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Article

Protecting the Confidentiality of Settlement Negotiations

by

WAYNE D. BRAZIL*

The wise lawyer takes care to understand the scope of the protection the law affords to statements made and acts done in connection with settlement negotiations. This Article, which focuses on settlement negotiations in federal courts, begins by exploring the scope of Federal Rule of Evidence 408.1 I describe how far this rule's promise of confidentiality extends and the circumstances under which it would permit communications made during settlement negotiations to be admitted into evidence at trial.

Second, this Article discusses other possible sources of protection against admissibility, especially Federal Rule of Evidence 4032 and stat-


Very useful discussions of the problem of confidentiality of settlement communications can be found in Green, A Heretical View of the Mediation Privilege, 2 OHIO ST. J. ON DISPUTE RESOLUTION 1 (1986); Dauer, "Confidentiality in ADR," a chapter in a forthcoming book by the Center for Public Resources entitled Containing Legal Costs: ADR Strategies for Corporations, Law Firms, and Government. I am especially indebted to the work by Professor Green, which brought to my attention for the first time several important cases and concerns.

1. Federal Rule of Evidence 408 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.

2. Federal Rule of Evidence 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially
utes that several states have recently enacted to encourage use of mediation. This state legislation is significant because it erects a protective shield around mediations that appears to be more difficult to penetrate than the shields that Federal Rules of Evidence 408 and 403 erect around settlement communications. Thus, counsel might want to take into account before filing a lawsuit or selecting the court in which to file it the extent of the protection that is available for communications whose purpose is to resolve the dispute before trial. When it is especially important to preserve the confidentiality of such communications, lawyers might consider mediation, as opposed to party-to-party settlement negotiations or even a judicially hosted settlement conference, because of the greater protection that some state laws seem to offer to mediation proceedings.

Third, this Article examines the circumstances under which settlement communications might be subject to pretrial discovery. It by no means follows that material from settlement negotiations is protected from discovery just because a rule of evidence would make that material inadmissible for certain purposes at trial. In fact, the weight of authority suggests that there is no generalized "privilege" for settlement communications and that they are discoverable, at least after a showing of substantial need. Lawyers who conduct settlement negotiations on behalf of or with public entities face an additional peril: there are a number of reported cases in which the press or parties who were not involved in the negotiations have been able to use the Freedom of Information Act, or a state law equivalent to the Act, such as the California Public Records Act, to force disclosure of settlement documents.

Finally, this Article examines the effectiveness of alternative methods for enhancing protection of settlement communications, including protective or sealing orders and side agreements. Although placing a settlement under seal pursuant to a court order may be useful in some circumstances 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.

3. See Note, Protecting Confidentiality in Mediation, 98 HARV. L. REV. 441, 452 (1984); infra note 385.

4. It is possible that federal courts sitting in diversity cases would construe the Erie doctrine (see Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny) or Federal Rule of Evidence 501 to require deference to state laws that confer privileged status on settlement discussions or mediation proceedings.

5. See infra notes 156-217 and accompanying text.


8. See infra notes 234-98 and accompanying text.
cumstances, counsel cannot be confident that this procedure assures protection of the settlement's confidentiality. In an important recent case from the United States Court of Appeals for the Third Circuit, an entity that was not a party to the settlement agreement successfully invoked its common law right of access to court records to force disclosure of a settlement agreement between purely private parties, even though that agreement had been sealed by order of the District Court. Likewise, counsel must appreciate the limitations of side agreements to protect the confidentiality of a settlement. A recent opinion from the United States Court of Appeals for the Second Circuit distinguishes between "private" judgments entered pursuant to settlement and "public" judgments so entered, holding that in the latter the parties must disclose any side agreements that would permit satisfaction of the judgment on lesser terms than those reflected in the public record.

The bottom line of this Article's analysis will be disheartening to some: despite the policy that inspires rule 408, there are many circumstances in which the things that lawyers and clients say and do during settlement negotiations will not be protected from disclosure or barred from use at trial. Thus, the prudent lawyer must think carefully about what she communicates in the settlement context and about selecting the safest possible environment for these communications. As I suggest in subsequent sections, the state of the law in this area may offer an extra incentive to parties who are especially interested in confidentiality to conduct their negotiations through a judicially hosted settlement conference that is structured around private caucuses. Counsel also should consider using private contractual agreements to strengthen the protection of the confidentiality of their settlement communications.

I. Federal Rule of Evidence 408: Failure to Fulfill its Promise of Confidentiality

A. The Scope of Rule 408 Beyond the Common Law: Historical Background and Policy Rationale

Federal courts had afforded an uneven and limited protection to settlement proposals prior to the adoption of the Federal Rules of Evidence in 1975. The principal source of limitation on the scope of the common

11. Id.
12. See infra text following note 394.
13. See infra notes 395-408 and accompanying text.
law doctrine applied prior to 1975 was the policy rationale that gave birth to it: for most courts, the reason not to admit offers of compromise lay in the notion that they were irrelevant. According to Wigmore, an offer to settle evidenced only a party's desire to terminate the litigation; it could not support any reliable inference about the merits of the claim or the amount of damages.\textsuperscript{14}

While the "irrelevance rationale" could support exclusion of the parties' offers or demands, the courts had considerable difficulty using this rationale to exclude statements made by the parties or their conduct while they were trying to negotiate a settlement. As a result, most courts would not exclude from evidence admissions of fact that parties made during settlement discussions unless the author explicitly made the statement hypothetical, or incanted the prophylactic words "without prejudice," or unless the words constituting the admission were "so connected with the offer as to be inseparable from it."\textsuperscript{15}

In drafting rule 408, the Advisory Committee decided that the common-law rationale for exclusion of offers of compromise was too narrow. The Committee (and, eventually, the Supreme Court and Congress) concluded that another rationale, recognized earlier by some courts,\textsuperscript{16} was "more consistently impressive."\textsuperscript{17} This rationale recognized that it was in the public interest, and in the interest of individual litigants, to encourage consensual resolution of disputes. Thus, the Committee made "compromise and settlement of disputes" the principal purpose of Federal Rule of Evidence 408.\textsuperscript{18} To promote that purpose, the Committee reconstructed the law so as to expand considerably the zone of "freedom of communication with respect to compromise."\textsuperscript{19} Most significantly, the new rule offered protection not just to offers or demands, but also to "conduct or statements made in compromise negotiations."\textsuperscript{20} Thus, in adopting this rule, the Supreme Court and Congress in effect reversed a


\textsuperscript{15} \textit{Fed. R. Evid.} 408 advisory committee's note; see also Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 553 (1st Cir. 1974) (court admitted notes with calculations of amounts owed in breach of contract dispute); Megarry Bros. v. United States ex rel. Midwestern Elec. Constr., Inc., 404 F.2d 479, 486 (8th Cir. 1968) (admission of testimony of statement by opponent in settlement negotiations prejudicial error); Nau v. Commissioner of Internal Revenue, 261 F.2d 362, 364-65 (6th Cir. 1958) ("admission of fact will not be summarily excluded simply because it was made in connection with an effort to compromise").


\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Fed. R. Evid.} 408.
long line of federal cases that refused to protect unqualified (e.g., not in hypothetical form) statements of fact or admissions that were made during the course of settlement talks.  

The importance of the principal rationale for rule 408 cannot be overemphasized. As articulated by the District Court in Minnesota shortly after the rule was adopted, "[t]he purpose for the privilege surrounding offers of compromise is to encourage free and frank discussion with a view toward settling the dispute." Counsel should use this rationale to enhance the protections the law affords their and their clients' words and deeds in settlement negotiations. Counsel should preface letters and direct or telephonic oral communications that are designed to contribute to prospects for settlement with an express statement that their purpose is to explore possible bases for settlement or to promote settlement negotiations. Lawyers who find themselves trying to dissuade a court from admitting evidence involving settlement negotiations should argue vigorously that a ruling in favor of admission would pose a grave threat to the policy objective that is at the heart of the rule. That 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.

The language of rule 408 unfortunately leaves a great deal of uncertainty about the scope of the rule. Trial judges must make judgments on a relatively unguided basis in many gray areas. It is in these areas that resort to the primary purpose of the rule is most important.

Counsel can argue persuasively that this is a rule that the courts could easily eviscerate. By resolving close cases in favor of admitting the evidence, courts would strike fear into the hearts of negotiating lawyers and clients and could compel them to play their settlement cards closer to their chest. Negotiations would thus become more of an irrational poker game and deprive parties of access to the reasoning that supports one another's positions. To avoid this result, counsel should argue that judges should construe the rule broadly. Broad construction of the rule would enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept. Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality. Every blow the courts strike against openness is a blow against the health of the

21. See supra note 15 and accompanying text.
system and against the fundamental values on which it is based. These kinds of arguments should be effective because rationality is at the center of the judiciary’s self-image.

Because the drafters of rule 408 departed so substantially from the principal thrust of the common-law tradition, lawyers cannot safely assume that cases decided before 1975 offer reliable guidance about the scope of the protection the rule affords. An attorney will be on firmer ground if he looks to ways in which state courts have interpreted provisions from state law that served as models for the current federal rule. California provided one such model when it adopted a rule extending protection to statements made during compromise negotiations. The notes of the United States Senate’s Committee on the Judiciary suggest that provisions adopted in Nevada, New Mexico, and Wisconsin also served as models for the federal rule.

B. Two Key Prerequisites to Invoking the Rule

Two important prerequisites to successful invocation of rule 408 emerge clearly from its terms: the rule only offers protection if there is a disputed claim, and it only applies to communications made or conduct that occurs “in compromise negotiations.” In other words, unless there are both a real dispute and negotiations to resolve it, the rule provides no help. Thus, if a client first acknowledges both the existence and size of a debt, then the attorney tries to negotiate compromise terms of payment, the conduct and statements receive no protection. The Advisory Committee’s notes articulate this limitation: “The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. . . . Hence, the rule requires that the claim be disputed as to either validity or amount.”

Of course, rule 408 could afford protection if a client acknowledged the existence of an obligation but did not concede its size. It also is important to emphasize that the rule’s reference to claims for an “amount” does not imply that its protections are available only in cases in which a party seeks monetary relief. The rule clearly applies regardless of the character of the relief sought (legal or equitable) or the kinds

23. See C. WRIGHT & K. GRAHAM, supra note 14, at 175-76.
24. Id. at 165-66, 172; see CAL. EVID. CODE §§ 1152, 1154 (West Supp. 1988).
27. FED. R. EVID. 408 advisory committee’s note (citation omitted).
of terms negotiated. As discussed below, however, a proposal to settle that consisted of inviting the opposition to join in an illegal act or conspiracy would not be protected.29

Counsel must beware of the possibility of narrow judicial views of when a claim is "disputed" for purposes of the rule. For example, in *Hiram Ricker & Sons v. Students International Meditation Society,*30 which was decided before rule 408 became effective but which acknowledged that one purpose of the common-law rule was to encourage settlement negotiations, the First Circuit upheld a decision to admit evidence of an offer that was intended to conclude a frayed relationship and preclude a follow-up lawsuit. The plaintiff had become "increasingly dissatisfied with the size of the periodic payments" that the defendant had been making, payments whose size was supposed to be a function of the number of the defendant's guests who used the plaintiff's facility. At trial, the plaintiff testified that, on the day the last payment was due, the defendant handed the plaintiff a sheet of paper that contained calculations and a bottom line figure and said "This is what we owe you. If you agree and sign a release absolving us from any and all damage and all future bills we will pay you."31

Both the trial court and the appellate court held that this statement was not entitled to protection as an offer of compromise. Recognizing that the "rule excluding offers of settlement is designed to encourage settlement negotiations after a controversy has actually arisen,"32 the appellate court reasoned that the defendant's statement did not qualify for protection because the plaintiff could not be sure there was "an actual controversy" until the defendant tendered its final payment.33 The appellate court found that the making of the subject statement marked the beginning of the "actual controversy" for purposes of rule 408.34 Readers should appreciate what this reasoning means: courts may deny protection even though (1) before the subject statement was made both sides knew that plaintiff was dissatisfied with defendant's performance and that litigation was a clear possibility, and (2) the obvious purpose of the statement was to make an offer, which, if accepted, would settle accounts and preclude any subsequent lawsuit.

Counsel also must beware of courts making a distinction between

29. *Id.*
30. 501 F.2d 550, 553 (1st Cir. 1974).
31. *Id.*
32. *Id.* (emphasis added).
33. *Id.*
34. *Id.*
mere business communications, which are not entitled to protection, and "offers of compromise," which are. 35 The key to drawing this line lies in how the courts define "dispute" or "controversy" for purposes of rule 408. If the dynamic between the parties does not qualify as a "dispute" within the meaning of the rule, then by definition communications cannot constitute offers of compromise.

Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co. 36 first suggested the distinction between business communications and offers of compromise. Prior to the filing of the action, plaintiff and defendant had exchanged correspondence to determine which company had the right to use the phrase "Big Foot" to identify its tires. In this correspondence, the plaintiff claimed that it had exclusive trademark rights in this phrase. In response the defendant indicated, among other things, that if the plaintiff sued "the case would be in litigation long enough that Goodyear might obtain all the benefits it desired from the term 'Bigfoot.'" 37 Thus, at the time the subject communications took place, clearly (1) the parties had a real and economically significant disagreement about who had the right to use the phrase "Big Foot," (2) the purpose of the subject communications was to attempt to resolve this disagreement, and (3) litigation was a real possibility.

Despite these facts, the Tenth Circuit upheld the trial court's conclusion that the communications from the defendant in this context did not qualify for protection under rule 408 and should be admitted into evidence. 38 Although the judges may have been motivated by a desire to punish the defendant for its "strong-arm" negotiating tactics, 39 the "law" that emerges from this appellate court opinion remains with us and can be troublesome for lawyers who make good faith efforts to negotiate settlements before lawsuits are filed. The Tenth Circuit seemed to suggest that the correspondence remained mere "business communications" because at the time the letters were sent the "discussions had not crystallized to the point of threatened litigation, a clear cutoff point." 40 The court apparently felt that it was not until the parties had exchanged positions through their letters that they could know that the plaintiff's claim was in fact "disputed" within the meaning of rule 408.

The difficulty with this reasoning lies in the implication that rule

36. 561 F.2d 1365 (10th Cir. 1977).
37. Id. at 1368.
38. Id. at 1373.
40. Big O Tire Dealers, 561 F.2d at 1373.
408's protections are available only after negotiations have degenerated to the point at which one party threatens litigation. In a slightly more recent Seventh Circuit case, *United States v. Hooper*, the court obliquely suggests (but does not unequivocally announce) the even more troubling idea that the protections of rule 408 might be available only when a lawsuit is already on file. If adopted by other courts, the overly technical and demanding views suggested by the Big O and Hooper courts would defeat one of the principal purposes of the rule: to encourage parties to settle their disagreements outside the court system.

Some courts have adopted more generous interpretations that are less threatening to rule 408's purposes. For example, in *Olin Corp. v. Insurance Co. of North America*, the District Court concluded that there was a disputed claim within the meaning of rule 408 because the plaintiff reasonably "contemplated that litigation might be necessary," and another party "conceded that litigation was possible." The court reached this conclusion even though no suit had been filed and the parties might not have known they were fully at loggerheads.

There is another context in which courts may find rule 408 inapplicable because no "dispute" existed prior to the time the subject communication occurred. *Cassino v. Reichhold Chemicals, Inc.*, concerned the admissibility of a document entitled "Settlement Agreement and General Release" that defendant had asked plaintiff to sign during a meeting in which defendant informed plaintiff that he was being terminated. "The document, which Cassino refused to sign, offered $18,000 in exchange for Cassino's release of all claims against [defendant] "including, but not limited to, rights under federal, state or local laws prohibiting age or other forms of discrimination. . . ." It is important to note that the *Cassino* result may reflect, sub silentio, the court's belief that the interests protected by federal statutes that prohibit age discrimination simply out-weigh the interests that might have been advanced by permitting the defendant in this case to use rule 408 to bar admission of a document the court believed was probative of defendant's motive in terminating an older employee.

In concluding that this document was admissible, however, the Ninth Circuit Court of Appeals distinguished between an offer that is
extended to try to settle a dispute that arises "after the termination," and an offer that is presented at the time the decision to terminate is communicated to the employee. Characterizing offers made at the time of termination as proposed "termination agreements," the court observed that such proposals "are generally made a part of the record in the case and are considered relevant to the circumstances surrounding the alleged discriminatory discharge itself. The termination agreements, therefore, are probative on the issue of discrimination." The "record" alluded to by the court presumably is the record developed during administrative proceedings on the underlying claim. Administrative bodies' routine consideration of these kinds of documents supports the court's conclusion that the documents are probative on the core liability issue; but that fact has no bearing on the scope of a rule of evidence that is inapplicable in the administrative context.

To support its holding that rule 408 barred admission of the proposed settlement and release agreement, the Cassino court relied on only one proposition: "the protections of Rule 408 were designed to encourage the compromise and settlement of existing disputes." The Court emphasized not the language or policies of the rule, but the probative weight (on the liability issue) of the content and timing of the settlement offer:

Where, as here, the employer tries to condition severance pay upon the release of potential claims, the policy behind Rule 408 does not come into play. Rule 408 should not be used to bar relevant evidence concerning the circumstances of the termination itself simply because one party calls its communication with the other party a "settlement offer."

Perhaps significantly, the court promptly added that "[s]uch communications may also tend to be coercive rather than conciliatory." The court proceeded to admonish that "‘courts should not allow employers to compromise the underlying policies of the ADEA [Age Discrimination in Employment Act] by taking advantage of a superior bargaining position or by overreaching.’ " This language suggests that Cassino may be another case in which the judiciary's hostility to "strong-arm" bargaining helps to explain the court's analysis of rule 408. In the end, however, one senses that the principal reason that the Cassino court

46. Id.
47. Id.
48. Id. at 1343 (emphasis added) (citations omitted).
49. Id.
50. Id.
52. 817 F.2d at 1343 (citations omitted).
insisted on construing rule 408 narrowly was the court's understandable belief that the policies that inspire rule 408 simply are not as important as those that inspire the ADEA.

What lessons should counsel learn from these cases? First, the policies that inform rule 408 often will be in competition with other social policies, and that competition may cause some courts to interpret the rule narrowly. A second lesson, implicit in Big O and Cassino, is that many courts do not like "strong-arm" negotiation strategies. Judges are especially likely to resent litigants or lawyers who try to use the cost and delay of litigation to gain an advantage to which they know they are not entitled. The most significant lesson from Big O is that some courts might punish your client if they believe that its bargaining position is not based on its perception of the merits of the case, but reflects a self-conscious attempt to use the fact that it will cost your opponent a great deal of money or take him a great deal of time to get relief through the court system or both.

The technical lesson from Big O, Hiram Ricker & Sons, and Cassino is this: To maximize the odds that communications will be protected by rule 408, an attorney should either (1) file suit before beginning negotiations (a move may not be conducive to constructive discussions) or (2) announce, as a preface to communications, that he is invoking the protections of rule 408, that communications already completed between the parties establish that they have a dispute, that his client fears the dispute could lead to litigation, and that the purpose of his communication is to present an offer of compromise and to contribute to negotiations looking toward a settlement agreement. The problem with this advice is that by following either route an attorney risks damaging the prospects for creating the kind of feelings between the parties that are most conducive to reaching agreement. It is unfortunate that tough cases (and overreaching litigants) have forced courts to construe rule 408 in ways that tend to defeat its purposes.

There is authority, however, for the view that statements need not rise to the level of formal "offers" in order to qualify for protection. Communications whose primary purpose is to explore whether an opponent is interested in discussing settlement should be protected, as should communications that solicit an offer or a demand from an opponent. Moreover, as long as it is viewed either as part of an effort to negotiate settlement or as an offer of compromise, a proposal to refer a dispute to

53. See C. Wright & K. Graham, supra note 14, at 214.
54. See cases cited infra notes 155-217.
55. See C. Wright & K. Graham, supra note 14, at 178.
arbitration or to some other alternative dispute resolution procedure also should come within the ambit of the rule.56

II. The Principal Limitations on the Scope of Rule 408

Unfortunately for lawyers and clients who want "free and frank discussion"57 to maximize the odds of achieving settlement, limits on the scope of rule 408 result in many circumstances in which courts may admit into evidence even communications that clearly were part of good faith negotiations, the sole purpose of which was to settle claims that already have been filed in court.

The primary reason counsel cannot safely assume that their communication will be protected by rule 408, however, is not the possibility that courts might construe narrowly the threshold requirements that there be a "claim" and that it be "disputed." The more consequential limit on the rule's scope is the proviso that it applies only when the purpose of admitting evidence from the negotiations is "to prove liability for or invalidity of the claim or its amount."58 Thus, by its own terms, rule 408 does not preclude admission of offers of compromise, or statements made in negotiations, when admitting the evidence would serve any purpose other than directly proving or disproving liability for or the amount of the claim. Because there are so many other purposes for which such evidence might be admitted, because it is impossible to forecast the likelihood that any such purpose will surface at trial, and because the outcome of any given judge's balancing analysis under rule 403 is not predictable, the wise lawyer has no choice but to be circumspect when negotiating directly with the opposition.

This sobering position means that counsel either must accept only half-rational negotiations (the "blind man's bluff" approach, in which neither side has meaningful access to the reasoning that supports the other side's view of the case) or must look to some device other than rule 408 to protect the confidentiality of what they say during negotiations. I describe some of the alternative sources of protection after briefly discussing some of the purposes for which evidence from settlements might be offered other than to "prove liability for or invalidity of the claim or its amount."59

There are many purposes for which settlement negotiation evidence might be offered that would not be within the scope of rule 408. The

56. Id. at 202-03.
58. FED. R. EVID. 408.
59. Id.
most significant of these are (1) to impeach a witness; (2) to negative a contention of undue delay; (3) to prove wrongful acts during negotiations; (4) to prove the existence of or to block enforcement of an alleged settlement contract; and (5) to show the state of mind of a party. The principal impression created by most of the cases discussed in this section is that the scope of rule 408 is indeed limited and that many courts appear to be quite comfortable permitting parties to brush past the thin veil of confidentiality that surrounds settlement negotiations. Before turning to these cases, however, I point out that there is authority for the view that the 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.

One recent case exemplifies this liberal spirit. In Stacey v. Bangor Punta Corp., Judge Carter refused to rule in advance of trial that evidence of a settlement between the plaintiff and a third-party defendant should be admitted, even though the defendant's proffer showed that the purpose of the evidence would be to establish the bias of the third party defendant and not to prove the "invalidity of the claim or its amount." In announcing that he would not rule on this motion until the unfolding of the trial itself better exposed "exactly the context in which Defendants will seek to offer [the] evidence," Judge Carter quoted with approval the following passage from a treatise by Professors Louisell and Mueller:

There are, to be sure, purposes for which the proof [of settlement] is competent, but these are relatively narrow. It is well recognized, and rightly so, that the risks of prejudice and confusion entailed in receiving settlement evidence are such that often Rule 403 and the underlying policy of Rule 408 [to encourage settlement] require exclusion even when a permissible purpose can be discerned.

Judge Carter went on to point out that it is often difficult to keep separate the purposes for which evidence is offered, and that if issues of impeachment "are inextricably bound up with issues of causation and liability," as they sometimes are, offers of evidence made ostensibly to impeach might still run "afool of Rule 408."

These passages from Stacey v. Bangor Punta Corp. suggest a point that we must keep clearly in mind while journeying through the forest of cases that conclude that rule 408 offers no protection because the purpose for which the settlement material is proffered is not to "prove liability for

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61. Id. (citing 2 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 170, at 272 (1978)).
62. Id. (citing McInnis v. A.M.F., Inc., 765 F.2d 240, 250-51 (1st Cir. 1985)).
or invalidity of the claim or its amount.” Courts cannot assume that evidence from settlement negotiations is admissible simply because it is offered for a real purpose other than one of the purposes prohibited by rule 408.63 In this situation courts also must conduct a balancing analysis under rule 403. Before deciding to admit settlement evidence, judges must be satisfied that its probative value is not clearly outweighed by any prejudice, confusion, or delay that introducing it might cause.

Counsel also should understand that trial judges have discretion in fixing the scope and content of cross-examination and that rule 408 does not destroy that discretion even when evidence of settlement is offered for some purpose other than that to prove liability. The Fifth Circuit’s opinion in Reichenbach v. Smith64 illustrates this point well. Without adverting to rule 403 at all, the Reichenbach court upheld the district judge’s decision to exclude evidence of plaintiff’s settlement with a codefendant even though the proffered purpose was to challenge the credibility of plaintiff’s testimony. In upholding the trial judge’s ruling the appellate court emphasized the importance of encouraging settlements and the role confidentiality can play in the settlement dynamic. The Fifth Circuit panel proceeded to declare that when ruling on an objection to the admission of evidence of settlement rule 408 permits the trial judge to:

balance the policy of encouraging settlements with the need for evaluating the credibility of the witnesses. . . . The importance of informing the jurors fully so that they can carefully judge the credibility of each witness in making their fact determination may in some situations outweigh the desire to encourage settlements. But this choice must be made in the first instance by the trial judge.65

The appellate court went on to affirm the trial judge’s conclusion that because there were other, obvious reasons for scrutinizing closely the plaintiff’s testimony, admitting the evidence of the settlement would not add significantly to the jury’s ability to assess her credibility. Because it was reasonable to conclude that admitting the evidence of the settlement would not contribute materially to the jury’s ability to assess credibility, the trial judge committed no harmful error by deciding that the balance tipped in favor of encouraging settlement.66

Inexplicably, however, the Reichenbach panel added a concluding paragraph that seems inconsistent with the body of its opinion and that appears to take away much of the discretion the court had just acknowl-

63. See infra notes 150-54 and accompanying text.
64. 528 F.2d 1072 (5th Cir. 1976).
65. Id. at 1075 (emphasis added).
66. Id.
edged. The court emphasized that its "affirmance is not to be considered an approval for the future of the trial court's approach. The existence of a settlement agreement goes directly to the issue of credibility and usually the better approach is that codified in rule 408."\textsuperscript{67} While this last paragraph obviously compromises the utility of this opinion for lawyers resisting the admission of settlements, the reasoning in the body of the opinion is sound and consistent with the body of doctrine developed separately under rule 403.

A. Impeachment

The first purpose outside rule 408's scope for which settlement material might be offered is impeachment. The word "impeachment" is used to embrace a great many purposes for which evidence might be introduced at trial. These purposes include showing witness bias or prejudice; demonstrating that a prior claim of the opponent is inconsistent with his present claim or that the present claim was omitted from a prior action in which it logically should have appeared; or providing evidence that a party made a prior statement that is inconsistent with a statement made at trial. When thinking about the scope of rule 408, lawyers must appreciate that whether it will serve as an obstacle to admissibility may depend in part on which kind of impeachment is being attempted.

\textit{(1) Bias or Prejudice of a Witness}

Despite the fact that the \textit{ultimate} purpose for introducing impeaching evidence is to help the proffering party win the case on the merits (or at least to affect the size of the damage award), and thus, in the language of the rule, "to prove liability for or invalidity of the claim or its amount," many courts would hold that rule 408 does not bar admission of statements made during negotiations if the \textit{immediate} purpose is to impeach by proving "bias or prejudice of a witness."\textsuperscript{68} By its express terms, the rule "does not require exclusion when the evidence is offered for . . . proving bias or prejudice of a witness."\textsuperscript{69}

A classic example of the application of this express limitation on the scope of the rule arises when one of several defendants settles with the plaintiff, then appears at trial to testify on the plaintiff's behalf. In this setting, some courts interpret rule 408 as permitting the non-settling de-

\textsuperscript{67} Id. at 1076.
\textsuperscript{69} Fed. R. Evid. 408.
fendants to introduce the terms of the settlement agreement in an effort to show that the testifying former defendant is biased in favor of the plaintiff.

The opinion by the Court of Appeals for the Third Circuit in *John McShain, Inc. v. Cessna Aircraft Co.* illustrates this point. In this case, the plaintiff had settled a purported $25,000 property damage claim with one of the named defendants for consideration that had two elements: (1) the defendant agreed to pay the plaintiff ten dollars and (2) the defendant permitted the plaintiff to use one of the defendant's employees as an expert witness at trial. When the employee testified at trial, the district judge permitted the remaining defendant to introduce evidence about the terms of the earlier settlement agreement, on the theory that these terms could support an inference that the employee-expert witness was biased in favor of the plaintiff. On appeal, the court concluded that this ruling neither offended rule 408 nor constituted an abuse of the trial court's discretion under rule 403.

In reaching this conclusion, the Third Circuit panel characterized quite narrowly the "core of the public policy that the rule against admission of compromises was designed to vindicate." That policy, according to the court, "encourages negotiation by preventing the parties to the compromise from being tied elsewhere to the concession they made inter se." Unfortunately, this narrow view ignores the Advisory Committee's and Congress' use of rule 408 to expand the common-law protection so that not just offers and demands would be covered, but also (as the language of the rule itself states) "conduct or statements made in compromise negotiations." Moreover, since the purpose of the extended coverage was to encourage "freedom of communication with respect to compromise," it is clear that the drafters of the rule intended to do much more than reduce fear of the one danger that the *McShain* opinion acknowledged, namely the fear of "being tied elsewhere to the concession... made inter se."
Professors Wright and Graham have pointed out another problem that the *McShain* court ignored: when judges permit introduction of evidence that the plaintiff settled a closely related claim against a former co-defendant on terms that are generous to the former defendant, the jury might infer that the plaintiff really does not believe in his claim against the remaining defendant.\(^7\) It is precisely this risk that rule 408 was designed to avoid. The principal fear that inspires exclusion of evidence of offers of compromise is that juries will interpret these offers as acknowledgements that a claim or defense is weak or meritless. Given this risk, lawyers should argue that even if a literal reading of rule 408 would not block admission of evidence about offers or demands, the balancing analysis (weighing probative value against the likelihood of unfair prejudice) required under rule 403 would compel exclusion.

Counsel looking for support for this line of argument can cite *Kennon v. Slipstreamer, Inc.*,\(^{78}\) a recent opinion from the Fifth Circuit. In this case a divided appellate court held that a trial judge violated rule 408 and committed reversible error when, in explaining to the jury the sudden absence of three defendants, he disclosed not just the fact that plaintiff had settled with them, but also that the amount of the settlement was a nominal ten dollars each.\(^7\) The *Kennon* majority acknowledged that the purpose of disclosing the fact of the settlement was to avoid jury confusion, but insisted that in the circumstances presented there was "no proper purpose" for disclosing the amount.\(^8\) Thus by disclosing the amount of the settlement the trial court had violated rule 408.

Having reached that conclusion, the appellate court was required to proceed to the next question: Did the violation of the rule require reversal? To answer this question, the Fifth Circuit panel had to assess the likelihood and probable magnitude of unfair prejudice to the remaining defendant. The centerpiece of the court's justification for reversing and remanding was its conclusion that when the trial judge disclosed the terms of the settlement, he created a great risk of extreme prejudice to the remaining defendant.\(^8\) The court's words have significant implications for many issues concerning the scope of rule 408:

First, the fact that the settlement was for a nominal amount suggests that the plaintiffs thought that the settling defendants were not liable

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77. C. WRIGHT & K. GRAHAM, supra note 14, at 264.
78. 794 F.2d 1067 (5th Cir. 1986).
79. Id. at 1071.
80. Id. at 1070.
81. Id.
for the plaintiff’s injuries and therefore points the finger at Slipstreamer as the one responsible. Just as we held in *McHann v. Firestone Tire and Rubber Co.*, that informing the jury of a large settlement by a co-defendant might lead the jury to believe that only the co-defendant, and not the nonsettling defendant, was negligent, the disclosure of the “nominal” ten dollar settlement in this case suggests to the jury that Slipstreamer alone was liable. Furthermore, the willingness of the plaintiff to settle for a pittance with the other defendants could be taken by the jury as a reflection of the strength of the plaintiffs’ case against Slipstreamer.82

Based on these and other considerations, the majority held that “no party, or the court, should disclose to the jury the amount of a settlement with other defendants in the absence of compelling circumstances demanding disclosure . . . .”83 The fact that the court’s logic about the scope of rule 408 is not air-tight84 should not obscure this opinion’s importance: it delineates the kind of substantial prejudice that can result from admitting terms of settlement into evidence and makes it clear that courts have a responsibility to weigh this prejudice when deciding whether to admit such evidence, regardless of the technical purpose for which it is proffered. In the end, the *Kennon* opinion may prove more useful to courts conducting analyses under rule 403 than under rule 408. In either event, it casts a long shadow of doubt over the continuing vitality of opinions like *John McShain, Inc. v. Cessna Aircraft Co.*85

(2) Prior Inconsistent or Omitted “Claims”

Another form of impeachment that might not be prevented by rule 408 involves evidence that before trial the opposing party made a claim that is inconsistent with a claim he is pressing at trial. As Professors Wright and Graham point out, rule 408, by its own terms, applies to offers of compromise and to statements made “in compromise negotiations,” but not to claims.86 Thus there is some risk that a court would view a party’s initial demand not as an offer of compromise of a disputed claim but as a description by that party of what his claim embraces. For example, in *Reich v. Reich*,87 the court decided that the evidence of how much a party was willing to pay for her interest in property was not an offer of compromise but a reflection of what she believed to be the value of the property. Courts also might permit an opponent to introduce evidence of

82. *Id.* at 1070 (citation and footnote omitted).
83. *Id.* at 1071.
84. *Id.* at 1075-76 (Thornberry, J., dissenting).
85. 563 F.2d 632 (3d Cir. 1977).
86. C. WRIGHT & K. GRAHAM, *supra* note 14, § 5311 at 266.
an initial demand to show that it did not include some claim that the plaintiff later pressed at trial. In *Fieldson Associates v. Whitecliff Laboratories, Inc.*,88 a California appellate court construed a state law counterpart to rule 408 to permit a defendant to prove the scope of a contract by introducing evidence that the plaintiff had not made a claim for lost profits.89

The view that rule 408 simply does not apply to statements of claims can be interpreted as a variation on the theme described above, which provides that the parties may seek the protection of this provision only after they know that there is a “dispute.” If taken too literally, this requirement would mean that rule 408 could apply only after an initial offer or demand has been rejected. This obviously makes no sense, in part because such an interpretation would not encourage settlements and would frustrate the purposes of the rule, and in part because it is not consistent with the “real world.” Opening offers or demands are often in fact “compromise” proposals, made in an environment in which everyone knows the parties do not see eye-to-eye about how a particular matter should be resolved.

The situation is different, of course, when a debtor expressly admits that he owes a specified sum, but offers to pay a smaller figure in the hope that the creditor will accept it rather than go through the hassle and expense of litigation to collect. The Advisory Committee’s notes to rule 408 make it clear that the “policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum.”90 Good lawyers will argue, however, that except when a party expressly concedes the amount of its obligation, courts should not construe rule 408 either to discourage parties from being the first to put an offer or demand on the table or to force the careful lawyer to inflate his client’s opening demand to cover every conceivable claim, thus eliminating the possibility of a later argument that because something was omitted his client does not really believe in the validity of it.91

The moral of these stories is relatively straightforward. The careful lawyer should preface an opening demand or offer by expressly stating that there is a dispute between the parties and that the proposal being advanced reflects neither a complete statement of the client’s claims nor a full valuation of them. Rather, the lawyer should make clear that the

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89. *Id.* at 772-73, 81 Cal. Rptr. at 333-34 (interpreting CAL. EVID. CODE §§ 1152, 1154).
90. FED. R. EVID. 408 advisory committee’s note (emphasis added).
proposal is an offer of compromise made in the hope that it will produce a settlement and thus enable both sides to avoid the cost and delay associated with litigating to judgment.

(3) Prior Inconsistent Statements

One of the most common forms of impeachment consists of evidence that a party or witness on some earlier occasion made a statement that is arguably inconsistent with a statement he or she has made on the stand during trial. Rule 408 bars admission of offers or demands, or statements made in settlement negotiations, if the direct and immediate purpose is "to prove liability for or invalidity of the claim or its amount." Thus a party clearly cannot introduce evidence of pretrial offers or statements made during negotiations as part of that party's case-in-chief on the liability or damages issues before the party who allegedly made the statement testifies. Surprisingly, however, 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 (1) when the party who allegedly made them has given testimony at trial with which the pretrial offer or statement is arguably inconsistent and (2) when the purpose of introducing the evidence is to attack that party's credibility by calling into question his veracity, memory, or accuracy of perception.

There is support from commentators and in cases for both sides of this issue. Among commentators, Professors Redden and Saltzburg take the position that it would effectively defeat the principal purposes of rule 408 to hold that it permits admission of statements made in negotiations solely because they are arguably inconsistent with testimony offered by a party at trial. Professors Louisell and Mueller seem to line up on the other side. Professors Wright and Graham also advocate admission of such statements, even though they do so without overwhelming conviction, and after acknowledging that the competing arguments are not without substance. The few judicial opinions in this area are not elaborately reasoned, but most seem to favor admission of settlement communications for impeachment purposes when the communications qualify as


prior inconsistent statements.\textsuperscript{95} Judicial support for the opposite view can be found in \textit{C & K Engineering Contractors v. American Steel Co., Inc.}\textsuperscript{96}

The next few paragraphs suggest arguments that could be used by lawyers whose objective is to persuade a court that rule 408 does not permit admission of statements made by a party opponent during negotiations merely because the statements are arguably inconsistent with testimony by that party at trial. Counsel should keep in mind, however, that even if they fail to persuade the court that rule 408 should be so construed, they may still be able to mount powerful arguments against admission under rule 403, since the evidence’s marginal contribution to the jury’s capacity to assess the credibility of the witness often clearly will be outweighed by the risk of unfair prejudice, confusion, and digression into collateral matters.\textsuperscript{97}

The most important argument counsel can make under rule 408 is that to admit statements made during negotiations simply because they are arguably inconsistent with a party’s prior trial testimony would eviscerate the rule completely. To admit such statements would make a mockery of the rule’s promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are completely consistent and because it is so easy to find some tension between virtually any two statements on the same subject. Even Professors Wright and Graham concede that interpreting rule 408 to permit the admission of statements merely because they are inconsistent with trial testimony threatens to reduce “the second sentence of Rule 408 to a cipher.”\textsuperscript{98}

If lawyers and parties know there is a great risk that what they say in settlement negotiations may be used against them at trial, they will retreat into a shell of secrecy and non-communication in the pretrial period, thus turning settlement “negotiations” into little more than posturing and poker-playing. If parties are afraid to share the reasoning that supports and explains their offers and demands, they bear a greater risk that the substantive terms of settlement agreements will not reflect rational and fair resolutions of disputes. Since so many of our cases are

\textsuperscript{95} See, e.g., County of Hennepin\textsuperscript{v. AFG Indus., Inc.}, 726 F.2d 149, 153 (8th Cir. 1984); American Family Life Assurance Co. v. Teasdale, 733 F.2d 559, 568 (8th Cir. 1984); Missouri Pac. Ry. v. Arkansas Sheriff’s Boys Ranch, 280 Ark. 53, 63-65, 655 S.W.2d 389, 394-95 (1983); \textit{In re Commodore Hotel Fire and Explosion}, 324 N.W.2d 245, 248 (Minn. 1982).

\textsuperscript{96} 23 Cal. 3d 1, 12-13, 587 P.2d 1136, 1142-43, 151 Cal. Rptr. 323, 329-30 (1978) (interpreting CAL. EVID. CODE § 1155).

\textsuperscript{97} See infra notes 125-54 and accompanying text.

\textsuperscript{98} C. WRIGHT & K. GRAHAM, supra note 14, at 227.
concluded by settlement agreements, it is unseemly to interpret rules of evidence in a way that significantly reduces the likelihood that settlements will be rational and that the parties will feel the settlements are fair. The courts' interpretation of evidentiary rules should promote rationality and respect for the ways disputes are resolved in the system rather than irrationality and cynicism.

Counsel can buttress these policy arguments by noting that the only form of impeachment acknowledged by the rule itself is proof of "bias or prejudice of a witness." In addition, all of the cases cited in the Advisory Committee's note supporting admissibility for purposes of impeachment involved evidence of generous settlements with former defendants who were subsequently called to testify at trial on behalf of plaintiff.99 It seems unlikely that the drafters of the rule would have failed to mention as common a form of impeachment as prior inconsistent statements, if they felt that it should constitute an exception to rule 408. Moreover, it is difficult to imagine that the drafters did not see that the apparent promise of meaningful protection offered by rule 408 would be a charade and a huge trap for the unwary if impeachment by a prior inconsistent statement were considered a sufficient basis for admission.

Counsel also can argue that there are other well-established "exceptions" to rule 408 that give courts ample power to admit evidence necessary to correct wrongs committed during settlement negotiations. As discussed below, there is clear authority to admit evidence of statements made during negotiations if the purpose is to show illegality in the terms of an agreement or that an agreement was acquired through fraudulent representations or omissions.100 Similarly, courts have held that because rule 408 applies only to genuine compromises of real disputes, it offers no protection when statements made during negotiations or the terms of an agreement tend to show that a purported settlement was in fact a sham. For example, rule 408 would not protect a statement that a settlement was entered solely to buy the testimony of a former defendant, or to induce him to pretend to remain active in the case by pursuing claims against co-defendants in order to give plaintiff more leverage with those other defendants.101

The only wrong that a party could hide behind rule 408 if courts refuse to admit statements made during negotiations simply because they

99. Id. at 262; see FED. R. EVID. 408 advisory committee's note.
100. See infra notes 108-16 and accompanying text.
are arguably inconsistent with testimony at trial is lying on the stand or during a settlement discussion. Lying from the witness stand or during settlement negotiations is a serious evil. But acknowledging that fact is not where thinking about this matter should stop.

First, courts must ask how much the narrower interpretation of the rule would affect real world behavior: how much less lying would there be, and how much more often would lying be detected, if rule 408 were construed to permit admission of statements that were made in settlement negotiations solely on the ground that they arguably are inconsistent with testimony offered at trial? Since there is no empirical study that answers this question, we are forced to speculate. My speculation is that adopting the narrower interpretation of the rule would have little effect on lying. The psychological and other forces that lead people to lie are probably sufficiently powerful in most instances to overwhelm whatever fear might be engendered by the rather remote possibility of exposure through admission of words uttered in settlement negotiations. Most lawyers and litigants understand that only a small percentage of cases reach the trial stage, so most counsel and clients probably would believe that the odds are small that a lie committed during settlement negotiations would be exposed at trial. Moreover, if a party lies during settlement negotiations about a matter of any real consequence, it seems unlikely that he would not repeat the lie at trial. If he repeats the lie, his stories will not be inconsistent and the narrower interpretation of the rule would not help expose his dishonesty.

There is some possibility that parties might be truthful during settlement negotiations but untruthful at trial. The odds of that scenario occurring often with respect to important issues seem small, however, because the pressure to be truthful at trial is much greater than it is in the informal, off-the-record settlement negotiations. Moreover, most settlement negotiations are conducted almost exclusively by counsel and not by the clients. Thus, in the vast majority of cases, the stories that would be compared for impeachment purposes would be (1) the story told by the client at trial and (2) the story told by his lawyer in settlement discussions. It is not clear that courts would permit impeachment of a party’s trial testimony by words uttered earlier by his lawyer in private efforts to compromise the claim. In sum, 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.

On the other hand, the broader interpretation of the rule, which would bar evidence of settlement communications if the only ground for admission was arguable inconsistency between statements in settlement
negotiations and testimony at trial, might promote positive ends by encouraging parties to share, during settlement discussions, more of the reasoning and evidence that supports the offers or demands they make. I hasten to concede that just as it is not clear how much a narrow interpretation of rule 408 discourages or exposes lying, it also is not clear how much a broad interpretation of the rule would improve the openness and rationality of settlement discussions. The absence of empirical data forces courts to make educated guesses on both sides of the debate. I fear, however, that fair consideration has not been given to the arguments that support a broader interpretation of the rule. Such consideration might begin by acknowledging that it is not true that only liars need fear an interpretation of rule 408 that would permit admission of statements made in negotiations solely on the ground that they are arguably inconsistent with trial or deposition testimony. Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent. In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous. The choice clearly is not between protecting liars and exposing liars. Rather, the choice is between (1) an interpretation of the rule that might, to some unmeasured extent, deter some lying by permitting party opponents to expose it when negotiations do not lead to settlements, and (2) an interpretation of the rule that would give some reality to its promise of confidentiality and that might, to some unmeasured extent, make settlement negotiations more rational by encouraging parties to share the reasoning that supports their positions. Given the lack of evidence that the narrow view of the rule has any effect on lying, courts should reject that interpretation on the ground that it makes rule 408 hollow and misleading and creates pressures on counsel and litigants that tend to defeat the rule's purposes.

B. Negativing a Contention of Undue Delay

By its own terms, rule 408 does not compel exclusion of settlement communications if they are proffered for the purpose of “negativing a contention of undue delay.” Parties are most likely to want to use settlement communications for this purpose when the opposition is asserting that the doctrine of laches should bar their claim. As both Wigmore and
Professors Wright and Graham point out, however, often it will only be the existence of negotiations that is relevant, not the content of the parties' statements during the discussions. Lawyers who are trying to limit disclosures from the negotiations should press this point on the judge. On the other hand, the content of statements made during the negotiations would be relevant and admissible, barring protection from some other rule such as rule 403, if plaintiff contended that he had failed to press forward because of specific promises defendant made during their settlement talks. For example, this may occur where there is evidence that the defendant told the plaintiff not to file suit because the defendant would make the plaintiff whole without the necessity of resorting to the court system.

In contrast, parties will rarely be able to use an opponent's assertion of a defense based on the statute of limitations to justify introducing evidence from settlement negotiations. The obstacle, however, would not be rule 408, but rule 402's requirement of relevance. Under most statutes of limitations, "the fact that one was attempting to compromise the dispute is usually no excuse for failure to file the complaint or to take whatever steps are required to comply with the statute." An exception to this generalization might arise when the evidence from the negotiations suggests that the defendant had affirmatively induced the plaintiff not to file his claim by making false promises to pay or otherwise correct the situation. When a defendant's request or promise reasonably induces the plaintiff not to file within the statutory period, the plaintiff might well be able to invoke the doctrine of equitable estoppel to make the evidence relevant.

Courts have permitted parties to use evidence of settlement negotiations to excuse failures to begin efforts to mitigate damages promptly, or to rebut a defendant's contention that the plaintiff's delay in stopping work under a contract showed that the plaintiff did not believe that the defendant had breached. Similarly, a defendant is likely to be permitted to introduce evidence that during settlement negotiations it offered to

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102. See C. Wright & K. Graham, supra note 14, at 272 (citing Wigmore, Evidence § 1061 n.43 (1972)).
104. C. Wright & K. Graham, supra note 14, at 271.
105. Id. at 283.
106. See, e.g., California & Haw. Sugar Co. v. Kansas City Terminal Warehouse Co., 602 F. Supp. 183, 188 (W.D. Mo. 1985) (company sold sugar to alternate buyer while negotiations progressed, resulting in greater damages due to drop in market price); Urico v. Parnell Oil Co., 708 F.2d 852, 855-56 (1st Cir. 1983) (plaintiff incurred additional loss of use damages while negotiating with insurer over who would pay for truck repair); C. Wright & K. Graham, supra note 14, at 272, 283.
reinstate the plaintiff when the purpose of the evidence is to show that the plaintiff did not mitigate his damages.107

C. Wrongful Acts During Negotiations

Rule 408 will not block admission of evidence from settlement negotiations if the purpose of the evidence is to show that a party committed a civil or criminal wrong or proposed illegal activity. For example, rule 408 would be no obstacle to introducing evidence that an offer to compromise made by a defendant in an antitrust action consisted of an invitation to join an illegal conspiracy.108 Similarly, there is no reason to read rule 408 as barring evidence that a party attempted to extort another during settlement negotiations. As suggested by Judge Weinstein, a former member of the Advisory Committee on the evidence rules, courts also should admit evidence from settlement negotiations that shows a libel, an assault, or an unfair labor practice during the negotiations themselves.109

Evidence from settlement negotiations may be used in other contexts. Parties may use such evidence to help prove the failure of an insurance carrier to make a good faith settlement within policy limits.110 Evidence from settlement negotiations also might be used to help prove a claim of attorney malpractice, or as part of a lawyer's effort to prove that he is entitled to a fee that a former client is wrongfully refusing to pay.111 There is also authority for the view that a grand jury investigating criminal charges may subpoena evidence about settlement negotiations in an earlier civil lawsuit.112 This exception finds support in rule 408's express permission to use evidence from settlement negotiations to prove "an effort to obstruct a criminal investigation or prosecution."113

A significant variation on this theme can arise when some members of a putative class object to a proposed settlement of a class action. An important Seventh Circuit opinion held that "the conduct of the negotia-

108. Cf. Crouse-Hinds Co. v. Internorth, Inc., 518 F.Supp 413, 414-16 (N.D.N.Y. 1980) (Clayton Act provides an exception to rule 408 as regards consent decrees or nolo contendere pleas in antitrust actions; exception is necessary to allow use of past antitrust conduct in enforcing law).
111. C. WRIGHT & K. GRAHAM, supra note 14, at 282.
113. FED. R. EVID. 408.
tions [is] relevant to the fairness" of a proposed class settlement.\textsuperscript{114} Therefore, members of a class that seek to block approval of such a settlement are entitled to conduct discovery or examinations into how the negotiations were handled, including inquiry into alternative offers that may have been considered and potential conflicts of interest of counsel who led the settlement negotiations on behalf of the class.\textsuperscript{115} The court noted that the "seemingly irregular conduct of the negotiations" raised real questions about whether those who had purported to represent the members had done so adequately and whether the terms of the proposed agreement were unfair to some of the people who would be included.\textsuperscript{116}

D. To Prove or Block Enforcement of an Alleged Settlement Contract

Rule 408 does not bar the use of evidence from settlement negotiations if the purpose is either (1) to prove that an agreement was reached and should be enforced, or (2) to defeat enforcement of an apparent agreement. For example, the rule will not prevent a party from introducing evidence from the negotiations to show that a settlement contract was procured by fraud\textsuperscript{117} or was the product of duress or mutual mistake.

There are some circumstances, however, in which counsel may be able to forestall such suits. Counsel may incorporate a release into the settlement contract that specifically announces that in deciding to enter the agreement neither party is relying on "any inducements, promises or representations" that are not set forth with particularity in the settlement contract itself. The Ninth Circuit recently relied, in part, on such language to deny a sophisticated commercial entity an opportunity to prove that a settlement and release were obtained through the intentional fraud of an opponent.\textsuperscript{118} Courts presumably would be more reluctant to permit such language to foreclose an effort to set aside a settlement between parties of substantially unequal bargaining power and sophistication. Moreover, state statutes may prevent general release language (as opposed to language that specifically identifies certain events or documents out of which no future claims could be made) from extinguishing "claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."\textsuperscript{119}

\begin{itemize}
  \item \textsuperscript{114} Oswald v. General Motors Corp., 594 F.2d 1106, 1124 (7th Cir. 1979).
  \item \textsuperscript{115} \textit{Id.} at 1123-25.
  \item \textsuperscript{116} \textit{Id.} at 1124.
  \item \textsuperscript{118} Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1445 (9th Cir. 1986).
  \item \textsuperscript{119} CAL. CIV. CODE § 1542 (West 1982).
\end{itemize}
E. State of Mind

Although there are innumerable other purposes for which counsel might seek to introduce evidence from settlement negotiations, one has been upheld over objections based on rule 408 so often that it warrants specific mention. Courts often have admitted evidence of settlements or from settlement negotiations to help prove the state of mind or the knowledge of a party to those negotiations. In Breuer Electric Manufacturing v. Toronado Systems of America, Inc.,120 for example, the court held that evidence from settlement negotiations that occurred before filing a complaint was admissible to rebut an assertion by defendant that it had not been aware of an issue until the suit was filed. In United States v. Gilbert,121 the Second Circuit upheld a trial court’s decision to admit a consent decree entered by defendant with the Securities Exchange Commission when the purpose of the evidence was to show the defendant’s knowledge of securities reporting requirements. Similarly, the Third Circuit has admitted evidence from settlement negotiations to show that a police department knew that a particular officer had violent propensities.122

Most reported opinions seem quite liberal in admitting evidence from settlement negotiations to prove or rebut contentions about a party’s state of mind or knowledge. At least one court, however, has viewed this kind of reasoning as perilously close to permitting the use of such evidence to prove the validity of a claim itself. In Fidelity & Deposit Co. of Maryland v. Hudson United Bank,123 the court refused to admit evidence of an earlier settlement with a non-party that was proffered to show that the defendant knew about alleged employee dishonesty earlier than it contended at time of trial. The court reasoned that admitting the evidence for such a purpose was tantamount to admitting it to establish the validity of the plaintiff’s underlying claim.124

III. Rule 403: An Additional Source of Protection

Rule 408 does not purport to compel courts to admit evidence of settlement whenever that evidence is offered for some purpose other than to prove liability or damages. Rather, in such situations the rule simply does not compel exclusion of the evidence. Rule 408 also does not purport to prevent counsel from invoking other rules of evidence to attempt

120. 687 F.2d 182, 185 (7th Cir. 1982).
121. 668 F.2d 94, 97 (2d Cir. 1981).
124. Id.
to block admission of settlement material. When rule 408 does not compel exclusion, counsel should look to Federal Rule of Evidence 403 as an independent potential source of protection.\textsuperscript{125}

Rule 403 provides that:

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.\textsuperscript{126}

It is important to emphasize at the outset that the Advisory Committee's note to this rule states that the other rules in article IV, which include rule 408, "reflect the policies underlying" rule 403 and consist of "concrete applications evolved for particular situations."\textsuperscript{127} Thus, rule 408 is a sub-species of rule 403, and the kind of analysis required by rule 403 is appropriate to decide whether evidence from settlement negotiations should be excluded under rule 403 even though it is not barred by rule 408.

Before turning to the case law that supports this view, it is important to describe a strong argument by analogy from rule 404(b). Rule 404(b), also in article IV, is one of the "concrete applications [of the kind of balancing generally called for in rule 403] evolved for particular situations."\textsuperscript{128} The structure of rule 404(b) parallels the structure of rule 408. Both begin by prohibiting admission of specified kinds of evidence for a specified purpose, then go on to announce that courts are not required to exclude the kind of evidence the rule covers if it is offered for a purpose other than the one proscribed. Rule 404(b) prohibits admission of evidence of "other crimes, wrongs, or acts ... to prove the character of a person in order to show that he acted in conformity therewith."\textsuperscript{129} In its second sentence rule 404(b) states that such evidence "may ... be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."\textsuperscript{130} Explaining how courts should proceed when "the rule does not require that the evidence be excluded" because it is offered for a purpose that is not prohibited, the Advisory Committee's note declares:

No mechanical solution is offered. The determination must be

\textsuperscript{125} See, e.g., Weir v. Federal Ins. Co., 811 F.2d 1387 (10th Cir. 1987); infra notes 134-54 and accompanying text.
\textsuperscript{126} FED. R. EVID. 403.
\textsuperscript{127} FED. R. EVID. 403 advisory committee's note.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.131

Thus, for a rule that also is in article IV, and that is structured just like rule 408, the Advisory Committee makes it clear that courts should conduct an independent analysis under rule 403 after they conclude that the concrete application provided for in a particular rule does not require exclusion.132

The Fifth Circuit proceeded exactly in this manner in United States v. Cook.133 Significantly, the evidence that generated the dispute consisted of a consent decree and supporting documents that resulted from a settlement of a prior civil lawsuit.134 Thus the court arguably could have adverted to the policies supporting rule 408 in addition to relying on rule 404(b). Neither party sought to draw support from rule 408, though, and the court did not raise the issue. The court did state clearly, however, that even if the evidence was not barred by rule 404(b) because it was proffered for a purpose other than the purpose proscribed, its admissibility “remains subject to the balancing test of rule 403. The probative value of the evidence under consideration must be determined and compared with the danger of unfair prejudice occasioned by its admission, error being found when it is clear that the latter substantially outweighs the former.”135 Applying this test, the Cook court concluded that the trial court had committed reversible error by admitting the consent decree documents.136 Since the reasoning in support of this conclusion was colored substantially by the special concern for protecting a defendant’s rights in a criminal trial, however,137 the implications of this holding for civil litigation are not clear.

As the Cook court suggested, and as the Advisory Committee’s note makes clear, the kind of analysis that is appropriate under rule 403 consists of “balancing the probative value of and need for the evidence against the harm likely to result from its admission.”138 In conducting this kind of analysis, courts may consider, among other things, the “availability of other means of proof” and whether the evidence would

131. FED. R. EVID. 404(b) advisory committee’s note.
132. Id.
133. 557 F.2d 1149, 1153-55 (5th Cir. 1977).
134. Id. at 1151.
135. Id. at 1153 (citing FED. R. EVID. 404 advisory committee’s note; United States v. Catano, 553 F.2d 497, 499-500 (5th Cir. 1977)).
136. Id. at 1155.
137. Id. at 1153-54.
138. FED. R. EVID. 403 advisory committee’s note.
have "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."\textsuperscript{139} \textit{Olin Corp. v. Insurance Co. of North America}\textsuperscript{140} is instructive in this context. In that case, the court refused to order pretrial disclosure of settlement documents, reasoning in part that representatives of the party seeking discovery had participated in the settlement discussions and thus would be in a position to impeach erroneous testimony about those discussions without discovery of the documents.\textsuperscript{141} Interestingly, the \textit{Olin} court did not cite rule 403; instead, the court based its holding on the implications of rule 408.\textsuperscript{142}

Given the strength of the common-law view that an offer of compromise sheds light only on a party's desire to terminate litigation, not on its assessment of the merits of an opponent's underlying position, counsel should be able to argue persuasively in many environments that evidence of an offer of compromise is of little or no probative value.\textsuperscript{143} Simultaneously, counsel can argue that admission of an offer of compromise would create a huge risk of unfairly prejudicing the party who made the offer and of confusing and misleading the jury—risks that could not be eliminated by limiting jury instructions. Moreover, if a court admitted evidence from settlement negotiations, fairness would require giving opposing counsel a full opportunity to explicate for the jury the context in which the settlement statements or offers were made. This would effectively expand the litigation into collateral matters that would exacerbate the jury's confusion and fruitlessly lengthen the trial.

Counsel should add arguments based on the policy that informs rule 408: courts that admit evidence from settlement negotiations discourage communication about settlement and impair the rationality of settlement discussions, and thus help to defeat the policy of encouraging consensual resolution of disputes. Admitting the proffered evidence would seriously threaten these important interests. Since that evidence generally would be of marginal probative value, it should be excluded.

While not numerous, there are several cases that clearly endorse the propriety of using a rule 403 balancing analysis before deciding to admit evidence from settlement that is not clearly barred by rule 408. In \textit{Weir}

\textsuperscript{139} \textit{Id.}
\textsuperscript{140} 603 F. Supp. 445, 450 (S.D.N.Y. 1985).
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{See id.}
\textsuperscript{143} \textit{See, e.g., Overseas Motors, Inc. v. Import Motors Ltd., Inc., 375 F. Supp. 499, 535-37 (E.D. Mich. 1974) (efforts to settle or compromise a claim, along with direct suggestions or overtures of settlement, will not be received in evidence as an admission of liability on part of the party making the offer).
v. Federal Insurance Co.,\textsuperscript{144} the district court had conducted a rule 403 analysis of proffered settlement evidence and had decided to exclude the evidence because "its relevance was outweighed by its prejudicial value."\textsuperscript{145} On appeal, the panel of Tenth Circuit judges explicitly upheld the propriety of conducting such an analysis under rule 403.\textsuperscript{146} The reviewing court declared:

The prejudicial effect of allowing a jury to hear of the circumstances surrounding the settlement of a claim was one of the concerns that motivated the drafters of the Federal Rules of Evidence to absolutely prohibit the use of evidence of a settlement to prove liability or the amount of a claim. Fed. R. Evid. 408. Although Rule 408 does not prohibit the admission of evidence of the circumstances surrounding a settlement to prove something other than liability—such as voluntariness—many of the same concerns about prejudice and deterrence to settlements exist regardless of the purpose for which the evidence is offered.

The district judge must weigh the prejudicial effect of such evidence against the relevance of the evidence.\textsuperscript{147} Remanding the case for other reasons, the \textit{Weir} court explicitly instructed the district judge to conduct a full balancing analysis of the proffered settlement evidence under rule 403.\textsuperscript{148} While the Tenth Circuit panel did acknowledge that the "exclusion of relevant evidence under Rule 403 is an extraordinary remedy to be used sparingly," it also emphasized that the "decision to exclude (or admit) evidence under [rule 403] is within the sound discretion of the trial court, and will not be reversed by this court absent a clear abuse of discretion."\textsuperscript{149}

Several years earlier a different panel of Tenth Circuit judges had more summarily endorsed this use of rule 403 in \textit{United Fidelity v. Law Firm of Best, Sharp, Thomas & Glass}.\textsuperscript{150} The appellate court upheld a trial judge's decision under rule 403 to exclude testimony that "would have revealed settlement efforts" in a related earlier case. The appellate court noted that rule 403 confers considerable discretion on a trial judge with respect to such matters and found no abuse of that discretion.\textsuperscript{151}

Several cases provide additional, but less direct, support for the notion that courts may use a rule 403 balancing analysis to decide whether

\textsuperscript{144} 811 F.2d 1387, 1395 (10th Cir. 1987).
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id.
\textsuperscript{148} Id. at 1396.
\textsuperscript{149} Id.
\textsuperscript{150} 624 F.2d 145, 149 (10th Cir. 1980). Only Judge McWilliams participated in both \textit{Weir} and \textit{United Fidelity}.
\textsuperscript{151} Id.
to admit settlement evidence whose exclusion would not be compelled by rule 408. In *Kennon v. Slipstreamer, Inc.*, the majority found a violation of rule 408, then focused on the extent of the prejudice to defendant in deciding that reversal was necessary because of the trial court’s disclosure of the amount of a settlement with former codefendants. The *Kennon* dissent argued that the appropriate analytical model in this situation consists of the balancing called for by rule 403.

In sum, it is entirely appropriate to invoke rule 403 to oppose the admission of settlement evidence that rule 408 would not automatically bar. As the arguments and authorities described above make clear, there are many circumstances in which the interests that would be advanced by exclusion clearly outweigh the benefits that might result from admission.

IV. Discoverability vs. Admissibility: Is There a “Privilege” for Settlement Communications?

Attorneys must be careful to distinguish pretrial discoverability from admissibility at trial. Litigators cannot safely assume that statements made during settlement negotiations that would not be admitted at trial (by virtue of rule 408, or rule 403, or simply because they would be irrelevant) are also immune from discovery. Courts attempting to resolve the discoverability question must face issues and conduct analyses that are quite different from the issues and analyses relevant when ruling on the question of admissibility. Unfortunately for counsel, who would like to be able to predict the likelihood that settlement communications will remain confidential, the published opinions on discoverability of settlement negotiations do not reflect a consensus about basic issues in this area. As the paragraphs that follow make clear, some courts are sympathetic with the need to preserve confidentiality even as against discovery, while many others have ruled that settlement communications are discoverable despite the policies that inform rule 408.

Whether or not communications made during settlement negoti-
tions are discoverable may depend, in part, on whether courts will recognize a "privilege" for settlement communications under rule 408 or federal common law. This question is important because the scope of discovery is defined as "any matter, not privileged, which is relevant to the subject matter involved in the pending action." It follows that if communications made in connection with settlement are privileged, they will fall outside the scope of discovery, even if they are relevant. While no appellate court in the federal system has addressed this question directly, several district court opinions express or imply views on this matter. The majority view seems to be that settlement communications are not "privileged" within the meaning of the rules that define the scope of discovery. The same question arises under analogous state statutes. As discussed below, the only appellate court in California that has addressed this question also has concluded that there is no generalizable "privilege" that shields settlement communications from discovery.

A. Support for the Existence of a Settlement Privilege

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. At least one important opinion from a federal court of appeal prior to 1975, when the Rules of Evidence became effective, uses the word "privileged" when referring to settlement communications. This reference, however, appears almost casual, not the product of self-conscious analysis about the significance of the word privilege.

More recently, Judge MacMahon of the United States District Court for the Southern District of New York appeared to endorse the notion that Federal Rule of Evidence 408 creates a "settlement privilege." This privilege would block discovery of communications related to settlement unless the party seeking the discovery can show clearly that rule 408 would not bar admission of the communications at a subsequent trial. Unfortunately, the only reasoning the court offers in support of this conclusion is a cryptic suggestion that denying discovery of the product of earlier settlement negotiations is necessary "in order to safeguard the policy favoring settlements."

158. See infra notes 172-217 and accompanying text.
162. Id. at 450; see Bottaro v. Hatton Assoc., 96 F.R.D. 158 (E.D.N.Y. 1982), discussed infra notes 211-19 and accompanying text.
Two of the other opinions that support the argument that rule 408 creates or reflects a privilege offer a little more by way of explanation but focus on the trial stage rather than on the discovery stage. *Kennon v. Slipstreamer, Inc.*, \(^{163}\) presented the issue of whether or not a trial judge had committed reversible error when, in explaining to the jury why certain defendants were no longer present, he disclosed not only the fact that they had settled with the plaintiff but also the nominal amount for which they were released. In support of his dissenting view that the trial court had not committed reversible error, Circuit Judge Thornberry emphasized that rule 408 "is rooted in the policy of promoting settlement by privileging settlements and settlement negotiations."\(^{164}\) When Judge Thornberry insisted that the rule "is based on the privilege rationale," however, his purpose was not to argue against the discoverability of such material, but to support his minority view that a party could effectively waive the operation of rule 408 at time of trial by agreeing to the introduction of its own settlement offer or demand.\(^{165}\) Thus his dissenting opinion lends only oblique support to arguments that rule 408 has created a generalized privilege for settlement negotiations that protects them from pretrial discovery.

Counsel will find a little more support for such an argument in the rationale that supports Senior District Judge Marovitz's conclusion in *Dunlop v. Board of Governors*.\(^{166}\) This case presented the issue of whether the court should strike an affidavit submitted in support of a motion for summary judgment because the affidavit contained accounts of positions the parties had taken in settlement negotiations.\(^{167}\) In explaining its decision to strike the affidavit, the court pointed out that the purpose of rule 408 is "to encourage settlement and compromise negotiations."\(^{168}\) The court then proceeded to argue that "[i]t is only through such orderly and ‘privileged’ discourse regarding claims that this policy is most effectively served, and only when the privileges thereby received are strictly enforced will opposing counsel feel free to candidly and fully set forth their proposed compromises."\(^{169}\)

While these opinions in *Kennon* and *Dunlop* addressed issues raised at the trial stage, the rationale that supports them surely is not irrelevant to the question we face here, which is whether federal law, through rule

\(^{163}\) 794 F.2d 1067, 1068-69 (5th Cir. 1986).

\(^{164}\) Id. at 1075-76.

\(^{165}\) Id.

\(^{166}\) 16 F.E.P. Cases 1116 (N.D. Ill. 1975).

\(^{167}\) Id. at 1117.

\(^{168}\) Id.

\(^{169}\) Id.
408 or otherwise, creates a "privilege" that can offer settlement communications some protection from discovery. The root of the rationale in each opinion is identical: if the law wants to encourage settlement by encouraging frank negotiations, it is important to create an environment in which counsel and parties can be fairly confident that what they say as they negotiate, and the terms of any agreements they might reach, will not be used against them later. Arguably, the law will fail to create such an environment if settlement communications are discoverable simply on a showing that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." 170

A strong argument in favor of viewing rule 408 as creating a privilege can be built from the principal purpose of this rule. Because its principal purpose is to encourage settlement by encouraging "freedom of communication with respect to compromise, even among lawyers," 171 rule 408 has something very important in common with traditionally recognized privileges. The principal reason the law cloaks communications between attorney and client with confidentiality, for example, is to encourage clients to "tell all" to their lawyers. The traditional privileges, in short, have been designed to open up lines of communication in certain settings in which full communication will serve important societal interests. The fact that rule 408 is designed to serve a closely analogous function is a major argument in favor of viewing it as creating a privilege.

B. Support for the View that No Settlement Privilege Exists

The traditional privileges attach to communications between persons who have ongoing, supportive, interdependent, nonadversarial relationships (e.g., between priest and penitent, husband and wife, doctor and patient, lawyer and client). One purpose of the traditionally recognized privileges is to strengthen these relationships, relationships that society has an interest in fostering. Parties to settlement negotiations, in sharp contrast, are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants, at least none that parallels the kind of societal interest that inspires the traditional privileges. Because no special relationship that society is committed to fostering is involved in most settlement negotiations, it can be argued that a key rationale supporting traditional privileges is inapplicable to the kinds of communications covered by rule 408.

171. Fed. R. Evid. 408 advisory committee's note.
Additional arguments can be marshaled against the view that rule 408 creates a privilege. One such argument is that the rule purports to apply only at the trial stage and offers no express protection against pre-trial discovery of settlement communications. Another argument is that by its own terms rule 408 erects no barrier to admission at trial of settlement communications when the evidence is offered for any purpose other than "to prove liability for or invalidity of the claim or its amount." Thus the protection rule 408 offers is much more limited than the protection offered by a privilege like the attorney-client privilege. The attorney-client privilege attaches automatically to certain kinds of communications and can be penetrated only on an extraordinary showing. Rule 408, however, does not come into play at all unless a party wants to introduce the settlement communication at trial for the only purpose that is forbidden by the rule. The rule alone is not a bar if the party who wants to introduce the evidence can proffer any one of the scores of other purposes that might make the evidence relevant. Since rule 408 promises so much less, it cannot serve as the source of an expectation of privacy that is nearly as strong as the expectation created by the attorney-client privilege.

Another reason that might be cited by courts in declining to hold that rule 408 creates a privilege lies in the fact that the legislative history of rule 501 strongly suggests that Congress did not want the Federal Rules of Evidence to serve as a source of "privilege" law. As originally submitted by the Supreme Court to Congress, article V of the proposed Federal Rules of Evidence contained thirteen rules, nine of which defined specific nonconstitutional privileges that the federal courts would have been required to recognize. Another of these proposed thirteen rules announced that federal courts could recognize only those privileges identified in the proposed rules or in some other act of Congress. Significantly, the prohibition against admission of settlement negotiations to prove liability was not in this package of privileges. It was set forth not in the article dealing with privileges, but in the article entitled "Relevancy and Its Limits," in which it is presently located. Thus, it would appear that the Advisory Committee and the Supreme Court did not consider the protection offered by rule 408 a privilege. Moreover, Con-

gress rejected the privilege rules as proposed by the Advisory Committee and the Court and substituted in their place what is now rule 501, which essentially provides that privileges in federal question cases "shall be governed by the [evolving] principles of the common law." Thus, Congress in effect decided that the Federal Rules of Evidence should not be used to establish or to change the scope of privileges. Since Congress rejected the use of the Federal Rules for this purpose, it would seem difficult to argue that rule 408 creates a privilege.

While they have not directly endorsed all the arguments described above, several federal courts have concluded that there is no generalized privilege that protects settlement communications from discovery. Before discussing opinions whose reasoning would appear to apply to cases of all kinds, it is important to discuss a Seventh Circuit opinion that deals with the special problems associated with settlement of class actions.\footnote{175} In In re General Motors Corp.,\footnote{176} the trial court had approved settlement as to a subclass of plaintiffs after refusing to permit lawyers for disgruntled class members to conduct discovery into how the negotiations were handled by other lawyers who purported to represent the interests of all members. The appellate court concluded that this refusal constituted an abuse of discretion and reversible error.\footnote{177} The court pointed out that, before approving proposed class action settlements, district courts have a special responsibility to make meaningful inquiry into their fairness.\footnote{178} If lawyers for class members who did not have an opportunity to participate in the negotiations challenge this fairness, meaningful review requires affording them an opportunity to discover "the options considered and rejected, the topics discussed, the defendant's reaction to various proposals, and the amount of compromise necessary to obtain a settlement."\footnote{179}

The court of appeals noted that there was "no convincing basis" for an argument that the conduct of these class action settlement negotiations "is protected from examination by some form of privilege."\footnote{180} The court insisted that its ruling was consistent with the letter and spirit of

\footnotesize{175. Presumably similar problems could arise in connection with any settlement that required court approval, e.g., "shareholder derivative suits, bankruptcy claims, antitrust suits brought by the United States . . . , and any suits 'affecting the public interest.'" Janus Films, Inc. v. Miller, 801 F.2d 578, 582 (2d Cir. 1986).
176. 594 F.2d 1106, 1124-25, 1131 (7th Cir. 1979).
177. Id. at 1131.
178. Id. at 1123.
179. Id. at 1125 (quoting Note, Developments in the Law—Class Actions, 89 Harv. L. Rev. 1318, 1562 (1976)).
180. Id. at 1124 n.20.}
It was consistent with the letter of that rule because, on its face, rule 408 "only governs admissibility." It was consistent with the spirit of the rule, which seeks to promote settlement, because:

Participants in negotiations to settle class actions are aware that Rule 23(e) requires the trial court's approval of any settlement reached. Moreover, they are or should be aware that the court will inquire into the conduct of the negotiations. . . . To the extent that such inquiry discourages settlements, it should only discourage those negotiated in circumstances so irregular as to cast substantial doubt on their fairness.  

In other words, the Seventh Circuit panel concluded that participants in class action settlement negotiations had no reasonable expectation of privacy, at least as against other members of the class. Where there is no reasonable expectation of privacy, no privilege should attach.

Because no published opinion takes exception to the holding or reasoning of In re General Motors Corp., counsel who participate in class action settlement negotiations should appreciate the substantial likelihood that their words and deeds in that context are both discoverable and admissible in a proceeding to assess the fairness of the proposed agreement or the adequacy of the representation of the class. Similar risks may attend any negotiations in which the court must approve the terms of a purported settlement.

In Federal Trade Commission v. Standard Financial Management Corp., a First Circuit panel held that the common-law right of access reaches financial statements submitted in confidence as part of a negotiated consent decree and that the parties resisting disclosure of these documents had failed to make the compelling showing that would be required to overcome this common-law right. The Standard Financial court accepted the premise that a common-law right of access attaches to all documents considered by a court "in the course of adjudicatory proceedings." The court then held that a judge's consideration of a proposed consent decree constitutes an "adjudicatory proceeding." According to the court, even when the proposed decree already has been hammered out through private settlement negotiations between a governmental agency and private parties, the trial court retains a responsibility to "make its own inquiry into the issue of reasonableness" before it can

181. Id.
182. Id.
183. Id. (citation omitted).
184. 830 F.2d 404, 409 (1st Cir. 1987).
185. Id.
186. Id. at 408-10.
put its imprimatur on the decree as proposed.\textsuperscript{187} In the case at hand, the district court had relied on the confidential financial statements "in assessing the reasonableness of the order, \textit{i.e.}, in determining the litigants' substantive rights, and in performing its adjudicatory function. The common-law presumption of public access therefore attached to them."\textsuperscript{188} The court went on to hold that a party who attempts to overcome the common-law right of access must make a compelling showing and that the courts should prohibit public disclosure (in this case to a newspaper) only when the interests that would be served by sealing the documents clearly outweigh the policy and tradition that support the public right of access.\textsuperscript{189} In the case at hand, the First Circuit upheld the trial court's decision to unseal the financial documents even though they had been submitted to the governmental agency as part of settlement negotiations on the assumption that they would remain confidential. \textit{En route} to its holding the court noted that the "appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch."\textsuperscript{190}

Two of the most important cases outside the class action environment that hold that settlement communications are not privileged from discovery involved the Freedom of Information Act (FOIA).\textsuperscript{191} Because the opinions in these cases obviously were influenced by the policies favoring disclosure that inform the FOIA, it may not be safe to assume that these courts would adopt the same posture in cases in which the target of the discovery is not the federal government and the FOIA is irrelevant.\textsuperscript{192} Neither court, however, limited its holding that rule 408 does not create a generalized discovery privilege.\textsuperscript{193} Thus, on their face, these opinions apply across the board.

District Judge Hogan wrote the first of these two opinions in \textit{Center

\textsuperscript{187} \textit{Id.} at 408.
\textsuperscript{188} \textit{Id.} at 410.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} \textit{Id.}
\textsuperscript{192} See \textit{NAACP Legal Defense & Educ. Fund}, 612 F. Supp. at 1146-47; \textit{Center for Auto Safety}, 576 F. Supp. at 742 n.5, 748-49; see also infra notes 234-325 and accompanying text (discussing FOIA's role in efforts to discover settlement communications from the federal government).
for Auto Safety v. Department of Justice. Because it has been cited with approval in subsequent opinions from other courts, the pertinent passage from this opinion warrants full reproduction here:

Moreover, the argument that a 'settlement negotiation' privilege is authorized under F.R.E. 408 is also misplaced. The cited rule limits a document's relevance at trial, not its disclosure for other purposes [citing 2 Weinstein's Evidence Par. 408 (1)]. The protection afforded by Rule 408 is far less broad than the DOJ asserts. While its intent is to foster settlement negotiations, the sole means chosen to effectuate that end is a limitation on their [sic] admission of evidence produced during settlement negotiations for the purpose of proving liability at trial, not the application of a broad discovery privilege. Otherwise parties would be unable to discover compromise offers which could be offered for a relevant purpose, i.e., proving bias or prejudice of a witness, opposing a claim of undue delay, proving an effort to obstruct a criminal investigation or prosecution, or enforcing a settlement agreement.

This interpretation of rule 408 is arguably inconsistent with the Advisory Committee's note, which indicates that excluding evidence of settlement negotiations as irrelevant is not as "consistently impressive" as the rationale that focuses on the importance of promoting settlement by encouraging "freedom of communication with respect to compromise." The Center for Auto Safety passage in effect reverses the position taken by the Advisory Committee by slighting, or discrediting altogether, the privilege rationale for rule 408 and restoring the pre-rule 408 predominance of considerations of relevance. Moreover, the paragraph cited from Judge Weinstein's treatise lends no real support to this reversal because that paragraph only makes the obvious point—a point made in the text of rule 408 as well—that a party cannot hide relevant facts simply by presenting them in a settlement discussion before they are requested in discovery, a principal that applies to all privileges.

While Center for Auto Safety is not faithful to the reordering of rationales for rule 408 that is suggested by the Advisory Committee, the opinion is consistent with the structure of the rule itself. In fact, the reasoning in Center for Auto Safety exposes the central difficulty that arises from the kind of compromise between competing concerns that rule 408 embodies. The compromise in the rule consists of the decision to make settlement communications inadmissible only for limited purposes—to prove liability for, the invalidity of, or the amount of damages from a claim—clearly leaving open the possibility that courts could ad-

195. Id. at 749.
196. FED. R. EVID. 408 advisory committee's note.
mit this same kind of evidence for any of a large number of other purposes.

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 that they purported to find so "consistently impressive" and that they intended to make the principal underpinning of the newly formulated rule. The protection of rule 408 virtually evaporates; there are so many conceivable purposes for which settlement communications might be admissible, and counsel easily can argue that they cannot determine whether there is some permissible purpose for which the communications might be admissible at trial unless they can discover their contents.\textsuperscript{197} The Center for Auto Safety opinion shows that the drafters constructed a rule that is unfaithful to its own rationale. To truly serve the privilege rationale, a rule would have to offer at least presumptive protection from both discovery and admissibility in most circumstances (perhaps analogous to the protection offered by the work product doctrine as it applies to material that does not reflect a lawyer's mental impressions or legal theories). By adopting the much more limited approach reflected in rule 408, the drafters made results such as those reached in Center for Auto Safety virtually inevitable.

Several other reported opinions support the notion that there is no generalized "privilege" for settlement communications. In NAACP Legal Defense and Educational Fund, Inc. v. Department of Justice,\textsuperscript{198} for example, the court paraphrases part of the key passage from Center for Auto Safety to justify the conclusion that rule 408 "was never intended to be a broad discovery privilege."\textsuperscript{199} Examples of opinions that reach the same conclusion on the privilege issue but do not rely on Center for Auto Safety include Triax Co. v. United States\textsuperscript{200} and Manufacturing Systems, Inc. v. Computer Technology, Inc.\textsuperscript{201} In an opinion issued just before rule 408 became effective, Judge Charles Richey concluded that while settlement communications "are clearly not admissible at trial for a number of public policy reasons, such negotiations do not fall within the confines of

\begin{footnotes}
\textsuperscript{197} See, e.g., Bennett v. La Pere, 112 F.R.D. 136, 139-40 (D.R.I. 1986), discussed infra notes 203-13 and accompanying text.
\textsuperscript{200} 11 Ct. Cl. 130, 134-35 (1986).
\textsuperscript{201} 99 F.R.D. 335, 336 (E.D. Wis. 1983).
\end{footnotes}
the privileges recognized at common law."

Judge Selya's recent opinion in *Bennett v. La Pere* reflects the most aggressive assault on the notion that settlement communications should be at least presumptively privileged from discovery. The court addressed "whether a nonsettling defendant in a civil action may compel disclosure of an accord reached between the plaintiffs and (former) codefendants." The court first faced the question whether or not the remaining defendant could show that the settlement documents met the "liberal view of the standards of relevance applicable in discovery proceedings." The judge answered this question in the affirmative. Significantly, he pointed out that rule 408 bars admission of such material only for limited, specified purposes, leaving open the possibility of admissibility for other purposes, and that there is "no satisfactory way for the [remaining defendant] to determine whether it can slip within the integument of the Rule 408 exception unless it gains discovery access to the settlement documents." The court confirmed the implication of this observation, noting that "in our adversary system" the only fair way to reach a conclusion about whether there might be a permissible use of the settlement documents at trial is to compel their disclosure in discovery.

Having thus concluded that it would be virtually impossible to block discovery of such material on grounds of irrelevance, the *Bennett* court asked whether there were any other considerations that "might militate against disclosure." In particular, it discussed whether some policy consideration reflected in rule 408 should either bar discovery of the settlement materials or, short of creating an absolute bar, lead courts to require parties who seek discovery of such material to make some showing of justification or need beyond satisfying the liberal relevance standard of rule 26(b). Rejecting the reasoning and conclusion in *Bottaro v. Hatton Associates*, the court held that nothing in rule 408's language or purposes justifies a conclusion that it creates any special obstacles to discovery. In finding that the settlement documents in question were

204. Id. at 137.
205. Id. at 139.
206. Id. at 139 n.1.
207. Id. at 139.
208. Id.
209. Id.
210. Id. at 140.
211. 96 F.R.D. 158 (E.D.N.Y. 1982); see infra notes 218-19 and accompanying text.
“not privileged” and were discoverable, the court relied not only on the fact that rule 408 applies only to admissibility at trial, but also on his argument that compelling disclosure of the terms of a completed settlement could not adversely affect the policy goal of encouraging settlements. In making the latter argument the court asserted that the only fear that might inhibit settlement, and that rule 408 attempts to assuage, is the fear that a pretrial settlement proposal would be used against the party who made it during a subsequent trial in the same case.

The one fear that the court in Bennett was willing to acknowledge is not the only fear that rule 408 is designed to assuage, as the courts in Bottaro v. Hatton Associates and Weissman v. Fruchtman recognize. The Bennett opinion misconstrues rule 408 in part because it accepts an unrealistically narrow view of the several different ways that fear of disclosure could impair the settlement dynamic. If the only fear the drafters of rule 408 wanted to combat was fear that the terms of a settlement proposal would be used against the party who made the proposal, they would have written the rule much more narrowly than they did. If combating this fear had been their only objective, the drafters certainly would not have extended the protections of the rule to evidence “of conduct or statements made in compromise negotiations.” The Advisory Committee’s note leaves no room to question the reason the drafters expanded the common-law doctrine through the rule to cover “admissions of fact” and other statements made during settlement discussions: the drafters believed that the “inevitable effect” of the narrower common-law approach had been “to inhibit freedom of communication with respect to compromise, even among lawyers.” The rule was designed to encourage communication about a broad range of settlement-related matters, not just about offers or demands.

Common sense supports the drafters’ broader vision. The Bennett court’s approach would enable counsel to exchange only offers and demands and would reduce “negotiations” to irrational volleys of numbers. It is hard to understand how a law that encourages only the exchange of numbers, with no regard for the reasoning or the evidence that supports those numbers, could contribute much to fostering settlement. It takes no genius to see that a rule that offers some protection to lawyers who share the reasoning underlying their positions will contribute much more

212. Bennett, 112 F.R.D. at 139-40.
213. Id. at 141.
216. FED. R. EVID. 408 advisory committee’s note.
to the prospects for settlement than a rule that permits only mechanical and sterile exchanges of bottom lines. Moreover, adopting rules whose effect is to reduce the negotiation process to mere number swapping degrades our system in fact and in the eyes of litigants who are forced to use it.

The Bennett court also mistakenly assumed that the purposes of rule 408 are fully satisfied once a settlement agreement has been reached by some or all of the parties to a particular action. What people say in negotiations to settle one lawsuit may well be relevant to other litigation in which they are involved or in which they fear they might become involved. I have hosted many settlement conferences during which parties have expressed concerns about related cases or parallel situations involving nonparties, or in which one party has been unwilling to settle unless it is assured that the terms will not be disclosed to others who might be encouraged to file new claims or hold out for more money in cases already docketed. It is naive not to recognize that lawyers and litigants are constantly concerned about how their statements or actions in one setting might come back to haunt them in other settings. If courts construe rules so as to increase the circumstances in which communications made during negotiations can be discovered or admitted into evidence, they create inhibiting forces that reinforce the instinct parties and lawyers already have to play their cards as close to their chests as possible.

C. A Test for Discoverability that Appropriately Reflects the Policy Objectives

For the reasons just described, I disagree strongly with the Bennett court's suggestion that it is appropriate to decide whether negotiation material is discoverable simply by using the same kind of analysis that courts would use for any other nonprivileged matter. Although it may be fair to say that rule 408 does not create a privilege, the rule clearly reflects a significant federal policy in favor of promoting settlements by encouraging freedom of communication that is not implicated by most discovery requests. This policy would be seriously jeopardized if courts routinely permitted discovery of communications made in settlement discussions. Counsel seeking to protect settlement materials from discovery should argue vigorously that courts should order disclosure only after conducting a balancing analysis in which the federal policy of promoting settlement is given the full weight it deserves.

Case law supports this balancing approach. For example, in Bottaro

217. Bennett, 112 F.R.D. at 140.
v. Hatton Associates,218 the opinion Judge Selya attacked in Bennett, the court declared:

Given the strong public policy of favoring settlements and the congres-
sional intent to further that policy by insulating the bargaining table
from unnecessary intrusions, we . . . require some particularized show-
ing of a likelihood that admissible evidence will be generated by the
dissemination of the terms of a settlement agreement.219

In Weissman v. Fruchtman,220 the court quoted this passage from Bottaro
with approval. The court relied on it to justify blocking a party's access
to settlement materials when he could not make a clear showing that
these materials would be admissible at trial or lead to discovery of admis-
sible evidence. In effect, the Bottaro and Weissman courts reversed the
presumption that the Bennett court indulged in favor of discovery. The
Bennett court held that a party must have discovery access to settlement
materials in order to determine whether they might be admissible on
some theory that would not be barred by rule 408.221 The Bottaro and
Weissman courts, in contrast, insisted that because free discovery access
to such materials would threaten the policy objectives of rule 408, courts
should protect these materials unless a party can make a persuasive
showing that such materials are likely to be admissible or to lead to sig-
nificant other evidence.222

Groton v. Connecticut Light & Power223 further supports the ap-
proach endorsed by Bottaro and Weissman. In Groton, the court used a
balancing test to determine whether to permit discovery that might inter-
fere with ongoing settlement negotiations.224 The court made clear that
it would prohibit discovery of this kind where the potential prejudice to
the settling parties outweighed the need for disclosure.225

Even without Bottaro, Weissman, and Groton, lawyers would be on
solid ground in asking a court to conduct a balancing analysis before
permitting discovery of confidential settlement communications. Federal
courts conduct exactly this type of balancing analysis when a party seeks
a protective order under Federal Rule of Civil Procedure 26(c). Rule

219. Id.
(WESTLAW, Allfeds database); cf. Olin Corp. v. Insurance Co. of N. Am., 603 F. Supp. 445,
449-50 (discovery of terms of insurance agreement denied in order to safeguard the policy
favoring settlements).
223. 84 F.R.D. 420, 423 (D. Conn. 1979).
224. Id. at 422-23.
225. Id. at 423.
26(c) clearly contemplates the courts' making particularized judgments comparing the potential utility of requested information with the harm that might be done if the information were disclosed.\textsuperscript{226} Rule 26(c) also expressly empowers courts to enter orders that certain discovery not be conducted at all, or that "certain matters not be inquired into, or that the scope of the discovery be limited to certain matters," or that "trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."\textsuperscript{227} Rule 26(c) obviously acknowledges that there will be circumstances in which the interests that support preserving the confidentiality of certain material will outweigh the interests that might be served by permitting discovery of this material.

Thus, even if federal courts refuse to hold that rule 408 creates a "privilege," they should afford settlement material an extra level of protection from routine discovery by conducting a balancing analysis in which the federal policy reflected in rule 408 is given the full weight it deserves. Courts should acknowledge that the public policies reflected in rule 408 create a substantial presumption against discovery of settlement material. Moreover, courts should permit rebuttal of this presumption only after a strong showing that the competing interests clearly outweigh the interests and the policies favoring confidentiality and that the competing interests cannot be satisfied in some other, less intrusive manner.

The only authority in this subject area is from a California court and points, albeit somewhat unclearly, in the direction of Bottaro and its progeny. In Covell v. Superior Court,\textsuperscript{228} the appellate court considered section 1152 of the California Evidence Code,\textsuperscript{229} which served as a model for Federal Rule of Evidence 408\textsuperscript{230} and affords the same kind of protection to settlement negotiations as the federal rule. The court concluded that the section does not create a privilege, relying entirely on one fact: section 1152 is not located in the division of the California Evidence Code that defines "privileges."\textsuperscript{231} While this reasoning is not profound, it may be sufficient.

\textsuperscript{226} FED. R. CIV. P. 26(c) (giving court discretion to grant a motion for protective order where "good cause shown," and "which justice requires to protect a party or persons from annoyance, embarrassment, oppression, or undue burden or expense"). See, e.g., Glick v. McKesson & Robbins, Inc., 10 F.R.D. 477, 479 (D. Mo. 1950); cf. FED. R. CIV. P. 26(b)(1) (1983 amendments) (describing general scope and limits of discovery).

\textsuperscript{227} FED. R. CIV. P. 26(c)(4), (7).


\textsuperscript{229} CAL. EVID. CODE § 1152 (West Supp. 1988).

\textsuperscript{230} FED. R. EVID. 408 advisory committee's note.

\textsuperscript{231} Covell, 159 Cal. App. 3d at 42, 205 Cal. Rptr. at 373. Section 1152 appears in the division that sets out evidence affected by or excluded for policy reasons.
The Covell court went on to hold, however, that the settlement material was not discoverable, even though it was not privileged, because the party seeking it had failed to show that it was "reasonably calculated to lead to the discovery of admissible evidence."\(^{232}\) Most significantly, the spirit in which the court reviewed the relevance arguments seems more demanding than one would normally expect at the discovery stage. The appellate court took the unusual step of finding that the trial court had abused its discretion when it ordered disclosure of the material.\(^{233}\) The appellate court's willingness to take this unusual step supports an inference that, under California law, judges will impose a more demanding standard for discovery of settlement material than they would for discovery of material that is unprotected by the kinds of public policies reflected in section 1152 of the California Evidence Code.

\[D. \text{ Settlemens with Public Entities: Public Right of Access}\]

Lawyers who represent public entities in settlement negotiations, or private parties who decide to enter a settlement agreement with a public entity, must be aware of the possibility that interested persons could use the Freedom of Information Act (FOIA),\(^{234}\) or a state law equivalent like the California Public Records Act,\(^{235}\) to force disclosure of both the terms of a settlement agreement and other documents related to settlement negotiations. This section focuses primarily on the applicability of the FOIA to materials generated in connection with settlement negotiations conducted by agencies of the federal government. It also includes a discussion of the only major opinion from a California appellate court that addresses the applicability of California's Public Records Act to an effort by a third party to compel disclosure of the terms of a settlement entered by a local government with a tort claimant.\(^{236}\)

FOIA contains no exemption that explicitly mentions materials generated in connection with settlement negotiations. Because of this, and the general admonition that courts are to construe FOIA's exemptions narrowly and to resolve doubts in favor of disclosure,\(^{237}\) there are circumstances in which citizens can use FOIA to force governmental agen-

\(232.\) 159 Cal. App. 3d at 43, 205 Cal. Rptr. at 374.
\(233.\) Id.
cies to disclose documents generated in connection with settlements. The reported decisions suggest that documents related to settlement negotiations will be deemed exempt from FOIA if they have not been disclosed to or received from an adversary. These decisions also suggest, however, that documents disclosed to or received from an adversary during confidential settlement negotiations are vulnerable to a FOIA request, regardless of the nature of the interest that inspires the request.

Among the nine exemptions from FOIA, the one that seemed most promising to lawyers trying to preserve the confidentiality of settlement documents was number five, which covers "inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." This exemption protects government-generated documents whose confidentiality the government has maintained and which satisfy the criteria for any clearly established privilege. For example, this exemption would prevent use of FOIA to compel disclosure of a document the government generated in connection with settlement negotiations if the document satisfied the criteria for the attorney-client privilege or the work product doctrine. Similarly, the fifth exemption applies to documents that would be protected from disclosure in civil litigation by the "deliberative process" privilege.

On several occasions government lawyers have tried unsuccessfully to persuade courts that there is a separate "settlement privilege" in civil litigation and that materials that would qualify for it also should fall within the protections of the fifth exemption. The seminal case is

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238. FOIA applies only to documents. 5 U.S.C. § 552 (1982).

239. This is true provided that documents also fit into some existing privilege or constitute work product. See, e.g., Center for Auto Safety, 576 F. Supp. at 748; see infra notes 241-43 and accompanying text.

240. For authority for the proposition that analysis of access rights under FOIA is not contingent on the nature or intensity of the requesting citizen's interest, see County of Madison, 641 F.2d at 1040-41. See also National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132, 143 n.10 (1975).


County of Madison, New York v. United States Department of Justice.\textsuperscript{245} In that opinion, Chief Judge Coffin, writing for a unanimous panel, ordered the government to disclose documents generated in connection with settlement negotiations in an earlier, related matter.\textsuperscript{246} The documents in question had either been sent by the party opponent to the government or by lawyers for the government to opposing counsel during the course of the negotiations.\textsuperscript{247} The appellate court refused to categorize these documents as “intra-agency” memoranda or letters.\textsuperscript{248}

The court also rejected an argument that FOIA empowers federal courts, under the guise of exercising equitable discretion, to decide whether considerations of “public policy” justify adding exemptions to FOIA for categories of documents not specifically exempted by Congress on the face of the statute.\textsuperscript{249} The court acknowledged the importance of the government’s ability to resolve disputes by settlement and conceded that the government’s ability to reach consensual agreements with adversaries in litigation would be impaired if parties knew that under FOIA “written settlement communications will be available to anyone, irrespective of the merit of his or her need to know.”\textsuperscript{250} The County of Madison panel felt constrained, nonetheless, to honor the letter and spirit of FOIA, which they emphasized “is not a withholding statute but a disclosure statute.”\textsuperscript{251} The court ruled that the public policy favoring settlement simply cannot justify distorting FOIA’s language and giving courts discretionary power to limit the statute’s disclosure mandate by carving out an exemption that is not even intimated in that language.\textsuperscript{252} The effect of County of Madison is clear: exemption five will not protect documents related to settlement that were generated by or shared with a party opponent, even if both the government and its opponent intended all such documents to remain confidential.

Center for Auto Safety v. Department of Justice\textsuperscript{253} followed and in some measure extended the reasoning of County of Madison. The former case arose when the Center for Auto Safety attempted to use FOIA to force the Justice Department (DOJ) to disclose documents it had shared with or received from the “big four” American auto manufacturers dur-

\textsuperscript{245} 641 F.2d 1036 (1st Cir. 1981).
\textsuperscript{246} Id. at 1039, 1041.
\textsuperscript{247} Id. at 1040-41.
\textsuperscript{248} Id. at 1040-42.
\textsuperscript{249} Id. at 1041.
\textsuperscript{250} Id. at 1040.
\textsuperscript{251} Id.
\textsuperscript{252} Id. at 1041.
ing the course of negotiations to modify a consent decree entered in an antitrust action.\textsuperscript{254} In the end, the court rejected the Justice Department's arguments that these documents were exempt from disclosure under either exemption five or exemption seven of FOIA.\textsuperscript{255}

First, the court ruled that memoranda or letters exchanged by the government and the consent decree defendants could not be considered "intra-agency" documents within the meaning of exemption five.\textsuperscript{256} The court rejected the argument that entry of the original consent decree somehow converted the auto makers into the equivalent of independent contractors working with the government to ensure that the public interest was satisfied.\textsuperscript{257} Instead, the court insisted that the auto makers remained adverse parties and thus that communications between them and the DOJ could not be considered "intra-agency."\textsuperscript{258} This ruling applied even to drafts of consent decrees prepared by DOJ lawyers and accompanying memoranda, both of which included comments and notations that reflected, among other things, "the mental impressions and views of various agency personnel."\textsuperscript{259} Drawing on \textit{Coastal States Gas Corp. v. Department of Energy},\textsuperscript{260} Judge Hogan held that documents that might otherwise be protected can be swept within the scope of FOIA once they are shown to adversaries because in so doing the governmental agency can be deemed either to adopt the documents as its position on an issue or to use them "in its dealings with the public."\textsuperscript{261} The court articulated its holding clearly: "[w]hile these documents may at one time have been used for internal advisory purposes and would therefore be protected, when the DOJ elected to use them as tools in their negotiations with the public [the defendants] they lost their internal status, and their qualification for Exemption 5."\textsuperscript{262}

In a significant part of the opinion, the court held that even if the documents in question somehow could be deemed "intra-agency" they would not satisfy the second requirement of exemption five—that they would be protected by some privilege that would have protected them

\textsuperscript{254. Id. at 741.}
\textsuperscript{256. Center for Auto Safety, 576 F. Supp. at 748.}
\textsuperscript{257. Id. at 745-46.}
\textsuperscript{258. Id. at 745-47.}
\textsuperscript{259. Id. at 747.}
\textsuperscript{260. 617 F.2d 854, 866 (D.C.Cir. 1980).}
\textsuperscript{262. Id.}
against an adverse party if the agency had been involved in litigation.\textsuperscript{263} Noting that there is a "presumption against recognizing new discovery privileges under Exemption 5,"\textsuperscript{264} Judge Hogan concluded that "there is no clear congressional intent to include a settlement negotiation privilege within Exemption 5" and that Federal Rule of Evidence 408 neither acknowledged nor created any such privilege.\textsuperscript{265} According to the court, since there is no clearly established "settlement negotiation privilege," the mere use of documents in settlement negotiations does not mean that they "would not be available by law to a party . . . in litigation with the agency," as required by the second clause of exemption five.\textsuperscript{266}

In combination, \textit{County of Madison} and \textit{Center for Auto Safety} stand for this proposition: Exemption five will not protect documents related to settlement unless they have \textit{not} been shared with or received from an adverse party and they meet all the requirements of a clearly established discovery privilege. The \textit{County of Madison} court did make a suggestion, however, to which government counsel should attend. Relying on \textit{Federal Open Market Committee v. Merrill},\textsuperscript{267} the court implied that FOIA could not be used to acquire these kinds of materials, even when shared with an adverse party, if counsel had persuaded a court to enter a protective order making the settlement negotiations and the documents related thereto confidential.\textsuperscript{268} Counsel practicing in the Second Circuit should be able to rely on this method of protecting confidentiality,\textsuperscript{269} but those practicing in the Third Circuit cannot assume that sealing orders will protect such material.\textsuperscript{270}

The \textit{Center for Auto Safety} court disposed of the government's arguments under exemption 7A with comparable dispatch.\textsuperscript{271} Congress recently expanded this exemption,\textsuperscript{272} but apparently not in ways that would eviscerate \textit{County of Madison}'s reasoning or dislodge its conclusion. To qualify under exemption seven, even as amended, the documents must have been "compiled for law enforcement purposes" and

\begin{thebibliographynumbers}
\bibitem{263} Id. at 748.
\bibitem{264} Id.
\bibitem{265} Id. at 749.
\bibitem{269} \textit{See infra} notes 300-33 and accompanying text.
\bibitem{270} \textit{See infra} notes 334-55 and accompanying text.
\end{thebibliographynumbers}
The case law suggests that a document will not be deemed to have been generated "for law enforcement purposes" unless it was created in connection with an investigation that focused on "specifically alleged illegal acts, illegal acts of particular identified officials, acts which if proved result in civil or criminal sanctions." Most documents generated in connection with efforts to settle civil litigation will not satisfy this requirement.

In 1984 and 1985 two federal district courts followed the lead of the County of Madison and Center for Auto Safety opinions in refusing to acknowledge a "settlement negotiation privilege" under exemption five and ordered governmental agencies to disclose terms of settlements or settlement-related documents that had been shared with an adversary. These two cases are Norwood v. Federal Aviation Administration and NAACP Legal Defense and Educational Fund, Inc. v. United States Department of Justice.

Norwood adds an important factor to the exemption five analysis. Pointing out that "the Supreme Court has held that 'final dispositions' of matters by an agency can never be exempt under exemption 5," Norwood announced that "the FAA [Federal Aviation Administration] cannot use exemption 5 to withhold production of the settlement agreements themselves, since the settlement agreements represent the final disposition of an agency case." Whether or not other courts will find this reasoning persuasive is difficult to predict, but counsel should be aware that exemption five might offer no protection at all to the final terms of settlement agreements.

The Norwood opinion discusses an additional exemption that might apply to some settlement documents. Exemption six covers "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In Norwood, a lawyer who represented 170 terminated air traffic controllers was using the FOIA in an effort to gain access to settlement agreements and related documents between the FAA and controllers reinstated after the nation-
wide strike in 1981.\textsuperscript{281} District Judge Horton declared that in order to qualify for exemption six the government would have to show three things: "(1) that the requested information is properly classified as a 'personnel,' 'medical,' or 'similar' file [and not simply put in a personnel file to shield it from the scope of FOIA]; (2) that the release of the information would violate substantial privacy interests of those involved; and (3) that the privacy interest is not outweighed by the public interest in disclosure."\textsuperscript{282} The court concluded that the removal letters and the settlement agreements had been properly classified as "personnel" matters, but that the government had failed to carry its burdens with respect to the remaining two requirements.\textsuperscript{283} In concluding that the documents had to be disclosed, the court made it clear that it would hold government counsel to demanding standards with respect to the second and third requirements, thus implying that it would be difficult to use exemption six to avoid disclosure of settlement documents.\textsuperscript{284}

Other exemptions to the FOIA might, in rare cases, protect documents related to settlement,\textsuperscript{285} but as far as I am aware only one of these other exemptions is the subject of a reported opinion in which a court ruled on an effort to discover materials related to settlement negotiations. In \textit{Parker v. Equal Employment Opportunity Commission},\textsuperscript{286} Judge Robinson, relying on exemption three, rejected an effort to use the FOIA to compel the Equal Employment Opportunity Commission (EEOC) to disclose "all predetermination settlement agreements and conciliation agreements made in the Commission's Philadelphia Regional Office during March, 1974."\textsuperscript{287} Exemption three covers agency records that are "specifically exempted from disclosure by statute," as long as the statute in question meets specified criteria.\textsuperscript{288} The court held that these documents qualified for exemption three even though the statute that governs EEOC procedures does not mention these kinds of documents, and the statute would impose a duty of confidentiality only on negotiations that occur after the Commission has found reasonable cause to believe that a charge of an unlawful employment practice is true. The significance of

\begin{itemize}
\item \textsuperscript{281} \textit{Norwood}, 580 F. Supp. at 996-97.
\item \textsuperscript{282} \textit{Id.} at 998.
\item \textsuperscript{283} \textit{Id.} at 998-99.
\item \textsuperscript{284} \textit{Id.}
\item \textsuperscript{285} For example, exemption four covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4) (1982).
\item \textsuperscript{286} 534 F.2d 977 (D.C. Cir. 1976).
\item \textsuperscript{287} \textit{Id.} at 979.
\item \textsuperscript{288} 5 U.S.C. 552(b)(3) (1982) (the exempting statutes must be framed so as to leave no discretion on the question of disclosure, or must either refer to the particular types of matters to be withheld or establish particular criteria for withholding).
\end{itemize}
the latter point is that "predetermination settlement [agreements] are en-
tered into after a charge is filed but before any determination of reason-
able cause by the Commission." 289 Despite these technical difficulties,
both the District Court and the appellate court were satisfied that Con-
gress intended to place a cloak of confidentiality around all types of in-
formal negotiations conducted by the Commission and all of the
agreements that such negotiations produced. 290 Both courts concluded
that Congress had elevated the public interest in fostering settlement of
EEOC claims, by extending a promise of confidentiality, above the public
interests generally reflected in the FOIA. 291 Thus, both the predetermi-
nation settlements and the conciliation agreements are "specifically ex-
empted from disclosure by statute" within the meaning of exemption
three. No other reported opinion has interpreted this exemption with
respect to settlement agreements.

The extent to which state law analogues to the FOIA might be used
to force disclosure of settlement materials is not at all clear. In fact, only
one reported opinion by a California appellate court even addresses this
question. That opinion suggests that attorneys who negotiate settlements
with or on behalf of public agencies in California cannot safely assume
that the terms of the deals they strike will remain confidential. In Regis-
ter Division of Freedom Newspapers, Inc. v. County of Orange, 292 the ap-
pellate court affirmed a trial court's ruling that California's Public
Records Act 293 entitled a newspaper to access to virtually all of the docu-
ments related to a confidential settlement of a tort claim brought by a
prison inmate against a county government. The court explicitly con-
cluded that the public agency's promise to the plaintiff to maintain the
confidentiality of the negotiations and of the terms of the agreement was
insufficient to overcome the statutory mandate of public access to the
records involved. 294

Holding that the terms of the settlement itself, as well as most re-
lated documents, had to be disclosed, the court of appeal made some
sweeping pronouncements that seem to reflect little sympathy for the no-
tion that confidentiality can be a key to the success of the settlement
process. Among other things, the county defendant had argued that dis-
closure of settlement documents would encourage people to file frivolous

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289. 534 F.2d at 979.
290. Id. at 980-81.
291. Id. at 978, 980.
294. 158 Cal. App. 3d at 909-10, 205 Cal. Rptr. at 102.
claims and would compromise the public body's freedom to decide that it was in the taxpayer's best interests to offer a nuisance value settlement rather than incur the much greater expense of defending a case through trial and appeal.295 "Against this interest," responded the court:

must be measured the public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny. We find these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs fostered by both the CPRA and Brown Act. While County's concern with the potential for escalating tort claims against it is genuine, opening up the County's settlement process to public scrutiny will, nevertheless, put prospective claimants on notice that only meritorious claims will ultimately be settled with public funds. This in turn will strengthen public confidence in the ability of governmental entities to efficiently administer the public purse.296

In a footnote that apparently was intended to offer some reassurance to public bodies, the court added a potentially significant, but unclear, limitation on the implications of this paragraph: "Plaintiff does not claim, nor do we hold, every discussion regarding settlement of an actual or potential case against the county should be made public. We limit the scope of our holding to the actual discussion and actions of the claims settlement committee."297

Because the Register court’s analysis turned almost entirely on California statutes, the law that emerges from this lengthy opinion is binding only in California courts.298 Counsel working in other states must determine whether their states have statutes comparable to California's Public Records Act.

V. Alternative Methods of Enhanced Protection of Settlement Negotiations

In light of the numerous threats to the confidentiality of settlement communications previously discussed, the following section presents a number of alternative approaches counsel can consider in order to protect settlement negotiations from disclosure. Part A will discuss the use

295. Id. at 909, 205 Cal. Rptr. at 102.
296. Id.
297. Id. at 909 n.13, 205 Cal. Rptr. at 102 n.13.
298. It would also be binding on a federal court whose jurisdiction was premised solely on diversity of citizenship if the court were to decide, under principles announced in Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and its progeny, that it was bound to follow California law on this kind of question.
of protective orders or sealing orders. Part B discusses side agreements under seal. Federal Rule of Civil Procedure 68 and recently enacted state mediation statutes are the subject of part C. Finally, part D discusses the enforceability of private contracts between settling parties to ensure confidentiality.

A. Protective or Sealing Orders

A protective or sealing order entered by a federal court apparently will prevent interested persons from being able to use FOIA to force disclosure of settlement agreements and related documents. The court in Center for Auto Safety stated, "[I]n the antitrust decree modification context, the DOJ is in the position of petitioning the supervisory court for a protective order under [Federal Rule of Civil Procedure] 26(c) which would qualify as a per se discovery privilege and bar to disclosure under FOIA." Other authorities suggest that the protections from FOIA that are available through protective or sealing orders are not limited to antitrust or consent decree settings.

One technical, but apparently sufficient, reason that court orders can protect documents otherwise discoverable under FOIA is that this statute reaches only "agency" records, and courts generally do not consider themselves to be "agencies" within the meaning of the statute. Thus, settlement documents that become court documents are simply outside the purview of the FOIA.

The most explicit consideration of this issue occurred in the trial court and affirming appellate court opinions in In re Franklin National Bank Securities Litigation, and Federal Deposit Insurance Corp. v. Ernst & Ernst. These opinions resulted from an effort by the Public Interest Research Group (PIRG) to use FOIA to force disclosure of the terms of a settlement agreement between the Federal Deposit Insurance Corporation (FDIC), the trustee for the bankrupt Franklin National Bank, and its accountant, Ernst & Ernst. PIRG launched this effort some two years after District Judge Jack B. Weinstein had entered an

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300. See, e.g., Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982).
303. See United States v. Charmer Indus., Inc., 711 F.2d 1164, 1170 n.6 (2d Cir. 1983).
305. 677 F.2d 230 (2d Cir. 1982).
order, at the parties’ request, sealing the settlement documents and commanding the parties to maintain the confidentiality of the terms of the agreement.\textsuperscript{307} PIRG first presented its request for information about the settlement to the FDIC, invoking the FOIA.\textsuperscript{308} Relying on the court’s order, the FDIC rejected the request.\textsuperscript{309} Thereafter, PIRG petitioned Judge Weinstein to vacate the order sealing the documents and compelling confidentiality.\textsuperscript{310}

The court rejected PIRG’s argument that “a court’s order to a federal agency to withhold agency records from the public is limited to the reasons for withholding permitted in the FOIA.”\textsuperscript{311} Judge Weinstein reasoned that the goals of the FOIA are:

- not necessarily defeated when an agency obtains protection from a court which is broader than the FOIA exemptions. The Act was intended to circumscribe the discretion of agencies rather than that of courts. In the context of this case it cannot be said that the FDIC manipulated this court in order to avoid the agency’s obligations under the FOIA. Rather, the court properly issued a not unusual protective order in aid of its own jurisdiction.\textsuperscript{312}

In a subsequent section of the opinion Judge Weinstein emphasized that it was not the FDIC, but private litigant Ernst & Ernst, that insisted on the confidentiality provision in the settlement agreement and the court order sanctioning it.\textsuperscript{313} The court might have been less confident about the implications of the FOIA for such a sealing order if the party who took the initiative and had the principal interest in seeking the order had been the federal agency that otherwise would have been constrained to disclose the terms of the agreement.

After rejecting the FOIA argument, the trial court considered the merits of PIRG’s petition to modify the sealing order.\textsuperscript{314} It balanced the interests that would be served by disclosure against those that had been advanced by sealing the settlement documents initially and those that would be harmed by withdrawing the protection of confidentiality after the parties had relied on it for two years.\textsuperscript{315} This balancing analysis acknowledges that there might be some circumstances in which a court

\textsuperscript{307} Id.
\textsuperscript{308} Id. at 470.
\textsuperscript{309} Id.
\textsuperscript{310} Id.
\textsuperscript{311} Id. at 471.
\textsuperscript{312} Id.
\textsuperscript{313} Id. at 472.
\textsuperscript{314} Id. at 471-72.
\textsuperscript{315} Id.
could be persuaded to “unseal” a settlement agreement.\textsuperscript{316} PIRG, however, failed to persuade the judge to exercise his discretion in favor of disclosure.\textsuperscript{317} In conducting its balancing analysis, the court emphasized how much time and resources were saved by the settlement of this massive case and the fact that one of the private parties absolutely refused to enter a settlement unless its terms were sealed.\textsuperscript{318} Thus, “[w]ithout secrecy of the terms, a settlement would not have been consummated.”\textsuperscript{319}

When Judge Weinstein turned to the interests that would be harmed by disclosure after the fact, he found substantial additional grounds for denying PIRG’s request. He noted:

The settlement agreement resulted in the payment of substantial amounts of money and induced substantial changes of position by many parties in reliance on the condition of secrecy. For the court to induce such acts and then to decline to support the parties in their reliance would work an injustice on these litigants and make future settlements predicated upon confidentiality less likely.\textsuperscript{320}

In sum, the trial court found that “the strong public policy favoring settlement of disputes, particularly in complicated cases, and the importance of the stability of judgments and settlements” outweighed the interests that would be advanced by disclosure.\textsuperscript{321}

On appeal, the Second Circuit upheld Judge Weinstein’s refusal to modify the original sealing order “essentially for the reasons stated” in his opinion.\textsuperscript{322} The appellate panel agreed that courts could order agencies to withhold documents even when no FOIA exemption covered the material in question.\textsuperscript{323} More specifically, the Second Circuit held that “the FOIA does not apply to a court’s order directing an agency not to reveal the terms of an agreement crucial to the settlement of an action.”\textsuperscript{324} The higher court also emphasized that after “a confidentiality order has been entered and relied upon, it can only be modified if an ‘extraordinary circumstance’ or ‘compelling need’ warrants the requested modification.”\textsuperscript{325}

A different panel of Second Circuit judges revisited this general sub-

\textsuperscript{316} Judge Weinstein explicitly confirmed this possibility in In re Agent Orange Product Liability Litigation, 597 F. Supp. 740, 770 (E.D.N.Y. 1984).
\textsuperscript{317} In re Franklin Nat'l Bank Sec. Litig., 92 F.R.D. at 472.
\textsuperscript{318} Id.
\textsuperscript{319} Id.
\textsuperscript{320} Id.
\textsuperscript{321} Id.
\textsuperscript{322} Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 231 (2d Cir. 1982).
\textsuperscript{323} Id. at 232.
\textsuperscript{324} Id.
\textsuperscript{325} Id.
ject three years later in *Palmieri v. State of New York*. The FOIA was not involved in *Palmieri*. Instead, the issue was simply what kind of showing was required to compel modification of existing protective orders that had covered both settlement negotiations between private parties and the terms of the settlement itself. What is particularly interesting about the *Palmieri* opinion is that it reflects considerable resistance to vacating such sealing orders even when the effort to penetrate the seal is being made by the Attorney General of the State of New York and a state grand jury for the purpose of developing evidence of possible criminal conduct arising out of the same circumstances that were the subject of the earlier settled civil antitrust action. Even in this situation, the Second Circuit held that the persons seeking to vacate the sealing order must satisfy a demanding standard by showing either that the original order was "improvidently granted" or that "extraordinary circumstances" or a "compelling need" justified the modification.

The appellate court went on to suggest that none of the required showings would be easy to make. For example, to establish that the sealing order had been improvidently granted, the state attorney general would be required to show that the issuing judge "reasonably should have recognized a substantial likelihood that the settlement would facilitate or further criminal activity." If the attorney general failed to carry this burden, the parties' reliance on the sealing orders, "as evidenced by their unwillingness to engage in settlement negotiations without the protections afforded, raises a presumption in favor of upholding those orders." Finally, the appellate panel pointed out that the attorney general's ability to make the required showing of a "compelling need" would be compromised, although not necessarily fatally, by the fact that the government and the grand jury had at their disposal "special investigatory powers not available to private litigants."

In sum, the tone of the *Palmieri* opinion is not hospitable to efforts to vacate orders that created the environment of secrecy that was essential to conducting settlement negotiations and concluding an agreement. Not surprisingly, the Second Circuit is not so inhospitable to such requests when targets of criminal investigations attempt to use sealing or-

326. 779 F.2d 861 (2d Cir. 1985).
327. *Id.* at 862.
328. *Id.* at 863.
329. *Id.* at 866.
330. *Id.* at 865-66.
331. *Id.* at 865 (citing Federal Deposit Ins. Corp. v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982)).
332. *Id.* at 866.
ders to prevent disclosure of corporate records that existed before litigation commenced, before any protective order was sought, and before settlement negotiations commenced.\textsuperscript{333}

A recent opinion by a divided panel of judges from the Third Circuit contrasts sharply with the Second Circuit opinions in \textit{Palmieri} and \textit{FDIC v. Ernst & Ernst}. As no governmental agency was involved in \textit{Bank of America v. Hotel Rittenhouse Associates},\textsuperscript{334} the party seeking disclosure of settlement documents could not rely on the FOIA. The two judges who formed the majority in \textit{Hotel Rittenhouse}, however, focused on a doctrine that the Second Circuit opinions had ignored: The "common law right of access to judicial records and proceedings."\textsuperscript{335} In fact, the majority relied on this doctrine to overrule the District Court's refusal to unseal settlement documents and other papers filed in a civil proceeding.\textsuperscript{336} In so doing, the court not only reversed the presumptions favoring sealing orders that are reflected in the Second Circuit opinions, but went much further by holding that the interests advanced by promising litigants that their settlement will remain confidential cannot outweigh, at least absent some extraordinary showing, the common-law right of public access to court documents.\textsuperscript{337} As the majority phrased it, "the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."\textsuperscript{338} Thus the majority made it clear that "the presumption of access" that attaches to sealed court documents is very strong and that a party seeking to overcome this presumption, and thus to maintain the confidentiality of such sealed documents, bears a heavy burden indeed.

Because Judge Sloviter's opinion for the two-judge majority in \textit{Hotel Rittenhouse} is so explosive in implications and so inconsistent with recent opinions from the Second Circuit, it is necessary to understand the context in which it arose. This context may expose a basis for distinguishing the case from situations more commonly arising in civil litigation. By looking carefully at the context, one also can develop practical suggestions for lawyers that should enable them to avoid the outcome reflected in the \textit{Hotel Rittenhouse} case.

Two aspects of the background against which \textit{Hotel Rittenhouse} was

\textsuperscript{333} See United States v. Davis, 702 F.2d 418 (2d Cir. 1983).
\textsuperscript{335} \textit{Id.} at 343.
\textsuperscript{336} \textit{Id.} at 344.
\textsuperscript{337} \textit{See id.}
\textsuperscript{338} \textit{Id.} at 346.
decided seem to have been most important to the court's decision: (1) the parties who entered the settlement decided to file the agreement, under seal, and thus to make it formally a record in the case;\textsuperscript{339} and (2) after filing the settlement agreement under seal, the parties began disputing its meaning and, most importantly, each filed motions petitioning the court to interpret and enforce the contract.\textsuperscript{340} The District Court permitted the parties to conduct their enforcement litigation entirely under seal: their motions, cross-motions, responses and replies remained under wraps, even when the court entered a judgment compelling one of the parties to pay the other more than thirty-eight million dollars pursuant to the contract and ordered the marshall to sell the subject commercial property.\textsuperscript{341} In the meantime, the concrete subcontractor for the project was pressing an 800,000-dollar claim for work done on the property.\textsuperscript{342} This contractor filed an action in state court charging that the two parties to the federal action had conspired to defraud him and that the sealing of the settlement action was one of the acts they committed in furtherance of their fraudulent scheme.\textsuperscript{343} The contractor's petition to unseal the settlement agreement and the subsequent motion papers led to the Hotel Rittenhouse opinion.\textsuperscript{344}

The Court of Appeals emphasized the fact that the parties had voluntarily elected to file their settlement in the District Court and then had sought to use that court to achieve their private enforcement ends.\textsuperscript{345} Judge Sloviter noted that the parties had an alternative that probably would have enabled them to protect the confidentiality of their agreement. "[I]t is likely," she wrote, "that had [the parties] chosen to settle and file a voluntary stipulation of dismissal, as provided in Rule 41(a)(1) of the Federal Rules of Civil Procedure, they would have been able to prevent public, and even [the cement subcontractor's], access to these papers."\textsuperscript{346} But the filing of the settlement documents, even under seal, made them part of the court record and, as such, "subject to the access accorded such records."\textsuperscript{347}

\textsuperscript{339} Id. at 344-45. The parties apparently took this step because they feared compliance problems, and they wanted to improve the odds that the court would help them enforce the terms of the contract in expeditious proceedings; they did not want to have to file a separate action on the settlement contract and wait in line for trial of that matter.
\textsuperscript{340} Id. at 341, 344.
\textsuperscript{341} Id. at 341.
\textsuperscript{342} Id. at 340-41.
\textsuperscript{343} Id. at 341.
\textsuperscript{344} See id. at 340.
\textsuperscript{345} Id. at 345.
\textsuperscript{346} Id. at 344.
\textsuperscript{347} Id. at 345.
In distinguishing the Second Circuit's opinion in *Federal Deposit Insurance Corp. v. Ernst & Ernst*, Judge Sloviter emphasized two factors. The first, and apparently the more important, was that in the *Hotel Rittenhouse* case, unlike in *Ernst & Ernst*, "there were motions filed and orders entered that were kept secret, in direct contravention of the open access to judicial records that the common law protects." Driving the point home, the court declared that "[h]aving undertaken to utilize the judicial process to interpret the settlement and to enforce it, the parties are no longer entitled to invoke the confidentiality ordinarily accorded settlement agreements." Judge Sloviter also distinguished *Ernst & Ernst* by pointing out that it implicated interests of much greater public import and of a much larger number of people than did the *Hotel Rittenhouse* matter. But because the cases were dissimilar, the two judges who made up the majority in *Hotel Rittenhouse* refused to decide whether the kind of showing of particularized need to maintain confidentiality that had been made in *Ernst & Ernst* was sufficient to "override the strong presumption of access."

From the structure of the court's opinion in *Hotel Rittenhouse*, it appears that there are virtually no circumstances in which Judges Sloviter and Aldisert would uphold the confidentiality of settlement documents and related papers when such materials have been the subject of litigated motions, orders, and judgments. The odds that these two judges would vote to preserve confidentiality appear to be somewhat better—but still not good—when there has been no litigation about the terms of the agreement and thus when the only court document that would remain under wraps is the settlement contract itself.

The lesson to be learned from *Hotel Rittenhouse* should be clear: lawyers practicing in the Third Circuit must decide whether preserving the confidentiality of the terms of their clients' agreement is more important than improved ability to enforce its terms. If preserving confidentiality is the more important consideration, counsel in the Third Circuit should not file their agreement. Instead, they should file a stipulated dismissal and rely on a separate action, sounding in contract, for enforcement purposes.

Two additional points about the majority opinion in *Hotel Rittenhouse* remain to be made. The first arises from Judge Sloviter's emphasis

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348. 677 F.2d 230 (2d Cir. 1982).
349. Id. (emphasis in original).
350. Id.
351. Id. at 345-46.
352. Id. at 346.
that there might be two independent bases on which a party could seek disclosure of sealed settlement documents. The basis on which the majority ruled in Hotel Rittenhouse was the "common law right of access to judicial records and proceedings." This common-law right gave rise to the test used in the court's opinion: a balancing analysis in which the scales are heavily weighted in favor of disclosure. Thus, the party seeking to preserve confidentiality must overcome the "strong presumption" in favor of access.

The second point to note is that the majority intimated, but refused to formally decide, that the first amendment might offer parties a separate, and independently sufficient, predicate for attacking the sealing of settlement documents. Moreover, Judges Sloviter and Aldisert suggested that the "test" to which the first amendment might give rise in situations like this might be even more difficult for parties resisting disclosure to survive. That test apparently would parallel the "compelling state interest" test developed by the Supreme Court for analyzing statutes that restrict core political speech on the basis of its content. Vigorously applied, this test is virtually impossible to pass. The significance of all this is that the court intentionally left open the possibility that even if its reasoning under the common-law right of access were to be rejected at some point in the future by the Supreme Court, it would have another, even more powerful, doctrine to invoke to support the same conclusion.

Judge Sloviter's reasoning has at least two vulnerabilities that could be used by counsel in other jurisdictions to persuade their courts not to follow Hotel Rittenhouse. The first "soft spot" in Judge Sloviter's reasoning is her unpersuasive effort to distinguish the Supreme Court's opinion in Seattle Times Co. v. Rhinehart, in which the High Court held that the first amendment did not prevent a District Court from entering a protective order sealing certain discovery documents. The Hotel Rittenhouse court argued that discovery "is ordinarily conducted in private" and that the public somehow has a less powerful interest in access to discovery documents than to a settlement agreement that is filed under seal. In many courts, of course, discovery documents are routinely filed and accessible to the public. Moreover, a number of settlement

353. Id. at 342-43.
354. Id. at 344.
355. Id. at 344-46.
356. Id.
357. Id. at 344.
358. Id.
360. Hotel Rittenhouse Assoc., 800 F.2d at 343.
agreements contain confidentiality clauses. As a general proposition, there may be a greater expectation of privacy with respect to the terms of settlement than there is with respect to discovery documents. For these reasons, Judge Sloviter's effort to distinguish *Seattle Times* remains unpersuasive.

The second problem with Judge Sloviter's opinion is her reliance on the "common law right of access." This is a controversial, ill-defined and unevenly supported doctrine, especially as it applies to civil litigation.361

Lawyers searching for help in efforts to challenge the reasoning of *Hotel Rittenhouse* may look to the essentially contemporaneous opinion by the Supreme Court of Minnesota in *Minneapolis Star & Tribune Co. v. Schumacher*.362 Like *Hotel Rittenhouse*, *Schumacher* dealt with settlement documents that had become part of the record of a civil action and did not address unfiled settlement agreements. After considering the relevant precedents from the United States Supreme Court, the Supreme Court of Minnesota decided in *Schumacher* that "no first amendment right of access exists" in settlement documents.363 In reaching this conclusion, the high court of Minnesota relied heavily on its perception that "[h]istorically, the majority of settlements entered into between parties have been private" and on its belief that allowing public access to settlement documents might jeopardize the important policy objective of encouraging consensual disposition of lawsuits.364

The *Schumacher* court went on to acknowledge, however, that even though the first amendment gives rise to no general right of access to settlement documents that are made a part of the record in civil actions, the common law creates a presumption in favor of such access that can be overcome only by showing "strong countervailing reasons why access [to the filed settlement documents] should be restricted."365 The court promptly softened the implications of this position, however, by (1) announcing that the standard of review for decisions by trial judges over whether to grant access to sealed settlement documents is abuse of discretion, and (2) holding that the trial judge had not abused his discretion

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362. 392 N.W.2d 197 (Minn. 1986). The *Schumacher* opinion was issued on August 8, 1986, exactly one month before the opinion in *Hotel Rittenhouse*. There is no reason to believe that the Third Circuit panel that produced *Hotel Rittenhouse* was aware of the *Schumacher* opinion.

363. *Id.* at 204.

364. *Id.* at 204-05.

365. *Id.* at 205-06.
in refusing to permit a newspaper to have access to "settlement and distribution papers" and transcripts of settlement hearings in five wrongful death actions against an airline that was being sued by other victims of the same accident.\[^{366}\] In affirming the trial judge's action, the Supreme Court noted that the "historical and philosophical privacy of settlement documents, along with the relevant facts and circumstances of this case, demonstrate that the privacy interests asserted by the litigants were strong enough to justify restricting access."\[^{367}\]

It is arguable that the effect of relying on the "historical and philosophical privacy of settlement documents" is to eviscerate the strong presumption in favor of access that the court purported to acknowledge. If the court permits the historical privacy of settlement to offset the presumption in favor of access, the "test" that emerges is an open balancing (that is, not weighted in favor of any outcome). And if the scales are not tipped at the outset significantly in favor of disclosure, trial courts will enjoy considerable discretion in deciding whether or not to permit access to sealed settlement documents. In *Schumacher*, the trial court was satisfied by a showing that if the settlement documents were made public the plaintiffs might be subjected to harassment, exploitation, and intrusions on their privacy.\[^{368}\] Neither the trial court nor the Minnesota Supreme Court ascribed much countervailing weight in the balancing process to the great public interest in the airline crash or to the pendency of other litigation arising out of the same incident. In fact, the Supreme Court used the level of public interest in the event and its aftermath to buttress its conclusion that disclosure of the terms of the settlements might lead to further intrusions on the privacy of the settling plaintiffs.\[^{369}\]

In spirit, *Schumacher* and *Hotel Rittenhouse* could not be more antithetical. The Minnesota Supreme Court seems to be more sympathetic than the Third Circuit with the goal of promoting settlement and with the argument that affording real protection to the privacy of settlement contracts is essential to that goal. By contrast, the Third Circuit ascribes more weight to the importance of public access to records that show how civil proceedings were closed. Which of the competing assumptions that underlie these two approaches is wisest is a question to which we have no empirical answer. Thus, the debate will continue at least until the Supreme Court of the United States enters the fray.

\[^{366}\] Id. at 206.

\[^{367}\] Id.

\[^{368}\] Id. at 205, 206.

\[^{369}\] Id. at 205.
B. Side Agreements Under Seal

Janus Films, Inc. v. Miller,370 a recent Second Circuit opinion, exposes a different kind of risk that lawyers face when they file a side agreement under seal in connection with a consent judgment or a settlement judgment. Janus Films was a copyright infringement action that the parties purported to settle in open court on the second day of trial. The proposed settlement included a concession of liability by the defendant, an agreement that judgment would be entered “for statutory damages, attorney’s fees, and costs in the total amount of $100,000,” and “a separate, confidential agreement, to be placed under seal, regarding ‘the terms and conditions of collection’ of the judgment.”371 The confidential side agreement permitted the defendant to satisfy the monetary aspect of the judgment by “payment of a sum considerably less than the $100,000 over an extended period of time.”372 Despite the defendant’s subsequent change of mind and attempt to avoid the commitment he had made in open court, the trial judge entered a judgment that described the 100,000-dollar obligation and certain injunctive relief, but did not mention either the content or the existence of the side agreement.373

The Second Circuit panel was not comfortable with the way the trial judge had handled the side agreement. Noting that it was dealing with an issue of first impression, the Court of Appeals distinguished between:

a judgment that concerns only the parties to the lawsuit being settled and a judgment likely to be of concern to others. The former, which might be called a “private judgment,” is illustrated by a judgment that resolves the claims of all parties to a dispute involving a tort or a breach of contract. The latter, which might be called a “public judgment,” is illustrated by the pending case, where a judgment resolves a dispute concerning a copyright that may be enforced against other members of the public besides the defendant in this litigation.374

Because the case did not involve a “private judgment,” the appellate panel declined to consider whether courts should permit parties in such actions to terminate their suit through entry of a consent judgment or a settlement judgment accompanied by a separate side agreement that is filed under seal.375

With respect to “public judgments,” however, the Janus Films court announced a new rule. Noting that “there is always the distinct risk that

370. 801 F.2d 578 (2d Cir. 1986).
371. Id. at 580.
372. Id.
373. Id. at 581.
374. Id. at 584.
375. Id. at 585.
either party may seek to induce others to settle similar disputes on terms exactly like or at least similar to the terms of the judgment," the Second Circuit held that parties who terminate litigation by having the trial court enter a consent judgment or a settlement judgment should be required to disclose the content of any side agreements that are part of the arrangement that concludes the suit.\textsuperscript{376} This holding does not mean that parties cannot settle cases on confidential terms. As the Janus Films panel pointed out, litigants who have settled their dispute retain the option of forgoing entry of judgment, terminating the case by a stipulated dismissal, and "keeping confidential all aspects of their settlement."\textsuperscript{377} If terms of disposition are "likely to be asserted against other[s]," however, the parties may not "secure a judicial imprimatur for an obligation that [they have secretly] agreed means less than its terms state."\textsuperscript{378}

C. Federal Rule of Civil Procedure 68 and State Mediation Statutes

Attorneys who are especially concerned about preserving the confidentiality of offers or demands, or of statements made during negotiations, should consider proceeding under Federal Rule of Civil Procedure 68, or a state law analogue, like section 998 of the California Code of Civil Procedure, or turning to a "mediation" process that enjoys special state statutory protection.

The bar to admissibility that is articulated in Federal Rule of Civil Procedure 68, and in section 998 of the California Code of Civil Procedure, is virtually unqualified, in sharp contrast to the limited protection offered by Federal Rule of Evidence 408. Rule 68 flatly declares that evidence of an unaccepted offer that was made under the rule is "not admissible except in a proceeding to determine costs."\textsuperscript{379} The language of section 998 of the California Code of Civil Procedure is similarly sweeping: "If such offer is not accepted ... it ... cannot be given in evidence upon the trial."\textsuperscript{380} These prohibitions seem operative regardless of the purpose for which the evidence would be proffered at trial and thus avoid the limitations on the scope of rule 408.\textsuperscript{381} Since neither rule 68 nor section 998 purports to extend protection to evidence of "conduct or

\textsuperscript{376} Id.
\textsuperscript{377} Id.
\textsuperscript{378} Id. at 584-85.
\textsuperscript{379} Evidence that a rule 68 offer was made could be introduced after judgment at trial, when the offeror attempts to recover his costs from a plaintiff who rejected a rule 68 offer that turned out to be larger than the award at trial.
\textsuperscript{380} CAL. CIV. PROC. CODE § 998 (West Supp. 1988).
\textsuperscript{381} See supra notes 57-124 and accompanying text.
statements made in compromise negotiations," counsel cannot be sure to what extent these rules of procedure can be invoked to protect communications that accompany and explain protected offers. Moreover, by their express terms, these rules apply only to offers that are not accepted. It is unlikely that these rules would offer any protection in a case in which a person who was not a party to a settlement agreement is attempting to compel disclosure of settlement communications or terms.

As an alternative to simple two-party settlement negotiations, counsel could proceed with private mediations that are covered by recently enacted state confidentiality statutes with much greater confidence in the scope of the protection they afford. As one commentator has noted, recent "legislative enactments in several states have provided near-absolute protection for communications made in mediation, [thus greatly enhancing] the protection available to mediation under the traditional rules of evidence and contract." Some of the most populous states in the country, including California, New York, and Florida, have enacted such laws.

The California version of these statutes appears as section 1152.5 of the Evidence Code, which was added in 1985. Except for certain family law matters that are covered by other confidentiality provisions, this statute applies to any kind of civil dispute. When parties "agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a civil dispute," and when, before the mediation begins, they agree in writing to invoke the protections of the statute after setting forth the provisions of the statute in their agreement, the law prohibits admitting evidence "of anything said or . . . any admission made in the course of the mediation" or any "document prepared for the purpose of, or in the course of, or pursuant to, the mediation."

382. FED. R. EVID. 408.
383. See FED. R. CIV. P. 68 ("An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine cost."); CAL. CIV. PROC. CODE § 998(b)(2) (West Supp. 1988) ("If the offer is not accepted prior to trial or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial.").
384. Note, supra note 3, at 452.
385. Id. at 452 n.79; see CAL. EVID. CODE § 1152.5 (West Supp. 1988); see also MINN. STAT. §§ 572.31-.40 (Supp. 1987); MINN. STAT. § 595.02 (Supp. 1987) (offering a shield of confidentiality to communications and documents connected with mediations except as needed in an action "to have a mediated settlement agreement set aside or reformed"); see also Protective Order Limits Deposition of Privately Retained Mediators, Alternative Dispute Resolution Rep. (BNA) 212-13 (Sept. 17, 1987).
386. CAL. EVID. CODE § 1152.5 (West Supp. 1988); see CAL. CIV. CODE §§ 4351.5, 4607 (West Supp. 1988); CAL. CIV. PROC. CODE § 1747 (West 1982).
The Law Revision Commission's comment to the 1985 addition makes clear that parties can waive their confidentiality rights under this section either by failing to object to a proffer at the time of trial or by mutual consent. The same comment points out that the purpose of this section is "to encourage this alternative to a judicial determination of the action" and that the justification for the confidentiality provision is the same as the justification for the much narrower provision contained in section 1152, which renders offers of compromise "inadmissible to prove . . . liability for the loss or damage or any part of it." The Law Revision Commission's comment emphasizes that instead of attempting to limit the applicability of the statute through a definition of the term "mediation," the legislature decided that it would make the statutory protections available only when "the persons who will participate in the mediation (including the mediator) execute a written agreement before the mediation begins stating that Section 1152.5 of the Evidence Code applies to the mediation" and only when their agreement sets "out the full text of subdivisions (a) and (b) of Section 1152.5."

Thus, California practitioners who want to take advantage of the broad protections available through this statute should develop forms that recite all the relevant provisions of the statute and that expressly articulate the commitments to confidentiality that all parties and the mediator make. When they follow the proper procedure, California lawyers should be able to use this statute to fill virtually any gap left by section 1152 of the California Evidence Code, which applies only to "offers to compromise."

There is no reason to believe that because a dispute is already the subject of litigation the protections of section 1152.5 are rendered inaccessible. There is reason to believe, however, that this more generous section would not apply to negotiations between the parties that did not involve a neutral third party. While the new statute does not purport to define "mediation," it clearly contemplates a process that involves the participation of a neutral person who must sign the confidentiality agreement. Counsel cannot simply change the label of direct settlement negotiations to "mediation" and assume that they will enjoy the protections of the new statute, but must involve a neutral person from the outset.

Before deciding to proceed under section 1152.5, counsel should consider the disadvantages that might derive from the breadth of its protections. As a commentator has pointed out concerning comparable stat-

388. CAL. EVID. CODE § 1152.5 law revision commission's comment (West Supp. 1988).
389. Id.
utes enacted in other states, proceeding under statutes that on their face bar use of evidence from mediations regardless of the purpose for which the evidence would be used could create extra difficulties for a party who subsequently seeks either (1) to enforce an agreement that resulted from the mediation or (2) to resist enforcement of an agreement that was the product of duress, fraud, mutual mistake, or overreaching.\footnote{See Note, supra note 3, at 452-54.} Similarly, the broad language of a statute like section 1152.5 could impair efforts to redress wrongs arising out of violation of some specific duty relating to the conduct of negotiations, such as the duty to bargain in good faith in labor disputes, or the duty of an insurance carrier to consider in good faith reasonable settlement proposals.\footnote{See id. at 452-54.}

Apparently anticipating this problem, the Minnesota legislature explicitly provided that the promise of confidentiality that extends generally to communications made in connection with mediations does not apply when a party applies to a court "to have a mediated settlement agreement set aside or reformed."\footnote{See MINN. STAT. § 595.02 (1984).} Even though they acted a year later than their counterparts in Minnesota, California legislators failed to add any such caveat or qualifier to the promise of confidentiality in section 1152.5. Thus, counsel cannot be sure how California courts will respond when a party attempts to use material or statements made in connection with a mediation to enforce or to defeat a mediated settlement agreement. Given this uncertainty, counsel must assess separately the needs and risks presented by each specific situation that calls for some effort to reach a settlement, then either (1) choose from the pre-existing procedures\footnote{Some of the alternatives include a judicially hosted settlement conference, a mediation, offers of compromise under rule 68 or section 998 of the California Civil Procedure Code, or traditional face-to-face negotiations by the lawyers.} the one that best fits that situation or (2) attempt to create, through private contract, a mini-trial process that is specially tailored to meet the needs of the parties.

D. Private Caucus Settlement Conferences

A private caucus settlement conference hosted by a judge or magistrate offers two sources of protection for communications. In conferences structured on this model the parties have virtually no direct interaction. The person to whom they present the reasoning that supports their offers or demands, and to whom they divulge how far they might be willing to go in an effort to compromise differences, is the
judge—not opposing counsel. Furthermore, the parties can ask the judge to keep secret the admissions or concessions about which they are most sensitive, or the most potentially damaging reasons for the positions they are taking. An opponent who does not learn these things cannot attempt to introduce them at trial.

The second source of protection for communications made during judicially hosted settlement conferences is the difficulty an opponent would have compelling a judge who had hosted such a conference to testify at trial about what a party said to her in confidence during the negotiations. There may be circumstances under which this kind of testimony could be compelled, but the judicial community is likely to require a compelling showing before permitting a party to penetrate this sensitive arena.

E. Using Private Contracts to Extend Protection

Another tool that counsel might consider using to increase protection for their settlement communications is a contract with the opposition designed explicitly for the purpose of guaranteeing confidentiality. In such a contract, the parties might commit themselves not to attempt to introduce at a trial on the merits, for any purpose, any statements made during settlement negotiations. Such a contract clearly would reach farther than rule 408 and erect a stone wall instead of a split rail fence between settlement negotiations and trial. Such contracts, of course, cannot bind parties who do not sign them and may have little effect on the capacity of a non-party to discover or introduce at trial the settlement communications covered by the contract.395

Unfortunately, the enforceability of such contracts is not always clear. There is a risk, though probably small, that a federal judge would refuse to enforce such an agreement on the ground that it embodies a doctrine Congress refused to enact when it adopted the Federal Rules of Evidence. There also is a risk that a federal judge would view such a contract as invading a judicial prerogative—restricting the judge's power to make sure that all the evidence that will help the jury ascertain the truth is accessible. Clearly there is a substantial risk that a judge will refuse to honor such a contract if doing so would make it impossible to determine whether a subsequent settlement agreement should be enforced. To write such an agreement that purported to go this far would be unwise in most circumstances. Similarly, courts can be expected to

penetrate any such agreement when it is necessary to determine whether the parties engaged in illegal conduct or set up a relationship that violated public policy.396

Confidentiality contracts that threaten none of these more compelling public policies, however, may be enforceable, at least in instances when they are entered into by parties who are competent and represented by counsel, and between whom there are not dangerous differences in bargaining power. A California appellate court has upheld such a contract as it applied to a voluntary mediation.397

Lawyers looking for creative ways to use contracts to increase protection for the confidentiality of settlement communications might find interesting a suggestion in United States v. Cook.398 In a footnote, a panel of Fifth Circuit judges indicated that they would be receptive to an argument that a party who promised—as part of a settlement contract in one case—not to use that settlement outside the action in which it was entered, should be estopped from introducing evidence from the settlement in a subsequent suit.399 Defendants in a criminal trial that the government launched after it had settled an earlier civil matter with them argued that “the government was estopped from using the injunction documents [a consent decree that resulted from a settlement agreement] because of the specific prohibition they contained against their use for any purpose other than ‘the purpose of this action.’”400 Characterizing this argument as “persuasive,” the Cook court went on to opine that in “simple equity, the government should not be allowed to induce or obtain a defendant’s consent to settlement under specific terms, and later violate those terms.”401 This comment suggests that counsel should consider adding clauses that explicitly limit the permissible uses of settlement material to their settlement contracts or to agreements that fix the rules for settlement negotiations.

The caveat that courts will not enforce such agreements if their purpose or effect violates public policy is reflected in the opinion of the California Court of Appeal in Mary R. v. B. & R. Corp.402 In that case, the

396. See 21 C. WRIGHT & K. GRAHAM, supra note 14, § 5039, at 207-08.
397. Simrin v. Simrin, 233 Cal. App. 2d 90, 95, 43 Cal. Rptr. 376, 379 (1965). See generally Note, supra note 3, at 450-52 (focusing on the status of stipulations whose effect is to exclude relevant evidence); 21 C. WRIGHT & K. GRAHAM, supra note 14, § 5039 (same); 22 C. WRIGHT & K. GRAHAM, supra note 14, § 5194 (same).
398. 557 F.2d 1149, 1152 n.6 (5th Cir. 1977).
399. Id.
400. Id.
401. Id.
court refused to enforce a term of a settlement agreement that purported to prohibit the plaintiff, the alleged victim of child molestation by a physician, from revealing information to regulatory authorities. While the facts of that case were unusual, the principle that emerges from it could apply in a wide range of more commonly occurring situations. In the securities area, for example, courts might well refuse to honor a contract, whether or not it led to a settlement agreement, in which the parties agreed that neither would share with the Securities Exchange Commission or anyone else information about insider trading that it learned during settlement discussions. Similarly, parties should not expect courts to enforce agreements between competitors that purport to prohibit disclosure or admission at trial of communications whose purpose or effect was to promote anticompetitive activities, even if these communications occurred during settlement negotiations.

Moreover, courts that follow precedents developed in cases dealing with the enforceability of "stipulations" could find many different grounds on which to relieve a party of an apparent contractual commitment limiting the admissibility of communications made or acts committed during the course of settlement discussions. Courts may relieve a party from a stipulation because it was procured by fraud, because it was entered as a result of misrepresentation, mistake of fact, or excusable neglect, or because there has been such a substantial change in circumstances that binding the party to the stipulation would be unfair. The significance of these grounds for relief from a stipulation lies in the fact that they also are commonly presented bases for relief from a settlement agreement. As explained earlier, rule 408 would not bar admission of communications made during settlement negotiations if the purpose for which they would be admitted is to prove that the settlement contract is unenforceable because it was procured by fraud, or was entered as a result of misrepresentation, mistake of fact, or excusable neglect. Thus a party might be able to use the same ground both to escape a contractual commitment not to disclose communications made during negotiations and to defeat the settlement agreement itself.

One additional warning is in order here. When the basis for subject matter jurisdiction in federal court is diversity of citizenship, there is a possibility that state law, rather than federal common law, will determine whether or not a contract that enlarges the protections of rule 408—for example, by making communications during negotiations inadmissible

403. Id. at 316, 196 Cal. Rptr. at 876.
405. See supra notes 108-19 and accompanying text.
for any purpose—is enforceable. Professors Wright and Graham suggest that courts deciding whether to enforce such contracts should consider doctrines developed in the law of procedure and doctrines developed in the substantive law of contract, arguing that procedural analysis should be based on federal common law in diversity cases, but that the substantive contract analysis should be based on the law of the relevant state.\textsuperscript{406} In \textit{Blum v. Morgan Guaranty Trust Co.},\textsuperscript{407} the Eleventh Circuit assumed, without conducting a detailed analysis under \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{408} and its progeny, that in a diversity case the enforceability of stipulations whose effect is to limit the admissibility of evidence is a question to be resolved under state law.

\section*{Conclusion}

Despite commonly made assumptions, and the apparent promise of Federal Rule of Evidence 408, there are many circumstances in which many courts would permit both the discovery and the admission at trial of confidential settlement communications. Given the unpredictability of judicial rulings in this area, and the unforeseeability of events that could result in disclosure or admission at trial of settlement communications, good lawyers have no choice but to proceed with caution in this area. If confidentiality is their client's paramount concern, counsel should not rely on the rules of evidence for protection and should consider taking some of the extra precautions described in the latter sections of this Article.

\begin{footnotesize}
406. \textit{See} 21 C. \textsc{Wright} & K. \textsc{Graham supra} note 14, § 5339.\\
407. 709 F.2d 1463, 1465 (11th Cir. 1983).\\
408. 304 U.S. 64 (1938).\end{footnotesize}