# NOTE

THE DISPUTE THRESHOLD: HOW THE PUBLIC POLICY RATIONALE FAILS TO GUIDE THE APPLICATION OF FEDERAL RULE OF EVIDENCE 408

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INTRODUCTION

Imagine that you have contracted with Joe’s Advertising Agency to provide marketing services. In the middle of performing the contract, Joe presents you with a bill for the services rendered so far. You and Joe dispute the manner in which the billing was supposed to be calculated under the contract. To resolve this problem, you suggest that you and Joe modify the contract’s terms, and discussions of the specific terms follow. Ultimately, the discussions fail, and Joe initiates litigation against you to collect on the bill. During litigation, Joe wants to submit into evidence the contract-modification discussions, specifically correspondence in which you admit that you did not read the contract terms carefully. You object to the admission of this evidence, stating that the discussions are protected as statements made during compromise negotiations under Rule 408 of the Federal Rules of Evidence. It is unclear, however, whether the contract modification was properly a compromise negotiation1 under Rule 408 or merely a business discussion to modify the terms of a contract.2

Rule 408 excludes evidence of conduct or statements made in compromise negotiations.3 Rule 408’s protection of conduct and statements made in compromise negotiations falls along two dimensions. First, Rule 408 does not protect conduct and statements made in compromise negotiations when they are used to “prove a witness’s bias or prejudice, negate a contention of undue delay, or prove an effort to obstruct a criminal investigation or prosecution.”4

1 In this Note, I use the term “compromise negotiation” to refer only to the technical term in Rule 408. I use “negotiation” to refer generally to the broader notion of negotiation in ordinary speech.
2 For a closer analysis of this example, see infra Part I.B.
3 The amended Federal Rule of Evidence 408(a), effective December 1, 2011, states: Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
   (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
   (2) conduct or a statement made during compromise negotiations about the claim—except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

4 Fed. R. Evid. 408(b). The rule’s wording, however, suggests that the purposes outlined in the rule are not exhaustive. See id. (“The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.” (emphasis added)). Furthermore, the wording of the rule before the 2011 amendment explic-
Instead, Rule 408’s prohibition applies to the use of settlement evidence to “prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction.”

Thus, along this dimension, the scope of Rule 408’s protection refers to the purposes for which a party introduces evidence of conduct and statements made in compromise negotiations. Second, Rule 408’s protection extends only to certain kinds of evidence: conduct and statements made in compromise negotiations. This Note focuses on issues concerning the second dimension of Rule 408’s scope, as illustrated in the example above.

Determining when compromise negotiations have begun is the crux of identifying the scope of Rule 408’s protection. This issue is pressing not only because attorneys rely on courts’ interpretations of when Rule 408 operates in resolving disputes and advising their clients but also because it affects how state courts protect compromise negotiations. Although Rule 408 only applies to federal courts, many states have modeled their rules of evidence on the Federal Rules of

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5 FED. R. EVID. 408(a).

6 See id. Rule 408 also provides an exception in criminal cases. See id. R. 408(a)(2) (“Evidence of . . . conduct or a statement made during compromise negotiations about the claim [is admissible] . . . when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.”). This exception does not fall squarely into the two-dimensional analysis of Rule 408’s scope. Rather, the exception looks at the party offering the evidence. Thus, the party offering the evidence can add a third dimension to the analysis of Rule 408’s scope. This dimension of the analysis also looks to the relationship between the party offering the evidence and the parties involved in the compromise negotiation, taking into account, for instance, the fact that the plaintiff attempts to offer evidence of compromise negotiations involving the defendant and third parties. For a discussion of compromise negotiations involving third parties, see Chad Albert, Comment, Racing to Settlement: The Applicability of Federal Rule of Evidence 408 to Nonparty Settlement Communications, 158 U. Pa. L. Rev. 1199, 1218 (2010).

7 See Wayne D. Brazil, Protecting the Confidentiality of Settlement Negotiations, 39 Hastings L.J. 955, 965 (1988) (“To maximize the odds that communications will be protected by rule 408, an attorney should either (1) file suit before beginning negotiations (a move that may not be conducive to constructive discussions) or (2) announce, as a preface to communications, that he is invoking the protections of rule 408, that communications already completed between the parties establish that they have a dispute, that his client fears the dispute could lead to litigation, and that the purpose of his communication is to present an offer of compromise and to contribute to negotiations looking toward a settlement agreement.”); Albert, supra note 6, at 1204 (“There has been a wealth of scholarship concerning the types of settlement communications covered by the Rule and the safeguards that parties must employ in order to ensure the Rule’s applicability to the precise circumstances of their litigation.”); Jonathan R. Cohen, Advising Clients to Apologize, 72 S. Cal. L. Rev. 1099, 1035 (1999) (“Often an offender will want to apologize immediately after the injury; however, F.R.E. 408 may not cover such an apology.”).
Evidence. Currently, the federal circuit courts have created various tests to determine when compromise negotiations begin, and these tests do not provide consistent guidance. The resulting circuit split compounds the problem for attorneys advising their clients in resolving disputes.

Beginning with the historical background of Rule 408 and an analysis of its two policy rationales (public policy and relevancy), Part I of this Note provides a more detailed explanation of the problem of determining when compromise negotiations begin and so trigger Rule 408’s protection. Part II details the circuit split in determining when compromise negotiations begin, outlining the various tests that the circuit courts have fashioned. Part III provides an overview of how the issue extends to state courts. Part IV discusses the conceptual problem concerning the way the circuit courts have approached the issue of determining when compromise negotiations begin. It starts with an analysis of why the public policy rationale of promoting the settlement of disputes has been the “more consistently impressive ground” for the protection of compromise negotiations. Part IV then argues that the public policy rationale provides little to no guidance for determining when compromise negotiations begin and that, contrary to present practice, courts should not look to the public policy rationale in deciding the threshold question of when compromise negotiations begin. Instead, the relevancy rationale should provide guidance in determining the boundaries of a compromise negotiation under Rule 408. Specifically, Part IV argues that courts should utilize a multifactor approach rather than the current vague standards to determine when a compromise negotiation begins.

I
Federal Rule of Evidence 408

A. Historical Background and Policy Rationales

Prior to the adoption of the Federal Rules of Evidence in 1975, federal courts afforded limited protection to compromise negotiations. The common law rule only protected evidence involving an
actual settlement offer, and admissions of fact made during attempts to settle were admissible unless they were hypothetical, expressly made “‘without prejudice,’ or so connected with the offer as to be inseparable from it.”13 Under the common law protection of compromise negotiations, there were two principal policy rationales for protecting settlement offers: lack of relevancy and the promotion of settlements.14 First, evidence of offers to compromise is irrelevant because those offers may be based on a desire to resolve the dispute or terminate litigation rather than a concession of liability.15 Such evidence “could not support any reliable inference about the merits of the claim or the amount of damages.”16 Second, excluding evidence of offers or demands to settle promotes the public policy of encouraging settlement. Knowing that an offer to settle a dispute will be inadmissible at trial, parties will be more willing to begin compromise negotiations.17

The common law protection of compromise evidence relied more heavily upon the relevancy rationale than the public policy ratio-

adoption of the Federal Rules of Evidence in 1975.”); see, e.g., Hiram Ricker & Sons v. Students Int'l Meditation Soc'y, 501 F.2d 550, 553 (1st Cir. 1974) (“It is, of course, true that evidence of settlement negotiations is generally inadmissible. On the other hand, there is a ‘well-recognized exception regarding admissions of fact as distinguished from hypothetical or provisional concessions conditioned upon the settlement’s completion.’” (quoting NLRB v. Gotham Indus., Inc., 406 F.2d 1306, 1313 (1st Cir. 1969))).

13 Fed. R. Evid. 408 advisory committee’s note (quoting CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 251, at 540–41 (1954)).

14 Hiram Ricker, 501 F.2d at 553 (“The rule excluding offers of settlement is designed to encourage settlement negotiations after a controversy has actually arisen. It also prevents admission of evidence that does not represent either party's true belief as to the facts.”). One scholar has suggested that there are five reasons for protecting offers in compromise:

(1) such offers are irrelevant since they do not imply belief in the validity of the adversary’s position,
(2) parties to a compromise negotiation may by express or implied contract agree that admissions made therein shall be excluded from evidence and courts will enforce the secrecy agreement,
(3) offers of compromise are excluded because the offeror does not intend to make an admission,
(4) it is only fair play to exclude the unsuccessful efforts at compromise so as to prevent them from being turned upon one of the parties,
(5) offers of compromise are privileged communications since the law favors the settlement of differences without resort to litigation.”


16 Brazil, supra note 7, at 958 (citing CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROEDURE § 5302 (1980); Note, Protecting Confidentiality in Mediation, 98 Harv. L. Rev. 441, 447 (1984)).

17 See Edward Valves, Inc. v. Cameron Iron Works, Inc., 286 F.2d 933, 938–39 (5th Cir. 1961) (“The law favors settlements. A man will hesitate to discuss a settlement if he thinks his words or willingness to settle will be turned against him.”); Alabanza, supra note 15, at 550–51.
nale of encouraging settlements. However, the courts had difficulty applying the relevancy rationale in determining whether to exclude offers of compromise. In applying the relevancy rationale, courts had to determine the motivation of a party’s communication before ruling on its admissibility; however, at the pretrial stage and early stages of trial, assessing the motivations of a party’s communication is often difficult. Thus, most courts limited the common law doctrine’s protection to “hypothetical or provisional concessions conditioned upon the settlement’s completion,” statements accompanied by the words “without prejudice,” and statements “so connected with the offer as to be inseparable from it.”

With the adoption of Rule 408, the Advisory Committee, which drafted the Federal Rules of Evidence, moved away from the relevancy rationale in favor of the public policy rationale of encouraging settlements. The public policy rationale “recognized that it was in the public interest, and in the interest of individual litigants, to encourage consensual resolution of disputes.” To promote this public policy, the Committee expanded the scope of Rule 408’s protection beyond the common law doctrine, which merely protected offers of compromise, to all conduct and statements made during compromise negoti-

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19 See Brazil, supra note 7, at 958.

20 See Alabanza, supra note 15, at 550 (citing 2 WEINSTEIN & BERGER, supra note 12, § 408.05[1]) (stating that the common law rule for excluding offers of compromise “result[ed] in a degree of arbitrariness”).

21 NLRB v. Gotham Indus., Inc., 406 F.2d 1306, 1313 (1st Cir. 1969); see also Hiram Ricker & Sons v. Students Int’l Meditation Soc’y, 501 F.2d 550, 553 (1st Cir. 1974) (allowing notes with calculations of amounts owed in breach of contract dispute to be admitted into evidence).

22 Fed. R. Evid. 408 advisory committee’s note (citing MCCORMICK, supra note 13, § 251, at 540–41); see also Cooper v. Brown, 126 F.2d 874, 878 (3d Cir. 1942) (“[A] distinct admission of a fact will not be summarily excluded simply because it was made in connection with an effort to compromise.”); Nau v. Comm’r, 261 F.2d 362, 364–65 (6th Cir. 1958) (citing Cooper). This approach was superseded by Rule 408. See Eid v. Saint-Gobain Abrasives, Inc., 377 F. App’x 438, 444–45 (6th Cir. 2010).

23 Fed. R. Evid. 408 advisory committee’s note (“[A] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.” (citing MCCORMICK, supra note 13, §§ 76, 251)).

24 Brazil, supra note 7, at 958; see also Laurie Kratky Doré, Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283, 290 (1999) (“The expense, risk, and delay that frequently attend formal adjudication in the American legal system explain, at least in part, the party preference for and rising incidence of settlement. . . . This public policy appears deeply embedded in, and actively encouraged by, our civil justice system, which has, as its primary objective, ‘the just, speedy, and inexpensive determination of every action.’” (footnotes omitted) (quoting Fed. R. Civ. P. 1)).
THE DISPUTE THRESHOLD

The rationale was that the free exchange of information would facilitate the settlement of disputes.

B. The Problem of Determining When Compromise Negotiations Begin

Triggering Rule 408 depends in part on determining whether the conduct or statements at issue are part of compromise negotiations. This determination is simple when the parties have begun litigation. However, when parties have not begun litigation, determining when compromise negotiations begin can often be problematic. Consider the following example: Party A contracts with Party B for certain services. In the middle of performing the contract, both parties dispute how Party B should calculate the bill under the contract. Party A then sends an e-mail to Party B, stating that if the parties cannot come to an agreement within a week, Party A will initiate litigation. The parties attempt to resolve their dispute but eventually move on to litigation. Whether this e-mail and any other conduct or communications between the parties aimed at resolving their dispute are part of a compromise negotiation—and therefore within Rule 408’s protection—is unclear.

A more problematic scenario follows the example above. Instead of sending an e-mail to Party B to threaten litigation, Party A suggests

25 Fed. R. Evid. 408 advisory committee’s note (“The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be ‘without prejudice,’ or so connected with the offer as to be inseparable from it. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. . . . These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself.” (citation omitted)); see 2 Weinstein & Berger, supra note 12, § 408.05[1]; Alabanza, supra note 15, at 548.

26 See Fed. R. Evid. 408 advisory committee’s note (stating that the common law doctrine “inhibit[ed] freedom of communication with respect to compromise”). But see Lynne H. Rambo, Impeaching Lying Parties with Their Statements During Negotiation: Demystifying the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes, 75 Wash. L. Rev. 1037, 1068 (2000) (“[T]here is no empirical evidence to support the public policy rationale . . . . For example, the author is unaware of any studies to suggest that the enactment of Rule 408 . . . led to an increase in the amount of negotiated settlements.” (footnotes omitted)).

27 See Fed. R. Evid. 408(a).

28 See Pierce v. F.R. Tripler & Co., 955 F.2d 820, 827 (2d Cir. 1992) (“[W]here a party is represented by counsel, threatens litigation and has initiated the first administrative steps in that litigation, any offer made between attorneys will be presumed to be an offer within the scope of Rule 408.”). But see Alpex Computer Corp. v. Nintendo Co., 770 F. Supp. 161, 164 (S.D.N.Y. 1991) (“[I]t is not always easy to tell when compromise negotiations begin, and informal dealings end.”).

29 See infra Part II.
that the parties modify the contract’s terms. The parties discuss various formulations of the billing terms, but they are unable to come to an agreement and eventually move on to litigation. During litigation, Party A wants to submit into evidence the contract-modification discussions. The difficulty this scenario presents is determining the line that separates when the parties merely are attempting to modify the contract and when the parties enter into the kind of negotiations that fall under Rule 408’s protection.31

The scope of Rule 408’s protection with respect to compromise negotiations raises two issues. On the one hand, the determination of when compromise negotiations begin presents a problem for counsel regarding how they advise clients.32 Should counsel for Party B have declined to discuss modifying the terms of the contract with Party A? Party B certainly could have announced that any discussion would be protected under Rule 408 should the dispute lead to litigation. However, this option is not always viable because it “risks damaging the prospects for creating the kind of feelings between the parties that are most conducive to reaching agreement.”33 Thus, in crafting a method to delineate between negotiations that society as a matter of public policy wants to promote and all other kinds of conduct and statements, that method’s effect on the conduct of parties in the future and whether it will create disincentives for parties to attempt compromise negotiations must be taken into account. On the other hand, this determination poses a challenge to the courts in fashioning a principled way to delineate the bounds of compromise negotiations that will avoid the kind of arbitrariness and administrative difficulty that the common law rule presented.34

31 See infra Part II.A.1.
32 See Brazil, supra note 7, at 961–62 (“Counsel also must beware of courts making a distinction between mere business communications, which are not entitled to protection, and ‘offers of compromise,’ which are.” (citing Olin Corp. v. Ins. Co. of N. Am., 603 F. Supp. 445, 449–50 (S.D.N.Y. 1985))); Cohen, supra note 7, at 1055–56. Compounding this problem is the fact that a circuit court will only overturn a district court’s decision to admit evidence if the circuit court finds an abuse of discretion. Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1107 (5th Cir. 1981); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1372 (10th Cir. 1977) (citing Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976)).
33 Brazil, supra note 7, at 965.
34 See Alabanza, supra note 15, at 550 (“The common law rule was difficult to apply, resulting in a degree of arbitrariness, because it required the court to determine the motivation of the party’s communication before ruling on its admissibility.” (citing 2 WEINSTEIN & BERGER, supra note 12, § 408.05[1], at 408-21 to -22)); Bell, supra note 14, at 239 (stating that under the common law rule, courts disagree on why they receive or exclude settlement evidence and that the “current decisions still indicate confusion and misunderstanding by courts in their handling of this evidence problem”).
II

THE CIRCUIT SPLIT

Rule 408’s language and the Advisory Committee’s note provide some guidance for determining when compromise negotiations begin. To trigger its exception, the rule requires an actual dispute regarding the validity or the amount of a claim. If, for example, both parties accept the validity and amount of a debt, then Rule 408 would not protect any negotiations that follow. The Advisory Committee’s note states: “The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lesser sum. Hence the rule requires that the claim be disputed as to either validity or amount.” However, the requirement of a dispute merely shifts the problem from determining when compromise negotiations begin to determining when a dispute begins. The federal courts have yet to develop a consistent approach to this issue, resulting in the current circuit split, and the Supreme Court has yet to address the issue.

A. The Two Extremes

1. The Tenth Circuit

In Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., the U.S. Court of Appeals for the Tenth Circuit adopted the narrowest interpretation of “dispute,” requiring that discussions “crystallize[] to the point of threatened litigation” for Rule 408 to apply. In this case, Big O Tire Dealers, Inc. (Big O) claimed that The Goodyear Tire

35 See Fed. R. Evid. 408 (“Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim . . . .”). Note that negotiations following an admission of either the validity or amount of a claim, but not both, would still fall under Rule 408’s protection. Id. Rule 408 does not, however, protect negotiations regarding illegal acts or conspiracies. Id. R. 408(a)(2); see also 23 Wright & Graham, supra note 16, § 5314, at 282 (“Rule 408 is . . . inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions; e.g., libel, assault, breach of contract, unfair labor practice, and the like. . . . Rule 408 does not prevent the plaintiff from proving his case; wrongful acts are not shielded because they took place during compromise negotiations.” (footnotes omitted)).

36 FED. R. EVID. 408 advisory committee’s note (citation omitted).


38 One case from the U.S. Court of Appeals for the Seventh Circuit suggests that Rule 408 is triggered only when a lawsuit is already filed. See United States v. Hooper, 596 F.2d 219, 225 (7th Cir. 1979); Brazil, supra note 7, at 963. However, this case was not decided in context of Rule 408; it merely used the same language of “offer in compromise.” Hooper, 596 F.2d at 225.

& Rubber Co. (Goodyear) violated its trademark, “Bigfoot.” Before litigation began, Goodyear informed Big O of its use of “Bigfoot” in its advertising campaign and asked Big O for a letter indicating that Big O had no objection to Goodyear’s use of “Bigfoot.” Big O refused and asked Goodyear to cease using the term “Bigfoot” in its advertising campaign. Goodyear responded by declaring that it intended to use “Bigfoot” as long as it continued to be a helpful advertising device and that “if Big O did sue, the case would be in litigation long enough that Goodyear might obtain all the benefits it desired from the term ‘Bigfoot.’”

At trial, Big O sought to introduce the communications between Big O and Goodyear. The trial court determined that “communications between Big O and Goodyear representatives . . . were not offers to compromise a dispute. . . . [T]hey were simply business communications and were relevant and material to show knowledge, willful infringement, and misconduct by Goodyear.” The Tenth Circuit affirmed the district court’s ruling, stating that “the court did not commit manifest error” in ruling that the disputed statements were “business communications and not compromise negotiations.” Without further explanation, the Tenth Circuit concluded that “[t]he discussions had not crystallized to the point of threatened litigation, a clear cut-off point.”

2. The Third Circuit

While the Tenth Circuit adheres to the narrowest interpretation of “dispute,” the U.S. Court of Appeals for the Third Circuit adopted the broadest interpretation, requiring merely “a clear difference of opinion between the parties.” In Affiliated Manufacturers, Inc. v. Aluminum Co. of America, the district court declined to follow the Tenth Circuit’s approach in Big O. The district court explained that the Tenth Circuit’s approach “was too restrictive in its establishment of ‘the point of threatened litigation [as] a clear cut-off point’ for application.” The court instead adopted the approach of Alpex Computer

40 Big O, 561 F.2d at 1368.
41 Id.
42 Id.
43 Id.
44 Id. at 1372.
45 Id. at 1373.
46 Id. One source suggests that “the judges may have been motivated by a desire to punish the defendant for its ‘strong-arm’ negotiating tactics.” Brazil, supra note 7, at 962 (citing 23 Wright & Graham, supra note 16, § 5306, at 214).
47 Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 528 (3d Cir. 1995).
48 See id. at 526–27.
49 Id. (alteration in original) (quoting Big O, 561 F.2d at 1373).
Corporation v. Nintendo Co., which “considered factors apart from any indicia of threatened litigation.”

The Third Circuit held that *Alpex* rejected the strict standard of *Big O*. The Third Circuit stated: “Rather, *Alpex* and other courts make clear that the Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation.” The court reasoned that because of the standard of review, *Big O* was “not entirely clear [on] how the Tenth Circuit would view exclusion, rather than inclusion, of negotiations made prior to ‘the point of threatened litigation.’” In concluding, the Third Circuit stated that the meaning of “dispute” in Rule 408 “includes both litigation and less formal stages of a dispute.”

B. The Middle Ground

1. The Fifth Circuit

In *Ramada Development Co. v. Rauch*, the U.S. Court of Appeals for the Fifth Circuit held that Rule 408’s scope extends to statements and conduct “intended to be part of the negotiations toward compromise.” The court, however, did not directly address the “dispute” language of the rule but rather generally discussed the rule’s scope.

In *Ramada*, the plaintiff sued the defendant for breach of contract, seeking damages for the construction of a motel. The defendant sought to introduce a report created by the plaintiff’s architect one year before litigation began. The court held that Rule 408 “does not indicate that there must be a pre-trial understanding or agreement between the parties regarding the nature of the report.” It reasoned that requiring such an understanding or agreement would undercut the rule’s underlying public policy rationale and return it to the common law doctrine, which required that a party assert that the

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51 *Affiliated Mfrs.*, 56 F.3d at 527.
52 *Id.*
53 *Id.*
54 *Id.* at 528.
56 See *Ramada*, 644 F.2d at 1106.
57 *Id.* at 1099–101.
58 *Id.* at 1106.
59 *Id.* at 1107.
statement is made “without prejudice.”60 Thus, the court excluded the report under Rule 408.

2. The Seventh Circuit

In S.A. Healy Co. v. Milwaukee Metropolitan Sewerage District, the U.S. Court of Appeals for the Seventh Circuit held that Rule 408 applied “only when a claim is rejected at the initial or some subsequent level.”61 In this case, Milwaukee’s sewage authority and S.A. Healy Co. (Healy) had entered into a construction contract.62 Healy encountered unexpected difficulties in the construction, which increased the cost, and it sought to adjust the contract price.63 The sewage authority refused, and Healy sued for breach of contract.64 During trial, Healy admitted evidence of a statement by the sewage authority’s engineer that indicated that Healy’s claim for a price adjustment probably had merit.65 On appeal, the sewage authority argued that under the contract’s claims clause, which required that “all claims by the Contractor arising from interpretation of or performance under the Contract Documents” be submitted to the engineer, a “claim” implied a dispute.66 The Seventh Circuit disagreed and stated: “A dispute arises only when a claim is rejected at the initial or some subsequent level.”67 The court thus held that Rule 408 was not applicable because there was no dispute.68

III A STATE-COURT PROBLEM

Because many states have modeled their evidence rules on the Federal Rules of Evidence, the problem of determining when compromise negotiations begin is also present in the state-court context.69 Some state courts have looked to the federal courts in fashioning their own approaches. For example, Arizona initially seemed to adopt a version of the Seventh Circuit’s approach, only to reject it later.70 In Hernandez v. State, Michael Hernandez fell and injured himself while visiting a state park and filed a notice of claim with the State of Ari-

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60 Id. (internal quotation marks omitted).
61 50 F.3d 476, 480 (7th Cir. 1995).
62 Id. at 478.
63 Id.
64 Id. at 478–79.
65 Id. at 480.
66 Id. (internal quotation marks omitted).
67 Id.
68 Id. (citing Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n, 830 F.2d 716, 724 n.12 (7th Cir. 1987); In re B.D. Int’l Disc. Corp., 701 F.2d 1071, 1074 n.5 (2d Cir. 1983)).
69 See supra note 8 and accompanying text.
zona claiming negligence. The notice described the circumstances of Hernandez’s fall and the amount he claimed for his injuries. After filing the notice of claim, Hernandez brought a civil action against the State, and the State sought to introduce portions of Hernandez’s notice of claim to impeach Hernandez’s credibility. The trial court admitted the notice of claim.

The court of appeals upheld the trial court’s decision to admit the notice of claim into evidence. The court of appeals explained that “because there is no ‘disputed’ claim when the claimant first files the notice of claim, the notice of claim cannot operate as an offer to ‘compromise’ a disputed claim, the second characteristic of excludable evidence under” Rule 408. The court elaborated that Rule 408 did not apply because the State had not yet disputed any aspect of the claim.

On appeal, the Supreme Court of Arizona vacated the court of appeals’s decision but held for other reasons that the trial court properly admitted the notice of claim into evidence. In the decision, the court assumed that a notice of claim constituted an offer to compromise under Rule 408. It then held that admitting the notice of claim for the purpose of impeaching Hernandez would promote candor during settlement negotiations. Thus, the state supreme court effectively rejected the court of appeals’s test, yet it did not offer a substitute. Instead, the court’s decision seems limited to the use of statements and conduct during compromise negotiations for impeachment purposes.

Judge Joseph W. Howard wrote a forceful dissent, arguing that the court should have determined first whether a notice of claim constitutes an offer to compromise. Judge Howard argued that the court of appeals’s approach, which required a party to take a contrary

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72 Id.
73 Id. at 767.
74 Id.
75 Id.
76 Hernandez I, 35 P.3d at 100.
77 Id.
78 Hernandez II, 52 P.3d at 769.
79 Id. at 767.
80 Id. at 768.
82 See Hernandez II, 52 P.3d at 770 (Howard, J., dissenting).
position, was "too narrow and overly restricts the policy underlying the rule." Instead, Judge Howard adopted the Affiliated Manufacturers approach, which emphasized the "apparent difference of opinion between the parties." The dissent, however, did not explain how this approach would further Rule 408’s goals.

At least one state, North Dakota, has adopted the Affiliated Manufacturers approach. In Schlossman & Gunkelman, Inc. v. Tallman, the Supreme Court of North Dakota held that under its version of Federal Rule of Evidence 408, a claim is disputed "if there is a difference in interests or views which the parties are attempting to resolve through compromise negotiations or offers to settle." To determine whether there was a difference in interests or views, the court adopted the Ramada intent test. The court stated: “Under [Federal Rule of Evidence] 408, the parties’ intent controls whether there is a difference in interests or views which the parties are attempting to resolve through an offer to settle.” However, Ramada never specifically addressed the “dispute” language of Rule 408. Rather, in Ramada, compromise negotiations were underway when the plaintiff’s architect created the report that the defendant sought to introduce into evidence. The issue before the court was whether the report was part of the compromise negotiations and not whether compromise negotiations had begun.

Thus, given the dearth of state-court cases addressing the scope of the state’s equivalent of Rule 408 and state courts’ reliance on federal precedent, the difficulty in applying Rule 408 is perhaps more evident in the state-court context. Some state courts, such as the Supreme Court of North Dakota, have taken the route of mixing and matching various aspects of the different federal approaches. Other courts, such as the Supreme Court of Arizona, have left the issue unaddressed. For example, Idaho state courts have confined analysis of Idaho’s version of Rule 408 to identifying a party’s purpose for admitting the evidence, ignoring the issue of when compromise nego-

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83 Id.
84 Id. (quoting Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 528 (3d Cir. 1995)) (internal quotation marks omitted).
86 Id. at 378 (citing Affiliated Mfrs., 56 F.3d at 526).
87 Id. at 378–79.
88 Id. at 379 (citing Kritikos v. Palmer Johnson, Inc., 821 F.2d 418, 423 (7th Cir. 1987); Ramada Dev. Co. v. Rauch, 644 F.2d 1097, 1106 (5th Cir. 1981)).
89 See Ramada, 644 F.2d at 1106–07.
90 Id.
91 Id.
92 See supra text accompanying notes 78–81.
tations begin. And at least one state has specifically rejected the federal approach: the Minnesota Court of Appeals rejected the Affiliated Manufacturers difference-of-opinion test and fashioned its own approach, requiring an “actual controversy.” But requiring an actual controversy does not do any better to clear the confusion; it merely narrows the scope of Minnesota’s equivalent of Federal Rule of Evidence 408.

IV
THE CONCEPTUAL PROBLEM

A. Begging the Question with the Public Policy Rationale

A survey of federal case law shows the varying approaches the federal courts take to determine when a dispute begins such that it triggers Rule 408. The same variety of approach also arises in the state-court context. In determining when a dispute begins, courts have largely relied on the public policy rationale of promoting settlement of disputes. But perhaps one reason for the varying approaches to the question of when a dispute begins is that the public policy rationale itself provides no guidance for courts to craft a consistent approach. Rather, the public policy rationale requires courts to determine when a dispute begins before they can apply the rationale. To understand this argument, this Part examines the public policy rationale for Rule 408 more closely.

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93 See, e.g., Hatfield v. Max Rouse & Sons Nw., 606 P.2d 944, 949–50 (Idaho 1980) (assuming that a letter from a party’s attorney was part of a settlement negotiation), overruled on other grounds by Brown v. Fritz, 699 P.2d 1371, 1373–74 (Idaho 1985).

94 C.J. Duffey Paper Co. v. Reger, 588 N.W.2d 519, 524 (Minn. Ct. App. 1999) ("The Minnesota Supreme Court, however, has taken a narrower view and has stated that an 'actual controversy' must exist at the time of the alleged offer, thus suggesting that the offer itself cannot be the mechanism that creates the dispute." (citing In re Commodore Hotel Fire & Explosion Cases, 324 N.W.2d 245, 247–48 (Minn. 1982))).

95 See id.

96 The term “begging the question” is often used to mean “raises the question.” William Safire, Take My Question—Please!, N.Y. TIMES MAG., July 26, 1998, at 10. However, I use the term “begging the question” in its technical sense of meaning a logically invalid form of argument that uses the conclusion as the premise for that conclusion. See ARISTOTLE, PRIOR ANALYTICS B15, at 89–90 (Robin Smith trans., Hackett Publ’g Co. 1989) (c. 384–322 B.C.E.); Safire, supra.

97 See supra Part II.

98 See supra Part III.

99 See, e.g., Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP, 224 P.3d 1068, 1084 (Idaho 2009) (holding that, in ascertaining the purpose for which a party wants to admit evidence, courts should give Rule 408 a broad interpretation “in order to encourage settlement negotiations”).
1. A “More Consistently Impressive Ground”

In adopting Rule 408 in 1975, the Advisory Committee stated that the “more consistently impressive ground” for the Rule was to promote settlements, but the Committee gave little indication in its notes as to why this rationale was “more consistently impressive” than the relevancy rationale. The congressional reports discussing the enactment of the Federal Rules of Evidence are also of little help, instead only demonstrating Congress’s hesitance in enacting Rule 408. More specifically, Congress feared that the rule could become a safe harbor for hiding evidence: a party could present certain evidence during settlement negotiations even if it did not relate to the settlement negotiations.

The courts have developed their own explanation for why the Advisory Committee preferred the public policy rationale to the relevancy rationale: promoting judicial efficiency through settlement. Shortly after Congress adopted Rule 408, the U.S. District Court for the District of Minnesota in *United States v. Reserve Mining Co.* explained: “The purpose for the privilege surrounding offers of compromise is to encourage free and frank discussion with a view toward settling the dispute.” Other courts have suggested that in promoting the settlement of disputes without a trial, the parties come to a

100 FED. R. EVID. 408 advisory committee’s note. The Advisory Committee’s note does indicate that the purpose of Rule 408 was to cure the effect of the common law rule that “inhibit[ed] freedom of communication with respect to compromise.” *Id.* But this statement does not explain why the public policy rationale is “more consistently impressive.” Rather, it merely suggests the means of putting the public policy rationale into effect.

101 See H.R. REP. NO. 93-650, at 8 (1973) (“For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until ‘compromise negotiations’ began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.”); S. REP. NO. 93-1277, at 8 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7057 (“[T]he committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.”).

102 412 F. Supp. 705, 712 (D. Minn. 1976); see also EEOC v. UMB Bank Fin. Corp., 558 F.3d 784, 791 (8th Cir. 2009) (stating that the purpose of Rule 408 is “to foster open discussions and out-of-court settlements” (citing FED. R. EVID. 408 advisory committee’s note)).
more efficient and cost-effective resolution. Furthermore, settlement relieves some of the judicial system’s caseload burden. The increase in civil and criminal cases in federal district courts, from 89,091 in 1960 to 127,280 in 1970, indeed suggests that there was a need to reduce the federal caseload. Thus, the federal courts’ gloss on the Advisory Committee’s note indicates that there are at least two reasons why promoting settlements is a “more consistently impressive ground” than relevance: (1) settlements create more efficient and cost-effective resolutions for the parties involved, and (2) settlements conserve judicial resources.

2. The Scope of the Public Policy Rationale

The Advisory Committee’s note is also unclear as to how Rule 408 should promote compromise and settlement of disputes. One possible interpretation of the public policy rationale is that courts should exclude settlement evidence so that parties will more willingly enter into compromise negotiations. Under this interpretation, promoting settlements involves, in part, “pushing” parties to enter compromise negotiations. This interpretation would suggest that Rule 408’s protection extends beyond formal negotiations.

Another possible interpretation of the public policy rationale is that courts should promote the settling of disputes once compromise negotiations begin. The difference between this narrower interpretation and the first interpretation is that the goal in the narrow interpretation is not to “push” parties into compromise negotiations but merely to promote an environment in which parties are more likely to come to an agreement once compromise negotiations have already begun. Certainly, the first interpretation will also include the goal of

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103 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003) (“The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system.”).

104 Id. State courts have also developed the same explanation for promoting settlements. The New York Court of Appeals has stated:

A negotiated compromise of a dispute avoids potentially costly, time-consuming litigation and preserves scarce judicial resources; courts could not function if every dispute devolved into a lawsuit. Moreover, there is a societal benefit in recognizing the autonomy of parties to shape their own solution to a controversy rather than having one judicially imposed. Additionally, a settlement produces finality and repose upon which people can order their affairs.


106 The only reference to settlements in the Advisory Committee’s note, other than to induce a creditor to settle an admittedly due amount for a lesser sum, merely states that “a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.” Fed. R. Evid. 408 advisory committee’s note (citing McCormick, supra note 13, §§ 76, 251).
creating an environment in which parties are more likely to come to an agreement.

The federal courts appear to have taken the narrower interpretation of the public policy rationale’s goals. In Reserve Mining Co., the District Court of Minnesota explained that the purpose of Rule 408 is “to encourage free and frank discussion.”107 In another case, the U.S. Court of Appeals for the Eighth Circuit declared that the purpose of Rule 408 is “to foster open discussions.”108 Furthermore, the Senate report discussing Rule 408 indicates that Congress intended this narrow view of the public policy rationale. The report states: “The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements . . . .”109 The focus on discussions and communication between parties suggests that the scope of the public policy rationale is limited to discussions that occur during compromise negotiations.

3. Begging the Question

Because of the abuse-of-discretion standard of review on appeal and the lack of written decisions on motions in limine at the trial level, the precise reasoning supporting the courts’ construction of tests to determine whether there is a dispute is unclear.110 The circuit courts have largely stated the public policy rationale for Rule 408 and then declared that the district court’s interpretation of “dispute” was within the spirit of Rule 408.111 Thus, the circuit courts seem to have justified the district courts’ interpretations of Rule 408 by looking at the scope of the public policy rationale.

However, courts should not look to the public policy rationale to guide the determination of when a dispute begins because this sort of reasoning begs the question.112 The public policy rationale aims to promote “the compromise and settlement of disputes.”113 To promote the compromise and settlement of disputes, courts must at the outset have a notion of what a dispute is and when one begins. Yet the

107 412 F. Supp. at 712.
110 See supra note 32.
111 See, e.g., Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 526–27 (3d Cir. 1995); S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 50 F.3d 476, 480 (7th Cir. 1995). In Big O, the court merely explained that a review of the record convinced the court that the trial court “did not commit manifest error” in its ruling. Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1375 (10th Cir. 1977).
112 For an explanation of “begging the question,” see supra note 96.
113 Fed. R. Evid. 408 advisory committee’s note (citing McCormick, supra note 13, §§ 76, 251).
question that the courts are trying to decide is precisely that: when a dispute begins.

Still, the most worrisome aspect of this problem is not the conceptual gap itself. Rather, the fact that the public policy rationale provides no guidance for courts to determine when a dispute begins means that practitioners have no guidance in planning their approach to settling disputes when they are operating at the fringes of Rule 408—long before litigation has begun. Because of the standard of review on appeal, the trial courts have much leeway in interpreting Rule 408’s scope. This possibility of varying interpretations of Rule 408’s scope undercuts the goals of the public policy rationale because it requires parties to attempt to negotiate under the narrowest interpretation of Rule 408. Thus, the conceptual gap creates both a problem for courts interpreting the scope of disputes falling under Rule 408 and a real-world problem for practitioners in planning their negotiations.

Furthermore, this conceptual problem bleeds into the real-world application of Rule 408. When parties to a potential dispute who do not have a sophisticated understanding of the Federal Rules of Evidence attempt to resolve their differences, they most likely do not consider the future implications of their statements and conduct under Rule 408. Yet, when a court applies the public policy rationale, it fashions a rule such that parties to future disputes will be more likely to negotiate a settlement; the court’s decision extends beyond whether the parties in the present case would have negotiated if they had known of this rule. In this respect, the public policy rationale directs courts away from resolving the issue with a view toward the present facts of the case. Instead, courts look to hypothetical future disputes. Thus, the conceptual problem is not merely confined to the realm of logic but also presents a challenge to practitioners, courts, and the unsuspecting layperson.

B. Returning to the Relevancy Rationale

1. A Multifactor Approach

If courts cannot look to the public policy rationale in determining when a dispute begins under Rule 408, then they should look to the second rationale: relevancy. Indeed, some courts have already looked to the relevancy rationale, although not explicitly. The *Alpex

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114 *See Affiliated Mfrs., 56 F.3d at 527* (“Because of the applicable standard of review, it is not entirely clear how the Tenth Circuit would view exclusion, rather than inclusion, of negotiations made prior to ‘the point of threatened litigation.’”).

115 In this respect, the public policy rationale is a forward-looking principle. The relevancy rationale, on the other hand, is a backward-looking principle that examines the particular facts of the case before the court. *See infra Part IV.B.*
court’s approach represents a bridge between the public policy analysis and the relevancy analysis. In making a Rule 408 determination, the district court in *Alpex* “considered factors apart from any indicia of threatened litigation” and analyzed the circumstances of each document and deposition excerpt that the defendant proposed for exclusion.\(^{116}\) The district court looked at two factors: (1) whether the communications “took place largely between lawyers,” and (2) whether “the party seeking to exclude the evidence in that case was guilty of overreaching . . . [such] that apply[ing] Rule 408 in that situation would enable that party to succeed in strongarming an opponent.”\(^{117}\)

The first factor is indicative of relevancy rather than the promotion of settlements. This factor looks at whether the parties had a sophisticated understanding of the implications of their conduct and statements. If the communications took place largely between lawyers, then the parties likely anticipated that a court would exclude the communications as evidence if the dispute went to trial. The second factor, however, seems to apply the public policy rationale. If the party seeking to exclude evidence appears to be abusing Rule 408’s protection, then courts should not allow that party to benefit from the rule. In this sense, the courts only promote certain kinds of compromise negotiations.

The flaw in the multifactor *Alpex* approach is that the court nonetheless utilizes the public policy rationale in fashioning its test. Furthermore, there is a tension between the relevancy rationale and the public policy rationale. The relevancy rationale’s implicit goal is truth; it recognizes that a desire to settle the dispute rather than to represent the truth may motivate conduct and statements made during compromise negotiations.\(^{118}\) The public policy rationale, on the other hand, does not aim at the truth. Rather, it represents a kind of privilege that society recognizes as valuable even if it comes at the cost of obscuring the truth. In particular, this value is the settlement of disputes outside of trial to conserve judicial resources and to reach a more efficient and cost-effective resolution.\(^{119}\)

This truth-versus-privilege aspect creates tension between the relevancy and public policy rationales. Although certain conduct and statements may be relevant to revealing the truth with respect to a party’s liability or the amount of a claim, the public policy rationale

\(^{116}\) *Affiliated Mfrs.*, 56 F.3d at 527 (quoting *Affiliated Mfrs., Inc. v. Aluminum Co. of Am.*, Civ. No. 91-2877, slip op. at 5–6 (D.N.J., Dec. 23, 1993)) (internal quotation marks omitted).


\(^{118}\) Fed. R. Evid. 408 advisory committee’s note.

\(^{119}\) See *supra* text accompanying notes 103–04.
may create a privilege for the conduct or statements. Certainly, nothing inherent in the tension between the truth-versus-privilege aspect of the two rationales for Rule 408 would require rejecting the multifactor approach.\textsuperscript{120} But because the public policy rationale cannot inform the determination of when a dispute begins under Rule 408,\textsuperscript{121} it adds nothing to the determination in balancing the two rationales in \textit{Alpex}.

2. Adding to the Multifactor Approach

Even if courts were to adopt the multifactor \textit{Alpex} approach and reject the public policy rationale under this approach, the test in \textit{Alpex} was very limited, outlining only two factors for courts to look at.\textsuperscript{122} To add to the factors, courts should perhaps examine the parties’ intent. Factors that look to the parties’ intent may include the likelihood that a party will succeed at trial and the party’s belief that the dispute will be properly determined in court. Another factor may be the parties’ sophistication, similar to the first \textit{Alpex} factor.\textsuperscript{123} Which particular factor is to become part of the test should develop over time.\textsuperscript{124} Courts did in fact look at the parties’ intent under the common law protection of offers of compromise.\textsuperscript{125} Under the common law approach,

\begin{quote}[t]he true reason for excluding an offer of compromise is that it does not ordinarily proceed from and imply a specific belief that the adversary’s claim is well founded, but rather a belief that the further prosecution of that claim, whether well founded or not, would in any event cause such annoyance as is preferably avoided by the payment of the sum offered. In short, the offer implies merely a desire for peace, not a concession of wrong done . . . \textsuperscript{126}
\end{quote}

\textsuperscript{120} Privilege rules in themselves suggest that Congress has taken the stance of favoring certain kinds of relationships over the ability to present probative evidence. \textit{See} Fed. R. Evid. 501.

\textsuperscript{121} My principal argument is that the public policy rationale itself requires a court to have a preconceived notion of what a dispute is because the public policy rationale’s goal is to promote the settlement of disputes.

\textsuperscript{122} \textit{Alpex}, 770 F. Supp. at 165.

\textsuperscript{123} \textit{Id}.

\textsuperscript{124} I do not suggest that these particular factors ought to become part of the multifactor \textit{Alpex} approach. Rather, my argument is that, at the very least, courts should create a more concrete test that will allow attorneys to plan negotiations in anticipation of litigation. Furthermore, by focusing on the relevancy rationale, courts will have a principled way to develop their own set of factors.

\textsuperscript{125} \textit{See} Bell, \textit{supra} note 14, at 248–49.

\textsuperscript{126} 4 Wigmore, \textit{supra} note 18, § 1061(c), at 36 (emphasis omitted). The Advisory Committee also recognized that settlement offers are not always probative of liability or the amount of a claim. Fed. R. Evid. 408 advisory committee’s note (“The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the
In determining whether a party is motivated by a desire for peace, some courts have examined the factual situation surrounding the making of the offer. For example, the plaintiff in Moore v. Stetson Machine Works claimed that the defendant’s car, which the defendant’s agent was negligently driving while within the scope of his employment, injured the plaintiff. The plaintiff offered evidence that the defendant repaired the plaintiff’s car without request, suggesting that the defendant was at fault for the accident. The court excluded this evidence because it found that the defendant’s motivation for repairing the car was to maintain good public relations.

The move to a multifactor approach that focuses on the parties’ intent addresses the problems of the current circuit split. First, the multifactor approach addresses the vagueness of the current tests and the difficulty that the current tests cause for attorneys in advising their clients. The benefit of a multifactor approach is that attorneys can position themselves for Rule 408 protection during negotiations without having to explicitly invoke Rule 408 or threaten litigation. Rather, a jurisdiction’s particular factors would function as formal steps to trigger Rule 408. Second, this approach avoids the circularity of using the public policy rationale to answer the threshold question of when a dispute begins under Rule 408. The relevancy rationale, rather than the public policy rationale, guides the courts in determining which factors are relevant in determining when a dispute begins.

A final benefit of the multifactor approach is that it allows particular jurisdictions to determine their own factors for deciding when a dispute begins under Rule 408. In this regard, the multifactor approach is easier to implement than completely overhauling how courts determine when a dispute begins under Rule 408. Courts, guided by relevancy considerations, can enunciate factors that elaborate on the vague current tests such as “a clear difference of opinion.” One hitch in this approach is that it fails to solve the current circuit split’s fragmentation problem. However, fragmentation is only a problem because of the vagueness of the tests. A move toward

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127 188 P. 769, 769 (Wash. 1920).
128 Id. at 769–70; Bell, supra note 14, at 245.
129 See, e.g., Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 528 (3d Cir. 1995) (applying “a clear difference of opinion between the parties” test); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977) (applying a “crystallized to the point of threatened litigation” test).
130 Recall that threatening litigation can often frustrate negotiations. See supra text accompanying note 33.
131 See supra Part IV.A.3.
132 See Affiliated Mfrs., 56 F.3d at 527–28.
133 See supra Part II.
defining factors that determine when a dispute begins would at least encourage courts to be more concrete about what they mean.

3. Criticisms of the Relevancy Rationale

Courts had difficulty applying the relevancy rationale under the common law protection of settlement offers. As a result, applying the relevancy rationale led to a degree of arbitrariness because courts had to determine the motivation behind a party’s communication before ruling on its admissibility. Because of this difficulty, the Advisory Committee shifted the focus away from the relevancy rationale and toward the public policy rationale with the adoption of the Federal Rules of Evidence.

The problem that courts had in applying the relevancy rationale was that it was often difficult to determine a party’s underlying motivations in offering to compromise. A party certainly can have multiple reasons for offering to compromise, and it can be difficult to pinpoint a principal reason, if any exists. For a court to resolve this ambiguity, it may have to rely on its own experience and knowledge of why people make settlement offers or examine the factual situation surrounding the offer. Yet, a judge’s own experience and knowledge may not be enough as a party’s underlying motivations are not always clear, and an examination of the factual situation surround-

134 See Brazil, supra note 7, at 958; see also Bell, supra note 14, at 242–43 (“It is true that a desire to obtain peace may be a motivating factor behind offers of settlement, but such a motive can and often does exist together with other factors which indicate a belief in the validity of the claim asserted.”).

135 See Bell, supra note 14, at 248–49; Brazil, supra note 7, at 958 (“[M]ost courts would not exclude from evidence admissions of fact that parties made during settlement discussions unless the author explicitly made the statement hypothetical, or incanted the prophylactic words ‘without prejudice,’ or unless the words constituting the admission were ‘so connected with the offer as to be inseparable from it.’” (quoting Fed. R. Evid. 408 advisory committee’s note)).

136 See supra text accompanying notes 23–26.

137 See Bell, supra note 14, at 243–44.

138 See id. at 243 (“Any of the following states of mind may underlie an offer of settlement: (1) a belief that there is no possibility of a successful [prosecution] of the claim, (2) a belief that the claim is valid up to a certain amount (which amount may be equal to, less than, or more than the offer of settlement) coupled with an unwillingness to pay more than the amount offered, (3) a belief that a valid claim exists with only the amount of the claim in doubt, or (4) a belief that a valid claim may possibly exist accompanied by uncertainty whether or not it could be successfully maintained.” (footnote omitted)).

139 See id. at 244.

140 See, e.g., I DavID P. LEONARD, THE NEW WigMORE: A TReATISE ON EVIDENCE: SeleCted RuleS OF LimIted Admissibility § 3.4, at 318 (rev. ed. 2002) (recognizing “the complex set of motivations that might stand behind the decision whether to engage in [compromise negotiations]”); Bell, supra note 14, at 248–49, 252–53 (criticizing the confusion that the relevancy rationale created under the common law exclusion of settlement offers).
ing the offer is only a small shift away from analyzing mental states.\textsuperscript{141} The factual situation can often be as ambiguous as a party’s motivations.\textsuperscript{142}

However, the difference in the multifactor approach is that it only applies to the threshold question of whether there is a dispute, whereas the common law approach that utilized the relevancy rationale was limited to assessing whether an offer to compromise was motivated by a desire to resolve the dispute. Although the difference between the multifactor approach and the common law approach may seem to be merely a shift in semantics from “offer of compromise” to “dispute,” the true difference is that the multifactor approach is a system by which attorneys can indicate to courts that they are invoking Rule 408’s protection without threatening litigation. In this respect, the primary goal of the multifactor approach is not to determine whether evidence is relevant, as it was under the common law rule. Rather, the goal of the multifactor approach is to allow parties to indicate to the court that they wish to protect their negotiations under Rule 408 without threatening litigation, which would hamper those negotiations.

The multifactor approach also does not extend to the determination of what conduct and statements are protected, such as e-mails and documents that parties use to prepare for a negotiation but never actually use during the negotiation. I do not suggest a rejection of the public policy rationale in applying Rule 408 generally; the public policy rationale still has a place in determining what kinds of conduct and statements fall within the protection of Rule 408 once negotiations have begun. Even if it is difficult for courts to determine which factors they should consider, merely establishing concrete factors that attorneys know about and can use to advise their clients is an incremental step in solving the problem of the current Rule 408, which is that the ambiguity of the rules creates difficulties for parties in negotiating compromises. Furthermore, courts already assess the evidence’s relevance under Rule 403,\textsuperscript{143} and they would not be treading into unknown territory by adopting the multifactor approach. The multifactor approach simply suggests that courts be forthcoming and explicit about what they already do.

\textsuperscript{141} See Bell, supra note 14, at 244–45.

\textsuperscript{142} See id. at 245 (citing Moore v. Stetson Mach. Works, 188 P. 769, 769–70 (Wash. 1920)).

\textsuperscript{143} See Fed. R. Evid. 403 (suggesting that a court should always determine the relevance of the evidence in addition to other possible reasons for exclusion).
CONCLUSION

The adoption of Federal Rule of Evidence 408 has shifted the rationale for protecting compromise negotiations from excluding irrelevant evidence to the public policy of promoting settlements. However, the public policy rationale has proven to be problematic in supporting a test to determine when compromise negotiations begin such that Rule 408 is triggered. First, the circuit courts have been cryptic in their reasoning for upholding district courts’ decisions to admit or exclude evidence. Second, the public policy rationale in fact provides no guidance as to the question of when compromise negotiations begin, which the courts have merely rephrased as the question of when a dispute begins. The public policy rationale itself aims to promote the settlement of disputes, but the question that courts are trying to answer is precisely when a dispute begins. Thus, to apply the public policy rationale to the question of when a dispute begins would be to engage in a line of circular argument.

Courts should instead look to the relevancy rationale for guidance in determining when compromise negotiations begin. For this, the courts should utilize a multifactor approach similar to the approach in Alpex. This approach addresses the current tests’ vagueness and the difficulty that the current tests cause for attorneys in advising their clients. With this approach, attorneys can position themselves for Rule 408 protection during negotiations without having to explicitly invoke Rule 408 or threaten litigation. Finally, this approach is a feasible solution that allows particular jurisdictions to determine their own factors that are relevant to decide when a dispute begins under Rule 408.

Although the history of the relevancy rationale has suggested that this approach produces a degree of arbitrariness and is difficult to apply, this approach would be limited to only determining when a dispute begins. The irony of the multifactor approach is that by rejecting the public policy rationale in analyzing the threshold question of when a dispute begins and by fashioning a more concrete test, courts can promote the public policy of encouraging the settlement of disputes. Although I do not outline the particular factors that courts should consider, a shift toward a multifactor approach—and away from the vague tests, such as the “crystallized to the point of

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144 See id. R. 408 advisory committee’s note (“[A] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.” (citing McCormick, supra note 13, §§ 76, 251)); Brazil, supra note 7, at 958 (“[T]he Committee made ‘compromise and settlement of disputes’ the principal purpose of Federal Rule of Evidence 408.” (quoting Fed. R. Evid. 408 advisory committee’s note)).

145 See supra text accompanying notes 110–11.

146 See supra Part IV.B.1–2.
threatened litigation" test found in *Big O*147—is a modest move in the right direction to allow attorneys to plan for Rule 408 protection in their negotiations.

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147 Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365, 1373 (10th Cir. 1977).