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# Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility under Federal Rule of Evidence 408

Fred S. Hjelmeset

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# IMPEACHMENT OF PARTY BY PRIOR INCONSISTENT STATEMENT IN COMPROMISE NEGOTIATIONS: ADMISSIBILITY UNDER FEDERAL RULE OF EVIDENCE 408<sup>1</sup>

FRED S. HJELMESET<sup>2</sup>

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<sup>1</sup>Rule 408, Compromise and Offers to Compromise, provides: 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.

FED. R. EVID. 408.

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## I. INTRODUCTION

In *Davidson v. Prince*,<sup>3</sup> the Court of Appeals of Utah, in dicta, suggested that "courts construing Federal Rule of Evidence 408 and similar state rules have held that evidence of statements made in settlement negotiations can and should be admitted for purposes of impeachment."<sup>4</sup> But this is not necessarily so.

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<sup>3</sup>813 P.2d 1225 (Utah Ct. App. 1991) (reprinted in JON R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE 430 (8th ed. 1995); noted in 23 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE & PROCEDURE, EVIDENCE § 5304, at 66 n.13, § 5307, at 73 n.66, § 5314, at 90 n.60 (Supp. 1995)), cert. denied, 826 P.2d 651 (Utah 1991).

<sup>4</sup>*Id.* at 1233 n.9. The court did not base its ruling on this interpretation of Rule 408, however, but held instead that the trial court correctly admitted plaintiff's statement in a letter to defendant's insurer, since the letter was not written as part of compromise negotiations, and therefore Utah Rule of Evidence 408 (Identical to Federal Rule of Evidence 408) did not apply. *Id.* The letter concluded: "You may speak with us directly or we can send it to lawyers and to court, you decide." *Id.* at 1233. Defendant's chief theory at trial was that plaintiff, who was attacked and gored by a stampeding steer released from defendant's overturned cattle truck, was contributorily negligent by cornering the animal. *Id.* at 1232. Defendant therefore stressed the importance of the distance between plaintiff and the steer when it charged. 813 P.2d at 1232. In deposition testimony, plaintiff estimated the distance to be 22 feet. *Id.* In the letter in question, however, plaintiff stated the distance to be "some 10 feet." *Id.* at 1232 n.8. This statement was admitted, and plaintiff was found forty percent at fault. *Id.* at 1227. One commentator notes that the court, in refusing to accept the letter as part of compromise negotiation, seems divided between a temporal approach (referring to negotiations as an event) and a functional approach (whether the purpose or intent behind the words was to further a compromise). 23 WRIGHT & GRAHAM, *supra* note 3, § 5307, at 73 n.66.

The question of impeaching a party by prior inconsistent statements in compromise negotiations reflects the tension between two important policies: accommodating the truth-finding process and furthering the policy of encouraging settlements.<sup>5</sup> The structure of Rule 408 leaves the question open and the tension unresolved,<sup>6</sup> and this has resulted in divergent decisions<sup>7</sup> and comments.<sup>8</sup>

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<sup>5</sup>See AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, EMERGING PROBLEMS UNDER THE FEDERAL RULES OF EVIDENCE 60, 61 (2d ed. 1991) ("To admit [settlement statements] is, of course, inconsistent with the announced policy of encouraging settlements. At the same time, such evidence may be quite valuable to the truth-finding process. The few decisions note but do not purport to resolve the tension between these two concerns.") (footnote omitted).

<sup>6</sup>*Id.*; see also Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 974 (1988) (noting that courts have not formulated a consistent, reliable body of doctrine in this area).

<sup>7</sup>Compare *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542 (10th Cir. 1991) (in action against employer pursuant to the Age Discrimination in Employment Act, defendant's subsequent letters to EEOC regarding planned mandatory retirement at age 65 were properly excluded when offered to impeach defendant executives' testimony denying the existence of such plans) with *Freidus v. First Nat'l Bank*, 928 F.2d 793 (8th Cir. 1991) (in a breach of contract suit, letters exchanged between the parties during compromise negotiations were properly admitted to impeach by specific contradiction testimony by plaintiff's agent/husband that defendant never gave reasons for its action regarding foreclosure).

<sup>8</sup>See, e.g., Judge Sam Pointer, Speech at Seminar for Newly Appointed United States District Judges, Federal Judicial Center (June, 1975), quoted in STEPHEN A. SALTZBURG & KENNETH R. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 190 (3d ed. 1982) (suggesting that Rule 408 would not require exclusion where "it is being offered to show a prior inconsistent statement of a witness—to impeach a witness") (for a contrasting view, see *infra* note 231); 23 WRIGHT & GRAHAM, *supra* note 3, § 5314, at 287 (1980) (advocating admission of inconsistent statements in settlement negotiations to impeach a party who testifies, but excluding the fact "that it was made during settlement negotiations."); 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 172, at 470 (1985) (recommending admission of such evidence, but noting that "there seems to be no authority in point."); Newell H. Blakely, *Article IV: Relevancy and Its Limits*, 20 HOUS. L. REV. 151, 242 (1983) (suggesting that admission of such evidence to impeach "seems to be the better view."). But see, e.g., MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 408.1, at 265 (2d ed. 1986) (advocating that "conduct or statements made during compromise negotiations should not be admissible as inconsistent statements to impeach.") (footnote omitted); 1 STEPHEN A. SALTZBURG & MICHAEL M. MARTIN, *FEDERAL RULES OF EVIDENCE MANUAL* 351 (5th ed. 1990) (advising against admitting settlement statements as impeachment evidence "when they are used to impeach a party who tried to settle a case but failed."); Jane Michaels, *Rule 408: A Litigation Mine Field*, 19 LITIGATION 34, 37 (Fall 1992) (suggesting that admitting prior inconsistent statements for impeachment "would eviscerate Rule 408."); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 18 (1986) (propounding that most courts recognize that allowing the parties to use such evidence for impeachment purposes "would destroy" Rule 408); Jon R. Waltz & J. Patrick Huston, *The Rules of Evidence in Settlement*, 5 LITIGATION 11, 16 (Fall 1978) (proposing that courts "should almost never admit a party's bargaining statements as discrediting prior inconsistent statements.").

The drafters' original intent behind Rule 408 was to expand the scope of the common law protection for offers to compromise<sup>9</sup> and to clarify its application.<sup>10</sup> However, drafting shortcomings,<sup>11</sup> ambiguities,<sup>12</sup> and an open-ended provision for exceptions<sup>13</sup> have contributed to increasing

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<sup>9</sup>"The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact. . . . An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers." FED. R. EVID. 408 advisory committee's note (as printed at 56 F.R.D. 183, 227 (1972) (citation omitted)).

<sup>10</sup>"Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations." *Id.*

<sup>11</sup>*See, e.g.,* Waltz & Huston, *supra* note 8, at 16 (noting that Rules 408 and 410 of the Federal Rules of Evidence "suffer from both under- and overdrafting"); Brazil, *supra* note 6, at 996 ("By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege rationale . . . [T]he drafters constructed a rule that is unfaithful to its own rationale."); SALTZBURG & REDDEN, *supra* note 8, at 191 (suggesting that Rule 408 be made consistent with Rule 410 which does not allow the use of bargaining statements for impeachment). Kristina M. Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 REV. LITIG. 665, 669 (1993) (noting that sentences 1, 3, and 4 of Rule 408 "create a Pandora's box of exceptions to the general exclusion of compromise evidence, which was probably not what the drafters intended.") (footnote omitted).

<sup>12</sup>*See, e.g.,* Leslie T. Gladstone, Comment, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 PEPP. L. REV. S237, S238 (1989) (noting that courts are in disagreement as to the intended scope of the rule and that "the direction of rule 408 remains unclear."); Kerwin, *supra* note 11, at 668 (noting that Rule 408 contains ambiguities and gaps.).

<sup>13</sup>*See, e.g.,* Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection*, 2 OHIO ST. J. ON DISP. RESOL. 37, 40 (1986) ("[T]he exceptions are so numerous that they almost swallow the rule as applied to mediation."); Michaels, *supra* note 8, at 37 ("In fact, the number of permissible purposes is limited only by the ingenious minds of the litigation bar"); Gladstone, *supra* note 12, at S238 (acknowledging that exceptions and loopholes within Rule 408 "potentially limit its applications."); Note, *Making Sense of Rules of Privilege Under the Structural (II) logic of the Federal Rules of Evidence*, 105 HARV. L. REV. 1339, 1348-49 (1992) [hereinafter *Making Sense*] ("[The exceptions] are broad and often allow evidence perilously close to the key issue of liability.") (footnote omitted); Kerwin, *supra* note 11, at 668 ("[T]his ['another purpose'] provision provides great incentive to find creative ways to recharacterize compromise evidence to fit into these exceptions."). *But cf.* 23 WRIGHT & GRAHAM, *supra* note 8, § 5308, at 238:

Although the use of compromise evidence for some permissible purpose is customarily talked of in terms of an "exception" to the general rule, this is, strictly speaking, incorrect. The evidence is admissible because it is beyond the scope of the rule of exclusion, not because of any exceptions to the rule.

(footnote omitted). However, even Chief Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York and member of the Rules Advisory Committee, has used the term "exception" to characterize the limitations on 408's exclusionary treatment contained in its last sentence. 2 JACK B. WEINSTEIN ET AL., WEINSTEIN'S EVIDENCE 408-37 (1995).

apprehension about the Rule's utility<sup>14</sup> and a retreat to common-law safeguarding techniques<sup>15</sup> among cautious attorneys.

This note will explore the concept of compromise and the public policy in furtherance of compromise and settlement, and then discuss whether Rule 408, in its current form, is maximizing its potential to effectively serve that public policy. The note concludes that an amendment extending Rule 408's protective reach to exclude a party's prior inconsistent statements in compromise negotiations from admission into evidence for impeachment purposes would strengthen the inducement to settle claims without erecting any new substantial obstacles in the way of the truth-finding process. The central rationale is that, if the laws permit compromise negotiations to become arenas where a party could risk a potential *coup de grace* to its case, this risk would weigh against a party's initial decision to engage in compromise and thus effectively undermine the public policy encouraging settlements.<sup>16</sup>

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<sup>14</sup>See, e.g., MICHAEL H. GRAHAM, EVIDENCE TEXT, R, ILLUSTRATIONS AND PROBLEMS 457 (1983)(Rule 408 is "[d]ifficult to apply in practice."); Brazil, *supra* note 6, at 1029 (noting that lawyers should proceed with caution when engaging in compromise negotiations); Michaels, *supra* note 8, at 34 (noting that Rule 408 "is more dangerous than it looks" and that "[v]eteran negotiators know that Rule 408 is full of perils, pitfalls, and exceptions."); David K. Rees, *Rule 408; Statements Made in the Course of Settlement Negotiations*, 20 COLO. LAW. 1520 (1991) (alerting lawyers to the possibility that damaging settlement statements "will not necessarily be excluded from evidence."); *Practical Trial Suggestions: Compromise and Settlement-Admissibility Issues*, 29 DEF. L.J. 253, 262-63 (Aug. 1980)("Admissibility of settlement negotiation evidence [is] an 'iffy' matter.").

<sup>15</sup>See, e.g., Brazil, *supra* note 6, at 966 ("This sobering position means that counsel either must accept only half-rational negotiations (the 'blind man's bluff' approach . . .) or must look to some device other than rule 408 to protect the confidentiality of what they say during negotiations."); 1 SALTZBURG & MARTIN, *supra* note 8, at 351 ("A choice must be made between allowing free bargaining where the parties can let their hair down . . . and requiring parties . . . to cast all factual statements either in hypothetical form or pursuant to an explicit agreement. . . . A Rule cannot have it both ways."); SALTZBURG & REDDEN, *supra* note 8, at 191 ("If impeachment is to be permitted whenever bargaining breaks down, it is probable that most lawyers will waste their client's time with hypothetical versions of facts that could be stated directly."); Gladstone, *supra* note 12, at S240 ("[I]nclusion of the 'without prejudice' language is often used as an additional guarantee that the evidence will be inadmissible."); MARK A. DOMBROFF, FEDERAL TRIAL EVIDENCE 66.1 (1994)(proposing, as a preventative measure, to note on all compromise-related correspondence "compromise and/or offer to compromise material not admissible in evidence at trial pursuant to Rule 408."). But see 23 WRIGHT & GRAHAM, *supra* note 8, at 292 (suggesting that since the decision to strike 408's second sentence "was ultimately reversed on grounds that disparaged the common law devices, there is no longer any basis for giving them any effect under Rule 408.") (footnote omitted).

<sup>16</sup>See, e.g., Charles T. McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447, 458-59 (1938) ("If one contemplating an offer of settlement, or his attorney, knew that the offer, if refused, could be used against him, he would as a practical matter weigh this danger in the balance, and it would often turn the scale of decision against making the offer."); Mason Ladd, *Determination of Relevancy*, 31 TUL. L. REV. 81, 92 (1956) (noting that, without protection from admission, making an offer of compromise would be a hazardous act and policy, therefore, supports exclusion); Bill Allcorn, *The*

### A. Compromise: Ambivalence and Ambiguity

The whole concept of compromise is brimming with ambiguities.<sup>17</sup> The word itself contains both positive and negative aspects,<sup>18</sup> and though praised for its social virtue in settling conflicts peacefully,<sup>19</sup> often the price for such peace is concession, which means surrendering something to the opponent.<sup>20</sup> This appears contrary to simplified principles of honor and righteousness, and engenders ambivalence.<sup>21</sup>

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*Admissibility of a Compromise Settlement in Evidence*, 1 BAYLOR L. REV. 160, 169 (1948)(suggesting that "it is little short of trickery to encourage and foster such settlements on the one hand and then force one to accept his settlement as his undoing on the other hand.").

<sup>17</sup>See, e.g., WEINSTEIN ET AL., *supra* note 13, at 408-21 ("[A]ny offer of compromise is essentially ambiguous . . ."); Robert J. Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69, 131-32 (1991) ("The term compromise itself is ambiguous . . ."); George M. Bell, *Admissions Arising Out of Compromise-Are they Irrelevant?*, 31 TEX. L. REV. 239, 244 (1953)("We have in effect an ambiguous act in any offer of settlement.").

<sup>18</sup>See, e.g., Joseph H. Carens, *Compromises in Politics*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS 123, 123 (J. Roland Pennock & John W. Chapman eds., 1979)("Ordinary attitudes toward compromise are marked by a fundamental ambiguity which is reflected in the definition of the term itself."); WILLIAM C. BURTON, *LEGAL THESAURUS* 93 (2d ed. 1992)(defining the verb "compromise" as either "Settle by mutual agreement" or "Endanger," and listing other synonyms of the latter, *inter alia* "expose to danger, hazard, imperil, . . . make vulnerable, . . . put under suspicion, risk, stake, venture."); WEBSTER'S NEW COLLEGIATE DICTIONARY 232 (Henry B. Woolf ed., 1973)(defining the intransitive verb "compromise" as either "to come to agreement by mutual concession" or "to make a shameful or disreputable concession."). Cf. George A. Kelly, *Mediation Versus Compromise in Hegel*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra*, at 87, 91 ("French has the word *compromis*, which more or less expresses the settlement of differences . . . [I]t also has the word *compromission*, applied frequently to dramas of the boudoir, which means a fatal sacrifice of one's virtue, or a 'sell out' . . .").

<sup>19</sup>See, e.g., EDMUND M. MORGAN, *BASIC PROBLEMS OF EVIDENCE* 209 (4th ed. 1963)("Almost all courts agree that there is a strong policy in favor of the settlement of disputed claims without litigation."); Arthur Kuflik, *Morality and Compromise*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 18, at 38 (noting that willingness to compromise is often viewed as a profound "expression of moral goodwill").

<sup>20</sup>See, e.g., 8 WORDS AND PHRASES 456 (perm. ed. 1951), citing *Texas Creosoting Co. v. R.B. Tyler Co.*, 156 So. 814 (La. 1934) ("Compromises' are distinguishable from 'contracts' in which equivalents are exchanged, since intention of parties in compromise agreement is to avoid litigation even at expense of what belongs to them."); David Resnick, *Justice, Compromise, and Constitutional Rules in Aristotle's Politics*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 18, at 69 (noting that compromise engenders a feeling that something has been given up and that the terms often can "appear slightly shabby.").

<sup>21</sup>As stated by one commentator,

There is at least an air of paradox surrounding the connection between morality and compromise. As we want to say that the person of good-

A compromise presupposes a common language among the opposing parties, and one party's moral acknowledgment of the other.<sup>22</sup> This requires emotional compromising and an elevated level of dedication.<sup>23</sup> Central to acknowledging the moral legitimacy of the opposition is the problem of trust.<sup>24</sup> The conflict may be effectively terminated only if the parties can rely on their mutual promise<sup>25</sup> to adhere to the compromise agreement, and an equitable agreement<sup>26</sup> is most likely to emerge in an atmosphere of openness,<sup>27</sup> power equilibrium<sup>28</sup> and confidentiality.<sup>29</sup>

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will is a person of firm principle, we are often inclined to suppose that the willingness to compromise is a sad but sure sign of moral turpitude. . . .

Of course, to affirm that compromise is in many cases morally commendable is *not* to deny that at times it is reprehensible. . . . There are circumstances (Chamberlain at Munich?) in which even the cause of peace is ill-served by accommodation. If this were not so, it would be hard to explain how the term "compromise" has acquired a pejorative as well as an honorific sense.

Kuflik, *supra* note 19, at 38, 52. This ambivalence to compromise may have been reflected in The Sermon on the Mount. See *Matthew* 5:9 ("Blessed are the peacemakers, for they shall be called sons of God.")(footnote indicating that "Peacemakers are not merely 'peaceable,' but those who work earnestly to 'make' peace."). But see *id.* at 6:24 ("No one can serve two masters; for either he will hate the one and love the other, or he will be devoted to the one and despise the other. You cannot serve God and mammon.").

<sup>22</sup>See Martin P. Golding, *The Nature of Compromise: A Preliminary Inquiry*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 18, at 16 ("The compromise process is a conscious process in which there is a degree of moral acknowledgment of the other party. The other party is accorded some degree of moral legitimacy, and so are some of his interests."); see also Theodore M. Benditt, *Compromising Interests and Principles*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 18, at 26, 27 ("In compromise a person has a certain sort of respect for his opponent, because of which he is willing to agree to an accommodation rather than make the best deal for himself that he can.").

<sup>23</sup>See Golding, *supra* note 22, at 5 ("The compromiser is either weak-willed or hypocritical or irrational. Compromise, therefore, may be dismissed as lacking moral significance.").

<sup>24</sup>See, e.g., *id.* at 18 ("A party can be trusted to mean what he says and to mean it sincerely . . . but perhaps only to the degree that the legitimacy of the other is recognized."); *id.* at 19 ("The introduction of trust, and trustworthiness too, helps to explain the possibility of accommodation, for a convergence of expectation is required to terminate the conflict.").

<sup>25</sup>See WEBSTER'S NEW COLLEGIATE DICTIONARY, *supra* note 18, at 232 (tracing the origin of the word "compromise" to the Latin word *compromissum*, from neutral of *compromissus*, past participle of *compromittere*; "to promise mutually."); cf. BLACK'S LAW DICTIONARY 287 (6th ed. 1990) (explaining *compromissum* as a "submission to arbitration").

<sup>26</sup>See, e.g., 8 WORDS AND PHRASES, *supra* note 20, at 447, citing *O'Hare v. Peterson*, 33 N.W.2d 566, 568 (Neb. 1948) ("A 'compromise' is an arrangement arrived at for settling a dispute upon what appears to be equitable terms."); Benditt, *supra* note 22, at 29 ("Though compromising conflicts of interests is similar in some respects to bargaining in that it involves proposal, attempt to secure agreement, and mutual concession, it



To ensure the presence of these elements requires extraordinary efforts from the conflicting parties. However, since the core of any compromise is mutual concessions,<sup>30</sup> a compromise settlement will rarely be a rational party's preferred outcome,<sup>31</sup> but rather a default option arrived at following a cost-benefit analysis of the option of continuing the conflict.<sup>32</sup>

With the relatively high demands on the compromising parties' dedication and risk-taking on one hand, and the potential for comparatively modest

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differs in that it involves giving due consideration to the interests of the opponent and attempting to find a fair accommodation.").

<sup>27</sup>See, e.g., Freedman & Prigoff, *supra* note 13, at 38 ("Mediation often reveals deep-seated feelings on sensitive issues. Compromise negotiations often require the admission of facts which disputants would never otherwise concede."); Edward Stettinius, *quoted in* Golding, *supra* note 22, at 5 (citing FRED C. IKLE, *HOW NATIONS NEGOTIATE* 206 (1967)) ("Compromise, when reached honorably and in a spirit of honesty by all concerned, is the only fair and rational way of reaching a reasonable agreement between two differing points of view.").

<sup>28</sup>The two parties who sit down together at the table to reach a settlement by compromise have rejected the prospect of reaching one by pure bargaining. . . . Though a principle of *reciprocity* is present, it is never completely operative, except perhaps in an "ideal" form of the compromise situation. Where full reciprocity exists, the parties recognize each other as moral equals despite their relative bargaining strengths. Golding, *supra* note 22, at 17; cf. Friedrich W. Nietzsche, *Human, All-Too-Human*, reprinted in *BASIC WRITINGS OF NIETZSCHE* 148 (Walter Kaufmann trans., 1968), *quoted in* Kuflik, *supra* note 19, at 56 ("Justice (fairness) originates among those who are approximately equally powerful, . . . where there is no clearly recognizable predominance and a fight would mean inconclusive mutual damage, there the idea originates that one might come to an understanding and negotiate one's claims . . .").

<sup>29</sup>See, e.g., Freedman & Prigoff, *supra* note 13, at 38 ("Fairness to the disputants requires confidentiality. . . . [P]arties often make communications without the expectation that they will later be bound by them. Subsequent use of information generated at these proceedings could therefore be unfairly prejudicial . . .").

<sup>30</sup>See, e.g., BLACK'S LAW DICTIONARY, *supra* note 25, citing *Newsom v. Miller*, 258 P.2d 812, 814 (Wash. 1953) (defining compromise and settlement as "Settlement of a disputed claim by mutual concession to avoid lawsuit."); 8 WORDS AND PHRASES, *supra* note 20, at 453-55 (annotating numerous cases under heading "Concessions must be mutual."); Beverly Hess, *Compromise in Louisiana*, 14 TUL. L. REV. 282, 285-86 & n.29 (1940) (suggesting that Louisiana's statutory compromise "contemplates reciprocal sacrifices". *But see* Bell, *supra* note 17, at 253 ("[I]f actual settlement of differences is the end desire, it should be immaterial whether or not there was a yielding in the negotiations. Our inquiry should be whether the parties were attempting to settle their differences . . .").

<sup>31</sup>See J.D. Lee, *Some Comments on Negotiations and Settlement*, 4 AM. J. TRIAL ADVOC. 277, 285-86 (1980) ("As a rule, if a settlement is reached with which both parties are uneasy, it is probably a good one.").

<sup>32</sup>See Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L.J. 1, 13 (1992) ("A party decides to sue or settle by comparing the value of the two alternatives-settlement and continued litigation. . . . A rational party will not contest a claim unless her expected net gain from continued litigation is greater than her expected net gain from settlement.").

results on the other, one could easily be tempted to infer that the idea and practice of compromise would be rather marginal in an adversarial justice system. But that would not be entirely correct.<sup>33</sup>

Plato presented the concept of justice itself as being a compromise.<sup>34</sup> Commentators have also suggested that laws are, in effect, compromises,<sup>35</sup> and that, as social animals, we organize society through negotiation and compromise.<sup>36</sup> In the common-law tradition, compromise has been an integral part of jurisprudence and conflict resolution since the Norman Conquest,<sup>37</sup> and at least for the last hundred years, it has been the express public policy to encourage compromise and settlement of disputes.<sup>38</sup>

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<sup>33</sup>See Martin Shapiro, *Compromise and Litigation*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 18, at 163, 174 ("[C]ompromise is as central a mode of Western legal systems as is winner-take-all litigation."); *id.* at 172 ("[F]rom the perspective of the legal system they [negotiation and litigation] constitute mutually supporting processes each of which is necessary to the success of the other.").

<sup>34</sup>This they affirm to be the origin and nature of justice; -it is a mean or compromise between the best of all, which is to do injustice and not be punished, and the worst of all, which is to suffer injustice without the power of retaliation; and justice, being at the middle point between the two, is tolerated not as a good, but as the lesser evil, and honored by reason of the inability of men to do injustice.

PLATO, 2 THE REPUBLIC 622-23 (Benjamin Jowett trans., 1937), *quoted in* Kuflik, *supra* note 19, at 55-56.

<sup>35</sup>See Aleksander Peczenik, *Cumulation and Compromises of Reasons in the Law*, in NOMOS XXI: COMPROMISE IN ETHICS, LAW, AND POLITICS, *supra* note 18, at 176, 176 ("Legal norms are, generally speaking, a result of various compromises. The law aims at achieving an equivalence of conflicting interests. The law is itself a result of a compromise of various political and other interests, both in legislation and in adjudication.").

<sup>36</sup>See Edmund Burke, *Speech on Conciliation With America* (Mar. 22, 1775), *quoted in* Golding, *supra* note 22 at 3, 7 (suggesting that all government and every human virtue is founded on compromise); *see generally* Melvin Aron Eisenberg, *Private Ordering Through Negotiation; Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976) (exploring how personal norms influence private negotiations for resolving disputes and establishing rules for future conduct); H.L.A. Hart, *Rawls on Liberty and Its Priority*, 40 U. CHI. L. REV. 534, 535 (1973) (discussing how principles of justice and standards of conduct arrived at by parties in "the original position" apply when liberties are in conflict).

<sup>37</sup>See Shapiro, *supra* note 33, at 166, citing DORIS STENTON, *ENGLISH JUSTICE*, 1066-1215 (1964) ("[T]he judicial ideal of Anglo-Saxon justice was not litigation but mutual agreement confirmed and recorded in judicial proceedings."); *see also* Kelly, *supra* note 18, at 89 ("English politics . . . proceeded by a series of compromises. The U.S. Constitution of 1787 was a vast and genial compromise between the states and the central power, the states themselves, and existing economic interests.").

<sup>38</sup>The public policy may have been promoted by Lord Mansfield, who based the rule of excluding offers of compromise on the rationale that "it must be permitted to men 'to buy their peace' without prejudice to them, if the offer did not succeed; and such offers are made to stop litigation without regard to the question whether any thing or what is due." BULLER'S NISI PRIUS 236b (7th ed. 1817), *quoted in* David Vaver, "Without Prejudice"

*B. Public Policy: "The Highest Law"*

Public policy is a vast,<sup>39</sup> nebulous<sup>40</sup> and fluctuating<sup>41</sup> concept that incorporates the overarching general ideas of public good,<sup>42</sup> public welfare,<sup>43</sup> community conscience<sup>44</sup> and the individual's duties to society<sup>45</sup> that are ex-

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*Communications; Their Admissibility and Effect*, 9 U. BRIT. COLUM. L. REV. 85, 88 (1974). A similar formulation was used by Justice Dewey in *Dickinson v. Dickinson*, 50 Mass. (9 Met.) 471, 474 (1845): "It must be permitted to men to endeavor to buy their peace, without being prejudiced by a rejection of their offers." Quoted in JOHN H. WIGMORE, 4 EVIDENCE IN TRIALS AT COMMON LAW § 1061 at 34 (James H. Chadbourne rev., 1972); see also *Grady v. deVille Motor Hotel, Inc.*, 415 F.2d 449, 451 (10th Cir. 1969), quoted in John R. Schmertz, Jr., *Relevancy and Its Policy Counterweights; A Brief Excursion Through Article IV of the Proposed Federal Rules of Evidence*, 33 FED. B.J. 1, 17 n.94 (1974) (advocating that the law "should not discourage settlement by subjecting a person who has compromised a claim to the hazard of having the settlement proved in subsequent trial . . ."); *Connor v. Michigan Wis. Pipe Line Co.*, 113 N.W.2d 121, 124 (Wis. 1962) ("We have yet to find a court decision holding that it is not in the interest of public policy that compromise settlement of disputed claims be encouraged."); MORGAN, *supra* note 19. For a contrasting argument, see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (suggesting that settlements may sacrifice justice to obtain peace, and should not be encouraged).

<sup>39</sup>See 35 WORDS AND PHRASES 456 (perm. ed. 1963), quoting *United States v. Musgrave*, 160 F.700, 702 (E.D. Ark. 1908) ("The 'public policy' of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably tending to have that effect may be prohibited by statute, and thereupon they are against public policy.").

<sup>40</sup>"Public policy" is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day . . . that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been let loose and free from definition in the same manner as fraud. *Id.*, quoting *Pendleton v. Greever*, 193 P. 885, 887 (Okla. 1920).

<sup>41</sup>See, e.g., *id.* at 455, quoting *Barwin v. Reidy*, 307 P.2d 175, 181 (N.M. 1957) ("Public policy" imports something that is uncertain and fluctuating, varying with the changing economic needs, social customs, and moral aspirations of the people."); *id.* at 456, quoting *Franklin Fire Ins. Co. v. Moll*, 58 N.E.2d 947, 950-51 (Ind. App. 1945) ("Public policy" is a term that is not always easy to define and it may vary as the habits, opinions, and welfare of a people may vary . . .").

<sup>42</sup>See 35 WORDS AND PHRASES 159 (perm. ed. Supp. 1994), quoting *Finkler v. Toledo Ski Club*, 577 N.E.2d 1114, 1117 (Ohio Ct. App. 1989) ("Public policy" is that which is naturally and inherently just and right.").

<sup>43</sup>See *id.* at 160, quoting *Smith v. Gore*, 728 S.W.2d 738, 746 (Tenn. 1987) ("Public policy" is present concept of public welfare or general good."); cf. BLACK'S LAW DICTIONARY, *supra* note 25, at 1233 (expanding the definition of "public welfare" to "bring within its purview regulations for the promotion of economic welfare and public convenience.").

<sup>44</sup>See BLACK'S LAW DICTIONARY, *supra* note 25, at 1231, quoting *Hammonds v. Aetna Casualty & Sur. Co.*, 243 F. Supp. 793, 796 (E.D. Ohio 1965) (public policy is community common sense and common conscience).

<sup>45</sup>*Id.*

pressed through our laws and court decisions.<sup>46</sup> As such, it has been proclaimed the "highest law"<sup>47</sup> that overrides the concerns for the individual,<sup>48</sup> but it has also been criticized for its volatility<sup>49</sup> and its vulnerability to political influence.<sup>50</sup>

### C. Common Law: Conflicting Rationales

Until Rule 408 was enacted, thereby establishing "promotion of the public policy favoring the compromise and settlement of disputes" as the "more consistently impressive ground"<sup>51</sup> for excluding compromise evidence from trial, sundry rationales for the exclusionary rule were used by the courts,<sup>52</sup> resulting in inconsistent applications and results.<sup>53</sup>

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<sup>46</sup>See, e.g., 35 WORDS AND PHRASES, *supra* note 39, at 457, quoting *Billingsley v. Clelland*, 23 S.E. 812, 815 (W. Va. 1895) ("The term 'public policy' is equivalent to the 'policy of the law.' It is applicable to the spirit as well as the letter."); 35 WORDS AND PHRASES (Supp. 1994), *supra* note 42, at 159, quoting *White v. Barcardi*, 446 So.2d 150, 156 (Fla. Dist. Ct. App. 1984) ("Public policy,' although often used loosely, means the law of the state, whether found in or clearly implied from its constitution, statutes, or judicial decisions.").

<sup>47</sup>See HERBERT BROOM, A SELECTION OF LEGAL MAXIMS 1 (10th ed. 1939) ("*Salus Populi est suprema Lex*. (XII. Tables:-Bacon, Max., reg. 12.)-Regard for the public welfare is the highest law.").

<sup>48</sup>See BURTON, *supra* note 18, at 422 ("*Necessitas publica major est quam privata*. Public necessity is greater than private. *Jura publica anteferenda privatis*. Public rights are to be preferred to private parts. *Privatum commodum publico cedit*. Private good yields to public good.").

<sup>49</sup>See BROOM, *supra* note 47, at 507.

<sup>50</sup>See Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27 ("Many public policies are better explained as the outcome of a pure power struggle—clothed in a rhetoric of public interest that is a mere figleaf—among narrow interest or pressure groups.").

<sup>51</sup>FED. R. EVID. 408 advisory committee's note, *supra* note 9, at 195.

<sup>52</sup>There are at least five principal reasons which have been advanced by the courts as to why offers in compromise are excluded from evidence: (1) such offers are irrelevant since they do not imply belief in the validity of the adversary's position, (2) parties to a compromise negotiation may by express or implied contract agree that admissions made therein shall be excluded from evidence and courts will enforce the secrecy agreement, (3) offers of compromise are excluded because the offeror does not intend to make an admission, (4) it is only fair play to exclude the unsuccessful efforts at compromise so as to prevent them from being turned upon one of the parties, (5) offers of compromise are privileged communications since the law favors the settlement of differences without resort to litigation.

Bell, *supra* note 17, at 240-41 (footnotes omitted).

<sup>53</sup>There has been substantial dispute as to the rationale for the rule that an offer of compromise may not be used as an admission of the validity or invalidity of the claim. This disagreement has had an effect on the

Although commentators disagree over which theory is the oldest,<sup>54</sup> it appears that the approach predating any contemporary rationale was one of hostility against out-of-court settlements,<sup>55</sup> possibly stemming from English courts' competition over jurisdiction and potential litigants in the early seventeenth century.<sup>56</sup> A line of cases starting in 1716,<sup>57</sup> however, treated offers to compromise as non-binding offers made without consideration, and therefore of no evidentiary weight.<sup>58</sup> This contract rationale gained support in common law courts through the 1700s,<sup>59</sup> but was then overshadowed by a new justification championed by Lord Kenyon in a string of cases just before the

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admissibility of "statements of independent fact" made during the course of negotiations for compromise.

2 WEINSTEIN ET AL., *supra* note 13, at 408-19 (footnote omitted); *see also* Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 593 (1955) ("The correct characterization of the rule is important because upon its characterization (as a rule of competency or as a rule of privilege) will depend significant procedural results.") (footnote omitted); Waltz & Huston, *supra* note 8, at 11 ("The rationale relied upon by a court in excluding evidence of the actual compromise offer usually dictated its approach to independent statements of fact accompanying the offer.").

<sup>54</sup> *See* 23 WRIGHT & GRAHAM, *supra* note 8, at § 5302, at 169 ("The oldest justification, what Wigmore called the 'true reasons', for the rule was that such evidence was irrelevant.") (footnotes omitted). *But see* Vaver, *supra* note 38, at 86 (suggesting that relevancy as a test of admissibility is a relatively recent concept in evidence law).

<sup>55</sup> *See* Vaver, *supra* note 38, at 86 ("As the courts' initial hostility towards arbitration as a form of settling disputes indicates, the policy then may have been one of discouraging extrajudicial settlement and encouraging litigation."). "[W]here a submission to arbitration under seal was held recoverable at any time before the award had been made. . . ." *Id.* at n.5 (citing *Vynior's Case*, 77 Eng. Rep. 597 (1609)).

<sup>56</sup> *Id.* ("Perhaps this occurred during the period when the various courts were vying with one another for jurisdiction and when judges were being paid according to the number of cases they heard.").

<sup>57</sup> *Id.* at 87 & nn.8, 11 ("[T]hat case appeared to turn on the point that a bare promise made without consideration was not binding as being a mere *nudum pactum*." (citing *Harman v. Vanhatton*, 23 Eng. Rep. 1071 (1716)); *Turton v. Benson*, 24 Eng. Rep. 488 (1718) ("Mr. Turton's offers made and accepted signified nothing; that Lord Cowper had often said a man should not be bound by an offer made during a treaty which afterwards broke off, or upon terms that were not accepted.") (quoting *Jekyll, M.R.*); *Baker v. Paine*, 27 Eng. Rep. 1140 (1750) ("[C]enerally speaking, offers by the parties by way of compromise are not to have much weight in the merits of the case, nor to be made use of. . .") (quoting *Lord Hardwicke L.C.*). Another commentator considered *Turton* and *Slack v. Buchanan*, 170 Eng. Rep. 59 (1790), as cases turning on the relevancy rationale. John E. Tracy, *Evidence-Admissibility of Statements of Fact Made During Negotiation for Compromise*, 34 MICH. L. REV. 524, 527 & n.11 (1936).

<sup>58</sup> Vaver, *supra* note 38, at 86 (suggesting that the original reason for the rule was that a settlement offer "was made without consideration, thus not binding, thus of no weight.").

<sup>59</sup> *See supra* note 57.

turn of the nineteenth century: men should be allowed "to buy their peace,"<sup>60</sup> and evidence of their peace-purchasing negotiations should be excluded, in order to encourage that method of conflict resolution.<sup>61</sup> It appears that this was the harbinger of today's public policy rationale.

Following Lord Mansfield's coining of the phrase "without prejudice,"<sup>62</sup> English courts gradually turned toward that phrase as a required prefatory qualification for keeping statements from compromise negotiations inadmissible in court.<sup>63</sup> By the turn of the twentieth century, the practice had embedded itself in British jurisprudence.<sup>64</sup> However, its dual origin in both

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<sup>60</sup>Vaver, *supra* note 38, at 88 n.15 (listing cases: Slack v. Buchanan, 170 Eng. Rep. 59 (1790); Walldridge v. Kennison, 170 Eng. Rep. 306 (1794); Turner v. Railton, 170 Eng. Rep. 424 (1796); Gregory v. Howard, 170 Eng. Rep. 557 (1800)). See also BULLER'S NISI PRIUS, *supra* note 38.

<sup>61</sup>See Vaver, *supra* note 38, at 88 ("The theory that the rule was contract-based fell into disfavour. The courts preferred the reason that extrajudicial settlement of disputes ought to be encouraged by preventing admission into evidence of negotiations entered into for the purpose of 'buying peace.'").

<sup>62</sup>See Vaver, *supra* note 38. Another thought by Lord Mansfield was later adopted by Dean Greenleaf, an early advocate for the relevancy rationale. See Bell, *supra* note 17, at 244 n.18 ("[A] defendant being sued for [£100] and offering [£20] to be rid of the action neither admitted nor ascertained any debt.") (citing 1 SIMON GREENLEAF, EVIDENCE 321 (16th ed. 1899)). Dean Wigmore was retained to edit the following edition of Greenleaf's treatise, but in the process he created a whole new treatise which was "greeted with adulation" when it appeared in 1904. Jacob A. Stein, *The Quest for Colonel Wigmore*, 19 LITIGATION 43, 44 (1992).

<sup>63</sup>A few cases through 1846 "held offers of compromise to be inadmissible even where not qualified by such words as 'without prejudice.'" Vaver, *supra* note 38, at 90 & n.23 (listing cases: Wayman v. Hilliard, 131 Eng. Rep. 39 (1830); Tennant v. Hamilton, 7 [sic] Eng. Rep. 1012 (1839); Jardine v. Sheridan, 175 Eng. Rep. 10 (1846)). However, "[i]n two [earlier] rulings of Lord Tenterden, offers by defendants, after the action had been brought, of specific sums less than the amount claimed by the plaintiff were held admissible as admissions of liability, the plaintiff obtaining a verdict in both cases," defendants having failed to qualify by "without prejudice." *Id.* at 89 & n.19 (listing cases: Nicholson v. Smith, 171 Eng. Rep. 797 (1822); Wallace v. Small, 173 Eng. Rep. 1219 (1830)). "[T]he decision in Wallace v. Small itself marks the turning point of the 'without prejudice' rule. From 1830, the cases rarely involve implied 'without prejudice', but rather became increasingly concerned with defining the scope of negotiations expressed to be 'without prejudice'." *Id.* at 90 & n.24 (also noting that CHARLES DICKENS, BLEAK HOUSE, "[p]ublished in monthly parts during 1852-53," satirized these developments through law clerk Guppy's "without prejudice" marriage proposal to Ms. Summerson). See also 4 WIGMORE, *supra* note 38, § 1061, at 36 n.3 (citing 2 L. & LAW. 305 (1840) (containing an "amusing anecdote" strikingly similar to Dickens' story)).

<sup>64</sup>Vaver, *supra* note 38, at 92 ("By the end of the nineteenth century, the doctrine of *stare decisis* had almost irretrievably fixed the approach to the scope of the express 'without prejudice' rule as involving an exercise in semantics under the guise of a search for the parties' intention.").

contract and public policy rationales has caused confusion in Commonwealth courts over the true meaning of the words "without prejudice."<sup>65</sup>

American courts, meanwhile, have utilized a variety of rationales and combinations thereof to explain the inadmissibility of compromise evidence to prove the validity or amount of a claim.<sup>66</sup> Commentators generally agree that Dean Wigmore's relevancy rationale<sup>67</sup> was predominant until the enactment

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<sup>65</sup>*Id.* ("Does not 'without prejudice' mean, 'I make you an offer; if you do not accept it, this letter is not to be used against me?'" (quoting *In Re River Steamer Co.*; *Mitchell's Claim*, 6 Ch. App. 822, 826 (1871) (James L.J.)). *But see id.* ("[T]he writer is not entitled to make this reservation in respect of a document which, from its character, may prejudice the person to whom it is addressed if he should reject the offer . . .") (quoting *In Re Daintrey*, ex parte Holt, 2 Q.B. 116, 120 (1893) (Williams J.)). *See also id.* at 85 ("[L]etters get headed 'without prejudice' in the most absurd circumstances.") (quoting *Tomlin v. Standard Telephones & Cables Ltd.*, 1 W.L.R. 1378, 1384 (C.A. 1969) (Ormrod J.)). For a recent American example of confusion over the use of "without prejudice," *see Coakley & Williams v. Structural Concrete Equip.*, 973 F.2d 349 (4th Cir. 1992) (plaintiff's settlement offer containing the prefatory words "without prejudice" was nevertheless admitted, without any apparent recognition of, or reference to, their common-law significance).

<sup>66</sup>*See Bell*, *supra* note 17, at 240-41.

<sup>67</sup>The true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary's claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done.

4 WIGMORE, *supra* note 38, § 1061, at 36. *But see McCormick*, *supra* note 16, at 458: [T]he argument fails. The reason offered is not coextensive with the rule. The reason is applicable only to such offers as might ordinarily be made to one asserting an unfounded claim or defense. If the defendant offers to pay nine-tenths of the asserted claim, it is unlikely in the highest degree that he believes the claim unfounded, but the rule applies to that offer just as it does to the proposal to pay one-tenth.

*See also Bell*, *supra* note 17, at 242-43:

It is true that a desire to obtain peace may be a motivating factor behind offers of settlement, but such a motive can and often does exist together with other factors which indicate a belief in the validity of the claim asserted. Finding the elusive "buying of peace" does not, without further investigation, warrant a conclusion that the offer is irrelevant.

Bell suggests that Dean Wigmore used his own experience "as the foundation for his analysis." *Id.* at 244 & n.14:

Wigmore's error is really an error of observation. Has he made an accurate analysis of the complex considerations which induce people to make offers of settlement? If his factual assumption is inaccurate, then his conclusions are likewise erroneous. Furthermore, he compounds his error because he states his basic assumption in terms of what people ordinarily do while his conclusions therefrom is a universal.

*Cf. Stein*, *supra* note 62, at 45 (suggesting a lesser-known side of Dean Wigmore; he "disparaged the importance of the technical rule" of evidence, and was "impatient with any exclusionary rules that might interfere with the scientific search for truth. For him, the rules of evidence [were] obstacles and minor distractions on the road to deeper

of Rule 408,<sup>68</sup> though some courts and commentators nevertheless continued to espouse alternative theories for exclusion, most notably contract and privilege.<sup>69</sup>

## II. TODAY'S RATIONALE

Since the adoption of Rule 408, privilege has emerged at the center of controversy in the search for a coherent rationale for the rule.<sup>70</sup> The Advisory Committee explicitly rejected the common-law "without prejudice" theory and

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knowledge, to an understanding of how facts are proven and decision-makers persuaded.").

<sup>68</sup> See, e.g., MORGAN, *supra* note 19, at 209 ("Most of the American opinions indicate that the offer has no relevance if in fact it is an offer to buy peace."); Waltz & Huston, *supra* note 8, at 11 ("Prior to Rule 408's advent, all federal and most state courts excluded offers of compromise as irrelevant to the substantive issues. . .").

<sup>69</sup> See, e.g., M.C. Slough, *Relevancy Unraveled (Part III)*, 5 U. KAN. L. REV. 675, 719 (1957) (suggesting that "a recognizable trend of judicial opinion" and an "increasing tide of text authorities" were leaning toward the privilege rationale); McCormick, *supra* note 16, at 459 & n.35 (noting that the privilege rationale view is "fortified by a substantial number of judicial pronouncements.") (footnote listing cases); Bell, *supra* note 17, at 253 ("In the confusion resulting from the coexistence of our several theories, it is difficult to state the view followed by the greatest number of American courts. Perhaps the privilege theory has the most adherents.") (footnotes omitted); Tracy, *supra* note 57, at 528 ("Among the text writers, Jones takes the view that public policy in encouraging compromise is the basis for the present rule; while Chamberlayne scouts the idea of privilege and argues for the admission of all compromise statements.") (footnotes omitted); *id.* at 525 n.4 ("No definite alignment of the courts can be made because the privilege and relevancy theories are not mutually exclusive. A court may consider an offer both privileged and irrelevant.") (listing cases); see also 4 WIGMORE, *supra* note 38, § 1061, at 36 ("[T]his tradition ['without prejudice'] has helped to cloud the discussion and to confuse the long line of rulings.") (footnote omitted); 23 WRIGHT & GRAHAM, *supra* note 8, § 5302, at 168-69 ("[I]f the courts were in agreement on the nature of the rule, there was no such consensus on its justification. The rationale for the rule has varied from time to time and to place to place. . . . Although a few American cases adopted the contract theory, most courts followed Wigmore in rejecting it.") (footnotes omitted); *id.* at 169 n.15 ("New Jersey apparently followed the English rule down to the time when the Uniform Rules were adopted in that state."); cf. Waltz & Huston, *supra* note 8, at 12 (noting that the contract theory was rejected by the Third Circuit in *Outlook Hotel Co. v. St. John*, 287 F. 115 (3d Cir. 1923)).

<sup>70</sup> See 2 WEINSTEIN ET AL., *supra* note 13, at 408-23 ("Treating the rule as a privilege seems sensible, although Rule 408 reads as if it were a rule of absolute exclusion . . ."); Blakely, *supra* note 8, at 224 ("This policy of privilege also underlies federal rule 408.") (footnote omitted); Gladstone, *supra* note 12, at S240 (claiming that the final and most recent justification for the exclusionary rule is privilege). *But see* Brazil, *supra* note 6, at 988 ("The majority view seems to be that settlement communications are not 'privileged' . . ."); Kerwin, *supra* note 11, at 670 (noticing that case law "clearly indicates" that there is no privilege for settlement communications established by Rule 408).



the relevancy-based<sup>71</sup> practice of hypothetical phrasing,<sup>72</sup> and proclaimed "promotion of the public policy favoring the compromise and settlement of disputes"<sup>73</sup> as the "more impressive ground" for the rule.<sup>74</sup>

This is in accord with commentators who have found public policy at the heart of most of the settlement-exclusionary rationales that predate Rule 408,<sup>75</sup> and with courts' practice of blending the policy concept in with other rationales, even with the highly technique-oriented relevancy theory.<sup>76</sup> However, since the privilege theory was left unaddressed,<sup>77</sup> some commentators have attempted to find a tacit creation of a compromise privilege

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<sup>71</sup> See 4 WIGMORE, *supra* note 38, at § 1061, at 34 ("[A] concession which is hypothetical or conditional only can never be interpreted as an assertion representing the party's actual belief, and therefore cannot be an admission; and, conversely, an unconditional assertion is receivable, without any regard to the circumstances which accompany it.").

<sup>72</sup> See advisory committee's note, *supra* note 9 (although mentioning the relevancy theory as one of the grounds for exclusion, stressing that "The validity of this position will vary . . ." and criticizing the practice of hypotheticals); cf. James Wm. Moore & Helen I. Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 18 (1974) (finding that the Advisory Committee "somewhat more dubiously" justified Rule 408 on relevancy); see also 23 WRIGHT & GRAHAM, *supra* note 8, § 5302, at 173 ("Because the Advisory Committee had earlier abandoned Wigmore's concept of 'legal relevance' in favor of a broad definition of relevance coupled with a discretionary power to exclude, it would have been very difficult to explain Rule 408 as an application of the doctrine of relevance."); Gladstone, *supra* note 12, at §239 (suggesting that Wigmore's relevance theory has been "implicitly rejected by rule 408.").

<sup>73</sup> See advisory committee's note, *supra* note 9.

<sup>74</sup> *Id.*

<sup>75</sup> See Vaver, *supra* note 56 (the hostility to settlement in the 1600s could arguably be viewed as an expression of the public policy at the time, albeit *contra* to the current public policy); Vaver *supra* note 61 (public policy in the "without prejudice" tradition); Bell, *supra* note 17, at 247 ("[T]he English courts are in the peculiar position of favoring compromises as a matter of public policy but limiting the application of the policy to situations where the parties have contracted their admissions out of evidence."); *id.* at 248 ("The magic phrase ['without prejudice'] is merely a signal to the adversary and the court, though not a conclusive one, that the negotiations are subject to the policy."); see also Norman B. Peek, *Evidence*, 21 S. CAL. L. REV. 414, 415 (1948) (suggesting that "the original reasons for excluding offers of compromise" were both public policy and lack of relevancy); Tracy, *supra* note 57, at 527 (proposing, by way of conjecture, that the first court to exclude evidence of compromise offers based on lack of relevancy "may have considered them privileged" but chose the more narrow relevancy test instead, thus establishing precedence); *id.*, *supra* note 69, at 525 n.4 (reporting courts' mixing of privilege and relevancy theories); cf. Thomas Black, *Evidence*, 16 TEX. TECH. L. REV. 331, 340 (1985) (suggesting that Rule 408 "echoes the common law policy" of exclusion based on the effort to encourage settlements).

<sup>76</sup> See Tracy, *supra* note 57; Slough, *supra* note 69, at 718 n.509 (listing cases where "relevancy and policy interlarded").

<sup>77</sup> See advisory committee's note, *supra* note 9.

in the Advisory Committee's public policy language.<sup>78</sup> Courts, however, have been generally unwilling to follow this construction.<sup>79</sup>

### A. Extrinsic Exclusionary Public Policy

The controversy may, in part, have its origin in a disparate understanding of the character and function of extrinsic policies, and in the continuing controversy over privileges.<sup>80</sup> Exclusionary policies affect otherwise relevant evidence at trial and are addressed in Article IV of the Federal Rules of Evidence.<sup>81</sup> The most common policy consideration is the danger of unfair

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<sup>78</sup> See, e.g., 23 WRIGHT & GRAHAM (Supp. 1995), *supra* note 3, § 5315, at 91, 92 & n.47.1 ("Some courts have by local rule attempted to extend Rule 408 to docket-clearing procedures designed to get rid of unwanted cases and to expand Rule 408 into a privilege for all communications during such procedures."); Brazil, *supra* note 6, at 988 (citing U.S. District Court for Northern District of California, Amended General Order 16, 1988, Rule 8, and characterizing it as "purporting to convert Rule 408 from a rule of exclusion at trial into a privilege . . ."); Waltz & Huston, *supra* note 8, at 14 (mentioning "the privilege theory underlying" Rule 408); Gladstone, *supra* note 12, at S248 ("Viewing the right to withhold settlement information as a rule of privilege helps to lessen the judge's role of prejudicial balancing."); see also Green, *supra* note 8, at 17 ("[T]he Rule creates a quasi-privilege for specifically defined conduct."); Making Sense, *supra* note 13, at 1345-46 (categorizing Rule 408 as an "activity privilege rule," noting that its "rationale parallels exactly the theory underlying the relational privilege rules.") (footnote omitted).

<sup>79</sup> See Brazil, *supra* note 6, at 988 ("The case law support for the view that rule 408, or its common law antecedent, creates a privilege is relatively thin and appears to represent the minority view."); Kerwin, *supra* note 11, at 670 (advocating similar view "despite an abundance of eloquent policy arguments to the contrary, federal case law clearly indicates that Rule 408 does not establish a privilege for settlement communications . . .").

<sup>80</sup> See Making Sense, *supra* note 13, at 1344 & n.30 (noting the "extremely controversial" draft for Article V, Privileges, of the Federal Rules of Evidence, and quoting Rep. Hungate, claiming that 50 percent of the complaints to the Criminal Justice Subcommittee related to that Article). "Privilege" is used for two different concepts: In connection with "privileged communication," an absolute immunity in a confidential relationship, such as attorney-client or marital privilege; however, "privilege" is also used loosely in connection with certain special exemptions or benefits. See BLACK'S LAW DICTIONARY, *supra* note 25, at 1198 ("Privileged communications. Those statements made by certain persons within a protected relationship such as husband-wife . . . and the like which the law protects from forced disclosure . . ."); *id.* at 1197 ("Privilege. A particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantage of other citizens . . . . A peculiar right, advantage, exemption, power, franchise, or immunity held by a person or class, not generally possessed by others."); BURTON, *supra* note 18, at 409 (listing two lines of meanings: *beneficium* and *immunitas*).

<sup>81</sup> See FED. R. EVID. 402 advisory committee's note (as printed at 56 F.R.D. 183 (1972)), reprinted in JOHN KAPLAN ET AL., CASES AND MATERIALS ON EVIDENCE app. at B-17 (7th ed. 1992) ("The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules . . . . Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy.").

prejudice.<sup>82</sup> While "[a]ll evidence against the adversary party is prejudicial in the sense that it creates a resistance to the success of establishing the party's case,"<sup>83</sup> the danger of unfair prejudice will only be weighed by the court when the probative value of the evidence is comparatively low.<sup>84</sup> Thus the policy consideration is balanced against the evidence's probative value, and in the court's discretion it may be excluded.

The remaining rules in Article IV are specific applications of this theme, taking into consideration various extrinsic policies.<sup>85</sup> Rule 408 represents a situation where, for a certain class of evidence, and for limited purposes,<sup>86</sup> the conflict between probative value and exclusionary policies has "been resolved with finality."<sup>87</sup> Thus, the public policy interest encouraging compromise has been found to outweigh the evidential value of otherwise relevant, material and competent evidence.<sup>88</sup>

### *B. Privilege Theory: A Minority View*

However, since the Advisory Committee cited Dean McCormick as its authority for making public policy the true 408 rationale<sup>89</sup> without distinguishing his policy-based privilege theory,<sup>90</sup> it has led some to see that

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<sup>82</sup> See *id.*, Rule 403, B-18 ("Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. 'Unfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.").

<sup>83</sup> Ladd, *supra* note 16, at 89.

<sup>84</sup> See *id.* ("The prejudicial aspects become important only when evidence has a minimum of probative quality.").

<sup>85</sup> See advisory committee's note, *supra* note 81, at B-18 ("The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.").

<sup>86</sup> See Rule 408, *supra* note 1 (Evidence of compromise or offer to compromise is "not admissible to prove liability for or invalidity of the claim or its amount.").

<sup>87</sup> Ladd, *supra* note 16, at 90.

<sup>88</sup> See *id.* at 91-92; see also generally Falknor, *supra* note 53.

<sup>89</sup> See FED. R. EVID. Rule 408, advisory committee's note, *supra* note 9.

<sup>90</sup> See McCormick, *supra* note 16, at 447-48 ("[The privileges'] sole warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.") (footnote omitted). However, shorthand definitions expanded privilege's reach:

Building upon this premise that an exclusionary rule is one which safeguards against unreliable evidence and may be invoked as of right only by a party to the suit, and that a rule of privilege is one which may not be invoked by a party as such, but only by one who claims an interest other than a stake in the outcome of the trial,

citation as a tacit approval of his theory.<sup>91</sup> But this inference ignores the Advisory Committee's rationale underlying Article IV *in toto*,<sup>92</sup> and "does not fit the rule of law as it is generally accepted and applied."<sup>93</sup>

Historic privileges of confidential communication, such as the attorney-client privilege and the marital privilege, are misunderstood if viewed on a strictly utilitarian basis.<sup>94</sup> Such relationships have in fact been granted protection to further significant human, social and moral values: "Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships, from the state's coercive or supervisory powers and from the nuisance of its eavesdropping."<sup>95</sup> The resulting exclusion of otherwise relevant evidence at trial "is merely a secondary and incidental feature of the privileges' vitality."<sup>96</sup> It is the all-encompassing divulging of one's entire persona to one's priest, counsel or spouse that necessitates the privilege,<sup>97</sup> and that characteristic distinguishes it from other confidential communications,

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we may be led to classify some rules as rules of privilege which have not always been recognized as such.

*Id.* at 450. By way of this simplistic analysis, the rule excluding compromise evidence was found to be one "which lies close to the border between privilege and incompetency." *Id.* at 457.

<sup>91</sup>See 23 WRIGHT & GRAHAM, *supra* note 8, § 5315, at 289 ("In adopting the privilege rationale for Rule 408, the Advisory Committee relied upon McCormick's analysis; it therefore seems reasonable that they accepted its implications . . .")(footnote omitted). *But see* CHARLES T. MCCORMICK, EVIDENCE § 72.1, at 172-73 (3d ed. 1984)(drawing a stronger distinction between "true rules of privileges" and exclusionary rules, including "those excluding offers of compromise"—since "the policies toward which these latter rules are directed may be fully realized by implementing the rules only in litigation" and "such rules may be asserted only by a party," classifying them as rules of privilege would be "analytically imprecise.").

<sup>92</sup>See FED. R. EVID. Rule 403 advisory committee's note, *supra* note 85.

<sup>93</sup>4 WIGMORE, *supra* note 38, § 1061, at 35; *cf.* 23 WRIGHT & GRAHAM (Supp. 1995), *supra* note 3, § 5315, at 91 ("Though it rests on a privilege-like rationale, the compromise rule is not a 'privilege' within the meaning of statutes and rules . . .").

<sup>94</sup>See *Making Sense*, *supra* note 13, at 1343 ("Wigmore's classic definition of privilege focuses on the most central concept: the relationship at stake must be sufficiently important that society is willing to sacrifice the production of probative evidence to preserve confidentiality within the relationship.")(footnotes omitted); *see also supra* note 90.

<sup>95</sup>David W. Louisell, *Confidentiality, Conformity and Confusion; Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110-11 (1956).

<sup>96</sup>*Id.* at 101.

<sup>97</sup>See Francis Bacon, *Of Counsell*, 20 BACON'S ESSAYS (Macmillan 1892), *quoted in* Louisell, *supra* note 95, at 112-13:

The great Truste, betweene Man and Man, is the Truste of Giving Counsell. For in other Confidences, Men commit the parts of life; Their lands, their Goods, their Children, their Credit, some particular affaire; But to such, as they make their Counsellors, they commit the whole: By how much the more, they are obliged to all Faith and integrity.

such as with one's accountant,<sup>98</sup> that involves only an insular part of one's life. Courts have therefore been reluctant to find new privileges.<sup>99</sup>

At the root of the rationale for a settlement privilege is the importance of creating "an environment in which counsel and parties can be fairly confident that what they say as they negotiate, and the terms of any agreement they might reach, will not be used against them later."<sup>100</sup> However, this would fail Dean Morgan's privilege test, since "[t]he privilege is that the confidential matter be not revealed, not that it be not used against the holder of the privilege or any other . . . ."<sup>101</sup> Finally, several other weighty arguments against the privilege view have been presented, involving the lack of a special relationship that society wants to foster; that the rule applies only at the trial stage; that Rule 408's protection is more limited, and only comes into play when a party attempts to introduce evidence; that Rule 501 shows that Congress did not want the Federal Rules of Evidence to be the source of privilege law; and that, by placing it in Article IV, "Relevancy and Its Limits," the Advisory Committee and the Supreme Court did not intend Rule 408 to establish a new privilege.<sup>102</sup>

Based on the preceding inquiry, it seems the better approach to consider Rule 408 as an exclusionary rule at trial, based on the extrinsic public policy of encouraging compromise and settlement. Rather than attempting to make the rule something it apparently is not (a rule of compromise negotiation communication privilege), it would be more constructive to explore how Rule 408 can best serve the public policy of encouraging compromise,<sup>103</sup> while at the same time exerting minimal negative impact on conflicting public policies and interests<sup>104</sup> such as the judicial truth-finding process and its need for relevant evidence.

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<sup>98</sup>See *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (finding the effort of the Second Circuit to foster candid communication between accountant and client by creating a self-styled work-product privilege "misplaced").

<sup>99</sup>See *Freedman & Prigoff*, *supra* note 13, at 39 ("A rule of privilege such as that which we are discussing here shuts out probative evidence, and thus obstructs the truth in order to protect some other interest or policy. Courts are therefore very reluctant to find such privileges.").

<sup>100</sup>See *Brazil*, *supra* note 6, at 990.

<sup>101</sup>EDMUND M. MORGAN, *SOME PROBLEMS OF PROOF* 102 (1956), *quoted in* *Louisell*, *supra* note 95, at 111.

<sup>102</sup>See *Brazil*, *supra* note 6, at 990-91.

<sup>103</sup>See 23 *WRIGHT & GRAHAM*, *supra* note 8, at 178 ("[I]t is unclear how far courts must go in carrying out the policy of Rule 408.").

<sup>104</sup>See *Practical Trial Suggestions*, *supra* note 14, at 263 ("There are, as well, numerous instances in which the evidence is offered . . . solely to enable the jurors to comprehend the relationship between the parties and to evaluate testimony. When that occurs, two important public policy considerations conflict."); AMERICAN BAR ASSOCIATION SECTION OF LITIGATION, *supra* note 5, at 61 ("The few decisions note but do not purport to resolve the tension between these two concerns.") (footnote omitted).

## III. FEDERAL RULE OF EVIDENCE 408

Although the rule has been characterized as "complicated,"<sup>105</sup> "full of loopholes,"<sup>106</sup> and "seemingly unstructured,"<sup>107</sup> Rule 408's drafting shortcomings<sup>108</sup> are only part of the reason why it is "[d]ifficult to apply in practice."<sup>109</sup> A more fundamental problem appears to be that "the language of the rule cuts one way, [and] policy another,"<sup>110</sup> presenting courts and litigants "with the dilemma of choosing between a strict interpretation of the text of the rule, with its many exceptions, and its underlying policy of promoting compromise,"<sup>111</sup> so that its resultant contribution may "best [be] described as one of confused reform."<sup>112</sup>

However, the central source of Rule 408's ambiguity is the second sentence, excluding "[e]vidence of conduct or statements made in compromise negotiations."<sup>113</sup> This represents the most drastic departure from common law,<sup>114</sup> and lies at the heart of the topic of this Note.

## A. First Sentence: Not Admissible to Prove Liability

The first sentence in Rule 408 defines the scope of exclusion:<sup>115</sup> Evidence of offers, or acceptances of offers, of a valuable consideration<sup>116</sup> in efforts to compromise a disputed<sup>117</sup> claim, is not admissible if presented for the purpose

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<sup>105</sup>Waltz & Huston, *supra* note 8, at 11.

<sup>106</sup>Gladstone, *supra* note 12, at S238.

<sup>107</sup>Waltz & Huston, *supra* note 8, at 13.

<sup>108</sup>See *supra* note 11 and accompanying text.

<sup>109</sup>Graham, *supra* note 14, at 457.

<sup>110</sup>23 WRIGHT & GRAHAM, *supra* note 8, § 5314, at 286.

<sup>111</sup>Kerwin, *supra* note 11, at 669.

<sup>112</sup>23 WRIGHT & GRAHAM, *supra* note 8, § 5302, at 176.

<sup>113</sup>See Rule 408, *supra* note 1.

<sup>114</sup>See advisory committee's note, *supra* note 9:

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact. . . . An inevitable effect is to inhibit freedom of communication . . . . Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.

<sup>115</sup>See Rule 408, *supra* note 1.

<sup>116</sup>See generally 23 WRIGHT & GRAHAM, *supra* note 8, § 5305, at 198 (discussing "valuable consideration"); 2 WEINSTEIN ET AL., *supra* note 13, at 408-14, 15.

<sup>117</sup>See generally 2 LOUISELL & MUELLER, *supra* note 7, § 171, at 459-63 (discussing "the controversy requirement").

of proving liability for the claim, its invalidity, or its amount. This delineation of only three forbidden purposes is the most "consequential limit"<sup>118</sup> on the rule's scope.

A strict interpretation of the rule would consider that "its protection applies only when the evidence is offered for the purpose of establishing liability for or invalidity of a claim,"<sup>119</sup> and that "408 permits settlement evidence for any purpose except to prove or disprove liability or the amount of the claim."<sup>120</sup> However, such an approach loses sight of the fact that "Rule 408 is a rule of exclusion, not admissibility,"<sup>121</sup> and that "the policies that inspire rule 408 are so important that courts should interpret the scope of its protection liberally."<sup>122</sup>

### *B. Second Sentence: Statements Likewise Not Admissible*

Most significantly, the "strict interpretation" approach ignores the crucial consequence of the second sentence, making statement evidence "likewise not admissible."<sup>123</sup> It has been assumed that the word "likewise" assigned the same limited protection to settlement statements as the first sentence affords offers and compromises.<sup>124</sup> However, specific statements of fact raise "problems of a

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<sup>118</sup>Brazil, *supra* note 6, at 966.

<sup>119</sup>Joint Statement by the Advisory Committee on Rules of Evidence and the Standing Committee of the Judicial Conference on Rules of Practice and Procedure, to Senator James O. Eastland, Chairman of the Senate Committee on the Judiciary, *Hearings on H.R. 5463 Before the Senate Committee on the Judiciary*, 93d Cong., 2d Sess. at 53, 59 (1974), *quoted in* 2 LOUISELL & MUELLER, *supra* note 8, § 170, at 447 & n.10.

<sup>120</sup>United States Aviation Underwriters, Inc. v. Olympia Wings, Inc., 896 F.2d 949, 956 (5th Cir. 1990) (trial court did not err in admitting evidence of settlement to show change in witness' position after his deposition had been taken) (citation omitted); *see also* Robert W. Lucas, *Review of Selected 1987 California Legislation*, 19 PAC. L.J. 610, 610 (1988) ("[E]vidence of compromise offers is admissible when that evidence is designed to prove a matter at issue other than liability.") (footnote omitted) (discussing Cal. Evid. Code sec. 1152(a), which, in similar fashion to Fed. R. Evid. 408, renders settlement evidence "inadmissible" to prove liability).

<sup>121</sup>Michaels, *supra* note 8, at 37.

<sup>122</sup>Brazil, *supra* note 6, at 967.

<sup>123</sup>Rule 408, *supra* note 1.

<sup>124</sup>*See* Michaels, *supra* note 8, at 36 ("The word 'likewise' refers back to the restrictions on offers of compromise contained in the first sentence of Rule 408. Thus, statements made in compromise negotiations are excluded on the same basis as the offers themselves."); *see also* Brazil, *supra* note 6, at 995 ("The compromise in the rule consists of the decision to make settlement communications inadmissible only for limited purposes . . . clearly leaving open the possibility that courts could admit this same kind of evidence for any of a large number of purposes."); *cf.* Okla. Stats. Ann. tit. 12, § 2408 (evidence statute otherwise identical with Fed. R. Evid. 408 has, *inter alia*, omitted "likewise" from second sentence), *noted in* 23 WRIGHT & GRAHAM, *supra* note 8, § 5301, at 167 n.33.

different nature,"<sup>125</sup> and therefore an analogy with offers "does not . . . seem to be well-founded."<sup>126</sup> Factual statements are much more specific and may have a higher relevance than the mere fact of an offer.<sup>127</sup> They can thus be more versatile in their utility, for example in showing individual elements relevant to the validity of a claim, without directly addressing the purposes forbidden in the rule's first sentence.<sup>128</sup> If used as evidence tending to detract from the credibility of a witness that has testified to an ultimate fact, settlement statements would arguably become evidence of validity of the claim.<sup>129</sup> However, the limited standard of the rule's first sentence, if mechanically applied to the second sentence, would not operate to require exclusion of such evidence.<sup>130</sup>

Prior to enactment of Rule 408, evidence of unqualified factual statements in compromise negotiations was admissible for any purpose.<sup>131</sup> In attempting to broaden the scope of protection to settlement statements, the drafters of Rule 408 therefore lacked the guidance of applicable case law. Their technical solution failed to address the unique problems posed by statements of fact<sup>132</sup> and the result is a gap, or gray area, not expressly covered by the rule's first sentence.<sup>133</sup> It has been suggested that the drafters' stated policy<sup>134</sup> should be given effect in this gray area, so as to exclude evidence of settlement statements

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<sup>125</sup>23 WRIGHT & GRAHAM, *supra* note 8, § 5308, at 246.

<sup>126</sup>*Id.* at 245.

<sup>127</sup>*See id.* at 246.

<sup>128</sup>*See id.* at 247.

<sup>129</sup>*See id.* at 240.

<sup>130</sup>The *Davidson* court suggested that evidence of a settlement statement regarding a pivotal fact (the distance between plaintiff and the stampeding steer) could be admitted to challenge the credibility of plaintiff's testimony in court. *See Davidson v. Prince*, *supra* note 3, at 1233 n.9.

<sup>131</sup>*See, e.g.,* SALTZBURG & REDDEN, *supra* note 8, at 188 ("In most common law jurisdictions, a line is drawn between offers to settle and admissions of fact during settlement negotiations. Factual admissions can be introduced against the party making the admissions unless they are inextricably bound up with offers to settle.").

<sup>132</sup>*See supra* notes 123-30 and accompanying text.

<sup>133</sup>*See* 23 WRIGHT & GRAHAM, *supra* note 8, § 5308, at 248: The [Advisory Committee's] Note says that the purpose of the second sentence is to enhance "freedom of communication" and to eliminate disputes "over whether a given statement falls within or without the protected area." Neither of these goals will be fostered by reading the word "likewise" in the second sentence as requiring technical adherence to the language of the first sentence.

*Id.* (footnote omitted).

<sup>134</sup>*See* advisory committee's note, *supra* notes 9 & 114.



if admission could discourage parties from entering compromise negotiations.<sup>135</sup>

### C. Third Sentence: Otherwise Discoverable Evidence

The last two sentences of Rule 408 state that the rule "does not require the exclusion"<sup>136</sup> of "otherwise discoverable"<sup>137</sup> evidence, and evidence "offered for another purpose"<sup>138</sup> than the three established in the first sentence. A strict reading of the first sentence would tend to render the last two superfluous. Therefore deletion was suggested as early as 1970,<sup>139</sup> and at least two states, Florida<sup>140</sup> and Maine,<sup>141</sup> have left them out of their state versions of Rule 408.

The third sentence was added to the original draft by the Senate Committee to allay government fears that in disputes with citizens, facts conceded in negotiations otherwise could be "immunized" from discovery.<sup>142</sup> Its language has been characterized as "redundant"<sup>143</sup> and "poorly chosen,"<sup>144</sup> and its meaning "obscure"<sup>145</sup> and "unclear; it seems to state what the law would be if

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<sup>135</sup>See 23 WRIGHT & GRAHAM, *supra* note 8, § 5308, at 248.

<sup>136</sup>Rule 408, *supra* note 1.

<sup>137</sup>*Id.*

<sup>138</sup>*Id.*

<sup>139</sup>See N.Y. Trial Lawyers, *Recommendation and Study of the Proposed Federal Rules of Evidence* 25 (1970), reprinted in 2 P.L.I., FED. CIV. PRAC. 4TH 287 (1972), quoted in 23 WRIGHT & GRAHAM, *supra* note 8, § 5314, at 279 n.2 (suggesting deletion "since the first sentence of the rule clearly sets forth the limited purpose for which such evidence is inadmissible.").

<sup>140</sup>See FLA. STAT. ANN. EVID. CODE § 90.408, quoted in 2 WEINSTEIN ET AL., *supra* note 13, at 408-48.

<sup>141</sup>See ME. REV. STAT. ANN., ME. R. EVID., 408, quoted in 2 WEINSTEIN ET AL., *supra* note 13, at 408-48 to 408-49. The Maine rule further provides that "[E]vidence of conduct or statements made in compromise negotiations is also not admissible on any substantive issue in dispute between the parties." *Id.* However, the Adviser's Note states that settlement evidence "may be admissible for another purpose, such as tending to show bias or prejudice of a witness." *Id.*

<sup>142</sup>See 23 WRIGHT & GRAHAM, *supra* note 8, § 5301, at 161 (noting that government lawyers feared the rule might allow a taxpayer to recant her admission "without fear of impeachment," and possibly immunize previously disclosed documents); cf. Report of the Senate Committee on the Judiciary, reprinted in SALTZBURG & REDDEN, *supra* note 8, at 196, 197.

<sup>143</sup>2 LOUISELL & MUELLER, *supra* note 8, § 170, at 448.

<sup>144</sup>*Id.*

<sup>145</sup>*Id.* at 448-49 n.15 (quoting memorandum prepared by Professor Cleary, *Comments on H.R. 5463 in the Senate* (Oct. 31, 1974)).

it were omitted."<sup>146</sup> Commentators have found that Rule 408 provides minimal, if any, protection of settlement evidence from discovery.<sup>147</sup>

*D. Fourth Sentence: Offered for Another Purpose*

Rule 408's last sentence reaffirms the first sentence, by providing that the rule "does not require exclusion when the evidence is offered for another purpose"<sup>148</sup> than to prove liability for a claim, its invalidity or its amount.<sup>149</sup> It then lists purposes "such as proving bias or prejudice of a witness, negating a contention of undue delay,<sup>150</sup> or proving an effort to obstruct a criminal investigation or prosecution."<sup>151</sup> Although the drafters proposed that the three situations listed were "illustrative,"<sup>152</sup> the Court of Appeals for the First Circuit has indicated that the list is exclusive,<sup>153</sup> and the Fifth Circuit that it "must be

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<sup>146</sup>Maine Adviser's Note, Rule 408, *quoted in* 2 WEINSTEIN ET AL., *supra* note 13, at 408-49.

<sup>147</sup>*See* Brazil, *supra* note 6; Kerwin, *supra* note 11.

<sup>148</sup>*See* Rule 408, *supra* note 1.

<sup>149</sup>*But see* discussion of "gray area" not covered by first sentence due to lacking analogy between offers and statements of fact, *supra* notes 124-30 and accompanying text.

<sup>150</sup>*See* 23 WRIGHT & GRAHAM, *supra* note 8, § 5312, at 269-73 (noting that the Advisory Committee cited a single sentence from Dean Wigmore as authority for this usage at common law; that it was supported by a single American case; that the language was ill-chosen; and that the Advisory Committee's intent regarding evidence of settlement statements offered to explain delay is unclear); *see also* 2 LOUISELL & MUELLER, *supra* note 8, § 172, at 477 (discussing "negating a contention of undue delay").

<sup>151</sup>Rule 408, *supra* note 1. For a consideration of the ultimate permissible provision, *see* 23 WRIGHT & GRAHAM, *supra* note 8, § 5313, at 273-79 (noting, *inter alia*, that its scope and rationale are uncertain; that it may be rooted in common law reluctance to plea bargaining; and that contemporary courts will have little difficulty in distinguishing *bona fide* compromises from schemes designed to obstruct a criminal prosecution). *See also* 2 LOUISELL & MUELLER, *supra* note 8, § 172, at 471-77 (indicating that traditionally, an attempt by an accused to offer compensation to the victim to refrain from pressing charges was considered a crime in itself, with the victim as the new offender. However, since contemporary courts view such private arrangements more favorably, they should be protected by Rule 408, at least when the offenses involved are minor and property-related).

<sup>152</sup>*See* advisory committee's note, *supra* note 9; *cf.* 23 WRIGHT & GRAHAM, *supra* note 8, § 5302, at 176 n.63 (observing that Rule 408's list of permissible uses is "strangely incomplete.").

<sup>153</sup>*See* Vincent v. Louis Marx & Co., Inc., 874 F.2d 36, 42 (1st Cir. 1989) (noting that the last sentence of the Rule "neither states nor suggests that unfair prejudice would be a ground for avoiding the prohibitions of the Rule.") (in products liability action, trial court properly excluded evidence, offered by plaintiff, of amount of defendant tricycle manufacturer's settlement with motorist in prior trial); *see also* Gladstone, *supra* note 12, at S246 (proposing that the "other purposes" should be limited to "rebutting an allegation or attacking credibility"); *cf.* BROOM, *supra* note 47, at 443 ("*Expressio unius est Exclusio*

balanced against the policy of encouraging settlements."<sup>154</sup> Commentators have pointed out that evidence falling within one of the categories still will be subject to the other Federal Rules of Evidence.<sup>155</sup>

*E. Central Provision: Proving Bias or Prejudice of a Witness*

This note focuses on the provision that sets evidence offered to prove bias or prejudice outside the scope of Rule 408, since it was basis for the *Davidson*<sup>156</sup> court's dicta regarding the admissibility of prior inconsistent statement to impeach plaintiff in that case.<sup>157</sup>

First, it is critical to emphasize the distinction between proving a witness' bias and impeaching a witness by a prior inconsistent statement.<sup>158</sup> The former is described as "an attack by a showing that the witness is biased on account of emotional influences such as kinship for one party or hostility to another, or motives of pecuniary interest, whether legitimate or corrupt."<sup>159</sup> The latter, "probably the most effective and most frequently employed, is an attack by proof that the witness on a previous occasion has made statements inconsistent

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*alterius* (Co. Litt. 210 a.) The express mention of one thing implies the exclusion of another.").

<sup>154</sup>Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. 1981)(in action brought by developer to recover balance due from motel owner, an architect's report used as a tool in unsuccessful compromise attempt was properly excluded under Rule 408); see also *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 655 (4th Cir. 1988)(holding that exclusion based on public policy was proper, since "[T]he fact that offering an item of evidence is not in terms barred by Rule 408 does not make it otherwise admissible)(in an antitrust suit against former business associate, settlement statements by attorneys in prior related litigation between the parties were properly excluded, even though plaintiff claimed they were offered for other purposes than proving liability); cf. *Blakely*, *supra* note 8, at 237 ("[T]he breadth of the phrase 'for another purpose' will require courts to determine how far to extend this use before it bumps into the policy of rule 408.").

<sup>155</sup>See GLEN WEISSENBERGER, *FEDERAL EVIDENCE* 117 (1987) ("[I]n any case in which compromise-related evidence is offered on theory of relevancy not presented by Rule 408, Rule 403 may operate to exclude the evidence where the probative value is low and the risk of prejudice or confusion is substantial.") (footnote omitted); 23 WRIGHT & GRAHAM, *supra* note 8, § 5311, at 261 n.2 ("The last sentence of Rule 408 says 'This rule does not require exclusion . . .,' clearly implying that other rules may."); 2 LOUISELL & MUELLER, *supra* note 8, § 170, at 443 (noting that "often Rule 403 and the underlying policy of Rule 408 require exclusion even when a permissible purpose can be discerned."); cf. *Brazil*, *supra* note 6, at 967 ("[T]he policies that inspire rule 408 are so important that courts should interpret the scope of its protection liberally and should resolve doubts about its scope by refusing to admit evidence from settlement negotiations.").

<sup>156</sup>*Davidson v. Prince*, 813 P.2d 1225 (Utah App. 1991), *cert. denied*, 826 P.2d 651 (Utah 1991); see *supra* note 3.

<sup>157</sup>*Id.*

<sup>158</sup>See 23 WRIGHT & GRAHAM, *supra* note 8, § 5311, at 265.

<sup>159</sup>MCCORMICK, *supra* note 91, § 33, at 72-73.

with his present testimony."<sup>160</sup> Dean Wigmore apparently distinguished the methods as belonging to two distinct classifications of impeachment; the former a deductive form, and the latter an empiric form of impeachment.<sup>161</sup> The distinction between the two is especially critical when seen in connection with the gap, or gray area, opened between the first and second sentences of Rule 408,<sup>162</sup> and since there is a tendency to extrapolate incorrectly that Rule 408's provision for evidence of witness bias embraces impeachment in general.<sup>163</sup>

Furthermore, it is important to keep in mind that there was no need to address the distinct issue of using prior inconsistent settlement statements to impeach a party at common law, since unqualified statements of fact were admissible for any purpose, including as evidence of liability.<sup>164</sup> As a result, the drafters of Rule 408 were unable to foresee the implications of adding the second sentence that developed into the current controversy addressed by this note.<sup>165</sup>

Finally, as with the other two provisions of the rule's last sentence,<sup>166</sup> Rule 408's provision for evidence of witness bias is based on the common-law

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<sup>160</sup>*Id.* at 72.

<sup>161</sup>3A JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 874, at 638-40 (James H. Chadbourne rev., 1970).

<sup>162</sup>See *supra* notes 124-30 and accompanying text.

<sup>163</sup>See PAUL F. ROTHSTEIN, *FEDERAL RULES OF EVIDENCE FOR UNITED STATES COURTS AND MAGISTRATES* 126.1 (2d ed. 1994). Compare 23 WRIGHT & GRAHAM, *supra* note 8, § 5311, at 265 & nn.26, 30 (remarking that failure to observe the distinction "is probably due to the loose application of the label 'impeachment' to the use of the evidence to show bias," and commenting that "Professor Rothstein consistently refers to this provision as permitting the use of the evidence for 'impeachment'") with Paul F. Rothstein, *The Proposed Amendments to the Federal Rules of Evidence*, 62 GEO. L.J. 125, at 127-28 n.13 (1973) (possibly reflecting the origin of his view when, in commenting on "[s]everal ambiguities" that existed in the Nov. 1972 draft of Fed. R. Evid. 407, 408, and 411, he suggested that those rules contained "varying terms for similar thoughts").

<sup>164</sup>See advisory committee's note, Rule 408, *supra* note 9; see also 23 WRIGHT & GRAHAM, *supra* note 8, § 5314, at 283.

<sup>165</sup>It has been proposed that the Advisory Committee, in its Joint Statement with the Standing Committee of the Judicial Conference on Rules of Practice and Procedure, see *supra* note 119 and accompanying text, when it was allaying government concerns that Rule 408 would encourage misrepresentations during compromise negotiations, somehow indicated support for an across-the-board admission of impeachment evidence. See 2 LOUISELL & MUELLER, *supra* note 8, § 170, at 447-48 ("In other words, Rule 408 does not bar statements in settlement talks when offered to impeach at trial."). But see 23 WRIGHT & GRAHAM, *supra* note 8, § 5314, at 285 (contending that the language in question—fearing that "encouragement" will result from "eliminating responsibility" for making misrepresentations—"looks more like a calculated effort to obscure the issue than an endorsement of use of negotiation statements for impeachment purposes.") (footnotes omitted).

<sup>166</sup>See *supra* notes 150, 151.

experience with compromise evidence, and therefore reflects its sharp distinction between the fact of the offer and statements of fact expressed during negotiations. Consequently, all the cases in the annotation cited in the Advisory Committee's Note<sup>167</sup> deal with the following situation, representing the "vast bulk"<sup>168</sup> of the pre-408 cases:

[O]ne party calls a witness to testify in his behalf and on cross-examination the opponent wishes to show that the witness and the party calling him have entered into a compromise of a related claim. If one applies a hearsay analysis to such cases, admissibility results because the act of the party in compromising the claim is not being offered to show an implied assertion on his part as to the validity of that claim; instead the compromise is offered to show its effect on the state of mind of the witness.<sup>169</sup>

When applied to Rule 408, this line of reasoning contrasts the showing of witness bias from an offer to prove liability or invalidity of the claim in the following fashion: Since it is the mere fact of the compromise in the related claim that is used to show that the witness in the instant case is biased, no inference regarding the liability or invalidity of the compromised related claim is required.<sup>170</sup>

The admissibility of compromise evidence to show witness bias at common law was most likely intended to prevent parties from using settlements as shields to secretly obtain favorable witness testimony.<sup>171</sup> However, as with the provision placing efforts to obstruct criminal prosecutions outside the scope of Rule 408's protection,<sup>172</sup> such schemes today would not qualify as *bona fide* settlements of disputed claims and would hence fall outside the scope of the rule altogether. The original impetus behind the provision has thus been diminished since Rule 408 was first introduced.

Furthermore, commentators suggest that the rationale and utility of the witness bias provision logically do not apply to a witness who is also a party in the case,<sup>173</sup> since "the party's interest is apparent [and thus] the need for

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<sup>167</sup>See advisory committee's note, *supra* note 9.

<sup>168</sup>23 WRIGHT & GRAHAM, *supra* note 8, § 5311, at 262.

<sup>169</sup>*Id.* at 262-63.

<sup>170</sup>*Id.* at 263.

<sup>171</sup>*See id.*

<sup>172</sup>*See supra* note 151.

<sup>173</sup>*See* 23 WRIGHT & GRAHAM, *supra* note 8, § 5311, at 264 ("The interest of the party in the outcome is so obvious and the relevance of his compromise with a third person to a showing of bias against his opponent so weak that it is difficult to see how a proper application of Rule 403 would ever permit its use.") (footnote omitted). *But see* MCCORMICK, *supra* note 91, § 274, at 813 ("This impeachment of party-witnesses, however, has occasionally been sanctioned.") (citing two pre-408 cases dating back to 1948 and 1949).

additional evidence on credibility is less."<sup>174</sup> Finally, "[w]here the witness sought to be impeached is a party to the litigation, the danger for prejudice is substantial,"<sup>175</sup> and the possibility of exclusion pursuant to Rule 403<sup>176</sup> is considerably heightened.

#### IV. FEDERAL RULE OF EVIDENCE 408: REVIEW OF APPLICABLE CASES

The preceding analysis of Rule 408's provision for placing settlement evidence offered to show witness bias outside the scope of its protection demonstrates that the provision cannot be used convincingly as an authority in support for admitting evidence of a party's prior inconsistent settlement statements for impeachment purposes. This conclusion is in accord with the applicable case law.

A survey of some representative cases yields the following impressions:

- A. The only court that has considered the issue of impeaching a party by prior inconsistent settlement statements has rejected the notion based on public policies. The courts that have found statements admissible for various purposes have not directly addressed the issue.
- B. Courts tend to provide statements with broad protection under Rule 408 if it is established that the statements were part of compromise negotiations. Where attempts to show the existence of compromise negotiations fail, courts commonly find Rule 408 inapplicable, and generally admit the statements.
- C. Cases involving efforts to demonstrate witness bias generally follow the common-law tradition that evidence of the fact of settlement is introduced, rather than evidence of specific settlement statements. However, evidence offered to show bias is still subject to discretionary exclusion based on other evidence rules and the public policy behind Rule 408.

##### *A. Impeaching Party by Prior Inconsistent Statement*

The only court that has addressed this question directly is the United States Court of Appeals for the Tenth Circuit, in *EEOC v. Gear Petroleum*.<sup>177</sup> Following

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<sup>174</sup>McCORMICK, *supra* note 91, § 274, at 813.

<sup>175</sup>WEISSENBARGER, *supra* note 155, at 117.

<sup>176</sup>Rule 403 of the Federal Rules of Evidence, Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time, provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

<sup>177</sup>948 F.2d 1542 (10th Cir. 1991), *supra* note 7.

an extensive survey of commentators that oppose such impeachment, the court found that the trial court properly excluded settlement statements offered to impeach the defendants, noting that the policy behind the rule weighed against admission, and that the proffer "was but a thinly veiled attempt to get the 'smoking gun' letter before the jury."<sup>178</sup> An attempt by defendant to introduce plaintiff's settlement with third party defendant in *Williams v. Chevron USA, Inc.*,<sup>179</sup> in order to impeach plaintiff's testimony that he could not afford surgery, was rejected by the trial court based on the theory that it related to the amount of the settlement and therefore was inadmissible under Rule 408. The Fifth Circuit upheld the exclusion after weighing the possibility of jury confusion under Rule 403.

The cases discovered that admit settlement statements are not directly on point and in most cases do not directly involve a party witness. However, one such case was used by the *Davidson*<sup>180</sup> court as the main authority in support of the contention that impeachment of a party by a prior inconsistent statement was allowed under Rule 408.<sup>181</sup> In a narrow reading of Rule 408, the Fifth Circuit found that the trial court properly permitted defendant's counsel to elicit evidence on redirect from defendant's mechanic about a settlement between himself and the plaintiff in order to rehabilitate him as a witness, since Rule 408 "permits settlement evidence for any purpose except to prove or disprove liability or the amount of the claim."<sup>182</sup>

In a similar vein, the catchall "another purpose" provision in Rule 408's fourth sentence was generously applied in *Urico v. Parnell Oil Co.*,<sup>183</sup> *Freidus v. First Nat'l Bank*,<sup>184</sup> and *Eisenberg v. University of New Mexico*.<sup>185</sup>

### *B. Admissibility of Statements in "Compromise Negotiations"*

Increasingly, the evidentiary threshold for settlement statements involves determining whether the statements were made in "compromise negotiations" or not. An affirmative answer generally provides shelter under Rule 408's

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<sup>178</sup>*Id.* at 1546.

<sup>179</sup>875 F.2d 501 (5th Cir. 1989).

<sup>180</sup>*See supra* note 3 and accompanying text.

<sup>181</sup>U.S. Aviation Underwriters v. Olympia Wings, Inc., 896 F.2d 949 (5th Cir. 1990).

<sup>182</sup>*Id.* at 956 (citation omitted).

<sup>183</sup>708 F.2d 852, 855 (1st Cir. 1983) (settlement statements were admitted to show defendant's insurer refused to make a reasonable settlement offer).

<sup>184</sup>928 F.2d 793 (8th Cir. 1991)(settlement letters between the parties' attorneys were properly admitted to negate a contention of undue delay by plaintiff, thereby effectively rebutting testimony of plaintiff's agent/husband).

<sup>185</sup>936 F.2d 1131, 1134 (10th Cir. 1991)(plaintiff's attorney's affidavit to the court requesting settlement conference was properly admitted for purpose of determining a Rule 11 violation; the Tenth Circuit found that the attorney waived Rule 408 protection by her own submission of the affidavit).

second sentence,<sup>186</sup> while statements not found to fall within the protected category almost automatically are denied protective status. This was the dispositive issue in *Davidson v. Prince*;<sup>187</sup> plaintiff's letter to defendant's insurer was admitted "because the letter was not an offer to compromise [his] claim, nor was it written as part of settlement negotiations."<sup>188</sup>

At least seven circuits have adopted a functional approach<sup>189</sup> to the question; if the statement was intended to be part of compromise negotiations, then it is granted protection by Rule 408's shield. Thus in *Ramada Dev. Co. v. Rauch*,<sup>190</sup> an architect's report commissioned by plaintiff was found to have been intended to function as a basis for compromise negotiations, since it "would not have existed but for the negotiations,"<sup>191</sup> and was therefore properly excluded from trial. Quoting a treatise, the Fifth Circuit coined the intent test: "[T]he question under the rule is 'whether the statements or conduct were intended to be part of the negotiations toward compromise.'"<sup>192</sup>

The *Ramada* test was applied in *Affiliated Mfrs., Inc. v. Aluminum Co. of America*,<sup>193</sup> *Blu-J, Inc. v. Kempter C.P.A. Group*,<sup>194</sup> *Fiberglass Insulators, Inc. v. Dupuy*,<sup>195</sup> and *Kritikos v. Palmer Johnson, Inc.*<sup>196</sup> Intent tests were also applied,

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<sup>186</sup>See *supra* notes 123-35 and accompanying text for discussion regarding the gap created in Rule 408 between its first and second sentences.

<sup>187</sup>See *supra* note 3 and accompanying text.

<sup>188</sup>*Davidson v. Prince*, 813 P.2d 1225, 1233 (Utah Ct. App. 1991).

<sup>189</sup>See 23 WRIGHT & GRAHAM, *supra* note 8, sec. 5307, at 231 (contrasting the functional approach with a temporal-event approach that determines first whether negotiations took place, then whether statements were made during that time):

The functional view is likely to be used by courts that have interpreted 'compromise negotiations' to refer to a state of mind rather than an event. Such courts will ask if the speaker was seeking to reach a compromise, then exclude the statement if it was germane to that purpose.

*Id.*

<sup>190</sup>644 F.2d 1097 (5th Cir. 1981); see *supra* note 154 and accompanying text.

<sup>191</sup>*Id.* at 1107.

<sup>192</sup>*Id.* at 1106 (quoting 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 408[03], at 408-21 (1980)).

<sup>193</sup>56 F.3d 521 (3d Cir. 1995)(internal memoranda intended as base's for compromise negotiation were properly excluded.) The court also used an event-oriented approach. See *supra* note 189.

<sup>194</sup>916 F.2d 637, 642 (11th Cir. 1990)(an evaluation of defendant's accounting methods prepared by mutual agreement between the parties was properly excluded, since it was "intended to be part of negotiations toward compromise . . .").

<sup>195</sup>856 F.2d 652, 653, 655 (4th Cir. 1988)(statements by attorneys in "acrimonious dispute of long standing between two former business associates" were properly excluded as part of an ongoing settlement process through a string of lawsuits, based on the parties' intent and "the strong public policy favoring exclusion"); see *supra* note 154 and accompanying text.



without citing *Ramada*,<sup>197</sup> in *Raybestos Prods. Co. v. Younger*,<sup>198</sup> *Trebor Sportswear Co. v. The Ltd. Stores, Inc.*,<sup>199</sup> and *Trans Union Credit Infor. v. Associated Credit Services*.<sup>200</sup> Three cases illustrating an event-oriented approach<sup>201</sup> are *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*,<sup>202</sup> *Winchester Packaging, Inc. v. Mobil Chemical Co.*,<sup>203</sup> and *Pierce v. F.R. Tripler & Co.*.<sup>204</sup> The classification of statements as not being part of compromise negotiation deprived them of Rule 408's

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196821 F.2d 418, 423 (7th Cir. 1987)(holding that trial court committed harmless error in admitting correspondence between plaintiff and his owner's representative because the letters were written "with the objective of advising plaintiff of a possible compromise solution before legal action was commenced").

<sup>197</sup> See *supra* note 154.

19854 F.3d 1234 (7th Cir. 1995) (in defamation action defendant's letter in response to plaintiff's earlier utter threatening to sue was admitted as evidence of intimidation, and was not found to have been intended as a settlement attempt). The court also used an event-oriented approach. See *supra* note 189.

199865 F.2d 506, 510 (2d Cir. 1989)(letter from defendant referring to current issues between the parties was properly excluded because the court concluded that the "documents were intended (at least in part) to settle the claims of contractual breach").

200805 F.2d 188, 192 (6th Cir. 1986)(plaintiff's alleged repudiation of service agreement was properly excluded since the statements were made at a meeting designed "to get together and talk about our interpretation of the contract" and because the parties' counsel indicated "their belief that the discussions were indeed settlement negotiations").

<sup>201</sup> See *supra* note 189.

20250 F.3d 476 (7th Cir. 1995) (statement by defendant's engineer that plaintiff's claim probably had merit was properly admitted, since claim had not yet been rejected, and there were no compromise negotiations.)

20314 F.3d 316 (7th Cir. 1994)(plaintiff's letters demanding payment and threatening litigation were held properly excluded since they constituted an inducement to avoid legal costs and since the policy of Rule 408 discourages the common-law requirement to clothe statements in hypothetical form). Faced with a similar scenario in *Davidson v. Prince*, the Court of Appeals of Utah held oppositely, and admitted the statements as non-settlement evidence. 813 P.2d 1225, 1233 (Utah App. 1991) ("Furthermore, appellant in the letter demands payment in full of appellant's claim and its whole tenor is that appellant will not compromise one bit.")(footnote omitted).

204955 F.2d 820, 829 (2d Cir. 1992)(in former employee's age discrimination suit, evidence of defendant's job offer was properly excluded when offered to show defendant's state of mind, since the determinative question was whether "defendant was motivated by impermissible factors," and thus the offer represented "evidence on the merits of the case," tending to go to liability and invalidity of the claim). This rationale could arguably apply to *Davidson v. Prince* since the distance between plaintiff and the steer constituted evidence on the merits of the case, and defendant's chief theory of contributory negligence was that plaintiff cornered the "escaped hamburgers-on-the-hoof." 23 WRIGHT & GRAHAM, *supra* note 3, § 5314, at 86 n.60 (Supp. 1995).

protection in *Hanson v. Waller*<sup>205</sup> and *Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*<sup>206</sup>

### C. Proving Bias of Witness by Fact of Settlement

As the following cases demonstrate, there is no automatic admission for evidence of settlement to show bias of a witness, even though Rule 408 expressly places that purpose outside the scope of its protective shield. The court may still, in its discretion, exclude such evidence based on other evidence rules such as Rule 403, or on the public policy behind Rule 408.

One such example is *Myers v. Pennzoil*,<sup>207</sup> where defendant, a valve manufacturer in a wrongful death suit arising from an oil rig accident, unsuccessfully sought to introduce evidence that plaintiff's witnesses were former defendants that had settled with plaintiff, in order to show their bias and prejudice. The Fifth Circuit held that the exclusion was not an abuse of discretion since the trial court "was concerned about jury confusion"<sup>208</sup> and had otherwise "afforded defendant wide latitude in conducting his cross-examination."<sup>209</sup>

However, an indemnity agreement between co-defendants in *Brocklesby v. United States*<sup>210</sup> was properly admitted in a tort action brought by plane crash survivors against the United States and a publisher of an instrument approach chart, where plaintiffs intended to show a nonadverse relationship existed between the defendants and, in addition, to attack the credibility of their witnesses. The Ninth Circuit found the evidence of the agreement relevant "because it tends to make their respective positions less credible."<sup>211</sup>

A reluctant Fifth Circuit found that no harmful error in the trial court's exclusion of evidence of a "Mary Carter"<sup>212</sup> agreement in *Reichenbach v.*

<sup>205</sup>888 F.2d 806, 813-14 (11th Cir. 1989) (correspondence between the parties' counsel in a wrongful death action arising from traffic accident containing the words "[I]f you care to discuss the matter with me, please feel free to call" was properly admitted as an admission of a party opponent since "there's nothing said in that letter about compromise").

<sup>206</sup>561 F.2d 1365, 1368, 1372-73 (10th Cir. 1977) (statements in communications between parties in a trademark infringement suit were properly admitted as "simply business communications" since the discussions "had not crystallized to the point of threatened litigation," even though defendant told plaintiff that if he sued, "the case would be in litigation long enough that Goodyear might obtain all the benefits it desired" from the disputed product name).

<sup>207</sup>889 F.2d 1457 (5th Cir. 1989).

<sup>208</sup>*Id.* at 1461.

<sup>209</sup>*Id.*

<sup>210</sup>767 F.2d 1288 (9th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986).

<sup>211</sup>*Id.* at 1292-93 n.2.

<sup>212</sup>A "Mary Carter" agreement is a contract "by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court,

*Smith*,<sup>213</sup> emphasizing that its affirmance was "not to be considered an approval . . . of the trial court's approach."<sup>214</sup> In a negligence suit against the pilot of a boat that collided with a boat carrying the plaintiff, a passenger, the defendant offered evidence of a settlement between plaintiff and a former defendant in order to attack the plaintiff's credibility. Possible reasons for the trial court's exclusion of the settlement evidence were the jury's prior knowledge of the relationship between the plaintiff and the settling defendant ("her friend and escort")<sup>215</sup> and plaintiff's status as litigant; "her inherent interest in the outcome of the litigation may have been too manifest to require further proof through impeachment."<sup>216</sup>

## V. ANALYSIS

### A. Federal Rule of Evidence 408: The Gap Left Open in its Structure

Since the drafters of Rule 408 were unable to anticipate the current controversy over whether a party's prior inconsistent settlement statements offered for impeachment should benefit from the rule's protective reach,<sup>217</sup> they left open a gap in its structure,<sup>218</sup> neither explicitly including such practice within its scope, nor excluding it.<sup>219</sup> Moreover, "courts have not formulated a consistent, reliable body of doctrine to determine the extent to which Rule 408 bars evidence of pretrial offers or statements made during negotiations"<sup>220</sup> when offered for this purpose, even though it is "[o]ne of the most common forms of impeachment."<sup>221</sup> Though it has been proposed that such use of settlement statements is "unlikely,"<sup>222</sup> since most negotiations will be done by

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his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants." *Ward v. Ochoa*, 284 So.2d 385, 387 (Fla. 1973), *quoted in* *Reichenbach v. Smith*, 528 F.2d 1072 (5th Cir. 1976). The term originates from *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. App. 1967).

<sup>213</sup>528 F.2d 1072 (5th Cir. 1976).

<sup>214</sup>*Id.* at 1076.

<sup>215</sup>*Id.* at 1075.

<sup>216</sup>*Id.*

<sup>217</sup>*See supra* notes 5-15 and accompanying text.

<sup>218</sup>*See supra* notes 123-35 and accompanying text.

<sup>219</sup>*See Brazil, supra* note 6, at 959 ("The language of Rule 408 unfortunately leaves a great deal of uncertainty about the rule."); *cf. GRAHAM, supra* note 14, at 460 ("[I]mpeachment is not specifically included as illustrative of such other purposes in Rule 408, although it is so included in Rule 407. The federal courts have yet to address this question.").

<sup>220</sup>*Brazil, supra* note 6, at 974.

<sup>221</sup>*Id.*; *see also MCCORMICK, supra* note 160.

<sup>222</sup>LOUISELL & MUELLER, *supra* note 8, § 172, at 470.

attorneys,<sup>223</sup> its potential for turning into a trap for the unwary layman is amply illustrated by the *Davidson*<sup>224</sup> case.

*B. The Vacuum Puts the Entire Rule in Jeopardy*

The gap between Rule 408's first and second sentence, coupled with an incorrect inference from its fourth sentence,<sup>225</sup> has led an occasional court to conclude that it "recognizes an exception to the policy"<sup>226</sup> when settlement evidence is "admitted for the purpose of impeaching the testimony of the party."<sup>227</sup> However, commentators warn that such use, if sanctioned, has the potential to "undercut,"<sup>228</sup> "eviscerate,"<sup>229</sup> or "destroy"<sup>230</sup> the rule. One concern is that it would "allow evidence perilously close to the key issue of liability,"<sup>231</sup> such as "camouflaged causation evidence."<sup>232</sup> It could also possibly be used as

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<sup>223</sup>*Id.*

<sup>224</sup>*See supra* note 3 (layman plaintiff, without counsel at the time, stated a crucial fact in a letter to defendant's insurer, which later was admitted at trial with devastating impact); *see also* Waltz & Huston, *supra* note 8, at 16 ("If the door is opened to impeachment of a party on the basis of concessions made at the bargaining table, sophisticated negotiators will revert to their old *arguendo* phraseology, and only the unwary will be subjected to later discrediting.").

<sup>225</sup>*See supra* notes 158-63 and accompanying text.

<sup>226</sup>*Estate of Spinoso*, 621 F.2d 1154, 1158 (1st Cir. 1980) (in a wrongful death action against a truck manufacturer, evidence of prior pleadings was properly excluded since there was no inconsistency with present pleadings).

<sup>227</sup>*Id.*

<sup>228</sup>SALTZBURG & REDDEN, *supra* note 8, at 191.

<sup>229</sup>Michaels, *supra* note 8.

<sup>230</sup>Green, *supra* note 8.

<sup>231</sup>*Making Sense*, *supra* note 13, at 1348 (footnote omitted); *cf.* 23 WRIGHT & GRAHAM, *supra* note 8, § 5314, at 284 (debating Judge Sam Pointer's comment, *supra* note 8):

A federal judge has argued that [settlement] statements are admissible to impeach, apparently on the theory that the use of the statement for impeachment purposes does not involve proof of liability or invalidity "substantively." This analysis is not very convincing unless one takes the view that the rule does not forbid the use of compromise evidence to prove an evidentiary fact that tends to prove liability. Moreover, it seems to rest on analogy to the hearsay rule and its distinction between "substantive" evidence and "impeachment," which is not wholly apt in the present context.

*Id.* (footnotes omitted).

<sup>232</sup>*McInnis v. A.M.F., Inc.*, 765 F.2d 240, 248 (1st Cir. 1985) (in a products liability case against a motorcycle manufacturer, appellate court found lower court committed a prejudicial error in admitting a release obtained by defendant to impeach plaintiff's testimony regarding cause of injury).

"a mere subterfuge to get before the jury evidence not otherwise admissible."<sup>233</sup> Consequently, one state has added a provision to its version of Rule 408 that reads: "Evidence of conduct or statements made in compromise negotiations is also not admissible on any substantive issue in dispute between the parties."<sup>234</sup>

It has also been warned that if settlement statements are admitted at trial, "many attorneys would be forced to testify as to the nature of discussions and thus be disqualified as trial counsel."<sup>235</sup> Moreover, "the almost unavoidable impact of disclosure about compromises is that juries will consider the evidence as a concession of liability,"<sup>236</sup> and "the tendency of juries to disregard instructions is so well known that the admission of the evidence for even a limited purpose would result in a frustration of the policy of encouraging settlements."<sup>237</sup>

The original intent behind Rule 408 was to encourage compromise and ensure freedom of communication in compromise negotiations.<sup>238</sup> It has been noted that its limited scope may be necessary to prevent abuses, but that its "exceptions cannot be so expanded as to *promote* abuse of the settlement process."<sup>239</sup> The rule in its present form, by not clearly protecting compromising parties from being impeached by prior inconsistent statements, is allowing "reserve and dissimulation, uneasiness, suspicion and fear into negotiations,"<sup>240</sup> and is incapable of fulfilling its mandate to promote compromise and settlements.

### *C. Public Policy is Better Served with an Amended Rule*

Although "judicial rulemaking [has] been generally regarded as the right way to deal with the subject matter of evidence,"<sup>241</sup> the "unpredictability of

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<sup>233</sup>United States v. Grooms, 978 F.2d 425, 429 (8th Cir. 1992)(in a sexual abuse case not involving Rule 408, no error was committed where trial court excluded prior inconsistent statements offered to impeach government witness)(citation omitted).

<sup>234</sup>ME. R. EVID. 408 (1985), *quoted in* 4 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 8 (Walter A. Reiser, Jr. Supp. 1986); *cf.* Pierce v. F.R. Tripler & Co., *supra* note 201.

<sup>235</sup>Pierce, 955 F.2d at 828.

<sup>236</sup>WEINSTEIN ET AL., *supra* note 13, ¶ 408[05], 408-37; *cf.* 3 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE, *supra* note 8, § 356, at 553 (1979) ("[T]he risk is high in this circumstance that the jury will misuse the statement as proof of the fact it asserts . . .")(footnote omitted).

<sup>237</sup>John P. Forney, Jr., *Evidence: Settlement and Compromise; Admissibility for Impeachment Purposes*, 27 TEX. L. REV. 555, 557 (1949).

<sup>238</sup>Advisory committee's note, Rule 408, *supra* note 9.

<sup>239</sup>Gladstone, *supra* note 12, at S242.

<sup>240</sup>Bell, *supra* note 17, at 257.

<sup>241</sup>Moore & Bendix, *supra* note 72, at 12.

judicial rulings"<sup>242</sup> in the area of Rule 408 warrants legislative action to adjust a minor defect, in order to enable the rule to better serve the purpose it was designed for. It is the intent behind, and not the letter of, the rule that represents the drafters' true accomplishment, and which should be kept in high regard.<sup>243</sup> It is clear that the rule has not lived up to its expectations,<sup>244</sup> and negotiating parties cannot always depend on courts giving it a liberal interpretation.<sup>245</sup>

This author therefore proposes that Rule 408 be amended with the following language from Alaska's version of the rule added to its fourth sentence: "[B]ut exclusion is required where sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement."<sup>246</sup>

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<sup>242</sup>Brazil, *supra* note 6, at 1029.

<sup>243</sup>*Cf.*, e.g., BROOM, *supra* note 47, at 466 ("Qui haeret in Litera Haeret in Cortice. (Co. Litt. 283 b.) He who considers merely the letter of an instrument goes but skin-deep into its meaning."); *id.* at 463 ("Contemporanea Expositio est optima et fortissima in Lege. (2 Inst. 11.) The best and surest mode of construing an instrument is to read it in the sense which would have been applied when it was drawn up."); Quinipiac Coun. v. Commission on Human Rights, 528 A.2d 352, 357 (Conn. 1987) ("When we are faced with ambiguity in a statute, however, we turn for interpretive guidance to its legislative history, the circumstances surrounding its enactment, and the purpose the statute is to serve.") (citation omitted).

<sup>244</sup>For expectations contemporary with drafting, see Schmertz, *supra* note 38, at 17 ("[T]he rule changes the law in one important respect by enlarging the rule of exclusion. Rule 408 excludes not only the offer or settlement itself, but, in addition any otherwise admissible express admissions of fact made during compromise negotiations."); see also Moore & Bendix, *supra* note 72, at 19 ("As a matter of elementary fairness, what people say in the course of settlement discussions should not be used against them. . . . The Court Rule would better promote these goals. . . ."). But see 23 WRIGHT & GRAHAM, *supra* note 8, § 5307, at 237 ("Until decisions of the courts have clarified the rule, it seems best to assume that 'freedom of communication' in negotiations has not been significantly altered.").

<sup>245</sup>*Cf.* Brazil, *supra* note 6, at 967 ("[T]he policies that inspire rule 408 are so important that courts should interpret the scope of its protection liberally . . ."); 2 LOISELL & MUELLER, *supra* note 8, § 171, at 456 ("Rule 408 should be generously construed to require exclusion of statements made during negotiations so that even the most cautious lawyer need not continue to follow the old habit [of hypothetical terms]"); BLACK'S LAW DICTIONARY, *supra* note 25, at 1410 ("Statuta pro publico commodo late interpretantur . . . Statutes made for the public good ought to be liberally construed."). But see Davidson v. Prince, 813 P.2d 1225 (Utah App. 1991), *supra* note 3.

<sup>246</sup>ALASKA R. EVID. 408 (R Pamph. 1979), quoted in SPENCER A. GARD & CLIFFORD S. FISHMAN, 2 JONES ON EVIDENCE, CIVIL AND CRIMINAL § 13B:3, at 253 (6th ed. Supp. 1994). Tennessee has adopted a similar provision. See *id.* ("[A] party may not be impeached by a prior inconsistent statement made in compromise negotiations."). See also Laird C. Kirkpatrick, *Reforming Evidence Law in Oregon*, 59 OR. L. REV. 43, 66-67 (1980) ("Rule 408 does not clearly preclude an admission made during negotiations from being used for impeachment purposes . . . . If the rule is truly to further open negotiations, an amendment is necessary"). Robert K. Harris, *The Impeachment Exception to Rule 407: Limitations on the Introduction of Evidence of Subsequent Measures*, 42 U. MIAMI L. REV. 901, 942 (1988) ("A model for resolving these [impeachment] questions on the state level is shown by the example of Alaska."); cf. Green, *supra* note 8, at 36 ("Working for modest amendment to Evidence Rule 408 to make it clear that the Rule excludes evidence of

In their commentary, the Alaskan drafters emphasized the unique needs that parties in compromise negotiations have for safety and reassurance before they dare to let their guard down:

This further protection is required in order to encourage free and open negotiations and to foster settlements. It may be necessary to "concede" issues to an opponent to advance negotiations which are not issues that one would readily concede for purposes of proving liability. If impeachment is allowed, the common law requirement of communicating in hypothetical terms would, for all practical purposes, be reinstated. Unless the parties to the negotiation are insured that they will not prejudice the merits of their respective cases, communications will be guarded.<sup>247</sup>

Compromise negotiations have similarities with peace talks between enemies. The parties are opponents, and they are ambivalent about the process.<sup>248</sup> Fear and mistrust will inhibit the process, as will any lingering threat of repercussions for statements made.<sup>249</sup> Free negotiations involve exchange of ideas and suggestions, exploring each other's views, evolving thoughts and perhaps changing viewpoints. In such a setting "it is extremely difficult to articulate positions at different times that are completely consistent,"<sup>250</sup> particularly because the main idea behind compromise negotiations is mutual concession and surrendering former positions. If the parties are aware that all they say or do during negotiations could be used against them for impeachment purposes later, "they will retreat into a shell of secrecy and non-communication in the pre-trial period, thus turning settlement 'negotiations' into little more than posturing and poker-playing."<sup>251</sup> The proposed amendment will allow the parties to "let their hair down and try to reach settlement in a variety of ways"<sup>252</sup> without having to watch their every word.

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compromises, offers to compromise, and statements made in connection with such offers for substantive as well as impeachment purposes, would be a better legislative agenda . . .").

<sup>247</sup>Reprinted in 2 WEINSTEIN ET AL., *supra* note 13, ¶ 408[08] at 408-47.

<sup>248</sup>See *supra* notes 17-29 and accompanying text.

<sup>249</sup>*Id.*

<sup>250</sup>Brazil, *supra* note 6, at 975.

<sup>251</sup>*Id.*

<sup>252</sup>SALTZBURG & MARTIN, *supra* note 8, at 351.

*D. The Amendment and the Truth-Finding Process*

It has been proposed, with reference to Rule 102,<sup>253</sup> that if a party could not be impeached by prior inconsistent settlement statements, the truth would not be fully "ascertained,"<sup>254</sup> since the effect of barring the use of inconsistent statements would be to "protect false representations."<sup>255</sup> However, one commentator surveying the issue concluded that "it is questionable whether the narrower interpretation of the rule would contribute to the goal of deterring or detecting perjury at trial or lying during settlement negotiations."<sup>256</sup> Moreover, "attack by prior inconsistent statements has the weakness of being indefinite: It indicates that the witness may have erred or lied, but not which or why."<sup>257</sup> Besides, the classic notion that the prior statement is "often inherently more trustworthy than the testimony itself"<sup>258</sup> has been challenged in the context of a trial following free-wheeling, but failed, negotiations.<sup>259</sup>

Finally, the degree of inconsistency required for impeachment is much lower than outright lying; "any material variance between the testimony and the previous statement will suffice."<sup>260</sup> There is no way this variance can be ascertained with certainty; "Is bias at work, or bad character, or a defect in perception, memory or narrative ability or is it simple, human, error?"<sup>261</sup>

The questionable deterrence value of such impeachment, the uncertainty of what it indicates, the low degree of inconsistency required, and its inability to distinguish between innocent errors and deliberate lies indicate that protecting a compromising party from impeachment by prior inconsistent statements does not inhibit the truthfinding process to any considerable degree. This becomes particularly clear when the facts that the "danger that the evidence will be used substantively as an admission is greater,"<sup>262</sup> and "the need for additional evidence on credibility is less"<sup>263</sup> (since the party's interest is

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<sup>253</sup>Fed. R. Evid. 102, Purpose and Construction, provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." FED. R. EVID. 102.

<sup>254</sup>See 23 WRIGHT & GRAHAM, *supra* note 8, § 5314, at 286 (noting that a party impeached at trial, in the absence of mistake, was lying at one time or another).

<sup>255</sup>*Id.*

<sup>256</sup>Brazil, *supra* note 6, at 957.

<sup>257</sup>3 LOUISELL & MUELLER, *supra* note 236, § 356, at 546.

<sup>258</sup>McCORMICK, *supra* note 91, § 34, at 75 (footnote omitted).

<sup>259</sup>Bell, *supra* note 17, at 251-52.

<sup>260</sup>McCORMICK, *supra* note 91, § 34, at 74.

<sup>261</sup>3 LOUISELL & MUELLER, *supra* note 236, § 356, at 546.

<sup>262</sup>McCORMICK, *supra* note 91, § 274, at 813.

<sup>263</sup>*Id.*



obvious), are weighed in on the other side of the scale, together with the strong public policy of encouraging compromise.<sup>264</sup>

## VI. CONCLUSION

In the final reckoning, it may be useful to inquire why the United States Supreme Court,<sup>265</sup> our common-law tradition, and the drafters of the Federal Rules of Evidence all have promulgated the encouragement of compromise and settlements. Commentators agree that the "policy objective is vital to the survival of our court system, for if a large percentage of our cases did not settle, the backlog in our courts would become totally intolerable."<sup>266</sup> Rule 408 therefore occupies a position of crucial importance among the Federal Rules of Evidence in particular, and in the entire American system of justice in general. Since it directly advances the "elimination of unjustifiable expense and delay"<sup>267</sup> more than perhaps any other provision and thereby contributes more than its share "to the end that the truth may be ascertained,"<sup>268</sup> we "should guard against needless inquiry and concern over credibility factors, which could well result in unnecessarily undercutting the basic exclusionary rule."<sup>269</sup>

The proposed amendment will stop the threatening erosion of Rule 408 that is exemplified by the dicta in *Davidson v. Prince*<sup>270</sup> and will enable it to regain its potential in furthering the public policy of encouraging compromise and settlements, which was exactly what the drafters intended.

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<sup>264</sup>Cf. Slough, *supra* note 69, at 721 ("Testing bias or interest of a witness is a legitimate activity, but the trial judge should ever be aware that needless inquiry and concern over credibility factors may spell dissolution of the basic rule of exclusion."). For similar phrasing, see *infra* note 265 and accompanying text.

<sup>265</sup>*Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts [citation] . . ."), *quoted in* 2 LOUISELL & MUELLER, *supra* note 8, § 171, at 453 n.2.

<sup>266</sup>Brazil, *supra* note 6, at 959; see also 23 WRIGHT & GRAHAM, *supra* note 8, § 5315, at 294 ("Although the settlement of disputes is of some advantage to the parties and to society at large, the real beneficiaries of a rule designed to encourage compromise are courts with crowded dockets.") (footnote omitted); 2 LOUISELL & MUELLER, *supra* note 8, § 171, at 453 (noting that private settlement is "an absolutely necessary factor in keeping court congestion to manageable levels").

<sup>267</sup>Fed. R. Evid. 102, *supra* note 253.

<sup>268</sup>*Id.*

<sup>269</sup>JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL, ¶ 7.05[01], at 7-85 (1992).

<sup>270</sup>813 P.2d 1225 (Utah App. 1991), *supra* note 3.