Settlement Negotiations

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What Is Protected from Discovery and Admission at Trial?

How to best protect your client’s interests when negotiations fail.

The push to compromise and settle disputes, rather than engage in full scale litigation and trial, has become commonplace in the American judicial system. Courts have routinely supported alternative dispute resolution, including mediation and judicial settlement conferences. Parties invited to participate in these settlement negotiations are often informed that all statements made during the negotiations will be protected from admission at trial. While settlement negotiations are generally protected from admission at trial, parties to litigation cannot simply assume that any statement made therein will be protected. In fact, reliance on this assumption may result in detrimental evidence being entered against a party at trial. This article focuses on Rule 408 of the Federal Rules of Evidence, its protections and deficiencies, the “settlement privilege,” and effective ways to protect your clients’ interests when engaging in settlement discussions and negotiations. This article deals predominantly with a plaintiff’s attempts to admit evidence from settlement negotiations that ultimately fail to effectuate a settlement. For a detailed discussion regarding the protection of settlement agreements that are actually effectuated, see Jennifer Heis, Keeping Settlement Secrets: Confidentiality of Settlement Agreements, which precedes this article.

The Federal Rules of Evidence—Rule 408

Courts have long recognized the public policy interest favoring the compromise and settlement of disputes. Based upon this public policy, Rule 408 of the Federal Rules of Evidence was enacted. Rule 408 provides:

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

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

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

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. Fed. R. Evid. 408 (2006). The Advisory Committee noted that the same public policy considered in the exclusion of offers of compromises is also recognized in Rule 68 of the Federal Rules of Civil Procedure, which provides that “[a]n offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.” See Fed. R. Civ. P. 68; see also Fed. R. Evid. 408, advisory committee’s notes.

Rule 408 was proposed to promote free and honest communication of the parties to a dispute. Prior to the enactment of the rule, a party could only guaranty protection by “couching his statements in hypothetical form.” Fed. R. Evid. 408, advisory committee’s notes. Rule 408, as drafted and proposed, was intended to protect all statements—factual admissions and hypothetical statements—from admission at trial. Id. Rule 408 became effective on January 2, 1975.

Several primary considerations have been suggested to support the adoption of Rule 408. First, the parties to a dispute must feel free to engage in the settlement negotiations without the fear that an offer will be used against them to show a weakness in their claim or defense. See Dimino v. New York City Transit Authority, 64 F. Supp. 2d 136, 161 (E.D.N.Y. 1999) (“If an offer to settle a dispute could be used as evidence of the weakness of the offeror’s claim or defense, parties would not come to the negotiating table”). Second, courts acknowledge that a certain amount of “puffing” is involved when trying to reach a settlement. Cook v. Yellow Freight System, Inc., 132 F.R.D. 548, 554 (E.D. Cal. 1990) (“Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are ‘motivated by a desire for peace rather than from a concession of the merits of the claim.’”). Finally, the prejudicial effect of offers of compromise can often far outweigh any probative value obtained from admission of the offer. Dimino, 64 F. Supp. 2d at 161.

Rule 408 has expressly been held to be inapplicable to criminal cases. The basis for this holding is that “the policy considerations that generally exclude settlement in civil proceedings are not applicable in the criminal context.” Manko v. United States, 87 F.3d 50, 54 (2d Cir. 1996) (citing United States v. Gonzalez, 748 F.2d 74 92d Cir. 1984)). Thus, for Rule 408 to apply, a civil dispute as to the validity or amount of a claim must exist. Id.; see also Fed. R. Evid. 408.

When Does Rule 408 Apply?

As the rule states, evidence of compromise or settlement related to a dispute are inadmissible. Accordingly, an important aspect in the application of Rule 408 is the determination of when a “dispute” exists. Generally, courts hold that the exclusion provided by Rule 408 applies to settlement negotiations that occur prior to the commencement of litigation. Kleen Laundry and Dry Cleaning Services, Inc. v. Total Waste Management Corp., 817 F. Supp. 225, 228–29 (D. N.H. 1993). In Kleen Laundry, the defendant moved to strike certain paragraphs from an affidavit submitted by the plaintiff. The applicable paragraphs referenced certain statements made during a meeting between the parties and their respective counsel. The plaintiff, in opposition to the motion to strike, countered that Rule 408 was not applicable “because the statements were made before a formal complaint was filed in the[e] action.” Id. at 229. The Kleen Laundry court held that there is no “bright-line” rule under Rule 408 requiring that a complaint be filed for Rule 408 to apply and, therefore, the statements made during settlement negotiations could not be used to support a motion for summary judgment. Id.

In some instances, a court may require evidence supporting a party’s contention that statements were made during attempts to settle an existing “dispute.” In such instances, the fact that attorneys are involved will likely assist the court in finding that attorneys will be presumed to be an offer within the scope of Rule 408. The party seeking admission of an offer under those circumstances must demonstrate convincingly that the offer was not an attempt to compromise the claim. Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992) (citations omitted).

Moreover, for the protections of Rule 408 to exist, both parties must be aware of the existence of the dispute. See, e.g., Hiram Ricker & Sons v. Students International Mediation Society, 501 F.2d 550, 553 (1st Cir. 1974). In Hiram Ricker & Sons, the plaintiff, a resort owner, brought suit to recover amounts owed for training sessions held by the defendant at the resort. On the last day of the training sessions, the defendant delivered a sheet of paper to the resort owner setting forth a series of calculations, which the defendant alleged it owed. The amount offered by the defendant was far less than the amount the resort owner claimed to be owed. During the litigation, the trial court permitted the admission of the document containing the calculations. The defendant moved to strike the testimony related to the document on the grounds that it was an inadmissible offer of compromise and settlement. The trial court refused. On appeal, the First Circuit affirmed the admission of the document, holding that until the resort owner “received [the defendant’s] final payment offer of $44,000, it could not determine...
whether it had an actual controversy with [the defendant]. The rule excluding offers of settlement is designed to encourage settlement negotiations after a controversy has actually arisen.” Id. Thus, if one party in unaware of an existing dispute, it is unlikely that Rule 408 will apply.

In addition, the parties to the communications must establish a willingness to resolve and compromise the dispute. Communications directed at an opposing party attempting to coerce the party to submit to a position will not be protected. See, e.g., Steinberg v. Obstetrics-Gynecological & Infertility Group, P.C., 260 F. Supp. 2d 492, 498 (D. Conn. 2003). In Steinberg, the defendant contended that communications between plaintiff’s counsel and defendant’s counsel was inadmissible as statements and conduct made in the course of compromise negotiations. The court found otherwise, stating: We find that the Letter was not made in the course of settlement negotiations. At no time did the communications between the parties reflect their willingness to settle the dispute before the commencement of legal action. Through such communications, each side asserted the correctness of their respective positions and did not indicate any desire to compromise. ... The Letter, therefore, is not to be excluded under Rule 408.

Id. Thus, it could be argued, that the attorney in Steinberg received a negative ruling as a result of her zealous representation of the client. Had either party communicated some weakness or, at a minimum, an intent to resolve the dispute short of litigation, the documents might have been protected by Rule 408.

Provided that both parties are fully aware of an existing dispute, the protections provided by Rule 408 should apply to settlement negotiations that take place prior to the commencement of litigation. Obviously, the public policy behind Rule 408 requires such a holding. The purpose of the rule is to advance and promote compromise and settlement. This would naturally include any attempts to compromise and settle a dispute prior to the initiation of litigation. Otherwise, parties would be forced to file a lawsuit, which could create an adversarial position precluding settlement, simply to obtain the protections provided by Rule 408. Such a result would contradict the very purpose of the rule.

However, to ensure that communications will be protected under Rule 408, a party initiating communications with an opposing party should take certain precautions. It is important to make sure that the opposing party is, in fact, aware of the existing dispute. Additionally, the party, during the communication, should make the opposing party sufficiently aware that the purpose of the communication is to reach a compromise and settlement to the existing dispute. Parties seeking to protect settlement negotiations would also benefit from referencing Rule 408 and indicating that any communications are offered for the purpose of compromising and settling the dispute. If such safety precautions are taken, it is likely that a court will find that a “dispute” exists and that Rule 408 applies.

Admissions of Fact
Prior to the enactment of Rule 408, admissions of fact were not excluded from trial. For instance, in Norling v. Carr, 211 F.2d 897, 901 (7th Cir. 1954), a statement by the defendant, who shot the plaintiff while duck hunting, that he would pay the plaintiff’s hospital bills was not considered an offer of compromise and was, therefore, admissible at trial. See also Sullivan v. Heyer, 21 N.E.2d 776 (the appellate court found that the trial court erred in refusing to allow testimony that the defendant paid the plaintiff’s hospital bills); Hanlon v. Lindberg, 48 N.E.2d 735. In Hanlon, the court admitted the statement of the defendant that he would pay the plaintiff’s hospital bills. In support of the admission, the Hanlon court held: It in no way partook of any attempt by the parties to effect a compromise of a disputed claim. Such declarations of an adverse party are generally admissible against him. Where the parties are strangers under the law, and the one charged with being the wrongdoer, promises to pay or does pay for hospital and medical care, it is a proper circumstance for the consideration of the jury. Id. at 738; see also City Bank of Honolulu v. Davila, 438 F.2d 1367, 1369 (1st Cir. 1971) (in an action on a note, the defendant’s request for extension of time to make payment and agreement to pay back the note in full with 8 percent interest held to be an admission, rather than an offer of compromise).

In light of the chilling effects on settlement negotiations arising from decisions as those above, Rule 408 sought to protect the rights of parties more clearly to negotiate freely in an effort to compromise and settle disputes. Rule 408 removed the requirement that parties, when communicating in settlement negotiations, speak in hypothetical terms. See Winchester Packaging, Inc. v. Mobil Chemical Co., 14 F.3d 316, 321 (7th Cir. 1994) (noting that Rule 408 no longer makes a distinction between factual statements, such as “You owe me $X,” and hypothetical statements, such as “I will drop my suit if you pay me $X.”) As a result, factual statements, if made during settlement negotiations, will be protected from admission into evidence. See Fed. R. Evid. 408, advisory committee’s notes.

Demands for Payment
A demand for payment will not necessarily be protected as an offer of compromise and settlement. In Winchester Packaging, Inc. v. Mobil Chemical Co., 14 F.3d 316, 319–20 (7th Cir. 1994), the Seventh Circuit distinguished a demand for payment from a settlement offer. In Winchester Packaging, the plaintiff sent letters to the defendant demanding payment of a set amount. The letters set forth a calculation of the amount owed by the defendant and referenced an intent to move forward with litigation. The court stated:

Two senses of “settlement” must be kept distinct. To settle a bill is to pay it. But a bill that itemizes what the sender thinks the recipient owes him and demands—even under threat of legal action—payment is not an offer in settlement or a document in settlement negotiations and hence is not excludable by force of Rule 408. … Dunnng a deadbeat by threatening to sue is not the same thing as making an offer or demand in the context of a settlement negotiation.
ment negotiations and offers of compromise are admissible if offered for purposes other than to establish the validity of a claim or amount, including proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. Fed. R. Evid. 408 (b). Additionally, courts have permitted the admission of settlement negotiations in other instances, such as the determination of whether to grant prejudgment interest, Iberian Tankers Co. v. Gates Construction Corp., 388 F. Supp. 1190, 1192 (S.D.N.Y. 1975), determining the validity of a defense for failure to mitigate damages, Thomas v. Resort Health Related Facility, 539 F. Supp. 630, 638 E.D.N.Y. (1982), to show notice, Breuer Electric Manufacturing v. Toronado Systems of America, 687 F.2d 182, 185 (7th Cir. 1982), or to show that the offering party was not acting in bad faith, Morley-Murphy Co. v. Zenith Electronics Co., 910 F. Supp. 450, 456 (W.D. Wis. 1996).

The “Settlement Privilege”

In addition to the protections provided by Rule 408, some courts have gone so far as to recognize an actual “settlement privilege.” See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976 981 (6th Cir. 2003). In 1974, proposed privilege rules were “submitted to Congress by an Advisory Committee consisting of judges, practicing lawyers, and academicians.” 3 Jack B Wienstein & Margaret A. Berger, Wienstein’s Federal Evidence, §501.02[1][c][i] (Joseph M. McLaughlin, ed., Mathew Bender 2ed ed., 1997). The rules were approved by the United States Supreme Court in an 8–1 vote. Id. Nevertheless, Congress rejected proposed Evidence Rules 502–513 and “manifested an affirmative intention not to freeze the law of privilege.” Trammel v. United States, 445 U.S. 40, 47 (1980). Now, only one Federal Rule of Evidence is applicable to privileges. Rule 501 of the Federal Rules of Evidence states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules proscribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law. Fed. R. Evid. 501 (emphasis added). Rule 501 provides a flexible standard to which privileges are to be created and applied. The rule permits courts to adopt privileges to changing circumstances and times, without being restrained by adamant standards, such as the proposed rules. The United States Supreme Court has interpreted Rule 501 to permit the extension of common-law privileges, as well as the creation of new privileges where appropriate. Jaffee v. Redmond, 518 U.S. 1, 7 (1996).

In Goodyear, 332 F.3d at 980, the Sixth Circuit held that “[v]iewed ‘in the light of reason and experience,’… a settlement privilege serves a sufficiently important public interest and should be recognized.” In reaching its conclusion, the Goodyear court noted its authority to recognize and adopt common law privileges. The Sixth Circuit examined In re the Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996), and Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir. 1988), two similar cases in which it denied members of the press access to summary jury trials. In both cases, the court found that summary jury trials are essentially settlement proceedings and the need for privacy in such settlement proceedings even outweighs the First Amendment right to access the proceedings. See Cincinati Enquirer, 94 F.3d at 199; Cincinnati Gas & Elec. Co., 854 F.2d at 903–04.

In adopting the settlement privilege, the Goodyear court also analyzed Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990). In Cook, the district court denied discovery of documents relating to settlement discussions applicable to the plaintiffs’ claims. The Cook court advanced several reasons for its holding, but focused on the inherent untrustworthiness of the discussions, stating:

What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of

Admission for Other Purposes

As Rule 408 indicates, evidence of settlement negotiations and offers of compromise may be interpreted by the courts of the

Requirement of Consideration

For a communication to be considered an offer of compromise and settlement, a party must offer some form of consideration to the opposing party. In short, for an offer of compromise to have occurred, there must be an “offer.” See Dimino v. New York City Transit Authority, 64 F. Supp. 2d 136, 162 (E.D.N.Y. 1999). In Dimino, the plaintiff brought an action against her employer for pregnancy discrimination and termination. In admitting certain communications, which related to the plaintiff’s employment status, the court stated:

The term “valuable consideration” should be interpreted broadly…. An apology has been accepted as valuable consideration…. [The defendant] presumably would claim that allowing [the plaintiff] to return to work was a valuable consideration. While offering an employee his or her job back is certainly valuable consideration, in this case [the plaintiff] had never lost her job.

It is not at all clear that [the defendant] offered to trade any valuable consideration for any compromise of a claim. Accordingly, evidence of the discussions would not seem to fall under the scope of Rule 408’s exclusion.

Id. at 162–63 (citations omitted). Thus, if there is no consideration shown to be “offered” to the opposing party when a communication is made, a court may determine that no “offer of compromise” took place under Rule 408.
settlement negotiations. The discovery of these sort of “facts” would be highly misleading if allowed to be used for purposes other than settlement. Id. at 554. Based upon the well-recognized rules that “public policy favors the settlement of lawsuits” and that “[i]n order for settlement talks to be effective, parties must feel uninhibited in their communications,” the Goodyear court elected to adopt the “settlement privilege.” Goodyear, 332 F.3d at 979–80.

However, recognition of the settlement privilege has not been uniform in federal courts. In Weissman v. Fruchtman, 1986 WL 15669, *19 (S.D.N.Y. Oct. 31, 1986), the district court noted the reluctance to recognize an actual “settlement privilege,” stating:

The legislative and judicial reluctance to extend the “settlement privilege” doctrine of Rule 408 to the discovery phase of a litigation is understandable. First, since the “settlement privilege” was not a privilege recognized at common law, the usual parallel between privilege law for discovery and evidentiary purposes is not controlling.... Second, there would appear to be little need for such an extension. In most cases, statements made for, or in the course of, settlement negotiations have been communicated to the adversary and need not be “discovered.” For non-communicated settlement statements or documents, the attorney-client and work product privileges would often supply sufficient protection.

Weissman, 1986 WL 15669, at *19, n. 23 (citations omitted). However, while the Weissmann court rationalized its declination to recognize a settlement privilege upon the fact that, in most instances, the adversary would already have the documents, it failed to recognize the protection needed when the settlement communications involved a third party seeking discovery of settlement negotiations to which it was not a party.

More recently, the United States District Court for the District of Columbia refused to recognize the settlement privilege. In re Subpoena Issued to Commodity Futures Trading Comm’n, 370 F. Supp. 2d 201 (D.D.C. 2005). The district court noted that:

The Supreme Court has identified several factors that should be considered when assessing a proposed privilege under Rule 501. First, the Court has asked whether there exists a broad consensus in federal and state law in favor of the privilege.... Second, the Court has considered whether “Congress has considered the relevant competing concerns but has not provided the privilege itself.”... Third, the Court has consulted the list of evidentiary privileges recommended by the Advisory Committee of the Judicial Conference in its proposed Federal Rules of Evidence.... Finally, “[t]he Supreme Court has instructed that a party seeking judicial recognition of a new evidentiary privilege under Rule 501 demonstrate with a high degree of clarity and certainty that the proposed privilege will effectively advance a public good.”

Id. at 208–09. Based upon all of the foregoing factors, the Court decline[d] to recognize a federal settlement privilege.” Id. at 212; see also In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir. 1979) (finding “no convincing basis” for proposition that “the conduct of the settlement negotiations is protected from examination by some form of privilege,” although acknowledging that some materials could be protected from discovery as attorney work product or as privileged attorney-client communications); Primetime 24 Joint Venture v. Echostar Communications Corp., 2000 WL 97680, at *4 n. 5 (S.D.N.Y. Jan. 28, 2000) (agreeing with defendants’ observation that Fed. R. Evid. 408 does not create a settlement privilege”); Morse/Diesel, Inc. v. Fid. & Deposit Co. of Maryland, 122 F.R.D. 447, 449 (S.D.N.Y.1988) (Rule 408 “only applies to the admissibility of evidence at trial and does not necessarily protect such evidence from discovery”); Bennett v. La Perre, 112 F.R.D. 136, 138–39 (D.R.I. 1986) (rejecting contention that some “particularized showing” of need is necessary to obtain settlement documents in discovery).

Still, other jurisdictions have not recognized the settlement privilege, but, instead, have required a higher showing of need for the production of settlement documents. See, e.g., Butta-Brinkman v. FCA Int’l, Ltd., 164 F.R.D. 475, 476 (N.D. Ill.1995) (holding that the “strong congressional policy favoring settlement weighs in favor of keeping such documents protected, so long as the information is available through other means”); Bottaro v. Hatton Ass’n, 96 F.R.D. 158, 160 (E.D.N.Y.1982) (holding that the movant has the burden of making “some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement”).

The existence of a federal “settlement privilege” is still relatively uncertain. Whether this privilege will become more widely established is yet to be determined. Moreover, issues will likely arise regarding discovery of settlement negotiations. Currently, a case could be pending in one jurisdiction that permits such discovery, while the actual settlement documents or witnesses could reside in another jurisdiction that prohibits the communications. Accordingly, several jurisdictional issues could, and likely will, arise as to what is properly discoverable and what is protected by Rule 408 or the settlement privilege.

Protection from Discovery Opposed to Exclusion from Admission as Evidence

Many courts have held that Rule 408 “limits a document’s relevance at trial; not its disclosure during discovery.... 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.” Weissman v. Fruchtman, 1986 WL 15669, *19 (S.D.N.Y. Oct. 31, 1986); see also NAACP Legal Defense and Educational Fund, Inc. v. Department of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985); Center for Auto Safety v. Department of Justice, 576 F. Supp. 739, 749 (D.D.C. 1983).

Often, while not recognizing a formal privilege, courts will deny discovery into settlement negotiations on the ground that the discovery is not relevant to the claim. For instance, in Weissman, the court refused to provide a blanket protection related to the discovery of prior settlement communications. Weissman, 1986 WL 15669, at *19. However, the court noted that “[i]n order to compel production the plaintiffs must show that the material they seek to discover comes within the scope of discovery allowed by Rule 26(b) of the Fed-
eral Rules of Civil Procedure, i.e., plaintiffs must show that the settlement agreement sought will be admissible or lead to admissible evidence.” *Id.* Because the plaintiff failed to show the requested information was likely to fall “within the permissible uses of settlement agreements accorded by Rule 408,” the plaintiff’s motion to compel was denied. *Id.* at *20; see also Bottaro v. Hatton Associates, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (for a court to require discovery and disclosure of confidential settlement negotiations, it should first “require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement”).

Likewise, in *Primetime 24 Joint Venture v. Echostar Communications Corp.*, 2000 WL 97680, *4*, n. 5 (S.D.N.Y. Jan. 28, 2000), the court refused to acknowledge the existence of a settlement privilege created by Rule 408. However, when a party-defendant asked a witness about her knowledge of settlement discussions between the plaintiff and a third party in separate but related litigation, the *Primetime 24 Joint Venture* court found that the party-defendant failed to demonstrate the relevance of the inquiry. The court noted that, “even if the question were marginally relevant, the plaintiff would be justified in resisting it in view of the courts’ recognition that the fact and substance of settlement negotiations may be treated as at least presumptively confidential, particularly if the negotiations are ongoing or unconsummated.” *Id.* at *4.* More recently, the United States District Court for the Southern District of New York distinguished Rule 26 of the Federal Rules of Civil Procedure from Rule 408 of the Federal Rules of Evidence, stating:

...admissibility is not a prerequisite to discoverability, and the scope of relevance under Rule 26 is broader than under the Rules of Evidence. This is not merely a matter of academic interest. Rule 408 is a rule of relevance and the Advisory Committee’s Note makes clear that evidence of an offer of settlement “is irrelevant,” at least as direct evidence of liability or damages. If the limits of relevance in the discovery and evidentiary contexts were coterminous, then offers of settlement would be, by definition, immune from discovery. Because the standards of relevance are different, however, Rule 408 does not bar discovery of offers of settlement under Rule 26, so long as the settlement material may reasonably lead to the discovery of admissible evidence. In re Initial Public Offering Securities Litigation, 2004 WL 60290, *4* (S.D.N.Y. Jan. 12, 2004) (footnotes omitted). Accordingly, courts appear to be moving toward the permission of discovery of settlement communications, provided that the party seeking the discovery is able to show that the discovery is reasonably calculated to lead to the discovery of admissible evidence.

Moreover, even when a “settlement privilege” is recognized, the party contesting discovery cannot simply rely upon the “blanket protection” provided thereunder. See *Grupo Condumex, S.A. de C.V. v. SPX Corp.*, 331 F. Supp. 2d 623, 629 (N.D. Ohio 2004). In *Grupo*, the United States District Court for the Northern District of Ohio held:

Documents created for some other purpose do not get clothed in a settlement privilege just because they are exchanged during negotiations. Rather, they must be the type of communications that the privilege was designed to protect: namely, those that are inherently unreliable because of the likelihood of puffery. Therefore, to the extent that there are documents exchanged during but not specifically created for settlement negotiations, those documents are not protected...

*Id.* This holding is intended to restrict the scope of the settlement privilege and ensure that a party is not permitted to withhold relevant documents under the guise of the settlement privileged. Of course, issues will arise hereunder as well. The party seeking to protect such documents will also be the party determining whether the privilege applies. As such, there will be a natural inclination to assert the privilege, even in some instances where it would likely not apply.

Restricting Evidence of Offers of Compromise


A defense attorney faced with the potential admission of settlement negotiations or offers of compromise would be best served to file a motion in limine ensuring that the settlement negotiations will not be offered at trial. A motion in limine will hopefully prevent any evidence of the settlement negotiations whatsoever and will ensure that the jury will not be exposed to such evidence. Even the slightest references to such negotiations could be prejudicial to the client, regardless of whether an evidentiary objection is sustained. However, in the event that evidence of settlement negotiations is offered on the record, defense counsel should object immediately and move to strike the evidence.

Conclusion

Offers of compromise and settlement have long been recognized as an important aspect of the American judicial system. Moreover, courts have routinely acknowledged the public policy favoring full and forthright disclosure during settlement negotiations. While the general rule holds that offers of compromise and settlement will be excluded in trial, there are several instances in which such information might become admissible. The scope of protection provided by Rule 408 and any “settlement privilege” will differ among jurisdictions, ranging from a blanket-protection of all communications from admission and discovery to a more narrow and strict application of Rule 408. Generally, defense counsel will be best served to assert a broad protection of settlement negotiations by objecting to discovery requests and the admission of protected settlement communications at trial.

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