04-EV-011

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To Rules_Comments@ao.uscourts.gov
cc
bcc
Subject Comment on proposed amendments to FRE 408

Dear Mr. McCabe:

I am attaching a letter that contains a number of comments on the proposed amendments to Federal Rule of Evidence 408. I have also sent hard copy of the letter, which I hope you will receive on or before the February 15 deadline.

Please note that a diverse group of law professors have joined my letter.

I hope you will have an opportunity to consider my comments. If you have any questions, don't hesitate to contact me.

David Leonard

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Letter re FRE 408.doc

February 9, 2005

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Amendments to Federal Rule of Evidence 408

Dear Mr. McCabe:

Thank you for providing an opportunity to comment on proposed amendments to the Federal Rules of Evidence. I have several comments about the proposed amendments to Rule 408 (Compromise and Offers to Compromise). Although I serve as Co-Chair of the ABA Criminal Justice Section Committee on Rules of Criminal Procedure and Evidence, I write in my individual capacity. The other individuals joining me in this letter also speak on their own behalf.

Proposal to make evidence of "conduct or statements made in compromise negotiations" inadmissible only in civil cases

This proposed amendment appears to have been offered in deference to Justice Department arguments that statements of fault can be critical evidence of guilt in subsequent criminal litigation. Hon. Jerry E. Smith, Chair, Advisory Committee on Evidence Rules, Report of the Advisory Committee on Evidence Rules (May 15, 2004), at 2 ("Smith Report"). The amendment would affect only the admissibility of conduct or statements made during compromise negotiations. Evidence of offers or acceptance of offers to compromise would be inadmissible in both civil and criminal cases.

There is conflicting case law on the issue addressed by the proposed amendment. The Advisory Committee Note cites *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994), which held that statements made in civil settlement negotiations are not barred in subsequent criminal prosecutions. Other cases have reached similar conclusions. *See, e.g., United States v. Logan*, 250 F.3d 350, 366-367 (6th Cir. 2001) (in prosecution for securities violations, evidence of an earlier settlement agreement and reprimand disposing of administrative action, as well as related evidence, was admissible); *Manko v. United States*, 87 F.3d 50, 54-55 (2d Cir. 1996) (holding that "[t]he policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient ... to outweigh the need for accurate determinations in criminal cases where the stakes are higher"); *United States v. Gonzales*, 748 F.2d 74, 77-78 (2d Cir. 1984) (in prosecution for wire and mail fraud, it was permissible to admit evidence that

defendants admitted forgery during negotiations for settlement of a potential civil claim; the justification for exclusion in civil actions does not apply to criminal cases, where "[t]he public interesting the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes"); *United States v. Cooper*, 283 F. Supp. 2d 1215, 1227-1228 (D. Kan. 2003) (holding that Rule 408 applies only to evidence offered in civil cases).

Other courts have held that the exclusionary rule applies in criminal cases. *See, e.g., United States v.* Bailey, 327 F.3d 1131, 1143-1147 (10th Cir. 2003) (reviewing conflicting case authority and concluding that the rule applies to both civil and criminal cases, "although the question is a very close one"; "[w]e reach this conclusion for essentially the same reasons stated by those courts: the Federal Rules of Evidence apply generally to both civil and criminal proceedings; nothing in Rule 408 explicitly states that it is inapplicable to criminal proceedings; the final sentence is arguably unnecessary if the Rule does not apply to criminal proceedings at all; and the potential prejudicial effect of the admission of evidence of a settlement can be more devastating to a criminal defendant than to a civil litigant"; *id.* at 1146); *United States v.* Meadows, 598 F.2d 984, 988-989 (5th Cir. 1979) (court assumed that the rule applies "to govern the admission of related civil settlement negotiations in a criminal trial; rule did not apply to facts of case, however, because discussions occurred during informal investigation); *United States v. Skeddle*, 176 F.R.D. 254, 255-256 (N.D. Ohio 1997) (in prosecution of former corporate executives for fraud, money laundering, and tax evasion, evidence of statements made in the course of negotiations to settle a civil dispute was inadmissible; the court found the question "straightforward," and noted that "[n]othing in Rule 408 limits its application to civil litigation that was preceded by or included settlement negotiations"). In addition, a number of treatises take the position that efforts to settle civil cases should be excluded from later criminal prosecutions unless the settlement effort was made for the purpose of interfering with a criminal prosecution. *See, e.g.*, 2 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 135, at 91 (2d ed. 1994) (stating that Rule 408 should be read to exclude "statements made by a person allegedly guilty of a criminal act in an effort to compromise *civilly* with the victim of the alleged crime" from any subsequent criminal prosecution); 23 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5306, at 217 (1980) (stating that "[t]here is no reason not to apply the rule ... unless the effort to settle with the victim is intended to interfere with the criminal prosecution..."). My own treatise volume takes the same basic position. David P. Leonard, The New Wigmore: A Treatise on Evidence: Selected Rules of Limited Admissibility § 3.7.3 (rev. ed. 2002) ("Leonard").

The current language of Rule 408 does not resolve the issue. Therefore, an amendment would be useful. However, I do not believe that the Advisory Committee has shown sufficient need for the evidence in subsequent criminal litigation. In particular, the Advisory Committee has not addressed how the potential admissibility of conduct and statements in later criminal cases might affect the settlement of civil actions. The possibility of criminal prosecution is hardly remote in many cases, and a civil party's counsel certainly would be obligated to inform her client that statements made during compromise negotiations would not be excluded from a subsequent criminal trial. The *Skeddle* court, in fact, took note of this possible effect, reporting that defendants asserted that they would not have held the discussions to compromise the civil

dispute had they known that summaries of their interviews would be turned over to government investigators. 176 F.R.D. at 256.

The proposed amendment could have a substantial chilling effect in certain types of disputes that often lead to criminal prosecution. There are an increasing number of circumstances in which civil actions are closely linked with criminal prosecutions. In these situations, the criminal sanction works to ensure compliance with the civil duty. Although antitrust and some forms of intellectual property cases (especially those involving high technology) come to mind immediately, there are many others. Both the United States and Virginia, for example, provide for criminal prosecution of parents who fail to pay adjudged child support. 18 U.S.C. § 228 (a potential felony); Va. Code § 20-61 (2004). With the revised Rule 408, a lawyer would be loath to engage in settlement discussions for fear evidence of such efforts, including statements made in the course of discussions, would be used in related criminal prosecution. I think it is also useful to keep in mind that although Rules amendments strictly speaking amend only the Federal Rules, such amendments affect the many states that have adopted codes based on the Federal Rules. Whether federal or state, the proposed amendment likely would make competent counsel far less likely to engage in settlement in many types of civil cases. At the very least, it would seem appropriate for the Committee to look further into this matter.

Another reason for concern about the proposed amendment is the relationship of Rule 408 to Rule 801 (d)(2)(C) & (D). Attorneys who make statements during compromise discussions may do so with or without their clients present. Counsel often discourage their clients from participating directly in discussions, believing that lawyers do a better job of conflict resolution than clients. Because counsel must be acting with the authorization of their clients and in the scope of their representation, their statements may qualify as admissions by clients. The possibility that lawyer statements may be admissible against clients in subsequent criminal cases may chill lawyers in their civil representation, make civil case lawyers witnesses against their clients in criminal proceedings, and result in their inability to continue to represent their clients in any proceedings. The negative impact of the proposed amendment on lawyer-client relations outweighs the beneficial effect of making evidence of limited probative value admissible in criminal cases.

Also, it is unclear under the proposed amendment whether a negotiator's statement of fault made "hypothetically" or "without prejudice" would be admissible in subsequent criminal litigation. At one time, the practice in England was only to exclude statements of fact made under these formal conditions. If the amendment to Rule 408 could be avoided by using such language, the rule could well become a tool for crafty counsel and a trap for the unwary.

Finally, although the proposed amendment appears to authorize admission of any conduct or statements made during civil compromise efforts when offered in subsequent criminal litigation, there is some indication that the Advisory Committee intended only "statements of fault." *Compare* Smith Report, *supra*, at 2 ("[t]he proposed amendment provides that statements of fault made in the course of settlement negotiations would not be barred by Rule 408 in a subsequent criminal case") *with* Proposed Advisory Committee Note ("the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement

negotiations when offered in a criminal case"). Most likely, the Advisory Committee's intention is to authorize admission of any statements or conduct (including, for example, a neutral statement about the circumstances surrounding the events at issue), but if this was not the Committee's intention, the rule should be clarified.

In sum, I do not believe that the Advisory Committee has sufficiently considered either the underlying policy questions or the potential implications of the proposed amendment.

Proposal to clarify Rule 408 to make clear that compromise evidence is not admissible to impeach a witness by contradiction or prior inconsistent statement

There is conflicting case law concerning whether compromise evidence is only admissible to prove "bias or prejudice of a witness" (one of the specific purposes currently listed in the rule), or may be admitted also to impeach by contradiction or prior inconsistent statement. *See* Leonard, *supra*, §3.8.2 (citing cases). Courts excluding the evidence when offered for the latter purposes generally do so because they believe admission would chill compromise discussion. I believe the Advisory Committee has made an appropriate choice in proposing to exclude compromise evidence when offered to impeach by contradiction or by prior inconsistent statement.

My only reservation is that explicit reference to impeachment by contradiction and prior inconsistent statement in Rule 408 rule might be interpreted to mean that evidence of certain other types of evidence governed by Article IV (including evidence of subsequent remedial measures, payment of medical expenses, and criminal pleas and plea bargaining statements) is admissible for those purposes. While true under some rules, it is not the case under others. To avoid misunderstanding of the Advisory Committee's intentions, I suggest adding a sentence to the Advisory Committee's Note indicating that the amendment is intended to address a special problem with compromise evidence, and that there is no intent to affect other rules.

Proposal to exclude compromise evidence when offered either against or on behalf of the person who made the statement or offer

The Advisory Committee proposes to resolve a conflict among the courts over when a party may offer in evidence her own efforts to compromise. There is little case authority on the question. A few courts have held that the evidence should be excluded regardless of who offers it. *See, e.g., Ward v. Allegheny Ludlum Steel Corp.*, 560 F.2d 579, 581 n.6 (3d Cir. 1977). Others have held that the rule does not exclude the evidence. *See, e.g., Crues v. KFC Corp.*, 768 F.2d 230, 233-234 (8th Cir. 1985) (holding that the rule is designed to exclude evidence offered to show the liability of the offeror, so evidence offered on behalf of the offering party is not within the exclusionary principle).

I am uncertain about whether settlement would be deterred if a party were permitted to offer evidence of its own compromise efforts. In fact, I have argued that "knowing that a settlement offer will be admissible might even enhance a clever party's incentive to make settlement offers because the party will sense that she will look reasonable in the eyes of the jury." Leonard,

supra, § 3.7.6, at 402. But I have also noted that "the clever party's settlement behavior might be geared toward later trial tactics rather than honest and good faith settlement of a disputed claim. This could, in turn, distort not just the settlement discussions, but the jury's effort to arrive at a determination of truth." *Id.* On balance, the Advisory Committee has most likely reached the most appropriate conclusion in proposing to make clear that Rule 408 bars a party from offering evidence of its own settlement activity as well as that of its adversary. I am also persuaded by the Advisory Committee's statement that if the evidence were to be admissible at the behest of the party who made the offer or statement, it would often have to come in through the testimony of attorneys, which would raise problems of potential disqualification.

Of course, in many cases Rule 408 would not be needed to bar evidence of a party's own compromise behavior because the hearsay rule would exclude it.

Proposed changes to make the rule "easier to read and apply"

The Advisory Committee proposal also reorganizes the rule "to make it easier to read and apply." Smith Report, *supra*, at 4. As part of its effort in this respect, the Advisory Committee proposes eliminating the sentence, "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." Because this sentence is not necessary (the Advisory Committee Note calls it "superfluous"), its excision is justifiable. I support this proposed amendment, as well as the other proposed stylistic changes.

Once again, I appreciate the opportunity to comment on the proposed amendment to Federal Rule of Evidence 408.

Sincerely,

David P. Leonard
Professor of Law and
William M. Rains Fellow

Please see attached list of law professors who join me in this letter.

The following individuals, speaking in their individual capacity, agree with the substance of the above letter and wish to join in it:

David E. Aaronson
Professor of Law and Director, Trial Practice Program
Washington College of Law
American University

Charles W. Adams
Professor of Law
University of Tulsa College of Law

Craig R. Callen
Professor of Law
Michigan State University College of Law

Clifford S. Fishman
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