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IMPEACHING LYING PARTIES WITH THEIR STATEMENTS DURING NEGOTIATION: DEMYSTICIZING THE PUBLIC POLICY RATIONALE BEHIND EVIDENCE RULE 408 AND THE MEDIATION-PRIVILEGE STATUTES

Lynne H. Rambo*

Abstract: Virtually all American jurisdictions have laws—either rules of evidence or mediation-privilege statutes or both—that exclude from evidence statements that parties make during negotiations and mediations. The legislatures (and sometimes courts) that have adopted these exclusionary rules have invoked a public policy rationale: that parties must be able to speak freely to settle disputes, and they will not speak freely if their statements during negotiation can later be admitted against them. This rationale is so widely revered that many courts have relied on it to prohibit the use of negotiation statements to impeach, even when the inconsistency of the negotiation statement reveals that the speaker either lied during the negotiation or is lying at trial. This Article challenges the public policy rationale, arguing that confidentiality has very little effect on an honest party's willingness to speak about the facts during negotiation, and so when the rationale is invoked to prohibit impeachment, it operates only to protect the dishonest. The Article concludes by proposing a specific amendment to Federal Rule of Evidence 408, its state counterparts, and the mediation-privilege statutes that would permit impeachment by a prior inconsistent negotiation statement, but only if the statement clearly demonstrated intentional misrepresentation by the speaker.

Your client is pacing the conference room. You have told her not to count on anything from this meeting. You have told her she will probably have to file suit to prove that the University was discriminating by paying her male colleagues some \$20,000 more per year. You have also told her that litigation should be her last resort: it is emotionally and even physically draining. And you have told her that if the University claims it based her pay on her student evaluations, the litigation will require a lot of money and time, because you will have to wade through the thousands of evaluations she and her colleagues have amassed over the years, and perhaps hire an expert to evaluate them. Having covered all this, you leave her to pace.

An hour later, in the middle of a tense mediation session, you are asserting that the University apparently operates on the theory that women

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will work cheap. You observe that your client and her male colleagues are performing substantially the same work, requiring the same skill, effort, and experience, and so the Equal Pay Act¹ requires the University to explain why your client is paid so much less. Responding to a letter from the University's counsel suggesting that your client's student evaluations are not as strong as her male colleagues', you insist that there appears to be no correlation whatsoever between student evaluations at the University and professors' pay. You state that everyone is aware that some of the highest-paid men have received very weak evaluations, and everyone knows that students evaluate poorly some of the very best (and hardest) teachers. Almost in unison, the Dean of your client's school (who herself made the pay decisions) and the University's counsel snort that faculty pay decisions are not based on student evaluations.

On what, then, you ask, *was* my client's pay based? The University's counsel's answer is non-responsive. Counsel shifts instead to the fact that the decision makers were women. There has been no gender discrimination, counsel insists, because the Dean and the President of the University are women. You propose that the University bring your client's salary up to the level of the male professor with equivalent seniority, but the University will not budge off its initial nuisance offer. Despite the mediator's best efforts, the meeting ends without resolution.

Your client is crestfallen, angry. Not to worry, you say, because at least we know now that our biggest obstacle is out of the way: the University will not be relying on your student evaluations, and that could have been the hardest evidence to overcome with the jury. You tell your client that the complaint is drafted and ready to file. Now she will have to decide whether she is ready to go to war, ready to endure. Of course, it will mean at least two years of being the pariah among her peers.

Six weeks later, the University's answer lands on your desk. Affirmative Defense Three reads: "Plaintiff's pay is not the product of gender

1. The Equal Pay Act provides in pertinent part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex

29 U.S.C. § 206(d)(1) (1994).

discrimination. Plaintiff's pay has been based on the poor student evaluations she has received over the last fifteen years." You march into the office of your co-counsel. How can they claim this as a defense? They flatly told her that student evaluations were not the reason for her pay! Co-counsel sighs, and says that does not matter. A party's admissions during negotiations are inadmissible.

Unwilling to accept this pronouncement, you turn to the Federal Rules of Evidence. Rule 408 does indeed say that statements made in compromise negotiations are inadmissible, but only when such statements are offered to prove "liability for or invalidity of a claim or its amount."² This language seems to mean that you will not be able to offer the Dean's comments as a substantive part of your case for liability, but if the Dean claims the "student-evaluation" defense at trial, you will be able to offer her negotiation comment to impeach her by prior inconsistent statement. Rule 408 specifically states that it "does not require exclusion when the evidence is offered for *another purpose*."³

The difficulty with this scenario lies in the fact that, notwithstanding what seems to be the clear import of Rule 408's language, several federal courts (and state courts in jurisdictions with Rule 408 counterparts) have rejected impeachment by prior inconsistent statement as one of the acceptable "other purposes" under Rule 408.⁴ The Advisory Committee responsible for the Rule has refrained from taking any position on impeachment by prior inconsistent statement.⁵ Moreover, a number of federal and state jurisdictions have enacted statutes and rules covering mediation communications that render those communications inadmissible for any purpose, irrespective of how Rule 408 has been construed.⁶

2. Fed. R. Evid. 408.

3. *Id.* (emphasis added).

4. *See infra* Part I.A.3. This Article focuses on impeachment by prior inconsistent statement or conduct, which Rule 408 does not expressly address, as distinguished from impeachment by establishing the bias or prejudice of the witness, which the Rule *does* expressly permit. Impeachment by prior inconsistent statement refers to proving that a witness has previously made a statement that is inconsistent with her testimony at trial. *See* Charles T. McCormick, *McCormick on Evidence* § 34, at 45 (John W. Strong ed., 4th ed. 1992). Impeachment by establishing the bias or prejudice of a witness refers to proving that a witness shares some relation to one party that may render the witness' testimony less objective. *See id.* § 39, at 52.

5. *See* Fed. R. Evid. 408 advisory committee's note.

6. *See infra* notes 109–23 and accompanying text.

The courts and commentators opposing the use of negotiation statements to impeach by prior inconsistent statement have almost universally intoned that such impeachment would act as a powerful disincentive to settlement. On this view, if parties knew their statements could be used to impeach them, they would not engage in the “free and frank discussion” necessary for settlement. A few commentators have acknowledged in passing that this position raises the potential for parties to lie during negotiations,⁷ but in the view of those opposing impeachment, the need for “free and frank discussion,” and the settlements expected to result, outweigh that concern.⁸

This Article argues that courts and legislatures must hold negotiating parties accountable for their factual representations in settlement negotiations and allow parties to be impeached when they change their stories at trial. The Article confronts the public policy rationale—the idea that negotiations must be completely confidential, or else parties will speak less freely and fewer settlements will result—and takes the position that confidentiality does not have the widely assumed effect on negotiating parties’ willingness to speak freely about the facts of their cases.⁹ Indeed, the statements of fact that confidentiality serves to promote generally are not the “free and frank,” honest statements at which the rules are aimed, but rather misrepresentations of fact. Thus, rules prohibiting the use of negotiation statements to impeach promote only settlements that are unjust and trial outcomes based on a false set of facts, and may actually encourage parties to lie.

7. See Kimberlee Kovach, *Mediation: Principles and Practice* 142 (1994); 23 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure: Evidence* § 5314, at 284 (1980 & Supp. 1999); Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 *Hastings L.J.* 955, 976–77 (1988); 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, 112 (1995).

8. See *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979); *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976); Brazil, *supra* note 7, at 976–77; Hjelmeset, *supra* note 7, at 112.

9. It is important at the outset to emphasize that this Article does *not* suggest that confidentiality in negotiation and mediation is wholly unnecessary or unwise. Confidentiality serves at least two extremely important purposes in promoting settlement. First, as will be set forth in detail below, confidentiality allows negotiating parties to speak freely about their internal difficulties with settling or not settling, and what it will take to overcome those difficulties, and thus the negotiation can be focused on meeting the parties’ particularized needs. See *infra* note 164 and accompanying text. Second, confidentiality probably sets negotiating parties more at ease about the process in general, making them more willing to participate. For these reasons, this Article does not advocate eliminating confidentiality altogether. It does suggest, however, that confidentiality is not operating in the way that courts and commentators have come to believe in terms of encouraging parties to make statements of *fact* related to their cases, and thus little purpose is being served by extending confidentiality so far as to preclude impeachment with respect to those strictly factual statements.

Part I sets forth the existing treatment of negotiation statements offered for impeachment purposes under both Federal Rule of Evidence 408 and the mediation-privilege statutes in effect across the country. Part II shows that the public policy rationale on which the law precluding the use of negotiation statements is based is essentially a false assumption when applied to statements of fact during negotiations, which are the only types of statements that would give rise to impeachment. Part III demonstrates that even if one assumes that the public policy rationale is accurate with respect to negotiation statements of fact, the rationale should not be extended to prohibit impeachment by prior inconsistent statement, because the only parties that would be inhibited by a rule permitting impeachment would be those intending to lie, and the only settlements that would be discouraged would be those based on falsehoods. Part IV recommends a specific amendment to Rule 408 and the mediation-privilege statutes to ensure that impeachment by prior inconsistent statement is permitted when intentional misrepresentation is involved.

I. THE ABSENCE OF REMEDIES WHEN PARTIES CHANGE THE FACTS FROM NEGOTIATION TO TRIAL

Settlements are reached in a variety of ways. Some settlements result from direct negotiation between the parties or their counsel or both.¹⁰ Others are the product of mediation, which is essentially a negotiation session in which a neutral party assists the parties in arriving at some mutually agreeable resolution.¹¹ Some result from a non-binding arbitration or mini-trial of the plaintiff's claims, which is used to inform the negotiating parties about the strength of their respective positions.¹² Still other out-of-court

10. See 1 Edward A. Dauer, *Manual of Dispute Resolution* § 4.04, at 4-20 (1994).

11. See Catherine Cronin-Harris, *A Primer on ADR Statutes and Cases*, in *What the Business Lawyer Needs To Know About ADR*, 449, 456 (PLI N.Y. Practice Skills Course Handbook Series No. F0-000S, 1998) (describing mediation as "a facilitated settlement process in which a third-party neutral mediator helps the parties explore their interests, needs and goals so they can negotiate a resolution of their dispute"); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1, 4 n.11 (1986) ("Mediation in most important respects is merely negotiation-plus," the "plus" being "[a] neutral intervenor who adds elements to the process of negotiation designed to overcome negotiation impasse").

12. See Green, *supra* note 11, at 2 n.4; Eric D. Green, *CPR Legal Program Mini-Trial Handbook*, in *Corporate Dispute Management* 15 (1982). Arbitration and mini-trials usually involve an abbreviated presentation of either evidence or what the attorneys expect the evidence to be, after which the factfinder

settlements are reached when the parties agree to submit to an arbitration or a private trial and be bound by the result.¹³

In each of these situations except the binding arbitration or private trial, the parties almost certainly will find themselves communicating with one another about the facts and law underlying the dispute.¹⁴ In the course of their discussion—at least if it is to have any promise of succeeding—the parties will have to commit to certain theories of their case and the facts that support those theories. These commitments will form the basis on which the parties gauge their respective risks and decide whether to settle or proceed with litigation.

If a dispute has already ripened into litigation and discovery is complete, the parties may be equally informed as to the available evidence and each other's theory of the case. If the discussions take place before discovery is complete, however, and one party has access to witnesses and evidence to which the other party does not, settlement will require a certain leap of faith by the party without such access. In deciding whether to settle and on what terms, the party without access will have to rely, in some measure at least, on its opponent's representations of the facts.¹⁵

Sometimes the factual representations made during settlement negotiations persuade parties that proceeding to trial is the only option. So, marshaling all their emotional and financial resources, they continue the litigation, only to hear their opponent offer during discovery and at trial an entirely different story than the one related during the negotiation. Under ordinary circumstances, when a party contradicts its own earlier statements, that party can be impeached at trial.¹⁶ If the inconsistency occurred during

indicates how the factfinder would resolve the claim. See Stephen B. Goldberg et al., *Dispute Resolution* 271–79 (1985).

13. See *Dauer*, *supra* note 10, § 5.02, at 5-4 to 5-6.

14. Even in the situation where the parties employ a non-binding arbitration or mini-trial, the parties will end up in negotiation, addressing their respective positions and the facts. This is because the parties are not bound by the result, and still must be convinced to settle and on what terms. See Goldberg et al., *supra* note 12, at 271–79. Further, many processes called “arbitration” or “mini-trials” do not involve sworn testimony, but simply parties or their counsel presenting in summary fashion what they expect their cases to be. See *id.*; Eric D. Green, *Growth of the Mini-Trial*, 9 Litig. 12, 12 (1982).

15. See Wendy E. Trachte-Huber, *Negotiation: Strategies for Law and Business* § 4.03[3], at 39 (1995) (“Since negotiation tends to occur early in a case, gathering information is sometimes difficult. If depositions have not been taken nor interrogatories answered, you will find yourself proceeding with incomplete information. You must carefully weigh this with your ability to represent your client effectively.”).

16. See McCormick, *supra* note 4, § 37, at 49–50 (“If a party takes the stand as a witness, and the adversary desires to use a prior inconsistent statement of the witness, the statement is receivable in two aspects, first as the admission of the opposing party, and second, as an inconsistent statement to impeach

settlement negotiations, however—precisely when a party knew its opponent was most likely to rely on what was said—the inconsistent party may be protected from impeachment under Federal Rule of Evidence 408¹⁷ or a state counterpart of Rule 408.¹⁸ And if the negotiations took place in a *mediated* negotiation session, the inconsistent party is very likely to have even greater protection under a federal or state mediation privilege.¹⁹ The party who has been lied to in the negotiation, or is being lied to at trial, has no recourse but to listen to the testimony in wide-eyed fury.²⁰

Conversely, the factual representations made during a negotiation session may persuade the parties to settle. Yet if one of the parties has seriously misrepresented the strength of its case during negotiation, then the settlement reflects an unjust outcome for the party to whom misrepresentations have been made. In many, if not most, instances, the party suffering from the misrepresentation will never learn the truth. The absence of remedies described below furthers this dynamic, because the party who lies in negotiation feels free to do so without any possibility of penalty if the case does not settle.

the witness.”). Indeed, a party witness may be impeached by extrinsic evidence of prior inconsistent statement without first providing the witness with an opportunity to explain or deny the statement, as is required with a non-party witness. *See* Fed. R. Evid. 613(b) (“This [extrinsic evidence] provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).”).

17. *See infra* notes 55–90 and accompanying text.

18. As of this writing, at least forty-one states, and Puerto Rico, have adopted rules of evidence substantially similar to Rule 408, including provisions that render statements made in compromise negotiations inadmissible. *See* Ala. R. Evid. 408; Alaska R. Evid. 408; Ariz. R. Evid. 408; Ark. R. Evid. 408; Cal. Evid. Code § 1152 (West 1995); Colo. R. Evid. 408; Del. R. Evid. 408; Fla. Evid. Code § 90.408; Haw. R. Evid. 408; Idaho R. Evid. 408; Iowa R. Evid. 408; Kan. R. Evid. 408; Ky. R. Evid. 408; La. Code Evid. Ann. art. 408(A) (West 1995); Me. R. Evid. 408; Md. R. Prac. & P. 5-408; Mass. R. Evid. 408; Mich. R. Evid. 408; Minn. R. Evid. 408; Miss. R. Evid. 408; Mont. R. Evid. 408; Neb. Rev. Stat. § 27-408 (2000); Nev. Rev. Stat. § 48.105 (2000); N.H. R. Evid. 408; N.J. R. Evid. 408; N.M. R. Evid. 408; N.C. R. Evid. 408; N.D. R. Evid. 408; Ohio R. Evid. 408; Okla. Stat. Ann. tit. 12, § 2408 (West 1993); Or. R. Evid. 408; P.R. R. Evid. 22(B); S.C. R. Evid. 408; S.D. R. Evid. 408; Tenn. R. Evid. 408; Tex. R. Evid. 408; Utah R. Evid. 408; Vt. R. Evid. 408; Wash. R. Evid. 408; W. Va. R. Evid. 408; Wis. Stat. Ann. § 904.08 (West 1993); Wyo. R. Evid. 408.

19. *See infra* notes 109–23, 135–40 and accompanying text.

20. The inability to expose the false testimony at trial depends on the subject matter of the false testimony. It may be that other evidence in the case will be sufficient to refute the false testimony. There are many situations, however—such as the one described in the opening hypothetical—in which the case turns either on a party’s subjective intent or on a mere swearing contest on critical facts, and the only evidence possible on those issues is testimony. Further, it hardly seems just to require a party to endure both the cost and effort required to refute a falsehood by other evidence, when the truth could be established quickly and conclusively if the witness would simply honor his or her responsibility to tell the truth.

A. *The Uncertainty of Impeachment by Prior Inconsistent Statement Under Rule 408*

Federal Rule of Evidence 408 opens by providing that offers of compromise or completed compromises are inadmissible when they are tendered “to prove liability for or invalidity of the [disputed] claim or its amount.”²¹ The Rule’s second sentence provides that statements made or conduct in the course of compromise negotiations are “likewise” inadmissible.²² The “likewise” refers back to the first sentence’s forbidden purpose of proving the validity or invalidity of a claim²³ or its amount.²⁴

21. Fed. R. Evid. 408. This provision alone has spawned a tremendous amount of litigation on three issues. The first issue is whether a compromise offer was made in the context of a “disputed” claim, or simply reflected the offeror’s desire to pay less than he knew he owed. *See, e.g., In re B.D. Int’l Discount Corp.*, 701 F.2d 1071, 1074 n.5 (2d Cir. 1983). This issue is, for obvious reasons, resolved on a case-by-case basis. The second commonly litigated issue is whether an offer of compromise or completed compromise is inadmissible only in the action in which the offer or compromise was made, or inadmissible in all subsequent litigation. *See, e.g., Frieman v. USAir Group, Inc.*, No. Civ. A. 93-3142, 1994 WL 675221, at *9 (E.D. Pa. Nov. 23, 1994). Because the Rule is somewhat ambiguous in this regard, with its reference to “the” claim and “its” amount, courts have disagreed as to whether offers or compromises are inadmissible in all subsequent litigation, provided the purpose for which an offer or a compromise is being introduced is to prove the validity or invalidity of the current claim or its amount. *Compare* *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985), *Playboy Enters., Inc. v. Chuckleberry Publ’g, Inc.*, 687 F.2d 563, 568–69 (2d Cir. 1982), *and* *Day v. NLO, Inc.*, 798 F. Supp. 1322, 1330 (S.D. Ohio 1992), *with* *Broadcort v. Summa Medic. Corp.*, 972 F.2d 1183, 1194 (10th Cir. 1992), *Wyatt v. Security Inn Food & Beverage*, 819 F.2d 69, 71 (4th Cir. 1987), *and* *Vulcan Hart Corp. v. NLRB*, 718 F.2d 218, 277 (8th Cir. 1983). Because of the courts’ disagreement, the members of The Evidence Project at American University have recommended amending Rule 408 by changing the wording from “the claim or its amount” to “any claim or its amount” to protect any prior negotiations, not just those in the current suit. *See* Paul R. Rice, *The Evidence Project: Proposed Revisions to the Federal Rules of Evidence with Supporting Commentary*, 171 F.R.D. 330, 467–68 (1997). The third litigated issue with respect to this first provision is whether the rule applies when a party attempts to introduce its own compromise offer or only when a party tenders an offer by someone else. The courts are split on this point. *Compare* *Bulaich v. AT&T Info. Sys.*, 113 Wash. 2d 254, 263–65, 778 P.2d 1031, 1036–37 (1989) (holding that employer’s introduction of its own reinstatement offer to prove its state of mind does not offend policies at which Rule 408 is aimed), *with* *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992) (holding that Rule 408 applies to exclude compromise offers even when they are tendered by offeror).

22. Fed. R. Evid. 408.

23. For ease of reference, the portion of Rule 408 referring to “liability for or invalidity of the claim” will for the remainder of this Article be referred to as the “validity or invalidity of a claim.” By so doing, the author does not intend to confuse the meaning of the phrase, only to render the reference to the prohibited purposes more readable.

24. *See* Fed. R. Evid. 408. Although it seems grammatically impossible to construe the term “likewise” as referring to anything but the purposes forbidden in the first sentence of Rule 408, one commentator has suggested that the second sentence of Rule 408 should be treated as a prohibition on the admission of statements and conduct in compromise negotiations not limited to the purposes of proving the validity or invalidity of a claim or its amount. *See* Hjelmset, *supra* note 7, at 96–97.

Impeachment With Negotiation Statements

The third and fourth sentences of the Rule elaborate on practical applications of the prohibitions set forth in the first two sentences. The third sentence provides that otherwise discoverable evidence does not become undiscoverable simply because it is presented in a compromise negotiation.²⁵ The final sentence emphasizes that the prohibited purposes set forth in the first sentence are the only prohibited purposes. It states that offers of compromise and completed compromises (and “likewise,” statements or conduct in negotiations) are admissible for purposes *other than* proving the validity or invalidity of a disputed claim or its amount, “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.”²⁶

25. See Fed. R. Evid. 408. It is very important to remember this provision in Rule 408 when one considers the conventional wisdom that negotiating parties make statements in compromise negotiations that they would not make if their statements were admissible, because this provision ensures that a party to a failed negotiation can launch discovery on information gained in the course of a negotiation. See *infra* notes 159–63 and accompanying text.

26. Fed. R. Evid. 408. The Advisory Committee’s Note makes clear that the list of purposes for which offers or compromises would be admissible is illustrative only: “Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The *illustrative* situations mentioned in the rule are supported by the authorities.” *Id.* advisory committee’s note (emphasis added). In theory, at least, most courts have acknowledged the Advisory Committee’s statement and admitted offers and compromises offered for purposes beyond those appearing in Rule 408’s express language (although, as will be discussed *infra* Part I.A.3., frequently not for impeachment by prior inconsistent statement). See, e.g., *Eisenberg v. University of N.M.*, 936 F.2d 1131, 1134 (10th Cir. 1991) (holding affidavit submitted in connection with settlement negotiations admissible to support Rule 11 sanctions); *Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987) (holding evidence of city’s settlement of prior brutality action admissible to support “condoned custom” theory of city’s liability); *Urico v. Parnell Oil Co.*, 708 F.2d 852, 855 (1st Cir. 1983) (holding evidence of settlement negotiations properly admitted on issue of whether party acting on behalf of defendant had interfered with efforts of plaintiff to mitigate damages); *Bradshaw v. State Farm Auto Ins.*, 758 P.2d 1313, 1322 (Ariz. 1988) (holding evidence of insurer’s statements in settlement negotiations admissible to show that it filed action it knew to be meritless as method of strong-arming plaintiff into settlement); *Jensen v. Westberg*, 772 P.2d 228, 236 (Idaho 1988) (holding evidence of compromise of claim with third person admissible to show costs that had been incurred by partners); *Harriman v. Maticos*, 518 A.2d 1027, 1031 (Me. 1986) (holding evidence of negotiation statements admissible to show that release was induced by fraud). Professors Wright and Graham state that the First Circuit has “assume[d] that [the] list in [the] last sentence of Rule 408 is exclusive.” Wright & Graham, *supra* note 7, § 5314 n.1 (Supp. 1999) (citing *Vincent v. Louis Marx & Co.*, 874 F.2d 36, 42 (1st Cir. 1989)). This may be a somewhat overbroad reading of the *Vincent* case, however, inasmuch as the First Circuit did not actually state that the list was exclusive, and the purpose advanced by the *Vincent* litigant was merely offsetting prejudice caused by its opponent’s introduction of pleadings from a prior action. *Vincent v. Louis Marx & Co.*, 874 F.2d 36, 42 (1st Cir. 1989). This is surely different from offering a settlement for an independent, substantive purpose.

1. *The Drafting and Enactment of Rule 408*

The first sentence of Rule 408, excluding offers to compromise and completed compromises, reflects essentially a codification of the common law as it stood in 1975 when the Federal Rules of Evidence were adopted.²⁷ Offers to compromise and completed compromises had long been held inadmissible by federal and state courts, at least to the extent that they were tendered as an admission that a party's position was invalid.²⁸ In excluding evidence of compromise, the courts had relied on what has come to be known as the "relevance" rationale: proposals to compromise are irrelevant for the purpose of disproving a claim or defense, because they do not necessarily signify any admission of weakness by the proposing party.²⁹ Parties compromise claims and defenses for a variety of reasons other than in belief that those claims and defenses are not sound.³⁰ The courts had also

27. The Advisory Committee on the Rules of Evidence worked to draft the Federal Rules of Evidence from 1961 to 1973. See 120 Cong. Rec. 40,890 (1974) (statement of Rep. William L. Hungate, Chairman of House Judiciary Subcommittee on Criminal Justice, presenting conference report on H.R. 5463 to House for final consideration). The U.S. Supreme Court transmitted the draft of the rules to Congress on February 5, 1973. See H.R. Rep. No. 93-650, at 19 (1974) (transmittal letter by Chief Justice Warren Burger), reprinted in 1974 U.S.C.C.A.N. 7075, 7092. The Rules were adopted by Congress on January 2, 1975, and became effective as of July 1, 1975. See Pub. L. No. 93-595, 88 Stat. 1926, 1949. Rule 408 was part of the first version of the Federal Rules and has not been amended since that time.

28. See *infra* notes 29-31 and accompanying text.

29. See, e.g., *Shipley v. Pittsburgh & L.E.R. Co.*, 83 F. Supp. 722, 762 (W.D. Pa. 1949) ("[P]ayment of money by way or in furtherance of compromise cannot be called an admission, since it was done to avoid a controversy or to avoid litigation."); *Brown v. Hyslop*, 45 N.W.2d 743, 748 (Neb. 1951) (excluding offers to compromise because they may be made "merely to secure peace and avoid the incidents of a legal contest"); *Berry v. Heinel Motors, Inc.*, 56 A.2d 374, 376 (Pa. Super. 1948) ("Of course, an offer to compromise or settle a pending controversy is not an admission of liability and is not admissible . . ."); *Moore v. Stetson Mach. Works*, 110 Wash. 649, 651, 188 P. 769, 770 (1920) (stating that offers to compromise are inadmissible unless facts show intent to admit liability).

30. Dean Wigmore described the relevance rationale well:

The true reason for excluding an offer of compromise is that it *does not* ordinarily proceed from and *imply a specific belief that the adversary's claim is well founded*, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the . . . sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done . . . By this theory, the offer is excluded because, as a matter of interpretation or inference, it does not signify an admission at all. There is no concession of claim to be found in it, expressly or by implication.

4 John Henry Wigmore, *Evidence* § 1061, at 36 (James H. Chadbourn rev. ed. 1972) (emphasis in original). Professor McCormick noted, however, that the courts excluded offers of compromise on relevance grounds even though there were some instances in which an offer of compromise could safely be interpreted as a concession of weakness:

The reason is applicable only to such offers as might ordinarily be made to one asserting an unfounded claim or defense. If the defendant offers to pay nine-tenths of the asserted claim, it is

recognized what has come to be known as the public policy rationale: negotiated compromises should be encouraged, and litigants will be discouraged from attempting compromises if their proposals can be used against them in the event negotiation fails.³¹ Indeed, at the time Rule 408 was enacted, commentators had come to view the latter rationale as bearing greater force. The Advisory Committee³² wrote: “A more consistently impressive ground [supporting the exclusion of compromises] is promotion of the public policy favoring the compromise and settlement of disputes.”³³

In contrast to Rule 408’s treatment of offers to compromise and completed compromises, the Rule’s second sentence, excluding statements and conduct in compromise negotiations, worked at least a partial reversal of the common law. Prior to enactment of the Rule, a party’s unconditional statements of fact had rarely been excluded from evidence, whether they were made in the course of compromise negotiations or not.³⁴ What were called “independent admissions of fact” were freely admissible; the only way a negotiating party could protect its statements in the course of

unlikely in the highest degree that he believes the claim unfounded, but the rule applies to that offer just as it does to the proposal to pay one-tenth.

Charles T. McCormick, *Evidence* § 76, at 158 (1954).

31. See, e.g., *Moffitt-West Drug Co. v. Byrd*, 92 F. 290, 292 (8th Cir. 1899) (“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 and prolonged.”); *Graff v. Fox*, 204 Ill. App. 598, 604 (1917) (“Admissions . . . when made for the purpose of effecting a compromise of the matter in dispute, should be excluded as evidence on the ground of public policy.”); *Eckhardt v. Harder*, 160 Wash. 207, 211, 294 P. 981, 983 (1931) (holding offer inadmissible because “[t]he law favors the settlement of controversies out of court”).

32. Under the Rules Enabling Act, the Supreme Court has “the power to prescribe general rules of . . . evidence for cases in the United States district courts (including proceedings before magistrates thereof),” 28 U.S.C. § 2072(a) (1994), subject to the approval of, or modification by, Congress:

The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed . . . is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.

28 U.S.C. § 2074(a) (1994). In prescribing the rules, the Supreme Court relies on recommendations of the Judicial Conference of the United States, which in turn appoints an Advisory Committee, “consist[ing] of members of the bench and the professional bar, and trial and appellate judges.” 28 U.S.C. § 2073(a)(2) (1994). As a matter of common practice, the Advisory Committee actually drafts the rules, including “an explanatory note” on each rule as required by 28 U.S.C. § 2073(d) (1994).

33. Fed. R. Evid. 408 advisory committee’s note (citing McCormick, *supra* note 30, §§ 76, 251).

34. See Michael H. Graham, *Handbook of Federal Evidence* § 408.1, at 432–33 & nn. 8–10 (4th ed. 1996) (citing *Overseas Motor Inc. v. Import Motors, Ltd.*, 375 F. Supp. 499, 536 (E.D. Mich. 1974), *aff’d*, 519 F.2d 119 (6th Cir. 1975)).

negotiations was to state facts in hypothetical terms or expressly state that its pronouncements were made “without prejudice.”³⁵ The Advisory Committee became convinced that this formalism both “inhibit[ed] freedom of communication with respect to compromise, even among lawyers,” and generated excessive “controversy over whether a given statement falls within or without the protected area.”³⁶ As a result, the Committee proposed to reverse the common law and exclude statements and conduct in compromise negotiations as well as the offers of compromise and compromises themselves.³⁷ The Supreme Court adopted this proposal and transmitted it to Congress as part of the original version of the Federal Rules of Evidence.³⁸

2. *Congress’s Failure To Address the Problem of Misrepresentation During Negotiation*

Professors Charles Alan Wright and Kenneth Graham report that the Supreme Court’s draft of Rule 408 was deemed noncontroversial when it reached Congress, until several federal agencies, most notably the Internal Revenue Service, launched an attack on the proposal to exclude compromise statements and conduct.³⁹ The IRS and the other agencies were concerned that parties they were investigating would initially refrain from speaking with them and providing evidence on the thought that once negotiations started, they could speak freely and immunize any negative evidence by asserting the protection afforded by the Rule.⁴⁰ The agencies

35. See, e.g., *Hiram Ricker & Sons v. Students Int’l Meditation Soc’y*, 501 F.2d 550, 553 (1st Cir. 1969); *United States v. Tuschman*, 405 F.2d 688, 690 (6th Cir. 1969); *In re Evansville Television, Inc.*, 286 F.2d 65, 70 (7th Cir. 1961); see also Fed. R. Evid. 408 advisory committee’s note (citing *McCormick*, *supra* note 30, § 251, at 540–41). The common law courts might also have excluded statements made in the course of compromise negotiations if they concluded that the statements were inseparable from the offer of compromise itself. See, e.g., *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U.S. 527, 548 (1876); *Factor v. Commissioner*, 281 F.2d 100, 125–26 (9th Cir. 1960); see also Fed. R. Evid. 408 advisory committee’s note (citing *McCormick*, *supra* note 30, § 251, at 540–41).

36. Fed. R. Evid. 408 advisory committee’s note.

37. See *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 237–39 (1969).

38. See *id.* at 226–27; H.R. Rep. No. 93-650, at 19 (1974), reprinted in 1974 U.S.C.C.A.N. 7075, 7092.

39. Wright & Graham, *supra* note 7, § 5301, at 160–61.

40. See H.R. Rep. No. 93-650, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. at 7081. The IRS was concerned that “parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until ‘compromise negotiations’ began and thus

were also concerned that a rule excluding statements during negotiation sessions would remove the incentive for an investigated party to tell the truth during those sessions.⁴¹ As one Department of Justice witness testified:

“[P]ublic policy . . . would certainly be undermined by assuring taxpayers that, unless criminal intent can be shown, they have no responsibility for the accuracy of any factual representations they may make in the course of settlement negotiations with the Internal Revenue Service The proposed rule would encourage frivolous and misleading, if not outright false, representations in the settlement process.”⁴²

Responding to the agencies’ concerns, the “Hungate Subcommittee”⁴³ rejected the exclusion of statements of fact and amended the proposed Rule to exclude only admissions or opinions of liability.⁴⁴ The House adopted the proposed Rule with that amendment in effect.⁴⁵ In the Senate, however, the Advisory Committee went to work defending its proposal, arguing that the public policy of promoting settlements demanded the exclusion of factual statements by the parties.⁴⁶ The Senate then restored the original provision excluding factual statements, but also responded to at least part of the federal agencies’ concerns by adding the third sentence of Rule 408, which provides that a party cannot immunize evidence from discovery simply by

hopefully effect an immunity for themselves with respect to the evidence supplied.” *Id.* As Professors Wright and Graham describe the concern,

[i]t 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 feared 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.

Wright & Graham, *supra* note 7, § 5301, at 160–61.

41. *See id.*

42. *Id.* at 161 n.11 (quoting 2 *Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 302, 345 (1973)).

43. The House Judiciary Committee referred the Supreme Court’s draft of the Federal Rules of Evidence to the Subcommittee on Criminal Justice, chaired by Representative William L. Hungate. *See* H.R. Rep. No. 93-650, at 4 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 7081.

44. *See id.* at 8, *reprinted in* 1974 U.S.C.C.A.N. at 7081.

45. *See* 120 Cong. Rec. 2370, 2393–94 (1974).

46. *See* S. Rep. No. 93-1277, at 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7057.

raising it during a negotiation session.⁴⁷ In conference, the House agreed to the Senate version,⁴⁸ and Rule 408 ultimately was enacted with the exclusion of compromise statements intact.⁴⁹

Curiously, although the Senate's changes addressed the agencies' concern that parties would try to immunize evidence by withholding it until negotiations had begun, the agencies' other big concern, that Rule 408 created an incentive for parties to lie during negotiations, was never resolved. Neither the Advisory Committee Note nor the Committee Reports addresses the issue.⁵⁰ Adding the third sentence of Rule 408—providing that evidence presented at negotiations could later be discovered—did not address the problem, inasmuch as there remained nothing to prevent a party from representing the facts one way during the negotiation and then, when asked about those facts during discovery, representing them differently.⁵¹

47. See *id.*, reprinted in 1974 U.S.C.C.A.N. 7051, 7057.

48. H.R. Conf. Rep. No. 93-1597, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7098.

49. See Pub. L. No. 93-595, 88 Stat. 1933 (1975).

50. Professor Michael Graham has asserted that “[t]he clear import of the Conference Report as well as the general understanding among lawyers is that [inconsistent] conduct or statements [made in connection with compromise negotiations] may *not* be admitted for impeachment purposes.” Michael Graham, *Federal Rules of Evidence* § 408.1, at 438 (4th ed. 1996) (emphasis in original). Whatever the understanding of practicing lawyers may be, this author respectfully disagrees with Professor Graham's reading of the Conference Report. The Conference Report does not seem to address the issue of impeachment by prior inconsistent statement, only whether negotiating parties can immunize evidence from discovery by presenting it first during negotiations. The entire discussion of Rule 408 in the Conference Report is as follows:

The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

H.R. Conf. Rep. No. 93-1597, at 6 (1974), reprinted in 1974 U.S.C.C.A.N. at 7098. This language does not seem to suggest the Conference Committee's position on impeachment by prior inconsistent statement, but only its position on whether statements or document exchanges in negotiation should be allowed to immunize the contents of the statements or the documents from discovery.

51. Indeed, the Senate Committee report suggests that the third sentence was added to address the problem of parties' seeking to immunize *documents*, not their own statements, from discovery. See

3. *Judicial Reliance on the Public Policy Rationale To Prohibit Impeachment by Inconsistent Statements During Negotiation*

It may be that the Rule's drafters simply assumed that if a party represented the facts one way during negotiations and presented a different version of the facts at trial, impeachment by prior inconsistent statement would be available.⁵² The language of the Rule allows for that interpretation: compromise evidence is not admissible "to prove liability for or invalidity of the claim or its amount," and negotiation statements are "likewise" not admissible, but the rule expressly "does not require exclusion when the evidence is offered for *another purpose*."⁵³ One could certainly assume that impeachment by prior inconsistent statement is one of the "other purposes" to which negotiation statements could be put.

S. Rep. No. 93-1277, at 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 7057 ("This amendment adds a sentence to insure that evidence, *such as documents*, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable.") (emphasis added).

52. The late Professor David Louisell and Professor Christopher Mueller assert that was the case. They rely on a passage from the Senate hearings in which the Advisory Committee responded to the "fear that the Court's rule would encourage misrepresentations during settlement talks." 2 David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 170, at 447 (rev. ed. 1985) (citing *Joint Statement of Advisory Committee and Select Committee on Rules, Hearings on H.R. 5463 before Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., at 59 (1974)). The passage they cite reads: "Of course that is not the case. Reference to the language of the rule discloses that its protection applies only when the evidence is offered for the purpose of establishing liability for or the invalidity of a claim." *Joint Statement of Advisory Committee and Select Committee on Rules, Hearings on H.R. 5463 before Senate Comm. on the Judiciary*, 93d Cong., 2d Sess., at 59 (1974). Professors Wright and Graham describe this as an ambiguous passage at best. In their view, this "looks more like a calculated effort to obscure the issue than an endorsement of use of negotiation statements for impeachment purposes." Wright & Graham, *supra* note 7, § 5314, at 285.

53. Fed. R. Evid. 408 (emphasis added). In the author's experience, both in practice and as observed at continuing legal education seminars, many practicing attorneys believe their offers of compromise and the statements they make in compromise negotiations are *absolutely* inadmissible. As one commentator has observed,

[i]t is a popular misconception that parties to private settlement negotiations and agreements may cloak the entire settlement process with confidentiality and prevent disclosure, after the fact, of the consummated agreement Instead, Rule 408 offers some protection from admission at trial of both the offer and the discussions surrounding it, but the protection is inherently limited by the rule.

Wendy L. Komreich, *Myths About Confidentiality in Employment Disputes*, Employment L. Strategist, Sept. 1996, at 1, 4. In fact, both the offers and the statements are admissible if they are offered for some purpose other than proving the validity or invalidity of a claim. See *supra* note 26 and accompanying text.

Unfortunately, if there was such an assumption, it remained unexpressed in all of the official sources. As a result, several courts apparently have considered the Rule inconclusive on the point and have turned to the broad policy behind Rule 408 to provide the answer. These courts have noted that the primary reason negotiation statements are excluded under Rule 408 is to promote candor in the pursuit of settlements, and reflexively concluded that permitting a party to be impeached with its inconsistent negotiation statement will discourage that candor.⁵⁴

The Tenth Circuit Court of Appeals' decision in *EEOC v. Gear Petroleum, Inc.*,⁵⁵ is the leading example. In *Gear Petroleum*, the EEOC brought an action under the Age Discrimination in Employment Act (ADEA),⁵⁶ alleging that 66-year-old Donald Trowbridge's employment had been improperly terminated on the basis of his age.⁵⁷ Prior to the lawsuit, the employer's counsel had written two letters to the EEOC in the course of discussing a negotiated resolution. The first letter stated that Mr. Trowbridge had been laid off not only because the company was generally reducing its staff and the employee had not performed well, but also because the company was "moving toward mandatory retirement at 65."⁵⁸ In the second letter, counsel stated that the company considered age to be a bona fide occupational qualification for Mr. Trowbridge's job, which would permit age to be taken into account without violating the ADEA.⁵⁹

During discovery depositions, however, the employer's story changed. The employer's executives testified that there was no mandatory-retirement policy and that age was not a factor in their termination of Mr. Trowbridge's employment.⁶⁰ The employer's counsel claimed that he had simply been mistaken in the two letters written to the EEOC.⁶¹ Prior to trial, the company moved in limine to exclude the letters and any testimony about them, and the district court granted the motion.⁶²

At trial, the employer's executives once again testified that there was no mandatory-retirement policy and that age had not been a factor in Mr.

54. See *infra* notes 55–90 and accompanying text.

55. 948 F.2d 1542 (10th Cir. 1991).

56. 29 U.S.C. §§ 621–634 (1994 & Supp. III 1997).

57. 948 F.2d at 1542–43.

58. *Id.* at 1543.

59. See *id.*

60. See *id.*

61. See *id.*

62. See *id.*

Trowbridge's firing.⁶³ The EEOC was prepared to show that the executives had actually conferred with their attorney in producing the letters to the EEOC and thereby had knowledge of the attorney's statements,⁶⁴ but the court still refused to allow the EEOC to impeach the executives with the letters.⁶⁵ The Tenth Circuit affirmed the judgment in favor of the employer, holding that the district court was not "clearly erroneous" in excluding the attorneys' letters.⁶⁶

The Tenth Circuit acknowledged that Rule 408 allows the admission of statements made in negotiations for purposes other than proving the validity or invalidity of a claim or its amount.⁶⁷ The court concluded, however, that the policy behind Rule 408 required exclusion of the letters even though they impeached the employer's defense.⁶⁸ Quoting a legal commentator, the court wrote:

"The philosophy of the Rule 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. Opening the door to impeachment evidence on a regular basis may well result in more restricted negotiations."⁶⁹

63. *See id.* at 1545.

64. *See id.* This proof would have established that the attorney's letters were adoptive admissions exempted from the hearsay rule under Federal Rule of Evidence 801(d)(2)(B), and were thus admissible under the law governing the use of attorney statements to impeach. *See infra* note 224 and accompanying text.

65. *See Gear Petroleum*, 948 F.2d at 1545.

66. *Id.* at 1546. The Tenth Circuit applied a "clearly erroneous" standard of review to the issue of the letters' admission for the purpose of impeachment, on the basis of Tenth Circuit precedent stating that "[t]he admission of evidence is discretionary with the trial court and will not be disturbed on appeal unless clearly erroneous." *Id.* at 1544 (quoting *Blim v. Western Electric Co.*, 731 F.2d 1473, 1476 (10th Cir. 1984) (per curiam)). It is unclear whether the court thought that some fact-finding warranting the clear error standard was involved. Elsewhere in the opinion, when addressing the EEOC's argument that the letters were submitted during the EEOC's investigation rather than during compromise negotiations, the court applied an "abuse of discretion" standard. *Id.* at 1545 ("We cannot say that the district court abused its discretion in determining that the Bauer letters were part of compromise negotiations and therefore were excludable.").

67. *Id.* at 1545.

68. *Id.* at 1546.

69. *Id.* at 1545-46 (quoting Stephen A. Saltzburg & Kenneth R. Redden, *Federal Rules of Evidence Manual* 286 (4th ed. 1986)). The court quoted another commentator relating the purported legislative view of Rule 408: "[C]ommentators have noted that '[t]he clear import of the Conference Report as well as the general understanding among lawyers is that [inconsistent] conduct or statements [made in connection with compromise negotiations] may not be admitted for impeachment purposes.'" *Id.* at 1545

The court did not acknowledge that the letters tended to prove that the employer's defense was false.

Several lower federal courts and state courts have reached the same result as the Tenth Circuit in *Gear Petroleum*. In *Davis v. Rowe*,⁷⁰ for example, the plaintiff sued to recover the value of art consigned to the defendant and lost in a fire.⁷¹ The defendant contended that the art collection was worth only the \$250,000 the parties had set forth in the consignment agreement.⁷² In two letters to its own insurer, however, the defendant had stated that the plaintiff's collection was worth more than \$4.6 million.⁷³ When the defendant moved to exclude these letters as statements made in compromise negotiations with the insurer, the court granted the motion.⁷⁴ Citing *Gear Petroleum*, the district court stated that "[i]nconsistent conduct or statements made in connection with compromise negotiations may not be used for impeachment purposes."⁷⁵

In *Vedin v. Texaco, Inc.*,⁷⁶ the plaintiff sought damages against Texaco for injuries he sustained when his boat crashed into an underwater obstruction that he alleged was owned by Texaco.⁷⁷ At trial Texaco claimed that it did not own the underwater obstruction.⁷⁸ To impeach Texaco's witnesses, the plaintiff sought to introduce evidence that Texaco's own insurer had paid the plaintiff for the property damage to the boat, thereby proving that Texaco owned the obstruction causing the injuries.⁷⁹ The district court excluded this evidence, holding that evidence of conduct during a compromise negotiation is inadmissible to impeach a party's

(quoting Graham, *supra* note 50, at 116). As explained, *supra* note 50, however, it is not at all clear from the Conference Report what the Conference Committee believed concerning impeachment by prior inconsistent statement. The Conference Committee did not address the issue.

70. No. 91-C-2254, 1993 WL 34867 (N.D. Ill. Feb. 10, 1993).

71. *See id.* at *1.

72. *See id.*

73. *See id.*

74. *Id.* at *5.

75. *Id.*

76. No. 92-3405, 1995 WL 232667 (E.D. La. Apr. 18, 1995). From the body of the opinion in this case, it appears that the plaintiff's name actually was "Verdin" rather than "Vedin." The "Vedin" name is nonetheless used in the text here so that readers may readily access the case.

77. *See id.* at *1.

78. *See id.* at *2.

79. *See id.*

defense because such impeachment is indistinguishable from using compromise evidence to prove liability.⁸⁰

Finally, in *C&K Engineering Contractors v. Amber Steel Co.*,⁸¹ the Supreme Court of California held that inconsistent statements made during negotiation could not be used to impeach.⁸² In *C&K*, the plaintiff general contractor brought a promissory estoppel action against the defendant subcontractor because the subcontractor had bid work at a very low price and then refused to perform when it found out that its bid was the result of a calculation error.⁸³ The subcontractor defended on the ground that the contractor's reliance on the subcontractor's bid was not reasonable because the contractor did not follow the industry custom of notifying the subcontractor of the gap between its bid and its competitors and permitting the subcontractor to modify the bid in the event of a mistake.⁸⁴ At trial, the contractor's employee testified to a phone conversation in which he claimed he had indeed notified the subcontractor that its bid was dramatically lower than its competitors.⁸⁵ The subcontractor sought to impeach this testimony by calling the party who represented the contractor in settlement negotiations.⁸⁶ According to the subcontractor, the contractor's representative during settlement negotiations had recounted the phone conversation quite differently from, and inconsistent with, the contractor's employee's account at trial.⁸⁷

The trial court did not permit the subcontractor to call the contractor's representative to testify to the alleged inconsistency, and the California Supreme Court affirmed.⁸⁸ The court wrote, "the excluded admission occurred during compromise negotiations in which both parties were discussing, and attempting to discover, the facts underlying their dispute. The strong public policy favoring settlement negotiations and the necessity

80. *Id.*

81. 587 P.2d 1136 (Cal. 1978).

82. *See id.* at 1142-43.

83. *See id.* at 1138.

84. *See id.*

85. *See id.* at 1142.

86. *See id.*

87. *See id.*

88. *Id.* at 1142-43.

of candor in conducting them combine to require exclusion of [the plaintiff contractor's] admission."⁸⁹

These cases holding that Rule 408 does not allow negotiation statements to be used to impeach by prior inconsistent statement (and several other cases suggesting that result, if not directly so holding)⁹⁰ are not the only cases to address the question. The courts have divided on the issue, and a somewhat greater number have either held or suggested that Rule 408 allows for impeachment by prior inconsistent statement, because the Rule identifies the purposes for which compromise evidence cannot be used, and impeachment by prior inconsistent statement is not among them.⁹¹ Legal

89. *Id.*

90. *See* *Derderian v. Polaroid Corp.*, 121 F.R.D. 9, 12 & n.1 (D. Mass. 1988) (granting, for purpose of impeaching defendant's principals, plaintiff's discovery deposition of defendant's attorney related to defendant's attorney's statements during negotiations allegedly relating what defendant's principals had said, but stating that Rule 408 would not permit attorney's negotiation statements themselves to impeach defendant's principals); *Fidelity & Deposit Co. v. Hudson United Bank*, 493 F. Supp. 434, 444-45 (D.N.J. 1980) (dictum) (stating that evidence that bank had previously made and settled claim for insurance to cover its employee's theft would not have been admissible to impeach bank's claim that it had no knowledge of employee dishonesty when it applied for bond with plaintiff); *In re Golden Plan, Inc.*, 39 B.R. 551, 554 (Bankr. E.D. Cal. 1984) (holding that in bankruptcy trustee's action to set aside foreclosure sale to defendant, defendant could not introduce trustee's settlement letter stating that trustee no longer asserted interest in foreclosed property).

91. *See, e.g., County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 152-53 (8th Cir. 1984) (holding that manufacturer sued by county for window defects could impeach county witnesses' testimony with statements made by county during settlement negotiations with insurer); *Allen-Myland, Inc. v. International Bus. Machs. Corp.*, 693 F. Supp. 262, 284 & n.48 (E.D. Pa. 1988) (holding that antitrust defendant could impeach plaintiff's president's testimony that his company needed 1.2% rate of return on upgrade parts by introducing settlement letter in which plaintiff stated it needed rate of return greater than 1.87%); *Stainton v. Tarantino*, 637 F. Supp. 1051, 1082 (E.D. Pa. 1986) (holding that defendant could impeach plaintiff's testimony that he always believed he held 99% interest in property at issue by introducing testimony of real estate appraiser hired by plaintiff for settlement negotiations that plaintiff knew he held only 50% interest); *DeForest v. DeForest*, 694 P.2d 1241, 1247 (Ariz. Ct. App. 1985) (holding that defendant could impeach plaintiff's testimony that he had not been aware of spousal maintenance award until currently ordered to pay it by introducing prior judge's testimony that plaintiff had signed proposed settlement decree providing for award 18 months earlier); *In re Estate of O'Donnell*, 803 S.W.2d 530, 531 (Ark. 1991) (holding that probate respondent could impeach attorney's testimony that handwritten document was intended as holographic will with attorney's statements in negotiations that document was merely "shopping list" from which formal will was to be prepared); *Davidson v. Beco Corp.*, 753 P.2d 1253, 1255-57 (Idaho 1987) (holding that plaintiff could impeach defendant's testimony that plaintiff had agreed to accept tractor in payment of debt with settlement offer letter from defendant's attorney stating that plaintiff had refused defendant's reasonable offer of tractor); *El Paso Elec. Co. v. Real Estate Mart, Inc.*, 651 P.2d 105, 109 (N.M. Ct. App. 1982) (holding that utility could impeach testimony of condemnee's value expert that land was worth \$648,000 with testimony that expert had during negotiation valued land at \$350,000); *Houston Lighting & Power Co. v. Sue*, 644 S.W.2d 835, 842 (Tex. Ct. App. 1982) (holding that plaintiff could impeach witness's testimony that he had no authority to act on defendant's behalf by introducing settlement letter in which witness agreed to certain actions on defendant's behalf); *see also Kraemer v. Franklin & Marshall College*, 909 F. Supp.

commentators are likewise split on the question,⁹² and their division mirrors the courts' difficulty in deciding whether Rule 408's purpose limitations, or the policy behind the Rule, should govern.

It is clear, however, that a party whose opponent advances two different versions of the facts involved in a dispute—one version that serves its interests best during negotiation and another version that serves its interests best at trial—faces under Rule 408 an uncertain remedy at best, and may well find itself unable to expose its opponent's deception. It is this uncertainty that demands the amendment to Rule 408 recommended in Part IV.

Moreover, in most jurisdictions, Rule 408 is not the only, or the most stringent, confidentiality provision. As will be described below, many federal courts and most state jurisdictions, whether or not they have adopted Rule 408, have enacted mediation privileges so broad that they almost certainly will preclude impeachment by prior inconsistent statement if the statement is made in the context of a mediated negotiation.⁹³

267, 268 (E.D. Pa. 1995) (dictum) (noting that plaintiff could have impeached dean's testimony that she intended to appoint plaintiff to associate professor with letter stating the contrary even if letter had been part of compromise negotiations); *Frieman v. USAir Group, Inc.*, No. Civ. A. 93-3142, 1994 WL 675221, at *9 (E.D. Pa. Nov. 23, 1994) (granting discovery of plaintiff's statements about his head injury in negotiations settling claim arising from earlier accident because some courts have permitted negotiation statements to be introduced for purposes of impeaching witnesses); *Missouri Pac. R.R. Co. v. Arkansas Sheriffs' Boys' Ranch*, 655 S.W.2d 389, 395 (Ark. 1983) (dictum) (noting that on retrial, if railroad's proof warranted it, railroad could be impeached with its claims agent's statement during negotiation that railroad thought it cheaper to pay claims arising out of fires than maintain right-of-way).

92. Compare Stephen A. Saltzburg et al., *Federal Rules of Evidence Manual* 513 (6th ed. 1994) (arguing that Rule 408 should not be interpreted to allow impeachment by prior inconsistent statement), Jane Michaels, *Rule 408: A Litigation Mine Field*, 19 Litig. 34, 37 (Fall 1992) (same), Green, *supra* note 11, at 1 (1986) (arguing that Rule 408 should be amended to ensure that impeachment by prior inconsistent statement is not permitted), Hjelmeset, *supra* note 7, at 111 (same), and Jon R. Waltz & J. Patrick Huston, *The Rules of Evidence in Settlement*, 5 Litig. 11, 16 (1981) (same), with 2 Louisell & Mueller, *supra* note 52, at 470 (stating that Rule 408 allows impeachment by prior inconsistent statement), Barry Russell, *Bankruptcy Evidence Manual* § 408.1, at 506 (2000) (same), 23 Wright & Graham, *supra* note 7, § 5314, at 286–87 (arguing that Rule 408 should be interpreted to allow for impeachment by prior inconsistent statement), and Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 La. L. Rev. 885, 952 (1997) (expressing concern that Rule 408 allows for impeachment by prior inconsistent statement).

93. See *infra* Part I.B.

B. The Unavailability of Impeachment by Prior Inconsistent Statement Under Existing Mediation-Privilege Statutes

By their terms, Rule 408 and its state law counterparts apply to all compromise negotiations.⁹⁴ Because mediations are but one form of compromise negotiations,⁹⁵ Rule 408 should be, and has been, applied to exclude evidence arising out of mediations.⁹⁶ The parties to mediations, however, can usually claim protection even greater than Rule 408 because of the widespread enactment of “mediation privilege”⁹⁷ statutes and rules.⁹⁸

94. See Fed. R. Evid. 408; *supra* note 18 (listing state counterparts to Fed. R. Evid. 408).

95. Within the alternative dispute resolution community, several definitions of “mediation,” emphasizing different aspects of the process, have been advanced, but all of those definitions include negotiation between the parties and assistance by a neutral third party. See, e.g., Nancy H. Rogers & Richard A. Salem, *A Student’s Guide to Mediation and the Law* 1 (1987) (“Mediation is a process through which two or more disputing parties negotiate a voluntary settlement of their differences with the help of a ‘third party’ (the mediator) who typically has no stake in the outcome.”); Alan Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard To Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1, 5 (“At its essence, mediation is a process of negotiations facilitated by a third person(s) who assists disputants to pursue a mutually agreeable settlement of their conflict.”); Leonard L. Riskin, *The Special Place of Mediation in Alternative Dispute Processing*, 37 U. Fla. L. Rev. 19, 24 (1985) (describing mediation as “a voluntary process in which a neutral third party, who lacks authority to impose a solution, helps participants reach their own agreement for resolving a dispute or planning a transaction”).

96. See *Vernon v. Acton*, 693 N.E.2d 1345, 1349 (Ind. Ct. App. 1998); *Espinoza v. Thomas*, 472 N.W.2d 16, 20 (Mich. Ct. App. 1991); see also *Doe v. Nebraska*, 971 F. Supp. 1305, 1307 (D. Neb. 1997) (assuming the applicability of Rule 408 to mediations). Some states have simply amended their version of Rule 408 to make it clear that Rule 408 applies to mediation negotiations. See, e.g., Haw. R. Evid. 408; Me. R. Evid. 408; Md. R. Evid. 5-408.

97. The term “mediation privilege” is used in this Article for two reasons. First, the majority of the statutes and rules that this Article will describe operate much the way other privileges, such as the attorney-client privilege, do: although the statutes may include certain exceptions, they generally label mediation communications “confidential,” prohibit their admission at trial, and preclude their disclosure to anyone outside the process. See *infra* notes 104–20 and accompanying text. Second, most of the literature on these statutes refers to them as mediation-privilege statutes. See *supra* notes 11, 95; *infra* notes 129, 130, 150. It can certainly be argued, however, that the statutes create something different from what is normally thought of as a privilege. At least one court has refused to treat a mediation confidentiality statute as creating a privilege, see *In re Grand Jury Subpoena*, 148 F.3d 487, 492 (5th Cir. 1998) (“‘Confidential’ does not necessarily mean ‘privileged.’”) (citing *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1205 (9th Cir. 1975) and *State v. Thompson*, 54 Wash. 2d 100, 104–05, 338 P.2d 319, 322 (1959)), and at least one commentator has preferred the term “mediation confidentiality legislation,” apparently on the ground that confidentiality provisions with exceptions are not true privileges. See, e.g., Mori Irvine, *Serving Two Masters: The Obligation Under the Rules of Professional Conduct To Report Attorney Misconduct in a Confidential Mediation*, 26 Rutgers L.J. 155, 168–69 (1994) (“Many jurisdictions have enacted mediation-confidentiality legislation which provide [sic] varying degrees of protection. Some statutes include exceptions to the confidentiality rule, while others create a mediation privilege that is comparable to the attorney-client privilege.”). Moreover, one commentator has insightfully pointed out that the statutory protection of mediation communications is based on a concept

These statutes and rules flatly prohibit the admission of mediation statements at trial.⁹⁹ Indeed, they typically prevent disclosure of mediation statements to any third party, at any time.¹⁰⁰

1. *The Breadth of Confidentiality Under Mediation-Privilege Statutes*

The mediation-privilege statutes and rules in place across the country¹⁰¹ vary considerably as to the mediations to which they apply. Some are written to apply to mediations in certain types of proceedings, such as

quite different from the concept usually invoked to justify a privilege: "The conclusion seems inescapable that what is truly at stake with a mediator's privilege is the promotion of the process of mediation rather than the protection of the relationship between mediator and party." Note, *Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence*, 105 Harv. L. Rev. 1339, 1356 (1992). In any event, the academic debate over the label makes little difference for the purpose of this Article because the prevailing law needs change whether the legislation creates a "privilege" or not.

98. For a comprehensive list of mediation-privilege statutes in effect through 1998, see Nancy H. Rogers & Craig McEwen, *Mediation: Law, Policy & Practice*, App. B (2d ed. 1994 & 1998 Supp.).

99. See *infra* notes 109–21 and accompanying text.

100. See, e.g., *infra* notes 118–22 and accompanying text.

101. The most recent compilation by Professors Rogers and McEwen indicates that some form of mediation-privilege statute is in place in 49 of the 50 states (all but Mississippi), the District of Columbia, and Puerto Rico. See Rogers & McEwen, *supra* note 98, at 149–245 & App. B (Supp. 1998). There are also a number of federal statutes conferring a form of mediation privilege, see *id.* at 249, for proceedings ranging from agricultural loan disputes, see 7 U.S.C. § 5101(c)(3)(D) (1994), to federal agency controversies, see 5 U.S.C. § 574 (1994 & Supp. IV 1998), to disputes over the treatment of disabled students, see 20 U.S.C. § 1415(e)(2)(G) (Supp. III 1997). Finally, a number of courts have adopted confidentiality provisions for at least portions of mediations as part of their local rules. See, e.g., U.S. Dist. Ct. Conn. Local R. 36(5); U.S. Dist. Ct. Mid. Dist. Fla. Local R. 9.07; U.S. Dist. Ct. S. Dist. Fla. Local R. 16.2(G)(2); U.S. Dist. Ct. Mass. Local R. 16.4(f); U.S. Dist. Ct. E. Dist. N.C. Local R. 32.07(h); U.S. Dist. Ct. Or. Local R. 240-2(d); U.S. Dist. Ct. E. Dist. Wash. Local R. 39.1(d)(3); U.S. Dist. Ct. W. Dist. Wash. Local R. 39.1(c)(5). An interesting question, beyond the scope of this Article, is whether these local court rules are valid in light of Federal Rule of Evidence 501, which codifies Congress' express intent to leave matters of privilege to the federal common law:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed 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.

Fed. R. Evid. 501; see also *id.* advisory committee's note. The Rules enacted by the Congress substituted the single Rule 501 in place of the 13 rules dealing with privilege and specifying the applicable relationships prescribed by the Supreme Court. See *id.*; see also Fed. R. Evid. 1101(d) (indicating that there are no federal proceedings to which rules of privilege, as opposed to other evidentiary rules, do not apply).

family law or workers' compensation.¹⁰² Some are triggered by court-ordered mediations,¹⁰³ specified mediation programs,¹⁰⁴ mediations conducted pursuant to agreement,¹⁰⁵ or some combination thereof.¹⁰⁶ Others apply only to mediations conducted by mediators with certain defined qualifications.¹⁰⁷ Still others are written very broadly and apply to virtually all mediations.¹⁰⁸

The privilege statutes and rules vary much less with respect to the types of information to which the privilege extends. They usually set forth a broad description of information that is protected and then enumerate categories of information that are excepted from the privilege.¹⁰⁹ In the majority of the statutes and rules, the mediation result itself, and all oral and written communications of both the mediator and the parties, are privileged.¹¹⁰ There are sometimes exceptions to the privilege for information relating to the commission of a crime,¹¹¹ information supporting a lawsuit against the

102. *See, e.g.*, Cal. Fam. Code § 3177 (West 1994) (child custody); Cal. Gov't Code § 12984 (West 1992 & Supp. 2000) (housing discrimination); Colo. Rev. Stat. Ann. § 8-43-205(2) (1998) (workers' compensation); N.C. Gen. Stat. § 50-13.1(b), (c) (1999) (family law); Wash. Rev. Code § 26.09.015(3) (1998) (West family law).

103. *See, e.g.*, Fla. Stat. Ann. § 44.102(3) (West Supp. 2000); Or. Rev. Stat. §§ 36.220-222 (1999); Wash. Rev. Code § 5.60.070(1) (1998).

104. *See, e.g.*, Fla. Stat. Ann. § 44.201(5) (West 1998) (citizen dispute settlement centers); Minn. Stat. Ann. § 494.02 (West 1990) (community dispute resolution program); Wash. Rev. Code § 7.75.050 (1998) (community dispute resolution centers).

105. *See, e.g.*, Minn. Stat. Ann. § 595.02(1)(k) (West 1988); Mo. Ann. Stat. § 435.014(1) (West 1992); N.D. Cent. Code § 31-04-11 (1996); Okla. Stat. Ann. tit. 12 § 1804(B)(2) (West 1993); Wash. Rev. Code § 5.60.070(1).

106. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2238(A) (West 1994); Wis. Stat. Ann. § 904.085 (2)(a) (West Supp. 1999).

107. *See, e.g.*, Mass. Gen. Laws Ann. ch. 233 § 23C (West 1986); Colo. Rev. Stat. Ann. § 13-22-302(2.4) (1998) Ann.; N.H. Rev. Stat. Ann. § 328-C:9.III (1995); R.I. Gen. Laws § 9-19-44(a) (1997).

108. *See, e.g.*, Ariz. Rev. Stat. Ann. § 12-2238(F) (West 1994); Va. Code Ann. § 8.01-581.21 (Michie 1992); Wyo. Stat. Ann. § 1-43-103 (Michie 1997).

109. *See* Kirtley, *supra* note 95, at 36 ("The usual statutory scheme is a broad general definition of information to be covered by the mediation privilege, followed by a list of specific exclusions.").

110. *See id.* (citing 5 U.S.C. §§ 574(a), (b) (1994 & Supp. IV 1998), Ariz. Rev. Stat. Ann. § 12-2238(B) (West 1994), Cal. Evid. Code § 1119 (West Supp. 2000), Colo. Rev. Stat. Ann. § 13-22-307(2) (1998), Fla. Stat. Ann. § 44.102(3) (West Supp. 2000), Kan. Stat. Ann. § 23-606 (West 1988), Minn. Stat. Ann. § 595.02(1)(k) (West 1988), Mo. Ann. Stat. § 435.014(2) (West 1992), N.H. Rev. Stat. Ann. § 328-C:9.I (1995), Ohio Rev. Code Ann. § 2317.02(H) (Anderson 1995), Wash. Rev. Code § 5.60.070(1)).

111. *See, e.g.*, Colo. Rev. Stat. Ann. § 13-22-307(2)(b) (1998) (providing that privilege does not apply to communication reflecting "intent to commit a felony, inflict bodily harm, or threaten the safety of a child"); N.D. Cent. Code § 31-04-11(1) (1996) (providing that privilege does not apply to evidence that "relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act"); Wash. Rev. Code

mediator,¹¹² and information not traceable to the parties used for research purposes.¹¹³ Apart from exceptions such as these, however, the exclusion of statements under the mediation statutes and rules is near absolute.¹¹⁴ In contrast to Rule 408, the statutes and rules do not allow consideration of the purpose for which the statement is offered.¹¹⁵

A Massachusetts statute, for example, provides that “[a]ny communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding.”¹¹⁶ The sole exception to this statute is the mediation of labor disputes.¹¹⁷ Colorado law provides similar protection: “Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator”¹¹⁸ Exceptions are available if a party’s communication reveals the party’s intent to commit a felony, inflict bodily harm or endanger a minor child, if a statute requires disclosure, if disclosure is necessary in an action alleging mediator misconduct, or if all the parties and the mediator consent to disclosure in writing.¹¹⁹

§ 7.75.050 (1998) (providing that privilege does not apply to “threat that injury or damage may be inflicted on any person or on the property of a party to the dispute”); Wyo. Stat. Ann § 1-43-103(c)(ii) (Michie 1997) (providing that privilege does not apply to communication that “involves the contemplation of a future crime or harmful act”).

112. See, e.g., 5 U.S.C. § 574(i) (1994); Colo. Rev. Stat. Ann. § 13-22-307(2)(d) (1998); Fla. Stat. Ann. § 44.102(4) (West Supp. 2000); Idaho R. Evid. 507(4)(E); N.D. Cent. Code §§ 31-04-11(2) (1996); Or. Rev. Stat. § 36.222(5) (1999); Va. Code Ann. § 8.01-581.22(ii) (Michie 1992); Wash. Rev. Code § 5.60.070(1)(g) (1998).

113. See, e.g., 5 U.S.C. § 574(h) (1994); Colo. Rev. Stat. Ann. § 13-22-307(5) (1998); Fla. Stat. Ann. § 44.201(5) (West 1998); Utah Code Ann. § 78-31b-8(2)(d) (1996).

114. Indeed, some of the privilege statutes and rules include within their language no exceptions whatsoever. See, e.g., Ala. Civ. Ct. Mediation R. 11; Mass. Gen. Laws Ann. ch. 233 § 23 (West 1986); Mo. Ann. Stat. § 435.014(2) (West 1992); R.I. Gen. Laws § 9-19-44 (1997); Wash. Rev. Code § 26.09.015(3) (1998).

115. Compare *supra* text accompanying notes 21, 26, with *supra* text accompanying notes 109–14.

116. Mass. Gen. Laws Ann. ch. 233 § 23C (West 1986).

117. See Mass. Gen. Laws Ann. ch. 233 § 23C.

118. Colo. Rev. Stat. Ann. § 13-22-307(2) (1998).

119. See Colo. Rev. Stat. Ann. § 13-22-307(2)(a)–(d) (1998).

Examples at the federal court level¹²⁰ include the local rules of the Western District of Washington:

All proceedings of the mediation conference, including any statement made by any party, attorney or other participant, shall, in all respects, be privileged and not reported, recorded, placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission. No party shall be bound by anything done or said at the conference unless a settlement is reached.¹²¹

The local rules of the Southern District of Florida are similarly broad:

All proceedings of the mediation conference, including statements made by any party, attorney, or other participant, are privileged in all respects. The proceedings may not be reported, recorded, placed into evidence, made known to the trial court or jury, or construed for any purpose as an admission against interest. A party is not bound by anything said or done at the conference, unless a written settlement is reached, in which case only the terms of the settlement are binding.¹²²

Neither of these rules enumerates any exceptions.¹²³

Of course, however broad these privilege statutes and rules are, it is important to keep in mind that they cover only “communications” during mediations. No jurisdiction has extended the privilege beyond communications to the information within the communication. Thus, any subject matter opened during a mediation may be explored in later discovery or trial provided the speaker is not asked what was said. In this respect, the mediation-privilege statutes comport with the third sentence of Rule 408, which provides that otherwise discoverable evidence does not become undiscoverable simply because it is presented in a compromise negotiation.¹²⁴

120. Mediation has become very common in the federal courts largely because of the mandate of the Civil Justice and Reform Act of 1990 (CJRA), Pub. L. No. 101-650, 104 Stat. 5090 (codified as amended at 28 U.S.C. §§ 471–482 (1994)). The CJRA required all 94 federal district courts to develop a “civil justice expense and delay reduction plan,” and recommended that, as part of that plan, courts develop alternative dispute resolution programs, including mediation services, to which they could refer appropriate cases. *See* 28 U.S.C. §§ 471, 473(a)(6) (1994).

121. U.S. Dist. Ct. W. Dist. Wash. Local R. 39.1(c)(5).

122. U.S. Dist. Ct. S. Dist. Fla. Local R. 16.2(G)(2).

123. *See* U.S. Dist. Ct. S. Dist. Fla. Local R. 16.2(G)(2); U.S. Dist. Ct. W. Dist. Wash. Local R. 39.1(c)(5).

124. *See* Fed. R. Evid. 408.

2. *The Public Policy Rationale Behind the Mediation Privilege*

Mediation privileges such as these are almost all of very recent vintage.¹²⁵ In the last two decades, few voices for litigation reform have been louder or more successful than the call for alternative dispute resolution (ADR),¹²⁶ and mediation appears to have emerged as the ADR process of choice.¹²⁷ As mediation has become increasingly popular,¹²⁸ academics and practitioners alike have stressed the need to ensure confidentiality in the process,¹²⁹ and both legislatures and courts have responded.¹³⁰

125. Virtually all of the mediation-privilege statutes have been enacted since 1980. See Rogers & McEwen, *supra* note 98, § 9:01, at 1.

126. See Elizabeth Plapinger & Donna Stienstra, *ADR & Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers* 4 (1996), reprinted at 172 F.R.D. 550, 555 (1996); Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 Wash. U. L.Q. 47, 57–58 (1996).

127. See Plapinger & Stienstra, *supra* note 126, at 556; Elizabeth Plapinger & Donna Stienstra, *Federal Court ADR: A Practitioner's Update*, 14 *Alternatives to High Cost Litig.* 7, 7 (1996) (“Mediation has eclipsed arbitration as the primary ADR process in the federal district courts.”).

128. Although mediation has become more popular as a court adjunct in recent years, the mediation process is not a new phenomenon. Jacqueline Nolan-Haley has collected several sources showing that a variety of ancient religions and cultures have long used mediative techniques to resolve disputes, that statutorily mandated mediation began in 1913 when Congress provided that the Secretary of Labor act as a mediator, and that community mediation programs were developed by the federal government in the 1960s and 1970s to resolve disputes in urban areas. Nolan-Haley, *supra* note 126, at 57 n.46; see also Kovach, *supra* note 7, at 21–22.

129. See, e.g., Brazil, *supra* note 7, at 1023; Eileen P. Friedman, *Protection of Confidentiality in the Mediation of Minor Disputes*, 11 Cap. U. L. Rev. 181, 196 (1982) (“The importance of confidentiality in programs established for the mediation of minor disputes cannot be over-stated. Confidentiality is essential to achieve the full cooperation of participants and, consequently, the integrity and ultimate success of the program.”); Kirtley, *supra* note 95, at 17; John Murphy, *Mediation and the Duty To Disclose*, ABA Special Comm. on Dispute Resolution, June 1984, in *Confidentiality in Mediation: A Practitioner's Guide* 87, 87 (ABA 1985) (“A guarantee of confidentiality promotes the honest airing of grievances by the disputants which enables the mediator to discover the true sources of conflict.”); Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1, 40 (1995); James J. Restivo, Jr. & Debra A. Mangus, *Alternative Dispute Resolution: Confidential Problem-Solving or Every Man's Evidence?*, in *Confidentiality in Mediation: A Practitioner's Guide* 143, 143 (ABA 1985) (“It is universally recognized that in order for non-judicial settlement discussions and other ADR mechanisms to work, they must be conducted in a spirit of candor and in such a fashion that anything said or done during the discussions will not cause jeopardy to any of the parties should there be subsequent litigation.”); Edwin B. Wainscott & Douglas W. Holly, *Zlaket Rules and Alternative Dispute Resolution*, in *Dispute Resolution Alternatives Supercourse*, 481 PLILit 631, 673 (1993) (“Acknowledging the importance of confidentiality in the ADR context and fostering the use of ADR, courts and legislatures throughout the country have recognized or established privileges and rules of confidentiality for communications made in the context of ADR.”); Christopher H. Macturk, Note, *Confidentiality in Mediation: The Best Protection Has Exceptions*, 19 Am. J. Trial Advoc. 411,

The reasoning initially advanced to support the enactment of mediation-privilege statutes sounded essentially the same theme as that used to justify Rule 408's exclusion of negotiation statements.¹³¹ According to one commentator, "[a] guarantee of confidentiality promotes the honest airing of grievances by the disputants which enables the mediator to discover the true sources of conflict."¹³² In another's view,

It is universally recognized that in order for non-judicial settlement discussions and other ADR mechanisms to work, they must be conducted in a spirit of candor and in such fashion that anything said or done during the discussions will not cause jeopardy to any of the parties should there be subsequent litigation.¹³³

In later pieces, scholars have continued to rely on the notion that the mediation process cannot work if participants are fearful of having their own statements used against them, but have also argued that Evidence Rule 408 is inadequate to ensure confidentiality in mediation. Noting that Rule 408 allows the admission of negotiation communications for "other purposes," does not protect mediation communications from discovery (as opposed to admission at trial), and does not apply to proceedings not

412 (1995) ("Confidentiality is pivotal to the success of mediation [because it] creates an atmosphere where disputants feel free to openly explore all aspects of their relationship and particular dispute."); Note, *Protecting Confidentiality in Mediation*, 98 Harv. L. Rev. 441, 445 (1984) ("Mediation demands [confidentiality so] that the parties feel free to be frank not only with the mediator but also with each other:").

130. Indeed, the American Bar Association Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws are in the process of drafting a Uniform Mediation Act that the organizations hope will be adopted by all states for all mediations, and their initial focus was on drafting a privilege that would apply to mediation. See Richard C. Reuben & Nancy H. Rogers, *Choppy Waters: Movement Toward a Uniform Confidentiality Privilege Faces Cross-Currents*, *Disp. Resol. Mag.*, Winter 1998, at 4. The March 2000 draft is set forth at <<http://www.pon.harvard.edu/guests/uma>> (visited June 20, 2000). Under section 5 of the draft Uniform Mediation Act, both the participants in a mediation and the mediator would have a privilege to prevent the discovery and disclosure of "mediation communications" in a civil or misdemeanor criminal proceeding. See March 2000 Draft Uniform Mediation Act, § 5(c), (d), at 3-4. Under section 6, this privilege could be waived only by express consent of all the participants, or, in the case of the mediator's communications, all the participants and the mediator. See *id.* § 6(a), (b), at 4. Section 8 of the draft provides for five absolute and three qualified exceptions to the privileges, which are much like those described *supra* notes 111-13 and accompanying text. See *id.* § 8(a), (b), at 5-6. The draft includes no provision that would allow for impeachment when a party has engaged in intentional misrepresentation. See generally *id.*

131. Compare sources cited *supra* note 129, with sources cited *supra* notes 68-69, 89 and accompanying text.

132. Murphy, *supra* note 129, at 87.

133. Restivo & Mangus, *supra* note 129, at 143.

governed by the rules of evidence, Professor Alan Kirtley asserts that “Rule 408’s shortcomings in protecting mediation communications provide justification for a mediation privilege and suggest its design.”¹³⁴ Wayne Brazil (a United States Magistrate at the time he wrote) agrees:

Unfortunately for lawyers and clients who want “free and frank discussion” 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.¹³⁵

3. *The Likely Treatment of Misrepresentations Under Mediation-Privilege Statutes*

Because the cases applying the mediation-privilege statutes are only now emerging, it remains to be seen how the courts will react to efforts to introduce mediation communications for purposes other than proving the validity or invalidity of a claim or its amount.¹³⁶ The sweeping language of the privilege statutes,¹³⁷ however, not to mention the scholarly commentary that lies behind them,¹³⁸ suggests that participants in a mediation will be able to claim virtually blanket protection for any statements they make in the course of the mediation process. Although Rule 408 would permit a mediation participant’s statements to be used for any purpose other than proving the validity or invalidity of a claim or its amount, 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,”¹³⁹ the

134. Kirtley, *supra* note 95, at 13.

135. Brazil, *supra* note 7, at 966 (quoting *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976)).

136. Most of the cases thus far seem to address whether a party may introduce statements during a mediation to support a claim that an oral agreement was reached during the mediation, and the courts have usually concluded that the party may not. *See, e.g.*, *Ryan v. Garcia*, 33 Cal. Rptr. 2d 158, 162 (Cal. Ct. App. 1994); *Royal Caribbean Corp. v. Modesto*, 614 So. 2d 517, 519 (Fla. Dist. Ct. App. 1992).

137. *See supra* Part I.B.1.

138. *See supra* Part I.B.2.

139. Fed. R. Evid. 408.

mediation-privilege statutes flatly prohibit such uses.¹⁴⁰ Indeed, the mediation privileges appear to have been enacted in large measure precisely to eliminate even the limited admissibility allowed under Rule 408.¹⁴¹

Thus, in many jurisdictions today, a party who presents one set of facts during a mediation, and a different set of facts as the case proceeds through discovery and trial, faces no consequences. Because the privilege statutes are written so broadly, and none provides for impeachment by prior inconsistent statement, the party's falsehood may well go unexposed to the trier of fact. In the name of ensuring "free and frank discussion" at the negotiation table, the mediation privilege effectively confers a license to lie.

II. THE MYTHICAL NATURE OF THE PUBLIC POLICY RATIONALE AS APPLIED TO NEGOTIATION STATEMENTS OF FACT

Evidence law includes a variety of rules that exclude relevant evidence in order to promote what is seen as a worthy public policy. Federal Rule of Evidence 407, for example, excludes evidence of subsequent remedial measures on the ground that freely admitting such evidence would discourage parties from making products or conditions safer.¹⁴² Likewise, the attorney-client privilege has long been recognized on the ground that admitting attorney-client communications would discourage clients from confiding in their attorneys.¹⁴³ The idea behind such exclusionary rules is

140. Compare *Eisenberg v. University of N. M.*, 936 F.2d 1131, 1134 (10th Cir. 1991) (holding that affidavit submitted by attorney to propose settlement negotiations could be considered as support for opposing attorney's Rule 11 motion, because Rule 11 showings are "another purpose" under Rule 408), with *Kitchen v. Kitchen*, 585 N.W.2d 47, 49 (Mich. Ct. App. 1998) (holding that under state mediation privilege statute, plaintiff's mediation statement could not be considered for purpose of imposing sanctions). The sole exception might be when an effort to obstruct a criminal investigation rises to the level of felony conduct, in a jurisdiction such as Colorado that has included an exception to the mediation privilege for statements that reveal an intent to commit a felony. See *supra* note 119 and accompanying text.

141. See *supra* notes 134–35 and accompanying text.

142. See Fed. R. Evid. 407 advisory committee's note. The Advisory Committee's note states, [u]nder a liberal theory of relevancy[, the relevancy] ground alone would not support exclusion as the inference is still a possible one . . . The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety.

Id.

143. See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications [and] is intended to encourage 'full and frank communication between attorneys and their clients and thereby promote

that the benefit to be gained from admitting evidence in one particular suit is outweighed by the cost to the public at large.¹⁴⁴

The exclusion of negotiation statements of fact (as a category separate from compromises or offers to compromise) by Rule 408 and the mediation-privilege statutes reflects the same sort of reasoning. The factual statements a party makes in a negotiation will in most instances be relevant, but Rule 408 and the mediation-privilege statutes exclude them on the public policy rationale that to do otherwise would inhibit the “free and frank discussion” necessary to render negotiations and mediations effective in producing settlement.¹⁴⁵ As one court has described the rationale in the context of a mediation-privilege rule applied to an appellate mediation,

[i]f participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.¹⁴⁶

In short, the need to ensure that parties can speak freely, and thereby be more likely to settle, is thought to outweigh whatever probative value a statement made during negotiation might have.

The courts that have interpreted Rule 408 to preclude the use of inconsistent negotiation statements to impeach, and the legislatures and courts that have created mediation privileges excluding such statements, have simply extended the public policy rationale one step further. When one party tries to introduce an inconsistent statement of fact that the other made during a negotiation, that statement bears additional relevance, i.e., relevance over and above the underlying facts addressed by the statement: it leads to an inference about the inconsistent party’s credibility. Yet the

broader public interests in the observance of law and the administration of justice.”) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) and citing *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)).

144. *See supra* note 142.

145. *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 712 (D. Minn. 1976).

146. *Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979).

courts and legislatures continue to rely on the idea that admitting negotiation statements will inhibit communication during the negotiation, concluding that the benefit of encouraging settlement outweighs the cost of excluding that relevant material.¹⁴⁷

The premise for this conclusion, what will hereafter be referred to as the public policy rationale, has been almost universally accepted, without question.¹⁴⁸ As Justice O'Connor recently stated, however, "[a] privilege should operate . . . only where 'necessary to achieve its purpose,' and an invocation of [a] privilege should not go unexamined 'when it is shown that the interests of the administration of justice can only be frustrated by [its] exercise.'"¹⁴⁹ This Article posits that when one examines negotiation confidentiality against the rationale that supposedly supports it, there is little reason to believe that confidentiality with respect to statements of fact actually promotes settlement, and even less reason to believe that prohibiting impeachment does.

First, there is no empirical evidence to support the public policy rationale even generally,¹⁵⁰ much less with respect to impeachment. For example, the author is unaware of any studies to suggest that the enactment of Rule 408—which reversed the common law on the admissibility of statements made during negotiation¹⁵¹—led to an increase in the amount of negotiated settlements. While this absence of empirical evidence is not conclusive in and of itself, it does suggest that the theory warrants greater scrutiny than it has heretofore received.¹⁵²

147. See *supra* notes 55–90, 109–23, 129 and accompanying text.

148. See, e.g., *supra* note 129 and accompanying text.

149. *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976) and *Cohen v. Jenkintown Cab Co.*, 357 A.2d 689, 693–94 (Pa. Super. Ct. 1976)).

150. See *Green*, *supra* note 11, at 2 n.2 ("Claims for the need for a mediation privilege are characterized both by the forcefulness of their assertion and the dearth of evidence to support such assertions."); Scott A. Hughes, *The Case for a Mediation Confidentiality Privilege Still Has Not Been Made*, *Disp. Resol. Mag.*, Winter 1998, at 14, 14 ("[T]here is no empirical work to demonstrate a connection between privileges and the ultimate success of mediation. Although parties may have an expectation of privacy, no showing has been made that fulfilling this expectation is crucial to the outcome of mediation.").

151. See *supra* notes 34–38 and accompanying text.

152. Instead of engaging in such scrutiny, most commentators have simply assumed that the public policy rationale is accurate and placed the burden on others to disprove it. Consider the following passage from Wayne Brazil's article:

[T]he choice is between (1) and [sic] 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

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Second, the courts and legislatures relying on the rationale that admitting negotiation statements will inhibit successful negotiation fail to distinguish between the different types of statements parties make during negotiations. As Part II.A will discuss, this lack of precision is significant, because the inhibiting effect of admitting negotiation statements is likely to differ markedly depending on what type of statement is involved.

Third, the notion that admitting negotiation statements would discourage settlements appears to be based on two assumptions: that settlements most often result when the parties admit the weaknesses in their cases, and that a negotiating party will feel free to admit the weaknesses in his or her case so long as a confidentiality rule is in place. As described below, these assumptions are unrealistic. The truth is that many settlements result even without the parties' admissions of weakness, and the admissions that are made would usually be made even without confidentiality, because the substance of the admissions will be revealed by other evidence in any event.¹⁵³

Finally, when one considers the types of statements that are actually made during negotiations, it becomes clear that confidentiality is necessary in largest measure only to protect statements that are not related to the underlying facts: the type of statements that address the parties' reasons for wanting to settle, such as a party's financial status or fear of proceeding. This type of statement, however, is not the type of statement that would even be used for impeachment, because the subject matter would not be relevant at trial, and thus there would *be* no relevant testimony to impeach.

A. Distinguishing the Types of Statements Parties Make During Negotiations

The premise on which Rule 408 and the mediation-privilege statutes are based is that admitting any statement whatsoever made during negotiations will inhibit the type of communication necessary for cases to settle. The

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.

Brazil, *supra* note 7, at 978 (emphasis added).

153. See *infra* Part II.B.

jurisdictions that have adopted Rule 408 have recognized that there are circumstances when negotiation statements should be admitted—for example, when they are used to show bias, obstruction of justice, or that a party has not engaged in undue delay—but these jurisdictions appear to have done so not on any belief that admitting only certain types of statements will inhibit settlement. Rather, they seem to have concluded, as a matter of policy, that the need to admit negotiation statements for certain purposes outweighs what is nonetheless believed to be the settlement-inhibiting effect of admitting *any* statement whatsoever.¹⁵⁴ Likewise, many of the mediation-privilege statutes include exceptions that will render negotiation statements admissible (for example, when such statements evidence an intent to commit a crime), but this also appears to reflect simply a cost-benefit analysis, a policy choice, rather than recognition that the admission of some types of statements may not inhibit settlements at all.¹⁵⁵

1. The Need To Distinguish the Different Types of Factual Statements Made During Negotiation

In reality, parties could be expected to react very differently in negotiations, depending on what type of negotiation statement were to be admitted. Imagine, for example, that a mediator asks a party to prepare one paragraph explaining why the party believes it would win at trial. It would not change one whit that party's willingness to do so—or any future party's willingness to do so—if the mediator told the party that the paragraph could be admitted at trial. Then consider that the mediator asks a party to prepare one paragraph describing its primary reason for wanting to settle the case. If a party knew that that type of statement could be admitted at trial, it would certainly choose its words carefully, and very well might not be candid. This lack of candor might, in turn, impede settlement negotiations.

This simple contrast suggests that the public policy rationale is overbroad, because the rationale fails to account for the difference in inhibiting effect of admitting different types of statements. The contrast further suggests that to determine whether the public policy rationale is accurate even in the majority of cases, it is necessary to break the overbroad

154. See *supra* notes 36–37 and accompanying text (describing Advisory Committee's reasoning behind Rule 408).

155. See *supra* notes 132–35 and accompanying text (describing scholarly commentary advocating adoption of mediation-privilege statutes).

category of “negotiation statements” into the different types of statements that might be made during negotiations.

2. *Identifying the Different Types of Negotiation Statements*

The first, broad level of differentiation among the types of statements that might be made during negotiations would distinguish (1) admissions of liability, (2) statements that relate to the facts underlying the dispute, and (3) statements that may aid resolution of the dispute but do not actually relate to the dispute. Applying this distinction to the hypothetical with which this Article opened, an admission of liability would be the University’s saying, “pay decisions were made on a discriminatory basis.” A statement in the second category—one of fact related to the underlying dispute—would be the plaintiff’s saying, “I have been awarded a Guggenheim fellowship, and none of the men paid more than I has received that award.” That statement is a statement of fact that relates plainly to the dispute over whether the defendant University is discriminating on the basis of gender in paying the plaintiff less. A statement in the third category—one of fact relevant to settlement but not related to the underlying dispute—would be the University’s saying, “we do not have the money in the budget to settle with you on these terms.”

Once these distinctions are drawn, further distinctions can be drawn within the second category of statements of fact related to the underlying dispute. One such distinction would be between statements of fact that the speaker perceives as supporting the speaker’s position, and statements of fact that the speaker acknowledges weaken the speaker’s position. Using the hypothetical again, the statement of the University’s counsel that the decision makers were both women would be a statement of fact that the speaker perceived as supporting the University’s position. In contrast, if plaintiff’s counsel admitted that the plaintiff’s student evaluations were worse than her male counterpart’s, that would be a statement that the speaker perceived as weakening the speaker’s position.

Thus, the universe of possible factual statements during negotiations can be charted initially as follows:

1. Pure admissions of liability or non-liability
2. Statements of fact related to the underlying dispute
 - a. Statements of fact perceived to support the speaker's position
 - b. Statements of fact perceived to weaken the speaker's position
3. Statements of fact relevant to resolving the dispute but not related to the underlying dispute

When the types of negotiation statements are distinguished this way, the public policy rationale, at first blush, appears accurate. It is clear, as described above, that even if there were no confidentiality, parties would not be inhibited from making the types of statements that fall within category 2.a (statements of fact that support their position) because no party would mind having the strengths of its case repeated outside the negotiation session. Negotiating parties might be inhibited, however, from making the types of statements that fall within categories 1, 2.b, and 3. If no other considerations were in play, negotiating parties would theoretically be less likely to admit liability (category 1), admit the weakness in their cases (category 2.b), or discuss the business or personal reasons that they want to settle (category 3) if they knew that these statements would be disclosed outside the negotiating session.

B. *Confidentiality's Limited Effect on the Statements Parties Make in Negotiation*

Of course, it is one thing to consider the effect of confidentiality in the abstract, and quite another to consider the effect of confidentiality in context. To measure the effect of confidentiality in context, one has to look at all of the other forces that come into play in a negotiation to determine what a party says. When these forces are considered, it becomes clear that confidentiality does not in fact promote the types of statements in categories 1 or 2 (admissions of liability or non-liability, or statements of fact related to the dispute), but only those statements falling within category 3.

1. *Admissions of Liability*

Common sense dictates that statements in category 1, pure admissions of liability or non-liability, are neither encouraged nor discouraged by

confidentiality. It could be argued, as a theoretical matter, that parties would be less likely to make such statements if their statements could be admitted at trial. In the actual negotiation context, however, it is clear that confidentiality has no effect whatsoever on a party's willingness to admit liability or non-liability. The reality is that regardless of whether their statements will later be disclosed or not, parties do not generally go into *any* negotiation and admit that they are liable or that their opponent is not. The purpose of negotiation, after all, is achieving the most self-beneficial outcome possible, and conceding the ultimate question would so disadvantage a party within the negotiation itself, wholly apart from what might happen at trial, that an admission of liability or non-liability is totally unlikely. Common sense suggests that people negotiating for the most self-beneficial outcome possible simply do not walk into negotiations and make confessions of wrongdoing, and that is going to be true even when the session is entirely confidential.¹⁵⁶ The public policy rationale thus fails because these statements almost certainly will not be made even when absolute confidentiality is in place.

The only exception would be a negotiation in which one party had already conceded liability and the amount owing was the only question. In that instance, however, even in the absence of confidentiality, parties would not be inhibited from admitting liability if they knew their statements could be used against them, because their admissions of liability would already be a matter of record. Thus, to the extent that negotiation statements are excluded on the thought that parties need to be free in negotiations to admit their liability, the public policy rationale on which the exclusion is based is a mirage. Because the kinds of statements in category 1 either are not made, or are made in situations where the party making them would not be affected by whether they were admissible or not, the public policy rationale that admitting negotiations statements would inhibit settlements does not apply.

156. Further, at least with respect to liability, Rule 408 does not even apply when one side has admitted liability or the other's non-liability. It is well settled that Rule 408 applies only in the context of a disputed claim, and if one side has admitted liability and is simply trying to talk down the amount legitimately owed, there is not a disputed claim to trigger the rule. *See* Fed. R. Evid. 408 advisory committee's note ("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.") (citation omitted); *see also In re B.D. Int'l Discount Corp.*, 701 F.2d 1071, 1074 n.5 (2d Cir. 1983).

2. *Admissions of “Bad Facts”*

Much the same might be said with respect to category 2.b (statements of fact that the speaker perceives are weaknesses in his or her case). It is unrealistic to assume that parties regularly admit facts during negotiation that they perceive will weaken their position.¹⁵⁷ Fundamental negotiation strategy suggests that a party will seek to capitalize on the other party's risk of failing at trial, because even a party with a very strong case must fear the unpredictability of the factfinder. For that reason, the usual approach to a negotiation is to emphasize the strengths of one's case and leave assertions of one's weaknesses to the other side.¹⁵⁸ This is not to say that a party will *never* admit the weaknesses in its case. Certainly, in the give-and-take of a negotiation, or when faced with an incisive mediator or opponent, parties will sometimes acknowledge what might be called “bad facts.” And sometimes these admissions are what enable parties to meet in the middle and reach a negotiated solution.

There are, however, two kinds of bad facts, and within category 2.b—what might be called the “admissions of bad facts” category—there is yet another potential distinction: (1) admissions of bad facts that the party believes will be or have been discovered, and (2) admissions of bad facts that the party has reason to believe may never come to light. Returning to the opening hypothetical, an example of an admission of a bad fact that the University knows will be discovered would be the statement, “all of the female professors are paid less than the male professors.” This is the type of bad fact the University is likely to admit when pressed, because the University will believe it is not truly giving away anything: even minimal

157. See Gerald R. Williams, *Legal Negotiation and Settlement* 70–71 (1983). Professor Williams identifies four stages of typical negotiations and discusses the information exchange that occurs. In stage one, “[n]egotiators talk primarily about the strengths or merits of their side of the case (often in very general terms).” *Id.* at 70. In stage two, “[e]ach side seeks to present its case in the strategically most favorable light,” and in stage three “[e]ach side seeks to discover the *real* position of the other, while trying to avoid disclosing its own real position.” *Id.* at 71. Finally, in stage four, “[e]ach side seeks to discover and reduce the real position of the other.” *Id.* All told, “[a] great deal of information is exchanged, but it is presented in a favorable light. Through this process, the legal and factual issues become better defined and the strengths and weaknesses of each side become apparent.” *Id.* at 80; see also Trachte-Huber, *supra* note 15, § 6.03[2], at 49.

158. See Trachte-Huber, *supra* note 15, §6.03[2], at 49 (“A prudent attorney will not be likely to tell her opponent what the weaknesses of her own case are. You may, however, listen while opposing counsel tells you difficulties he sees in your case.”); see also Richard E. Walton & Robert B. McKersie, *A Behavioral Theory of Labor Negotiations* 69 (1965) (describing labor negotiators' tactics of presenting their own demands and issues in strategically favorable light and selectively controlling the flow of information with respect to weaknesses).

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discovery during the litigation will reveal the fact. In contrast, an example of an admission of a bad fact that the University believes might not be discovered would be the University's statement that the former dean told the current dean five years ago that the female professors were underpaid. The University is highly unlikely to admit this during a negotiation session, because it could well be giving away something the plaintiff might never learn.

Thus, the chart in Part II.A.2, representing the universe of potential factual statements made during negotiations, now looks as follows:

1. Pure admissions of liability or non-liability
2. Statements of fact related to the underlying dispute
 - a. Statements of fact perceived to support the speaker's position
 - b. Statements of fact perceived to weaken the speaker's position
 - (1) Facts the speaker believes have been or will be discovered
 - (2) Facts the speaker believes may not be discovered
3. Statements of fact relevant to resolving the dispute but not related to the underlying dispute

For purposes of evaluating the accuracy of the public policy rationale, this distinction is a critical one. As detailed below, this is because when one considers separately the type of statements falling within category 2.b.1 (statements of "bad fact" that the speaker believes have been or will be discovered), the speaker will not be terribly concerned about confidentiality. When one considers separately the types of statements falling within category 2.b.2 (statements of "bad fact" that the speaker believes may never be discovered), one realizes that these statements, like those falling within category 1, are not very likely to be made in *any* negotiation, even when rules of absolute confidentiality are in place.

With respect to statements falling within category 2.b.1, confidentiality almost certainly will not be determinative of whether the speaker makes them. In these circumstances, confidentiality is essentially superfluous because the speaker knows that even though his or her opponent cannot quote the negotiation statement verbatim, the opponent will be able to either (1) prove up the fact through other evidence that emerges during discovery, or (2) ask the speaker a question regarding the very same subject matter "on

the record” when the speaker is deposed or questioned at trial.¹⁵⁹ It is essential to recall, in this regard, that evidence otherwise discoverable does not become undiscoverable under Rule 408 or the mediation-privilege statutes simply because it was discussed during negotiation or mediation.¹⁶⁰ Both Rule 408 and the mediation statutes protect “communications” during negotiations, but they do not protect the information *within* those communications.

Indeed, it is precisely this dynamic—that otherwise discoverable evidence does not become undiscoverable simply because it was broached during a negotiation—that explains why a party to a negotiation is highly unlikely ever to make a statement falling within category 2.b.2 (in other words, raise a bad fact that may not be discovered) in the course of *any* negotiation, whether the negotiation is confidential or not.¹⁶¹ Irrespective of confidentiality, the negotiating party knows that if the negotiation or mediation fails, its opponent would then know that the bad fact is out there, and seek to discover evidence pertaining to it that *could* be used at trial.¹⁶²

159. See Rogers & McEwen, *supra* note 98, § 9:05, at 14. As Rogers and McEwen have stated, [Rule 408] permits a party to use information obtainable through the discovery process even though the same information was revealed during settlement. For example, at mediation, a party admits drinking three beers just before the car accident. Afterward, the opposing party sends an interrogatory about the ingestion of alcohol before the collision. The answer to the interrogatory is arguably admissible at trial, even though the statement made during the mediation is not.

Id.

160. See, e.g., Fed. R. Evid. 408 (“This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.”); Ariz. Rev. Stat. Ann. § 12-2238(c) (West 1994) (“Evidence that exists independently of the mediation even if the evidence is used in connection with the mediation is subject to service of process or subpoena.”); Fla. Stat. Ann. § 44.201(5) (West 1998) (“This subsection shall not be construed to prevent or inhibit the discovery or admissibility of any information which is otherwise subject to discovery or which is admissible under applicable law or rules of court.”).

161. One commentator makes clear that however attractive it may become to admit the weaknesses of a case when a negotiation seems to be moving forward, a negotiating party must always be aware of the ramifications if the negotiation fails:

Reality testing in the context of a negotiation session is a bit more difficult, because it requires that the parties work openly and honestly. At this juncture, meaningful reality testing may even mean disclosing something about one’s case that is less than positive. As a practical matter, both parties must be working in a cooperative manner and seeking a long-term relationship before this method is appropriate. In a litigation settlement negotiation, putting all your cards on the table and informing opposing counsel about the weaknesses as well as the strengths of your case requires considerable confidence in opposing counsel, and in the strength of your position. If you have any hesitation, don’t give your case away.

Trachte-Huber, *supra* note 15, § 7.03, at 55.

162. See Williams, *supra* note 157, at 85 (“[T]he effective negotiator will take full cognizance of the relationship between pre-trial procedures and the stages identified in the negotiation process.”).

The confidentiality of the statement made during negotiation would then be the least of the party's concerns. Knowing that one's opponent now has a fertile ground for discovery that it did not have before would be its biggest worry.¹⁶³

3. *Admission of Statements of Fact Unrelated to the Underlying Dispute*

Thus, all that remains for consideration is whether the public policy rationale serves its purpose with respect to category 3, statements of fact relevant to resolving the dispute but unrelated to the underlying dispute. This category covers a variety of statements made during negotiations that address issues beyond the transactional facts. One example might be the University's claim that settling with the plaintiff would lead to an onslaught of discrimination claims. Another might be an admission that the University is already deeply in debt. Another might be the plaintiff's admission that one of her witnesses will not come across well.

With respect to this category of statements, the public policy rationale works well. Certainly, if a negotiating party were told that these statements would be disclosed outside the confines of the negotiation, the party would be less likely to make them. The party would not necessarily fear the admission of such statements at trial, because they are by definition unrelated to the transactional facts, and thus the content of any such statement would be irrelevant. The party might well fear disclosure other than at trial, however, because of the impact disclosure would have outside the context of the existing litigation. For example, the University in the hypothetical might harbor serious fears about what might happen if other faculty members learned that it was on shaky financial ground, and if the negotiation were not confidential, choose not to reveal its reason for resisting the plaintiff's offer.

Further, it seems that settlements would be less likely to result if the type of statement falling within category 3 were made less often. Numerous commentators have recognized that the most effective negotiators are those

163. This analysis of statements falling within category 2.b (admissions of fact perceived to be weaknesses) presupposes, of course, a *truthful* party: a party who intends to be honest if asked about the same fact during the discovery process. Blanket confidentiality would indeed make a big difference to the party intending to lie during the ensuing discovery process. *See infra* notes 167–199 and accompanying text.

who are most able to assess the value of certain proposals to both parties and adapt the proposals to best fit the negotiating parties' needs.¹⁶⁴ These assessments become much less possible, however, if parties are inhibited in discussing their needs and fears in settling.

All told, then, the public policy rationale may well be accurate with respect to statements in category 3 (those relevant to resolution of the dispute but not related to the underlying facts), but is not likely to be accurate with respect to any of the categories of statements addressed to the underlying facts. Returning to the chart of statements potentially made during negotiations, it now looks as follows:

1. Pure admissions of liability or non-liability: *exclusion does not promote settlement because parties will not make these statements even when there is confidentiality*
2. Statements of fact related to the underlying dispute
 - a. Statements of fact perceived to support the speaker's position: *exclusion does not promote settlement because parties will make these statements even when there is not confidentiality*
 - b. Statements of fact perceived to weaken the speaker's position
 - (1) Facts the speaker believes have been or will be discovered: *exclusion does not promote settlement because the speaker knows that the information will come into evidence and will therefore make the statement irrespective of confidentiality*

164. See Roger Fisher & William Ury, *Getting To Yes: Negotiating Agreement Without Giving In* 41–57 (Bruce Patton ed. 1991); Trachte-Huber, *supra* note 15, at 27–28; see also Walton & McKersie, *supra* note 158, at 65–75 (discussing tactics labor negotiators employ to discover what opposing party needs to settle and to present own needs as greater than they are).

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- (2) Facts the speaker believes may not be discovered: *exclusion does not promote settlement because parties will not make these statements even when there is confidentiality because the same facts can be raised in discovery or at trial*
3. Statements of fact relevant to resolving the dispute but not related to the underlying dispute: *exclusion does promote settlement because parties will be inhibited in making these statements and fewer settlements will result*

C. *Why the Public Policy Rationale Should Not Be Extended To Preclude Impeachment*

As this statement-by-statement analysis demonstrates, the public policy rationale—that confidentiality is necessary to ensure the communication necessary to effect settlements—is not particularly accurate with respect to *any* statements of fact related to the underlying dispute. The rationale is effective *only* with respect to statements relevant to resolving the dispute but not related to the underlying facts (category 3). The rationale therefore should not be applied to prohibit impeachment by prior inconsistent negotiation statement, because impeachment by prior inconsistent statement will rarely, if ever, involve a breach of the confidentiality of the type of statements falling within category 3.

For a party to impeach by prior inconsistent statement, there must be testimony at trial with which the statement is inconsistent.¹⁶⁵ The information disclosed by statements in category 3, however, is not the type of information that would be admitted at trial because, by definition, it is unrelated to the underlying facts and thus irrelevant to a trial on the facts.¹⁶⁶

165. See *United States v. Columbo*, 869 F.2d 149, 153 (2d Cir. 1989) (“It is axiomatic that there must be testimony in the trial at hand with which the prior statement is inconsistent before the latter may be introduced.”); see also *United States v. Greer*, 939 F.2d 1076, 1097 (5th Cir. 1991) (“A prior statement of a witness . . . is admissible only if it is inconsistent with his trial testimony.”).

166. See Fed. R. Evid. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); *United States v. Gordon*, 634 F.2d 639, 644 (1st Cir. 1980) (holding that evidence regarding events two years after events underlying trial and related to different transaction not relevant); *Womack v. United States*, 294 F.2d 204, 206 (D.C. Cir. 1961) (“Whether academically we call the principle materiality or relevancy, it is settled that to be admissible a bit of evidence must have some potential probative weight upon the issue of fact under trial.”).

Put another way, it is highly unlikely that there would ever be trial testimony with which a negotiation statement in category 3 *could* be inconsistent.

In sum, the public policy rationale provides little support for a flat ban on using negotiation statements to impeach by prior inconsistent statement. Although confidentiality continues to serve the purpose of encouraging parties' candor with respect to issues unrelated to the underlying facts, and presumably promotes settlements by doing so, there is no real reason to believe that permitting impeachment by inconsistent statements concerning the facts involved in the dispute would have the deadly effect on settlement negotiations that most commentators have predicted. As shown, the types of factual statements related to the transaction that can contribute to settlements will be made with or without confidentiality.

III. RELIANCE ON THE PUBLIC POLICY RATIONALE TO PRECLUDE IMPEACHMENT PROTECTS ONLY DISHONEST PARTIES

The astute reader of this challenge to the public policy rationale might ask a basic question. If it is true that negotiating parties do not go into negotiation sessions and regularly admit their weaknesses, then why is impeachment even an issue? Without admissions of weakness during negotiations, these readers might say, there should *be* no statements with which an opposing party would seek impeachment.

Other readers—particularly the most ardent advocates of mediation confidentiality—might also suggest that this analysis is too neat, too deterministic. These readers may complain that the analysis assumes incorrectly that parties extensively analyze the ramifications of statements in each of the categories described above when they prepare for and participate in negotiations. In particular, the supporters of absolute (or near-absolute) confidentiality may claim that, whether it is wise for parties to do so or not, parties (1) do indeed make admissions of liability or non-liability in negotiations; (2) do admit undiscoverable weaknesses in negotiations; and (3) are in fact more likely to discuss even discoverable weaknesses in their cases when a confidentiality rule is in place. On this view, it presumably does not matter whether parties behave in the most logical fashion possible when they participate in negotiations: it matters only that these statements continue to be made and that the settlements believed to result be encouraged.

The answer to both of the above points is simply that the analysis assumes the conduct of an *honest* party, and addresses what an *honest* party

is most likely to do in the face of a confidentiality rule. Thus, the analysis does not assume that negotiating parties will never admit weaknesses in their case during negotiations. It assumes instead that *honest* negotiating parties—those planning to tell the truth about the subject matter of a negotiation statement if asked—will either admit their weaknesses irrespective of confidentiality, because later testimony is going to reveal it anyway, or will not admit the weakness because they know that they will then have to testify about the same subject later in the case. It is therefore only the statements of *dishonest* negotiating parties—those who are willing to alter their stories during any later litigation—that the public policy rationale is currently operating to protect, and it is precisely impeachment of those parties, who fall outside the analysis, that should be permitted.

It may be true that the analysis above does not account for honest parties who participate in negotiations without any in-depth assessment of the discovery consequences of their statements, and that these people really do communicate more freely in negotiations when the negotiations are confidential.¹⁶⁷ Even if that is true, however—if honest parties are willing to admit weaknesses without worrying about the later treatment of their admissions during discovery—then there is no reason to believe that these same parties would behave any differently in response to the possibility of impeachment. Put another way, just as these parties do not worry over the consequences of revealing something that could later be the subject of discovery, neither would they worry about the mere possibility of impeachment.

To demonstrate this, recall the case used in the opening hypothetical, in which the plaintiff professor has sued a university under the Equal Pay Act because her salary is markedly lower than her male counterparts. Further imagine that, at the time of the mediation, the Dean knows, but has not yet disclosed, that she was told by the prior dean five years earlier that the female professors were underpaid relative to the men. This would, incidentally, be the type of statement falling within category 2.b.2 (a statement the speaker perceives to be a weakness but believes may not be discovered).

167. These would also have to be parties who are (1) unrepresented by counsel, (2) represented by less than effective counsel, or (3) willing to ignore the advice of counsel, because surely counsel who does not discuss with a client prior to a negotiation session which facts can be disclosed, and which facts should in no circumstance be disclosed, and precisely why, has failed to provide competent representation.

Now assume that the Dean has been told the existing law (in a jurisdiction with a typical mediation privilege) by the mediator: “everything you say in this mediation is confidential, except that any otherwise discoverable information you reveal in this mediation will be subject to discovery.” How does the Dean react? The analysis above assumes that the Dean plans to be truthful at her subsequent deposition, and so she will continue to keep this information to herself, because if she reveals it and is later asked about it, she will have to tell the truth and the former dean’s statement will then become fodder for the trial.

To address the determinism criticism—that parties might not always behave logically in their best interests—assume that the Dean intends to be truthful at her later deposition, but (1) does not have a lawyer to explain the concept of otherwise discoverable information, (2) does not have a competent lawyer who can see the potential for later discovery, (3) does not understand the potential for later discovery even if a competent lawyer has explained the concept, or (4) does not particularly care even if a competent lawyer has explained the concept. Under any of these circumstances, the Dean might disclose the information, because she either does not appreciate or does not care about the strategic consequences of revealing the former dean’s comments, and settlement might result, a good thing. Further, if the Dean discloses, the case does not settle, and then the Dean tells the truth on deposition, there will be no need to impeach her at trial if she changes her story. The deposition testimony will suffice.

Allowing for impeachment will change the Dean’s approach only if she plans to be dishonest. Assume that the mediator has told the parties, “everything you say in this mediation is confidential, except that any otherwise discoverable information you reveal in this mediation will be subject to discovery, and you can be impeached if you make an inconsistent statement later on.” How does the Dean react? Once again, if the analysis above is wrong, and the later discoverability does not matter to her, she might lean toward disclosing. Yet if her decision whether to disclose the information actually turns on the idea that she could be impeached with the disclosure later, then this strongly suggests that she plans to take a different position (or at least wants to preserve that option) if asked about the disclosed information later in a deposition or at trial. In other words, if the Dean intends to be truthful at a later deposition, she will not be worried about the possibility of impeachment and she will disclose. If she does not intend to be truthful when deposed, however, she *does* have to worry about impeachment and may choose not to disclose. From this it becomes clear that even if the public policy rationale is correct, and confidentiality *generally* will lead parties to disclose the weak facts in their cases,

extending confidentiality to preclude impeachment does little to encourage communication from honest parties and protects only those who intend to change their story if it suits them later.

One commentator has argued that the issue is not so clear cut,¹⁶⁸ because even honest parties can reasonably fear impeachment:

Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are 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.¹⁶⁹

As support for the public policy rationale, and the blanket confidentiality many commentators support, this argument is weak at best. First, the argument assumes that witnesses are regularly impeached with rather insignificant, totally understandable inconsistencies in their statements on the facts. One gets the distinct feeling that the commentator trusts neither the attorneys who attempt impeachment nor the bench that monitors them (of which the commentator was a member) to distinguish between a slight or explicable inconsistency and a material one. A competent attorney, however, will not try to impeach a witness with a slight inconsistency, because the jury will penalize the attorney for either nitpicking or bullying

168. Wayne Brazil has written an article advising attorneys how to argue that negotiation statements should not be admitted for impeachment purposes, and in the course thereof, has at least analyzed whether prohibiting impeachment encourages negotiating parties to lie. *See* Brazil, *supra* note 7, at 977. He argues that it does not. *See id.* Strangely, Brazil's article stands alone in offering any extensive treatment of the flaws of the public policy rationale. Virtually all of the other scholarly works on negotiation confidentiality are so extremely in favor of confidentiality that they summarily reject the idea that impeachment should be permitted. *See supra* note 129. Indeed, Professor Eric Green's widely cited article, *A Heretical View of the Mediation Privilege*, was "heretical" because he argued against enactment of broad mediation-privilege statutes, but even Professor Green was not prepared to commit the "heresy" of arguing that impeachment should be allowed: he argued that the only change necessary from existing law was amendment of Rule 408 to ensure that impeachment by prior inconsistent statement was *not* available. *See* Green, *supra* note 11, at 36 ("Working for modest amendment to Evidence Rule 408 to make it clear that the Rule excludes evidence of compromises, offers to compromise, and statements made in connection with such offers for substantive as well as impeachment purposes, would be a better legislative agenda.").

169. Brazil, *supra* note 7, at 978.

the witness.¹⁷⁰ Neither will a competent attorney try to impeach a witness with an inconsistency that can be explained, because the witness' explanation itself will make the attorney look foolish. Further, the court must initially determine under Rule 104(a)¹⁷¹ whether a statement is sufficiently inconsistent and material to warrant admission,¹⁷² and the court has even more discretion under Rule 403¹⁷³ to decide that the probative value of an "honest" inconsistency is substantially outweighed by the unfair prejudice of suggesting to the jury that the witness is not credible.¹⁷⁴ Thus, while it is theoretically possible that a witness could be impeached on a statement that is something less than a full-blown lie, both practical trial strategy and evidence law suggest that such impeachment is unlikely.

Indeed, it generally will not be the inadvertent, accidental, "pure as the driven snow" inconsistencies as to which impeachment is most likely to be sought, and nothing suggests this more persuasively than the cases addressing the issue of impeachment by negotiation statement. The cases in

170. See, e.g., McCormick, *supra* note 4, § 33, at 45. As this treatise advises, "[t]here is a cardinal rule of impeachment. Never launch an attack which implies that the witness has lied deliberately, unless you are convinced that the attack is justifiable, and is essential to your case. An assault which fails often produces in the jury's mind an indignant sympathy for the intended victim." *Id.*

171. Federal Rule of Evidence 104(a) provides that "[p]reliminary questions concerning the . . . admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [which covers situations where relevancy depends on the fulfillment of a condition of fact and is not applicable here]." Fed. R. Evid. 104(a). Under this rule, questions of whether a statement is sufficiently inconsistent are to be resolved by the court. See Russell, *supra* note 92, § 408.1, at 506 ("A determination of whether a statement falls within the protection of Rule 408 is exclusively for the court pursuant to Rule 104(a).").

172. See *United States v. Rogers*, 549 F.2d 490, 496–97 (8th Cir. 1976) (holding that inconsistency has to relate to matter of "sufficient relevancy" rather than issues "extraneous" to case); *United States v. Jordano*, 521 F.2d 695, 697–98 (2d Cir. 1975) ("A party may always attack the credibility of an adverse witness by showing that she has made statements which are inconsistent with some material part of h[er] testimony."); McCormick, *supra* note 4, § 34, at 46 (noting that difference between earlier statement and testimony must be material).

173. Federal Rule of Evidence 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

174. See, e.g., *Vaughn v. Willis*, 853 F.2d 1372, 1379 (7th Cir. 1988) (holding that trial court did not abuse its discretion under Rule 403 by excluding letter offered to impeach when court concluded that letter's ambiguity and circumstances of its writing suggested low probative value in relation to potential for unfair prejudice and misleading jury); see also *United States v. Cody*, 114 F.3d 772, 777–78 (8th Cir. 1997) (holding that trial court did not abuse discretion under Rule 403 in excluding statements from unofficial transcript when witness refused to acknowledge accuracy of transcript); *United States v. Walker*, 930 F.2d 789, 792 (10th Cir. 1991) (holding that trial court had discretion under Rule 403, and even under Confrontation Clause, to preclude cross-examination on prior statements arguably not inconsistent and collateral).

which impeachment has actually been sought show that the inconsistencies typically are not the product of merely “imperfect” human thought processes, but are almost always the product of a calculated, deliberate change in position. In *EEOC v. Gear Petroleum, Inc.*,¹⁷⁵ for example, the defendant claimed during negotiations that the plaintiff was fired because he was approaching mandatory retirement age, and that age was in fact a bona fide occupational qualification. The defendant then claimed at trial that there was no mandatory retirement age and that age had not been a factor in the firing.¹⁷⁶ This is hardly something about which the defendant’s principals could simply have been mistaken. In *Davis v. Rowe*,¹⁷⁷ the defendant valued the insured art during negotiation at \$4.6 million, and then contended during the lawsuit that the art was worth only \$250,000.¹⁷⁸ Again, this inconsistency was not the result of honest human error. In *C&K Engineering Contractors v. Amber Steel Co.*,¹⁷⁹ the defendant’s employee allegedly admitted during negotiations that he had not notified the subcontractor of a huge gap between its bid and that of its competitors, but then testified at trial that he had.¹⁸⁰ This notification was the critical issue in the case, and any inconsistency was the result of something other than inadvertence.

In *County of Hennepin v. AFG Industries, Inc.*,¹⁸¹ the plaintiff county claimed in negotiations with its insurer that it had suffered \$508,000 in window damage and ultimately recovered \$508,000 from the insurer, but then the county claimed in a lawsuit against the window manufacturer that only \$82,000 of the insurer’s payout was attributable to the window damage, and the remainder reflected some sort of “windfall” from the insurer.¹⁸² In *Allen-Myland, Inc. v. International Business Machines Corp.*,¹⁸³ the plaintiff claimed during negotiations that a rate of return less than 1.87% would put it out of business, and then claimed at trial that a

175. 948 F.2d 1542 (10th Cir. 1991).

176. *See id.* at 1542–43.

177. No. 91-C-2254, 1993 WL 34867 (N.D. Ill. Feb. 10, 1993).

178. *See id.* at *1.

179. 587 P.2d 1136 (Cal. 1978).

180. *See id.* at 1142.

181. 726 F.2d 149 (8th Cir. 1984).

182. *See id.* at 152–53.

183. 693 F. Supp. 262 (E.D. Pa. 1988).

1.2% rate of return was a reasonable amount.¹⁸⁴ In *Stainton v. Tarantino*,¹⁸⁵ the plaintiff admitted to a real estate appraiser he hired for purposes of settlement negotiations that he held only a 50% interest in the property at issue, then contended at trial that he believed he held a 99% interest.¹⁸⁶ In *DeForest v. DeForest*,¹⁸⁷ the plaintiff during negotiations had signed a proposed settlement decree providing for spousal maintenance and eighteen months later claimed that he had not been aware of any spousal-maintenance award.¹⁸⁸ In *In re Estate of O'Donnell*,¹⁸⁹ the attorney for the decedent during negotiations stated that a handwritten document was merely a "shopping list" from which he was supposed to prepare a will, then testified at trial that the document was intended as a holographic will.¹⁹⁰ In *Houston Lighting & Power Co. v. Sue*,¹⁹¹ a witness agreed during settlement negotiations to undertake certain actions on the defendant's behalf, then claimed during trial that he had no authority to act on defendant's behalf.¹⁹² In *El Paso Electric Co. v. Real Estate Mart, Inc.*,¹⁹³ the plaintiff condemnee's expert during negotiations valued the land at \$350,000, and then the plaintiff claimed at trial that the land was worth \$648,000.¹⁹⁴ In *Davidson v. Beco Corp.*,¹⁹⁵ the defendant's attorney acknowledged in a letter during negotiation that the plaintiff had refused the defendant's offer of a tractor as payment, then claimed at trial that the plaintiff had accepted that offer.¹⁹⁶ In not one of these cases—or any other that the author has located—can it seriously be claimed that the difference between the negotiation statement and the trial testimony was the product of faulty human memory. Each case involved only intentional, deliberate changes of position.¹⁹⁷

184. *See id.* at 284 & n.48.

185. 637 F. Supp. 1051 (E.D. Pa. 1986).

186. *See id.* at 1081.

187. 694 P.2d 1241 (Ariz. Ct. App. 1985).

188. *See id.* at 1247.

189. 803 S.W.2d 530 (Ark. 1991).

190. *See id.* at 531.

191. 644 S.W.2d 835 (Tex. Ct. App. 1982).

192. *See id.* at 841–42.

193. 651 P.2d 105 (N.M. Ct. App. 1982).

194. *See id.* at 107.

195. 753 P.2d 1253 (Idaho 1987).

196. *See id.* at 1254.

197. The reported cases all seem to involve dramatic differences between the negotiation statement and the trial testimony. This is not to suggest that parties have never sought impeachment on less than a

Second, and perhaps more importantly, it is inappropriate to project an observation that honest people are sometimes impeached at trial into the context of how negotiating parties would react to learning that their statements could be used to impeach them. Whether honest people do sometimes get impeached at trial by slight or understandable inconsistencies, the issue presented by the public policy rationale is whether negotiating parties will actually conduct themselves differently because they *fear* impeachment. It strains credulity to suggest that a negotiating party deciding whether to speak or not would fear impeachment on some kind of “honest” inconsistency that, in any event, could be explained at trial. If that is the case with a particular witness, and if the law is going to act on that basis, then the law would do well to eliminate pretrial depositions altogether, because a witness necessarily faces the prospect *then* that “honest” inconsistencies will doom the witness’s case.

Indeed, if the law is to presume that honest people will be “spooked” out of admitting the weaknesses in their case by the mere possibility that they could be impeached, it thereby acknowledges that negotiating parties do in fact assess the strategic and legal consequences before they speak in negotiations. If this is so, then one must likewise accept the point made in Part II.B: that the public policy rationale does not really advance communication because most honest parties will make a strategic choice not to admit weaknesses during negotiations lest they have to testify about those weaknesses later on.¹⁹⁸ In other words, one cannot claim that communication is furthered by confidentiality because people do *not* assess the effect of their statements on later discovery, and simultaneously claim that communication would be hampered by allowing impeachment because people *do* assess the even less likely consequence that they will be impeached by an honest inconsistency.¹⁹⁹

dramatic difference, because those cases may simply not have resulted in published opinions. The imbalance of the reported cases, however, is worth noting.

198. See *supra* notes 161–63 and accompanying text.

199. Further, as will be set forth *infra* Part IV, it is possible to permit impeachment by prior inconsistent statements during negotiations only in those situations where the inconsistency does, in fact, reflect a calculated, deliberate misrepresentation of the facts at one time or another. In other words, if the ordinary handling of prior inconsistent statements does not adequately take account for situations in which negotiating parties make honest mistakes of fact, then the requirements for this form of impeachment could be made more stringent to ensure that impeachment by the use of statements during negotiations is available only for intentional misrepresentations. In the meantime, a blanket ban on impeachment is not the answer.

Thus, when the public policy rationale is extended so far as to preclude impeachment by prior inconsistent statement, the law tends to protect only parties who are ready and willing to be dishonest, and the rule becomes a license to lie. The lying might occur in the context of the negotiation itself: a party might assert facts more favorable to its case than the real facts in order to skew the settlement in its favor, and it can do so knowing there will be no consequences if the evidence later reveals that the facts were not as the party asserted. In that instance, if the case does not settle, there will be no real harm, because the finder of fact will hear the true, weaker facts at trial. If the case does settle, however, then the settlement is based on a false set of facts, and the party acting in reliance on the asserted facts is cheated without ever knowing it.

On the other hand, the party might be truthful during the negotiation, admitting the facts unfavorable to its case, but then, on deposition or at trial, assert facts more favorable to its position.²⁰⁰ In this circumstance, if the case settles, no harm has been done, because the settlement is based on an accurate set of facts. If the case does not settle, however, and the party does indeed assert different, stronger facts during a subsequent deposition or at trial, then the party that has been lied to may well be unable to expose the lie, and the trial outcome is, to the knowledge of all but the factfinder, based on a false set of facts. Settlement is exalted at the cost of truth.²⁰¹

200. Professors Wright and Graham suggest that this is the scenario in which the impeachment issue is most likely to come up directly:

Since most falsehoods in negotiations would probably favor the party making them, it is doubtful that the opponent would ever care to use them to impeach an honest statement at trial. Hence, most cases in which the issue is likely to arise will be cases in which the party attempts to mislead his opponent with a spurious candor in negotiations or honestly admits a weakness during negotiations and attempts to cover it up with a lie at trial.

Wright & Graham, *supra* note 7, § 5314, at 286 n.55.

201. *See id.* § 5314, at 286. As Wright and Graham state,

[a] party who is impeached at trial by an inconsistent statement made during settlement negotiations, in the absence of some mistake, must have been lying at one time or the other. It is difficult to see why the law would care to encourage falsehood in either venue. The purpose of Rule 408 is to foster "complete candor" between the parties, not to protect false representations.

Id.

IV. ACHIEVING A BALANCE BETWEEN PROMOTING SETTLEMENT AND ADVANCING THE TRUTH

It is easy enough to see why the law has moved in this direction. Courts are crowded, litigation seems to take forever and cost too much,²⁰² and the outcomes rarely anoint clear winners and losers. Alternative dispute resolution promises at least the possibility of a civilized, win-win, even therapeutic solution.²⁰³ As many people have recently observed, the only thing many litigants want is an apology from the perceived wrongdoer.²⁰⁴

202. In *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (5th Cir. 1976), the court addressed specifically the need for settlements to lighten the judicial workload:

With today's burgeoning dockets and the absolute impossibility of Courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises shepherded [sic] by competent counsel, whose experience as advocates makes them reliable predictors of litigation were it pursued to the bitter end.

Id.

203. One compilation of surveys comparing litigation and mediation suggests that, as compared to cases completed by litigation, mediated cases (1) save litigants money; (2) save litigants time, at least when the mediation is successful; and (3) result in higher satisfaction ratings by the parties. See *CPR Institute for Dispute Resolution, ADR Cost Savings & Benefits Studies*, I-83 to I-84, I-86 to I-87 (1994). In 1994, however, the Rand Institute for Civil Justice conducted an extensive study of six mediation and early neutral evaluation programs operating in federal courts in 1992-93 pursuant to the Civil Justice Reform Act, and found no statistically significant differences between the ADR sample cases and the non-ADR comparison cases, in costs of litigation (as measured by lawyer work hours), time to disposition, and lawyers' perceptions of fairness. See James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation Under the Civil Justice Reform Act* 34-38, 42-44, 48-49 (1996) [hereinafter *Rand Report*]. Even so, as the *Rand Report* authors point out, "most mediation and neutral evaluation programs have been in place in federal court for only a few years, [so] refinements should be expected as time progresses." *Id.* at xxxiv. Further, "[i]t is possible that these programs had smaller effects that could not be identified as statistically significant in the sample of cases . . . studied." *Id.*; see also Craig A. McEwen & Elizabeth Plapinger, *Rand Report Points Way to Next Generation of ADR Research*, *Disp. Resol. Mag.*, Summer 1997, at 10 ("Was the glass only 90 percent full instead of 95 percent—the conventional, but arbitrary, criterion for confidence generally used by social scientists? Four of the studied programs had time savings that could be attributed to ADR with 92 percent, 91 percent, 83 percent, and 80 percent confidence respectively."). Finally, the *Rand Report* was unable to draw conclusions about party satisfaction, as opposed to lawyer satisfaction, because of the low completion rate of their litigants' surveys. *Rand Report* at xxxiv.

204. See, e.g., Stephen Keeva, *Does Law Mean Never Having To Say You're Sorry?*, A.B.A. J., Dec. 1999, at 64, 65 ("[I]n the medical malpractice context somewhere around 30 percent of plaintiffs claim they wouldn't have sued if only there had been an apology.") (quoting Professor Jonathan Cohen); see also Jonathan R. Cohen, *Advising Clients To Apologize*, 72 *So. Cal. L. Rev.* 1009, 1022 (1999) (noting that "if the injured party receives the apology early enough, she may decide not to sue").

For these reasons, the law has begun to take a very strong stance encouraging the nonadversarial settlement of disputes.²⁰⁵

Likewise, extending confidentiality to negotiations has undoubtedly borne significant benefits. Even if, as this Article argues, confidentiality has not caused parties to make statements of fact they otherwise would not have made, it likely has made parties more willing to discuss why they are having trouble settling or what particular needs must be met if they are to settle. Perhaps even more importantly, the broad concept itself—that no one will gratuitously repeat statements made privately in an effort to resolve a dispute—has probably played a less tangible, psychological role in getting parties to the bargaining table. For these reasons, confidentiality generally is an approach worth retaining.

If the judicial system is to have legitimacy, however, it must continue to be about justice, and reaching outcomes that come as close as possible to reflecting the truth.²⁰⁶ This means that in the rush to promote settlement, the legal system must not eliminate those mechanisms designed to ensure the integrity of the judicial process, whether that process is a litigated or negotiated one. As one of the few commentators willing to place limits on mediation confidentiality has eloquently put it: “[A] blanket privilege . . . is an overenthusiastic response to the legitimate concern for confidentiality in the mediation process . . . [We must create] not only an atmosphere where law-abiding citizens can privately resolve disputes, but [avoid] a process of dispute resolution that allows the lawless citizen to lie, cheat and abuse with absolute impunity.”²⁰⁷

205. A few have questioned this emphasis, arguing that settlement itself should not be promoted as superior to adjudication because it often sacrifices justice to obtain peace, *see* Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085 (1984) (“Parties might settle while leaving justice undone.”), and often results from an imbalance of power between the parties, *see* Jerold S. Auerbach, *Justice Without Law?* 144 (1983) (“[A]lternatives [to litigation] prevent the use of courts for redistributive purposes in the interests of equality, by consigning the rights of disadvantaged citizens to institutions with minimal power to enforce or interpret them.”).

206. As Professors Wright and Graham have asserted, the argument that permitting impeachment would lead to restricted negotiations “ignores an equally important policy: ‘the end that truth may be ascertained.’” Wright & Graham, *supra* note 7, § 5314, at 286 (quoting Fed. R. Evid. 102); *see also* Hughes, *supra* note 149, at 15. Professor Hughes writes:

[T]o assess the overall value of mediation privileges, it is important to weigh any gains that would be attributable to mediation against their cost . . . Consider . . . among those costs the degree to which a privilege condones lying during a mediation. Although some lying in negotiation is tolerated, if not assumed and expected, most find some forms of lying in negotiation intolerable.

Id.

207. Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 Hamline J. Pub. L. & Pol’y 329, 355–56 (1996).

Parties who come to the table to negotiate (as well as their attorneys)²⁰⁸ should be expected to do so within the confines of what they know to be the truth. This means that, even as parties are advised that what they say is generally confidential, they must also be advised that (1) they must neither intentionally make false representations nor state as fact anything which in truth they do not yet know, and (2) the confidentiality extends only to the extent that they do not later adopt an inconsistent version of the facts. No apologies should be made for this expectation, and the law should enforce it.

Indeed, even the most enthusiastic supporters of ADR should embrace such a requirement. It would help ensure the integrity of ADR processes and thereby increase both participation in mediation and party and attorney satisfaction with the process.²⁰⁹ Moreover, if the law does not soon provide some vehicle to ensure that parties cannot lie during negotiations, then as the use of mediation increases, it will not be long before unscrupulous attorneys and their clients regularly take advantage of the impunity with which the process allows parties to lie.²¹⁰

208. One student commentator suggests that a factor some attorneys consider in deciding whether to participate in mediation is whether their bar's ethical-reporting rules would require the attorney-mediator to report their misconduct. See Cletus C. Hess, Comment, *To Disclose or Not To Disclose: the Relationship Between Confidentiality in Mediation and the Model Rules of Professional Conduct*, 95 Dick. L. Rev. 601, 616-17 (1991). While it is true that one unclear area of the law is whether attorney mediators can, should, or must report to the bar attorney misconduct occurring in a mediation, see, e.g., Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty To Maintain Mediation Confidentiality and the Duty To Report Fellow Attorney Misconduct*, 1997 BYU L. Rev. 715, 747-53, one can only hope that most attorneys do not plan ahead of time to engage in misconduct during mediations such that this would be a significant concern.

209. See Kovach, *supra* note 7, at 142 (noting that party lied to in mediation who finds himself without remedy "may choose not to participate in mediation again"); Jaime Alison Lee & Carl Giesler, Comment, *Confidentiality in Mediation*, 3 Harv. Negot. L. Rev. 285, 296-97 (1998) (asserting that overbroad rules on confidentiality deter participation in mediation just as much as lax rules on confidentiality); see also Earl F. Hale, Jr., *Tell the Mediator the Truth, the Whole Truth, and Nothing But the Truth About Your Client's Case*, Dallas Bar Ass'n Headnotes, Aug. 1, 1999, at 5 ("The private caucus is time for candor, not a campaign of disinformation; it is time for legal analysis, not 'hide the ball.'").

210. Anecdotal evidence suggests that this is already happening. Professor Kimberlee Kovach reports that "some attorneys, operating under the assumption that the mediation is completely confidential, have bragged about resolving the case by misrepresentation." Kovach, *supra* note 7, at 142. Further, at a February 2000 meeting of the Texas State Bar ADR section, in which the author participated, several mediators reported that parties regularly lie during mediation.

To prevent this development and restore a balance between promoting settlement and advancing the truth-seeking goal of the judicial process, two changes are required. Rule 408 should be amended to state expressly that statements of fact made during negotiations can be used to impeach by prior inconsistent statement, and the state legislatures and federal courts that have created mediation privileges should enact exceptions permitting impeachment by prior inconsistent statements made during mediations.

A. The Weaknesses of a Blanket Impeachment Exception

Doing nothing more than simply reversing the law's position, however, might present several practical concerns. First, just as blanket confidentiality licenses lying, a blanket impeachment exception might generate frivolous efforts to impeach with negotiation statements, either statements that actually were made but were simply honest mistakes (as discussed in the previous section),²¹¹ or statements that were never made but have been fabricated by unscrupulous attorneys or parties or both. Second, a blanket impeachment exception might lead the law right back to the concern that the Advisory Committee expressed originally in proposing the protection for statements of fact in Rule 408: the frequency with which the courts were becoming embroiled in determining what was a statement of "fact" and what was not.²¹² Third, permitting impeachment with statements made during mediations could mean that mediators would regularly be called as witnesses by one party against another. In the view of the mediation community, this would endanger the very process because it would destroy the mediator's impartiality.²¹³ Finally, if impeachment were permitted without limitation, there might be an increase in the number of occasions where lawyers are called to witness for or against their client. This possibility not only might threaten attorney-client relationships but could also result in a raft of disqualification motions based on ethical rules that prohibit lawyers from serving simultaneously as advocate and witness.²¹⁴

211. See *supra* notes 168-99 and accompanying text.

212. See *supra* note 36 and accompanying text.

213. See *NLRB v. Macaluso*, 618 F.2d 51, 54 (9th Cir. 1980) (noting that "the public interest in maintaining the perceived and actual impartiality of mediators outweighs the benefits derivable from [a given mediator's] testimony"); Note, *supra* note 129, at 445-46 (stating that "protection of the mediator's status as a neutral demands recognition of a distinct privilege on his part not to testify").

214. Model Rule of Professional Conduct 3.7 provides:

B. A Proposal To Allow Impeachment in a Qualified Fashion

The solution, however, does not need to be an all-or-nothing proposition: the law need not choose between extending blanket confidentiality on the one hand or flinging wide the doors to impeachment on the other. It is possible to allow for impeachment by prior inconsistent statement but qualify its availability in a way designed to meet all of these concerns. Both Rule 408 and the mediation-privilege statutes could be amended to include the following language:

- (1) A party's statement of fact made during compromise negotiations or mediations may be used to impeach the party by prior inconsistent statement only if the court in which such impeachment is sought finds that the inconsistency:
 - (a) actually occurred,²¹⁵
 - (b) addresses a material issue in the case, and
 - (c) reflects a party's intentional misrepresentation during either the negotiations or subsequent judicial proceedings.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

Model Rule of Professional Conduct 3.7 (1998). The Comment to the Rule indicates that when lawyer testimony deals with subjects other than uncontested issues or the nature and value of legal services, "a balancing is required between the interests of the client and those of the opposing party." *Id.* The outcome of such balancing should depend on "the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses." *Id.* According to the Comment, "[i]t is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness." *Id.* at cmt. 4 (1998).

215. This part of the amendment would have the effect of overriding the normal operation of Federal Rule of Evidence 104. Under Rule 104, the court normally decides questions of admissibility, *see* Fed. R. Evid. 104(a), but if the sheer *relevance* of an item of evidence is dependent on the finding of a preliminary fact, then the court merely decides whether the foundational evidence is sufficient to find the fact, and sends the fact itself to the jury to decide. *See* Fed. R. Evid. 104(b). Because a statement alleged to be inconsistent would be completely irrelevant if it were found never to have been made, this question would ordinarily be one for the jury.

- (2) A mediator who was witness to the mediation in which an inconsistent statement allegedly occurred shall not be called as a witness with respect to the alleged statement, unless the court after hearing from the parties determines that the mediator's testimony is indispensable to the court's determination under section (1).
- (3) No lawyer for any party to compromise negotiations or a mediation may be called as a witness with respect to an alleged inconsistent statement made therein, with the exception of a lawyer alleged personally to have made the inconsistent statement, who may be called by either party.

Such an amendment would give a party lied to during negotiations or at trial the opportunity to expose the deception to the trier of fact. It would place negotiating parties on notice that they could suffer strategic consequences if they engage in intentional misrepresentation either during the negotiations themselves or in the subsequent litigation. This knowledge should help to reduce the incidence of misrepresentations and might actually further settlements by discouraging parties from presenting during settlement negotiations extreme positions not founded in fact. Indeed, mediators would be that much more effective in demanding the truth from the parties if they were able to state that there might be repercussions if the parties lie.

At the same time, both the procedure and the heightened, "intentional misrepresentation" standard²¹⁶ included in the amendment would ensure that parties could not readily seize upon honest misstatements in negotiation for impeachment purposes. Even assuming that lawyers would make the unwise strategic decision to go after an opponent on an honest misstatement (which, as described above, is a questionable assumption),²¹⁷ the requirement that the court find intentional misrepresentation would prevent the attorney from doing so. The court would hear from the party whose

216. It is possible to impeach with a prior inconsistent statement without any suggestion that the inconsistency was intentional in nature, because even if an inconsistency does not suggest that a witness has lied, it may well suggest that a witness's memory is not reliable. See Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence Under the Rules* 638 (4th ed. 2000) ("And while the mere fact of the prior inconsistent statement is indefinite in that it does not explain *why* the witness has changed her view, the cross-examiner may be able to draw from the larger setting all sorts of theories on this point: The witness changed her story out of bias for the calling party . . . or because her memory is poor, and so forth.").

217. See *supra* notes 170–74 and accompanying text.

impeachment is sought, and if it were satisfied that the mistake was honest, there would be no impeachment before the jury.²¹⁸

Likewise, the fabrication of statements made during negotiations for impeachment purposes would not be a significant problem. A dishonest lawyer or party willing to fabricate an inconsistent statement would not be able even to get to a jury with the inconsistency without surviving the more penetrating scrutiny of the court. Further, at least in the mediated negotiation context, the mere possibility that the court could call in the mediator to resolve the issue makes it that much more unlikely that an unscrupulous party would resort to fabrication.

It bears emphasis, in this regard, that parties already face the possibility that an unscrupulous opponent will claim that they have said something they did not. A dishonest party who wishes to make up an inconsistent statement for impeachment purposes can already do so simply by placing the allegedly inconsistent statement outside the context of negotiation. Moreover, the amendment's heightened standard for impeachment with a negotiation statement (the requirement that the court find an intentional misrepresentation) would actually render the use of negotiation statements to impeach less likely than impeachment with non-negotiation statements.

The heightened standard of intentional misrepresentation would also eliminate the problem the courts faced under the common law prior to the Advisory Committee's choice to protect statements of fact under Rule 408. As described above, the common law excluded offers of compromise but admitted what were called "independent admissions of fact."²¹⁹ The Advisory Committee then chose to do away with this distinction and exclude both the offers and the statements of fact in part because the distinction "generat[ed] controversy over whether a given statement [fell] within or without the protected area."²²⁰ The amendment proposed here,

218. Some might suggest that this places the court improperly in the position of the factfinder as to credibility. The reality, however, is that in the course of making admissibility determinations, the court frequently finds itself in the position of a factfinder on credibility. Under Federal Rule of Evidence 104(a), the court always resolves such questions as whether a defendant's confession was self-initiated (in the face of a defendant's claim that it was not), *see* *Talbott v. Commonwealth*, 968 S.W.2d 76, 83 (Ky. 1998), whether third parties were present for an allegedly privileged conversation (in the face of a client's claim that they were not), *see* *FEC v. Christian Coalition*, 178 F.R.D. 61, 67, 72 (E.D.Va. 1998), and whether the rate of error of a scientific technique is actually 2% (as the expert claims). *See* *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-94 (1993).

219. *See supra* note 36 and accompanying text.

220. Fed. R. Evid. 408 advisory committee's note.

however, would require a court to find that a negotiation statement reflected intentional misrepresentation on the part of a negotiating party. By definition, that standard would affect only statements that clearly are statements of fact. A statement that can be construed as an offer or an opinion is not capable of the objective falsity that would be required to find that the statement reflected intentional misrepresentation by the party making it. Put another way, the borderline, ambiguous statements that generated the controversy about which the Advisory Committee was concerned most likely would not be sufficient to convince a court that intentional misrepresentation had taken place.

C. *The Mediator As Witness to an Inconsistent Statement*

The amendment would also address the concern that mediators might regularly be called as witnesses. Ideally, the amendment itself would serve as a disincentive to lie sufficient to reduce significantly the number of instances in which inconsistent statements arise. Even if the amendment did not have this effect, however, the requirement that the mediator's testimony first be "indispensable" to resolving the issue²²¹ would mean that most disputes concerning these statements would be resolved on the testimony or documentary submissions²²² of the parties, without the necessity of calling the mediator. Further, by lodging the initial authority to call the mediator with the court, rather than with one or the other of the negotiating parties, the mediator would retain his or her status as an impartial third party, and the nature of the mediation process would not be threatened.²²³

221. For an example of a court considering the need for a mediator's testimony, albeit not in the context of evaluating an alleged inconsistent statement, see *Olam v. Congress Mortgage Co.*, 68 F. Supp. 1110, 1136 (N.D. Cal. 1999) (compelling mediator testimony because mediator was "positioned . . . to offer what could be crucial, certainly very probative evidence" and such evidence would "greatly improve the court's ability to determine reliably what the pertinent historical facts actually were").

222. In many instances, the inconsistent statements of fact are memorialized in a writing, so there would be no need for the mediator to testify. See, e.g., *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1543 (10th Cir. 1991) (noting that party took position at trial inconsistent with two letters written by party's attorney); *Davis v. Rowe*, No. 91-C-2254, 1993 WL 34867, at *1 (N.D. Ill. Feb. 10, 1993) (finding that party took position at trial inconsistent with letter previously written by party).

223. It is safe to say that most mediators abhor the thought of ever being called into court as a witness. See, e.g., Edward F. Sherman, *Confidentiality in ADR Proceedings: Policy Issues Arising from the Texas Experience*, 38 S. Tex. L. Rev. 541, 554 (1997). It is unclear whether this aversion stems from the inconvenience or messiness involved, or a sincere belief that having to testify threatens the nature of their position as a neutral. With respect to the first possibility, even Eric Green, a staunch advocate of mediation, has recognized that "[a] persuasive case has yet to be made that an individual mediator's desire to avoid being called as a witness during a trial deserves any greater recognition than the normal

D. The Lawyer As Witness to an Inconsistent Statement

Finally, the amendment meets the concern that permitting impeachment would regularly result in lawyers being called as witnesses for or against their clients. The lawyers for both sides would generally be prohibited from testifying, regardless of which side of the issue they represented. Thus, in the ordinary situation, there would be no threat to the attorney-client relationship and no issue of attorney disqualification.

The only exception would be a situation in which a lawyer was alleged to have personally made an inconsistent statement. In that case, the court would hear from the lawyer alleged to have made the inconsistent statement, and the court could admit the statement only if the court found that the inconsistency actually occurred and reflected intentional misrepresentation, either by the lawyer at the time the statement was made, or by the party during the subsequent litigation proceedings.

If an attorney is alleged to have made an inconsistent statement, two scenarios are possible. If the court were to find either that the statement alleged was not made, or that any inconsistency did not reflect intentional misrepresentation on a material issue, then the situation would resolve itself. There would never be any trial testimony on the statement, and there would be no basis on which to call the lawyer as a witness. No issue of disqualification would arise. On the other hand, if the court were to find that the lawyer did make the inconsistent statement, and that the inconsistency reflected intentional misrepresentation, then the inconsistent statement might well be admitted at trial. This would depend on the existing law with respect to imputing to a party the inconsistent statements of its lawyer.²²⁴

desire of any person, whether percipient witness or professional consultant, to avoid being involuntarily drawn into a court battle." Green, *supra* note 11, at 5. With respect to the belief that serving as a witness threatens the process, mediators should consider whether misrepresentation in the course of mediations presents a greater threat to the process than does their occasional testimony.

224. One might assume that Federal Rule of Evidence 801(d)(2), addressing vicarious admissions, would govern this issue. Under this Rule, the courts have been quite willing to treat lawyers' statements on behalf of their clients as admissions of the client, either under subsection 801(d)(2)(C), which deems an admission "a statement by a person authorized by the party to make a statement concerning the subject," or subsection 801(d)(2)(D), which deems an admission "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment." See Fed. R. Evid. 801(d)(2)(D); *see also, e.g.*, United States v. Brandon, 50 F.3d 464, 468-69 (7th Cir. 1995) (holding defendant's former attorney's statements admissible against defendant as admissions under Rule 801(d)(2)(D)); Harris v. Steelweld Equip. Co., 869 F.2d 396, 403 (8th Cir. 1989) (holding attorney's statements to expert witness admissible against client as admissions under Rule 801(d)(2)(D)); *In re Younie*, 211 B.R. 367, 376 (B.A.P. 9th Cir. 1997) (holding creditor's attorney's statements admissible

This law generally requires that the inconsistent statement have been made under circumstances suggesting that the client adopted the lawyer's statement.²²⁵ If the prior inconsistent statement were deemed admissible, then the lawyer quite possibly might have to serve as a witness, and the disqualification issue would be squarely presented.

At first blush, this possibility of lawyers being disqualified from representing their clients seems troubling. It may appear a huge cost to pay for simply providing parties an opportunity to impeach their opponents. Further scrutiny, however, reveals that disqualification would be nothing more than an appropriate sanction for what can only be seen as misconduct by either the lawyer or the party.

Consider, for example, the opening hypothetical. In that scenario, both the Dean and the University's lawyer assured the plaintiff's counsel during a negotiation session that student evaluations were not relied upon in the University's pay decisions. Only weeks later, however, in the University's answer (drafted by that same lawyer), the University claimed that student evaluations were the basis for the pay decision. Assuming the Dean went on to testify during deposition or at trial that she relied on the plaintiff's

against creditor as admissions under Rule 801(d)(2)(D)); *Knight v. Vernon*, 23 F. Supp. 2d 634, 641 (M.D.N.C. 1998) (holding county attorney's statements admissible against county as admissions under Rule 801(d)(2)(D)); *State v. Ahmed*, 924 P.2d 679, 687-88 (Mont. 1996) (holding defendant's attorney's statements admissible against defendant under Rule 801(d)(2)(C) and (d)(2)(D)). The courts have generally been much more demanding, however, before they will impute a lawyer's statements to a party for the purposes of *impeaching* that party with the statement. *See infra* note 225 and accompanying text. This is somewhat counterintuitive, because it is ordinarily harder to have an inconsistent out-of-court statement admitted substantively, as non-hearsay, than it is to have it admitted for impeachment purposes only. The reasoning seems to be that credibility is a uniquely personal issue, and it is inappropriate to saddle a party with the suggestion that he or she has lied unless he or she has personally, actually approved the statement.

225. *See Ballou v. Master Properties No. 6*, 234 Cal. Rptr. 264, 270 (Cal. Ct. App. 1987) (holding that plaintiff could not be impeached by unverified allegations in complaint drafted and filed by attorney); *Douglas-Bey v. United States*, 490 A.2d 1137, 1137 n.1 (D.C. 1985) (holding that attorney's statement could not be used to impeach witness where court properly determined that witness had not adopted statement); *Johnson v. State*, 341 S.E.2d 220, 223 (Ga. 1986) (holding that witness could not be impeached by statements made in bail application where witness' attorney filed application); *People v. Accardo*, 551 N.E.2d 1349, 1358 (Ill. App. Ct. 1990) (holding that witness could be impeached by attorney's statements to court in witness' sentencing proceeding where witness stood silent); *Sinha v. Dabezies*, 590 So. 2d 795, 799 (La. Ct. App. 1991) (holding that physician's answer in medical malpractice action could not be used as prior inconsistent statement to impeach physician where answer was signed only by attorney); *People v. Mahone*, 614 N.Y.S.2d 409, 411 (N.Y. App. Div. 1994) (holding that defendant's lawyer's statements could be used to impeach where statements were made in defendant's presence and with his participation); *State v. Dault*, 19 Wash. App. 709, 717-18, 578 P.2d 43, 48 (1978) (holding that attorney's statements about defense at omnibus hearing could be used to impeach defendant).

student evaluations, should the plaintiff be able to call the lawyer as a witness to the inconsistent statement, and thus disqualify the lawyer from serving as counsel for the University?²²⁶

The answer ought to be “yes,” because the lawyer herself has participated in advancing an untruth, either by making the statement in the negotiation or in placing the Dean on the stand to lie, depending on which of the two statements is false. If the lawyer knew her statement in the negotiation was false, and student evaluations were in fact relied upon, then the lawyer should be disqualified for violating the ethical rule prohibiting lawyers from making knowingly false representations.²²⁷ If the lawyer’s statement during the negotiation was true, but the position taken later at trial was false, then the lawyer ordinarily should be disqualified for violating the ethical rule prohibiting lawyers from suborning perjury.²²⁸ Indeed, disqualification should not even have become an issue, because the lawyer should have stepped down upon realizing that the client intended to offer an untruthful defense despite the lawyer’s urging not to do so.²²⁹

It is possible to imagine a situation in which the testimony at trial is the truth, and the lawyer made a statement during negotiations that was false, but the lawyer believed at the time it was true. This would not present any ethical violation by the lawyer, because the lawyer would not have knowingly misrepresented any fact and could not be seen as suborning

226. The hypothetical thus presents the situation contemplated by section 1 of the proposed amendment, because (1) a prior inconsistent statement of fact has occurred; (2) the inconsistent statement relates to a material issue in the case, namely, whether pay decisions were discriminatory or not; and (3) the inconsistency reflects an intentional misrepresentation, because the Dean, who personally made the decisions on pay, has to have known at all times whether she relied on student evaluations or did not.

227. *Model Rule of Professional Conduct 4.1* provides: “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.” *Model Rule of Professional Conduct 4.1* (1998). This provision is even narrower than the provision under the Model Code of Professional Responsibility, which states: “In his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact.” *Model Code of Professional Responsibility* DR 7-102(A)(5) (1969).

228. *Model Rule of Professional Conduct 3.3(a)* provides, “[a] lawyer shall not knowingly . . . (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.” *Id.*

229. The Comment to *Model Rule of Professional Conduct 3.3* indicates that a lawyer knowing that a client intends to offer false evidence should ordinarily “remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court.” *Model Rules of Professional Conduct Rule 3.3* cmt. 11 (1998).

perjury because the testimony to be given under oath is the truth. In this situation, under the law governing what statements of a lawyer can be imputed to a client for impeachment purposes, the lawyer's statement could be imputed to the client only if the circumstances indicated that the client actually adopted the lawyer's unwittingly false statement.²³⁰ Thus, unless the client knowingly permitted the lawyer to misrepresent facts on her behalf, the inconsistent statement could not be admitted at trial, and there would be nothing as to which the lawyer might be a witness. If the party did knowingly permit the lawyer to lie, however, then it is only appropriate that the opposing party be allowed to call the lawyer as a witness and that disqualification follow as a sanction for the party's own misconduct.

That same argument, of course, would support allowing lawyers as witnesses any time their clients engage in intentional misrepresentation either during negotiations or in subsequent litigation, rather than, as the amendment proposes, only when it is the lawyer himself or herself who has made the inconsistent statement. In both situations, the party has engaged in misconduct worthy of exposure by whomever has witnessed the deception. There are several reasons, however, why the proposed amendment draws the line between inconsistent statements actually made by a party's lawyer and those merely witnessed by a party's lawyer.

First, as a practical matter, allowing lawyers who merely witnessed an alleged inconsistent statement to testify would not add much probative value to the dispute, inasmuch as the testimony would be merely cumulative of the parties' testimony. In contrast, when it is a lawyer who has made an inconsistent statement, there would be a great deal of probative value in hearing from the lawyer in person. Indeed, from the proponent's perspective, it might be absolutely necessary if the lawyer admits that he or she made the statement but the party does not. Conversely, if the lawyer continues to contend, in the face of the court's finding that the statement was made, that the lawyer did not make the statement, it would seem inappropriate to prevent the lawyer from personally defending against the accusation.

Second, allowing lawyers who merely witnessed misrepresentations to testify at trial could lead to disqualification motions of unmanageable proportions. Both sides could file disqualification motions on the theory that every lawyer who was in the room at the time is a potential witness.²³¹

230. See *supra* note 225 and accompanying text.

231. See *supra* note 214.

Indeed, even the lawyer for the party who was the victim of the intentional misrepresentation might find it necessary to take the stand if the lawyer for the impeached witness chooses to do so even after the court's finding that the misrepresentation occurred and was intentional.²³² Drawing the line between the lawyer-witness and the lawyer-speaker therefore seems appropriate to prevent the litigation from becoming excessively protracted.

Finally, the ramifications for the attorney-client relationship in the lawyer-witness situation and the lawyer-speaker situation are different. It is unfortunate when a lawyer's client engages in intentional misrepresentation without the lawyer's participation, but in that case there is no reason to believe the lawyer has acted improperly. Moreover, allowing the lawyer to remain as counsel might actually encourage a more ethical presentation of the remainder of the case. In contrast, when it is the lawyer who has made the inconsistent statement, there is a substantial possibility, as described above, that the lawyer has acted improperly right along with the client. Further, even when the lawyer has not acted improperly—in other words, when the attorney made the inconsistent statement believing it to be true but the client knew it was false—this provides reason to believe that the client has been willing to lie to his or her own lawyer, because the lawyer is likely to have received the false information from the client. Under these circumstances, the attorney-client relationship is not operating as the profession would hope, and infringing on the relationship to the extent of permitting the lawyer to testify does not seem nearly as great a cost.

In sum, the proposal offered here qualifies the availability of impeachment by prior inconsistent statements made during negotiations or mediations, primarily so that it will apply only when intentional misrepresentation has occurred during the negotiation or mediation or is occurring at trial. The proposal may not have anticipated every practical

232. Cf. 2 Louisell & Mueller, *supra* note 52, § 172, at 471 n.11. As Louisell and Mueller have observed,

[i]f defense counsel were to testify as to what plaintiff's counsel said, in all probability the latter would feel obliged to testify as well, for the two are unlikely to agree on the tenor of their prior exchange. If they continued to act as trial counsel, each would have to argue the case while defending his own personal credibility and attacking that of opposing counsel, a conflicted role uncongenial to our adversary system.

Id. One solution to this problem might be to prohibit lawyers from serving as witnesses only at *trial*, because the primary concern on which the lawyer disqualification rule is based is that the jury would not be able to distinguish the lawyer's dual roles. See *Model Rules of Professional Conduct Rule 3.7 cmt. 2.* (1998). Eliminating this problem, however, would not address the other issues described in the text.

difficulty that might arise from permitting impeachment: the terrain between blanket confidentiality and allowing impeachment whenever there is inconsistency has not been charted before. It is a beginning, however, to be improved upon as we come to accept that the public policy rationale is not as sound as the law has long assumed, and does not warrant the blanket exclusion of statements of fact made during negotiations.

V. CONCLUSION

The law currently extends confidentiality to the parties to a negotiation or mediation on the nearly universally accepted public policy rationale that confidentiality is necessary to ensure that parties can communicate freely enough to reach settlements. That rationale is undeserving of its widespread application, however, because it is only partly correct. Although confidentiality does help parties discuss their needs in settling or their hesitation in settling, it is not what determines whether an honest party will divulge the facts needed to resolve the case. Thus, when confidentiality is extended so far as to preclude impeachment by inconsistent statement, it operates only to protect dishonest parties, those who would represent the facts one way during negotiation or a mediation and deliberately represent the facts differently during subsequent litigation. The honest parties on the other side of the table may then become the unknowing victims of an unjust settlement, or the knowing, but helpless, victims of a false trial outcome.

The amendment proposed by this Article seeks to achieve a balance between promoting settlements and protecting the truth-seeking process. It leaves confidentiality in place to the extent that confidentiality *actually* furthers communication in negotiations, and yet provides the opportunity to expose intentional misrepresentation that occurs during negotiation or at trial. Depending on how much misrepresentation is occurring, the amendment's impact could be great or it could be negligible, but at least it places the law squarely in favor of expecting the truth from both parties and their attorneys.