on institutional concerns about the integrity of the evidence can be raised by either party or even by the court on its own motion. Privileges to bar the use of evidence, however, can be asserted only by someone who is specifically authorized to assert that privilege, known as the “holder” of the privilege.³²² Depending on the privilege, the holder may not even be a party to the suit, such as with the spousal privilege, which permits a non-party spouse to assert the privilege to block the introduction of even a highly relevant spousal communication be-

more nuanced doctrines that focus more on the reason for the exclusion rather than just who is proffering the evidence).

³¹⁵ *Id.* §§ 1.1, 2.1.

³¹⁶ MUELLER ET AL., *supra* note 67, §§ 4.2, 8.1.

³¹⁷ FED. R. EVID. 801(c), 802.

³¹⁸ FED. R. EVID. 803(3).

³¹⁹ IMWINKELRIED, *supra* note 76, § 1.1.

³²⁰ *Id.* § 1.3.

³²¹ *Id.*

³²² *Id.*

cause of the extrinsic policy favoring the sanctity of marital communications.³²³ Not so with challenges based on institutional concerns about the evidence. Because these challenges exist to help ferret out the truth of what happened in individual cases, rather than implement a broader social policy, they can only be asserted by the parties in the dispute.³²⁴

Because of the strength of privileges as a barrier to admissibility, courts are generally loath to create privileges on their own, and typically construe privileges narrowly.³²⁵ Executive privilege provides a famous example, as the federal courts rejected assertions of this privilege by Presidents Richard Nixon and Bill Clinton in their efforts to preclude access to evidence in their respective scandals.³²⁶

Importantly, privileges further vary according to the strength or robustness of their protection. Some privileges are considered “absolute” in that they are only subject to waiver or certain narrow, specific exceptions, and leave courts no discretion to receive or reject the evidence.³²⁷ Others are considered “qualified” privileges in that they permit the court to engage in judicial balancing to determine if the privilege will apply to bar evidence in a particular case. Examples include the privilege for trade secrets³²⁸ and the identity of confidential informants.³²⁹

2. Rule 408 as a “Quasi-Privilege”

Rule 408 is a unique hybrid that includes elements of both privilege and exclusions based on institutional concerns. Its placement in Article IV of the Federal Rules of Evidence bears a Janus-like significance. Looking to the past, it reflects Wigmore’s historical rationale for the rule as a doctrine of relevance. Looking to the future, it recognizes its deeper purpose—to promote the private settlement of dispute. The drafters acknowledged both rationales in the Advisory Committee Notes to the original 1976 rules, but, importantly, conceded that the “more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.”³³⁰

³²³ *Id.* § 1.3.6.

³²⁴ *See id.* § 1.1 (comparing the rationale behind “institutional concerns” with the social policy rational of privileges).

³²⁵ *Id.* § 4.2.4.

³²⁶ *Id.* § 1.1; *see* *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (“[I]t is . . . settled that the President is subject to judicial process in appropriate circumstances.”); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (providing “that the legitimate needs of the judicial process may outweigh Presidential privilege”).

³²⁷ *See generally* IMWINKELRIED, *supra* note 76, § 6.3 (describing “[t]he structure of an absolute communications privilege”).

³²⁸ *See, e.g.*, CAL. EVID. CODE §§ 1060–1063 (West 2017).

³²⁹ *Id.* §§ 1040–1042.

³³⁰ FED. R. EVID. 408 advisory committee’s notes on proposed rules.

The analogy to the mythological Janus is particularly apt. Janus was the Roman god of transitions, of beginnings and endings, and played a key role with respect to conflict and disputes.³³¹ He is said to have opened his temple doors during times of war, to offer refuge to those seeking relief. So, too, Rule 408 offers a safe harbor for those seeking to end disputes, fostering the communications necessary to resolve disputes by ensuring their confidentiality. This was the primary hope and intention of its drafters.

Yet, as this Article documents, Rule 408 is in fact far too porous to provide this safe harbor—a problem that again speaks to the Janusian quality of transition. Litigation was far different in 1975 than it is today, nearly a half century later. It was, for the most part, tightly focused on economic redistribution pursuant to an adversarial process. It was discussion about that economic exchange that the rule sought to shelter, and appropriately so given the narrow distributive focus of these talks, the disfavor with which the law views barriers to “every man’s evidence,” and the historic nature of the compromise discussion as a doctrine of relevance and limited admissibility.

As shown, legal negotiations are far different today as they steadily evolve toward a more consensual, problem-solving process model in which the exchange of interests, concerns, and preferences can lead to the creation of value rather than its mere distribution, and to terms in addition to, or other than, the simple exchange of money.³³² Apologies, changes of practices, and acknowledgments are just a few of the many non-monetary terms that are commonly found in today’s settlement agreements.³³³ To be sure, such concessions can have economic value, but often in ways that are more speculative than “the validity or amount of a dispute claim” that is the crux of Rule 408.

As currently drafted, contemporary settlement discussions about these issues simply do not come within the narrow reaches of the rule, even though they often constitute the bulk of legal negotiation. Worse yet, even when the rule does apply, its many exceptions and limitations further undermine its utility.

The problems outlined in Parts II–IV suggest that the compromise hybrid model that made sense in 1975 no longer makes sense today, and that the courts cannot be counted upon to fix the problem. Just as practice has evolved, so, too, Rule 408 must evolve from a quasi-privilege to a full privilege if our legal system is to continue to honor the primary rationale em-

³³¹ *Janus*, ENCYCLOPÆDIA BRITANNICA, <https://www.britannica.com/topic/Janus-Roman-god> [<https://perma.cc/82U5-JMZ9>].

³³² See *supra* notes 260–302 and accompanying text.

³³³ For a discussion of apology, see generally, for example, Robbenolt, *supra* note 283. For a discussion of other non-economic considerations in negotiation, see MNOOKIN ET AL., *supra* note 33, at 14–15.

braced by the Advisory Committee—the extrinsic policy of promoting private settlement.

The law does have some recent experience in making such a transition, and in a similar context—mediation, which like negotiation, is a consensual dispute resolution process dependent upon the exploration and at least minimal mutual satisfactions of party interests.

3. The Uniform Mediation Act

The most significant recent legislative drafting effort on a rule of confidentiality is the Uniform Mediation Act (“UMA”).³³⁴ The first uniform rule to be jointly drafted by representatives of the Uniform Law Commission (“ULC”) and the American Bar Association (“ABA”) in its century-long history of partnership, the UMA also provides critical guidance on how to recraft Rule 408 as a privilege.

a. Background

The UMA was enacted in 2001 after a four-and-a-half-year drafting effort that included nearly a dozen published drafts for comment, preceding as many public drafting sessions.³³⁵ Public participation was strong and diverse, including more than fifty official observers from within and beyond the law, and within and beyond the ADR community, as well as scores of other interested parties.³³⁶ The drafting was a difficult process, as the committees struggled with many of the issues that now plague Rule 408. This makes particular sense given that mediation is simply a form of “facilitated negotiation.”³³⁷

At the end of the day, however, the UMA was broadly endorsed for consideration by the states, the ABA, the major ADR professional organizations, the significant ADR provider organizations, judges’ groups, law professors, and many others.³³⁸ It has been signed into law by nearly a half-dozen juris-

³³⁴ In the interest of full disclosure, the author served as the Reporter for the ABA drafting committee of the Uniform Mediation Act, and the Associate Reporter for the Uniform Law Commission’s (“ULC”) drafting committee. Nancy Rogers was the Reporter for the ULC’s drafting committee and had overall responsibility for the project.

³³⁵ Reuben, *Dust Settling*, *supra* note 8, at 100 & n.3, 106, 111. For a history, see *id.* at 101–08.

³³⁶ See *id.* at 105.

³³⁷ Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 967 (2000) (internal quotation marks omitted).

³³⁸ Reuben, *Dust Settling*, *supra* note 8, at 100 & n.2.

dictions in the fifteen-plus years since its enactment,³³⁹ which is a good pace by uniform law standards.³⁴⁰

Though it has been introduced in a few jurisdictions that ultimately did not adopt it, the reason it did not move forward dealt with political will, not substantive concerns about the Act. In enactment states, it has been well received by the practicing bar and by the courts. A Westlaw search in January 2018 revealed only fifty-two mentions of the UMA in the state cases database since its enactment in 2001, most of which are pro forma or approving citations.³⁴¹ The most significant substantive issue appears to be what constitutes waiver of the mediation privilege under the Act. This issue makes sense given the inevitable need for courts to interpret new statutes, especially on such fact-driven issues as waiver.³⁴²

The critical point here is that the UMA is a consensus document on the needs of the settlement process in today's litigation environment. It was drafted through a national consensual process, endorsed by the ABA through the national political process, embraced by the states through their legislative processes, and upheld by the courts that have considered it through their judicial processes. Although drafting was often heated in the clash of legitimate interests and concerns, most if not all concerns were addressed to the point of consensus if not unanimity, to the point where even its harshest critics ultimately urged its passage by the ULC.³⁴³ In 2003, the United Nations Commission on International Trade Law drew upon the Uniform Mediation Act privilege in structuring similar provisions for its 2002 Model Law on International Commercial Conciliation.³⁴⁴

The second critical point goes directly to the issues confronting Rule 408: after extensive consideration and debate over a period of years, the drafters rejected the Rule 408 structure as a national standard for protecting mediation communications against subsequent admissibility in favor of a

³³⁹ The ULC tracks such information on its website. *See Acts*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/Acts.aspx> [<https://perma.cc/6P2A-QFKM>]. For the UMA, see *Mediation Act*, *supra* note 301, for legislative adoption information.

³⁴⁰ *See* Bridney, *supra* note 302, at 805–13 (providing that enactment rates of “uniform” legislation tend to be higher than those of “model” legislation).

³⁴¹ “*Uniform Mediation Act*,” WESTLAW, <https://next.westlaw.com/> (select “All States” in search bar; then search “Uniform Mediation Act”).

³⁴² *See, e.g.,* Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 71 A.3d 888, 890 (N.J. 2013) (providing an example of where the plaintiff waived mediation privilege).

³⁴³ Reuben, *Dust Settling*, *supra* note 8, at 101 (noting that the UMA was “able to draw the support from even its most ardent critics”).

³⁴⁴ *See* G.A. Res. A/57/17, Annex I, arts. 8–10 (June 17–28, 2002); *see also* Luis Miguel Diaz & Nancy Oretskin, *The U.S. Uniform Mediation Act and the Draft UNCITRAL Model Law on International Commercial Conciliation*, *MEDIATE* (Mar. 18–19, 2002), <http://www.mediate.com/articles/daiz2.cfm> [<https://perma.cc/TB2Q-4D3E>].

strong privilege with limited exceptions.³⁴⁵ More pointedly, Rule 408's structure was not even a factor in the intense debate over how to structure the protection because of concerns over its weakness.³⁴⁶ Rather, it was quickly dismissed as drafters and commenters focused on what were perceived to be the two most realistic choices: a categorical rule of exclusion with no exceptions (akin to an absolute privilege) and the privilege approach that the drafters ultimately adopted.³⁴⁷

b. The UMA Privilege

Both Rule 408 and the UMA are unusual rules in the world of privilege. However, their quirks point in very different directions. As a quasi-privilege, Rule 408 includes characteristics of both privilege and institutional doctrines of exclusion, and, as evolved and interpreted, posits a rule of presumptive admissibility set in the context of limited inadmissibility.

The UMA goes the other way in providing the strongest privilege known to the law. Unlike other privileges, its scope by statute extends far beyond judicial proceedings and applies to preclude admission of mediation communications in administrative proceedings, arbitrations, and even grand jury proceedings.³⁴⁸ Moreover, it is explicitly available to more holders than any other privilege, extending to mediators and other "nonparty participants" in the mediation—including witnesses and support people—as well as the parties themselves.³⁴⁹ Finally, although privileges can generally be waived expressly or by conduct inconsistent with the privilege, the UMA does not permit for waiver by conduct; any waiver must be express.³⁵⁰

The drafters worked hard at clarity, pushed in part by the presence of non-lawyers at the table as well as a felt need to constrain judicial discretion, while at the same time allowing courts to do justice in individual cases within those constraints.³⁵¹ The UMA is a communications privilege, and, unlike most statutory communications privileges, specifically articulates who can block the admissibility of mediation communications evidence—a feature made necessary by the presence of uncommon privilege holders, specifically the mediator and nonparty participants.³⁵²

³⁴⁵ See Unif. Mediation Act § 4 cmt. 2(a) (Nat'l Conference Comm'rs on Unif. State Law 2003) (noting that "[t]he [d]rafters ultimately settled on the use of the privilege structure").

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* §§ 2(7), 3.

³⁴⁹ *Id.* § 4(b).

³⁵⁰ *Id.* § 5.

³⁵¹ See Reuben, *Dust Settling*, *supra* note 8, at 112–13 ("[c]hoosing specificity over brevity").

³⁵² Unif. Mediation Act § 4(b) (Nat'l Conference Comm'rs on Unif. State Law 2003).

The exceptions to the general rule of privilege are even more telling of the drafter's commitment to clarity and balance. Section 6 of the UMA essentially includes two classes of exceptions, which were referred to during the drafting as "above the line" and "below the line" exceptions.³⁵³ The Section 6(a) exceptions do not permit judicial discretion; if they apply, there is no privilege and the mediation communications evidence comes in. These include situations such as the mutual agreement of the parties to admit the evidence,³⁵⁴ evidence of crime or fraud,³⁵⁵ evidence of professional malpractice,³⁵⁶ and evidence of the abuse of vulnerable parties.³⁵⁷ These exceptions were not controversial in the drafting or adoption processes, and, not surprisingly, reflect several of the exceptions courts have found for Rule 408.

The "below the line" exceptions of Section 6(b) do permit judicial discretion to admit the evidence in certain situations, such as in cases involving felonies or claims that the mediation agreement was fraudulently induced or subject to some other defect of contract formation.³⁵⁸ Even then, the UMA provides the courts with explicit guidance as to how to conduct this balance with a presumption of inadmissibility, stating such evidence should be admitted only if the court determines:

after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality, and that the mediation communication [evidence] is sought or offered . . . [for a purpose specified by statute].³⁵⁹

c. Applicability to Rule 408

Although it would take some adaptation, the UMA provides a blueprint for how to provide the safeguard for legal negotiations in today's litigation environment that Congress intended when it enacted the rule in 1975.

With respect to structure, the privilege structure provides stronger, more certain protections than the hybrid Rule 408, and this accounts for the more interest-based format of many legal negotiations today. It is the need to accommodate the many interests, concerns, and preferences in a modern settlement process that led the drafters of the UMA to explicitly reject the Rule 408

³⁵³ Reuben, *Dust Settling*, *supra* note 8, at 121.

³⁵⁴ Unif. Mediation Act § 6(a)(1).

³⁵⁵ *Id.* § 6(a)(4).

³⁵⁶ *Id.* § 6(a)(5).

³⁵⁷ *Id.* § 6(a)(7).

³⁵⁸ *Id.* § 6(b).

³⁵⁹ *Id.*

approach as a structure for a uniform state law to secure the confidentiality of mediation communications.³⁶⁰ Communications made in traditional legal negotiations deserve no less protection. Indeed, it is a cruel irony that mediation provides parties far more protection against subsequent admission than the negotiation process upon which mediation is based, at least in UMA states.

Redrafting Rule 408 as a full privilege would further allow the drafters to clearly define and broaden the scope of the protection to include all aspects of the legal negotiation, not just those statements made pursuant to the value of disputed claims. This would include statements of apology, discussions about non-economic compensation, as well as settlement terms other than the exchange of value.³⁶¹

Redrafting Rule 408 as a full privilege like the UMA would add certainty and clarity to the law by articulating limited exceptions that will inspire public confidence in the private settlement process. At the same time, it would also provide courts with critical guidance for implementing what continues to be congressional intent with respect to Rule 408. In this regard, the UMA's two-part approach to exceptions is particularly instructive. Many of the UMA's non-discretionary "above the line" exceptions already apply in the context of Rule 408, though others may be worth considering, such as the exception to permit evidence relating to the abuse of vulnerable parties.³⁶² At the same time, the rule accommodates the need for judicial discretion in other situations—but, critically, provides courts with clear guidance in terms of how to exercise this discretion in a way that ensures fidelity to congressional intent.³⁶³

To be sure, there are many issues to be considered in such a drafting process, and the UMA was drafted in the context of a dispute resolution process that needed to account for considerations that are not found in traditional legal negotiations, such as the presence of the third party neutral. As a result, there will be aspects of the UMA privilege that are less applicable to the legal negotiation context than they are to the mediation context, such as the need to confer holder status on a third party neutral.³⁶⁴ At the same time, the thoughtfulness of the UMA process has also identified and resolved issues that may be worth a fresh look by a Rule 408 drafting committee.

³⁶⁰ *Id.* § 4 cmt. 2(a).

³⁶¹ MNOOKIN ET AL., *supra* note 33, at 14–16; Robbenolt, *supra* note 283, at 363.

³⁶² Unif. Mediation Act § 6(a)(7) (Nat'l Conference Comm'rs on Unif. State Law 2003).

³⁶³ *Id.* § 6(b).

³⁶⁴ There would be no need to consider a special classification of holder status for the mediator such as is found in UMA section 4(b)(2). *See id.* § 4(b)(2). Nor would there be a need for special rules limiting the testimony of the mediator, as found in section 7(c). *See id.* § 7(c).

CONCLUSION

There is little question that the intent and purpose of Rule 408 and related state laws is to promote settlement in civil cases by rendering statements made in such discussions inadmissible in subsequent proceedings—in effect providing a safe harbor for candid settlement discussions that can help courts operate more efficiently and effectively.

There is also little question that settlement is better for the parties in many cases. It allows the parties to use that safe harbor to explore their needs and concerns in order to come up with a mutually satisfying resolution of their dispute, without fear that such disclosures will lead to exploitation by virtue of their admission in a court of law if the negotiation fails. This is the essential predicate of modern negotiation, as well as the mediation movement built upon that foundation.

Close analysis of the statutory text and doctrine in the state and federal courts, however, demonstrates a vast gulf between these noble intentions and the reality of the state of the law of legal negotiation, and how it can actually play out in particular cases. This is a predictable outcome of a perfect storm: evolved statutory permissiveness on the federal side without conforming legislation by the states, judicial desire to do justice by allowing parties in cases before them access to the evidence necessary to prove their cases, and a shift in negotiation practice toward greater disclosure to facilitate broader settlements.

As clear as the problem is, fixing it will be challenging. Political will may be the most significant issue. Though this research focuses on cases where the Rule 408 claim was rejected, even a cursory review of the rest of the Rule 408 cases suggests that courts often do apply the rule's protections, probably more often than they reject the claim. Thus, the problem is somewhat obscured by the fact that it is one of potential, rather than certainty, in any particular case. Such a dynamic makes it difficult to develop the political will for change. A cataclysmic event, such as the admission of settlement discussions evidence in a high-profile case, could bring enough attention to the issue to galvanize a reform effort, but if and when that will happen is highly speculative.

Moreover, even if the potential for admission is realized in particular cases, the effect of the problem is dispersed rather than concentrated. That is to say, there is likely to be little if any coordination among attorneys whose clients have been harmed by the leniency of Rule 408, leaving them frustrated in individual cases but unable to see the larger problem that has been presented in this Article. Nor is it likely that the research herein presented will be replicated any time soon or that any entity will step up to provide ongoing monitoring of the issue.

Finally, change in the law is challenging even with political will. The need to change must be proven, as hopefully has been done here. But even then, the mechanics of change are difficult. In this context, for example, this Article has simply proposed elevating the protection for compromise negotiations from a “quasi-privilege” to a full privilege and broadening the protection to apply to all aspects of legal negotiations rather than just compromise discussions over value. Even that, however, would require redrafting the federal rule, again, and moving its placement from Article IV to Article V of the Federal Rules of Evidence. To some traditionalists, that alone might seem heretical. Then there is the matter of getting all fifty states to conform—no small matter, as evidenced by the fact that the overwhelming majority of state rules are still based on the 1975 formulation of Rule 408, having not yet even caught up with the 2006 and 2011 changes.

It is fortunate that the universe of U.S. legal institutions includes two entities that can help make such a transition much easier, assuming there is the political will to act and to do so in a coordinated way. The first of these institutions—the Advisory Committee for the Federal Rules of Evidence—is the essential starting point. It alone has authority to recommend changes to the Federal Rules of Evidence, and its recommendations are almost always adopted by the U.S. Supreme Court and Congress for application in all federal courts.

The second of these institutions is the National Conference of Commissioners on Uniform State Laws—or, as it is commonly known, the Uniform Law Commission. The ULC’s mission is to provide for uniform state laws in areas where uniformity in state laws is desirable, such as contracts and trusts.

The ULC has already recognized the importance of uniformity on the issue of mediation confidentiality, adopting a mediation privilege among other issues when it adopted the Uniform Mediation Act in 2001.³⁶⁵ Vertical and horizontal uniformity of confidentiality law for legal negotiations are just as important as mediation, if not more so, given the similarity of the dispute resolution processes, and the much higher prevalence of legal negotiations as compared to mediations.

The experience to date with the adoption of Rule 408 in the states suggests that it may be inefficient, if not counter-productive, to leave the adoption of a revised federal rule to be handled on an individual state basis. The risk of variations rises with each state’s consideration, thereby undermining the goal of uniformity, and there is no assurance that all states will act at substantially the same time, if at all.

The ULC can overcome this inefficiency by adopting the revised federal rule as a uniform law, perhaps with minor revisions appropriate to state

³⁶⁵ See *supra* notes 335–337, 348–352 and accompanying text.

courts, and then sending that uniform rule to the states for adoption. Uniform law commissioners are said to have a “moral obligation” to help promote the enactment of duly adopted uniform laws in their states and to keep the final enactments as close as possible to proposed uniform law to assure uniformity.³⁶⁶

Even with these institutions, fixing the problems that now plague Rule 408 and related state laws will take time and effort. But the need for reform is there. The blueprint for reform is there. The opportunity for reform is there. The time to seize it is now.

³⁶⁶ Reuben, *Dust Settling*, *supra* note 8, at 103 n.20.

