FRCP 26 VS. FRE 408: WHY SETTLEMENT NEGOTIATIONS SHOULD BE PRIVILEGED AGAINST THIRD-PARTY DISCOVERY

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INTRODUCTION

"The public has a right to every man's evidence"[1] is a centuries-old common-law theme.[2] This theme is the basis for Federal Rule of Civil Procedure ("FRCP") 26, which provides for broad discovery in civil disputes in an effort to give parties adequate information to present their case.[3] However, allowing broad discovery sometimes conflicts with other policy goals, such as encouraging settlements. To encourage settlements, Congress enacted Federal Rule of Evidence ("FRE") 408, which limits the admissibility of compromise offers and negotiations as evidence to allow for "free and frank discussion with a view toward settling the dispute."[4] While FRE 408 clearly prohibits the admissibility of settlement negotiations, the underlying interests of FRCP 26 and FRE 408 conflict with respect to the consideration of whether settlement negotiations should be privileged against third-party discovery.

Whether settlement negotiations are discoverable by third parties is the issue that arose in *In re MSTG*.[5] In 2008, MSTG Inc. ("MSTG") filed patent suits against multiple cellular providers for the alleged infringement of U.S. Patent Nos. 5,920,511, 6,198,936,

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1 Debate in the House of Lords on the Bill to indemnify Evidence, 12 Hansard's Parliamentary History of England, 675, 693, May 25, 1742, quoted in 8 WIGMORE ON EVIDENCE (3d ed.) at 64, s 2192.

2 Jim Thompson, *Self-Incrimination and the Two Sovereignties Rule*, 49 J. CRIM. L., CRIMINOLOGY & POLITICAL SCI. 240–49 (1958–1959). *See also* United States v. Bryan, 339 U.S. 323 (1950); United States v. Monia, 317 U.S. 424 (1943).

3 *See* FED. R. CIV. P. 26.

4 *See* FED. R. EVID. 408; United States v. Reserve Mining Co., 412 F. Supp. 705, 712 (D. Minn. 1976).

5 *In re* MSTG, 675 F.3d 1337 (Fed. Cir. 2012).

and 6,438,113 (collectively "patents-in-suit"), relating to third-generation mobile telecommunications technologies.[6] MSTG settled with all of the defendant cellular providers, except AT&T Mobility, LLC ("AT&T").[7] In the settlement agreements, MSTG gave most of the defendants licenses to the patents-in-suit.[8] During its suit with MSTG, AT&T sought documents relating to the settlement negotiations with the other cellular providers in order to support its analysis of what royalties would be reasonable.[9] In response to the request, MSTG provided the licensing and option agreements but refused to provide additional underlying information regarding the negotiations, arguing the documents were irrelevant to the royalty analysis.[10] AT&T then filed a motion to compel, but was denied by the magistrate judge presiding over the discovery process.[11] However, after MSTG used an expert witness whose testimony seemingly relied upon the settlement negotiation documents, the magistrate judge decided to grant AT&T's motion to compel.[12]

MSTG appealed the magistrate judge's decision to the district court, and then petitioned the Federal Circuit for a writ of mandamus to block the district court's affirmation.[13] The Federal Circuit, in its exclusive jurisdiction over patent appeals,[14] ruled that the district court correctly ordered the production of the underlying negotiation documents and refused to recognize a settlement-negotiation privilege.[15] In reaching its decision, the Federal Circuit analyzed the Supreme Court's *Jaffee* factors for evaluating potential new privileges.[16] However, the Federal Circuit did note "other courts have imposed heightened standards for discovery in order to protect confidential settlement discussions,"[17] and that "many district courts also require heightened showings for discovery of settlement negotiations."[18] The Federal Circuit reserved "for another

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6 *Id.* at 1339.

7 *Id.*

8 *Id.*

9 In re *MSTG*, 675 F.3d at 1340.

10 *Id.*

11 *Id.* at 1337.

12 *Id.*

13 Id. at 1339–41.

14 *See* 28 U.S.C. § 1295(a)(4)(C) (West 2014) (granting exclusive jurisdiction to the Federal Circuit in cases involving an appeal of a final decision of a district court case involving patents).

15 In re *MSTG*, 675 F.3d at 1337.

16 *Id.* For a further discussion of the *Jaffee* factors, see Part I of this Note.

17 *Id.*

18 *Id.*

day the issue of what limits can appropriately be placed on discovery of settlement negotiations."[19]

Because of the Federal Circuit's affirmation, AT&T gained an advantage during the negotiations with MSTG by examining the documents underlying the settlement agreements between MSTG and the other cellular providers. Had MSTG's attorneys known that the underlying information relating to the settlement negotiations would be discoverable, it would have greatly influenced what they said and put in writing during the negotiations. Moreover, if the other cellular providers had known the Federal Circuit would not recognize a settlement-negotiation privilege, they may have held out until AT&T settled to try to reap the same negotiation advantages against MSTG.

The issue of whether settlement-negotiations are privileged against third-party discovery is especially important because most cases in the United States court systems settle.[20] While there is not an agreed-upon measure of the settlement rate in civil cases, scholars agree that the overwhelming majority of cases are settled.[21] The legal process generally encourages litigants to settle in order to avoid the time, expense, and unpredictability of trial.[22] While settling avoids the costs of an actual trial, the discovery and negotiation process is still expensive.[23] According to one study, litigants settle seventy-six percent of cases before the pretrial hearing and an additional sixteen percent of cases are settled before trial.[24]

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19 *Id.*

20 *See* Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care*?, 6 J. EMPIRICAL LEGAL STUD. 111 (2009); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991); Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 WASH. U. L. REV. 237, 244 (2006).

21 Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705, 706 (2004) (noting the conventional wisdom that if five percent of cases go to trial, ninety-five percent of cases can be assumed to settle); Kesan & Ball, *supra* note 20, at 264 (finding that approximately eighty percent of patent cases settle); Eugene R. Quinn, Jr., *Using Alternative Dispute Resolution to Resolve Patent Litigation: A Survey of Patent Litigators*, 3 MARQ. INTELL. PROP. L. REV. 77, 116 (1999) (finding in a survey that seventy-six and one half percent of patent litigators estimate that between seventy percent and ninety percent of their patent cases settle). *See generally* Missouri v. Frye, 132 S. Ct. 1399 (2012) (finding in criminal cases "97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas").

22 Gross & Syverud, *supra* note 20, at 320.

23 *See* Kesan & Ball, *supra* note 20, at 244.

24 Mark Schankerman & J. Lanjouw, Characteristics of patent litigation: a window on competition, 32 RAND J. OF ECON. 129 (2011).

Given this statistic, the median length of time it takes litigants to reach a settlement after an action commences is eight months and sixteen months, respectively.[25] As in the *In re MSTG* case, a frequent question for courts is whether underlying documents produced during these lengthy and costly settlement negotiations are privileged against third-party discovery.[26] Third parties have attempted to discover details of settlement negotiations both to avoid the time and costs associated with settlements and to learn their opponent's negotiation strategies. If courts allow third parties to discover documents underlying settlement negotiations, it will greatly limit what attorneys say and put in writing during settlement negotiations. Furthermore, some scholars argue that allowing discovery of settlement negotiations will reduce the number of cases that settle.[27]

This Note proposes that courts should recognize a settlement-negotiation privilege because it will incentivize parties to settle. Settling disputes is beneficial to the judicial system as it is more efficient and effective at resolving disputes than trying cases.[28] Recognizing a settlement-negotiation privilege will increase the number of settlements by avoiding the free-rider problem that the Federal Circuit's approach in *In re MSTG* will create.[29] Similarly, creating a settlement-negotiation privilege will avoid the uncertainty caused by not recognizing a privilege or requiring heightened standards for discovery. The confidentiality and certainty of a settlement-negotiation privilege will encourage parties to settle as well as eliminate the redundant costs parties use to set up an artificial mediation framework to ensure their communications are privileged. This Note will also attempt to reconcile *In re MSTG* with the Note's proposal and criticizes the Federal Circuit's broad holding refusing to recognize a settlement-negotiation privilege. Finally, this Note will argue that requiring third parties to meet a heightened standard to discover settlement negotiations is impractical and inefficient.

Part I of this Note provides background on the history and power of courts to recognize new privileges. This section also discusses settlement negotiations and FRE 408, which governs the ad-

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25 *Id.*

26 *See In re* MSTG, 675 F.3d 1337, 1337 (Fed. Cir. 2012).

27 *See, e.g.*, Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003).

28 *Id.*

29 *Id.*

missibility of compromise offers and negotiations. Part II explores the Federal Circuit's *In re MSTG* opinion as well as how other circuit courts, district courts, and England have dealt with the discoverability of settlement negotiations. This section also analyzes the various heightened showings that district courts require for discoverability. Part III proposes that all courts should recognize a settlement-negotiation privilege and explains why the alternative approaches are not viable options.

I. Background

A. *How are privileges created?*

The purpose of discovery is to allow both parties to gather information relevant to their cases.[30] As the Supreme Court explained in 1947, "mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[31] FRCP 26 governs discovery in federal courts.[32] FRCP 26(b)(1) outlines the scope of discovery:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).[33]

The Federal Rules provide for broad discovery. As explained by FRCP 26, the two limitations are that the information must be nonprivileged and must be relevant.[34] Courts typically interpret

30 Fed. R. Civ. P. 26, advisory committee's note.
31 Hickman v. Taylor, 329 U.S. 495, 507 (1947).
32 *See* Fed. R. Civ. P. 26.
33 Fed. R. Civ. P. 26(b)(2)(C).
34 *Id.*

the relevancy requirement broadly, which will be discussed more in Part III of this Note.[35]

A privilege is an exemption from providing testimony or evidence that would otherwise be required.[36] While exempting evidence is contrary to evidence's primary goal of fact-finding, courts and legislatures have enacted privileges to protect other interests and relationships that are important to society.[37] The judiciary was the first entity to recognize privileges,[38] but in the 19th century legislatures assumed the responsibility of creating privileges.[39] In its proposed Federal Rules of Evidence, the Advisory Committee recommended (and the Supreme Court approved) nine non-constitutional privileges.[40] After much controversy following the Watergate scandal, Congress did not codify the proposed privileges but instead enacted FRE 501.[41] FRE 501 "authorizes federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience.'"[42] Congress specifically intended not to freeze the law and to allow courts to create additional privileges on a case-by-case basis.[43] Courts must balance the interests in privacy with the common-law principle that the public has a right to every man's evidence.[44] While the federal courts have recognized several privileges, including the attorney-client privilege, a spousal privilege, a qualified reporter's privilege,

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35 *See Hickman*, 329 U.S. at 506–7; Prac. Guide Fed. Civ. Proc. Before Trial (Nat Ed.) Ch. 11(III)–B.

36 Jaffee v. Redmond, 518 U.S. 1, 9 (1996); BLACK'S LAW DICTIONARY 1215 (7th ed. 2009).

37 KENNETH S. BROUN, MCCORMICK ON EVIDENCE 130 (West 6th ed. 2006) ("Their warrant is the protection of interests and relationships which, rightly or wrongly, are regarded as of sufficient social importance to justify some sacrifice of availability of evidence relevant to the administration of justice.").

38 *Id.* at 136.

39 *Id.* at 137. A hypothesized reason for the shift to legislatures creating new privileges is that the primary effects of privileges are found outside of the courtroom and as a result are more appropriate for legislatures. Moreover, the judiciary may have stopped creating privileges as privileges impede court's primary concern of facilitating litigation.

40 *Id.* The nine privileges proposed were: required sports, attorney-client, psychotherapist-patient, husband-wife, clergyman-communicant, political vote, trade secrets, secrets of state and official information, and identity of informer.

41 *Id.*

42 Jaffee v. Redmond, 518 U.S. 1, 8 (1996) (quoting FED. R. EVID 501); Wolfe v. United States, 291 U.S. 7, 12 (1936).

43 Trammel v. United States, 445 U.S. 40, 47 (1980) (citing 120 Cong. Rec. 40891 (1974) (statement of Rep. Hungate)); U.S. Code Cong. & Admin. News 7051 (1974). *See also Jaffee*, 518 U.S. at 1; Univ. of Penn. v. EEOC, 493 U.S. 182, 189 (1990).

44 United States v. Bryan, 339 U.S. 323, 331 (1950); *Trammel*, 445 U.S. at 51; Debate in the House of Lords on the Bill to indemnify Evidence, *supra* note 1.

and a medical counseling privilege,[45] there is generally a presumption against recognizing new privileges because of the long-standing common-law interest in broad discovery.[46]

In the landmark case *Jaffee v. Redmond*, the United States Supreme Court provided factors to consider when evaluating new privileges.[47] In *Jaffee*, the Court considered whether to recognize a "psychotherapist privilege."[48] The situation stemmed from an incident where Redmond, a police officer, shot a man while responding to a street fight.[49] Officer Redmond received extensive counseling following the dramatic altercation.[50] The victim's family sued Officer Redmond, claiming she had used excessive force while responding to the fight.[51] During discovery, the victim's family sought notes taken by the social worker during Officer Redmond's counseling sessions.[52] Redmond objected, claiming the conversations and corresponding notes taken during counseling were privileged.[53] Although the district court rejected Redmond's argument, the Court of Appeals for the Seventh Circuit ultimately reversed the decision and recognized a psychotherapist-patient privilege.[54]

In *Jaffee,* the Supreme Court set forth various factors that courts should evaluate before recognizing new privileges.[55] First, the Court considered whether the situation inherently requires trust and confidence.[56] The Court found that effective psychotherapy is dependent on the individual being comfortable disclosing their actions, thoughts, and emotions.[57] Without the patient trust-

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45 Upjohn Co. v. United States, 449 U.S. 383, 386–90 (1981) (recognizing attorney-client privilege); *Trammel*, 445 U.S. at 51–53 (1980) (recognizing marital communications privilege); Riley v. City of Chester, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing a qualified reporter's privilege). *See also Developments in the Law–Privileged Communications,* 98 HARV. L. REV. 1450 (1985) (discussing and comparing existing privileges).

46 *Trammel*, 445 U.S. at 50; Pearson v. Miller, 211 F.3d 57, 67 (3d Cir. 2000).

47 *Jaffee*, 518 U.S. at 1.

48 *Id.* at 4.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Jaffee*, 518 U.S. at 5.

53 *Id.*

54 *Id.* at 5–6. While the District Court Judge held Redmond's counseling conversations were not privileged, Redmond and the counselor continued to refuse to answer questions regarding their conversations. In the Judge's jury instructions, the Judge instructed the jury to presume the conversations and related notes between Redmond and her counselor were unfavorable.

55 *Jaffee*, 518 U.S. at 9–19.

56 *Id.* at 10.

57 *Id.*

ing the therapist, psychotherapy would be ineffective.[58] Second, the Court evaluated whether the privilege "serves public ends."[59] The Court found psychotherapy improves the nation's mental health and is an important public service.[60] Third, the Court considered whether there would be an evidentiary benefit if it did not recognize the privilege.[61] The Court concluded that the benefit would be minimal, since patients would be unlikely to make incriminating statements during counseling if they knew their conversation could be used against them during litigation.[62] Fourth, the Court looked to whether their decision would frustrate the purpose of state legislation. This was especially important because all fifty states and the District of Columbia had already enacted some form of a psychotherapist privilege.[63] The existence of state psychotherapist privileges further swayed the Court to recognize the new privilege because a denial of the privilege in federal courts would undermine the state-created privileges.[64] The Court explained that the state created psychotherapist privileges would be useless if federal law did not also protect the conversations.[65] Finally, the Court considered whether the privilege is one of the nine privileges recommended by the Judicial Conference Advisory Committee in its proposed privilege rules.[66] The Advisory Committee had recommended a psychotherapist privilege, which even further persuaded the court to recognize the privilege.[67] After

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58 *Id.*

59 *Id.* (citing Upjohn Co. v. United States, 449 U.S. 383, 389 (1981)).

60 *Jaffee*, 518 U.S. at 11 ("The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem.").

61 *Id.* at 11–12.

62 *Id.*

63 *Id.*

64 *Id. But see* Adkins v. Christie, 448 F.3d 1324, 1330 (11th Cir. 2007) (where the Eleventh Circuit, joining the Fourth and Seventh Circuits, refused to recognize a medical peer review privilege even though all fifty States and the District of Columbia recognized the privilege).

65 *Jaffee*, 518 U.S. at 13.

66 *Id.* at 14–15.

67 *Id.*; *see, e.g.*, United States v. Gollock, 445 U.S. 360, 368 (1980) (where the United States Supreme Court refused to recognize a legislative-speech privilege partly because it was not one of the nine specific privileges the Judicial Conference Advisory Committee recommended). However, some courts and scholars argue that since Congress did not adopt the nine specific privileges proposed by the advisory committee, and instead adopted Federal Rule of Evidence 501, the nine specific privileges proposed do not indicate Congress's intent. *See* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 992 (1988).

evaluating these five factors,[68] now known as the *Jaffee* factors,[69] the Supreme Court held that communications between a psychotherapist and their patients are in fact privileged.[70]

B. *Settlement Negotiations*

Negotiation is the most frequently used method of dispute resolution.[71] Negotiation "involves two or more disputing parties meeting together in good faith to identify and discuss the issues at hand, present facts and supporting data, arrive at mutual solutions, and abide by the outcome."[72] During settlement negotiations, the goal is to arrive at a mutual agreement in order to prevent or resolve pending litigation.[73] There are many benefits to settling a legal dispute, such as avoiding the time, expense, risk, and stress of litigation.[74] The settlement of cases also reduces the already heavy burden on the judicial system.[75] For these reasons, it is widely considered good public policy to encourage settlements.[76] To promote this policy, the Federal Rules of Civil Procedure provide that the facilitation of settlement is a valid purpose for a court to order parties to appear in court.[77] In fact, to promote this policy, the Fifth Circuit has upheld sanctions for parties who failed to participate in pretrial settlement conferences in good faith.[78]

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68 Some courts only read *Jaffee* to have four factors. These courts typically exclude whether the Advisory Committee recommended the privilege from the five factors outlined above. *See*, *e.g.*, Adkins v. Christie, 448 F.3d 1324 (11th Cir. 2007).

69 *See Adkins*, 448 F.3d at 1324; Jenkins v. DeKalb Cnty., Ga. 242 F.R.D. 652 (N.D. Ga. 2007); *In re* Grand Jury Subpoenas, 438 F. Supp. 2d 1111 (N.D. Ca. 2006); Chester Cnty. Hosp. v. Independence Blue Cross, 2003 WL 25905471 (E.D. Pa. 2003); *In re* RDM Sports Group, Inc., 277 B.R. 415 (N.D. Ga. 2002); Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, (C.D. Cal. 1998).

70 *Jaffee*, 518 U.S. at 14–15. In dissent, Justice Scalia heavily criticized the majority for creating the new privilege contrary to the common law rule that "the public . . . has a right to every man's evidence." Scalia characterized the new privilege as "new, vast, and ill defined."

71 7 West's Legal Forms, Domestic Relations § 21:3 (3d ed.).

72 *Id.*

73 State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc., 90 Haw. 315 (1999).

74 Roy J. Lewicki, David M. Saunders & Bruce Barry, Essentials of Negotiation (McGraw-Hill/Irwin, 5th ed. 2011).

75 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003).

76 *See* Fed. R. Civ. P. 16(a)(5).

77 *Id.*

78 *See*, *e.g.*, Guillory v. Domtar Indus., 95 F.3d 1320 (5th Cir. 1996).

While the majority of cases ultimately settle, the settlement negotiation process can take many forms.[79] For example, in litigation, negotiating towards a settlement can take place on the phone, by e-mail, in person, or even at a more formal settlement conference.[80] Similarly, the settlement negotiation process may take place at drastically different stages of the litigation.[81] Generally, the settlement negotiations begin with one party extending an opening offer.[82] The parties then make counter offers while producing evidence and arguments to support why their offer is fair.[83] The parties ask questions to gauge how their opponent's value what is in dispute and make concessions in order to meet their needs and interests.[84] This process varies widely depending on the type of dispute and parties involved.

C. *What about Federal Rule of Evidence 408?*

Congress specifically addressed the admissibility of settlement negotiations in Federal Rule of Evidence 408:[85]

> (a) Prohibited Uses. 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:
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> (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
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> (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 pub-

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79 *Id.*; *See also* Charles B. Craver, *The Negotiation Process,* 27 AM. J. TRIAL ADVOC. 271, 273 (2003).

80 *See* Craver, *supra* note 79; Jonathan S. Rosenthal, *Defining & Understanding ADR Terms*, MD. B.J., (Sept./Oct. 2005) at 18, 20.

81 *See* Craver, *supra* note 79.

82 *Id.*

83 *Id.*

84 *Id.*

85 The Federal Rules of Evidence were originally proposed by the United States Supreme Court but were enacted into law by Congress in 1975. Currently, the Supreme Court can amend the Federal Rules of Evidence subject to Congressional disapproval, except "any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." 28 U.S.C. § 2074. For more on the history of the adoptions of the Federal Rules of Evidence, *see* Complaint of Nautilus Motor Tanker Co., Ltd., 85 F.3d 105, 112 (3d Cir. 1996).

> lic office in the exercise of its regulatory, investigative, or enforcement authority.
>
> (b) Exceptions. 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.

FRE 408 governs the admissibility of settlement negotiations and generally provides that courts will not receive compromise offers or negotiations as evidence.[86] Courts have held that FRE 408 not only covers settlement agreements, but also a wide range of other materials including internal reports, memorandum, expert opinions, depositions, and more.[87] While FRE 408 does not resolve whether settlement negotiations are discoverable—admissibility and discoverability are distinct issues—some of the stated intents of the rule are applicable as to whether the rule should be extended to recognize a privilege. According to the advisory committee notes on FRE 408, the legislature intended to exclude both offers and statements made during compromise discussions in order to encourage settlements.[88] Shortly after its adoption, a federal district court interpreted the purpose of the rule as "to encourage free and frank discussion with a view toward settling the dispute."[89]

As we will see, parties on both sides of the settlement-negotiation privilege debate use FRE 408 to support their position.[90] Supporters of a settlement-negotiation privilege believe that since Congress adopted FRE 408 to encourage settlements, it is a logical step to extend FRE 408 to discovery in order to even further promote settlements.[91] Conversely, those arguing against a settlement-negotiation privilege claim that since FRE 408 is specifically limited to admissibility, Congress did not intend to create a privilege limiting the discoverability of settlement negotiations.[92]

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86 FED. R. EVID. 408.

87 MUELLER & KIRKPATRICK, EVIDENCE 242 (4th ed. 2009). *See*, *e.g.*, Blu-J, Inc. v. Kemper C.P.A. Grp., 916 F.2d 637, 641 (11th Cir. 1990).

88 FED. R. EVID. 408, advisory committee's notes.

89 *See*, *e.g.*, Affiliated Mfrs., Inc. v. Aluminum Co. of Am., 56 F.3d 521, 530 (3d Cir. 1995); Blu-J, Inc., 916 F.2d at 641.

90 United States v. Reserve Min. Co., 412 F. Supp. 705, 712 (D. Minn. 1976), *aff'd and remanded* United States v. Reserve Mining Co., 543 F.2d 1210 (8th Cir. 1976).

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

92 *See, e.g.*, In re *MSTG*, 675 F.3d 1337, 1344 (Fed. Cir. 2012) ("Congress did not take the additional step of protecting settlement negotiations from discovery.").

II. Survey of The Current Judicial View on the Discoverability of Settlement Negotiations

A. *The Federal Circuit's* In re MSTG *Decision*

As discussed in the Introduction, the Federal Circuit refused to recognize a settlement-negotiation privilege in *In re MSTG*.[93] The Federal Circuit provided six reasons for not creating a settlement-negotiation privilege, mostly based on the Supreme Court's *Jaffee* factors.[94] First, the Federal Circuit noted that the failure to recognize a privilege will not "frustrate the purposes" of state legislation.[95] According to the Federal Circuit, the States have not reached a consensus regarding a settlement-negotiation privilege,[96] so refusing to recognize the privilege will not undermine the States as in *Jaffee*.[97] Second, the Federal Circuit found that Congress had not intended to create a settlement-negotiation privilege because when it limited the admissibility of settlement negotiations through FRE 408, Congress "did not take the additional step of protecting settlement negotiations from discovery."[98] Third, the Federal Circuit explained that a settlement-negotiation privilege is not one of the nine specific privileges that the Advisory Committee of the Judicial Conference recommended in its proposed Federal Rules of Evidence, a factor relied on heavily in the Supreme Court's analysis in *Jaffee.*[99] The Federal Circuit also found that a settlement-negotiation privilege does not advance the public good.[100] The Federal Circuit reasoned that the additional trust and confidence a privilege would provide during negotiations is not sufficient to create a new privilege because litigants already frequently reach settlements without a privilege.[101] Another reason the Federal Circuit provided for not recognizing the settlement-negotiation privilege is

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93 In re *MSTG*, 675 F.3d at 1344.

94 *Id.*

95 *Id.* at 1343.

96 *Id.* The Federal Circuit is unclear whether some states recognize a settlement- negotiation privilege. In one instance, the opinion indicates that "there is no state consensus as to a settlement-negotiation privilege." However, later the Court notes it is "not aware of any state that recognizes a settlement privilege outside the context of mediation." *Id.*

97 *Id.*

98 In re *MSTG*, 675 F.3d at 1344 (explaining that Congress would have explicitly protected the discovery of settlement negotiations if it had intended to).

99 *Id.*; Jaffee v. Redmond, 518 U.S. 1, 8 (1996).

100 In re *MSTG*, 675 F.3d at 1345.

101 *Id.*

that the privilege would require numerous exceptions, causing so much uncertainty the privilege would be useless.[102] Finally, the Federal Circuit reasoned that FRCP 26 already sufficiently limits discovery.[103] Specifically, the Federal Circuit noted that FRCP 26(b)(2)(C)[104] gives courts power to limit discovery when "allowing broad discovery would undermine other important interests in confidentiality."[105] Since the *In re MSTG* decision, several district courts have followed the Federal Circuit's holding and reasoning.[106]

B. *Sixth Circuit in* Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.

The most notable opinion at odds with *In re MSTG* is the Sixth Circuit's decision in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc*.[107] While *Goodyear Tire* arises in a different context,[108] it presents the same question: whether settlement negotiations are privileged.[109] In this case, the Sixth Circuit provided three reasons for recognizing a settlement-negotiation privilege.[110] First, the Sixth Circuit found there is a strong public policy interest in settlement negotiations being confidential because it will en-

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102 *Id.* at 1345–46.

103 *Id.* at 1346; *See also* FED. R. CIV. P. 26(b) (regarding the scope of discovery).

104 In re *MSTG*, 675 F.3d 1337, 1346 (quoting FED. R. CIV. P 26). Courts are required to "limit the frequency or extent of discovery otherwise allowed . . . if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." *Id.*

105 In re *MSTG*, 675 F.3d at 1247 (citing Wisenberger v. W.E. Hutton & Co., 35 F.R.D. 556, 557 (S.D.N.Y. 1964) (holding in a Securities Act case that even though the plaintiff's tax return was relevant to show that certain tax savings by the plaintiff for investments that turned out to be fraudulent could be offset against any liability of the defendant, a party's income tax return should only be discoverable "where a litigant himself tenders an issue as to the amount of his income.").

106 *See, e.g.*, Barnes and Noble, Inc. v. LSI Corp., 2012 WL 6697660 (N.D. Cal. Dec. 23, 2012); Avocent Redmond Corp. v. Rose Electronics, 2012 WL 4903272 (W.D. Wash. May 29, 2012).

107 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976 (6th Cir. 2003); In dicta of a more recent case, the Sixth Circuit continued to stand by its holding that settlement negotiations are privileged. *See* Stockman v. Oakcrest Dental Ctr., P.C., 480 F.3d 791, 798 (6th Cir. 2007).

108 This case arises from settlement negotiations during a tort case. *Goodyear*, 332 F.3d. at 976–80.

109 *Id.* at 979–80.

110 *Id.*

courage more settlements.[111] Second, the Sixth Circuit asserted that protecting the confidentiality of settlement negotiations is consistent with both expectations and precedent.[112] In its assertion, the Sixth Circuit cited a wide range of cases,[113] some of which held the need for confidentiality in settlement negotiations outweighed the First Amendment right to access while others explicitly recognized settlement-negotiation privilege exists.[114] Third, the Sixth Circuit reasoned that settlement negotiations should not be discoverable because during settlement negotiations there is an "inherent questionability of the truthfulness of any statements made."[115] The Sixth Circuit explained how during settlement negotiations, the goal is peace and compromise, not truthfulness.[116] The hope in settlement negotiations is for each side to concede from their position in order to reach an intermediate agreement.[117] During this process, each side positions itself and then concedes from its original position in order to reach the best possible agreement.[118] Thus, the court concluded statements made during settlement negotiations are not necessarily true, and as a result should not be discoverable.[119] For these reasons, the Sixth Circuit held that "any communications made in furtherance of settlement are privileged."[120]

C. *Other Circuits*

Most of the other circuit courts of appeal have not yet considered whether to recognize a settlement-negotiation privilege.[121]

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111 *Id.* (in order for there to be successful negotiations, parties "must be able to abandon their adversarial tendencies to some degree" and "feel uninhibited in their communications.").

112 *Goodyear*, 332 F.3d at 980–81.

113 *Id.*

114 *Id.* (citing Palmieri v. New York, 779 F.2d 861, 865 (2d Cir. 1985); In re the Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996); Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir. 1988); Allen Cnty. v. Reilly Indus., Inc., 197 F.R.D. 352 (N.D. Ohio 2000)).

115 *Goodyear*, 332 F.3d at 981 (citing Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990). *See also* Weinstein & Berger, WEINSTEIN'S EVIDENCE § 408(1) (1981).

116 *Goodyear*, 332 F.3d at 981.

117 *Id.*

118 *Id.*

119 *Id.*

120 *Id.*

121 *See, e.g.*, Gov't of Ghana v. ProEnergy Services, LLC, 677 F.3d 340 (8th Cir. 2012) (the Eight Circuit specifically did not address whether to acknowledge a settlement-negotiation privilege); *In re* General Motors Engine Interchange Litigation, 594 F.2d 1106, 1124 n. 20 (7th Cir. 1979) (the Seventh Circuit noted that neither side in the class action argued that there is a settle-

For example, in *In Re Subpoena Duces Tecum Issued to Commodity Futures Trading Commission*, the Fourth Circuit overturned a magistrate judge's ruling that a federal settlement privilege protected subpoenaed documents. The court explained that the party claiming the privilege has the burden of proving the privilege should apply.[122] In the case, the Fourth Circuit held that the party asserting the privilege failed to show that the subpoenaed documents were created for the purpose of settlement discussions, and as a result, the court did not need to consider whether to recognize a federal settlement-negotiation privilege.[123]

The Second Circuit's ruling on a similar but distinct issue—the discovery of confidential mediation communications—has influenced how many district and state courts handle the discovery of settlement negotiations.[124] In *In re Teligent, Inc.*, the parties in a bankruptcy dispute reached a settlement following mediation.[125] The communications relating to the mediation were limited due to standard protective orders imposed by the bankruptcy court during mediations.[126] The settlement required one of the parties, Mandl, to file a malpractice action against their original counsel in the matter, K & L Gates.[127] During discovery in the malpractice action, K & L Gates attempted to obtain documents relating to the settlement negotiations that were under protective orders from the mediation.[128] After the bankruptcy court denied K & L Gates' attempt to lift the protective orders, the Second Circuit drew from many sources to create "heightened showings" a party needs to make before discovering confidential mediation communica-

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ment privilege, but discussed how their ruling in this case would not undermine the purpose of FRE 408 to encourage settlements).

122 *Id.* at 754 ("WD Energy had the burden to build a record containing specific information about the disputed documents and the factual context for the privilege claim, including information about when settlement discussions began, what representations were made by those involved, and what documents were created or submitted to the Commission to facilitate those discussions.").

123 *Id.* ("there was an inadequate record upon which the district court could assess the merits of a novel privilege claim in this circuit"). *But see* United States v. Sterling, 724 F.3d 482, 531 (listing the settlement-negotiation privilege recognized in *Goodyear* as an example of privileges created by courts using Rule 501).

124 *In re* Teligent, Inc., 640 F.3d 53 (2d Cir. 2011).

125 *Id.* at 56.

126 *Id.*

127 *Id.*

128 *Id.* at 56–57.

tions.[129] The Second Circuit concluded that "[a] party seeking disclosure of confidential mediation communications must demonstrate (1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence outweighs the interest in maintaining confidentiality."[130] The Second Circuit forced parties seeking discovery to meet heightened standards in order to discover the protected communications. Instead of completely allowing discovery of settlement negotiations or creating a settlement-negotiation privilege, many lower courts apply the Second Circuit's "heightened standards" for discovery of confidential mediation communications to third-party discovery of settlement negotiations.

D. *District Courts*

The federal district courts also disagree regarding how to handle third-party discovery of settlement negotiations. Some district courts follow the Sixth Circuit's framework in Goodyear and fully recognize a privilege protecting settlement negotiations from third-party discovery.[131] These courts' analyses generally focus on the reasons relied on in the Goodyear opinion, such as the question of the truthfulness of settlement negotiations and the policy of encouraging settlements.[132] The settlement-negotiation privilege recognized in these cases usually only covers agreements arising from litigation.[133] If the parties entered the agreement outside the context of litigation, courts usually permit discovery.[134]

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129 *Id.* at 57–58 (the Second Circuit created the standard from multiple Second and Fourth Circuit cases in addition to the Uniform Mediation Act, Administrative Dispute Resolution Act of 1996, and the Administrative Dispute Resolution Act of 1998).

130 In re *Teligent, Inc.*, 640 F.3d at 53.

131 California v. Kinder Morgan Energy Partners, L. P., Civil No. 07-1883-MMA(WVG), 2010 WL 3988448 (S.D. Cal. Oct. 12, 2010); Phoenix Solutions v. Wells Fargo Bank, 254 F.R.D. 568, 583 (N.D. Cal. 2008); Cook v. Yellow Freight, 132 F.R.D. 548, 554 (E.D. Cal. 1990), *overruled on other grounds by* Jaffee v. Redmond, 518 U.S. 1 (1996).

132 *See* Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 981 (6th Cir. 2003).

133 Software Tree, LLC v. Red Hat, Inc., No. 6:09-CV-097, 2010 WL 2788202 (E.D. Tex. June 24, 2010). This scope is comparable to the scope of FRE 408, which only covers settlement negotiations occurring in the context of litigation.

134 *Id.* For example, a patent license agreement entered outside of litigation is not protected by the settlement-negotiation privilege. The Ninth Circuit discussed this distinction in Cassino v. Reichhold Chemicals, Inc., 817 F.2d 1338 (9th Cir. 1987).

More popular than the recognition of a settlement-negotiation privilege is the requirement of heightened standards for discoverability. Instead of recognizing a full privilege or using standard discovery rules, these courts seek to find a middle ground to balance the general competing interests in broad discovery and confidentiality. This standard is similar to the one articulated by the Second Circuit in *In re Teligent, Inc.*, but applied to settlement negotiations instead of mediations.[135] For example, in *Atchinson Casting Corp. v. Marsh, Inc.*, the District Court for Massachusetts required a "particularized showing of a likelihood that admissible evidence will be generated by the dissemination of the terms of [the] settlement agreement."[136] One court defined the required particularized showing as one "to the effect that the settlement documents are reasonably calculated to lead to the discovery of admissible evidence."[137] In the *Atchinson* case, the court did not review the document *in camera*, but found that the settlement documents would obviously be sufficiently relevant to the defendant's argument based solely on the description of the underlying litigation provided by the plaintiff.[138] The reasoning of the court's requirement of heightened showings was to attempt to promote settlements through confidentiality while still allowing litigants to discover necessary information during their ongoing litigation.[139]

While many district courts have adopted the heightened showing framework, they have not settled on a consistent approach to apply the standard. Specifically, the courts differ on which party has the burden of proving whether the settlement-negotiation documents meet the particularized showing. Some courts, such as the one in *Atchinson*, have simply reviewed the documents themselves and determined whether the documents meet the particularized showing.[140] Normally during discovery, the burden is on the party

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135 *In re* Teligent, Inc., 640 F.3d 53 (2d Cir. 2011).

136 Atchison Casting Corp. v. Marsh, Inc., 216 F.R.D. 225, 227 (D. Mass. 2003). *See also* Bottaro v. Hatton Assoc., 96 F.R.D. 158 (E.D. N.Y. 1982).

137 Morse/Diesel, Inc. v. Fid. & Deposit Co. of Md., 122 F.R.D. 447, 451 (S.D. N.Y. 1988).

138 *Atchison Casting Corp.*, 216 F.R.D. at 227. *See also Morse/Diesel, Inc.*, 122 F.R.D. at 451 (1988) (the court used the heightened standard analysis, found that the required showing had been made, and ordered disclosure of the settlement materials). *But see* Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (1994) (applying the heightened standard analysis and refusing disclosure).

139 *See Bottaro*, 96 F.R.D. at 160.

140 *See* United States v. Dish Network, L.L.C., No. 09-3703, 2013 WL 1876419 (C.D. Ill. May 6, 2013) (reviewing the documents *in camera* and determining they did not need to remain confidential).

opposing the discovery to show why it is impermissible.[141] A few courts have followed this approach and required the party opposing the discovery to show the material does not meet the heightened showing.[142] However, when requiring a heightened showing, many courts have shifted the burden of proof to the party seeking discovery, requiring them to show a particularized need for the requested settlement negotiations.[143] This method can be criticized in that it requires the party who does not yet have the requested information to show how the material meets the required particularized showing.

Another variation on the heightened showing analysis is using a balancing test after the party requesting the discovery has met the heightened standard. For example, in *Lesal Interiors, Inc. v. Resolution Trust Corp.*, the District Court for the District of New Jersey ruled that even if a party has made the particularized showing, the "court must go further and determine whether and to what extent this discovery will impact elsewise."[144] Specifically, the district court was concerned the settlement negotiations would effect a separate, ongoing case.[145] Thus, the district court "must balance against plaintiff's asserted interest and need for the documents" and the "effects that may flow from their discovery."[146] This balancing test gives courts even more discretion in deciding whether to allow discovery.

Many federal district courts do not recognize a privilege or require a heightened showing. These courts, like the Federal Circuit in *In re MSTG*, merely apply the normal limitations on discovery imposed by the Federal Rules of Civil Procedure.[147] These

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141 FED. R. CIV. P. 26.

142 *See Bottaro*, 96 F.R.D. at 160.

143 Fidelity Fed. Sav. & Loan Ass'n v. Felicetti, 148 F.R.D. 532, 534 (E.D. Pa. 1993) (applying heightened standard and switching the burden of proof from the party opposing the discovery to the party seeking it); Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc., 265 F.3d 1294, 1308 (Fed. Cir. 2001) (holding "[i]n light of Medtronic's failure to show the materiality of the settlement agreement and, hence, the relevance of the evidence it would be seeking in discovery, we discern no abuse of discretion.").

144 Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D. N.J. 1994).

145 *Id.*

146 *Id.*

147 *See*, *e.g.*, Matsushita Elec. Indus. Co., Ltd. v. Mediatek, Inc., 2007 WL 963975 (N.D. Cal. 2007); *In re* Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 202 (D. D.C. 2005*) aff'd in part on other grounds sub nom.*; Primetime 24 Joint Venture v. Echostar Communications Corp., 2000 WL 97680, at *4 n. 5 (S.D.N.Y. 2000); Bennett v. La Pere, 112 F.R.D. 136, 140 (D. R.I. 1986).

courts' reasoning generally includes the *Jaffee* factors, especially a textual analysis of FRE 408.

However, one notable case that refused to recognize a settlement-negotiation privilege, *Bennett v. La Pere*, argued that allowing discovery of settlement negotiations by third parties would increase the frequency of settlements.[148] In contrast with previously mentioned rationales indicating that confidentiality allows parties to more freely negotiate, this case reasoned that allowing discovery would help the disputing parties reach a fair settlement.[149] The court explained how a settlement would be difficult when one party is "needlessly blind" regarding settlements their opponent has made with third parties on similar issues.[150] Furthermore, the court reasoned future parties will still settle without their negotiations being confidential because they will continue to receive the normal benefits of settlements, such as saved expenses and not having to disclose information during a public trial.[151]

E. *England*

In England, settlement negotiations are privileged against third-party discovery.[152] England's "without prejudice rule" governs the admissibility of statements made in an attempt to settle.[153] Like FRE 408, the rule limits the admissibility of settlement negotiations in order to encourage settlements.[154] In *Rush & Thompkins v. Greater London Council*, the House of Lords extended the "without prejudice rule" to protect settlement negotiations from third-party discovery.[155] As the court reasoned:

> In multi-party litigation it is not an infrequent experience that one party takes up an unreasonably intransigent attitude that

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148 Bennett v. La Pere, 112 F.R.D. 136, 140 (D. R.I. 1986).

149 *Id.*

150 *Id.*

151 *Id.*

152 Rush & Tompkins Ltd v. Greater London Council [1989] A.C. 1280 (H.L.) 7.

153 *Id.*

154 *Id.* (quoting Cutts v. Head [1984] Ch. 290, 306)

> It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings.

Id.

155 *Id.*

> makes it extremely difficult to settle with him. In such circumstances it would, I think, place a serious fetter on negotiations between other parties if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. What would in fact happen would be that nothing would be put on paper but this is in itself a recipe for disaster in difficult negotiations which are far better spelt out with precision in writing.[156]

The court reasoned that allowing third-party discovery of settlement negotiations will hinder parties' negotiations and reduce the number of settlements.[157] Furthermore, the court determined the value of being able to discover other co-defendant's settlement negotiations is minimal because they are normally inadmissible at trial.[158] The court balanced these two interests and decided to extend the "without prejudice rule" to protect negotiations from being discoverable by third parties.[159]

G. *Summary*

The current judicial status of whether settlement negotiations are privileged against third-party discovery is unclear since the two circuit courts of appeal that have considered the issue have reached opposite conclusions.[160] Similarly, the district courts use a variety of methods to resolve the issue.[161] This uncertainty is harmful because attorneys are unsure what they can say and put in writing during settlement negotiations. If settlement negotiations are privileged, attorneys will be more relaxed in how they communicate during settlement negotiations. However, if a settlement-negotiation privilege is not recognized, attorneys will have to be more cautious in order to protect their client's confidentiality during negotiations.

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156 *Id.*

157 *Id.*

158 Rush & Tompkins Ltd., [1989] A.C. 1280 (H.L.) 7.

159 *Id.*; *see also* Cumbria Waste Management Ltd & Anor v. Baines Wilson (A Firm) [2008] Q.B. 786 (Eng.) (following the *Rush & Thompkins Ltd.* decision).

160 *See supra* notes 93–120 and accompanying text.

161 *See supra* notes 131–51 and accompanying text.

III. Proposal

A. *Courts Should Recognize a Settlement-Negotiation Privilege*

This Note submits that settlement negotiations should be privileged against third-party discovery. Courts should not allow third-party discovery of settlement negotiations even if parties make a heightened showing because it will create a free-rider problem that will reduce the number of settlements. In addition to avoiding the free-rider problem, recognizing a settlement-negotiation privilege will also encourage effective settlements while eliminating redundant costs. The interest in encouraging settlements that is promoted by a privilege outweighs the minimal benefits of providing the information to third parties. This Note's proposal is consistent with the approach in England and in *Goodyear*.

If settlement negotiations are discoverable by third parties, a free-rider problem will be created that will discourage settlements. When a party sues multiple defendants for the same or similar reasons, a settlement-negotiation privilege will encourage the defendants not to settle until the other co-defendant's settle.[162] By delaying their trial and possible settlement negotiations until the other parties have settled, parties can use the other defendant's settlements to negotiate their own settlement.[163] Not recognizing a privilege will incentivize parties to wait for the other defendants to settle because it will allow them to save some of the expenses involved with negotiating as well as give them an advantage by revealing information about their counterparts' negotiating range. With the knowledge that settlement negotiations are discoverable, all defendants will try this tactic and the number of settlements will plummet.[164] Recognizing a settlement-negotiation privilege will avoid this potentially disastrous problem.

Another consequence of not recognizing a settlement-negotiation privilege is that parties may try to negotiate without adequately communicating. Parties will want to limit their communications in order to protect themselves from potential third-party discovery in the future. Without a privilege, any admissions, confessions, offers, or other information generated during negotiations may be used against the negotiating parties in the fu-

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162 *See, e.g.*, Rush & Tompkins Ltd. [1988] UKHL 7 (H.L.).

163 *Id.*

164 *Id.*; Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003).

ture.[165] Thus, parties will be hesitant to share information necessary for them to come together and reach an agreement.[166] Without a settlement-negotiation privilege, parties will be cautious in making concessions because future negotiation counterparts will undoubtedly demand at least the same concessions.[167] Since communication is crucial for effective negotiations, limiting what parties are comfortable sharing will prevent them from reaching settlements.

Recognizing a settlement-negotiation privilege will not only encourage settlements, but it will also eliminate the redundant transaction costs caused by parties setting up artificial mediation frameworks for increased confidentiality. Most states currently recognize some form of mediation privilege or have a statute limiting the discovery of communications relating to mediation.[168] Disputing parties can ensure the confidentiality of their negotiations by simply hiring a mediator to be present during the proceedings. Recognizing a settlement-negotiation privilege will allow these parties to have confidential negotiations without the redundant costs of hiring a mediator merely to increase confidentiality. Similarly, recognizing a settlement-negotiation privilege will provide confidentiality for parties who cannot afford to set up an artificial mediation framework for their negotiations. Courts should recognize a settlement-negotiation privilege to eliminate the redundant cost of hiring a mediator and create a level playing field for parties without the financial ability to set up a mediation framework.

The public policy advantages of recognizing a settlement-negotiation privilege outweigh the evidentiary benefits that would be provided by allowing third-party discovery of settlement negotiations. If no privilege existed and a third party satisfied the relevancy requirement of FRCP 26 to obtain information relating to settlement negotiations, the information would still be inadmissible pursuant to FRE 408.[169] As a result, the benefit to the third party

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165 *See Goodyear*, 332 F.3d at 980 ("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.").

166 *Id.*; *see also* Rush & Thompkins Ltd., at 1988 UKHL at 7 (H.L.) (calling this scenario a "recipe for disaster").

167 *See* MUELLER & KIRKPATRICK, *supra* note 87, at 244 (explaining how a purpose of Federal Rule of Evidence 408 is to allow parties to confidentially concede liability in order to reach settlements).

168 32 A.L.R. 6th 285 (Originally published in 2008); 4 N.Y. Prac., Com. Litig. in New York State Courts § 48:13 (3d ed.).

169 *See* MUELLER & KIRKPATRICK, *supra* note 87, at 241–46.

would be minimal as it can only be used for their own strategic purposes, not for evidence at trial. Not only is this information only marginally helpful, but it is also unfair for third parties to use information generated by other parties. Furthermore, the information underlying settlement negotiations is not necessarily the parties' actual position, as it often includes concessions aimed at reaching a compromise.[170] Thus, the need for a settlement-negotiation privilege "promotes sufficiently important interests to outweigh the need for probative evidence," as required by the Supreme Court when considering whether to recognize a privilege.[171]

B. *What's Wrong With the MSTG Approach?*

The strongest authority that refuses to recognize a settlement-negotiation privilege is the Federal Circuit's *In re MSTG* decision.[172] However, the Federal Circuit's holding was unnecessarily broad. While the Federal Circuit analyzed and ultimately rejected a settlement-negotiation privilege using the Supreme Court's *Jaffee* factors, this was unnecessary because MSTG's expert witness relied on the underlying settlement-negotiation documents during his testimony.[173] As one recent decision noted, the key to the *In re MSTG* decision "was due to the patent owner's expert's reliance on facts related to the settlement negotiations."[174] This court found "it was on this narrow basis that the Federal Circuit held on mandamus review that the district court did not clearly abuse its discretion."[175] MSTG's expert witness arguably waived any possible privilege by basing his analysis on the underlying settlement negotiations.[176] Moreover, most third-party discovery of settlement negotiations is already impermissible pursuant to FRCP

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170 *See Goodyear*, 332 F.3d at 980–81; Allen Cnty., Oh v. Reilly Industries, Inc., 197 F.R.D. 352 (N.D. Ohio 2000); Wyatt v. Sec. Inn Food & Beverage, 819 F.2d 69, 71 (4th Cir. 1987).

171 Trammel v. United States, 445 U.S. 40, 49 (1980).

172 *In re* MSTG, 675 F.3d 1337 (Fed. Cir. 2012).

173 *Id.* at 1340; *see also* ABT Sys. LLC v. Emerson Elec. Co., 2012 WL 6594996 (E.D. Mo. 2012).

174 *ABT Sys.*, 2012 WL 6594996 at 2.

175 *Id.*

176 *See* Velsicol Chem. Corp. v. Parsons, 561 F.2d 671, 674–675 (7th Cir. 1977); Weil v. Investors/Indicators, Research & Mgmt., Inc., 647 F.2d 18, 23–25 (9th Cir. 1981).

26.[177] Thus, the narrow holding of allowing the discovery in the *In re MSTG* case is reconcilable with this Note's proposal.[178]

Besides analyzing the issue in *In re MSTG* too broadly, the Federal Circuit erred in its analysis of the *Jaffee* factors. First, the Federal Circuit overemphasized Congress' intentions regarding whether to create a settlement-negotiation privilege. The Federal Circuit was highly influenced by the fact that the Advisory Committee of the Judicial Conference did not recommend a settlement-negotiation privilege in its proposed Federal Rules of Evidence.[179] When it passed the Federal Rules of Evidence in 1975, Congress did not agree to codify these recommended privileges,[180] but instead enacted FRE 501 with the intention of letting the old privileges stand.[181] Many courts and scholars argue a common law settlement-negotiation privilege does exist.[182] As a result, it is erroneous for the Federal Circuit to rely on the Advisory Committee of the Judicial Conference's failure to recommend the privilege. Moreover, opponents to a settlement-negotiation privilege contend that because FRE 408 mentions that settlement-negotiation privileges may be admissible for some limited purposes indicates that Congress envisioned settlement negotiation would be discoverable. However, it is highly unlikely Congress intended anything with respect to civil procedure when it enacted the Federal Rules of Evidence in 1975 because Congress deliberately avoided codifying privileges in wake of the Watergate scandal.

The numerous exceptions a settlement-negotiation privilege will require was another reason the Federal Circuit did not recognize the privilege.[183] The Federal Circuit's rationale regarding ex-

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177 *ABT Sys.*, LLC, 2012 WL 654996.

178 While the narrow holding focusing on the expert witness relying on the settlement negotiations is consistent with this Note's proposal, the Federal Circuit's broad analysis of whether a settlement-negotiation privilege exists is at odds with this Note's proposal.

179 In re *MSTG*, 675 F.3d at 1337, 1345 (Fed. Cir. 2012).

180 MUELLER & KIRKPATRICK, *supra* note 87 (congress was especially weary of privileges in 1975 because President Nixon's use of an executive privilege during the Watergate scandal).

181 Fed. R. Evid. 501 ("The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise.").

182 *See*, *e.g.*, Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980–81 (6th Cir. 2003); Palmieri v. New York, 779 F.2d 861, 865 (2d Cir. 1985); *In re* Cincinnati Enquirer, 94 F.3d 198, 199 (6th Cir. 1996); Cincinnati Gas & Elec. Co. v. General Elec. Co., 854 F.2d 900, 903–04 (6th Cir. 1988); Allen Cty. v. Reilly Indus., Inc., 197 F.R.D. 352 (N.D. Ohio 2000).

183 In re *MSTG*, 675 F.3d at 1346 ("Thus, a privilege for settlement negotiations would necessarily be subject to numerous exceptions. The existence of such exceptions would distract from the effectiveness, clarity, and certainty of the privilege.").

ceptions is flawed for two reasons. First, some privileges, most notably the work-product privilege, successfully operate with numerous exceptions.[184] Second, while a settlement-negotiation privilege may require some exceptions, the Federal Circuit's proposed mechanism of using FRCP 26 to limit the discovery of settlement negotiations will create even more uncertainty than this Note's proposed settlement-negotiation privilege.[185] FRCP 26 gives broad discretion to the trial court to limit discovery if the discovery would undermine other important interests in confidentiality.[186] The uncertainty of relying on FRCP 26 to limit the discoverability of settlement-negotiations will make it difficult for attorneys, as they will be unsure what aspects of their settlement negotiations may be discoverable in future litigation.

C. *Requiring Heightened Standards to Discover Information Related to Settlement Negotiations is Not a Viable Option*

As discussed during the background portion of this Note, many courts currently require a heightened showing in order for a third party to discover information relating to settlement negotiations.[187] Proponents of this method believe this is a fair balance between the competing interests of FRCP 26 and FRE 408.[188] The method attempts to permit broad discovery as supported by the Federal Rules of Civil Procedure, while still limiting discovery to encourage settlements.[189] However, this approach is impracticable, unpredictable, and creates further uncertainty for attorneys in settlement negotiations.

The approach of requiring the third party to make a heightened showing is impracticable because it is impossible to make the prerequisite showing before the party has discovered the documents. For example, one court requires the third party to show "a particularized showing of a likelihood that admissible evidence will

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184 2 Federal Evidence § 5:38 (4th ed.) (discussing the parameters of and exceptions to the work-product privilege).

185 *See, e.g.* ABT Sys., LLC v. Emerson Elec. Co., 2012 WL 6594996 (E.D. Mo. 2012) (where a dispute similar to that in *In re MSTG* hinged on the trial court's analysis under Federal Rule of Civil Procedure 26).

186 *Id.*; FED. R. CIV. P. 26.

187 *See*, *e.g.*, Atchison Casting Corp. v. Marsh, Inc., 216 F.R.D. 225 (D. Mass. 2003); Bottaro v. Hatton Ass., 96 F.R.D. 158 (E.D.N.Y. 1982).

188 *Id.* at 227.

189 *Id.*

be generated by the dissemination of the terms of [the] settlement agreement."[190] It is almost impossible for the third party to make this showing without knowing the contents of the settlement-negotiation information they have not yet obtained. This scenario illustrates why the heightened showing approach is difficult to implement.

In addition to being impracticable, the heightened showing approach creates unnecessary uncertainty regarding whether the settlement negotiations will be discoverable. Instead of the settlement negotiations being privileged (as this Notes proposes) or discoverable subject to the limitations of FRCP 26 (as discussed in the previous subsection), the heightened showing approach gives courts the discretion to determine whether the parties meet the standard.[191] In fact, many district courts use a balancing test after determining whether the party has met the heightened standard.[192] It is difficult to determine what courts will find meets the heightened standard and declare discoverable. Attorneys need to know in advance what will be privileged during settlement negotiations in order to best protect their client's interests. The uncertainty caused by requiring third parties to meet a heightened standard for discovering settlement negotiations will undoubtedly negatively affect the settlement negotiation process.

IV. CONCLUSION

Settlement negotiations are not only an integral part of the United States judicial system but are also beneficial for society because they are "more efficient, cost-effective and less burdensome on the judicial system" than trials.[193] However, the competing interests of FRCP 26 and FRE 408 complicate whether settlement negotiations should be privileged against third-party discovery. Courts should come to a consensus and resolve the issue of whether settlement negotiations are discoverable by third parties. This Note proposes that courts should privilege settlement negotia-

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190 *Atchison Casting Corp.*, 216 F.R.D. at 227.

191 *See*, *e.g.*, Morse/Diesel, Inc. v. Fidelity and Deposit Co. of Md., 122 F.R.D. 447, 451 (S.D.N.Y. 1988); *Bottaro*, 96 F.R.D. at 158.

192 *See*, *e.g.*, Lesal Interiors, Inc. v. Resolution Trust Corp., 153 F.R.D. 552, 562 (D. N.J. 1994).

193 Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 980 (6th Cir. 2003).

tions against third-party discovery in order to further encourage settlements.

If courts fail to recognize a settlement-negotiation privilege, the free-rider problem and resulting uncertainty will discourage settlements. Defendants will delay their settlement negotiations in an attempt to receive an unfair advantage during negotiations. In addition, to avoid putting themselves at a disadvantage, parties will attempt to negotiate without effectively communicating, making it difficult to reach a compromise. Without a clearly recognized privilege, attorneys will be left with the uncertainty provided by FRCP 26, the heightened standards approach, or the costs of setting up an artificial mediation framework. This uncertainty will make it impossible for attorneys to know what they can say and put in writing during negotiations without other parties using their communications against them in future disputes. As the Sixth Circuit put it, "[w]ithout a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost."[194] Courts should resolve this problem by clearly recognizing a settlement-negotiation privilege.

194 *Id.*