
COMMENT

RACING TO SETTLEMENT: THE APPLICABILITY OF FEDERAL RULE OF EVIDENCE 408 TO NONPARTY SETTLEMENT COMMUNICATIONS

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INTRODUCTION

The racing world breathed a long sigh of relief on May 22, 2008—the date on which Bruton Smith, Chairman of Speedway Motorsports Inc. (SMI), announced his intention to purchase Kentucky Speedway.¹ For the previous two years, Kentucky Speedway had been engaged in a bitter antitrust battle against NASCAR involving the latter's refusal to award it a lucrative NEXTEL Cup race,² and it appeared that all of the necessary pieces were finally in place for a settlement agreement to be reached. Kentucky Speedway had lost at the trial level,³ it was hemorrhaging money, and its investors were desperately trying to sell the speedway.⁴ Thus, when Bruton Smith effectively conditioned the acquisition of the speedway on the lawsuit between Kentucky and NASCAR ending,⁵ it seemed as though the three entities would naturally work together on a settlement that would be in all of their best interests. NASCAR could avoid the costs of an appeal, Bruton Smith could acquire the

¹ Marty Smith, *Key NASCAR Track Owner to Buy Kentucky Speedway*, ESPN.COM, May 23, 2008, <http://sports.espn.go.com/rpm/nascar/cup/news/story?id=3407605>.

² *See* Ky. Speedway, LLC v. NASCAR, No. 05-0138, 2008 WL 113987, at *1 (E.D. Ky. Jan. 7, 2008), *aff'd*, 588 F.3d 908 (6th Cir. 2009).

³ *See id.* at *8 (granting NASCAR's motion for summary judgment).

⁴ The investors were willing to sell the track for half of the price that they had paid to construct it. *See NASCAR Says It's Too Late to Add Kentucky to 2009 Schedule*, CBSSPORTS.COM, May 23, 2008, <http://www.cbssports.com/autoracing/story/10839377> ("Smith has not yet completed the speedway purchase, in which he agreed to pay \$78.3 million for the track that cost \$152 million to build."). This desperation was understandable given the large debt that the speedway had incurred. *See* Bob Pockrass, *SMI: We Haven't Made Decision on Kentucky Speedway Transaction*, BUS. COURIER (Cincinnati), Aug. 7, 2008, <http://cincinnati.bizjournals.com/cincinnati/stories/2008/08/04/daily43.html> (noting that the \$78 million deal with SMI would include "\$63 million in debt assumption").

⁵ While Bruton Smith was interested in Kentucky Speedway for its potential value in holding a NEXTEL Cup race, NASCAR continually stressed that it would not consider sanctioning such a race until its litigation with the previous owners of Kentucky Speedway was resolved. *See* Pockrass, *supra* note 4 ("Smith has said that as long as the current owners continue their lawsuit, he cannot realign a race date to Kentucky."). Smith included a provision in the acquisition contract allowing SMI to back out of the deal within ninety days, *see id.*, and he knew that his success in obtaining the race depended on the resolution of the lawsuit. *See* Bob Pockrass, *Smith Not Saying Which SMI Track Could Lose Date to Kentucky*, SCENEDAILY.COM, June 17, 2008, http://www.scenedaily.com/news/articles/nationwideseries/Smith_not_saying_which_SMI_track_could_lose_date_to_Kentucky.html (reporting Smith's acknowledgment that, in order to get the race that he wanted, "the key would be for the current Kentucky Speedway ownership group to settle or drop its federal antitrust lawsuit against NASCAR").

speedway for a fraction of its value, and Kentucky Speedway's shareholders could be bailed out of their failing investment.

Given the prevalence of settlement in federal lawsuits,⁶ the parties' lawyers were likely quite familiar with an immediate concern of their clients—ensuring that their statements to the opposing party over the course of settlement negotiations would not expose them to future liability.⁷ The lawyers likely turned to Federal Rule of Evidence 408⁸ to explore the specific protection that their clients could enjoy during the course of the settlement proceedings. There is a wealth of case law and academic literature to which these practitioners may have turned for answers concerning the application of this Rule to settlement communications *between* the parties,⁹ and it is clear that it would have afforded protection to such communications directly between NASCAR and Kentucky Speedway.¹⁰

An interesting issue must have surfaced, however, when the practitioners considered the consequences of Bruton Smith—a nonparty to the litigation—being involved in the settlement proceedings. Neither the most thorough inspection of the Rule nor the most detailed analysis of its accompanying advisory note would have yielded a sufficient answer to the question whether communications between Bruton Smith and one of the parties to the litigation, in furtherance of settlement with the other party, would have been protected.¹¹ Such a settlement

⁶ See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1285 n.129 (2002) (“[B]y most estimates, approximately seventy percent of all cases filed in federal court end in pretrial settlement.”).

⁷ See 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, 110 (1995) (“[T]he almost unavoidable impact of disclosure about compromise is that juries will consider the evidence as a concession of liability, and the tendency of juries to disregard instructions is so well known that the admission of the evidence for even a limited purpose would result in a frustration of the policy of encouraging settlements.” (internal quotation marks omitted) (footnote omitted)).

⁸ Rule 408 describes the conditions under which statements made in the course of settlement negotiations are inadmissible.

⁹ See, e.g., Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 957-82 (1988) (exploring the scope and limitations of Rule 408's protection of communications made between parties to a litigation).

¹⁰ See FED. R. EVID. 408(a) (noting the conditions under which “conduct or statements made in compromise negotiations regarding the claim” are “not admissible on behalf of any party”).

¹¹ Specifically, the issue is whether communications to a *nonparty* (e.g., Bruton Smith) in furtherance of settlement would constitute “compromise negotiations” and thus warrant protection under the Rule—an issue on which the Rule is silent.

scenario would arguably further the policy goals underlying the Rule¹² and be enormously advantageous to everyone involved. There is no case law, though, to guide practitioners encountering such a situation, and the academic literature is similarly silent.

When confronted with this issue, practitioners are thus forced either to forgo potentially beneficial interactions with third parties (people like Bruton Smith) or to proceed with an imperfect understanding of their clients' potential exposure to liability resulting from admissions or concessions made in such communications. This void in both the literature and the case law is particularly troubling given the increasing complexity of settlement negotiations and the underlying disputes. In addition, given the growth of mergers and acquisitions and the involvement of third-party "specialists"¹³ to whom parties convey a wide variety of sensitive information, the Bruton Smith example might even begin to seem relatively simple. Practitioners are responsible for protecting their clients from harm during the course of settlement proceedings, and it is essential that the issue of nonparty communications be clarified in order to provide practitioners with necessary direction.

This Comment presents an initial analysis of the applicability of Rule 408 to communications made by a party to a nonparty in furtherance of a settlement with another party to the dispute.¹⁴ Given the lack of direct authority regarding this issue, I rely on a textual analysis of the Rule itself, an examination of the public policy considerations motivating the Rule's enactment, and an analysis of the applicability of this Rule to other, similar situations within the jurisdiction of the federal courts of appeals, in order to provide recommendations to practitioners facing this issue.

In Part I, I present an overview of the origins and foundations of the Rules concerning the secrecy of settlement communications and offer a brief description of some of the issues resulting from the Rules'

¹² See *infra* Section II.B.

¹³ Joseph H. Flom, *Mergers & Acquisitions: The Decade in Review*, 54 U. MIAMI L. REV. 753, 773-74 (2000).

¹⁴ For shorthand, this Comment sometimes refers to this simply as "the issue." The Comment will also briefly discuss the settlement privilege recently acknowledged, under Rule 501, by the Sixth Circuit. See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 981 (6th Cir. 2003) ("The public policy favoring secret negotiations, combined with the inherent questionability of the truthfulness of any statements made therein, leads us to conclude that a settlement privilege should exist . . ."). Because the Sixth Circuit is the only circuit in which the privilege applies, though, this Comment will largely focus on the general applicability of Rule 408.

ambiguity. I then argue that the applicability of these Rules to nonparties involved with settlement negotiations has yet to be adequately addressed, note the probable reasons for this being the case, and reflect on the necessity of a swift resolution to this failure.

In Part II, I engage in a textual, policy-based, and common law analysis of the applicability of Rule 408 to nonparty settlement communications under the jurisdiction of the federal courts of appeals. In so doing, I find that the terms of the Rule, its underlying policy, and its current application to analogous cases suggest that the federal circuits would look favorably upon protecting nonparty communications in furtherance of settlement.

In Part III, I present circuit-specific recommendations to practitioners based on the results of my analysis in Part II. I argue that practitioners should feel most comfortable engaging in nonparty settlement communications in the Third, Fifth, Sixth, Eighth, and Eleventh Circuits; that practitioners should feel less, but still reasonably, comfortable engaging in such communications in the First and Ninth Circuits; and that there is insufficient case law upon which to base a conclusion in the Second, Fourth, Seventh, Tenth, and D.C. Circuits. Finally, I argue that because the federal courts of appeals have acknowledged a broad policy of encouraging the settlement of lawsuits under Rule 408, it would not be inherently unreasonable for parties to engage in such communications—even in the more ambiguous circuits—when the communications would be particularly advantageous.

I. PROTECTING THE DRIVERS: THE FEDERAL RULES CONCERNING THE SECURITY OF SETTLEMENT COMMUNICATIONS

Before I analyze the applicability of the Rules concerning the secrecy of settlement negotiations to nonparties to a litigation, it is important to understand both the context in which these Rules arose and the current issues resulting from their ambiguity. I explain the absence of an adequate discussion of the issue and emphasize the importance of reaching a resolution.

A. *Rule 408*

Federal Rule of Evidence 408, entitled “Compromise and Offers to Compromise,” concerns the admissibility of settlement offers and other communications made during the course of settlement negotiations.¹⁵

¹⁵ FED. R. EVID. 408.

It provides, in its current amended form, that “offering . . . or accepting . . . valuable consideration in compromising or attempting to compromise [a] claim” and “conduct or statements made in compromise negotiations regarding [a] claim” are “not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction.”¹⁶

The Advisory Committee on Evidence Rules has noted two principal motivations behind the enactment of Rule 408: First, the Rule seeks to guard against the admission of statements made in compromise negotiations because of the statements’ questionable evidentiary value; as settlement is often “motivated by a desire for peace rather than from any concession of weakness of position,” the use of these statements in another context may be highly misleading.¹⁷ Second, the Rule seeks to further the general public policy of encouraging settlement of lawsuits.¹⁸ Successful settlement negotiations are vital to ensuring that the federal courts remain productive and efficient, and Rule 408 attempts to encourage settlement discourse by freeing individuals from the worry that their statements may expose them to future liability.

As is the case with many of the Rules of Evidence, the federal courts have yet to implement a consistent judicial philosophy regarding the proper scope and application of Rule 408,¹⁹ and the Supreme Court has yet to produce an opinion addressing the Rule. Given that settlement negotiations are involved in most federal lawsuits,²⁰ the academic community has understandably developed a keen interest in attending to the various ambiguities inherent in Rule 408. There has been a wealth of scholarship concerning the types of settlement communications covered by the Rule and the safeguards that parties must employ in order to ensure the Rule’s applicability to the precise circumstances of their litigation.²¹

¹⁶ *Id.*

¹⁷ FED. R. EVID. 408 advisory committee’s note.

¹⁸ *Id.*

¹⁹ *See* *Constar Int’l, Inc. v. Ball Plastic Container Corp.*, No. 05-0669, 2006 WL 6021150, at *1 (W.D. Wis. Mar. 27, 2006) (“Courts are all over the map on how to apply Rule 408.”).

²⁰ *See supra* note 6 and accompanying text.

²¹ *See, e.g.,* Brazil, *supra* note 9, at 955, 957-82 (discussing “how far [Rule 408’s] promise of confidentiality extends and the circumstances under which it would permit communications made during settlement negotiations to be admitted into evidence at trial”); Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76

Such scholarship, however, has generally been limited to the context of negotiations taking place directly between two adverse parties to a litigation. Even when the issue of nonparties has been broached in the literature and case law, it has only been with regard to ancillary third parties entering into a preexisting dispute and bringing their own claims against the defendant. The situation is generally as follows: Party *A* is involved in a lawsuit with Party *B*. Nonparty *C* considers engaging in its own litigation against *B* arising out of the lawsuit between *A* and *B*, and then *B* and *C* settle. *A* now wants both to discover and to admit evidence of the terms of this settlement agreement or communications made therein. The courts have clearly held, however, that the admission of such evidence is barred by Rule 408.²² Although the settlement agreement between *B* and *C* arose out of the lawsuit between *A* and *B*, it is still a “compromise negotiation[.]”²³ within the scope of the Rule.

This example, of course, is distinct from a situation in which a party to a litigation communicates with a nonparty in furtherance of a settlement with another party. In the latter situation, *B* and *C* are not engaged in any dispute arising from the original lawsuit and are not communicating in hopes of reaching a settlement agreement between themselves. Rather, *B* is communicating with *C* in the hope of coming to an agreement with *A*. The interesting issue, then, is whether the scope of Rule 408 extends to “conduct or statements made in compromise negotiations”²⁴ when *B* is not compromising with *C* but rather is communicating with *C* in order to further her compromise negotiation with *A*. That is, does the protection of Rule 408 extend to communications made by a party involved in a lawsuit to a nonparty when such communications are in furtherance of a settlement with another party to the dispute?

Unfortunately, both Rule 408 and its accompanying advisory notes are silent on this issue, and neither the academic literature nor case law provides any sufficient discussion of the issue. This void may be due to a variety of different factors. With regard to an absence of case

U. CIN. L. REV. 939, 940 (2008) (discussing Rule 408’s inapplicability to statements made to government officials during settlement negotiations and how this “creates an inconspicuous trap awaiting any person who is the subject of a civil investigation by a governmental body,” as “admissions of fault made during those settlement talks can become the basis for a later criminal proceeding”).

²² See, e.g., *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 91-92 (9th Cir. 1982).

²³ FED. R. EVID. 408.

²⁴ *Id.*

law, it may be that parties are unlikely to communicate with nonparties in furtherance of a settlement with another party precisely because they are unaware of their potential liabilities for doing so. As to the void in the literature, it may be that the wealth of other uncertainties concerning the scope and application of Rule 408²⁵ has led to a broader academic discourse surrounding the Rule.

Regardless of the specific reasons for the absence of a significant discussion of this issue, such a failure must quickly be resolved. Settlement negotiations are becoming as complicated and far-reaching as the transactions and disputes at their foundation, and interested third parties are increasingly attempting to become involved in their resolution. Indeed, settlement negotiations surrounding mergers and acquisitions—a context in which this issue is likely to arise—have never been as complex as they have become in recent history. Practitioners are currently forced either to forgo potentially beneficial communications with nonparties or to participate in such communications with an imperfect understanding of their resulting potential for future liability under Rule 408. The scope of Rule 408's protection in this area must be explored and clarified in order to provide direction to practitioners accountable for the course of settlement negotiations.

B. *Rule 501 and the Settlement Privilege*

While not the focus of this Comment, a discussion of the Rules protecting the secrecy of settlement negotiations would be incomplete without an introduction to the newly acknowledged settlement privilege under Rule 501. Unlike Rule 408's concern with the *admissibility* of evidence, Rule 501 provides the general guidelines by which courts may recognize the existence of privileges preventing the very *discoverability* of evidence. The broad language of Rule 501 states that the recognition of privileges "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," except as otherwise required by the laws of the United States.²⁶ The Supreme Court has noted that Rule 501 allows the federal courts to recognize privileges not previously enjoyed under the common law so long as the recognition promotes

²⁵ See, e.g., Jeffrey J. Lauderdale, *A New Trend in the Law of Privilege: The Federal Settlement Privilege and the Proper Use of Federal Rule of Evidence 501 for the Recognition of New Privileges*, 35 U. MEM. L. REV. 255, 306-09 (2005) (discussing various uncertainties raised when trying to reconcile Rule 408 with the settlement privilege).

²⁶ FED. R. EVID. 501.

a public interest that is “sufficiently important . . . to outweigh the need for probative evidence”²⁷ and the recognition is consistent with the “reason and experience” of federal jurisprudence.²⁸

In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, the Sixth Circuit became the first circuit to recognize the existence of a general “settlement privilege” under Rule 501.²⁹ The issue before the court was “whether statements made in furtherance of settlement are privileged and protected from third-party discovery” when a plaintiff sought discovery of communications made during settlement negotiations between the two defendants to his claim.³⁰ While the court readily noted that Rule 408 was not on point because it applies to admissibility and not discoverability, it elected to recognize a general settlement privilege under Rule 501.³¹ Having analyzed the historical development of various protections for settlement communications in the common law, the court stated that “[v]iewed in the light of reason and experience, we believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized.”³² The court thus denied discovery of the statements made in furtherance of the settlement negotiations.³³

While this settlement privilege goes beyond Rule 408’s provision of inadmissibility and makes settlement communications undiscoverable, the policy goals inherent in the *Goodyear* court’s recognition of the privilege are identical to the policy goals underlying Rule 408: encouraging the settlement of lawsuits³⁴ and shielding from discovery potentially misleading and contextually driven statements.³⁵

In addition to sharing similar purposes with Rule 408, the settlement privilege has similar ambiguities. As with Rule 408, the federal

²⁷ *Trammel v. United States*, 445 U.S. 40, 51 (1980).

²⁸ *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (holding that communications made between patient and psychotherapist are privileged).

²⁹ 332 F.3d 976, 980 (6th Cir. 2003).

³⁰ *Id.* at 977.

³¹ *Id.* at 979-81.

³² *Id.* at 980 (internal quotation marks omitted).

³³ *Id.* at 983.

³⁴ *Compare id.* at 980 (“The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications.”), *with supra* text accompanying note 18.

³⁵ *Compare* 332 F.3d at 981 (recognizing that settlement negotiations frequently include “puffing and posturing” and that allowing discovery of such statements “would be highly misleading if allowed to be used for purposes other than settlement” (internal quotation marks omitted)), *with supra* text accompanying note 17.

courts have yet to adopt a consistent philosophy regarding the nature of the settlement privilege.³⁶ Most significantly, the Sixth Circuit is currently the only circuit even to acknowledge its existence.³⁷ While most courts have simply failed to reach the issue of this privilege on the merits,³⁸ a number of them have outright rejected the privilege, arguing that the Sixth Circuit's conclusion was unjustified.³⁹ And, even where the existence of this privilege is accepted, there is no clear consensus among the district courts as to its proper scope and application.⁴⁰ The broad language of the *Goodyear* holding⁴¹ and the absence of advisory committee notes to aid in Rule 501's interpretation leave the settlement privilege riddled with even more uncertainties than Rule 408.

It is not surprising, given its similar purpose and ambiguity, that issues pertaining to the settlement privilege have enjoyed the same wealth of discourse in the literature as those involving its Rule 408 counterpart.⁴² There has been a great deal of debate within the academic community as to the specific types of settlement communications

³⁶ Compare *Lauderdale*, *supra* note 25, at 306-13 (discussing several "issues [that] exist regarding the substantive scope and application of the [settlement] privilege"), with *supra* note 19 and accompanying text.

³⁷ *Cf. Lauderdale*, *supra* note 25, at 259 ("In [*Goodyear*] the Sixth Circuit became the first federal court to recognize a 'settlement privilege'—a privilege between adverse parties for communications made at the bargaining table while attempting to settle a dispute.").

³⁸ See, e.g., *United States v. Williams Cos.*, 562 F.3d 387, 398 (D.C. Cir. 2009) (declining to address the issue of settlement privilege because it was not properly raised in the district court); *In re Subpoena Duces Tecum Issued to Commodity Futures Trading Comm'n*, 439 F.3d 740, 742, 754 (D.C. Cir. 2006) (deeming "premature" a consideration of the merits of the settlement-privilege claim because the party claiming the privilege failed to meet its burden of showing that the allegedly protected documents were a part of settlement negotiations).

³⁹ See *Ray v. BlueHippo Funding, LLC*, No. 06-1807, 2008 WL 3399392, at *1 (N.D. Cal. Aug. 11, 2008) (refusing to acknowledge a federal settlement privilege); *Bd. of Trs. of the Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 521, 523 (C.D. Cal. 2008) (same); *Newman & Assocs. v. J.K. Harris & Co.*, No. 04-9264, 2005 WL 3610140, at *2-3 (S.D.N.Y. Dec. 15, 2005) ("Under federal law, courts have generally declined to recognize a privilege that would preclude discovery for the purpose of settlements or settlement negotiations. . . . To the extent that defendants rely on the existence of such a privilege, their argument fails as a matter of law.").

⁴⁰ See *Irwin Seating Co. v. IBM Corp.*, No. 04-0568, 2007 WL 518866, at *3-4 (W.D. Mich. Feb. 15, 2007) (holding that, while *Goodyear* did not provide direct guidance on the issue, a magistrate judge's decision to strike the plaintiff's expert testimony because the plaintiff had revealed to the experts confidential information obtained during mediation before the experts testified was not clearly erroneous or unduly harsh).

⁴¹ See *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 983 (6th Cir. 2003) ("In sum, any communications made in furtherance of settlement are privileged.").

⁴² See *supra* note 21 and accompanying text.

covered by the Rule,⁴³ the exact degree to which such communications can be disclosed,⁴⁴ and the safeguards that a party must employ in order to ensure the applicability of the privilege to the party's litigation.⁴⁵ There is controversy as to whether the Sixth Circuit was even justified in creating the privilege, with some academics contending that the court's historical analysis was inaccurate and its general reasoning inadequate.⁴⁶

The contours of such scholarship, however, have likewise been limited to the context of settlement negotiations taking place directly between two adverse parties to litigation. There has been no discussion in the courts or in the literature about whether the settlement privilege extends to communications made by a party involved in a lawsuit *to a nonparty* when such communications are in furtherance of a party's settlement. In the Rule 501 context, however, the reasons for the lack of discourse are far clearer than in the case of Rule 408. Given the groundbreaking nature of the settlement privilege, its adoption only seven years ago, and the current circuit split regarding its acceptance, far more pressing concerns regarding the acknowledgment of this privilege⁴⁷ have diverted the attention of courts and scholars alike.

The academic interest in the "bigger picture" presented by the settlement privilege, however, does nothing to address the specific concerns of everyday practitioners who are responsible for guiding clients in their communications with nonparties. As in situations involving Rule 408, these practitioners are currently forced either to forgo potentially beneficial communications with nonparties or to participate in such communications with an imperfect understanding of the communications' discoverability. Clients negotiating with extremely sensitive information may not be content knowing that their communications

⁴³ See, e.g., *Lauderdale*, *supra* note 25, at 309-10 (noting that *Goodyear* left open the precise definition of "settlement negotiations" and that it remains unsettled "whether the privilege applies to forms of alternative dispute resolution such as mediation or arbitration").

⁴⁴ See *id.* at 308-09 (arguing that *Goodyear* intended to create a privilege against discovery but that disclosure should also be barred).

⁴⁵ See *id.* at 306-07 (noting that "it is unclear to what extent one [party] can prevent the disclosure of communications by the other" and that "it remains an open question as to what happens should one party disregard the privilege and reveal such information to a third party").

⁴⁶ See, e.g., *Thompson*, *supra* note 21, at 985-88 (discussing the controversy over whether the *Goodyear* court correctly applied precedent in reaching its ruling).

⁴⁷ For a discussion of such concerns—including "whether and how the settlement privilege can be reconciled with the provisions in Rule 408," how "settlement negotiation" should be defined, and "whether the privilege can attach before litigation"—see *Lauderdale*, *supra* note 25, at 305-13.

may be inadmissible but perhaps discoverable, and they certainly do not appreciate the ambiguity. The scope of the settlement privilege's protection of communications made by a party to a nonparty must be explored and clarified in order to provide sufficient direction for practitioners responsible for taking such issues into account.

In sum, while there has been a great deal of discussion surrounding both Rule 408 and the settlement privilege, it has been limited to issues regarding settlement communications directly between parties to a dispute. There has yet to be any significant headway in either the academic literature or the case law concerning application of either Rule 408 or the privilege to communications made by a party to a nonparty in furtherance of a settlement with another party. Given the mounting complexity of settlement negotiations and the increasing demand for nonparty involvement in such compromises, it is essential that this void in the literature be addressed by a developing discussion that takes the issue of nonparty settlement communications seriously.

II. NAVIGATING THE TRACK: NONPARTY SETTLEMENT COMMUNICATIONS IN THE COURTS OF APPEALS

Having acknowledged this dearth of discourse, I now analyze the applicability of Rule 408 to communications made by a party to a nonparty in furtherance of settlement with another party. In doing so, I find that the terms of the Rule, its underlying policy, and its current application to analogous situations within the jurisdiction of the federal courts of appeals suggest that its protections apply to these communications. Because the settlement privilege arose from the same policy considerations underlying Rule 408, I will at times discuss the privilege in order to further elucidate the discussion.

A. *Textual Analysis*

The textual provisions of Rule 408 are not facially limited to settlement communications between parties to a litigation. In fact, the terms suggest a broad scope of protection for communications made in furtherance of settlement, without restrictions on the recipient of such communications. That is, Rule 408 seems more concerned with the nature of *what* is said than with *to whom* it is said; it simply protects communications made in furtherance of settlement.

For instance, Rule 408 states that offers "attempting to compromise [a] claim" and "conduct or statements made in compromise negotiations *regarding [a] claim*" are to be afforded the Rule's protec-

tion.⁴⁸ In tying the Rule's protection to the type of communication made rather than to the relationship between the speaker and the recipient of the communication, the drafters of Rule 408 may have anticipated situations in which compromise negotiations would not merely be directly between the parties to the dispute. In fact, evidence scholars have noted that the choice of words employed by the Rule suggests that it was intended to have a significantly broader scope than a literal application would provide.⁴⁹

Similarly, the settlement privilege articulated by the *Goodyear* court appears to have been focused more on the nature of the settlement communication than on its recipient. Nowhere did the court state or imply that the settlement privilege should be construed as limited to communications made directly between the parties; rather, its reasoning focused on offering protection to settlement communications surrounding the claim itself. In fact, the court broadly concluded that "any communications made in furtherance of settlement are privileged."⁵⁰ Such an expansive statement appears to entail that communications in furtherance of settlement, regardless of the relationship between the parties, are to be privileged.

The fact that Rule 408 and the settlement privilege appear to focus on the nature of a communication rather than on the individual to whom it was made lends support to the proposition that communications made to a nonparty, so long as they were in furtherance of a settlement with a party to the dispute, would be both inadmissible and privileged to the extent that the Rules otherwise applied.⁵¹ However, it is also important to note that, given the inherent ambiguity of the text, the mere fact that the text is consistent with such an interpretation does not *necessarily* mean that the Rules were intended to encompass such a situation. I thus turn away from a facial evaluation of these Rules and toward an examination of their foundational principles.

⁴⁸ FED. R. EVID. 408(a) (emphasis added).

⁴⁹ See, e.g., JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL, STUDENT EDITION § 7.05[1][b] (8th ed. 2007) ("If either [party] makes an offer of compromise to a person other than the other potential litigant, the offer should be protected by exclusionary treatment.")

⁵⁰ *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 983 (6th Cir. 2003).

⁵¹ Rule 408(b) identifies an example of when the Rules would nonetheless not apply: exclusion is not required for evidence "offered for purposes not prohibited by subdivision (a)," such as "proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution."

B. Foundational Policy

While the scope of Rule 408 is far from clear, the public policy motivations at its foundation suggest that communications by a party to a nonparty to further settlement with another party ought to be protected. Such communications would be equally suspect as a means by which to assess a party's liability, and their protection would significantly further the general public policy of encouraging settlement in order to promote judicial efficiency.

1. Avoiding Reliance on Statements of Suspect Evidentiary Value

In Part I, it was noted that one of the principal motivations behind the enactment of Rule 408 was to guard against the admission of statements made in compromise negotiations because of the statements' questionable evidentiary value.⁵² Because an offer to settle is often "motivated by a desire for peace rather than from any concession of weakness of position," the use of statements made during compromise negotiations in another context may be highly misleading.⁵³ The *Goodyear* court, in describing its motivation for acknowledging a settlement privilege, similarly noted that there is an "inherent questionability of the truthfulness of any statements made" during compromise negotiations,⁵⁴ as parties may make admissions or engage in conduct in order to bring peace for the "unique purpose of settlement negotiations."⁵⁵

⁵² See *supra* text accompanying note 17.

⁵³ FED. R. EVID. 408 advisory committee's note. The federal courts of appeals have similarly acknowledged the importance of this policy. See, e.g., *EEOC v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009) (noting that one of the primary purposes of the rule is "to guard against the admission of evidence that may not fairly represent the actual value or merits of a claim" (citing FED. R. EVID. 408 advisory committee's note)); *United States v. Arias*, 431 F.3d 1327, 1337 (11th Cir. 2005) (noting that "the evidence is irrelevant, as the compromise at issue may have been motivated by a desire for peace rather than any concession as to the merits of the party's position" (citing FED. R. EVID. 408 advisory committee's note)); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (noting that evidence obtained from compromise negotiations "is of questionable relevance on the issue of liability or the value of a claim, since settlement may well reflect a desire for peaceful dispute resolution, rather than the litigants' perceptions of the strength or weakness of their relative positions"); *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (noting that such evidence is "irrelevant as being motivated by a desire for peace rather than from a concession of the merits of the claim" (citing FED. R. EVID. 408 advisory committee's note)).

⁵⁴ 332 F.3d at 981.

⁵⁵ *Id.* (quoting *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990)).

These policy considerations noted by both the Rules Advisory Committee and the *Goodyear* court are quite understandable. During a settlement negotiation, a party may well be willing to make certain admissions or concessions solely for the purpose of bringing about a speedy or cost-effective solution to a dispute. Rather than maintaining a truthful or principled stance regarding actual liability, a party may bend and waver for a number of reasons that have nothing to do with underlying guilt or innocence. The party may simply want to avoid the hassle, bad publicity, or significant cost that litigation may entail, and she may say or do anything to bring about such a result. Because there is thus an “inherent questionability of the truthfulness”⁵⁶ of any communications that such a party would make in furtherance of the settlement, it is in the interest of good public policy to ensure that an individual is not exposed to liability on the basis of these questionable statements.

If the courts are genuinely concerned with the inherent truthfulness of statements made in the pursuit of settlement, then such a policy consideration must necessarily extend to the type of statements at issue here. Whether a party engages in settlement communications with another party or nonparty, the underlying motivation is the very desire for settlement that offers little utility in attributing liability.⁵⁷ That is, the very nature of a settlement communication is of questionable probative value because it may be motivated by factors independent of any inherent truth. So long as an individual communicates with a nonparty in genuine furtherance of a settlement with a party, the truthfulness of such communications is as suspect as if the individual were communicating with the party directly. There is no logical distinction between these two cases with regard to this specific policy motivation, as there is no reason to believe that the latter communications would have greater probative value than the former.

Thus, to the extent that courts are concerned about the future admission of statements made for the “unique purpose of settlement negotiations,”⁵⁸ such concern should apply to all such statements offered for the “unique purpose of settlement.” This category certainly covers communications made by a party to a nonparty in furtherance of a settlement with another party, because the Rule is principally concerned with the *type* of statement to be protected.

⁵⁶ *Id.*

⁵⁷ See *supra* text accompanying note 17.

⁵⁸ *Goodyear*, 332 F.3d at 981 (quoting *Cook*, 132 F.R.D. at 554).

2. Promoting Judicial Efficiency Through Settlement

Far beyond providing a check against the suspect evidentiary value of settlement communications, the overwhelming purpose of Rule 408—as acknowledged by both the drafters of the Rule and the courts of appeals applying it—is to encourage the settlement of lawsuits in order to advance judicial efficiency.⁵⁹ The primary goal of the enactment of Rule 408 was to encourage the promotion of the public policy favoring the compromise and settlement of disputes that would otherwise be discouraged with the admission of such evidence.⁶⁰ The federal courts of appeals have acknowledged this foundational policy and its underlying utility.⁶¹ In recognizing the settlement privilege

⁵⁹ See *supra* text accompanying note 18.

⁶⁰ See FED. R. EVID. 408 advisory committee's note (calling the promotion of public policy favoring settlement a "more consistently impressive ground" for the Rule than the reliability of evidence produced during settlement).

⁶¹ See *EEOC v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009) (noting that the purpose of Rule 408 is "to foster open discussions and out-of-court settlements" (citing FED. R. EVID. 408 advisory committee's note)); *Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 805 (6th Cir. 2007) (arguing that the purpose of Rule 408 is "the promotion of the public policy favoring the compromise and settlement of disputes that would otherwise be discouraged with the admission of such evidence" (citation omitted)); *United States v. Arias*, 431 F.3d 1327, 1337 (11th Cir. 2005) (noting that one of the justifications for Rule 408 is that "the exclusion promotes settlement of disputes" (citing FED. R. EVID. 408 advisory committee's note)); *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005) ("The primary policy reason for excluding settlement communications is that the law favors out-of-court settlements, and allowing offers of compromise to be used as admissions of liability might chill voluntary efforts at dispute resolution."); *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545-46 (10th Cir. 1991) ("The philosophy of the Rule is to allow the parties to locate their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial." (quoting STEVEN A. SALTZBURG & KENNETH R. REDDEN, *FEDERAL RULES OF EVIDENCE MANUAL* 286 (4th ed. 1986))); *Trebor Sportswear Co. v. Ltd. Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989) (acknowledging that Rule 408 supports the "public policy of encouraging settlements and avoiding wasteful litigation"); *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) ("The public policy of favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions."); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (noting that "the rule illustrates Congress' desire to promote a public policy favoring the compromise and settlement of claims by insulating potential litigants from later being penalized in court for their attempts to first resolve their dispute out of court"); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 273 n.39 (3d Cir. 1983) ("Chief Judge Seitz believes that it is the purpose of Rule 408 to encourage settlements by shielding the parties to a settlement from liability based on the fact of settlement or on statements made in settlement negotiations."), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) ("By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering

under Rule 501, the Sixth Circuit noted that the privilege shared Rule 408's goal of promoting a "public policy favoring secret negotiations."⁶² It argued that "[t]he ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system."⁶³ In order to attain this goal, parties must be allowed "to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts" without fear that such information may later be used against them.⁶⁴

It seems that protecting a party's settlement communications with a nonparty could only encourage the settlement of lawsuits. There are certainly times when an interested nonparty to a lawsuit may be vital to the success of any settlement negotiations that take place.⁶⁵ If such negotiations would leave parties open to future liability, however, it would seriously limit their ability to compromise on any aspect of the claim, as they would be forced to entertain an understandable worry. In order to promote the public policy favoring the settlement of such disputes, the federal courts should be eager to ensure that the party has the necessary freedom of discussion with regard to compromises.

As a concrete example of how the protection of such nonparty communications would further the foundational public policy goals of this Rule, recall the previous discussion of NASCAR, Bruton Smith, and Kentucky Speedway.⁶⁶ Without a successful settlement, the complicated antitrust case between NASCAR and Kentucky Speedway would certainly have led to a more "burdened" Sixth Circuit.⁶⁷ A settlement seemingly would have been impossible without the intervention of Bruton Smith, a nonparty to the litigation.⁶⁸ Such an arrangement of three distinct individuals seeking their own advancement while incidentally benefiting the entire court system seems to be the

the policy toward settlement."); *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106 (5th Cir. Unit B May 1981) ("This rule is designed to encourage settlements by fostering free and full discussion of the issues.").

⁶² *Goodyear*, 332 F.3d at 981.

⁶³ *Id.* at 980.

⁶⁴ *Id.*

⁶⁵ See, e.g., *supra* notes 1-13 and accompanying text.

⁶⁶ *Id.*

⁶⁷ See *Goodyear*, 332 F.3d at 980 ("The ability to negotiate and settle a case without trial fosters a . . . significantly less burdened judicial system.").

⁶⁸ Without Smith, Kentucky would have had nothing to gain and thus no substantial reason to agree to a settlement with NASCAR.

very type of “creative *quid pro quos*”⁶⁹ that the courts seek to encourage. Furthermore, it cannot seriously be doubted that this settlement arrangement would “otherwise be discouraged with the admission of such evidence.”⁷⁰ NASCAR would likely never have dared to make the necessary concessions or admissions that such negotiations involve to either Kentucky Speedway or Bruton Smith if there were a risk that a different speedway could subsequently use such statements as proof of liability. Thus, the protection of communications made by parties to nonparties to a dispute furthers the public policy encouraging the settlement of lawsuits, and the absence of such protection would weaken that policy’s goal.

C. *Similar Cases*

While the federal courts of appeals thus acknowledge the powerful foundational policies at the heart of Rule 408,⁷¹ such broad considerations alone do not provide sufficient guidance to practitioners concerned with the specific scope of a circuit court’s application of the Rule. Indeed, in discussing the goals of Rule 408, the courts have noted that it would be erroneous to take the view that “*any* recognition of statements made during settlement will ruin the freedom of communication with respect to compromise that the Rule protects.”⁷² Although the federal courts of appeals have yet to entertain a case specifically concerning whether the scope of Rule 408 encompasses communications made by a party to a nonparty in furtherance of settlement, an examination of how the courts have dealt with similar ambiguities under the Rule suggests that the Rule’s protection would extend to such circumstances.

1. Internal Work Product

The most significant support for extending Rule 408’s protection to the issue is found within the courts of appeals’ treatment of a party’s internal work product, which—while prepared in furtherance of settlement—was never intended to be communicated to the opposing party. Despite the fact that Rule 408 does not directly address this sit-

⁶⁹ *Goodyear*, 332 F.3d at 980.

⁷⁰ *Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 805 (6th Cir. 2007) (internal quotation marks omitted).

⁷¹ *See supra* notes 53, 61.

⁷² *Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1161 (9th Cir. 2007) (emphasis added) (internal quotation marks omitted).

uation, several circuits have found that the Rule affords protection to such internal communications regarding settlement, whether they are formal memoranda,⁷³ reports,⁷⁴ accounting materials,⁷⁵ or even handwritten notes prepared informally.⁷⁶ Such decisions are especially significant to this Comment's issue because they suggest that these courts are more concerned with promoting the underlying policy considerations behind Rule 408 than they are with limiting the Rule's application to communications directly between parties.

In the most recent treatment of internal work product, the Eighth Circuit has echoed the Third, Fifth, and Eleventh Circuits' sentiments in stating that the spirit of Rule 408, "as recognized by several circuits . . . , supports the exclusion of certain work product . . . created specifically for the purpose of conciliation, even if not communicated to the other party."⁷⁷ In dealing with the ambiguity, the court noted that the purposes of the Rule were "to foster open discussions and out-of-court settlements and to guard against the admission of evidence that may not fairly represent the actual value or merits of a claim."⁷⁸ Given that protecting internal work product would further the policy goals of Rule 408, the court noted that it found the other circuits' reasoning persuasive and agreed that it was "appropriate to view Rule 408 as being sufficiently broad to encompass" the internally communicated material.⁷⁹

It is reasonable to believe that the courts of appeals that have acknowledged the applicability of Rule 408 to internal settlement communications based on policy considerations would also find the Rule applicable to the issue here. The previous discussion already found that nonparty settlement communications significantly further the

⁷³ See *Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 528-30 (3d Cir. 1995) (holding that Rule 408 bars the admission of internal memoranda prepared for settlement negotiations).

⁷⁴ See *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1107 (5th Cir. Unit B May 1981) (holding that an internal report "made in the course of an effort to compromise" was properly excluded under Rule 408).

⁷⁵ See *Blu-J, Inc. v. Kemper C.P.A. Group*, 916 F.2d 637, 641-42 (11th Cir. 1990) (holding that an accountant's report prepared for the purpose of compromise negotiations was properly excluded).

⁷⁶ See *EEOC v. UMB Bank Fin. Corp.*, 558 F.3d 784, 791 (8th Cir. 2009) (holding that Rule 408 applied to a "handwritten . . . document memorializing notes" taken by a job counselor while discussing damages "as part of the conciliation process").

⁷⁷ *Id.*

⁷⁸ *Id.* (citing FED. R. EVID. 408 advisory committee's note).

⁷⁹ *Id.*

policy goals at the foundation of Rule 408,⁸⁰ and there does not appear to be a relevant distinction between the preparation of an internal memorandum and an external memorandum to a nonparty if they are both in furtherance of settlement with the other party to the dispute. The courts' strong emphasis on policy and their unwillingness to draw the line with particular relationships demonstrate their concern for promoting the settlement of lawsuits and for protecting communications that are genuinely in furtherance of such settlement. Thus, one could reasonably expect courts that apply Rule 408 to internal settlement communications to likewise apply the Rule to nonparty communications in furtherance of settlement.

2. Third-Party Settlements

Several of the federal courts of appeals have held that Rule 408 is applicable to settlement communications between a party to a dispute and an adverse nonparty entering the original dispute.⁸¹ Recall, of course, that such a situation is conceptually distinct from the one here.⁸² For instance, if Bruton Smith decided to sue NASCAR with claims arising from its original dispute with Kentucky Speedway, then these courts would hold that NASCAR's communications in furtherance of a settlement with Bruton Smith would be afforded protection, as these two would now effectively be parties to a new dispute. Here, in contrast, the concern is NASCAR's communications with a nonparty, with which it has no dispute, in furtherance of a settlement with the party to the original dispute.

The significance of these decisions lies not in the specific facts of the cases but rather in the reasoning that the courts employed in order to address the ambiguity in Rule 408. In *McInnis v. A.M.F., Inc.*,

⁸⁰ See *supra* Section II.B.

⁸¹ See, e.g., *Hudspeth v. Comm'r*, 914 F.2d 1207, 1213-14 (9th Cir. 1990) (finding that the plaintiffs' "contention that Rule 408 does not apply when third party compromises are involved is not tenable" because of the Rule's underlying policy); *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 247 (1st Cir. 1985) (noting that while "[t]he settlement agreement at issue here was entered into between a litigant and a third party, rather than between the two litigants themselves, . . . the policies underlying the exclusionary rule are equally applicable to such a situation"). While the D.C. Circuit has not specifically addressed this issue, its district courts have looked favorably on similar decisions by other circuits. See, e.g., *C & E Servs., Inc. v. Ashland Inc.*, 539 F. Supp. 2d 316, 319-20 (D.D.C. 2008) (citing other circuits and noting that "[t]he very policy underlying Rule 408 would be defeated if it did not operate to preclude the admissibility of settlement discussions in a case involving another party or another claim").

⁸² See *supra* text accompanying notes 23-24.

for instance, the First Circuit was forced to confront the issue of whether “a plaintiff who ha[d] accepted payment from a third party against whom he ha[d] a claim” was entitled to Rule 408’s protection.⁸³ After initially determining that the Rule’s policy called for the protection of third-party compromise negotiations generally, it confronted the novel issue of a *plaintiff’s* compromise⁸⁴ by turning to the twin policy goals underlying Rule 408. Because failing to extend Rule 408 to such a case would “discourage settlements” and be of questionable “relevance . . . to the validity of the claim,” the court found the plaintiff’s compromise negotiations inadmissible.⁸⁵ In so doing, the court noted that “[i]f the policies underlying Rule 408 mandate that settlements may not be admitted” in the traditional case, then “it is axiomatic that those policies likewise prohibit the admission of settlement evidence” in the novel case of a plaintiff’s settlement.⁸⁶

It is reasonable to believe that the courts of appeals that have specifically acknowledged an ambiguity in Rule 408’s treatment of third-party settlement negotiations arising from the initial dispute and that have addressed this ambiguity by appealing to policy considerations would look favorably on the issue here. Even when courts have failed to extend the Rule’s protection to such a situation, it has often been because “the settlement communications at issue arise out of a dispute distinct from the one for which the evidence is being offered.”⁸⁷ The situation at issue here, however, deals with communications to a nonparty in furtherance of a settlement of the *same* dispute. Given the previous discussion of how such nonparty settlement communications would further the foundational policy of the Rule,⁸⁸ these courts would likely support the applicability of Rule 408 to this issue.

3. Purposes Other than Settlement

In addition to courts of appeals extending the applicability of Rule 408 beyond its text to communications in furtherance of settle-

⁸³ 765 F.2d at 247.

⁸⁴ The court acknowledged that other courts extending Rule 408 to cover third-party compromises generally dealt with “agreements between a defendant and a third party to compromise a claim arising out of the same transaction as the one being litigated,” rather than agreements with a plaintiff. *Id.*

⁸⁵ *Id.* at 247-48.

⁸⁶ *Id.* at 247.

⁸⁷ *Zurich Am. Ins. Co. v. Watts Indus., Inc.*, 417 F.3d 682, 689 (7th Cir. 2005); *see also id.* at 689-90 (finding that evidence regarding the settlement of a claim different from the one litigated was properly admitted).

⁸⁸ *See supra* Section II.B.

ment when conducive to policy goals, some courts have gone so far as to apply the Rule to communications that could only *vaguely* be construed as used for settlement purposes. In *EEOC v. Gear Petroleum, Inc.*, for instance, the Tenth Circuit acknowledged that a letter appeared to be intended more for investigation purposes than for conciliation, but it nonetheless allowed the letter to fall under the general umbrella of a settlement communication, finding that “when the issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers.”⁸⁹ Furthermore, once a document has been deemed a settlement communication, other courts of appeals have demonstrated that the seriousness of Rule 408’s foundational public policy supercedes competing interests.⁹⁰

Because the primary concern of this Comment is to analyze whether communications to nonparties in furtherance of party settlement constitute compromise negotiations under Rule 408, the opinions of these circuits are, admittedly, not particularly helpful. Nonetheless, they demonstrate that the courts are willing to transcend the textual confines of Rule 408 and decide cases with overwhelming deference to the encouragement of settlement negotiations.

4. Mediation in the Sixth Circuit

Given the Sixth Circuit’s recognition of a broad settlement privilege above and beyond Rule 408, it is not surprising that a practitioner confronted with this Comment’s issue would likely fare well in that circuit. Because the Sixth Circuit’s broad respect for the secrecy of settlement communications echoes that of other circuits, however, and because the Sixth Circuit’s district courts’ specific reasoning with regard to mediation is fascinating for this issue, Sixth Circuit case law is nonetheless worth examining in more detail.

A recent Sixth Circuit district court opinion, *Irwin Seating Co. v. IBM Corp.*, recognized that, under the local court rules, “[a]ll ADR [alternative dispute resolution] proceedings are considered to be com-

⁸⁹ 948 F.2d 1542, 1544-46 (10th Cir. 1991) (quoting *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987)).

⁹⁰ See *Trebor Sportswear Co. v. Ltd. Stores, Inc.*, 865 F.2d 506, 509-11 (2d Cir. 1989) (citing the powerful public policy behind Rule 408 and finding that documents introduced to satisfy the statute of frauds were to be excluded because they were originally settlement communications); *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 653-55 (4th Cir. 1988) (noting that the public policy behind Rule 408 necessitates that the Rule be “broader than the common law exclusionary rule” and “exclude[] from evidence all statements made in the course of settlement negotiations” despite competing interests in admitting evidence).

promise negotiations within the meaning of Federal Rules [sic] of Evidence 408.”⁹¹ The court noted that the scope of Rule 408’s protection includes a party’s communications to an ADR mediator in furtherance of a settlement with another party.⁹² While the concept of the mediation privilege is distinct from this Comment’s inquiry, the inclusion of the mediator under Rule 408 suggests that these district courts intend to give parties enormous latitude to involve nonparties in the mediation and settlement process. In fact, the court noted that such negotiations need not be conducted “under the auspices of the court” because the same public interest is served when they are conducted “*informally* between the parties.”⁹³ Based on this criterion, it would seem that the courts could allow for an almost unlimited variety of nonparty interventions, as they appear more concerned with encouraging and protecting settlement communications than they are with limiting communications based on relationships.

Irwin also made clear that the settlement privilege from *Goodyear* would not be narrowly tailored to the facts supporting the latter’s holding. In *Irwin*, the plaintiff’s expert witnesses learned of, and disclosed in their reports, settlement communications made by the defendant; the plaintiff was thus sanctioned by the magistrate judge for violating the *Goodyear* settlement privilege.⁹⁴ On appeal, the court explained that “[t]he fact that the Sixth Circuit did not approve the identical sanction does not demonstrate the unreasonableness of the sanction imposed in this case”; the experts had disturbed the sanctity of a settlement negotiation, and no alternative sanction would suffice.⁹⁵ While the circumstances were different from those of this Comment’s specific inquiry, the district court demonstrated an intent to broadly protect communications in furtherance of settlement.

Thus, unsurprisingly, it is likely that the Court of Appeals for the Sixth Circuit and its district courts would look favorably on nonparty settlement communications in furtherance of party settlement. Giv-

⁹¹ No. 04-0568, 2007 WL 518866, at *3 (W.D. Mich. Feb. 15, 2007) (quoting what was then the Western District of Michigan’s Local Rule 16.2(e)).

⁹² See *id.* (“[I]nformation disclosed during the ADR process shall not be revealed to any one [sic] else” (quoting what was then the Western District of Michigan’s Local Rule 16.2(e))).

⁹³ *Id.* at *3 (emphasis added) (quoting *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003)).

⁹⁴ See *id.* at *1 (“The Magistrate Judge reasoned that, regardless of whether Plaintiff acted with bad faith, Plaintiff was solely at fault for the breach of confidentiality . . . [and] the only appropriate remedy was to strike Plaintiff’s expert witnesses.”).

⁹⁵ *Id.* at *4.

en that this circuit has continually espoused protection for settlement communications with virtually no limitation, it is reasonable to believe that Rule 408 would apply to the communications at issue in the Sixth Circuit.

III. THE FINAL LAP: RECOMMENDATIONS TO PRACTITIONERS

While there is an unfortunate absence of direct authority offering counsel to practitioners seeking to engage in settlement communications with nonparties to their dispute, the weight of the available authority is sufficient to derive a number of conclusions. Broadly speaking, the text of Rule 408 does not facially prohibit nonparty settlement communications, and the previous discussion of policy suggests that in the federal courts of appeals there will be a significant presumption in favor of encouraging the settlement of lawsuits.⁹⁶ Further, the analysis of the applicability of the Rule in the federal courts of appeals leads to more specific recommendations.

Practitioners should feel most comfortable engaging in nonparty settlement communications in the Third, Fifth, Sixth, Eighth, and Eleventh Circuits. Given that the Sixth Circuit has recognized a general settlement privilege and has broadly and continually stated its intent to protect communications in furtherance of settlement, it would be extremely unlikely for a judge in that circuit to hold that either Rule 408 or the settlement privilege does not apply to this situation. Though the Third, Fifth, Eighth, and Eleventh Circuits have yet to go as far as the Sixth, their acknowledgement of the applicability of Rule 408 to internal work product that is not communicated to a party in the dispute—and their reliance on the policy behind the Rule—is sufficiently analogous to create a high likelihood of a favorable outcome.

Practitioners should also feel reasonably comfortable engaging in such communications in the First and Ninth Circuits. It is reasonable to assume that these courts, which have specifically appealed to policy considerations in confronting the ambiguity in Rule 408's treatment of third-party settlement negotiations arising from the initial dispute, would also appeal to policy considerations if confronted with this issue. Because the policy argument is strong, the courts would likely be supportive of extending protection to such communications.

Practitioners in the remaining circuits do not have enough case law to make a confident decision. Because the Tenth Circuit has held that

⁹⁶ See *supra* note 61 and accompanying text.

communications even vaguely in furtherance of settlement will be protected, there is a strong argument that its obvious encouragement of settlement would lead to a positive outcome in this situation. Similarly, because the Second and Fourth Circuits have given Rule 408's policy interests great deference in the face of competing interests, there is a good argument that they would do the same in this case. Because these decisions dealt exclusively with parties to the litigation, however, the decisions are not sufficiently analogous to warrant deference.

Although the Seventh Circuit certainly has not put forth any opinions that would run contrary to protecting the communications at issue, it has not touched upon anything remotely analogous to non-party settlement communications, and practitioners should thus proceed with caution. In addition, while the decisions of the D.C. Circuit's district courts could logically be grouped with those of the First and Ninth Circuits, the Court of Appeals for the D.C. Circuit has not itself addressed the issue.

Finally, aside from these specific recommendations, it should be reiterated that the courts of appeals have acknowledged a broad policy of encouraging the settlement of lawsuits. Thus, even where there is not enough case law on which to base an adequate suggestion, it would not be unreasonable for practitioners to engage in such communications if the communications would otherwise be particularly advantageous. Given that the text of Rule 408 suggests that any genuine settlement negotiation is protected, that the two distinct policy goals at the foundation of the Rule are better served by the extension of its scope to nonparties, and that the federal courts have protected settlement communications in a wide variety of different circumstances, communications made to nonparties could reasonably be entertained if they are undertaken in genuine furtherance of settlement.

CONCLUSION

In the end, Kentucky Speedway and NASCAR never came to a settlement agreement, and the Sixth Circuit eventually affirmed the district court's grant of summary judgment in favor of NASCAR.⁹⁷ Perhaps the outcome would have been different if the parties had been assured that any and all of their settlement negotiations would be protected by the Federal Rules of Evidence. In any event, if the public policy encouraging the settlement of lawsuits is as important as both

⁹⁷ *Ky. Speedway, LLC v. NASCAR*, 558 F.3d 908, 921 (6th Cir. 2009).

the courts and the literature suggest, then it is essential that practitioners be provided the means by which to become aware of the true scope of the settlement negotiations covered by Rule 408, including those regarding nonparties to a lawsuit.

While the principal goal of this Comment is to provide some direction to practitioners frustrated by the ambiguity of nonparty settlement negotiations under the Federal Rules, my hope is that others will soon confront this issue and elaborate on my analysis in a more sophisticated way. Settlement negotiations occur too often and are too important to the federal system to allow for such an ambiguity to continue enjoying uncritical deference in the literature.