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

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INTRODUCTION

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

This rule . . . does not require exclusion when the evidence is offered for another purpose (besides those excluded), such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.3

Courts have inconsistently delineated the boundary between im permissible purposes and “other purposes” when applying Rule 408. New laws and new legal issues compound their difficulty.

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

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5. See Schiro v. Raymond, 54 N.W.2d 529, 533 (Minn. 1952) (“Offers of settlement ordinarily proceed from an attempt to buy peace rather than a concession of liability; therefore, evidence of such offers is irrelevant to the issue of liability.”); Brown v. Hyslop, 45 N.W.2d 743, 748 (Neb. 1951) (“It is the intention of the law to repel any inference which may arise from a proposition not made in either design or purpose to admit the existence of a fact but merely to secure peace and avoid the incidents of a legal contest.”).


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

Rule 408 modified the common law by excluding statements made and conduct occurring in the course of compromise — whether inchoate or completed.10 Before the Rule's adoption, courts generally admitted statements of fact made in the course of a settlement discussion, as United States v. Tuschman11 illustrates. The Internal Revenue Service ("IRS") assessed income tax, interest, and civil fraud penalties against Tuschman in the amount of $131,580, obtained a tax lien against his property, and sued to enforce its lien.12 At trial, Tuschman testified that his son owned the majority of a $120,000 bond held in his name.13 To refute this testimony, the IRS sought to admit a letter from Tuschman that documented his total assets and stated that he owned the entire bond.14 At the end of the letter, however, Tuschman made an offer to settle his tax liability, which the IRS declined.15 The district court held the letter inadmissible as an offer of compromise, and refused to allow the IRS to impeach the debtor's testimony regarding his son's ownership of the bond.16 On appeal, the Sixth Circuit held that the district court erred in refusing to admit the letter.17 The letter made "material representations as to the ownership of the bond" and, therefore, it was admissible "despite the fact that the documents were offered in an effort to effect a compromise of enforcement of the tax lien."18

Before Rule 408 was adopted, to prevent Tuschman-like statements from being admitted into evidence, lawyers insulated their settlement conversations by speaking hypothetically.19 A lawyer might say, for example, "Hypothetically, if Tuschman owned the entire bond, would you accept the bond in settlement of his tax liability?" This practice created a "trap for the unwary."20 Rule 408 was adopted to end this practice.21

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

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

11. 405 F.2d 688 (6th Cir. 1969).
13. Tuschman, 405 F.2d at 689.
14. Id. at 689.
15. Id.
16. Id.
17. Id.
18. Id.
24. See Rambo, 75 Wash. L. Rev. at 1048-51; see also WRIGHT & GRAHAM supra note 4, § 5301. According to Wright and Graham:
   [Several government agencies] launched an attack on the provision in the rule that required the exclusion of admissions of fact made during settlement negotiations. The thrust of these objections was that in the administrative handling of disputes between the Government and citizens, e.g., in a tax case, it was often difficult to say just when investigation stopped and efforts to settle began. It was feared that a taxpayer might concede a number of facts to government investigators, then claim that these admissions were made during settlement negotiations. It was argued that at best, this meant that the government would have to go after the information again, perhaps through formal discovery. At worst, the government lawyers claimed that the rule might be read as permitting the taxpayer to deny what he had once admitted, without fear of impeachment, and even immunizing documents that had been disclosed to government investigators during what a court later determined to be settlement negotiations rather than investigation.]
25. See Rambo, 75 Wash. L. Rev. at 1048-51; see also WRIGHT & GRAHAM supra note 4, §§ 5006, 5301.
26. See Rambo, 75 Wash. L. Rev. at 1048-51; see also WRIGHT & GRAHAM supra note 4, §§ 5006, 5301.
and reverted to the Rule's original version. To placate the IRS, however, the Senate added what became the Rule's third sentence: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." The conference committee adopted the Senate's version of the Rule.

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

NEW RULE 408

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

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction: (1) furnishing or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise the claim and, (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice, negating a contention of undue delay, and proving an effort to obstruct a criminal investigation or prosecution.

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

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

But that "extensive case law" contains inconsistent — and in some instances, erroneous — applications of the "another purpose"
THE "ANOTHER PURPOSE" CLAUSE IN ACTION

A. CASES IN WHICH THE CLAUSE HAS BEEN APPLIED

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

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

Beyond these categories of cases, courts' application of Rule 408 has been inconsistent. Evidence gleaned from or comments made during negotiation or settlement has been admitted for other purposes including not only impeachment,55 but also as evidence of employ-
ment discrimination,\textsuperscript{56} failure to mitigate damages,\textsuperscript{57} intent,\textsuperscript{58} prior knowledge,\textsuperscript{59} that the amount at issue in the case exceeded the requisite amount for diversity jurisdiction,\textsuperscript{60} and of contractual intent.\textsuperscript{61}

Other courts, however, have refused to admit these same categories of evidence under Rule 408.\textsuperscript{62}

B. \textbf{SOURCE OF DISAGREEMENT – "BALANCING" RULE 102 AND 408}

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

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

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


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

\textsuperscript{60} Cohn v. Petmart, Inc., 281 F.3d 887, 890 n.3 (9th Cir. 2002); Archer v. Kelly, 271 F. Supp. 2d 1330, 1333 (N.D. Ohio 2003).


\textsuperscript{62} See, e.g., ESOU v. Texaco Petroleum, Inc., 945 F.2d 1942, 1945 (10th Cir. 1991) (refusing to admit Rule 408 evidence for impeachment purposes); C & K Eng'rs Contractors v. Amber Steel Co., 587 F.2d 1136, 1142 (Cal. 1979) (same); Schlossman & Gunkelman, Inc. v. Fallman, 583 N.W.2d 374, 379-81 (N.D. 1998) (refusing to admit Rule 408 evidence for the purpose of interpreting a contract and or proving intent); Pollet v. Sears Roebuck & Co., 46 F. App’x 226 (5th Cir. 2002) (acknowledging that a settlement offer was made in excess of the amount necessary to establish jurisdiction but refusing to consider that offer when ruling on whether the amount in controversy exceeds $75,000); Trebor Sportswear Co. v. Limited Stores, Inc., 865 F.2d 506, 610-11 (2d Cir. 1989) (refusing to admit Rule 408 evidence for the purpose of satisfying the statute of frauds); Marks v. Mobil Oil Corp., 562 F. Supp. 759 (E.D. Pa. 1983) (failing to admit Rule 408 evidence for mitigation of damages purposes).

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

688

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

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

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

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

\textsuperscript{64} Hernandez, 52 P.3d at 766.

\textsuperscript{65} 52 P.3d 766 (Ariz. 2002).

\textsuperscript{66} Hernandez v. State, 52 P.3d 765, 766 (Ariz. 2002).

\textsuperscript{67} Id.

\textsuperscript{68} Id.

\textsuperscript{69} Id.

\textsuperscript{70} Id. at 766-71.

\textsuperscript{71} Id. at 767.

\textsuperscript{72} Id.

\textsuperscript{73} Id.


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

\textsuperscript{76} Id. at 767.
mitted for "another purpose," that being impeachment.\textsuperscript{77} Invoking "public policy," the court held that impeachment evidence is not so related to the validity of a claim that exclusion is required.\textsuperscript{78} According to the court, admitting this evidence was consistent with Rule 102 and 408's policy goals.\textsuperscript{79} According to the court, "Lawyers should not lie on behalf of clients in presenting a claim. Allowing the use of evidence from compromise negotiations for impeachment facilitates Rule 408's goal of encouraging truthfulness by putting parties on notice that they should not falsely represent claims, either during compromise negotiations or at trial."\textsuperscript{80}

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

Justice Joseph W. Howard's dissent in Hernandez questioned whether the majority's holding was consistent with Rule 408's policy objectives.\textsuperscript{82} The dissent defined Rule 408's goal as "to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial."\textsuperscript{83} In the dissent's view, allowing impeachment with a statement made in settlement negotiations is inconsistent with this goal.\textsuperscript{84} The dissent also noted "the only possible relevance of [impeachment] evidence is to assist the jury in determining 'liability for or invalidity of the claim or its amount.' . . . Evidence concerning credibility merely assists the jury in determining which set of facts it should adopt, which will determine liability."\textsuperscript{85} Therefore, according to the dissent, impeachment evidence cannot be admitted under Rule 408 for "another purpose"; whenever impeachment evidence is offered, it is offered to establish or avoid liability.\textsuperscript{86}

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

Consider Trebor Sportswear Co. v. Limited Stores, Inc.\textsuperscript{89} There, the Second Circuit affirmed the trial court's decision to exclude a letter that attempted to settle the dispute even though the plaintiff sought the letter's admission for the limited purpose of satisfying the Uniform Commercial Code's statute of frauds.\textsuperscript{90} In so holding, the Second Circuit first considered whether Rule 408 barred admission of the settlement letter; i.e., whether satisfying the statute of frauds was "another purpose" under Rule 408.\textsuperscript{91} The court held that satisfying the statute of frauds was not "another purpose" under Rule 408.\textsuperscript{92}

For appellants, satisfying the statute of frauds was the necessary step to proving, ultimately, the validity of their claims of breach of contract. Since the two questions [liability and the statute of frauds] were so closely intertwined, admission of the documents even initially for the purpose of meeting the statute of frauds requirement would, under the circumstances of this case, militate against the public policy considerations which favor settlement negotiations and which underlie Rule 408.\textsuperscript{93}

\textsuperscript{77} Id. at 789.
\textsuperscript{78} Id. at 769.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 769.
\textsuperscript{81} See Wright & Graham, supra note 4, § 5314 (emphasis added).
\textsuperscript{82} Hernandez, 52 F.3d at 772 (Howard, J., dissenting). Justice Howard stated "[The basis for concluding that statements concerning the facts of the accident made in compromise negotiations are not admissible to impeach a party is that a contrary conclusion undermines the purpose of Rule 408, which is to facilitate settlements by encouraging 'free communication between parties.' Advisory Committee Notes to Fed.R.Evid. 408. "The philosophy of [Rule 408] is to allow the parties to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used at trial." If such statements are admissible to impeach a party, the incentive to make those statements is greatly reduced and the purpose of Rule 408 is undermined."
\textsuperscript{83} (Howard, J., dissenting) (some citations omitted).
\textsuperscript{84} Id. (Howard, J., dissenting).
\textsuperscript{85} Id. at 772 (Howard, J., dissenting).
\textsuperscript{86} Id. (Howard, J., dissenting).
\textsuperscript{89} 865 F.2d 506 (3d Cir. 1989).
\textsuperscript{90} Trebor Sportswear Co. v. Limited Stores, Inc., 865 F.2d 506, 508 (3d Cir. 1989).
\textsuperscript{91} Trebor, 865 F.2d at 510-11.
\textsuperscript{92} Id. at 511.
\textsuperscript{93} Id. at 510.
Under this rationale, just about any issue is related to liability. If a court is unwilling to find that complying with the statute of frauds is "another purpose" under Rule 408, what other purpose will suffice?

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

After entering into the contract with MLB, ESPN entered into a contract with the National Football League that allowed ESPN to air football games on Sunday nights. ESPN sought permission from MLB to air football instead of baseball on six occasions. MLB denied these requests; however, it informed ESPN by letter that if it consented to "wholesale" changes in the parties' agreement that were more favorable to MLB, it would accede to ESPN's request to air the football games.

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

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

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

**RULE 408(B) SHOULD BE APPLIED EXPANSIVELY**

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

A. A CONVENTIONAL APPLICATION: STATUTE OF LIMITATIONS

In Kraft v. St. John Lutheran Church, the Eighth Circuit held that a demand letter was admissible for the purpose of deciding when the statute of limitations began to run. Kraft, who was molested as a child, hired a lawyer who sent a demand letter to the defendants. Less than a year after sending the demand letter, Kraft was evaluated...
by a physiologist and diagnosed with severe posttraumatic distress disorder.\textsuperscript{115} Kraft nevertheless claimed that he had not discovered his injury, for purposes of starting the limitations period to run, until after seeing the psychologist.\textsuperscript{116} Relying on the demand letter, the defendants moved for summary judgment on limitation grounds.\textsuperscript{117} Kraft responded that the demand letter and subsequent settlement negotiations were inadmissible under Rule 408.\textsuperscript{118} The district court disagreed and granted summary judgment.\textsuperscript{119} In affirming, the Eighth Circuit held that the demand letter was offered "for another purpose" and, therefore, was admissible.\textsuperscript{120}

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

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

In Cohn v. Petsmart, Inc.,\textsuperscript{121} Cohn sued Petsmart in state court alleging violations of state trademark law.\textsuperscript{122} Before suing, Cohn had sent Petsmart a written settlement demand of $100,000.\textsuperscript{123} Relying solely on the demand letter, and invoking diversity jurisdiction, Petsmart removed the action to federal district court.\textsuperscript{124} Cohn moved unsuccessfully to remand the case to state court.\textsuperscript{125} The district court ultimately awarded summary judgment to Petsmart, holding there was no likelihood of confusion.\textsuperscript{126}

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

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

C. AN ATYPICAL APPLICATION: FEDERAL CYBERPIRACY

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

\begin{itemize}
  \item \textsuperscript{115} Id. at 946.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} Id.
  \item \textsuperscript{118} Id. at 947.
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Cohn v. Petsmart, Inc., 281 F.3d 837 (9th Cir. 2002).
  \item \textsuperscript{122} Id. at 840.
  \item \textsuperscript{123} Cohn v. Petsmart, Inc., 281 F.3d at 839-40.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} Id. at 839.
  \item \textsuperscript{126} Id.
  \item \textsuperscript{127} Id. at 840 n.3. Under Federal Rule of Evidence 1101, Rule 408 applied in determining whether the court could consider the settlement letter.
  \item \textsuperscript{128} Id.; see also Archer v. Kelly, 271 F. Supp. 2d 1320 (N.D. Okla. 2003).
  \item \textsuperscript{129} Id.; see also Archer v. Kelly, 271 F. Supp. 2d 1320 (N.D. Okla. 2003).
  \item \textsuperscript{130} Cohn, 281 F.3d at 840.
  \item \textsuperscript{131} Cohn provides a good example of how a "plain meaning" application of a rule can lead to unintended results. Probably for brevity's sake, Rule 408 is framed in off-the-neutral terms. That is, compromise evidence is excluded if offered for an impermissible purpose, and admissible otherwise, whether the plaintiff or the defendant offers it. In the Cohn jurisdictional dispute, though, the parties found their roles reversed vis-à-vis the amount of Cohn's claims: Petsmart wanted to establish a greater amount in controversy, and Cohn a lesser one. Under those circumstances, excluding the demand letter would do little or nothing to advance the policy interest of promoting settlement.
\end{itemize}
offer[ed] to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or services, or the person’s prior conduct indicating a pattern of such conduct.132

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

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

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

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

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

D. ANOTHER ATYPICAL APPLICATION: EFFECTS TEST JURISDICTION

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

not charged with more untargeted negligence. Rather, their intentional . . . actions were expressly aimed at California.

Petitioner South wrote and petitioner Calder edited an article

134. Id. at 14; Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321-22 (9th Cir. 1998); Shields v. Zuccarini, 254 F.3d 476 (3d Cir. 2001).
137. The intersection between Rule 408 and 15 U.S.C. § 1125(d)(1)(B)(vi) presents an interesting issue in and of itself. Rule 408 has force only because Congress granted power to the Supreme Court to promulgate it. 28 U.S.C. § 2072(a) (2000). Rule 408 cannot abridge, enlarge, or modify any substantive right. 28 U.S.C. § 2072(b). And it must be consistent with Acts of Congress. 28 U.S.C. § 2071(a) (2000). On the other hand, as noted above, the "offer to sell" factor of 15 U.S.C. § 1125(d)(1)(B)(vi) is only one of several non-exclusive factors the court is to consider in determining "bad faith intent to profit" under 15 U.S.C. 1125(d)(1). Knowing that the judiciary has been left to both promulgate and apply the evidence rules generally, and to weigh the "offer to sell" factor as it sees fit in the individual cyberpiracy case, one might conclude that the intersection between the statute and the rule lies wherever a court decides it does.
that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article.139

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

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

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

CONCLUSION

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

141. E.g., Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002).
142. E.g., Schwartzegger v. Fred Martin Motor Co., 374 F.3d 797, 800 (9th Cir. 2004); Sinatra v. Nat'l Enquirer, Inc., 854 F.2d 1191, 1197 (9th Cir. 1988).
143. E.g., Dakota Indus., Inc. v. Dakota Sportswear, Inc., 946 F.2d 1384, 1381 (8th Cir. 1991); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 417 (9th Cir. 1997).
144. E.g., Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 225 F.3d 1082, 1087 (9th Cir. 2000); Panavision Intl, L.P. v. Toeppen, 141 F.3d 1316, 1321-23 (9th Cir. 1998).
145. Myers v. Bennett Law Offices, 238 F.3d 1068, 1076 (9th Cir. 2001).