

OF "PURPOSES NOT PROHIBITED": NEW FEDERAL RULE OF EVIDENCE 408(B)

GREGORY B. COLLINS AND ANDREW F. HALABY†

INTRODUCTION

The recent amendment of Federal Rule of Evidence 408 provides a good opportunity to revisit the rule's fundamental principles — principles the amendment was intended to affirm — regarding the circumstances under which settlement communications may be admitted into evidence. While many lawyers think of Rule 408 simply as the "one can't use a settlement communication against its maker" rule, that notion is overbroad and wrong because, sometimes, one can. Now, as before, Rule 408 embodies a careful balancing of the policy interests of truth-seeking and settlement promotion. But courts have struggled to apply Rule 408 in cases at the intersection of these policy interests — an intersection embodied in what was the Rule's final sentence:

This rule . . . does not require exclusion when the evidence is offered for *another purpose* [besides those excluded], 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.¹

Courts have inconsistently delineated the boundary between impermissible purposes and "other purposes" when applying Rule 408. New laws and new legal issues compound their difficulty.

This Article describes how courts generally have applied the "another purpose" clause now embodied in the "Permissible Uses" provision of Rule 408(b). It demonstrates that, properly applied, an expansive genus of compromise evidence should qualify for admission under Rule 408(b). With a view to identifying several species within that genus, the Article then describes how Rule 408 has been or might be applied in several different contexts. The Article concludes that, if faithfully applied, Rule 408 appropriately reconciles the Rule's competing policy interests of promoting (or at least not discouraging) settlement-conducive conduct while also serving the courts' fundamental truth-seeking function.

† Greg Collins is an associate and Andy Halaby is a partner at Snell & Wilmer L.L.P., Phoenix, Arizona. They would like to thank Dan McAuliffe and Doug Richmond for their helpful contributions.

1. FED. R. EVID. 408 (West 2006) (amended 2006) (emphasis added).

BACKGROUND

Until December 1, 2006, Federal Rule of Evidence 408 provided, 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

The Rule reflected both a codification and a modification of the common law as it stood in 1975 when the Rule was adopted. The Rule's first sentence codified the common law,³ excluding from evidence offers of compromise and completed compromises.⁴ Even before Rule 408's adoption, most courts held that offers of compromise were inadmissible, either because they were irrelevant,⁵ or because admitting offers of compromise would discourage settlement.⁶ Those relying on the irrelevance ground did so because, they maintained, offers of compromise are made "merely to secure peace and avoid the incidents of a legal contest," not as admissions of strength or weakness of a party's case.⁷ Those relying on the settlement promotion rationale did so because, as one court put it, "If every offer to buy peace could be used as evidence against him who presents it, many settlements would be prevented, and unnecessary litigation would be produced

2. FED. R. EVID. 408 (West 2006) (amended 2006) (emphasis added).

3. See FED. R. EVID. 408 advisory committee's note.

4. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5303 (1980).

5. See *Schiro v. Raymond*, 54 N.W.2d 329, 332 (Minn. 1952) ("[O]ffers of settlement ordinarily proceed from an attempt to buy peace rather than a concession of liability; therefore, evidence of such offers is irrelevant to the issue of liability."); *Brown v. Hyslop*, 45 N.W.2d 743, 748 (Neb. 1951) ("It is the intentment of the law to repel any inference which may arise from a proposition not made in either design or purpose to admit the existence of a fact but merely to secure peace and avoid the incidents of a legal contest.")

6. See *Zahumensky v. Fandrich*, 267 P.2d 664, 665 (Or. 1954); see also *Burger v. Van Severen*, 188 N.E.2d 373, 377 (Ill. App. Ct. 1963); *Floresville Oil & Mfg. Co. v. Tex. Refining Co.*, 118 S.W. 194, 196 (Tex. Civ. App. 1909).

7. *Brown*, 45 N.W.2d at 748; see also, e.g., *S. Pac. Transp. Co. v. Veliz*, 571 P.2d 696, 697-98 (Ariz. Ct. App. 1977).

and prolonged.⁸ Regardless of rationale, courts excluded only the amount offered in settlement, not the statements of fact that often accompanied such offers.⁹

Rule 408 modified the common law by excluding statements made and conduct occurring in the course of compromise — whether inchoate or completed.¹⁰ Before the Rule's adoption, courts generally admitted statements of fact made in the course of a settlement discussion, as *United States v. Tuschman*¹¹ illustrates. The Internal Revenue Service ("IRS") assessed income tax, interest, and civil fraud penalties against Tuschman in the amount of \$131,580, obtained a tax lien against his property, and sued to enforce its lien.¹² At trial, Tuschman testified that his son owned the majority of a \$120,000 bond held in his name.¹³ To refute this testimony, the IRS sought to admit a letter from Tuschman that documented his total assets and stated that he owned the entire bond.¹⁴ At the end of the letter, however, Tuschman made an offer to settle his tax liability, which the IRS declined.¹⁵ The district court held the letter inadmissible as an offer of compromise, and refused to allow the IRS to impeach the debtor's testimony regarding his son's ownership of the bond.¹⁶ On appeal, the Sixth Circuit held that the district court erred in refusing to admit the letter.¹⁷ The letter made "material representations as to the ownership of the bond" and, therefore, it was admissible "despite the fact that the documents were offered in an effort to effect a compromise of enforcement of the tax liens."¹⁸

Before Rule 408 was adopted, to prevent *Tuschman*-like statements from being admitted into evidence, lawyers insulated their settlement conversations by speaking hypothetically.¹⁹ A lawyer might say, for example, "Hypothetically, if Tuschman owned the entire bond, would you accept the bond in settlement of his tax liability?" This

8. *Moffitt-West Drug Co. v. Byrd*, 92 F. 290, 292 (8th Cir. 1899).

9. FED. R. EVID. 408 advisory committee's note; *Shaeffer v. Burton*, 155 S.E.2d 884 (W. Va. 1967); *Johnson v. Minihan*, 200 S.W.2d 334, 338 (Mo. 1947).

10. FED. R. EVID. 408 (West 2006) (amended 2006); WRIGHT & GRAHAM, *supra* note 4, § 5314.

11. 405 F.2d 688 (6th Cir. 1969).

12. *United States v. Tuschman*, 405 F.2d 688, 689 (6th Cir. 1969).

13. *Tuschman*, 405 F.2d at 689.

14. *Id.* at 690.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. S. REP. NO. 93-1227, at 10 (1974), as reprinted in 1974 U.S.C.A.N. 7051, 7057.

practice created a "trap for the unwary."²⁰ Rule 408 was adopted to end this practice.²¹

The Supreme Court proposed Rule 408 when it sent the original version of the Federal Rules of Evidence to Congress for approval.²² The proposed Rule met stiff opposition from many government agencies such as the IRS,²³ which was concerned that debtors would refuse to speak candidly with it until the onset of formal settlement discussions.²⁴ The IRS likely was concerned that the proposed Rule would change the result in cases like *Tuschman*.²⁵ It also was concerned that the proposed Rule would do nothing to stop a debtor from lying to the agency during settlement discussions.²⁶ In response to these concerns, the House rejected the Rule's proposed second sentence.²⁷

The Senate sympathized with the IRS, but dealt with its concerns differently. Before the Senate, the Advisory Committee argued that the public policy of promoting settlements required the exclusion of factual statements made by parties; therefore, the Senate should accept the Rule as originally drafted.²⁸ In large part, the Senate agreed

20. See, e.g., S. REP. NO. 93-1227; *Hernandez v. State*, 52 P.3d 765, 773 (Ariz. 2002).

21. S. REP. NO. 93-1227.

22. See H.R. REP. NO. 93-650, at 8 (1973).

23. See Lynne H. Rambo, *Impeaching Lying Parties with Their Statements During Negotiation: Demystifying the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes*, 75 WASH. L. REV. 1037, 1048-51 (2000); WRIGHT & GRAHAM, *supra* note 4, § 5301.

24. See Rambo, 75 WASH. L. REV. at 1048-51; see also WRIGHT & GRAHAM, *supra* note 4, § 5301. According to Wright and Graham:

[S]everal government agencies launched an attack on the provision in the rule that required the exclusion of admissions of fact made during settlement negotiations. The thrust of these objections was that in the administrative handling of disputes between the Government and citizens, e.g., in a tax case, it was often difficult to say just when investigation stopped and efforts to settle began. It was feared that a taxpayer might concede a number of facts to government investigators, then claim that these admissions were made during settlement negotiations. It was argued that at best this meant that the government would have to go after the information again, perhaps through formal discovery. At worst, the government lawyers claimed that the rule might be read as permitting the taxpayer to deny what he had once admitted, without fear of impeachment, and even immunizing documents that had been disclosed to government investigators during what a court later determined to be settlement negotiations rather than investigation.

Id.

25. See Rambo, 75 WASH. L. REV. at 1048-51; see also WRIGHT & GRAHAM, *supra* note 4, §§ 5006, 5301.

26. See Rambo, 75 WASH. L. REV. at 1048-51; see also WRIGHT & GRAHAM, *supra* note 4, §§ 5006, 5301.

27. See H.R. REP. NO. 93-650. The second sentence of Rule 408 provided, "Evidence of conduct or statements made in compromise negotiations is likewise not admissible." FED. R. EVID. 408 (West 2006) (amended 2006).

28. *Proposed Amendments to the Federal Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 93rd Cong. 59 (1974).

and reverted to the Rule's original version.²⁹ To placate the IRS, however, the Senate added what became the Rule's third sentence: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."³⁰ The conference committee adopted the Senate's version of the Rule.³¹

While both the Senate and the House addressed the IRS's concern that once formal settlement discussions began, a debtor's statements regarding his or her assets would be inadmissible, neither the Senate nor the House addressed the agency's concern that taxpayers could lie during settlement discussions.³² The Advisory Committee's comments offered little guidance on that issue.³³ As a result, one of the most litigated aspects of Rule 408 was whether it allowed impeachment of a witness with statements made during settlement negotiations.³⁴

NEW RULE 408

In September 2005, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended that Rule 408 be amended.³⁵ The Committee's proposed amendment, which became effective December 1, 2006,³⁶ provides,

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or promising

29. S. REP. NO. 93-1227.

30. See Rambo, 75 WASH. L. REV. at 1050 n.50. In the most recent amendment to Rule 408, this sentence was deleted as duplicative.

31. FED. R. EVID. 408 advisory committee's note.

32. Rambo, 75 WASH. L. REV. at 1050.

33. *Id.*; see FED. R. EVID. 408 advisory committee's note. Whether a lawyer may lie during settlement discussions is the subject of a recent formal ABA Ethics Opinion. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-439 (2006).

34. Compare *Hernandez v. State*, 52 P.3d 765 (Ariz. 2002) (allowing the use of Rule 408 evidence to impeach a witness); *Cochonour v. Cameron Sav. & Loan*, 160 F.3d 1187, 1190 (8th Cir. 1998) (same); *County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984) (same); *In re Estate of O'Donnell*, 803 S.W.2d 530, 531 (Ark. 1991) (same), *overruled in part by Edmundson v. Estate of Fountain*, 189 S.W.3d 427 (Ark. 2004); and *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 651 P.2d 105, 108-09 (N.M. Ct. App. 1982) (same); *with EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1546 (10th Cir. 1991) (refusing to admit Rule 408 evidence for impeachment purposes); and *C & K Eng'g Contractors v. Amber Steel Co.*, 587 P.2d 1136, 1142 (Cal. 1978) (same).

35. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, AGENDA E-18 299-311 (2005), <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf> [hereinafter SUMMARY].

36. *Id.* at 301-03 (committee note).

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.³⁷

The amendment clarified that settlement communications may not be used to impeach. It also deleted what had been the Rule's third sentence — "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."³⁸ — as "superfluous."³⁹

The amendment was not, however, intended to alter the Rule's application in determining whether "compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of the disputed claim."⁴⁰ According to the Committee, "The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the 'validity,' 'invalidity,' or 'amount' of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is"⁴¹ offered for another purpose, such as "proving a witness's bias or prejudice, negating a contention of undue delay, and proving an effort to obstruct a criminal investigation or prosecution."⁴²

But that "extensive case law" contains inconsistent — and in some instances, erroneous — applications of the "another purpose"

37. *Id.* at 299-300.

38. *Id.* at 301-03 (committee note).

39. *Id.*; see also, e.g., ME. R. EVID. 408 advisory committee's note (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Wyo. R. EVID. 408 advisory committee's note (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. See *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097 (5th Cir. Unit B 1981). But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

40. SUMMARY, *supra* note 35, at 302-03.

41. *Id.*

42. *Id.*

clause.⁴³ The Committee doubtless had no intention to give its imprimatur to bad decisions. Rather, it meant simply that it did not intend, with Rule 408's amendment, to alter the boundary between permissible and impermissible uses of compromise evidence.

Fortunately, the plain meaning of the former Rule's "another purpose" clause and that of the new Rule 408(b) is the same. According to both, settlement discussions are not barred in all circumstances.⁴⁴ Though inadmissible for the purpose of proving liability or the amount of the claim, they are admissible for other purposes.⁴⁵ Under Rule 408, at least, the universe of those other purposes is expansive.⁴⁶ The original Rule made that reasonably clear, providing, "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."⁴⁷ The Rule might have been clearer had it said "any other" purpose rather than "another" purpose. And the term "such as" might be misinterpreted as limiting rather than demonstrative. On that score, the new Rule arguably is clearer, providing in Rule 408(b): "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."⁴⁸ "Examples" are just that. In any event, since the boundary between impermissible and permissible uses of compromise evidence remains the same — both by plain meaning and the drafters' intent — in both the pre- and post-amendment versions of the Rule, case law applying the pre-amendment Rule is equally pertinent to post-amendment issue analyses.

43. For commentators discussing Congress's failure to deal with the implications of this sentence, see Rambo, 75 WASH. L. REV. at 1048-51; and WRIGHT & GRAHAM, *supra* note 4, § 5301.

44. WRIGHT & GRAHAM, *supra* note 4, § 5314; Fred S. Hjelmeset, *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 CLEV. ST. L. REV. 75, 94-95 (1995); Rambo, 75 WASH. L. REV. at 1049-51.

45. A.E. Korpela, Annotation, *Admissibility of Admissions Made in Connection with Offers or Discussions of Compromise*, 15 A.L.R.3d 13 (1967 & Supp. 2006).

46. Federal Rule of Evidence 403 can operate to exclude evidence even if Rule 408 would permit its admission.

47. FED. R. EVID. 408 (West 2006) (amended 2006) (emphasis added).

48. FED. R. EVID. 408.

THE "ANOTHER PURPOSE" CLAUSE IN ACTION

A. CASES IN WHICH THE CLAUSE HAS BEEN APPLIED

The first and most obvious category of cases involving "another purpose" is those in which one party to a settlement fails to abide by the terms of the settlement.⁴⁹ In these cases, evidence related to the settlement agreement is not offered to prove liability; it is offered to prove the terms of the settlement agreement.⁵⁰ Similarly, when a defendant alleges that a settlement bars the plaintiff's claims, evidence related to the settlement discussions is admissible to show whether an accord and satisfaction occurred.⁵¹

It also is universally accepted that Rule 408 does not bar admission of settlement discussions when the plaintiff alleges that a wrong occurred during settlement.⁵² For example, when an insurer is sued for bad faith, the wrong alleged typically is a failure to settle the case within policy limits.⁵³ Evidence relating to the settlement discussions is admissible for the same reason that such evidence is admissible in a breach of settlement case.⁵⁴

Beyond these categories of cases, courts' application of Rule 408 has been inconsistent. Evidence gleaned from or comments made during negotiation or settlement has been admitted for other purposes including not only impeachment,⁵⁵ but also as evidence of employ-

49. *Taylor v. Taylor*, 650 So. 2d 662 (Fla. Dist. Ct. App. 1995); *Coakley & Williams Constr., Inc. v. Structural Concrete Equip., Inc.*, 973 F.2d 849 (4th Cir. 1992).

50. *Taylor*, 650 So. 2d at 663 ("A party seeking relief from a written settlement agreement on the basis of his or her intent and thoughts at the time the agreement was entered into may not assert that matters discussed during the negotiations of that agreement are privileged."); see also *Coakley & Williams*, 973 F.2d at 353:

[S]ettlement offers are only inadmissible when offered to prove liability or damages. See Fed.R.Evid. 408. The district court only considered the offer as evidence of the parties' intent. Therefore, even if the release in the settlement agreement was ambiguous, extrinsic evidence of the parties' intent resolves the ambiguity in favor of SCE's position that the release bars this action.

51. *Moving Picture Mach. Operators Union Local No. 162 v. Glasgow Theaters, Inc.*, 86 Cal. Rptr. 33, 37 (Cal. Ct. App. 1970); *Tag Res., Inc. v. Petroleum Well Servs., Inc.*, 791 S.W.2d 600, 606 (Tex. App. 1990).

52. *Eisenberg v. Univ. of N.M.*, 936 F.2d 1131, 1134 (10th Cir. 1991); *Thomas v. Thomas*, 674 N.E.2d 23, 26 (Ind. Ct. App. 1996); *Harriman v. Maddocks*, 518 A.2d 1027, 1031 (Me. 1986).

53. See, e.g., *Athey v. Farmers Ins. Exchange.*, 234 F.3d 357 (8th Cir. 2000); *Urlico v. Parnell Oil Co.*, 708 F.2d 852, 855 (1st Cir. 1983).

54. *Compare Athey*, 234 F.3d at 362, with *Coakley & Williams*, 973 F.2d at 353.

55. *Cochenour v. Cameron Sav. & Loan*, 160 F.3d 1187, 1190 (8th Cir. 1998); *County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984); *In re Estate of O'Donnell*, 803 S.W.2d 530, 531 (Ark. 1991), *overruled in part by Edmundson v. Estate of Fountain*, 189 S.W.3d 427 (Ark. 2004); *Hernandez v. State*, 52 P.3d 765 (Ariz. 2002); *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 651 P.2d 105, 109 (N.M. Ct. App. 1982).

ment discrimination,⁵⁶ failure to mitigate damages,⁵⁷ intent,⁵⁸ prior knowledge,⁵⁹ that the amount at issue in the case exceeded the requisite amount for diversity jurisdiction,⁶⁰ and of contractual intent.⁶¹ Other courts, however, have refused to admit these same categories of evidence under Rule 408.⁶²

B. SOURCE OF DISAGREEMENT – "BALANCING" RULE 102 AND 408

Whether a court chooses to admit compromise evidence largely turns on how the court weighs the policies underlying Rule 408. In applying the other purposes clause, many courts have purported to "balance" Rule 408's goal of encouraging settlement negotiations with Federal Rule of Evidence 102's goal "that the truth may be ascertained and proceedings justly determined."⁶³ But these goals conflict, and must be chosen between rather than balanced. Consider an admission

56. See *Bulaich v. AT&T Info. Sys.*, 778 P.2d 1031, 1037 (Wash. 1989) (admitting Rule 408 evidence as proof of the employer's state-of-mind in a employment discrimination action).

57. *Thomas v. Resort Health Related Facility*, 539 F. Supp. 630, 638 (E.D.N.Y. 1982) (admitting Rule 408 evidence for mitigation of damages purposes); *Orzel v. City of Wauwatosa Fire Dept.*, 697 F.2d 743, 757 n.26 (7th Cir. 1983) (same); *In re Disciplinary Action Against Landon*, 600 N.W.2d 856, 859 (N.D. 1999).

58. *Lee Middleton Original Dolls, Inc. v. Seymour Mann, Inc.*, 299 F. Supp. 2d 892 (E.D. Wis. 2004) (admitting Rule 408 evidence as evidence of intent to infringe plaintiff's trademark).

59. *United States v. Hauert*, 40 F.3d 197, 200 (7th Cir. 1994) (holding that the trial court properly admitted Rule 408 evidence to demonstrate that a criminal defendant had knowledge of the tax laws); *Gagliardi v. Flint*, 564 F.2d 112, 116 (3d Cir. 1977) (stating Rule 408 evidence was properly admitted to show the defendant's knowledge regarding its employees past behavior).

60. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 n.3 (9th Cir. 2002); *Archer v. Kelly*, 271 F. Supp. 2d 1320, 1323 (N.D. Okla. 2003).

61. *Rosemann v. Roto-Die, Inc.*, 377 F.3d 897, 902 (8th Cir. 2004); *ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 383, 410-14 (S.D.N.Y. 1999); *Civil Aeronautics Bd. v. Dreyer*, 501 F. Supp. 905, 911 n.16 (E.D.N.Y. 1980); *Armstrong v. HRB Royalty, Inc.*, 392 F. Supp. 2d 1302, 1304-09 (S.D. Ala. 2005).

62. See, e.g., *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545 (10th Cir. 1991) (refusing to admit Rule 408 evidence for impeachment purposes); *C & K Eng'g Contractors v. Amber Steel Co.*, 537 P.2d 1136, 1142 (Cal. 1978) (same); *Schlossman & Gunkelman, Inc. v. Tallman*, 593 N.W.2d 374, 379-81 (N.D. 1999) (refusing to admit Rule 408 evidence for the purpose of interpreting a contract and/or proving intent); *Pollet v. Sears Roebuck & Co.*, 46 F. App'x 226 (5th Cir. 2002) (acknowledging that a settlement offer was made in excess of the amount necessary to establish jurisdiction but refusing to consider that offer when ruling on whether the amount in controversy exceeds \$75,000); *Trebor Sportswear Co. v. Limited Stores, Inc.*, 865 F.2d 506, 510-11 (2d Cir. 1989) (refusing to admit Rule 408 evidence for the purpose of satisfying the statute of frauds); *Marks v. Mobil Oil Corp.*, 562 F. Supp. 759 (E.D. Pa. 1983) (failing to admit Rule 408 evidence for mitigation of damages purposes).

63. 29 AM. JUR. 2D *Evidence* § 516 (2005); *Hernandez*, 52 P.3d at 769; see also *Schlossman*, 593 N.W.2d at 380 ("[A] trial court considering the admissibility of settlement evidence for impeachment purposes must carefully balance the probative value of the evidence against the danger it will be used for an improper purpose within the context of the policies encouraging open and frank discussions during settlement negotia-

of liability in a settlement discussion. To ensure that the truth is ascertained through the proceedings, the party's admission should be admitted into evidence. But doing so will chill candid settlement communications.

As a policy matter, the Rules' competing interests have already been balanced, and the result is Rule 408's provision that compromise evidence is admissible for some purposes but not others. Notwithstanding the Rule's plain meaning, and the fact that nothing in either the pre- or post-amendment commentary suggests that the competing interests should be balanced to reach a result contrary to the plain meaning, nearly every court that considers the "other purposes" clause purports to engage in such a balancing analysis.

*Hernandez v. State*⁶⁴ illustrates courts' struggle in attempting this balancing act. Hernandez was injured while camping on state-owned land.⁶⁵ By Arizona statute, before suing the State, Hernandez had to file a notice of claim.⁶⁶ Hernandez's notice stated how he had been injured and also included the amount the State could pay to settle the claim.⁶⁷ After filing the notice, Hernandez sued.⁶⁸ At trial, portions of Hernandez's deposition testimony explaining how he was injured were admitted into evidence.⁶⁹ The State then sought to use Hernandez's notice of claim as impeachment evidence because the facts stated therein differed from Hernandez's deposition testimony.⁷⁰ Hernandez objected on Rule 408 grounds.⁷¹ The court overruled the objection.⁷² After a five-day trial, the jury returned a verdict for the State.⁷³

The Arizona Court of Appeals affirmed the trial court's decision allowing the use of Hernandez's notice of claim for impeachment.⁷⁴ On Hernandez's appeal, the Arizona Supreme Court agreed.⁷⁵ It assumed that the notice was an offer of settlement, making Rule 408 apply.⁷⁶ The court held, however, that the evidence was properly ad-

tions and fostering the truth-finding process through the evaluation of a witness's credibility."); *ESPN, Inc.*, 76 F. Supp. 2d at 410-14.

64. 52 P.3d 765 (Ariz. 2002).

65. *Hernandez v. State*, 52 P.3d 765, 766 (Ariz. 2002).

66. *Hernandez*, 52 P.3d at 766.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 766-67.

71. *Id.* at 767.

72. *Id.*

73. *Id.*

74. *Hernandez v. State*, 35 P.3d 97, 100-01 (Ariz. Ct. App. 2001), *vacated*, 52 P.3d 765 (Ariz. 2002).

75. *Hernandez*, 52 P.3d at 767, 769. The court agreed with both lower courts, although it vacated the opinion of the court of appeals. *Id.* at 769.

76. *Id.* at 767.

mitted for "another purpose," that being impeachment.⁷⁷ Invoking "public policy," the court held that impeachment evidence is not so related to the validity of a claim that exclusion is required.⁷⁸ According to the court, admitting this evidence was consistent with Rule 102 and 408's policy goals.⁷⁹ According to the court, "Lawyers should not lie on behalf of clients in presenting a claim. Allowing the use of evidence from compromise negotiations for impeachment facilitates Rule 408's goal of encouraging truthfulness by putting parties on notice that they should not falsely represent claims, either during compromise negotiations or at trial."⁸⁰

Although the *Hernandez* court asserted that it had applied Rule 408's policy goal, it really applied Rule 102's goal of truth-seeking. Rule 408 promotes settlement by *excluding* statements made during settlement negotiations.⁸¹ Rule 408 promotes candor between the parties because statements *cannot* be used to establish liability. Allowing statements made during settlement conversations for impeachment, as *Hernandez* does, is contrary to, not consistent with, Rule 408's settlement-promotion objective. Thus, *Hernandez's* reasoning does not reflect "balancing." Rather, the court decided that Rule 102 trumped Rule 408.

Justice Joseph W. Howard's dissent in *Hernandez* questioned whether the majority's holding was consistent with Rule 408's policy objectives.⁸² The dissent defined Rule 408's goal as "to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial."⁸³ In the dissent's view, allowing impeachment with a statement made in settlement negotiations is inconsistent with this goal.⁸⁴ The dissent also noted "the only possible relevance of [impeachment] evidence is to assist the jury in determining 'liability for or invalidity of the claim or

77. *Id.* at 769.

78. *Id.* at 768.

79. *Id.*

80. *Id.* at 769.

81. See WRIGHT & GRAHAM, *supra* note 4, § 5314 (emphasis added).

82. *Hernandez*, 52 P.3d at 772 (Howard, J., dissenting). Justice Howard stated

[T]he basis for concluding that statements concerning the facts of the accident made in compromise negotiations are not admissible to impeach a party is that a contrary conclusion undermines the purpose of Rule 408, which is to facilitate settlements by encouraging "free communication between parties." Advisory Committee Notes to Fed.R.Evid. 408. "The philosophy of [Rule 408] is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial." If such statements are admissible to impeach a party, the incentive to make those statements is greatly reduced and the purpose of Rule 408 is undermined.

Id. (Howard, J., dissenting) (some citations omitted).

83. *Id.* (Howard, J., dissenting).

84. *Id.* at 773 (Howard, J., dissenting).

its amount.' . . . Evidence concerning credibility merely assists the jury in determining which set of facts it should adopt, which will determine liability."⁸⁵ Therefore, according to the dissent, impeachment evidence cannot be admitted under Rule 408 for "another purpose"; whenever impeachment evidence is offered, it is offered to establish or avoid liability.⁸⁶

When considering evidence for "another purpose," some courts take the view embraced by *Hernandez's* majority and admit all types of evidence.⁸⁷ Other courts take the view espoused in the *Hernandez* dissent and admit the evidence only if it is necessary to address a wrong related to a settlement.⁸⁸ This latter group views nearly all issues in a case, procedural or substantive, as related to liability. For these courts, evidence related to settlement is always offered to prove liability and therefore is inadmissible.

Consider *Trebor Sportswear Co. v. Limited Stores, Inc.*⁸⁹ There, the Second Circuit affirmed the trial court's decision to exclude a letter that attempted to settle the dispute even though the plaintiff sought the letter's admission for the limited purpose of satisfying the Uniform Commercial Code's statute of frauds.⁹⁰ In so holding, the Second Circuit first considered whether Rule 408 barred admission of the settlement letter; *i.e.*, whether satisfying the statute of frauds was "another purpose" under Rule 408.⁹¹ The court held that satisfying the statute of frauds was not "another purpose" under Rule 408.⁹²

For appellants, satisfying the statute of frauds was the necessary step to proving, ultimately, the validity of their claims of breach of contract. Since the two questions [liability and the statute of frauds] were so closely intertwined, admission of the documents even initially for the purpose of meeting the statute of frauds requirement would, under the circumstances of this case, militate against the public policy considerations which favor settlement negotiations and which underlie Rule 408.⁹³

85. *Id.* at 772 (Howard, J., dissenting).

86. *Id.* (Howard, J., dissenting).

87. *Rosemann v. Roto-Die, Inc.*, 377 F.3d 897, 902 (8th Cir. 2004); *ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 333, 410-14 (S.D.N.Y. 1999); *Civil Aeronautics Bd. v. Dreyer*, 501 F. Supp. 905, 910 n.16 (E.D.N.Y. 1980); *Armstrong v. HRB Royalty, Inc.*, 392 F. Supp. 2d 1302 (S.D. Ala. 2005).

88. *Power Auth. of N.Y. v. United States*, 62 Fed. Cl. 376 (2004); *Trebor Sportswear Co. v. Limited Stores, Inc.*, 865 F.2d 506 (2d Cir. 1989).

89. 865 F.2d 506 (2d Cir. 1989).

90. *Trebor Sportswear Co. v. Limited Stores, Inc.*, 865 F.2d 506, 506 (2d Cir. 1989).

91. *Trebor*, 865 F.2d at 510-11.

92. *Id.* at 511.

93. *Id.* at 510.

Under this rationale, just about any issue is related to liability. If a court is unwilling to find that complying with the statute of frauds is "another purpose" under Rule 408, what other purpose will suffice?

In contrast, consider *ESPN, Inc. v. Office of the Commissioner of Baseball*,⁹⁴ in which the trial court admitted settlement correspondence offered to prove an element of the plaintiff's *prima facie* case — not simply to satisfy a procedural rule.⁹⁵ ESPN had a contract with Major League Baseball ("MLB") to air baseball games on Wednesdays and Sundays.⁹⁶ If ESPN wanted to air another program instead of the Sunday game, it needed MLB's consent,⁹⁷ which could not be unreasonably withheld.⁹⁸

After entering into the contract with MLB, ESPN entered into a contract with the National Football League that allowed ESPN to air football games on Sunday nights.⁹⁹ ESPN sought permission from MLB to air football instead of baseball on six occasions. MLB denied these requests; however, it informed ESPN by letter that if it consented to "wholesale" changes in the parties' agreement that were more favorable to MLB, it would accede to ESPN's request to air the football games.¹⁰⁰ ESPN denied these requests and aired the football games without MLB's consent.¹⁰¹

After airing the games, ESPN sued, alleging that MLB materially breached the contract by unreasonably withholding consent.¹⁰² MLB counterclaimed for breach of contract based on ESPN's airing of the six games.¹⁰³ MLB moved *in limine* to exclude MLB's correspondence that it would consent to the football broadcasts if the parties' contract were modified.¹⁰⁴ MLB argued that these letters were settlement communications whose admission was barred by Rule 408.¹⁰⁵ The court assumed that the letters were settlement discussions,¹⁰⁶ but denied MLB's motion because the evidence was admissible under Rule 408's another purpose clause.¹⁰⁷ What was the other purpose? To prove MLB's allegedly improper motive in rejecting, and therefore the

94. 76 F. Supp. 2d 383 (S.D.N.Y. 1999).

95. *ESPN, Inc. v. Office of the Comm'r of Baseball*, 76 F. Supp. 2d 383, 411 (S.D.N.Y. 1999).

96. *ESPN, Inc.*, 76 F. Supp. 2d at 395.

97. *Id.*

98. *Id.*

99. *Id.* at 396.

100. *Id.* at 396, 412.

101. *Id.* at 396.

102. *Id.*

103. *Id.* at 387.

104. *Id.* at 409-10.

105. *Id.* at 411-12.

106. *Id.* at 411.

107. *Id.* at 409-13.

unreasonableness of withholding its consent to, ESPN's request to air the football games.¹⁰⁸

In so ruling, the court acknowledged that Rule 408 excludes compromise evidence because juries may unfairly infer an admission of liability from the party's willingness to settle, and because avoiding the specter of such an inference promotes settlement.¹⁰⁹ The court concluded that admission of the letters would not frustrate those objectives.¹¹⁰ The court did not, however, address the plain language of Rule 408, which provided specifically that evidence related to settlement "is not admissible to prove liability for or invalidity of the claim or its amount."¹¹¹ It is difficult to see how offering the settlement correspondence to prove the absence of reasonableness — something ESPN had to prove to prevail — was offering it for anything other than to prove liability.

As *Hernandez, Trebor*, and *MLB* reveal, courts' efforts to "balance" policy interests yield inconsistent results. Among other effects, these conflicting results make it difficult for lawyers to predict when they can speak freely and when statements made in settlement can be used against them later. The astute lawyer may have little choice but to refrain from commenting about the underlying facts of the case during any settlement dialogue. That result upsets Rule 408's settlement-promotion objective.

RULE 408(B) SHOULD BE APPLIED EXPANSIVELY

Applied correctly, Rule 408 excludes evidence from the factfinder's consideration only in limited circumstances. Compromise evidence ought to be treated as admissible for other purposes, as a few examples — ranging from the conventional to the unusual — illustrate.

A. A CONVENTIONAL APPLICATION: STATUTE OF LIMITATIONS

In *Kraft v. St. John Lutheran Church*,¹¹² the Eighth Circuit held that a demand letter was admissible for the purpose of deciding when the statute of limitations began to run.¹¹³ Kraft, who was molested as a child, hired a lawyer who sent a demand letter to the defendants.¹¹⁴ Less than a year *after* sending the demand letter, Kraft was evaluated

108. *Id.* at 411-13.

109. *Id.* at 411.

110. *Id.* at 412.

111. *Id.*

112. 414 F.3d 943 (8th Cir. 2005).

113. *Kraft v. St. John Lutheran Church*, 414 F.3d 943, 947 (8th Cir. 2005).

114. *Kraft*, 414 F.3d at 945, 946.

by a physiologist and diagnosed with severe posttraumatic distress disorder.¹¹⁵ Kraft nevertheless claimed that he had not discovered his injury, for purposes of starting the limitations period to run, until after seeing the psychologist.¹¹⁶ Relying on the demand letter, the defendants moved for summary judgment on limitation grounds.¹¹⁷ Kraft responded that the demand letter and subsequent settlement negotiations were inadmissible under Rule 408.¹¹⁸ The district court disagreed and granted summary judgment.¹¹⁹ In affirming, the Eighth Circuit held that the demand letter was offered "for another purpose" and, therefore, it was admissible.¹²⁰

Kraft's result is correct. It is true that, the defendants having raised the statute of limitations defense, whether the statute was satisfied ultimately went to the issue of liability. In a sense, every issue in a case ultimately goes to liability or damages. But reading Rule 408(a)'s exclusionary provision that broadly would render Rule 408(b) meaningless. The defendants' use of Kraft's demand letter did not seek to prove that the underlying facts Kraft asserted were either true or untrue based on something Kraft said or did not say in the letter. Accordingly, the demand letter was offered for a purpose separate from "prov[ing] liability for, invalidity of, or amount of a claim," and was properly admitted under Rule 408.

B. A LESS STRAIGHTFORWARD APPLICATION: AMOUNT IN CONTROVERSY FOR DIVERSITY JURISDICTION PURPOSES

In *Cohn v. Petsmart, Inc.*,¹²¹ Cohn sued Petsmart in state court alleging violations of state trademark law.¹²² Before suing, Cohn had sent Petsmart a written settlement demand of \$100,000.¹²³ Relying solely on the demand letter, and invoking diversity jurisdiction, Petsmart removed the action to federal district court.¹²⁴ Cohn moved unsuccessfully to remand the case to state court.¹²⁵ The district court ultimately awarded summary judgment to Petsmart, holding there was no likelihood of confusion.¹²⁶

115. *Id.* at 946.

116. *Id.*

117. *Id.*

118. *Id.* at 947.

119. *Id.*

120. *Id.*

121. 281 F.3d 837 (9th Cir. 2002).

122. *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 839 (9th Cir. 2002).

123. *Cohn*, 281 F.3d at 839-40.

124. *Id.*

125. *Id.* at 839.

126. *Id.*

On appeal to the Ninth Circuit, Cohn asserted that the district court erred in denying his motion to remand because the matter in controversy did not exceed \$75,000,¹²⁷ and invoked Rule 408 in arguing that the district court should not have considered his \$100,000 pre-suit demand in deciding that motion.¹²⁸ The Ninth Circuit disagreed, holding that "Rule 408 is inapplicable because this evidence was not offered to establish the amount of [Petsmart's] liability, but merely to indicate [Cohn's] assessment of the value of" the case.¹²⁹ Noting that Cohn "consistently maintained that his mark is worth more than \$100,000," the court held the demand letter "sufficient to establish the amount in controversy."¹³⁰

The Ninth Circuit's conclusion in *Cohn* seems right — Cohn was, after all, attempting to value his claim differently for different purposes. But was Petsmart not "offer[ing]" Cohn's demand "to prove . . . [the] amount of a claim," requiring the demand letter's exclusion under Rule 408's plain meaning? Actually, no. Rather, Petsmart was attempting to prove the "matter in controversy" for purposes of 28 U.S.C. § 1332(a), not attempting to prove the amount of Cohn's claim to a factfinder. Since Petsmart was offering the demand letter for "another purpose" besides those prohibited, the demand letter was admissible.¹³¹

C. AN ATYPICAL APPLICATION: FEDERAL CYBERPIRACY

Consider a federal cyberpiracy claim under 15 U.S.C. § 1125(d). Broadly speaking, liability under that statute requires that the defendant have registered, trafficked in, or used a domain name that is confusingly similar to another's trademark with "bad faith intent to profit" from that mark. "Bad faith intent to profit" is a statutory term of art which, in turn, is to be decided based on a non-exclusive list of nine factors codified at 15 U.S.C. § 1125(d)(1)(B). One of those factors is whether the defendant has

127. *Id.*

128. *Id.* at 840 n.3. Under Federal Rule of Evidence 1101, Rule 408 applied in determining whether the court could consider the settlement letter.

129. *Id.*; see also *Archer v. Kelly*, 271 F. Supp. 2d 1320 (N.D. Okla. 2003).

130. *Cohn*, 281 F.3d at 840.

131. *Cohn* provides a good example of how a "plain meaning" application of a rule can lead to unintended results. Probably for brevity's sake, Rule 408 is framed in offeror-neutral terms. That is, compromise evidence is excluded if offered for an impermissible purpose, and admissible otherwise, whether the plaintiff or the defendant offers it. In the *Cohn* jurisdictional dispute, though, the parties found their roles reversed vis-à-vis the amount of Cohn's claims: Petsmart wanted to establish a greater amount in controversy, and Cohn a lesser one. Under those circumstances, excluding the demand letter would do little or nothing to advance the policy interest of promoting settlement.

offer[ed] to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person's prior conduct indicating a pattern of such conduct.¹³²

Assuming one accepts the premise that Congress has done its job when it simply articulates (non-exclusive) factors the court must consider, leaving the job of weighing them to the courts, this "offer to sell" factor makes sense. Congress was concerned with cyberpiracy because, among other things, it "deprive[d] legitimate trademark owners of substantial revenues and consumer goodwill."¹³³ Whether a defendant is marketing domain names without any independent commercial interest in them sheds light on whether the defendant is "legitimate" or not. The well-known cyberpirate Dennis Toeppen, for example, hoarded many domain names that legitimate enterprises might (and did) want, then attempted to extort substantial sums to release the names to those enterprises.¹³⁴ But not all those who offer to sell domain names are cyberpirates. As the Senate Committee noted:

there are cases in which a person registers a name in anticipation of a business venture that simply never pans out. And someone who has a legitimate registration of a domain name that mirrors someone else's domain name, such as a trademark owner that is a lawful concurrent user of that name with another trademark owner, may, in fact, wish to sell that name to the other trademark owner.

The *Hasbro, Inc. v. Clue Computing, Inc.*¹³⁵ case provides a fine example of a dispute between companies with competing, yet legitimate, interests in a domain name — there, *clue.com*. Clue Computing's predecessor-in-interest registered the domain name in 1994 for use in connection with its "Internet consulting, training, system administration, and network design and implementation" business.¹³⁶ Hasbro, whose CLUE® board game had been on the market for decades, wanted that domain name. The ensuing litigation, which included an appeal to the First Circuit, took years and probably consumed many thousands of dollars in legal fees. Clue Computing

132. 15 U.S.C. § 1125(d)(1)(B)(VI) (2000 & West Supp. 2006).

133. S. REP. NO. 106-140, at 2 (1999).

134. *Id.* at 14; *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998); *Shields v. Zuccarini*, 254 F.3d 476 (3d Cir. 2001).

135. 66 F. Supp. 2d 117 (D. Mass. 1999), *aff'd*, 232 F.3d 1 (1st Cir. 2000).

136. *Hasbro, Inc. v. Clue Computing, Inc.*, 66 F. Supp. 2d 117, 120 (D. Mass. 1999), *aff'd*, 232 F.3d 1 (1st Cir. 2000).

prevailed, but presumably, the cost of the litigation hit it harder than Hasbro, a much larger company.

Suppose that Clue Computing's owners had a crystal ball, and at the outset of the case, decided that they would rather have whatever sum Hasbro might be willing to pay for the domain name. This would be a perfectly rational decision so long as the net present value of the amount to be paid by Hasbro exceeded the value of owning of *clue.com* plus the cost of the litigation. Clue Computing might then offer to sell the domain name to Hasbro. Assuming Clue Computing could demonstrate the requisite use or intent to use *clue.com* "in the bona fide offering of any goods or services," the fact of its offer would not tend to show "bad faith intent to profit" under 15 U.S.C. § 1125(d)(1).

But under *Trebor's* interpretation of Rule 408, in which admission of compromise evidence turns on how "intertwined" with liability the other purpose for which the evidence is offered is, Hasbro would never get the chance to argue otherwise. In *Hasbro* and every other cyberpiracy case in which the defendant offered to sell a domain to the plaintiff, proof under Section 1125(d)(1)(B)(vi) would be thwarted because, under the *Trebor* rule, Rule 408 would prevent admission of the offer. The better approach, from the perspective of both the statute and the rule, is to hold that the evidence of the hypothetical "offer to sell" is admissible under Rule 408(b).¹³⁷

D. ANOTHER ATYPICAL APPLICATION: EFFECTS TEST JURISDICTION

Consider the issue of personal jurisdiction under the "effects test" of *Calder v. Jones*,¹³⁸ in which the Supreme Court considered whether a *National Enquirer* reporter and editor, both Florida residents, were subject to personal jurisdiction in a California Superior Court libel suit by actress Shirley Jones. As the Court observed, the reporter and editor were

not charged with mere untargeted negligence. Rather, their intentional . . . actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article

137. The intersection between Rule 408 and 15 U.S.C. § 1125(d)(1)(B)(vi) presents an interesting issue in and of itself. Rule 408 has force only because Congress granted power to the Supreme Court to promulgate it. 28 U.S.C. § 2072(a) (2000). Rule 408 cannot abridge, enlarge, or modify any substantive right. 28 U.S.C. § 2072(b). And it must be consistent with Acts of Congress. 28 U.S.C. § 2071(a) (2000). On the other hand, as noted above, the "offer to sell" factor of 15 U.S.C. § 1125(d)(1)(B)(vi) is only one of several *non-exclusive* factors the court is to consider in determining "bad faith intent to profit" under 15 U.S.C. 1125(d)(1). Knowing that the judiciary has been left to both promulgate and apply the evidence rules generally, and to weigh the "offer to sell" factor as it sees fit in the individual cyberpiracy case, one might conclude that the intersection between the statute and the rule lies wherever a court decides it does.

138. 465 U.S. 783 (1984).

that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.¹³⁹

The Court concluded, "petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis."¹⁴⁰

Based on *Calder*, plaintiffs have asserted the existence of personal jurisdiction over nonresident defendants in a variety of tort cases, including cases with claims of fraud,¹⁴¹ violation of the right of publicity,¹⁴² trademark infringement,¹⁴³ cyberpiracy,¹⁴⁴ violation of the Fair Credit Reporting Act,¹⁴⁵ and others. And given the *Calder* Court's emphasis on the defendant's state of mind toward the plaintiff and the forum, evidence of that state of mind can be critical.¹⁴⁶

What if that evidence arises from pre-suit communications? The issue of whether a demand letter and a response that neither acquiesces in nor flatly rejects the demand fairly may be characterized as Rule 408 settlement communications almost certainly turns on the particular facts. But assume for purposes of this demonstration that they may. Further assume that the putative defendant responds that it is aware of the plaintiff and aware that plaintiff is located in the forum. The would-be defendant might make blustery statements like these in an effort to discourage the plaintiff from proceeding with the litigation. But they also permit the inference that the defendant knew its conduct, if wrongful, would harm the plaintiff in the forum — an inference that supports jurisdiction under *Calder*. If the plaintiff later sues in the forum, and defendant seeks dismissal alleging lack of personal jurisdiction, the court ought to be able to consider defendant's bluster as admissions bearing on defendant's state of mind, and thus,

139. *Calder v. Jones*, 465 U.S. 783, 789–90 (1984) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)) (citations omitted).

140. *Calder*, 465 U.S. at 790.

141. *E.g.*, *Dole Food Co. v. Watts*, 303 F.3d 1104, 1111 (9th Cir. 2002).

142. *E.g.*, *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Sinatra v. Nat'l Enquirer, Inc.*, 854 F.2d 1191, 1197 (9th Cir. 1988).

143. *E.g.*, *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1391 (8th Cir. 1991); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 417 (9th Cir. 1997).

144. *E.g.*, *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321–22 (9th Cir. 1998).

145. *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1076 (9th Cir. 2001).

146. *See Estate of Witko v. Hornell Brewing Co.*, 156 F. Supp. 2d 1092, 1099 (D.S.D. 2001).

the jurisdictional issue. Proving the defendant's amenability to personal jurisdiction is "another purpose" for which the evidence may be admitted under Rule 408's last sentence.

CONCLUSION

Rule 408 reconciles competing policy interests — interests that are best balanced by applying the Rule as written. So applied, Rule 408 should permit admission of compromise evidence for all purposes but those specifically excluded under Rule 408(a). Two final points should be considered. First, any untoward impacts of applying Rule 408(b) expansively can be mitigated under Rules 401 through 403. The proffered compromise evidence has to be relevant to be admissible. And even if it is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice from its admission. But the court should analyze the proffered evidence on those terms, not by purporting to "balance" Rule 408's policy interests in any manner different than the balance struck by the Rule itself.