Unsettling Observations on the Settlement Privilege
By Ronald G. Blum and Andrew J. Turro

I. Introduction

After years of litigation, your adversary finally understood the strength of your client’s case—and, as significant, your advocacy skills. The terms of the settlement are confidential, so all you can say is that the matter is resolved and the client pleased. You sent the files to storage, mailed the client a final bill and turned to other matters.

Not long after, you receive a subpoena from a party in a different matter. Not for the usual—the documents exchanged during discovery—but for the settlement agreement in your case, as well as all drafts of that agreement and the testimony of your client about the negotiations leading up to the agreement. You update the client, reassuring: “Don’t worry, the settlement agreement is confidential and the settlement discussions won’t be discoverable.” Not so fast! Your assurance may be no more than wishful thinking.

Although many attorneys assume that settlement talks and documentation will remain confidential and that non-party discovery requests cannot reach them, the law is less clear, and often to the contrary. Only a handful of federal courts have recognized a settlement privilege; the majority have expressly rejected the privilege.1

II. Only a Few Courts Have Recognized the Privilege

The minority view recognizing a settlement privilege is best articulated by the Sixth Circuit in Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.2 Goodyear involved two federal actions: a contract action in Ohio between Goodyear and Chiles Power and a later Colorado action by homeowners against Goodyear and Chiles Power.

In the earlier Ohio case, Goodyear sued Chiles Power for breach of contract because the defendant had not paid Goodyear for hoses used in home heating systems. Chiles Power counterclaimed, alleging breach of the implied warranty of merchantability. The Ohio federal court granted Goodyear summary judgment on its contract claim but denied summary judgment on defendant’s counterclaim. Thereafter, the Ohio court presided over settlement talks, warning the parties that the discussions were to remain confidential.3 The settlement negotiations proved unsuccessful and the trial resulted in a jury verdict in favor of Goodyear on defendant’s remaining counterclaims. Afterwards, Daniel Chiles, a co-founder of the defendant company, was quoted in a newspaper claiming that on the eve of trial Goodyear offered to settle by paying Chiles Power and indemnifying it from homeowner lawsuits in exchange for a written statement “agree[ing] that the fault is with the homeowners and contractors.”4 Goodyear subsequently sought relief based upon Chiles’ statement. The Ohio district court held a hearing and issued an order stating that “the content of settlement discussions are always confidential” and may never be disclosed even after the matter is over.5 The court further permitted Goodyear to issue a corrective statement in response to Chiles’ remark.6

While the Ohio action was pending, Colorado homeowners commenced an action against Chiles Power and Goodyear alleging that Chiles Power had used defective hose manufactured by Goodyear in the plaintiffs’ home heating systems. When the plaintiffs learned of Daniel Chiles’ statement, they requested that the Colorado district court direct defendant to testify about the settlement discussions. That court denied the motion on the ground that it lacked jurisdiction to overturn the Ohio court’s ruling that the discussions were confidential. Undeterred, the Colorado homeowners intervened in the Ohio action, seeking to compel Chiles to testify. The Ohio district court denied the request and the homeowners appealed.

Before the Sixth Circuit, the homeowners argued that Federal Rule of Evidence 408 demonstrates that settlement discussions are discoverable: the rule allows introduction into evidence of settlement discussions to prove bias or prejudice, even though it makes them inadmissible for other purposes.7 The Sixth Circuit rejected the homeowners’ claim based on Rule 408, and relying on public policy considerations, recognized a settlement privilege:

There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of “impeachment evidence,” by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties
would more often forgo negotiations for the
relative formality of trial. Then, the entire
negotiation process collapses upon itself, and
the judicial efficiency it fosters is lost.8

Noting that Federal Rule of Evidence 501 authorizes the
federal courts to determine new privileges by examining
“common law principles . . . in light of reason and
experience,”9 the Sixth Circuit concluded that “a settlement privilege serves a sufficiently important public interest,
and therefore should be recognized.”10

A few district courts have reached similar results. For
example, in Cook v. Yellow Freight System,11 a California
court denied defendant’s motion to compel disclosure of
the content of settlement negotiations based on the “well
established privilege relating to settlement discussions.”12
While expressly recognizing that Rule 408 addresses the
“inadmissibility of evidence at trial and [is] generally
pertinent to the inadmissibility of compromise material
to prove damages or liability,” the Cook court nevertheless
concluded that the same policy concerns support the
invocation of the settlement privilege in the context of
pre-trial disclosure. More specifically, the court invoked the
settlement privilege and refused to direct disclosure of the
non-party’s settlement materials. It reasoned that settle-
ment discussions frequently are not the “product of truth
seeking,” but rather “puffing and posturing.”13

More recently, an Ohio district court upheld a plaintif-
f’s refusal to produce documents related to settlement
 correspondence because they were protected by a “settle-
ment privilege.”14 After inspecting the materials in camera,
the court quoted and relied on Cook in denying the motion
to compel because “discovery of such unreliable ‘facts’
would be highly misleading.”15

III. The Majority of Courts Reject the Privilege

Most federal courts refuse to recognize a settlement
privilege. For example, more than 25 years ago, the Sev-
enth Circuit rejected the proposition that a settlement priv-
ilege protects settlement negotiations from discovery.16 The
General Motors case arose from a class-action settlement
and a challenge by objectors to the trial court’s refusal to
allow disclosure of settlement negotiations. The district
court had refused to allow the discovery on the ground
that the conduct of the negotiations was irrelevant to the
fairness of the settlement. Although not raised by either
party, the Court of Appeals, in dicta, rejected suggestion
of a settlement privilege because Rule 408 governs only
admissibility, not discoverability, and therefore provides no
basis to bar disclosure of the settlement documents.17

A District of Columbia court recently reached the same
conclusion. In re Subpoena issued to Commodity Futures Trad-
ing Commission18 involved an underlying action brought by
E. & J. Gallo Winery in a California district court against
WD Energy Services alleging manipulation of energy
prices.18 The Commodity Futures Trading Commission
had earlier investigated WD Energy Services, and Gallo
served a non-party subpoena on the Commission, seeking
documents it had received from WD Energy Services in
connection with its investigation. The California court had
protected from disclosure some of WD Energy Services’
documents on the basis of a federal settlement privilege
and the CFTC urged the District of Columbia court to rec-
ognize the privilege.19

Rejecting that request, the court noted that although
Rule 501 directs courts to continue development of privile-
ages, recent cases have urged restraint.20 It also observed that
Rule 408 limits only admissibility, not discoverability, of
settlement material, and that the rule contemplates a num-
ber of circumstances under which settlement documents
may be used at trial. Citing a leading treatise on evidence,
Weinstein’s Federal Evidence, the court explained that Rule
408 cannot be used to curtail discovery rights.21 Accord-
ingly, the court granted Gallo’s motion to compel disclosure
of the documents despite the California court’s ruling.22

A Southern District of New York judge reached the
same conclusion, contrasting the purposes of Rule 408,
which governs evidence, and Federal Rule of Civil Pro-
cedure 26, which governs discovery.23 In re Initial Public
Offering Securities Litigation24 concerned whether Wells
submissions to the Securities and Exchange Commission
are discoverable in subsequent civil litigation. In holding
the submissions discoverable, the court observed that Rule
408 addresses only admissibility, while the broader Federal
Rule of Civil Procedure 26 governs discoverability and
requires only a showing of relevance, even of inadmissible
evidence. This holding is in accord with many district court
decisions that have refused to recognize the settlement
privilege.24

IV. Even When Refusing to Recognize a
Settlement Privilege, Some Courts Have
Protected Settlement Discussions or
Documents

While courts have refused to recognize a settlement
privilege, many of these same courts have protected some
settlement discussions or documents.

For example, even in the face of Seventh Circuit pre-
cedent rejecting the privilege, an Illinois district court relied
on policy grounds in prohibiting discovery of settlement
negotiations that did not culminate in an agreement. In
ABN Amro Inc. v. Capital Int’l Ltd., et al.,25 the defendant de-
 nied being a “placement agent” or “distribution agent” for
the other defendants. The parties subsequently engaged in
settlement discussions that proved unsuccessful. Thereafter,
at his deposition, defendant’s senior executive officer con-
ceded that Capital International had acted as a distribution
agent for co-defendant Deutsche Bank. During the deposition,
co-defendant Eirles Four Ltd. sought to question the
witness on the substance of the settlement discussions. Both
plaintiff and defendant Capital objected, contending that

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While readily acknowledging that the Seventh Circuit had declined to recognize a settlement privilege in *General Motors* and that other courts had directed disclosure because settlement terms and agreements may be relevant in establishing bias or prejudice, the Illinois district court doubted that unsuccessful settlement negotiations could be probative on any such issue:

It is a harder question whether settlement negotiations that do not lead to any agreements are discoverable. Eirles has stated that the negotiations are themselves relevant to bias. But, settlement negotiations that do not lead to any *quid pro quo*, may not be probative of bias. Eirles has not demonstrated how the substance of negotiations, in the absence of any settlement, may be relevant to bias. To allow defendant Eirles to discover settlement negotiation information without sufficient justification, particularly in the absence of a settlement actually being reached, could frustrate the policy encouraging confidential settlements and have a chilling effect on a party’s willingness to engage in settlement discussions.26

Based on this reasoning, the court refused to permit inquiry into the unsuccessful settlement negotiations and ruled that the movant could discover only whether a settlement had been reached and, if so, the substance of the agreement.27

Similarly, one court noted that disclosure of ongoing settlement negotiations might conflict with the policy of encouraging settlement, and therefore disclosure could be denied under Federal Rule of Civil Procedure 26 on the ground that it might cause undue burden or embarrassment.28

Other courts have fashioned a different approach, allowing discovery only upon a “heightened” showing of necessity. For example, in *Bottaro v. Hatton Associates*,29 the plaintiff settled with one of three defendants and the remaining defendants sought discovery of the terms of the settlement. In support of their application, defendants claimed that although the settling parties’ agreement was inadmissible under Rule 408 “to prove liability for or inadmissible under Rule 408 ‘to prove liability for or invalidity of the claim or its amount,” it should be disclosed because “it may produce admissible evidence on the question of damages.”30 The district court acknowledged that Rule 408 would not insulate from disclosure documents or factual admissions “merely because they were exchanged in the course of negotiating a settlement.”31 Nonetheless, the *Bottaro* court held that the party seeking disclosure of settlement materials must support the application with something more than a “hope that it will somehow lead to admissible evidence on the question of damage” and opined that “the better rule is to require some particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of a settlement agreement.”32

**V. Practical Considerations**

As the foregoing discussion suggests, the possible disclosure of settlement information must be carefully considered by the practitioner. Prospectively speaking, when an attorney is negotiating and crafting a settlement, a few steps may help preserve the confidentiality of such materials. Given a choice, settle in the Sixth Circuit. Absent that choice, a practitioner wanting to ensure the confidentiality of the agreement should insist that it contain more than a standard confidentiality provision. Such a provision should, at the very least, require notice to all parties and an opportunity to be heard in the event disclosure of the settlement agreement or settlement materials is sought. Buttress the confidentiality provision by explaining the need for confidentiality and its importance to the settlement. Consider requiring that drafts of the agreement be destroyed. Nonetheless, be sure to caution a settling client that despite these efforts, the settlement information and documents may become discoverable.

Where discovery disputes concerning the disclosure of settlement information arise, courts may balance the broad scope of Rule 26 disclosure of any non-privileged matter “that is relevant to the claim or defense of any party,” and Rule 408’s goal of encouraging settlement of disputes. Therefore, the practitioner seeking disclosure of settlement materials should be mindful that under Rule 26 a party must establish that the information is relevant or reasonably calculated to lead to discovery of admissible evidence. And, as discussed above, some courts require even more.33 Even courts reluctant to recognize a settlement privilege may be sensitive to the pitfalls presented by discovery of settlement materials. Such discovery may jeopardize ongoing discussions. It may bring to light offers and counter-offers that are far removed from the merits of the underlying litigation. And, of course, it may discourage discussions that could lead to amicable resolutions. Accordingly, when crafting arguments urging disclosure of settlement information, do not overlook the particular policies underlying Rule 408’s goal of encouraging settlement of disputes and be sure to highlight with particularity the relevance of the information sought to the material issues in the case at hand.

On the other hand, a party seeking to convince a federal court to adopt the settlement privilege bears an especially heavy burden since most courts reject the privilege. As the D.C. Circuit noted, the proponent of a privilege bears the burden of establishing facts sufficient to warrant applying the privilege.34 This requires a threshold showing of entitlement to a ruling on the existence of the privilege.35 The proponent of the settlement privilege can learn from the mistakes of WD Energy: clearly identify the allegedly privileged documents with detailed descriptions and, if
that detail would undermine the privilege, seek an in camera review by the court.30

Evidence Rule 408 and Civil Procedure Rule 26 address different concerns. While those disparate concerns may have caused many courts to reject the privilege, a number of courts nonetheless have relied on these concerns to reaffirm that settlement information should be afforded a higher degree of protection from discovery than other types of materials. Balancing those concerns challenges even the best judge. Navigating this unclear area of the law—whether it be to protect settlement materials or to access them through discovery—remains the practitioner’s challenge.

Endnotes
1. This article discusses the settlement privilege as it arises in federal courts under federal common law. Where state law supplies the rule of decision as to an element of a claim or a defense, questions of privilege are decided under state law. Fed.R.Evid. 501. This article does not address a different, but related privilege—the mediation privilege. See Sheildone v. Penn. Turnpike Commn., 104 F. Supp. 2d 511 (W.D. Pa. 2000) (adopting federal mediation privilege); Foll v. Motion Picture Ind. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998) (same); but see Deluca v. Allied Domecq Quick Service Restaurants, 2006 WL 2713944 at *8 (E.D.N.Y. Sept. 22, 2006) (upholding magistrate judge’s report that noted that the Second Circuit has not recognized the mediation privilege).

2. 332 F.3d 976 (6th Cir. 2003).
3. Id. at 978.
4. Id.
5. Id.
6. Id.
7. Id. at 979.
8. Id. at 980.
10. 332 F.3d at 980. Goodyear has been criticized on the ground that jurisdiction was based on diversity and, therefore, the privilege issue should have been governed by state law pursuant to Fed. R. Evid. 501. See Ohio Consumers’ Counsel v. Public Utilities Commission, 111 Ohio St. 3d 300, 322 (2006) (noting criticism, finding Goodyear unpersuasive and declining to recognize settlement privilege under Ohio law).

12. 132 F.R.D. at 554.
13. Indeed, the Cook court concluded:
   [T]he court finds that one consideration in precluding documents generated in the course of settlement discussions lies in the fact that such discussions are frequently not the product of truth seeking. Settlement negotiations are typically punctuated with numerous instances of puffing and posturing since they are “motivated by a desire for peace rather than from a concession of the merits of the claim.” United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982). What is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise actually contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purposes of settlement negotiations. The discovery of these sort of “facts” would be highly misleading if allowed to be used for purposes other than settlement.


15. Id. at 354.
16. In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 (7th Cir. 1979).
17. Id. at 1124, n.20.
19. Id. at 207–08.
20. Id. at 208–09, citing Univ. of Pennsylvania v. EEOC, 493 U.S. 182, 194 (1990) and n.8, cases rejecting privilege for identity of reporters’ confidential sources, child abuse records, parent-child communications, academic peer-review records and many additional circumstances.
21. Id. at 211, citing 2 Weinstein’s Federal Evidence § 408.07 at 408-26 (2005).
22. On appeal, the D.C. Circuit declined to reach the settlement privilege issue, affirming the trial court because WD Energy had not met its burden of building a record sufficient to allow a court to rule on its claim to settlement privilege protection. 439 F.3d at 754.
26. Id. at 5.
27. Id. at 6.
30. Id. at 159.
32. Id. at 160. Courts have criticized requiring a “heightened” showing on the ground that such a standard is contrary to Rule 26. See, e.g., Rates Technology Inc. v. Cablevision Systems Corp. 2006 WL 3050879 at *4 (E.D.N.Y. Oct. 20, 2006).
33. See, e.g., Vardon Golf Co. v. BBMG Gold Ltd., 156 F.R.D. 641, 650 (N.D. Ill. 1994)(requiring party seeking settlement materials to articulate both “what kind of information it reasonably expects to find in the documents sought and how this will lead to other admissible evidence.”).

34. 429 F.3d at 750.
35. Id.
36. WD Energy did not give a detailed description of the documents for fear of vitiating the privilege. That fear led to the release of the documents—the circuit court held that lack of specificity fatal to WD Energy’s claim. 439 F.3d at 752.

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