The Discoverability Of Severance Agreements In Wrongful Discharge Litigation

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I. INTRODUCTION

As the amount of wrongful discharge and other types of employment litigation have steadily escalated, so has the employer’s...
effective cost of terminating an employee. As a result, the practice of
offering terminated employees severance pay or other benefits in
exchange for their release of potential employment claims has become
increasingly common.

While this practice has the salutary effect of reducing litigation over
employment terminations, it creates a potential dilemma for employers.
The problem stems from the fact that information concerning an
employer's severance agreements is likely to be of interest to other
terminated employees who were not offered, or declined to enter into,

Here will rarely, if ever, depend upon the precise nature or denomination of the employment claim
being litigated.

1. One court has described the present era as "a time of profuse employment litigation." Henderson v. City of Murfreesboro, 960 F. Supp. 1292, 1298-99 (M.D. Tenn. 1997); see also Malik v. Carrier Corp., 986 F. Supp. 86, 91 (D. Conn. 1997) (observing that "employment-related claims represent[] one of the fastest growing areas of litigation across the country"), aff'd in part and rev'd in part, 202 F.3d 97 (2d Cir. 2000); Stefanac v. Cranbrook Educ. Cmty., 458 N.W.2d 56, 87 (Mich. 1990) (Levin, J., dissenting) (referring to "the burgeoning wrongful discharge litigation industry").


3. See Local Union No. 1992, IBEW v. Okonite Co., 189 F.3d 339, 348 (3d Cir. 1999) (Rosenn, J., dissenting) ("The requirement that employees sign a release as a condition of receiving severance pay is a common provision in modern severance agreements."); Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1342 (9th Cir. 1987) (describing the scenario in which "an employment relationship is terminated and the employer offers a contemporaneous severance pay package in exchange for a release of all potential claims"); Stefanac, 458 N.W.2d at 72 (Levin, J., dissenting) ("It has become common for employers to use the exit interview as a means of obtaining a 'rush release' by offering a discharged employee separation or severance pay on a take-it-or-leave-it basis.").


5. Among other things, the practice may create an undesired incentive for employees to assert, or at least threaten to assert, wrongful discharge claims. See Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 HASTINGS L.J. 955, 999 (1988) (noting that settling with one potential adversary may encourage others "to file new claims"). See generally Tyler v. Corner Constr. Corp., 167 F.3d 1202, 1206 (8th Cir. 1999) (discussing the desire of parties considering settlement "not to create a market in complaints"); 2 BARBARA LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1932 (Paul W. Crane et al. eds., 3d ed. 1996) (noting that "employers . . . wish to discourage the filing of claims by others").


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similar agreements, but instead chose to challenge the lawfulness of their terminations in court.

For a variety of reasons, employers are likely to have a countervailing interest in keeping their severance agreements confidential. As a result of these conflicting interests, a severance agreement intended to avoid litigation over an employee's termination may result in alternative litigation over its discoverability in cases

severance benefits in exchange for the release of federal age discrimination claims as part of "an exit incentive or other employment termination program offered to a group or class of employees" be given "preliminary discovery as to the impact of the program on older workers." 2 LINDEMANN & GROSSMAN, supra note 6, at 1925-26. In particular, the employer must provide such employees with written notice of the following information:

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.


8. See, e.g., Holley v. Pansophic Sys. Inc., No. 90 C 7505, 1993 U.S. Dist. LEXIS 13910, at *23 (N.D. Ill. Sept. 30, 1993) (describing a terminated employee who was seeking to "use [other employees'] severance agreements as evidence that [she] received less favorable treatment upon her termination").

9. One commentator recently illustrated the employer's dilemma with the following example:

Consider a hypothetical sex discrimination [claim asserted] by an employee alleging hostile work environment. . . . [T]he employer drafts a settlement agreement that includes a confidentiality clause prohibiting disclosure of both the nature of the [employee's] charge and the terms of the settlement agreement. The problem arises when, after settlement, a third party . . . [such as] the plaintiff [in] a future sexual harassment [case], seeks to depose or otherwise obtain information from the original [employee] regarding the facts underlying the original claim and settlement.


10. See generally Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 351 (3d Cir. 1986) (Garth, J., dissenting) ("Parties may have many reasons for desiring secrecy for the terms of their settlements."). In some instances, an employer's interest in maintaining the confidentiality of its severance agreements "could stem from a desire not to disclose [its] bad behavior." Daines v. Harrison, 838 F. Supp. 1406, 1408 (D. Colo. 1993). However, this certainly is not always the case. See McHann v. Firestone Tire & Rubber Co., 713 F.2d 161, 166 n.8 (5th Cir. 1983) ("[P]arties settle cases for many reasons and . . . settlements are not necessarily indicative of liability.").


brought by other terminated employees. This possibility undoubtedly serves to deter some employers from offering their employees severance pay in exchange for a release, and thus has a detrimental impact on employers, employees, and the public in general. This article discusses this phenomenon. It begins with a discussion of the federal evidentiary rules upon which an employer might rely in attempting to maintain the confidentiality of its severance agreements, including specifically Rules 408 and 501 of the Federal Rules of Evidence. The article then considers the impact of the liberal discovery presumptions reflected in the Federal Rules of Civil Procedure on the confidentiality of severance agreements and other types of settlements. The article also discusses the effectiveness and impact of including language in a severance agreement specifically requiring the parties to


16. See Sprague v. Gen. Motors Corp., 133 F.3d 388, 403 (6th Cir. 1998) (noting that “disincentives for employers to offer benefits” are “not in the interests of employees generally”); Borne v. A & P Boat Rentals No. 4, Inc., 780 F.2d 1254, 1257 (5th Cir. 1986) (observing that denying employees the option to settle an employment dispute by eliminating the employer’s incentive for doing so is “no kindness”).

17. See Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1177 (C.D. Cal. 1998) (“[C]onsensual dispute resolution serves the public good by fostering conciliatory relationships between employees and employers . . . .”), aff’d, 216 F.3d 1082 (9th Cir. 2000). But see Brazil, supra note 6, at 990 (“Parties to settlement negotiations . . . are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants . . . .”).

18. There is not an abundance of case law addressing the discoverability of severance and other types of settlement agreements. See Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 650 (N.D. Ill. 1994) (“This question has received surprisingly little treatment in the published opinions.”).

19. See Folb, 16 F. Supp. 2d at 1171 (“The existing Federal Rules provide an important backdrop against which to view the role of a . . . privilege in protecting confidentiality and trust between disputants.”) (citing, inter alia, Fed. R. Evid. 408).


22. See infra Part II.C.
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maintain the confidentiality of the agreement. The article ultimately concludes that despite the existence of strong policy arguments in favor of protecting severance agreements from discovery, an employer contemplating the use of a severance agreement cannot be confident that it will be able to preserve the confidentiality of the agreement.

Before proceeding, a word of caution is in order. There is authority for the contention that Rule 408, which provides at least some degree of confidentiality protection to settlement evidence, should not apply to an employer’s offer of severance pay in exchange for an employee’s release of potential claims. The rationale for this view appears to be that no dispute has yet arisen in that situation, and “Rule 408, on its face, is limited to actual disputes over existing claims,” or “at least an apparent difference of opinion between the parties.”

However, this is a questionable interpretation of the rule, and other courts have declined to embrace it, particularly where the employee accepted the severance offer. In any event, a detailed analysis of this issue is beyond the scope of the present article, which assumes (not

23. See infra Part II.D.
24. See infra Part III.
25. See Brazil, supra note 6, at 961 (“Counsel must beware of the possibility of narrow judicial views of when a claim is ‘disputed’ for purposes of [Rule 408].”).
26. See infra Part II.A.
27. See Cassino v. Reichhold Chems., Inc., 817 F.2d 1338, 1342-43 (9th Cir. 1987).
28. See Haun v. Ideal Indus., Inc., 81 F.3d 541, 547 (5th Cir. 1996) (“In Cassino, the employer asked the employee to sign a release when he was fired. The Ninth Circuit held that there was no dispute between the parties at the time of the firing, so the release did not fall within Rule 408.”); Mundy v. Household Fin. Corp., 885 F.2d 542 (9th Cir. 1989).
32. See, e.g., Kirkpatrick, 963 F. Supp. at 634 (“This court... is not inclined to follow the Cassino case.”); cf. Haun, 81 F.3d at 547 n.3 (“[T]here is doubt about the continuing precedential value of Cassino... ”).
33. See Stroman v. W. Coast Grocery Co., 884 F.2d 458, 462 & n.2 (9th Cir. 1989) (holding that the analysis in Cassino was irrelevant in a case involving a “validly executed” release).
34. For a prior academic discussion of the issue, see Brazil, supra note 6, at 960-66.
Illogically, it is submitted\textsuperscript{35} that a terminated employee's release of claims in exchange for severance benefits ordinarily resolves a dispute between the employee and the employer concerning the propriety of the employee's termination.\textsuperscript{36}

II. POTENTIAL BASES FOR PRECLUDING THE DISCLOSURE OF SEVERANCE AGREEMENTS

A. Protecting the Confidentiality of Severance Agreements

Under Rule 408

Although it specifically addresses the admissibility of evidence at trial rather than the scope of discovery,\textsuperscript{37} Rule 408 of the Federal Rules of Evidence\textsuperscript{38} provides a logical starting point in analyzing the confidentiality of severance agreements involving the release of employment claims.\textsuperscript{39} The rule states, in pertinent part, as follows:

\textsuperscript{35} See Hamilton v. 1st Source Bank, 928 F.2d 86 (4th Cir. 1990).

In discharge cases, the adverse nature of the act is inherent and obvious. Termination of employment communicates to a discharged employee that he is being treated differently from other employees, for he or she realizes that other co-workers have been retained and he or she has not. Termination prompts immediate inquiry into the employer's rationale for taking such adverse action.

Id. at 92 (Sprouse, J., concurring in part and dissenting in part).

\textsuperscript{36} See, e.g., Wynne v. P.C. Greenville Ltd. P'ship, No. 4:97-CV-89-BO(3), 1997 U.S. Dist. LEXIS 21828, at *4-*5 (E.D.N.C. Dec. 10, 1997) (finding that the severance pay an employee received in exchange for her release of claims "represented a settlement on a disputed claim"); Conery v. Bath Assocs., 803 F. Supp. 1388, 1401 (N.D. Ind. 1992) (describing an employer that "entered in [a] severance agreement to avoid potential litigation concerning the basis for [an employee's] severance"); \textsuperscript{37} See also Alpex Computer Corp., 770 F. Supp. at 164 (indicating that "the existence of [a] dispute or a difference of opinion sufficient to meet the threshold requirement of Rule 408" can be "implied").


\textsuperscript{38} FED. R. EVID. 408. Rule 408 governs "the admissibility of evidence of compromise offers or agreements in federal trials." McInnis v. A.M.F., Inc., 765 F.2d 240, 247 (1st Cir. 1985). However, most states have comparable rules that presumably would lead to similar results in state court litigation. See generally Charter Oak Fire Ins. Co. v. Color Converting Indus. Co., 45 F.3d 1170, 1177 (7th Cir. 1995) (referring to "Fed. R. Evid. 408 and its state counterparts"); Davidson v. Prince, 813 F.2d 1225, 1233 n.9 (Utah Ct. App. 1991) (discussing "Federal Rule of Evidence 408 and similar state rules").

\textsuperscript{39} See Brazil, supra note 6, at 987-88 ("Whether or not communications made during settlement negotiations are discoverable may depend, in part, on whether courts will recognize a 'privilege' for settlement communications under rule 408 . . . ."). See generally Smith v. B & O R.R. Co., 473 F. Supp. 572, 585 (D. Md. 1979) ("Courts have generally held that the law of
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct of statements made in compromise negotiations is likewise not admissible.40

Despite its focus on admissibility, Rule 408 was applied to preclude discovery pertaining to the settlement of an employment claim in Kalinauskas v. Wong.41 In Kalinauskas, an individual alleging unlawful sex discrimination sought to depose another former employee who had previously filed a sexual harassment action against the same employer.42 The potential deponent had settled her claim prior to trial and signed a confidential settlement agreement that the court then sealed at the request of the parties.43

40. FED. R. Evid. 408.
41. 151 F.R.D. 363, 365 (D. Nev. 1993). Kalinauskas and a number of the other cases discussed in this article address the discoverability of agreements to settle claims asserted in litigation, rather than prelitigation "severance" agreements. However, subject to the caveat previously discussed, supra notes 25-36 and accompanying text, the analysis under Rule 408 is generally the same in both situations. See Alpex Computer Corp., 770 F. Supp. at 164 ([L]itigation need not have actually commenced for Rule 408 to apply.”); Ferguson v. FDIC, No. 3:91-CV-2492-D, 1997 U.S. Dist. LEXIS 16546, at *5 (N.D. Tex. Mar. 19, 1997) (noting that "Rule 408 is not limited to settlement negotiations that commence after a lawsuit is filed"). Indeed, “one of the principal purposes of the rule [is] to encourage parties to settle their disagreements outside the court system." Brazil, supra note 6, at 963 (emphasis added); cf. Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976) ("A primary reason for excluding evidence of a compromise is to encourage non-litigious solutions to disputes.").
42. See Kalinauskas, 151 F.R.D. at 365. Sexual harassment is, of course, a form of unlawful sex discrimination. See Swenson v. Potter, 271 F.3d 1184, 1191 (9th Cir. 2001).
43. See Kalinauskas, 151 F.R.D. at 365. Requesting that an agreement settling litigation be “sealed” is a common means of attempting to maintain its confidentiality. See Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 351 (3d Cir. 1986) (Garth, J., dissenting) (speculating that “many trial judges regard it as self-evident that secrecy is often necessary and they therefore order settlement agreements filed under seal as a matter of course”). However, this strategy is unavailable to employers seeking to maintain the confidentiality of prelitigation severance agreements, and it is by no means foolproof in any event. See ABF Capital Mgmt. v. Askin Capital Mgmt., Nos. 96 Civ. 2978 (RWS) et al., 2000 U.S. Dist. LEXIS 3633, at *8 (S.D.N.Y. Feb. 8, 2000) (observing that “litigants cannot shield a settlement agreement from discovery merely because it . . . was filed under seal”); Brazil, supra note 6, at 956-57 ("Although placing a settlement under seal pursuant to a court order may be useful in some circumstances, counsel cannot be confident that this procedure assures protection of the settlement’s confidentiality.").
The Kalinauskas court acknowledged that the scope of discovery is ordinarily very broad, and indicated that the deponent could be examined about her own employment experiences and any knowledge she might have concerning sexual harassment by the employer. However, the court cited Rule 408 in concluding that the public interest should protect the secrecy of settlement when desired by the settling parties. Observing that permitting discovery into all aspects of the deponent’s case might discourage similar settlements, the court held that her deposition and any additional discovery into her case could not address the substantive terms of her settlement.

In reaching this result, the court relied on the analysis in Flynn v. Portland General Electric Corp., an earlier federal court decision in which the plaintiffs in an age discrimination case sought discovery of information pertaining to the settlement of another former employee’s claim against the same employer. As part of that settlement, the employee with respect to whom discovery was being sought had agreed to maintain the confidentiality of all information concerning the case, including the terms of the settlement. Without specifically discussing Rule 408, the court concluded that the plaintiffs were not entitled to

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45. See Kalinauskas, 151 F.R.D. at 367. Employers are occasionally successful in prohibiting even this type of discovery on the ground that the deponent did not work in the “employing unit or work unit from which came the decision of which the [plaintiff] complains.” EEOC v. Packard Elec. Div., Gen. Motors Corp., 569 F.2d 315, 318 (5th Cir. 1978).

46. See Kalinauskas, 151 F.R.D. at 367. The court stated that the employer could not “conceal basic facts of concern to [the plaintiff] in her case, and of legitimate concern, regarding employment at its place of business.” Id.; see also Wendt v. Walden Univ., 69 Fair Empl. Prac. Cas. (BNA), 1542, 1543 (D. Minn. 1996) (“In employment discrimination cases, the testimony of co-workers is often the most probative of evidence. The evidence is often not just relevant, but indispensable.”).

47. See Kalinauskas, 151 F.R.D. at 365 (“See, e.g., Fed. R. Evid. 408 which protects compromises and offers to compromise by rendering them inadmissible to prove liability.”).

48. Id.
49. See id.
50. See id. at 367.
52. See id. at 1497.
53. See id.
54. Settlement evidence has some degree of common law protection independent of Rule 408 itself. See Kolson v. Vembu, 869 F. Supp. 1315, 1333 (N.D. Ill. 1994) (observing that Rule 408 “is the well-known embodiment, plus an extension, of the common law rule that sought to encourage the settlement of disputes”); see also Derderian v. Polaroid Corp., 121 F.R.D. 9, 11 (D. Mass. 1988) (stating that “Rule 408 . . . was specifically drafted with the intent of expanding the ‘common law rule’”).

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discover the confidential settlement information they were seeking.\textsuperscript{55}
Foreshadowing the analysis later adopted in \textit{Kalinauskas},\textsuperscript{56} the \textit{Flynn}
court concluded that the public policy favoring the voluntary resolution
of disputes dictates that agreements to keep settlements confidential not
be lightly abrogated.\textsuperscript{57}

Despite the analysis in \textit{Kalinauskas} and \textit{Flynn}, Rule 408 does not
provide a reliable basis for concluding that severance agreements are
privileged from disclosure in discovery.\textsuperscript{58} Both \textit{Kalinauskas} and \textit{Flynn}
were cited with approval in \textit{Hasbrouck v. BankAmerica Housing Services},\textsuperscript{59} a case discussed later in this article\textsuperscript{60} in which another court
relied in part upon Rule 408 in precluding the discovery of settlement
evidence.\textsuperscript{61} However, both cases were also discussed in \textit{Wendt v. Walden University},\textsuperscript{62} a case that arguably reached a different result.\textsuperscript{63}

In \textit{Wendt}, the plaintiff in a sexual harassment case sought to depose
two of her former coworkers who had ceased working for the defendant
employer after executing severance agreements that contained
confidentiality provisions.\textsuperscript{64} The employer sought to prevent the
coworkers, who had also allegedly been subjected to harassment or some
other form of discrimination,\textsuperscript{65} from being deposed concerning any
aspect of their severances.

While acknowledging that confidential settlements may benefit
society,\textsuperscript{66} the court held that the employer had not shown the “good
cause” necessary to preclude the coworkers’ depositions\textsuperscript{68} under Rule
26(c) of the Federal Rules of Civil Procedure.\textsuperscript{69} The court concluded that

\begin{itemize}
\item \textsuperscript{55} See \textit{Flynn}, 50 Fair Empl. Prac. Cas. (BNA) at 1498.
\item \textsuperscript{56} See supra notes 41-50 and accompanying text.
\item \textsuperscript{57} See \textit{Flynn}, 50 Fair Empl. Prac. Cas. (BNA) at 1498; see also \textit{In re N.Y. County Data
Entry Worker Prod. Liab. Litig.}, 616 N.Y.S.2d 424, 428 (Sup. Ct. 1994) (citing \textit{Flynn}).
\item \textsuperscript{58} One court has specifically stated that “the argument that a ‘settlement negotiation’
privilege is authorized under [Rule] 408 is . . . misplaced.” \textit{Ctr. for Auto Safety v. Dep’t of Justice},
\item \textsuperscript{59} 187 F.R.D. 453, aff’d, 190 F.R.D. 42 (N.D.N.Y. 1999).
\item \textsuperscript{60} See infra notes 347-68 and accompanying text.
\item \textsuperscript{61} \textit{See Hasbrouck}, 187 F.R.D. at 456, 458-59, 461-62.
\item \textsuperscript{62} \textit{See Wendt}, 69 Fair Empl. Prac. Cas. (BNA) 1542 (D. Minn. 1996).
\item \textsuperscript{63} In fact, the \textit{Wendt} court specifically distinguished \textit{Flynn}. \textit{See id.} at 1543.
\item \textsuperscript{64} \textit{See id.} at 1542.
\item \textsuperscript{65} \textit{See id.} at 1543.
\item \textsuperscript{66} \textit{See id.} at 1542.
\item \textsuperscript{67} \textit{See Wendt}, 69 Fair Empl. Prac. Cas. (BNA) at 1543; cf. \textit{In re N.Y. County Data Entry
Worker Prod. Liab. Litig.}, 616 N.Y.S.2d 424, 427 (Sup. Ct. 1994) (“[T]here is a societal benefit in
recognizing the autonomy of parties to shape their own solution to a controversy rather than having
one judicially imposed.”).
\item \textsuperscript{68} \textit{See Wendt}, 69 Fair Empl. Prac. Cas. (BNA) at 1543.
\item \textsuperscript{69} \textit{Fed. R. Civ. P.} 26(c). Under Rule 26(c), the court, upon a showing of good cause, may

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while the coworkers were free to contract with the employer as they saw fit,\textsuperscript{70} their agreements should not prohibit the plaintiff, who was not a party to the agreements, from pursuing discovery in support of her own case.\textsuperscript{71} A contrary result, the court explained, would effectively permit employers to use settlements to silence their employees when the facts of one employment dispute could be relevant to another.\textsuperscript{72}

It is not clear precisely how broadly the decision in \textit{Wendt} should be read. The court in that case did not discuss Rule 408, apparently because the plaintiff was seeking to discover the facts underlying the deponents’ separation from employment,\textsuperscript{73} rather than the specific terms of their severance agreements.\textsuperscript{74} The rule by its terms does not apply to evidence that is otherwise discoverable merely because it is the subject of settlement negotiations.\textsuperscript{75}

Thus, \textit{Wendt} has been cited for the unremarkable proposition that “the public interest is better served by permitting discovery of facts about similar claims against a party in a discrimination suit despite the . . . agreement of litigants not to disclose such information.”\textsuperscript{76} In this respect, the court’s decision to permit the requested discovery is undoubtedly correct,\textsuperscript{77} but would not preclude reliance on Rule 408 to


\textsuperscript{71}See \textit{Wendt}, 69 Fair Empl. Prac. Cas. (BNA) at 1543; \textit{see also} Long v. Am. Red Cross, 145 F.R.D. 658, 667 (S.D. Ohio 1993) (“[I]t is generally held that private agreements to keep information confidential are not enforceable against third parties if the information agreed to be kept confidential is not deserving of protection in the absence of a confidentiality agreement.”).


\textsuperscript{73}See id.

\textsuperscript{74}See ESPN, Inc. v. Office of Comm’r of Baseball, 76 F. Supp. 2d 383, 410 (S.D.N.Y. 1999) (“There is no bright-line rule governing whether evidence constitutes settlement material for purposes of [Rule] 408.”).

\textsuperscript{75}See 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.”).


prohibit the discovery of actual settlement evidence in cases such as Kalinauskas.\textsuperscript{78}

This conclusion is suggested by a recent Kansas state court decision in a similar case, Farmers Group, Inc. v. Lee.\textsuperscript{79} In Lee, an employee signed a severance agreement resolving a discrimination claim he had asserted against the employer.\textsuperscript{80} The agreement prohibited the employee from disclosing not only the terms of the agreement, but also his knowledge of any alleged discrimination by the employer against other employees.\textsuperscript{81} A group of individuals subsequently sought to call the employee as a witness in their own case against the employer.\textsuperscript{82} The employer argued that the employee should be enjoined from testifying in that action,\textsuperscript{83} and that such an injunction would not violate the state’s public policy.\textsuperscript{84}

The Kansas Court of Appeals sustained the lower court’s recognition that a trial court may not lawfully enjoin the employee from participating in the litigation of third-party claims against the employer.\textsuperscript{85} The court stated:

\begin{quote}
The problem is that . . . the injunction under scrutiny here purported to prevent [the employee] from disseminating even nonconfidential, truthful information when called upon to do so in connection with a claim against his former employer . . . . Permitting employers to silence former employees in such a manner ultimately undermines not only\end{quote}

which occurred during the settlement session as opposed to evidence of past conduct which was presented during negotiations."; Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) ("Rule 408 [does] not immunize documents or factual admissions merely because they were exchanged in the course of negotiating a settlement . . ."); United States v. Reserve Mining Co., 412 F. Supp. 705, 712 (D. Minn.) (stating that any "privilege surrounding offers of compromise" does not "shield otherwise discoverable documents, merely because these documents represent factual matters that might be or are incorporated in a settlement proposal"), aff'd and remanded, 543 F.2d 1210 (8th Cir. 1976).

80. See id. at 415.
81. See id. at 415-16.
82. See id. at 416.
83. More specifically, the employer argued that the trial court had erred in modifying a prior injunction to permit the employee to testify. See id.
84. See Lee, 28 P.3d at 417.
85. See id. at 419-20.
individual third-party plaintiffs' abilities to vindicate their rights but the judicial system itself.\textsuperscript{86}

However, noting that a former employee can be enjoined from disclosing confidential information,\textsuperscript{87} the court permitted the employee to testify only about company operating procedures that were not covered by the severance agreement's confidentiality provision.\textsuperscript{88} The court left intact the portion of the injunction prohibiting the employee from participating in "any other conduct or communication" that would violate the agreement,\textsuperscript{89} including, presumably, the provision in which he agreed "not [to] disclose and... to maintain in confidence... the terms of [the] Agreement."\textsuperscript{90}

In \textit{Scott v. Nelson},\textsuperscript{91} another state appellate court specifically relied on \textit{Wendt} in permitting limited discovery in a similar context.\textsuperscript{92} In \textit{Scott}, the defendant's settlement of a prior claim against him was memorialized in an agreement that prohibited the claimant from responding to any inquiries concerning the facts that gave rise to the claim.\textsuperscript{93} When the plaintiffs in a subsequent case attempted to depose the claimant, the defendant sought to prevent the deposition on the ground that permitting the claimant to testify "would... deprive him of the protections for which he bargained in the settlement."\textsuperscript{94}

The court acknowledged that the strong public policy favoring the settlement of disputes dictates that such confidentiality agreements not be lightly disregarded.\textsuperscript{95} Nevertheless, the court held that the agreement could not preclude the plaintiffs from discovering potentially relevant evidence in support of their own claims.\textsuperscript{96} However, in refusing "to prevent any discovery based upon [the] settlement agreement,"\textsuperscript{97} the court emphasized that the plaintiffs were "not seeking information about the terms of the settlement agreement," but instead were merely seeking

\begin{itemize}
\item[\textsuperscript{86} Id.]
\item[\textsuperscript{87} See id. at 419 (citing Koch Eng'g Co. v. Faulconer, 610 P.2d 1094 (Kan. 1980)).]
\item[\textsuperscript{88} See id. at 420 (stating that the employee could "testify about only those ordinary operating procedures that are not covered by the agreement or the injunction, i.e., nonconfidential ordinary operating procedures").]
\item[\textsuperscript{89} Lee, 28 P.3d at 416.]
\item[\textsuperscript{90} Id.]
\item[\textsuperscript{91} 697 So. 2d 1300 (Fla. Dist. Ct. App. 1997).]
\item[\textsuperscript{92} See id. at 1300-01.]
\item[\textsuperscript{93} See id. at 1300.]
\item[\textsuperscript{94} Id.]
\item[\textsuperscript{95} See id. at 1301.]
\item[\textsuperscript{96} See Nelson, 697 So. 2d at 1300-01.]
\item[\textsuperscript{97} Id. at 1301 (emphasis added).]
\end{itemize}
to discover potentially relevant "factual information" about the claim that had been settled.\textsuperscript{98}

This analysis is consistent with the \textit{Wendt} court's own observation that requiring a party to disclose the terms of a settlement is "emphatically different" from permitting discovery into the facts that gave rise to the settled dispute.\textsuperscript{99} Thus, at least one commentator has also relied on \textit{Wendt} in asserting that courts considering the discoverability of settlement evidence should "distinguish between the facts concerning the settlement itself and evidentiary information relevant to the underlying merits."\textsuperscript{100}

However, \textit{Wendt} has also been cited in support of the proposition that Rule 408 does not create a settlement "privilege" for discovery purposes,\textsuperscript{101} and several courts have reached the same conclusion without specifically relying upon \textit{Wendt}.\textsuperscript{102} Thus, while there is academic,\textsuperscript{103} legislative\textsuperscript{104} and judicial support for the view that Rule 408 should be interpreted as a form of privilege,\textsuperscript{105} an employer seeking to maintain the

\begin{itemize}
\item \textsuperscript{98} Id.
\item \textsuperscript{99} \textit{Wendt v. Walden Univ.}, 69 Fair Empl. Prac. Cas. (BNA) 1542, 1543 (D. Minn. 1996).
\item \textsuperscript{100} \textit{Laurie Kratky Dore}, \textit{Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement}, 74 \textit{NOTRE DAME L. REV.} 283, 399 & n.452 (1999).
\item \textsuperscript{103} \textit{See, e.g.}, \textit{Alpex Computer Corp. v. Nintendo Co.}, 770 F. Supp. 161, 166 (S.D.N.Y. 1991) ("Weinstein and Berger contend that Rule 408 should be treated as a species of privilege . . . ." (citing 2 \textit{JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE} \textsection 408[2], at 408-20 (1990))); Brazil, \textit{supra} note 6, at 990 ("A strong argument in favor of viewing rule 408 as creating a privilege can be built from the principal purpose of the rule.").
\item \textsuperscript{104} \textit{See} \textit{Kennon v. Slipstreamer, Inc.}, 794 F.2d 1067, 1075 n.1 (5th Cir. 1986) (Thombery, J., dissenting) (observing that "the Senate Judiciary Committee apparently viewed the Rule as resting solely on [a] privilege rationale" (citing S. REP. No. 93-1277 (1974), \textit{reprinted in} 1974 U.S.C.C.A.N. 7051, 7056)).
\item \textsuperscript{105} \textit{See, e.g.}, \textit{Small v. Hunt}, 152 F.R.D. 509, 511 (E.D.N.C. 1994) (assuming, without deciding, that there is a "privilege delineated in Rule 408"); \textit{Prod. Credit Ass'n of Midlands v. Ryan}, 441 N.W.2d 379, 385 (Iowa Ct. App. 1989) (Sackett, J., dissenting) ("Rule 408 is akin to a privilege rather than a rule of competency"); \textit{cf.} \textit{Coulter, Inc. v. Allen}, 624 P.2d 1199, 1202 (Wyo. 1981) (relying on the Advisory Committee Note to Rule 408 in holding that a state counterpart to the rule "is in the nature of a privilege").
\end{itemize}
confidentiality of its severance agreements cannot safely assume that Rule 408 will be applied in that fashion.\textsuperscript{106}

\section*{B. Protecting Confidentiality Under Rule 501}

Although Rule 408 itself may be insufficient for the purpose,\textsuperscript{107} additional support for the recognition of a settlement privilege might be found in Rule 501 of the Federal Rules of Evidence.\textsuperscript{108} The latter rule states, in pertinent part, that evidentiary privileges are "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."\textsuperscript{109} It thus authorizes the federal courts to develop such privileges on a case-by-case basis.\textsuperscript{110}

An evidentiary privilege authorizes its holder to refuse to disclose otherwise relevant evidence and also to prevent others from revealing protected communications.\textsuperscript{111} Thus, Rule 501 is not limited to the admissibility of evidence, but permits courts to protect confidential communications from discovery where doing so would serve broad societal objectives.\textsuperscript{112} Rule 501 thus may supplement the argument available under Rule 408\textsuperscript{113} for precluding the discovery of information pertaining to an employer's severance agreements, as well as other types of settlement evidence.\textsuperscript{114}

\textsuperscript{106} See Multi-Tech Sys., Inc. v. Dialpad.com, Inc., No. 00-1540 ADM/RLE, 2002 U.S. Dist. LEXIS 309, at *5 (D. Minn. Jan. 8, 2000) (discussing criticism of the view that Rule 408 "established a semi-privilege [applicable] to confidential settlement agreements and negotiations"); Brazil, \textit{supra} note 6, at 957 ("[D]espite the policy that inspires rule 408, there are many circumstances in which . . . settlement negotiations will not be protected from disclosure . . . ").

\textsuperscript{107} See Brazil, \textit{supra} note 6, at 966 (observing that parties "must look to some device other than rule 408 to protect the confidentiality of what they say during negotiations").

\textsuperscript{108} FED. R. EVID. 501.

\textsuperscript{109} \textit{Id}.


\textsuperscript{113} See \textit{supra} Part II.A.

In *Sheldone v. Pennsylvania Turnpike Commission*, for example, the court relied on Rule 501 in adopting a federal "mediation" privilege that prohibits the discovery of communications made in connection with or during settlement negotiations conducted before a neutral mediator. The court cited Rule 408 in asserting that its recognition of this privilege was supported by "the well established public needs of encouraging settlement and reducing court dockets." This observation, coupled with the fact that mediation is merely a specialized form of settlement negotiation, suggests that Rule 501 may also support the recognition of a broader privilege applicable to settlements negotiated outside the context of a formal mediation process.

In *Kientzy v. McDonnell Douglas Corp.*, for example, the court held that employee communications with a company ombudsman are privileged.
made for the purpose of resolving employment disputes "informally and more quickly than other more formal [settlement] procedures" were protected from disclosure under Rule 501. Although Kientzy did not involve actual settlement negotiations between the employer and the employee, the ombudsman’s potential role in obtaining a settlement provided the essential backdrop for the court’s decision.

The plaintiff in Kientzy asserted a sex discrimination claim against her former employer after her employment was terminated. She then sought to depose the employer’s ombudsman. The plaintiff argued that the discovery of information obtained from other employees during the ombudsman’s prior investigation of the plaintiff’s internal complaint might reveal the existence of a discriminatory motive underlying the decision to terminate her.

The court observed that the purpose of the ombudsman position was “to mediate, in a strictly confidential environment, disputes . . . between employees and management.” Noting that Congress in enacting Rule 408 recognized the value of such efforts, the court stated that “[t]he utility of [the ombudsman’s] program and office, in resolving disputes in this workplace and thus diminishing the need for more formal resolution procedures, is founded on the confidentiality of its

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125. See id. at 571. For academic discussions of this issue, see generally Brenda V. Thompson, Comment, Corporate Ombudsmen and Privileged Communications: Should Employee Communications to Corporate Ombudsmen Be Entitled to Privilege?, 61 U. CIN. L. REV. 653 (1992), and Mary Elizabeth McGarry, The Ombudsman Privilege: Keeping Harassment Complaints Confidential, 214 N.Y. L.J. L (1995).
126. See Kientzy, 133 F.R.D. at 571 (“The plaintiff apparently sought the ombudsman’s assistance in attempting to obtain a settlement of her employment dispute, but the employer “nevertheless terminated her.” Kientzy, 133 F.R.D. at 571.
127. See id. at 572 (“The function of the ombudsman’s office is [to] receive communications and to remedy workplace problems, in a strictly confidential atmosphere.”); cf. State ex rel. Strothers v. Wertheim, 684 N.E.2d 1239, 1240 n.1 (Ohio 1997) (describing an ombudsman as an “office or person to which people may come with grievances” (quoting BLACK’S LAW DICTIONARY 1086 (6th ed. 1990))).
128. See Kientzy, 133 F.R.D. at 572 (“It is important that . . . employees have an opportunity to make confidential statements and to receive confidential guidance, information, and aid to remedy workplace problems to[] benefit themselves and possibly the nation.”).
129. See id. at 571.
130. See id. at 571, 573.
131. See id. at 571.
132. Id.

http://scholarlycommons.law.hofstra.edu/hlelj/vol20/iss1/1
communications to and from company officials and employees.\textsuperscript{134} The court therefore refused to permit the plaintiff to depose the ombudsman,\textsuperscript{135} or to question other employees about their discussions with the ombudsman.\textsuperscript{136}

Not all courts have been willing to interpret Rule 501 this broadly.\textsuperscript{137} In fact, the court in Carman v. McDonnell Douglas Corp.\textsuperscript{138} specifically rejected the analysis in Kientzy.\textsuperscript{139} In holding that discovery of employee communications to an employer’s ombudsman was \textit{not} prohibited by Rule 501,\textsuperscript{140} the Carman court stated:

To justify the creation of a privilege, [the employer] must first establish that society benefits in some significant way from the particular brand of confidentiality.... Only then can a court decide whether the advantages of the proposed privilege overcome the strong presumption in favor of disclosure of all relevant information.\textsuperscript{141}

In Folb v. Motion Picture Industry Pension & Health Plans,\textsuperscript{142} a federal district court in turn cited Carman\textsuperscript{143} in indicating that it would not extend the mediation privilege recognized in Sheldone\textsuperscript{144} and other cases\textsuperscript{145} to less formal settlement negotiations.\textsuperscript{146} The Folb court reasoned

\textsuperscript{134} Kientzy, 133 F.R.D. at 572.
\textsuperscript{135} See id. at 573; see also Garstang v. Superior Court of L.A. County, 46 Cal. Rptr. 2d 84, 87 (Ct. App. 1995) ("In our opinion, private institutions have a qualified privilege not to disclose communications made before an ombudsman in an attempt to mediate an employee dispute.").
\textsuperscript{136} See Kientzy, 133 F.R.D. at 573. In Derderian v. Polaroid Corp., 121 F.R.D. 9 (D. Mass. 1988), the court concluded that statements obtained from other employees during a similar internal investigation were not protected from discovery under Rule 408, because such statements are "not made in compromise negotiations," and the rule only applies to "evidence of conduct or statements made in compromise negotiations." Id. at 10, 13 (quoting FED. R. EVID. 408).
\textsuperscript{137} See generally Mem’l Hosp. v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) (asserting that "in making the determination required under Rule 501," courts should bear in mind that "because evidentiary privileges operate to exclude relevant evidence and thereby block the judicial fact-finding function, they are not favored and, where recognized, must be narrowly construed").
\textsuperscript{138} 114 F.3d 790 (8th Cir. 1997).
\textsuperscript{139} See id. at 794. But cf. Garstang, 46 Cal. Rptr. 2d at 88 n.4 ("We find the Kientzy reasoning useful . . . in considering whether, and under what circumstances, a qualified privilege should be extended to communications made before an ombudsman.").
\textsuperscript{140} See Carman, 114 F.3d at 794-95; see also Solorzano v. Shell Chem. Co., 83 Fair Empl. Prac. Cas. (BNA) 1481, 1483-84 (E.D. La. 2000) (finding merit in the contention that "no ombudsman’s privilege exists under federal common law").
\textsuperscript{142} 16 F. Supp. 2d 1164 (C.D. Cal. 1998), aff’d, 216 F.3d 1082 (9th Cir. 2000).
\textsuperscript{143} See id. at 1174-75.
\textsuperscript{145} See, e.g., Hays v. Equitex, Inc. (In re RDM Sports Group, Inc.), 277 B.R. 415, 425-31
that the confidentiality of settlement evidence is generally protected "only by Rule 408's limitations on admissibility." The court explained:

[T]he mediation privilege ... applies only to information disclosed in conjunction with mediation proceedings with a neutral. Any interpretation of Rule 501 must be consistent with Rule 408. To protect settlement communications not related to mediation would invade Rule 408's domain; only Congress is authorized to amend the scope of protection afforded by Rule 408.

Despite this analysis, interpreting Rule 501 to create a settlement privilege is not necessarily inconsistent with Rule 408. Courts that have rejected the notion that settlement evidence should be privileged generally have done so on the ground that Rule 408's prohibition on admissibility does not apply where settlement evidence is offered for a purpose other than to prove liability for, or the invalidity or amount of, a disputed claim. Unless settlement evidence is discoverable, this argument goes, the proponent of the discovery will be unable to determine whether it is admissible for a permissible purpose.
However, Rule 408 merely "does not require the exclusion" of settlement evidence offered for certain purposes.\(^1\) It neither compels the admission of such evidence\(^2\) nor precludes any statute, court order, or other rule from providing protection it does not afford\(^3\) by, for example, prohibiting the admission of settlement evidence for any purpose.\(^4\) Accordingly, interpreting Rule 501 to authorize the recognition of a common law privilege applicable to settlement evidence would not appear to contravene Rule 408.\(^5\)

In fact, the admission of settlement evidence for a purpose permitted under Rule 408 is no less likely to deter settlements than the admission of such evidence for a purpose prohibited by the rule.\(^6\) Thus, the recognition of a settlement privilege would actually further the public policy objective the rule was primarily intended to promote.\(^7\)

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1. Fed. R. Evid. 408; cf. Weir v. Fed. Ins. Co., 811 F.2d 1387, 1395 (10th Cir. 1987) (observing that "Rule 408 does not prohibit the admission of evidence of... settlement to prove something other than liability").

2. See, e.g., Gunter v. Ridgewood Energy Corp., 32 F. Supp. 2d 162, 166 (D.N.J. 1998) ("Fed. R. Evid. 408 states that it 'does not require' the exclusion of evidence negating a contention of undue delay; it does not require its inclusion."); Santryll v. Burrell, No. 91 Civ. 3166 (PKL), 1998 U.S. Dist. LEXIS 586, at *6-*7 (S.D.N.Y. Jan. 22, 1998) ("The language of the rule is clear: settlement agreements are not automatically excluded from evidence if they are introduced for the limited purpose of showing the bias or prejudice of the witness. This does not mean that the agreement automatically is admissible ...."); see also Wallis v. Carco Carriage Corp., Nos. 95-7176 et al., 1997 U.S. App. LEXIS 25309, at *18 (10th Cir. Sept. 19, 1997) ("Rule 408 is merely an exclusionary rule, not one providing for the admission of evidence.").


6. In Gunter, for example, the plaintiffs sought to introduce a written settlement evaluation that had been prepared by the defendant in a separate action in which the plaintiffs were not parties. See Gunter, 32 F. Supp. 2d at 163-65. Relying on a local court order providing for the confidentiality of such evidence, the court not only held that the settlement evaluation was inadmissible, but that it "should never have been disclosed to plaintiffs." Id. at 163, 164-66. Rejecting plaintiffs' contention that the confidentiality protection available under the order could be no broader than that provided for in Rule 408, the court held that the fact that the order offered protection not afforded by Rule 408 "does not mean that it contradicts that Rule." Id. at 164-66.

7. See Weir, 811 F.2d at 1395 ("Although Rule 408 does not prohibit the admission of evidence of the circumstances surrounding a settlement to prove something other than liability... many of the same concerns about... deterrence to settlements exist regardless of the purpose for which the evidence is offered."); see also Orth v. Emerson Elec. Co., White-Rogers Div., 980 F.2d 632, 639 (10th Cir. 1992) (quoting Weir).

8. See Manko v. United States, 87 F.3d 50, 54 (2d Cir. 1996) ("The primary purpose of Rule
Indeed, the existence of such a privilege would rectify a widely perceived deficiency in the rule\(^\text{159}\) that one court described in the following terms:

> If any comments about the dispute made during the negotiation process were later... to be used... as permitted in Fed.R.Evid. 408, the posturing of the parties in the negotiations could well reduce or eliminate any likelihood of settlement, or even serious negotiation, for the parties would be extremely cautious about advancing a settlement proposal that might be used against them. Thus, they may never get beyond their ‘positions,’ even if they both may genuinely want to settle their dispute.\(^\text{160}\)

Another problem with the analysis in *Folb* is that Rule 408 applies equally to settlement negotiations that take place in mediation\(^\text{161}\) and those that occur under less formal circumstances.\(^\text{162}\) Thus, the *Folb* court’s willingness to recognize a common law mediation privilege\(^\text{163}\) is no less an invasion of Rule 408’s “domain”\(^\text{164}\) than would be the extension of that privilege to other types of settlement negotiations.\(^\text{165}\)

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\(^{159}\) Fed.R.Evid. 408 advisory committee’s note; Fid. & Deposit Co. of Md. v. Hudson United Bank, 493 F. Supp. 434, 445 (D.N.J. 1980) (“[T]he underlying purpose of the rule... is to encourage settlement.”), rev’d on other grounds, 653 F.2d 766 (3d Cir. 1981).

\(^{160}\) See, e.g., Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 166 (S.D.N.Y. 1991) (noting that although “complete confidentiality of settlements may promote [the rule’s] goal,” the rule itself “is merely a rule of evidence, which promotes compromises in one limited way”); Charles W. Ehrhardt, Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court, 60 LA. L. REV. 91, 124 (1999) (“Many argue that the extent of protection provided... by Rule 408 is insufficient.”); Rambo, supra note 116, at 1064 (noting that “scholars have... argued that Evidence Rule 408 is inadequate to ensure confidentiality”).


\(^{162}\) See Ehrhardt, supra note 159, at 124 (“Rule 408... applies to all mediation proceedings, as it does to other compromise or settlement discussions.”); cf. Olam v. Congress Mortgage Co., 68 F. Supp. 2d 1110, 1124 n.19 (N.D. Cal. 1999) (“Protection for mediation communications... might be found in... rules related to settlement negotiations or to offers of compromise or judgment.”).

\(^{163}\) *See Folb*, 16 F. Supp. 2d at 1179-80 (“[T]his Court finds it is appropriate, in light of reason and experience, to adopt a federal mediation privilege applicable to all communications made in conjunction with a formal mediation.”).

\(^{164}\) Id. at 1180; *cf. Doe*, 971 F. Supp. at 1307 (noting that without a mediation privilege, Rule
Indeed, the *Folb* court itself effectively acknowledged that absent its adoption of a mediation privilege, negotiations occurring in mediation would, like any other settlement negotiations, only be protected by Rule 408's limitation on admissibility. Specifically, the court stated that "Rule 408 only protects disputants from disclosure of information to the trier of fact, not from discovery by a third party. Consequently, without a federal mediation privilege under Rule 501, information exchanged in a confidential mediation, like any other information, is subject to the liberal discovery rules." More fundamentally, however, the fact that Rule 408 does not create a discovery privilege simply does not preclude the recognition of such a privilege under Rule 501. In fact, as originally proposed by the Supreme Court, Rule 501 would have precluded the recognition of evidentiary privileges not provided for elsewhere in the federal rules.

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408 "would allow introduction of statements made during negotiations when offered for 'another purpose' than proving 'liability for or invalidity of the claim or its amount'" (quoting FED.R.EVID. 408).

165. *See* Ehrhardt, *supra* note 159.

An important issue is whether the analysis used to recognize a common law mediation privilege under Rule 501 differs because of the presence of Rule 408, which generally protects against the admission of statements made during settlement negotiations. No other confidential communication protected under Rule 501 is also protected by an exclusionary rule of evidence.

166. *See* Folb, 16 F. Supp. 2d at 1180; *cf*. Lawson v. Brown's Day Care Ctr., Inc., 776 A.2d 390, 392 n.2 (Vt. 2001) (noting that a state counterpart to Rule 408 "make[s] information disclosed in mediation inadmissible, but not privileged"). This observation is generally applicable only in federal question cases. *See* Olam, 68 F. Supp. 2d at 1122 (observing that "state law protections might be stronger than the protections offered... through any federal common law mediation privilege"). In state court litigation, mediation negotiations are likely to be protected from discovery by state statute. *See* Sheldone v. Pa. Tpk. Comm'n, 104 F. Supp. 2d 511, 515 (W.D. Pa. 2000). The same is true in federal diversity cases. *See* Magnaleasing v. Staten Island Mall, 76 F.R.D. 559, 563 n.5 (S.D.N.Y. 1977) ("In a diversity case, the scope of an evidentiary privilege is determined in accordance with state law, both at trial and in discovery proceedings.").

167. *Folb*, 16 F. Supp. 2d at 1171; *cf*. Ehrhardt, *supra* note 159, at 119-20 ("Rule 408 does not go as far in extending the cloak of confidentiality as does a mediation privilege. For example, a privilege shields the mediation process from discovery and does not permit privileged matter to be used to impeach the credibility of a witness.").


169. *See* Santryll v. Burrell, No. 91 Civ. 3166 (PKL), 1998 U.S. Dist. LEXIS 586, at *6-*7 (S.D.N.Y. Jan. 22, 1998) (observing that settlement evidence that is "not automatically excluded" under Rule 408 "remains subject to scrutiny under... other rules of evidence"); *cf*. Olam, 68 F. Supp. 2d at 1120 n.15 ("[I]t would elevate form over substance to suggest that [Rule] 501 could not be implicated by [the] invocation of [a statute]... [that] does not in terms create a 'privilege' (but merely promises and mandates confidentiality).").

170. In *Baylor* v. Mading-Dugan Drug Co., 57 F.R.D. 509 (N.D. Ill. 1972), the court indicated that under Rule 501 as originally proposed by the Supreme Court, evidence was "not to be
or, alternatively, in a federal statutory or constitutional provision.\textsuperscript{171} However, that version of the rule was rejected by Congress\textsuperscript{172} in favor of a common law approach that permits the judiciary to develop privileges on a case-by-case basis.\textsuperscript{173} This legislative history\textsuperscript{174} suggests that Rule 408’s failure to make settlement evidence privileged\textsuperscript{175} does not preclude the recognition of a common law settlement privilege under Rule 501.\textsuperscript{176}

Moreover, the fact that no common law privilege applicable to settlement evidence existed at the time the federal evidence rules were considered privileged\textsuperscript{177} unless it was “defined as an exception” to the rule. \textit{id.} at 512; \textit{see In re Verplank}, 329 F. Supp. 433, 437 (C.D. Cal. 1971) (citing the original version of Rule 501 for the proposition that “only the privileges therein specified should be recognized in the absence of action by the Supreme Court or Congress”); \textit{In re Grand Jury Subpoena}, 710 F. Supp. 999, 1011 (D.N.J. 1989) (observing that “the Advisory Committee which drafted the original Federal Rules of Evidence did not look favorably upon privileges in general”).

171. \textit{See In re Agosto}, 553 F. Supp. 1298, 1323 (D. Nev. 1983) (“Proposed Rule 501 provided that no testimonial privilege would be recognized if it was not contained in the Rules themselves or in an Act of Congress, or in the Constitution of the United States, and thus, no such privilege could be utilized in any federal court.”). Specifically, the proposed rule stated:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress, and except as provided in these rules or in other rules adopted by the Supreme Court, no person has a privilege to:

1. Refuse to be a witness; or
2. Refuse to disclose any matter; or
3. Refuse to produce any object or writing; or
4. Prevent another from being a witness or disclosing any matter or producing any object or writing.


176. One commentator has stated that because Congress “decided that the Federal Rules of Evidence should not be used to establish or change the scope of privileges,” it is “difficult to argue that rule 408 creates a privilege.” Brazil, supra note 6, at 992. However, because the version of Rule 501 that was rejected in favor of a common law approach to the development of the law of privileges would have precluded the recognition of privileges not specifically provided for in other federal rules or statutes, it is equally difficult to argue that Rule 408 precludes the judicial recognition of a settlement privilege under Rule 501. See Three Juveniles v. Commonwealth, 455 N.E.2d 1203, 1205 n.3 (Mass. 1983) (discussing the impact of a similar rejection of a state court counterpart to the unadopted version of Rule 501).
enacted because the courts are empowered to adopt new common law privileges pursuant to [Rule 501], on a case by case basis.

As one court stated:

[T]his court does not view Congress' decision to enact Rule 501 as it now stands... as an intendment that the federal common law of privileges should be frozen as it existed at the time the Federal Rules of Evidence took effect. Rather, Rule 501 is a mandate to the courts to develop the federal common law of privileges as reason and experience dictate.

Implicitly adopting this analysis, one federal court has indicated that settlement evidence should be protected by a common law privilege premised in part upon "the pro-settlement policy embodied in

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177. See Weissman v. Fruchman, No. 83 Civ. 8958 (PKL), 1986 U.S. Dist. LEXIS 18289, at *62 n.23 (S.D.N.Y. Oct. 31, 1986) (stating that "the 'settlement privilege' was not a privilege recognized at common law"); Smith v. B & O R.R. Co., 473 F. Supp. 572, 585 (D. Md. 1979) ("Privileges generally recognized under federal law include those for marital communication, those between professional and client, and the Fifth Amendment privilege from self-incrimination."); Oliver v. Comm. for Re-election of the President, 66 F.R.D. 553, 556 (D.D.C. 1975) ("While offers of settlement (and presumably also negotiations which led to such offers) are clearly not admissible at trial for a number of public policy reasons, such negotiations do not fall within the confines of the privileges recognized at common law.").

178. See In re Grand Jury Subpoena, 710 F. Supp. 999, 1004 (D.N.J. 1989), aff'd, 879 F.2d 861 (3d Cir. 1989) ("[T]he common law's failure to recognize [a] privilege is not determinative."); see also Kennon v. Slipstreamer, Inc., 794 F.2d 1067, 1075 (5th Cir. 1986) (Thornberry, J., dissenting) ("Although commentators have advanced several rationales for the common law predecessor to Rule 408, the Rule itself is rooted in the policy of promoting settlement by privileging settlements and settlement negotiations.").

179. Reichhold Chems., Inc. v. Textron, Inc., 157 F.R.D. 522, 526 (N.D. Fla. 1994) (emphasis added); see also In re Grand Jury Subpoena, 710 F. Supp. at 1005 n.8 (discussing "Congress' desire for an evolutionary development of the federal law of privileges, an evolution which is to occur by the careful evaluation of asserted privileges in the context of concrete disputes").


181. See United States v. Alex. Brown & Sons, Inc., 169 F.R.D. 532, 543 (S.D.N.Y. 1996) (suggesting that settlement evidence is "protected from disclosure by a variety of statutory, contractual and common law confidentiality provisions and privileges"); cf. Brazil, supra note 6, at 988 (suggesting that the courts may recognize "a 'privilege' for settlement communications under... federal common law").
This observation suggests that, when read in conjunction with Rule 501, Rule 408 supports, rather than precludes, the recognition of some form of privilege limiting the discoverability of settlement evidence.

In short, Rule 501 contemplates the recognition of common law privileges where assuring the confidentiality of a communication would serve broad societal objectives. Rule 408 in turn was “designed to promote ‘the public policy favoring the compromise and settlement of disputes,’” and reflects recognition of the fact that this policy will be furthered “more by maintaining the confidentiality of [settlement] agreements than by disclosure.” Thus, when read together, the two rules support the recognition of at least a qualified privilege that would “limit otherwise broad discovery parameters” where settlement evidence is concerned.


183. See Brazil, supra note 6, at 990 (“A strong argument in favor of viewing rule 408 as creating a privilege can be built from the principal purpose of this rule.”); Lo Bosco v. Kure Eng’g Ltd., 891 F. Supp. 1035, 1037 (D.N.J. 1995) (“Where... the text of [Rule 408] does not provide a clear answer to the problem at hand, the [courts] must be sensitive to the purpose of the provision.”).


188. See generally In re Grand Jury, 103 F.3d 1140, 1158 (3d Cir. 1997) (Mansmann, J., concurring in part and dissenting in part) (referring to “the authority granted to the federal courts by Congress under Rule 501... [to] recognize a limited privilege”).

C. Protecting Confidentiality Under the Discovery Rules

1. The View That Settlement Evidence is Subject to the Liberal Discovery Rules

Federal Rule of Civil Procedure 26(b), permits the discovery of "any matter, not privileged, that is relevant to the claim or defense of any party." Relevance is defined broadly for the purpose of encompassing information that may be inadmissible at trial, but that is nevertheless "reasonably calculated to lead to the discovery of admissible evidence." Thus, the fact that settlement evidence may be irrelevant and inadmissible at trial under Rule 408 does not necessarily render it irrelevant for discovery purposes.

Indeed, despite the potential policy arguments in favor of protecting settlement information from discovery, some courts have concluded that the liberal discovery standards reflected in Rule 26(b) should apply to settlement evidence in the same manner as they apply to other types of evidence. For example, the parents of a

190. FED. R. CIV. P. 26(b)(1).
191. For purposes of admissibility at trial, by contrast, relevant evidence is defined as "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." FED. R. EVID. 401.
192. See Burns v. Thiokol Chem. Corp., 483 F.2d 300, 304 n.8 ("Ultimate admissibility is simply not the test for relevance of material to be discovered."); reh'g denied, 485 F.2d 687 (5th Cir. 1973); Bottaro v. Hatton Assocs., 96 F.R.D. 158, 159 (E.D.N.Y. 1982) ("Relevance in [the discovery] context is broader than that required for admissibility at trial.").
193. FED. R. CIV. P. 26(b)(1); see also Computer Assocs. Int'l, Inc. v. Am. Fundware, Inc., 831 F. Supp. 1516, 1531 (D. Colo. 1993) ("Information which may not be admissible at trial under the rule is still discoverable so long as that information may lead to the discovery of other admissible evidence."); City of Groton v. Conn. Light & Power Co., 84 F.R.D. 420, 422 (D. Conn. 1979) ("Relevancy, the touchstone of discovery, is defined in terms of the likelihood that evidence useful to a party's case may be uncovered.").
195. See Mfg. Sys., Inc. v. Computer Tech., Inc., 99 F.R.D. 335, 336 (E.D. Wis. 1983) (rejecting the proposition that "because the matters upon which [an individual] is to be deposed pertain to settlement negotiations between the parties, they are inadmissible under Fed.R.Evid. 408 and therefore irrelevant for the purposes of Fed.R.Civ.P. 26(b)").
196. See Brazil, supra note 6, at 990 ("A strong argument in favor of viewing rule 408 as creating a privilege can be built from the principle purpose of this rule."); Kerwin, supra note 151, at 676 (referring to "the very convincing policy argument that compromise communications should be immune from discovery to encourage settlement").
197. See, e.g., Griffin v. Mashariki, No. 96 Civ. 6400 (DC), 1997 U.S. Dist. LEXIS 19325, at
brain-damaged child brought a negligence action against the child’s physicians and a hospital.199 After the physicians settled with the plaintiffs, the hospital moved to compel production of the settlement documents.200 Relying on Rule 408,201 the plaintiffs opposed the motion on the ground that compelled disclosure of such evidence would deter future litigants from settling their disputes.202

The court rejected the contention that the hospital was required to make “some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the . . . settlement agreement.”203 Asserting that the public policy concerns underlying Rule 408 are not implicated by the disclosure of information pertaining to completed settlements,204 the court concluded that requiring a nonsettling party to make a heightened showing of need for the discovery of such information “place[s] the shoe on precisely the wrong foot.”205

Because it found that settlement evidence is not privileged,206 the court held that the hospital instead was merely required to establish that the information it was seeking met the broad standard of relevance under Rule 26(b).207 Once this “modest threshold” was crossed,208 the burden

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199. See id. at 137.
200. See id. at 138, 140.
201. See id. at 139-40.
202. See id. at 138, 140.
204. The court stated:

Bottaro misconceives the public policy considerations which underlie Rule 408. Parties will be discouraged from making offers in compromise if such offers can unimpededly creep into evidence at trial; so Rule 408 creates a prophylaxis to guard against this foreseeable evil. Parties can now freely make settlement proposals, knowing that if they are spurned the propositions will not come back to haunt them before a jury. But, the climate changes when a settlement is achieved. The fears which might inhibit the making of offers in the absence of Rule 408 do not apply in such circumstances. No discouragement attends discoverability anent completed compromises.

_id. at 140.
205. Id.
206. See id.
207. See id. The court noted that “the range of discovery under this provision is extremely broad,” and that “by its terms, Rule 26(b) does not condition the availability of discovery upon the likely admissibility of the information sought.” Bennett, 112 F.R.D. at 138.
208. Id. at 140. The court found the information at issue relevant “in several respects,” including the fact that Rule 408 itself provides for certain limited exceptions to its general prohibition on the admissibility of settlement evidence. _Id. at 138-39. The court stated: “There is, of course, no satisfactory way for the hospital to determine whether it can slip within the integument of
shifted to the plaintiffs to establish good cause or a sound reason for prohibiting disclosure. Finding that the plaintiffs had not satisfied this burden, the court granted the hospital’s motion to compel disclosure of the settlement information.

2. The View That a Heightened Showing of Need Is a Prerequisite to the Discovery of Settlement Evidence

The analysis in Bennett has been characterized as the judiciary’s most aggressive attack on the proposition that settlement evidence should be at least presumptively privileged from discovery. However, one of the nation’s leading authorities on mediation, settlement and discovery, Magistrate Judge Wayne D. Brazil, is highly critical of the view represented by Bennett.

As Judge Brazil notes, the Bennett court’s refusal to require any heightened showing of need for the discovery of settlement evidence was based in large part upon its interpretation of Rule 408 as effectively having no application to “completed compromises.” This interpretation appears to have been premised upon the court’s conclusion that only the potential evidentiary use of a “spurned” settlement offer by the party who rejected it is likely to inhibit settlement negotiations.
However, Rule 408 by its terms applies to actual settlements no less than to attempts to settle disputed claims. The Advisory Committee Note to the rule similarly states that “[w]hile the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises.” Thus, courts other than the one in Bennett have consistently recognized that Rule 408 extends to completed settlements.

Judge Brazil also correctly notes that the Bennett court’s assumption that Rule 408’s objectives are fully served once a settlement has been reached reflects “an unrealistically narrow view of the several different ways that fear of disclosure could impair the settlement dynamic.” In fact, the need for confidentiality may be particularly acute for an employer that must look beyond the context of its negotiations with a particular employee and assess whether a settlement would increase the likelihood that other employees will assert future claims.

By failing to recognize that the disclosure of information about completed settlements may encourage other potential litigants to assert claims, the analysis in Bennett and other comparable cases inhibits

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1046, 1050 (Fed. Cir. 1986) (“An unaccepted offer of settlement ordinarily is not admissible evidence to show either the existence or amount of liability.”).

218. See Fed. R. Evid. 408 (stating rule’s applicability to disputants’ statements or conduct in “compromising or attempting to compromise a claim”); Burns v. City of Des Peres, 534 F.2d 104, 112 n.9 (8th Cir. 1976) (“[Rule] 408 sets forth the general rule proscribing the admission of compromises or offers to compromise except under limited circumstances.”).


221. See Brazil, supra note 6, at 999 (discussing Bennett).

222. Id. at 998.

223. See Sears, Roebuck & Co. v. EEOC, 435 F. Supp. 751, 759 (D.D.C. 1977) (“Knowledge that anything ‘said or done’ by way of settlement . . . will be disclosed to potential litigants is bound to dissuade candor and even participation by employers in a negotiated settlement.”), aff’d in part and rev’d in part, 581 F.2d 941 (D.C. Cir. 1978); cf. Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 351 (3d Cir. 1986) (Garth, J., dissenting) (“The necessity for confidentiality may be particularly acute . . . where a defendant must look beyond the parameters of a settlement with a single plaintiff and anticipate the impact of its settlement on innumerable future cases.”).

224. See Brazil, supra note 6, at 999 (noting the frequent concern of parties negotiating a potential settlement with “parallel situations involving nonparties . . . who might be encouraged to file new claims” if information concerning the settlement was disclosed to them).
parties’ willingness to settle and reinforces their natural instinct “to play their cards as close to their chests as possible.” This in turn obviously deters settlements, and thus undermines the policies underlying Rule 408.

Judge Brazil asserts that Rule 408’s policy of encouraging freedom of communication will be seriously undermined if other courts follow Bennett and routinely permit the discovery of settlement evidence. He thus maintains that even if the rule does not make settlement information privileged, that evidence should have “at least

225. See Vardon Golf Co. v. BBMG Golf Ltd., 156 F.R.D. 641, 650 (N.D. Ill. 1994) (referring to cases that “follow Bennett”).

226. See White v. Kenneth Warren & Son, Ltd., 203 F.R.D. 364, 369 (N.D. Ill. 2001) (“[F]uture parties may be deterred from entering into settlement agreements if settlement agreements are later discoverable.”); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1172 (C.D. Cal. 1998) (“Refusing to . . . protect confidential communications . . . creates an incentive for participants to . . . refuse to participate at all.”), aff’d, 216 F.3d 1082 (9th Cir. 2000).


228. See Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (discussing the likely deterrence to settlement “[i]f participants cannot rely on the confidential treatment of everything that transpires,” and thus “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”). But see United States v. Ky. Utils. Co., 124 F.R.D. 146, 153 (E.D. Ky. 1989) (“[S]ettlements will be entered into in most cases whether or not confidentiality can be maintained. The parties might prefer to have confidentiality, but this does not mean that they would not settle otherwise.”), rev’d, 927 F.2d 252 (6th Cir. 1991).

229. See Cheyenne River Sioux Tribe v. United States, 806 F.2d 1046, 1050 (Fed. Cir. 1986) (noting that an interpretation of Rule 408 that would “discourage parties from discussing settlement or making settlement offers” is inconsistent with the policy “favor[ing] settlement of litigation which reduces the burden on courts and counsel and mitigates the antagonism and hostility that protracted litigation . . . may cause”).

230. See Brazil, supra note 6, at 999 (observing that the policy underlying Rule 408 “would be seriously jeopardized if courts routinely permitted discovery of communications made in settlement discussions”) (discussing Bennett); cf. Ford Motor Co. v. Leggat, 904 S.W.2d 643, 649 (Tex. 1995) (adopting the view that “routine discovery of settlement amounts” should not be permitted because “revelation of confidential settlement amounts might have a chilling effect on parties’ willingness to settle at all”).

231. Judge Brazil acknowledges that interpreting Rule 408 to create a settlement privilege cannot be reconciled with the literal language of the rule. See Brazil, supra note 6, at 991, 995-96. He nevertheless asserts that the rule is premised upon a “privilege rationale” that “focuses on the importance of promoting settlement by encouraging ‘freedom of communication with respect to compromise,’” and that by providing for the admission (and thus, by implication, the discovery) of settlement evidence for some purposes, the drafters “constructed a rule that is unfair to its own rationale.” Id. at 995-96.
presumptive protection from both discovery and admissibility in most circumstances." He states:

[I]f the law wants to encourage settlement by encouraging frank negotiations, it is important to create an environment in which counsel and parties can be fairly confident that what they say as they negotiate, and the terms of any agreements they might reach, will not be used against them later. Arguably, the law will fail to create such an environment if settlement communications are discoverable simply on a showing that "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Judge Brazil is certainly not alone in this view. A number of courts have also suggested that Rule 408 should generally be interpreted to protect settlement evidence from discovery as a means of promoting settlement. As one such court has stated:

[T]he policy underlying Rule 408 is that settlements are to be encouraged. The courts have generally sought to do so in the context of discovery by applying a modest presumption against disclosure of settlement negotiations in those circumstances in which disclosure seems likely to chill parties' willingness to make the sort of disclosures in settlement discussions that are necessary to achieve agreement.

Perhaps the most prominent example of this reasoning appears in Bottaro v. Hatton Associates, a case in which the court attempted "not to formulate the basis of a privilege under Rule 408 but, rather, to formulate a framework for establishing the relevance of settlement-

232. Id. at 996.
233. Id. at 990.
234. Another commentator made essentially the same point in the following terms: Effective negotiation requires that the [parties] feel free to make candid remarks and to engage in open discourse with their adversaries. To allow negotiations to become public through free-wheeling discovery would discourage open discussion and thus interfere with settlement. Public policy favors encouraging settlement... Assurance of confidentiality in negotiations... is one means of encouraging settlement.


235. See Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1576 (D.N.M. 1994) ("[M]any federal courts that have considered the discoverability of settlement negotiations or agreements have explicitly or impliedly found that Rule 408 expresses the policy of protecting settlement negotiations and agreements from unnecessary intrusions in order to encourage settlement.").


related materials under Rule 26(b)(1)." In Bottaro, one of the defendants entered into a confidential settlement with the plaintiffs. The remaining defendants then moved to compel disclosure of the terms of the settlement agreement. The court denied the motion. The court acknowledged that litigants are generally entitled to liberal discovery. However, it also noted that the terms of the settlement were unlikely to be admissible at trial, and asserted that the information at issue must have some evidentiary value before the disclosure of otherwise inadmissible evidence will be compelled.

In considering this issue, the court indicated that a mere "hope" that information pertaining to settlement would lead to the discovery of admissible evidence is insufficient. The court stated:

Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we think the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.

While Bottaro involved alleged violations of state and federal securities laws, the analysis in that case has been applied in numerous other contexts, including employment disputes. In Childers v.

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238. Morse/Diesel, Inc. v. Trinity Indus., 142 F.R.D. 80, 84 (S.D.N.Y. 1992) (characterizing Bottaro); see also Kerwin, supra note 151, at 671 ("[R]ather than recognize the existence of a settlement privilege, the [Bottaro] court simply rejected the idea that compromise information should be discoverable per se and instead articulated a stricter discovery standard... ").

239. See Bottaro, 96 F.R.D. at 159.
240. See id.
241. See id.
242. See id.
243. See id. at 159-60 (discussing Rule 408).
244. See Bottaro, 96 F.R.D. at 159.
245. Id. at 160.
246. Id. Presumably concluding that Rule 408 makes it unlikely that the disclosure of settlement information will lead to the discovery of admissible evidence, cf. Shipes v. BIC Corp., 154 F.R.D. 301, 309 (M.D. Ga. 1994), the Bottaro court ultimately held that the defendants had not made the showing necessary to obtain settlement information under the heightened discovery standard it adopted. See Bottaro, 96 F.R.D. at 160; cf. Mitchell v. Hutchings, 116 F.R.D. 481, 483-84 (D. Utah 1987) ("If the evidence sought is... inadmissible, and it does not appear that the evidence sought will lead to evidence that is admissible, then the court can properly limit discovery.").
247. See Bottaro, 96 F.R.D. at 159.
248. See Young v. State Farm Mut. Auto. Ins. Co., 169 F.R.D. 72, 76 (S.D. W. Va. 1996) ("When the requested discovery concerns a confidential settlement agreement, the majority of courts considering the issue have required the requesting party to meet a heightened standard, in
Slater, for example, the plaintiff in an action alleging employment discrimination and retaliation submitted interrogatories seeking information pertaining to her employer's handling of other employees' complaints of discrimination. In particular, the plaintiff sought to discover whether the employer's stated reason for not settling her claim was a policy it applied equally to all complainants.

The employer argued that the public policy underlying Rule 408 protects settlement discussions from disclosure in order to encourage the settlement of disputes. It asserted that permitting discovery into its reasons for settling or refusing to settle claims asserted by other employees would violate this policy and therefore "discourage the very thing Rule 408, and the judicial process, seeks to promote."

Finding the employer's argument persuasive, the court refused to grant the plaintiff the broad discovery she was requesting. The court instead permitted the plaintiff "only a limited intrusion into the [employer's] settlement processes." In reaching this result, the court stated:

defersence to Federal Rule of Evidence 408, and the public policy to encourage settlements and to uphold confidentiality provisions.

249. See, e.g., Butta-Brinkman v. FCA Int'l, Ltd., 164 F.R.D. 475, 476-77 (N.D. Ill. 1995) (relying on Bottaro and "the strong congressional policy favoring settlement" to "deny the plaintiff's motion to compel the production of confidential settlement agreements reached with other employees").


251. See id. at *1, *17.

252. See id. at *2, *17.

253. See id. at *15.


256. See id.

257. See id. Another court has specifically held that Rule 408 precludes the admission of settlement evidence to prove that a litigant was "treated discriminatorily compared to the treatment afforded [others]." Weissman v. Fruchtman, 83 Civ. 8958 (PKL), 1986 U.S. Dist. LEXIS 18289, at *64 (S.D.N.Y. Oct. 31, 1986).


259. See id. at *17.

260. Id. Specifically, the employer was only required to identify comparable claims it had settled or refused to settle, and disclose the race and gender of the claimants in those cases and whether any of them had made previous allegations of discrimination. The employer was not required to disclose its reasons for settling or refusing to settle other claims. See id. at *17-*18.
This Court has specifically rejected finding a "settlement negotiation privilege" emanating from Rule 408 in the context of protecting documents from disclosure... in the discovery context. However, as a matter of public policy... plaintiff cannot gain wholesale access into the [employer's] settlement processes through discovery. Settlement discussions and settlement decisions occupy a unique and protected place in our judicial system... Any invasion into that process that might discourage negotiations or settlements must be very carefully weighed against plaintiff's need to prove the allegations of her complaint.

The heightened discovery standard adopted in Bottaro and at least implicitly applied in Childers effectively creates a rebuttable presumption that settlement evidence is confidential. Such a presumption tends to encourage fuller and more frank settlement discussions, while nevertheless permitting the discovery of settlement evidence in those cases in which the proponent of discovery can overcome the presumption by establishing that the information at issue is "truly relevant."


The significance of Bottaro’s heightened discovery standard is suggested by the observation in Doe v. Methacton School District that

261. Id. at *15-*17 (citations omitted).
264. See Brazil, supra note 6, at 999-1000.
265. Shipes v. BIC Corp., 154 F.R.D. 301, 309 (M.D. Ga. 1994) (discussing Bottaro); see also Kerwin, supra note 151, at 673 (observing that the Bottaro approach “allow[s] discovery of [settlement] information under some circumstances”; Young, 169 F.R.D. at 79 (“It is appropriate to protect confidential settlement agreements, but not if such protection prevents necessary discovery.”).
although the court in *Bennett v. La Pere*,\(^{267}\) which purported to reject the *Bottaro* approach,\(^{268}\) "did not expressly require a particularized showing, the court did, in fact, find such a showing before it ordered discovery."\(^{269}\) The *Doe* court thus maintained that none of the courts considering the present issue, including *Bennett*, have readily permitted the discovery of settlement evidence, but all instead have required "some heightened showing of relevance or need" for the discovery.\(^{270}\)

However, this observation is not precisely accurate.\(^{271}\) The analysis in *Bottaro* and its progeny\(^{272}\) has actually been the subject of considerable controversy,\(^{273}\) and several courts have specifically refused to follow it.\(^{274}\) Nevertheless, even some of those courts have adopted an approach that shifts the burden of proof from the party opposing the discovery to the party seeking settlement information,\(^{275}\) but that does not require any "particularized" or "heightened" showing in order to satisfy that burden.\(^{276}\)

In *Vardon Golf Co. v. BBMG Golf Ltd.*,\(^{277}\) for example, the court joined *Bottaro* in placing the burden of proof on the proponent of

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270. Id. (citing, inter alia, both *Bennett* and *Bottaro*).


272. See *id.* (referring to "the *Bottaro* court and . . . courts following its reasoning").

273. See United States v. Barrier Indus., Inc., No. 95 Civ. 9114 (BSJ), 1997 U.S. Dist. LEXIS 2244, at *6 n.2 (S.D.N.Y. Feb. 28, 1997) ("To the extent that *Bottaro* . . . requires a heightened showing of relevance where settlement information is sought in discovery, courts have not uniformly embraced the decision."); SEC v. Downe, 92 Civ. 4092, 1994 U.S. Dist. LEXIS 708, at *17 (S.D.N.Y. Jan. 27, 1994) ("Courts have by no means uniformly embraced *Bottaro*.").


276. See, e.g., Salgado v. Club Quarters, Inc., No. 96 Civ. 383 (LMM) (HBP), 1997 U.S. Dist. LEXIS 7047, at *2 (S.D.N.Y. May 20, 1997) ("Although I agree with those authorities holding that . . . no heightened showing need be made to justify discovery of a settlement agreement, a party seeking production of a settlement agreement must, nevertheless, show relevance.") (citations omitted).

discovery, but concluded that the heightened discovery standard adopted in Bottaro overstated the extent of the proponent's burden. Rather than adopt Bottaro's requirement of a particularized showing of need, the Vardon Golf court held that a party may discover settlement evidence by showing that the information at issue is admissible for one of the purposes permitted under Rule 408 or, alternatively, "by articulating a plausible chain of inferences showing how discovery of the item sought would lead to other admissible evidence."

In Alcan International Ltd. v. S.A. Day Manufacturing Co., another court similarly refused to compel a representative of one of the parties to provide deposition testimony pertaining to the parties' prior settlement negotiations, despite acknowledging that Rule 408 does not specifically limit the discoverability of evidence. The court explained that the party seeking the deposition had "not shown that the evidence sought by way of [the] deposition would be 'otherwise discoverable' under the discovery rules," or "that the evidence sought would be admissible for any other purpose."

Requiring the party seeking settlement evidence to establish that the information should be discoverable is not necessarily inconsistent with...
the pertinent discovery rules, because some courts have suggested, because those rules must be read in conjunction with the policies underlying Rule 408. Thus, in the case of settlement evidence, courts should be permitted to depart from the traditional presumption of discoverability in recognition of the "privilege rationale" upon which the rule is premised. The Vardon Golf court reasoned that placing the burden of proof on the proponent of discovery could also be justified on pragmatic grounds:

The policies underlying exclusionary evidentiary rules have an equal if not stronger basis in our policy as the policies favoring sweeping discovery. The more logical approach to reconciling these divergent policies follows the path of Bottaro. To place the burden of proving that the evidence sought is not reasonably calculated to lead to the discovery of admissible evidence on the opponent of discovery is to ask that party to prove a negative. This is an unfair burden, as it would require a party to refute all possible alternative uses of the evidence, possibly including some never imagined by the proponent.

Moreover, the court in Bennett itself acknowledged that the discovery rules do not necessarily require the disclosure of settlement evidence. Significantly, this is in contrast to information pertaining to


290. See generally Payton v. N.J. Tpk. Auth. 641 A.2d 321, 328 (N.J. 1997) ("Although relevance creates a presumption of discoverability, that presumption can be overcome by demonstrating the applicability of an evidentiary privilege. A privilege reflects a societal judgment that the need for confidentiality outweighs the need for disclosure.") (citations omitted).


293. Bennett v. La Pere, 112 F.R.D. 136, 141 n.2 (D.R.I. 1986) ("[T]he Rules make no special provision for the disclosure of settlement agreements.").
insurance coverage,\textsuperscript{294} which like settlement evidence is generally inadmissible,\textsuperscript{295} but the disclosure of which is specifically provided for in the discovery rules.\textsuperscript{296} The absence of a similar provision for the discovery of settlement evidence may provide a basis for interpreting the rules as creating a presumption against the disclosure of such evidence.\textsuperscript{297}

In addition, the rules specifically prohibit the discovery of other evidence that, unlike settlement information, clearly is relevant\textsuperscript{298} if that evidence is privileged.\textsuperscript{299} In construing this discovery limitation,\textsuperscript{300} courts have generally concluded that the principles applicable to admissibility at trial also determine whether evidence is privileged for purposes of discovery.\textsuperscript{301} Under this analysis, evidence that would not be admissible because of an evidentiary privilege is likewise not subject to discovery.\textsuperscript{302}

As one court has explained:

\begin{footnotesize}
\begin{enumerate}
\item Prior to 1970, the federal rules were silent on the discoverability of insurance information, see Henderson v. Zurn Indus., Inc., 131 F.R.D. 560, 562-63 (S.D. Ind. 1990), and the courts were split on the issue. See Gangemi v. Moor, 268 F. Supp. 19, 20-21 (D. Del. 1967).
\item See Fed. R. Evid. 411; see also Henderson, 131 F.R.D. at 568 ("[E]vidence of conduct or statements made in compromise is inadmissible under Rule 408 of the Federal Rules of Civil Procedure. Moreover, under Rule 411, evidence of liability insurance is also not admissible."); Kubista v. Romaine, 538 P.2d 812, 816 (Wash. Ct. App. 1975) (describing the prohibitions on admissibility of "settlement negotiations or offers of compromise" and "the fact that the defendant carries liability insurance" as "rules . . . designed not to discourage compromise and settlement").
\item See Fed. R. Civ. P. 26(a)(1)(D). The same is also now true in a number of state courts. See Irvington-Moore v. Superior Court, 18 Cal. Rptr. 2d 49, 53 (Ct. App. 1993) ("Specific provisions for the discovery of insurance information are relatively recent developments in this and other jurisdictions.").
\item Cf. Bisserier v. Manning, 207 F. Supp. 476, 480 (D.N.J. 1962) ("If disclosure . . . is thought to be desirable, the discovery provisions of the Federal Rules of Civil Procedure should be amended . . . to allow such discovery." (interpreting the rules prior to their amendment to provide for the disclosure of insurance information)). But see Bennett, 112 F.R.D. at 141 n.6 (finding "no obstacle to ordering [the] production [of settlement agreements] when circumstances warrant").
\item Rule 408 is premised in part upon the theory that "evidence of settlement . . . is irrelevant to the issue of liability," although it may be relevant for other purposes. ESPN, Inc. v. Office of Comm'r of Baseball, 76 F. Supp. 2d 383, 411 (S.D.N.Y. 1999).
\item See Bennett, 112 F.R.D. at 138, 140 (quoting Fed. R. Civ. P. 26(b)); see also Int'l Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 180 (M.D. Fla. 1973) ("Rule 26 of the Federal Rules of Civil Procedure allows discovery in civil cases 'regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.' . . . Accordingly, material subject to . . . privileges is not discoverable unless said material falls within some exception to the rule.").
\end{enumerate}
\end{footnotesize}
The term "not privileged" as used in [the discovery rules] refers to a "privilege" as that term is used in the law of evidence. A privilege thus exists or not according to common acceptations in the law of evidence, and immunity from production based on privilege is neither broader nor narrower than it would be in the normal trial context. The disclosure of information at the discovery stage of litigation which would be inadmissible at trial due to the existence of a testimonial or evidentiary privilege created by statute or common law is accordingly not permitted, assuming the party intended to be protected asserts the privilege at the appropriate time and satisfies his burden of establishing its existence.303

In other words, while the test for determining whether evidence is relevant is broader for discovery purposes than it is for determining whether evidence is admissible,304 there is no difference in the tests for determining whether evidence is privileged.305 Thus, if settlement evidence is considered presumptively privileged under Rule 408 or 501,306 precluding the discovery of such evidence where the presumption has not been rebutted creates no more conflict with the federal discovery rules than does the application of any other evidentiary privilege.307

One court applying this analysis in the settlement context308 thus assumed, without deciding, that Rule 408 applies to both the

306. See supra Part II.A-B.
308. See, e.g., Small v. Hunt, 152 F.R.D. 509, 511 (E.D.N.C. 1994) ("Rule 26(b)(1) of the Federal Rules of Civil Procedure, limiting discovery to matter that is 'not privileged,' has been
discoverability and the admissibility of settlement evidence.\textsuperscript{309} The practical difficulty this conclusion presents arises from the fact that Rule 408 makes settlement evidence inadmissible for some purposes, but not for others\textsuperscript{310} (i.e., settlement evidence is only "semi-privileged").\textsuperscript{311} Thus, even if Rule 408 does apply to discovery,\textsuperscript{312} that fact does not resolve the question of whether settlement evidence is discoverable in a particular case\textsuperscript{313} because the evidence might fall within an exception to the Rule 408 evidentiary "privilege."\textsuperscript{314}

In other words, given the unique structure of Rule 408, categorically prohibiting the discovery of settlement evidence cannot be interpreted to mean that the same rules apply . . . to discovery as apply at trial.” (citing CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2016 (1970)).

309. See id.; see also Florida v. Castellano, 460 So. 2d 480, 481 (Fla. Dist. Ct. App. 1984) (suggesting that "the admissibility of [settlement] evidence could be equated with the privilege not to disclose the evidence"); Dutton v. Guste, 387 So. 2d 630, 632 (La. Ct. App. 1980) ("[M]atters that are privileged are not subject to discovery. A compromise settlement is generally regarded as privileged . . . ."); rev'd on other grounds, 395 So. 2d 683 (La. 1981); Brazil, supra note 6, at 988 ("[I]f communications made in connection with settlement are privileged, they will fall outside the scope of discovery, even if they are relevant."); cf. Derderian v. Polaroid Corp., 121 F.R.D. 9, 10 (D. Mass. 1988) (discussing the contention that "statements . . . [that] are inadmissible pursuant to Rule 408 . . . should not be the subject of discovery").

310. See Centillion Data Sys., Inc. v. Ameritech Corp., 193 F.R.D. 550, 553 (S.D. Ind. 1999). Under Federal Rule of Evidence 408, evidence of settlement offers and acceptances is not admissible on the issues of liability or damages, but may be admissible for other purposes "such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

311. See id. at 553 (quoting FED. R. EVID. 408).

312. See Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998) (discussing cases that "provide a semi-privilege to confidential settlement agreements and negotiations"), aff'd, 216 F.3d 1082 (9th Cir. 2000).

313. See, e.g., Trebor Sportswear Co. v. Ltd. Stores, Inc., 865 F.2d 506, 512 (2d Cir. 1989) (Oakes, J., dissenting) (observing that Rule 408 "protects from discovery certain statements and conduct presented in the course of compromise negotiations"); cf. Henderson v. Zurn Indus., Inc., 131 F.R.D. 560, 568 (S.D. Ind. 1990) (asserting that evidence pertaining to a settlement evaluation "would ordinarily not be discoverable because evidence of conduct or statements made in compromise is inadmissible under Rule 408").

314. See Dutton, 387 So. 2d at 632 ("Compromises are not privileged for all purposes or in all cases. Certain exceptions exist to the general privilege."); Frank W. Schaeffer, Inc. v. C. Garfield Mitchell Agency, Inc., 612 N.E.2d 442, 446 (Ohio Ct. App. 1992) ("Because the same rules of privilege govern the scope of discovery as govern admissibility at trial, a party may obtain pretrial discovery of privileged materials . . . if such materials fall within some exception to the privilege . . . ." (citing Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976))).

reconciled with the literal language of the rule. Nevertheless, several courts have relied on the policy of encouraging settlements underlying the rule in fashioning a heightened standard governing the discoverability of such evidence, concluding that the rule has “tempered the liberal breadth of Rule 26(b) as applied to the discovery of settlement negotiations and agreements.” Alternatively, the courts in Vardon Golf and Alcan International effectively required the party seeking discovery to establish that the information it was seeking was “relevant” in the broad discovery sense for a nonprivileged purpose.

Both of these approaches are more protective of the policies underlying Rule 408 than one that would permit the routine discovery of settlement evidence. Nevertheless, some courts continue to follow Bennett and require that the party opposing the disclosure of settlement information bear the burden of establishing that the information is not discoverable. These differing views of the discoverability of settlement evidence serve to illustrate the dilemma employers face in attempting

(discussing “the structure of Rule 408,” which “provides for certain situations when statements made during compromise negotiations are admissible”).

316. See Ctr. for Auto Safety v. Dep’t of Justice, 576 F. Supp. 739, 749 (D.D.C. 1983) (construing Rule 408 to create a “broad discovery privilege” would be inconsistent with the fact that the rule permits parties to offer settlement evidence “for a relevant purpose”); cf. In re Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 n.20 (7th Cir. 1979) (“Inquiry into the conduct of [settlement] negotiations is . . . consistent with the letter and the spirit of Rule 408 of the Federal Rules of Evidence.”).


318. Servants of Paraclete, Inc. v. Great Am. Ins. Co., 866 F. Supp. 1560, 1576 (D.N.M. 1994); cf. Douglas v. Windham Superior Court, 597 A.2d 774, 776-77 (Vt. 1991) (suggesting that a state counterpart to Rule 408 “creates an argument that . . . settlement negotiation information should not be disclosed because it is not relevant and is not ‘reasonably calculated to lead to the discovery of admissible evidence’”) (citation omitted).

319. Cf. Dutton v. Guste, 387 So. 2d 630, 632-33 (La. Ct. App. 1980) (concluding that although “[c]ompromises are not privileged for all purposes,” courts should assume, in the absence of a contrary showing, that settlement evidence is being “sought for purposes which fall under the general privilege, and thus is ‘not subject to discovery’”), rev’d on other grounds, 395 So. 2d 683 (La. 1981).

320. See, e.g., Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D.N.J. 1994) (concluding that the “most reasonable means” of reconciling the conflicting policies underlying Rule 408 and the liberal discovery rules “is to require a greater, more ‘particularized showing’ that the evidence sought is relevant and calculated to lead to the discovery of admissible evidence”) (citing Bottaro with approval).


322. See Vardon Golf Co. v. BBMG Ltd., 155 F.R.D. 641, 650 (N.D. Ill. 1994) (“Courts placing the burden on the opponent of discovery to show that the evidence is not likely to lead to the discovery of admissible evidence follow Bennett . . .”).

323. See Serina v. Albertson’s, Inc., 128 F.R.D. 290, 293 (M.D. Fla. 1989) (referring to the “conflicting standards” applied in Bennett and Bottaro); Morse/Diesel, Inc. v. Fid. & Deposit Co.,
to determine whether they can maintain the confidentiality of their severance agreements.\textsuperscript{324}

\textbf{D. Protecting Confidentiality by Private Agreement}

In light of the uncertainty concerning the confidentiality of settlement evidence under the pertinent procedural and evidentiary rules,\textsuperscript{325} parties often attempt to protect their settlements from discovery through the inclusion of specific confidentiality provisions in their settlement agreements.\textsuperscript{326} In one recent nonemployment case, \textit{Centillion Data Systems, Inc. v. Ameritech Corp.},\textsuperscript{327} the court relied on such a provision in prohibiting the discovery of settlement evidence,\textsuperscript{328} stating that "the effectiveness of contracts is an interest the courts will protect."\textsuperscript{329}

Employers may find it particularly useful to include confidentiality provisions in their severance agreements\textsuperscript{330} because their communications with employees are otherwise unlikely to be considered

\begin{itemize}
    \item \textsuperscript{324}See, e.g., \textit{Fid. Fed. Sav. & Loan Ass'n v. Felicetti}, 148 F.R.D. 532, 534 (E.D. Pa. 1993) (asserting that controlling precedent "provide[d] little guidance as to whether evidence of settlement negotiations is subject to the heightened particularized showing or whether the information is discoverable upon a mere showing of relevance").
    \item \textsuperscript{326}See, e.g., \textit{In re N.Y. County Data Entry Worker Prod. Liab. Litig.}, 616 N.Y.S.2d 424, 428 (Sup. Ct. 1994) (discussing a settlement that "could not have been achieved without an agreement that the terms of the settlement, particularly the consideration paid, would not be revealed"); see also \textit{U.S. EEOC v. Rush Prudential Health Plans}, No. 97 C 3823, 1998 U.S. Dist. LEXIS 4170, at *12 (N.D. Ill. Mar. 31, 1998) ("Confidentiality clauses are common in settlement agreements . . ."); Brazil, \textit{supra} note 6, at 957 ("Counsel . . . should consider using private contractual agreements to strengthen the protection of the confidentiality of their settlement communications.").
    \item \textsuperscript{327}193 F.R.D. 550 (S.D. Ind. 1999).
    \item \textsuperscript{328}Although the court found some support for its holding in Rule 408, it recognized that the rule only addresses the admissibility of evidence, and that "admissibility and discoverability are not equivalent." \textit{Id.} at 553 (quoting \textit{Bottaro v. Hatton Assocs.}, 96 F.R.D. 158, 159 (E.D.N.Y. 1982)).
    \item \textsuperscript{329}\textit{Id.}
    \item \textsuperscript{330}See \textit{2 LINDEMANN & GROSSMAN}, \textit{supra} note 6, at 1932 ("Confidentiality clauses are frequently of substantial importance to an employer.").
\end{itemize}
privileged. In Kalinauskas v. Wong, for example, the court stated that "[t]he secrecy of settlement agreements and the contractual rights of the parties thereunder deserve court protection" in refusing to permit discovery concerning an employer's confidential settlement of a previous sexual harassment claim. Although the court also relied on Rule 408, the employer had not argued that the settlement was privileged under that rule, but instead relied primarily on the language of the settlement agreement.

A similar result was reached in Chase v. Weight, where the court refused to compel the plaintiff in a wrongful termination case to disclose the terms of his settlement with a former nonparty employer. The plaintiff had agreed not to reveal the terms of the settlement "other than as required by court order or legal counsel." The court concluded that the settlement, while not privileged in the evidentiary sense, was nevertheless confidential, and that dissemination of its terms might injure the former employer.

331. See United States v. Keeney, 111 F. Supp. 233, 235 (D.D.C. 1953) ("The law does not recognize that communications between an employer and employee are privileged, even though there may be a moral duty not to disclose such communications except when ordered by a competent tribunal."), rev'd on other grounds, 218 F.2d 843 (D.C. Cir. 1954); Smith v. B & O R.R. Co., 473 F. Supp. 572, 585 (D. Md. 1979) (citing Keeney in rejecting the existence of "an employer-employee privilege"). But cf. Jessup v. Luther, 227 F.3d 993, 999 (7th Cir. 2000) (referring to "the confidential nature of employer-employee relations").


333. Id. at 365.

334. See id. at 365, 367.

335. See id. at 365; see also supra notes 41-50 and accompanying text.

336. See Kalinauskas, 151 F.R.D. at 366; cf. Dimino v. N.Y. City Transit Auth., 64 F. Supp. 2d 136, 164 (E.D.N.Y. 1999) ("If defendants had made a stronger case as to the substance of the settlement agreement, that agreement would have been more likely to gain protection under Rule 408.").


338. See id. at *1-*2, *4.

339. Id. at *2.

340. See id. at *6-*7; see also Salgado v. Club Quarters, Inc., 96 Civ. 383 (LMM) (HBP), 1997 U.S. Dist. LEXIS 7047, at *2 (S.D.N.Y. May 20, 1997) (concluding that "no privilege attaches to settlement agreements").

341. See Chase, 1988 U.S. Dist. LEXIS 3801, at *4. Judge Brazil has observed that while "some courts would distinguish between a 'privilege' and . . . a promise of confidentiality," it is not clear that there should be any "significance to this distinction" in the present context. Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999) (Brazil, J.).

The impact of a contractual confidentiality provision was addressed in more detail in *Hasbrouck v. BankAmerica Housing Services*. In *Hasbrouck*, an employee asserting a wrongful termination claim against her former employer refused to disclose information pertaining to her settlement of a previous claim against another former employer. The settling employer, a nonparty to the litigation, intervened for the purpose of joining in the employee's request for an order precluding discovery pertaining to the settlement.

The court acknowledged the liberal scope of discovery generally available to the defendant employer. However, it also noted that the breadth of the discovery rules creates a significant potential for abuse by a party seeking discovery. For that reason, the rules also provide for the issuance of protective orders limiting or precluding particular discovery upon a showing of good cause by the party opposing the discovery.

The court found good cause for protecting the confidentiality of the settlement based on the fact that the settlement agreement contained a provision prohibiting the plaintiff from disclosing any information related to the settlement. The court noted that compelled disclosure of the information at issue would deny the settling employer "the benefit, confidentiality, for which it contracted." Citing *Kalinauskas*, the court concluded that this contractual right deserved its protection.

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344. See id. at 454.
345. See id. at 453-54.
346. The plaintiff and the settling employer had resolved their dispute prior to the commencement of litigation. See id. at 459 n.5.
347. See id. at 454.
349. See id. at 455; cf. Eggleston v. Chi. Journeymen Plumbers Local Union No. 130, 657 F.2d 890, 903 (7th Cir. 1981) ("With a liberal interpretation of relevance comes the risk of abuse . . . ").
350. See Hasbrouck, 187 F.R.D. at 455 (citing FED. R. CIV. P. 26(c)); see also supra note 69 and accompanying text.
353. Among other things, the defendant employer sought information pertaining to the terms of the agreement, any payments that had been made under the agreement, the type of claim that had been settled, and any witnesses to the alleged conduct that had given rise to the claim. See Hasbrouck, 187 F.R.D. at 460.
354. Id. at 458. A settlement obviously may result in "the payment of substantial amounts of money . . . in reliance on the condition of secrecy." In re Franklin Nat'l Bank Sec. Litig., 92 F.R.D. 468, 472 (E.D.N.Y. 1981), aff'd sub nom. FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982); see
The court also indicated that the plaintiff herself had a legitimate interest in maintaining the confidentiality of the settlement,\(^{355}\) if for no other reason than to avoid potential liability for breach of the settlement agreement.\(^{358}\) Rejecting the contention that it could somehow protect the plaintiff from contractual liability for breaching the agreement’s confidentiality provision,\(^{359}\) the court stated: “The language of the agreement... must control: a monetary penalty would ensue against [the plaintiff] should she breach the confidentiality of the Agreement, regardless of whether she voluntarily discloses the information sought or it is obtained through judicial process.”\(^{360}\)

In holding that the discovery at issue would not be permitted,\(^{361}\) the court suggested that it might have reached a different result if the confidentiality provision contained an exception for “disclosure pursuant to judicial process or order.”\(^{362}\) In doing so, the court contrasted its holding with the result in \textit{Reiser v. West Co.},\(^{363}\) an earlier decision in which a court had refused to protect settlement information from

\(^{355}\) See supra notes 41-50, 332-36 and accompanying text.

\(^{356}\) See id.; see also Anchor Packing Co. v. Grimshaw, 692 A.2d 5, 22 (Md. Ct. Spec. App. 1997) (“[B]oth parties have an interest in non-disclosure of settlement amounts because such information may affect future settlement negotiations in other cases.”), vacated and remanded sub nom. Porter Hayden Co. v. Bullinger, 713 A.2d 962 (Md. 1998).

\(^{357}\) See Hasbrouck, 187 F.R.D. at 458; see also Capital Servs. of N.Y., Inc. v. E-Poxy Indus., Inc., 196 F.R.D. 11, 12 (N.D.N.Y. 2000) (stating that “violation of the confidentiality clause” contained in a settlement agreement “gives rise to an independent cause of action”); Long v. Am. Red Cross, 145 F.R.D. 658, 667 (S.D. Ohio 1993) (“If disclosure of the information would breach some private agreement, the party in possession of that information may wish to seek a protective order in order to be able to defend a claim that the confidentiality agreement was breached.”).

\(^{358}\) See Hasbrouck, 187 F.R.D. at 456; see also N. Trust Co. v. Brentwood N. Nursing & Rehab. Ctr., 588 N.E.2d 467, 470 (Ill. Ct. App. 1992) (“A settlement agreement may not be altered as to material terms without the consent of both parties, and a court may not alter an agreement on its own accord.”).

\(^{359}\) Hasbrouck, 187 F.R.D. at 456; cf. Ingalls v. Superior Court, 573 P.2d 522, 524 (Ariz. Ct. App. 1977) (“There is nothing illegal about the entry into such an agreement such as would make it void... since, as between the parties involved, the agreement is valid and enforceable for its purpose of preventing adverse publicity which might stem from the settlement of the previous suit.”).

\(^{360}\) See Hasbrouck, 187 F.R.D. at 461-62.

\(^{361}\) Id. at 462 n.9; cf. Kalinauskas v. Wong, 151 F.R.D. 363, 367 (D. Nev. 1993) (holding that contractual penalties for the disclosure of information pertaining to a settled employment claim did not apply to “the disclosure of information for discovery purposes in furtherance of [another employee’s] case” because “the settlement agreement itself [made] exception for court ordered release of information”).

discovery because the settlement agreement specifically permitted the disclosure of certain otherwise confidential information.\textsuperscript{364}

\textit{Reiser} was a sex discrimination case in which the plaintiff deposed another former employee who had previously settled a discrimination claim against the same employer.\textsuperscript{365} The deposition was terminated when the employer asserted that the deponent’s testimony was precluded by a confidentiality provision contained in the settlement agreement.\textsuperscript{366}

After the court indicated in a conference with the parties that a review of the agreement would be necessary to resolve their discovery dispute, the employer submitted the agreement for in camera inspection,\textsuperscript{367} and the parties proceeded to brief the employer’s confidentiality claim.\textsuperscript{368} After reviewing the agreement, and without discussing Rule 408,\textsuperscript{369} the court held that the deponent’s proposed testimony was not confidential,\textsuperscript{370} and that there was no basis for the employer’s objection to it.\textsuperscript{371}

The court based its holding on the fact that the settlement agreement itself permitted the disclosure of information that would otherwise be confidential if the disclosure was made “pursuant to legal

\begin{itemize}
  \item \textsuperscript{364} See Hasbrouck, 187 F.R.D. at 456 (summarizing Reiser).
  \item \textsuperscript{365} See Reiser, 1988 U.S. Dist. LEXIS 3243, at *1. An interesting sidelight to the Reiser litigation arose when the deponent subsequently sued the employer again, alleging that it had unlawfully retaliated against her by threatening and harassing her in connection with her appearance at the Reiser deposition. See Polay v. West Co., No. 88-9877, 1990 U.S. Dist. LEXIS 5373, at *1-*3 (E.D. Pa. May 4, 1990). The employer was ultimately awarded summary judgment on that claim. See id. at *19-*26, *34-*36.
  \item \textsuperscript{366} See Reiser, 1988 U.S. Dist. LEXIS 3243, at *1. The agreement stated that “the various claims raised by [the deponent], their general subject matter, ... the reasons for the termination of [her] employment, ... and the terms of settlement and amount of settlement, all are confidential information.” Polay, 1990 U.S. Dist. LEXIS 5373, at *20 n.10 (discussing the Reiser litigation).
  \item \textsuperscript{367} See Reiser, 1988 U.S. Dist. LEXIS 3243, at *2. The use of in camera review appears to be relatively common in such situations. See Commonwealth v. Martin, 668 N.E.2d 825, 831 (Mass. 1996) (“Federal courts have approved the use of an in camera inquiry when a claim of privilege is made and the information available to the judge does not, in the judge’s estimation, afford adequate verification of the witness’s assertion of the privilege.”). But cf. United States v. Solomon, 422 F.2d 1110, 1119 (7th Cir. 1970) (asserting that “courts have indicated general dissatisfaction with the use of in camera inspection of confidential material”).
  \item \textsuperscript{368} See Reiser, 1988 U.S. Dist. LEXIS 3243, at *2.
  \item \textsuperscript{369} See Hasbrouck, 187 F.R.D. at 458.
  \item \textsuperscript{370} The court’s opinion is silent with respect to whether the testimony at issue involved the terms of settlement, or simply the facts that gave rise to the settled claim. See Reiser, 1988 U.S. Dist. LEXIS 3243, at *1 (stating only that the dispute involved “the permissible scope of [the deponent’s] testimony”). As discussed previously, if it was merely the latter, the court’s conclusion that the information was not confidential is unremarkable. See supra notes 73-100 and accompanying text.
  \item \textsuperscript{371} See Reiser, 1988 U.S. Dist. LEXIS 3243, at *2.
\end{itemize}
process. Noting that the plaintiff had subpoenaed the deponent to testify, the court stated that "a subpoenaed witness testifies pursuant to legal process." As another court has stated:

"A subpoena is the medium for compelling the attendance of a witness, and it is a process in the name of the court or judge, carrying with it a command dignified by the sanction of the law." The only basis which the witness would have for justifying a refusal to answer such a court-ordered appearance would necessarily . . . be a matter of statutory or case law.

Although the decision in Reiser was subsequently vacated, a settling party undoubtedly can waive any confidentiality protection afforded by contract or under Rule 408, as effectively was found to have occurred in that case. In Welch Foods, Inc. v. Packer, for example, another court similarly permitted discovery of settlement evidence that otherwise may not have been discoverable under Rule 408, because the settlement agreement itself provided that disclosures could be made "if required by legal process." The court explained that a contrary result would render the contractual provision permitting such disclosures superfluous.

372. Id. at *4. More specifically, the agreement stated that information deemed to be confidential under the terms of the agreement "shall not be disclosed, discussed or otherwise published by [the deponent] . . . except pursuant to legal process." Polay, 1990 U.S. Dist. LEXIS 5373, at *20 n.10.


374. Id. at *4; cf. Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 90 (E.D.N.Y. 1981) ("Disclosure pursuant to the discovery rule is disclosure 'authorized by law . . . .'").


376. See Polay, 1990 U.S. Dist. LEXIS 5373, at *24 (discussing Reiser). The decision to vacate the ruling in Reiser appears to have been based on nonsubstantive grounds. See id. at *24 n.11.


380. See id. at *14.

381. Id.

382. See id.
In fact, as originally promulgated, the proposed federal evidence rules specifically stated that "[a] person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if he . . . consents to disclosure of any significant part of the matter." While this provision was not adopted by Congress, it is nevertheless a fair statement of the law on the subject, and effectively applies to any claim of confidentiality that otherwise could be asserted with respect to settlement evidence.

The waiver analysis in Reiser and its progeny thus serves to illustrate the potential importance of the language of a severance agreement, as well as the uncertainty employers face when considering the potential confidentiality of such agreements. In Marine Midland Realty Credit Corp. v. LLMD of Michigan, Inc., for example, the court cited Reiser in refusing to enjoin a party to a settlement agreement

383. For discussions of the controversy surrounding the approach to evidentiary privileges reflected in the federal rules as they were originally proposed, see Krattenmaker, supra note 180; Stephen Lloyd Tober, Comment, The Privilege Doctrine and the Proposed Federal Rules of Evidence, 24 SYRACUSE L. REV. 1173 (1973).


385. See Brink’s Inc. v. City of New York, 717 F.2d 700, 708 (2d Cir. 1983).

386. See United States v. Benford, 457 F. Supp. 589, 598 (E.D. Mich. 1978). As one federal appellate court has noted:

[O]f the rules promulgated by the Supreme Court, Rules 501-13 were not adopted by Congress although Rule 501 was amended by the Congress and became a substitute for all of the court’s promulgated privilege rules. Rule 501 thus left the law of privilege in its then current posture, to be developed by the judiciary utilizing “the principles of the common law . . . in the light of reason and experience . . . .” Nevertheless, we can at least look at the standards proposed to the Supreme Court by the Advisory Committee on the Federal Rules of Evidence, and adopted by the Court, as reflective of reason and experience and “as a convenient starting point for examining questions of privilege.”

Brink’s Inc., 717 F.2d at 708 (citations omitted).

387. Cf. Doe v. City of N.Y., 15 F.3d 264, 269 (2d Cir. 1994) ("[A]n individual possessing a right to confidentiality could waive that right if she failed to take the precaution of getting the [other parties to the settlement] to agree to confidentiality.").


389. See generally 2 LINDEMANN & GROSSMAN, supra note 6, at 1927 (“Careful consideration and drafting of the terms of the settlement agreement are critical for . . . employers.").

390. See generally Brazil, supra note 6, at 1029 (referring to “the unpredictability of judicial rulings in this area, and the unforeseeability of events that could result in disclosure . . . of settlement communications”).


392. See id. at 372.
from disclosing the terms of the settlement in a subsequent judicial proceeding, where the agreement itself permitted disclosure if "required by law or by judicial or administrative process or regulation." The *Marine Midland* court explained the importance of the language of the confidentiality provision in the following terms:

This Court recognizes that confidentiality is often essential to the settlement of cases. The Court in no way minimizes the importance or denies the legitimacy of confidentiality provisions. Yet, in the final analysis, it is the language of the settlement agreement that governs. The Court will not enjoin disclosure where it is not specifically prohibited by the settlement agreement.

The court also suggested that the outcome would have been different if the exception to confidentiality had been more narrowly drafted. However, at least in the employment context, this is an overly formalistic and debatable proposition. Employees negotiating the terms of a severance agreement are likely to insist that any confidentiality provision make exception for disclosures that occur in response to compulsory legal process in order to minimize their potential legal exposure for a subsequent alleged breach of the agreement.

In addition, the fact that a severance agreement does not expressly permit disclosure in response to legal process might not be sufficient to preclude discovery of the agreement, because a seemingly unqualified

393. See id. at 372-74.
394. Id. at 373.
395. Id.
396. *See Marine Midland*, 821 F. Supp. at 374 ("Had the parties wished to define more narrowly the . . . exception to confidentiality . . . they could have done so.").
397. *See Ridgeway v. Mont. High Sch. Ass’n*, 858 F.2d 579, 587 (9th Cir. 1988) (criticizing "formalistic arguments which do not fit the pattern of . . . settlement efforts.").
398. *See 2 LINDEMANN & GROSSMAN, supra* note 6, at 1932 ("Confidentiality clauses should define clearly the scope of the obligation, specifying any exceptions such as . . . disclosure in response to a court order . . . ").
399. *See, e.g., Calvert v. Mehville R-IX Sch. Dist.*, 44 S.W.3d 455, 458 (Mo. Ct. App. 2001) (reversing a judgment for breach of contract based upon the defendant’s disclosure of a settlement where the settlement agreement permitted disclosure as "required by law . . . or in response to a lawfully issued subpoena").
400. *See, e.g., Long v. Am. Red Cross*, 145 F.R.D. 658, 667 (S.D. Ohio 1993) ("[R]elevant, unprivileged, and non-confidential information cannot be withheld in the face of a legitimate discovery request simply because the party who possesses that information has agreed . . . not to disclose it."); *see also* Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983) ("[A] confidentiality agreement between the parties does not bind the court in any way.").
confidentiality provision could be interpreted to contain an implicit provision of this nature in any event.\textsuperscript{401} Thus, the specific language of the confidentiality provision contained in a severance agreement, while relevant,\textsuperscript{402} may not be dispositive of the agreement’s discoverability.\textsuperscript{403}

III. CONCLUSION

As a matter of policy, the law favors the negotiation of severance agreements as a means of settling or avoiding employment disputes, and thereby reducing the amount of employment litigation.\textsuperscript{404} It seems equally clear that “on balance, ... settlements are and will be encouraged, in the run of cases, more by maintaining the confidentiality of agreements than by disclosure.”\textsuperscript{405} There are thus strong policy

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Ingalls v. Superior Court, 573 P.2d 522, 523-24 (Ariz. Ct. App. 1977) (holding that a settlement agreement that prohibited the parties from "giv[ing] out any information regarding the [settled] litigation" would not prohibit the disclosure of such information under "the very broad language of Rule 26(b), which makes subject to discovery all material relevant to the subject matter which is not privileged"); cf. Homax Corp. v. Wagner Spray Tech Corp., 9 U.S.P.Q.2d (BNA) 1830, 1831 (D. Minn. 1988) (holding that a settlement agreement that did not “expressly preclude discovery” did not prohibit the disclosure of settlement evidence); Trinity Med. Ctr., Inc. v. Holum, 544 N.W.2d 148, 156 (N.D. 1996) (“[C] onfidentiality addresses the obligation to refrain from disclosing information to third parties other than as part of legal process.”) (emphasis added) (quoting Scheutzow & Gillis, supra note 111, at 192).
\item 402. Severance agreements and other types of settlements are “treated as any other contract for purposes of interpretation.” United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992). Thus, the language of the agreement, including that of any confidentiality provision contained therein, provides the obvious starting point in interpreting the agreement. See ITT Corp. v. United States, 770 F. Supp. 863, 870 (S.D.N.Y. 1991) (“In interpreting a settlement agreement, ‘as with any contract, the court looks first at the plain language of the agreement.’”) (citation omitted).
\item Centillion Data Sys., Inc. v. Ameritech Corp., 193 F.R.D. 550, 553 (S.D. Ind. 1999); see also Bank of Am. Nat’l Trust & Sav. Ass’n v. Hotel Rittenhouse Assocs., 800 F.2d 339, 350 (3d Cir. 1986) (Garth, J., dissenting) (“While the importance of settlement would seem to be self-evident, I believe it is equally obvious that confidentiality is often a key ingredient in a settlement agreement – and that many settlements would not be reached if the secrecy of their terms could not be safeguarded.”).
\end{enumerate}
\end{footnotesize}
arguments for making severance agreements and other forms of settlement at least presumptively privileged from discovery.\textsuperscript{406} However, there will be circumstances under which this presumption of confidentiality can be overcome,\textsuperscript{407} in which case a severance agreement would be discoverable.\textsuperscript{408} Even if those situations are relatively rare,\textsuperscript{409} an employer contemplating the use of a severance agreement cannot safely assume that it will be able to maintain the confidentiality of the agreement,\textsuperscript{410} nor can it afford to ignore the potential ramifications of being compelled to disclose the agreement's terms to other employees.\textsuperscript{411} Unfortunately, this uncertainty will inevitably reduce the number of severance offers that would otherwise be extended to terminated employees as a means of resolving employment disputes,\textsuperscript{412} to the ultimate detriment of all concerned.\textsuperscript{413}

\textsuperscript{406} See supra notes 157-60, 181-89, 213-65 and accompanying text.
\textsuperscript{407} See SEC v. Thrasher, No. 92 Civ. 6987 (JFK), 1996 U.S. Dist. LEXIS 2141, at *6 (S.D.N.Y. Feb. 26, 1996) ("[A] party may rebut the presumption by demonstrating a need for such discovery, particularly in view of the fact that Rule 408 contemplates the trial use of settlement statements for a variety of purposes.").
\textsuperscript{408} See Brazil, supra note 6, at 957 ("Despite the policy that inspires rule 408, there are many circumstances in which . . . settlement negotiations will not be protected from disclosure . . . .").
\textsuperscript{409} See id. at 1001 ("[C]ourts should permit rebuttal of this presumption only after a strong showing that the competing interests clearly outweigh the interests and the policies favoring confidentiality and that the competing interests cannot be satisfied in some other, less intrusive manner.").
\textsuperscript{410} See id. at 966 (observing that parties "cannot safely assume that their [settlement] communication[s] will be protected by rule 408"); Kerwin, supra note 151, at 685 ("[D]espite the eloquent policy-arguments favoring confidentiality, . . . litigants must be prepared to reveal informal, unassisted settlement information under almost any circumstances . . . .").
\textsuperscript{411} See Anchor Packing Co. v. Grimshaw, 692 A.2d 5, 22 (Md. Ct. Spec. App. 1997) (noting that the disclosure of settlement evidence "may affect future settlement negotiations in other cases"); vacated and remanded sub nom. Porter Hayden Co. v. Bullinger, 713 A.2d 962 (Md. 1998); Miami Herald Publ'g Co. v. Collazo, 329 So. 2d 333, 338 (Fla. Dist. Ct. App. 1976) (discussing "the possibility that public knowledge of . . . settlement terms might affect other pending litigation").
\textsuperscript{412} One court has stated that "employers would be reluctant to provide enhanced severance benefits if waivers executed in exchange for those benefits could be struck down." Mahaffey v. Amoco Corp., No. 93 C 4587, 1995 U.S. Dist. LEXIS 13766, at *32 (N.D. Ill. Sept. 8, 1995). In many cases, this observation would be equally applicable where it is only the confidentiality provision contained in the "waiver" that might be unenforceable. Cf. Anchorage Sch. Dist. v. Anchorage Daily News, 779 P.2d 1191, 1193 (Alaska 1989) (noting that "some . . . parties are unwilling to settle unless the terms of settlement remain confidential, and . . . a [party's] inability to assure confidentiality may, therefore, adversely affect its ability to negotiate a settlement").
\textsuperscript{413} See generally Salowitz Org., Inc. v. Traditional Indus., Inc., 268 Cal. Rptr. 493, 498 (Ct. App. 1990) (observing that "the prompt resolution of disputes benefits the . . . parties as well as the judicial system").