Alabama Rules of Evidence

Article IV. Relevancy and Its Limits

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 when offered to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering 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.

(b) *Permitted Uses.* This rule does not require exclusion if the evidence is offered for purposes not prohibited by section (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. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

[Amended 8-15-2013, eff. 10-1-2013.]

Advisory Committee's Notes

By excluding evidence of offers to compromise, this rule promotes the policy of encouraging parties to settle their disputes. The theory underlying this rule is similar to that underlying Rule 407 – evidence of offers to compromise is inadmissible only when it is offered for the expressly impermissible purposes of proving liability for, or invalidity of, the claim, or to prove its amount. This rule is adopted, without change, from the corresponding Federal Rule of Evidence. See Fed.R.Evid. 408. Such a general exclusionary rule, regarding offers of compromise, has long been recognized in Alabama. See, e.g., *Glaze v. Glaze*, 477 So.2d 435 (Ala.Civ.App.1985); *Whitfield v. Birmingham Trust & Sav. Co*., 244 Ala. 526, 14 So.2d 137 (1943). See also C. Gamble, McElroy's Alabama Evidence § 188.01(1) (4th ed. 1991). Chief among the permissible purposes for which otherwise precluded compromise evidence would be admissible, is that of proving the bias or prejudice of a witness. See *Plitt v. Griggs*, 585 So.2d 1317 (Ala.1991); *Louisville & Nashville R.R. v. Martin*, 240 Ala. 124, 198 So. 141 (1940); C. Gamble, McElroy's Alabama Evidence § 49.01(11) (4th ed. 1991).

The policy underlying this exclusionary rule is substantially similar to that underlying Ala.R.Civ.P. 68, which establishes a procedure whereby the defendant in civil litigation is authorized to make an offer of judgment in an effort to settle the dispute. Such an offer, if not

accepted, is “deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.”

In addition to evidence of compromise offers, Rule 408 excludes evidence of completed compromises. Ordinarily, of course, a completed compromise would be offered only in a situation where a party has made such an agreement with some third person. The exclusion of evidence of completed compromises is consistent with preexisting Alabama authority. See *Chandler v. Owens*, 235 Ala. 356, 179 So. 256 (1938); *Cargall v. Riley*, 209 Ala.183, 95 So. 821 (1923).

The breadth of exclusion under Rule 408 is extended beyond that existing at common law to now preclude, in addition to evidence of mere offers of compromise, evidence as to conduct occurring, or statements made, in compromise negotiations. Heretofore, for example, Alabama law has not expanded the exclusion to include admissions made in the course of compromise negotiations. Rather, it has applied the rule so as to exclude only the offer of compromise itself. *Millsap v. Williamson*, 294 Ala. 634, 320 So.2d 649 (1975); *Baker v. Haynes, Henson & Co.*, 146 Ala. 520, 40 So. 968 (1906). But see *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala.1987) (indicating that conversations and negotiations would be inadmissible).

The adoption of Rule 408 would appear to extinguish that preexisting line of authority in Alabama providing that offers to pay full compensation for an injury, as opposed to offers of a specified sum, are admissible. See *Landham v. Lloyd*, 223 Ala. 487, 136 So. 815 (1931); *York v. Chandler*, 40 Ala.App. 58, 109 So.2d 921, cert. denied, 268 Ala. 700, 109 So.2d 925 (1958).

Alabama has a clear and long line of decisions applying the principle that the jury may be made privy to the fact and the amount of a settlement between the plaintiff and a person who, as to the defendant, is alleged to be a joint tort-feasor. See, e.g., *Hardman v. Freeman*, 337 So.2d 325 (Ala.1976); *Miller v. Dacovich*, 355 So.2d 1109 (Ala.1978); *Reynolds v. McEwen*, 416 So.2d 702 (Ala.1982). See C. Gamble, McElroy’s Alabama Evidence § 188.06 (4th ed. 1991). See also, C. Gamble, Alabama Law of Damages § 10-4 (2d ed. 1988). The present rule is in no way intended to change this preexisting Alabama law under which the amount paid by a joint tort-feasor can be shown in mitigation of damages. See Vt.R.Evid. 408 advisory comments. While evidence of third-party settlements is within the general exclusion of Rule 408, it is not excluded when offered for the permissible purpose of proving the amount of damages the defendant must pay. C. Wright & A. Miller, Federal Practice and Procedure § 5314, at 282 (1980).

Alabama law of damages requires that a defendant assert the plaintiff’s pro tanto settlement with a joint tortfeasor before being allowed to set off the amount of such a settlement against the amount of the judgment secured by the plaintiff. Under Alabama authority predating the adoption of these Alabama Rules of Evidence, this damages rule dictates that evidence of such a pro tanto settlement by the plaintiff with the joint tortfeasor be admitted when offered by the defendant. Rule 408 has no impact upon this line of authority. See *Miller v. Dacovich*, 355 So.2d 1109 (Ala.1978); *Hardman v. Freeman*, 337 So.2d 325 (Ala.1976).

Nothing in Rule 408 is intended to protect otherwise discoverable evidence simply because a party has offered such evidence during compromise negotiations. Stated differently,

a party is not allowed to use Rule 408 as a shield against otherwise proper pretrial discovery.

Rule 408 is in no way intended to impede the preexisting broad interpretation that Alabama courts have applied to the rule excluding evidence of compromise negotiations. In particular, evidence of a party's offer to settle will continue to be inadmissible when offered in that party's own behalf as going to show the validity and strength of the offeror's own case and the corresponding invalidity of the offeree's case. See, e.g., *Kelly v. Brooks*, 25 Ala. 523 (1854) (excluding evidence of plaintiff's own offer to submit dispute to a panel); *Glaze v. Glaze*, 477 So.2d 435 (Ala.Civ.App.1985) (excluding evidence of defendant's self-serving offer of settlement). Overall, the advisory committee expects that the Supreme Court of Alabama will continue its generous protection, as privileged and inadmissible, of negotiations looking to compromise of controversies. See *Super Valu Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala.1987). This in no way detracts from the concept, otherwise embodied in Rule 408, that offers of compromise may be admissible for purposes not precluded in the rule. This "other purpose" doctrine, however, should be applied by the courts in a way that does not defeat the underlying policy of the rule. See J. Weinstein & M. Berger, 2 Weinstein's Evidence ¶ 408[04], at 408-31 (1992).

Advisory Committee's Notes to Amendment to
Rule 408 Effective October 1, 2013

Rule 408 of the Alabama Rules of Evidence was identical to Federal Rule 408 until the federal rule was amended in 2006. Rule 408, Ala. R. Evid., has been amended to incorporate some of, but not all, the changes made to the federal rule.

First, the text of Rule 408 has been edited and rearranged in the same fashion as the federal rule. These changes were made in an effort to make the rule easier to read and understand and are not substantive.

Second, two of three changes made to Federal Rule 408 are adopted. Like Federal Rule 408, the amendment provides that compromise evidence "is not admissible on behalf of any party." Thus, Rule 408 clearly provides that compromise evidence is excluded even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. This language is added to keep Alabama's rule consistent with the federal rule, but it is not intended to effect any change in existing Alabama law. *See*, *e.g., Northwestern Mut. Life Ins. Co. v. Sheridan*, 630 So. 2d 384, 389 (Ala. 1993) (party could not admit portions of a letter it had sent to opposing party that constituted an offer of compromise); *Glaze v. Glaze*, 477 So. 2d 435, 436 (Ala. Civ. App. 1985) (excluding evidence of defendant's self-serving offer of settlement); and *Kelly v. Brooks,* 25 Ala. 523 (1854) (excluding evidence of plaintiff's own offer to submit dispute to a panel). In addition, if this language were omitted from Ala. R. Evid. 408, it might lead to unintended confusion as to whether the omission meant that a change in Alabama law was intended.

The amendment also incorporates language from the federal rule prohibiting the use of negotiation conduct or statements when offered "to impeach through a prior inconsistent statement or contradiction." Although impeachment by prior inconsistent statement or contradiction could technically be considered an "other purpose" for using compromise

evidence, it is believed that allowing such broad impeachment would, in effect, swallow the rule and discourage parties from engaging in frank and open discussions.

This amendment does not incorporate all the changes made to Federal Rule 408. Two differences should be noted. First, Federal Rule 408 allows the admission of evidence of settlement conduct or statements in a criminal case in one situation -- where "the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative or enforcement authority." Fed. R. Evid. 408(a)(2). This criminal-case exception for the use of evidence of settlement conduct or statements is rejected. Historically, the exclusionary rule embodied in Alabama's Rule 408 has been applied to exclude compromise evidence in criminal cases. See *Hodges v. State*, 570 So. 2d 1252, 1258 (Ala. Crim. App. 1989) (trial court properly excluded testimony regarding attempt by theft victim to work out repayment with accused); *Strickland v. State*, 40 Ala. App. 413, 416, 115 So. 2d 273, 276 (1959) ("Evidence of civil settlements adduced by the State is not admissible over objection in criminal trials); and 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 188.04(1) (6th ed. 2009) ("Such settlement negotiations have been excluded whether offered for or against the accused."). Alabama caselaw has not recognized a criminal-case exception for settlement conduct or statements made in civil cases brought by government agencies, and it is felt that recognizing such an exception is unwarranted because it would discourage settlement discussions in such cases.

A second change made to Federal Rule 408 is rejected. The 2006 amendment to Federal Rule 408 deleted, as superfluous, the following sentence: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." This sentence has been retained in Alabama's Rule 408 as a precaution against frivolous argument.

Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d.