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Mr. Peter G. McCabe, Secretary
Administrative Office of the Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Comment on Proposed Amendment to Fed. R. Evid. 408

Dear Mr. McCabe:

Thank you for the opportunity to comment on the pending proposed amendments to the Federal Rules of Evidence. I shall confine my comments to the Rule 408 proposal, as it makes several important policy choices.

1. Application to Mediation Unaddressed

First, the proposed Rule does not address whether actions or statements made in mediation are protected by the Rule. It is not clear to me that the Rule would protect such evidence, though I believe protection is desirable for the same reasons that underlie 408 in general. Of course, this matter may also be left to development of the common law of privilege or to enacted law regarding confidentiality. But in Maryland's 1994 evidence codification, we followed Vermont in explicitly adding protection for such evidence in order to encourage free discussion in court-sponsored mediation. A copy of the Maryland Rule, 5-408, is attached. Several other Maryland Rules complement 5-408 in this respect: 9-205, 17-102, 17-104, and 17-109 (copies also attached).

2. Impeachment by Prior Inconsistent Statement Precluded

Second, the proposed Rule would explicitly exclude use of 408(a)(1) and (2) evidence when offered "to impeach" as "a prior inconsistent statement or contradiction." This makes good sense, else the entire thrust of the Rule may be circumvented. Maryland's Rule 5-408, following Alaska's lead, incorporated a similar provision, but placed it as a limitation on the "other purposes" section of the Rule. To my knowledge, the Rule has worked well.

3. Admission of Civil Settlements or Civil Negotiations in Related Criminal Proceedings

Third, the proposed Rule directly addresses an issue unaddressed by the existing Rule: to what extent does Rule 408 preclude the admissibility in criminal proceedings of relevant civil settlements and negotiations? This question would foreseeably arise, for example, as to environmental torts that are also crimes, antitrust violations, motor vehicle accidents, sexual assault, and child abuse. The proposal would exclude use of 408(a)(1) evidence when offered in a criminal case but leave exclusion of 408(a)(2) evidence to the court's discretion under Rule 403 in criminal cases. Thus, the proposed Rule tips toward admissibility, in a criminal case, of 408(a)(2) evidence, conduct or statements made in civil compromise negotiations, but totally excludes 408(a)(1) evidence. The reasons given in the Committee Note for the distinction between the two types of evidence are that the 408(a)(1) evidence is less probative, and that admitting it could discourage settlement of civil claims.[1]

But potentially admitting evidence of 408(a)(2) evidence can also discourage settlement of civil claims. To protect their clients, counsel will have to retreat to the old practice of speaking hypothetically or "without prejudice." In my view, the Committee's compromise has split the baby in two. The Committee ought instead to decide the policy question head-on: either exclude all 408 evidence in criminal proceedings or permit the admission of all 408 evidence, subject to possible exclusion under 403.

The latter choice would be to follow the judgment call in *Prewitt*, cited in the Committee Note, that the public interest in prosecution of crimes trumps the considerations regarding civil settlements underlying Rule 408. The Seventh Circuit in *Prewitt* relied on the Second Circuit's decisions in *United States v. Gonzalez*, 748 F.2d 74, 78 (2d Cir. 1984) and *United States v. Baker*, 926 F.2d 179 (2d Cir. 1991). More recently, the Sixth Circuit has agreed with this position, *United States v. Logan*, 250 F.3d 350, 366-67 (6th Cir. 2001), and the Second Circuit has reaffirmed it. *Manko v. United States*, 87 F.3d 50, 54-55 (2d Cir. 1996) (error to exclude evidence offered by accused of his apparently favorable settlement with the IRS).

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[1] The Committee Note states:

> But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter defendants from settling a civil claim, for fear of evidentiary use in a subsequent criminal action. *See, e.g.*, Fishman, *Jones on Evidence, Civil and Criminal*, § 22:16 at 199, n.83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

But the question is not an easy one. Reasonable minds can differ, and Maryland's highest court, for example, went the other way entirely, excluding all Rule 5-408 evidence in related civil actions. Indeed, probably the majority of cases and commentators have taken this view. *See United States v. Bailey*, 327 F.3d 1131, 1144-46 (10th Cir. 2003); *United States v. Graham*, 91 F.3d 213, 218 (D.C. Cir. 1996) (dictum); *United States v. Hays*, 872 F.2d 582, 588-89 (5th Cir. 1989); *United States v. Meadows*, 598 F.2d 984, 988-89 (5th Cir. 1979); *United States v. Thomas*, 15 Fed. R. Evid. Serv. 167, 170 n.4 (4th Cir. 1984) (per curiam) (unpublished); *Ecklund v. United States*, 159 F.2d 81, 83-85 (6th Cir. 1947); *United States v. Skeddle*, 176 F.R.D. 254 (N.D. Ohio 1997) [note that *Ecklund* and *Skeddle* have been overruled by *Logan* on this point]; *State v. Gano*, 988 P.2d 1153, 1159-60 (Haw. 1999); 2 MCCORMICK ON EVIDENCE § 266 at 198 (5th ed. 1999) (Strong, ed.); 2 MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 138 at 104-05 (criticizing *Gonzalez*); 2 WEINSTEIN'S FEDERAL EVIDENCE § 408.02 [5] (2004) (McLaughlin, ed.). *See also United States v. Peed*, 714 F.2d 7, 9-10 (4th Cir. 1983) (accused's offer to return stolen dolls to victim, if she dropped charges, was "an attempt to avoid criminal prosecution, not . . . an effort to resolve a civil claim" and was not inadmissible under Fed. R. Evid. 408).

The question may be seen as which takes precedence: encouragement of settlement of civil claims or an all-out pursuit of criminal justice, leaving exclusion of unreliable or unfairly prejudicial evidence to be achieved via Rule 403. On the other hand, there are those who argue that allowing a perpetrator and a victim to settle an issue "often produces better results than criminal sanctions." 2 MUELLER & KIRKPATRICK, § 138 at n.17.

I believe the question is a difficult one. My comment is that the compromise in the proposed Rule, by having a foot in each court, achieves neither full encouragement of settlement nor full-out prosecutions.

Very truly yours,

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Encl.

Maryland Rule 5-408. COMPROMISE AND OFFERS TO COMPROMISE

(a) The following evidence is not admissible to prove the validity, invalidity, or amount of a civil claim in dispute:.

(1) Furnishing or offering or promising to furnish a valuable consideration for the purpose of compromising or attempting to compromise the claim or any other claim;.

(2) Accepting or offering to accept such consideration for that purpose; and.

(3) Conduct or statements made in compromise negotiations or mediation.

(b) This Rule does not require the exclusion of any evidence otherwise obtained merely because it is also presented in the course of compromise negotiations or mediation.

(c) Except as otherwise provided by law, evidence of a type specified in section (a) of this Rule is not excluded under this Rule when offered for another purpose, such as proving bias or prejudice of a witness, controverting a defense of laches or limitations, establishing the existence of a "Mary Carter" agreement, or proving an effort to obstruct a criminal investigation or prosecution, but exclusion is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement.

(d) When an act giving rise to criminal liability would also result in civil liability, evidence that would be inadmissible in a civil action is also inadmissible in a criminal action based on that act.

Maryland Rule 9-205. MEDIATION OF CHILD CUSTODY AND VISITATION DISPUTES

(a) Scope of Rule. This Rule applies to any case under this Chapter in which the custody of or visitation with a minor child is an issue, including an initial action to determine custody or visitation, an action to modify an existing order or judgment as to custody or visitation, and a petition for contempt by reason of non-compliance with an order or judgment governing custody or visitation.

(b) Duty of court. (1) Promptly after an action subject to this Rule is at issue, the court shall determine whether:

(A) mediation of the dispute as to custody or visitation is appropriate and would likely be beneficial to the parties or the child; and.

(B) a properly qualified mediator is available to mediate the dispute.

(2) If a party or a child represents to the court in good faith that there is a genuine issue of physical or sexual abuse of the party or child, and that, as a result, mediation would be inappropriate, the court shall not order mediation.

(3) If the court concludes that mediation is appropriate and feasible, it shall enter an order requiring the parties to mediate the custody or visitation dispute. The order may stay some or all further proceedings in the action pending the mediation on terms and conditions set forth in the order.

Cross-References. -- With respect to subsection b (2) of this Rule, see Rule 1-341 and Rules 3.1 and 3.3 of the Maryland Rules of Professional Conduct.

(c) Scope of mediation. (1) The court's initial order may not require the parties to attend more than two mediation sessions. For good cause shown and upon the recommendation of the mediator, the court may order up to two additional mediation sessions. The parties may agree to further mediation.

(2) Mediation under this Rule shall be limited to the issues of custody and visitation unless the parties agree otherwise in writing.

(d) If agreement. If the parties agree on some or all of the disputed issues, the mediator may assist the parties in making a record of the points of agreement. The mediator shall provide copies of any memorandum of points of agreement to the parties and their attorneys for review and signature. If the memorandum is signed by the parties as submitted or as modified by the parties, a copy of the signed memorandum shall be sent to the mediator, who shall submit it to the court.

Committee note. -- It is permissible for a mediator to make a brief record of points of

agreement reached by the parties during the mediation and assist the parties in articulating those points in the form of a written memorandum, so that they are clear and accurately reflect the agreements reached. Mediators should act only as scribes recording the parties' points of agreement, and not as drafters creating legal memoranda.

(e) If no agreement. If no agreement is reached or the mediator determines that mediation is inappropriate, the mediator shall so advise the court but shall not state the reasons. If the court does not order mediation or the case is returned to the court after mediation without an agreement as to all issues in the case, the court promptly shall schedule the case for hearing on any pendente lite or other appropriate relief not covered by a mediation agreement.

(f) Confidentiality. Confidentiality of mediation communications under this Rule is governed by Rule 17-109.

Cross-References. -- For the definition of "mediation communication," see Rule 17-102 (e).

(g) Costs. Payment of the compensation, fees, and costs of a mediator may be compelled by order of court and assessed among the parties as the court may direct. In the order for mediation, the court may waive payment of the compensation, fees, and costs.

Cross-References. -- For the qualifications and selection of mediators, see Rule 17-104.

CIRCUIT COURT PROCEEDINGS

Maryland Rule 17-102. DEFINITIONS

In this Chapter, the following definitions apply except as expressly otherwise provided or as necessary implication requires:

(a) Alternative dispute resolution. "Alternative dispute resolution" means the process of resolving matters in pending litigation through a settlement conference, neutral case evaluation, neutral fact-finding, arbitration, mediation, other non-judicial dispute resolution process, or combination of those processes.

Committee note. -- Nothing in these Rules is intended to restrict the use of consensus-building to assist in the resolution of disputes. Consensus-building means a process generally used to prevent or resolve disputes or to facilitate decision making, often within a multi-party dispute, group process, or public policy-making process. In consensus-building processes, one or more neutral facilitators may identify and convene all stakeholders or their representatives and use techniques to open communication, build trust, and enable all parties to develop options and determine mutually acceptable solutions.

(b) Arbitration. "Arbitration" means a process in which (1) the parties appear before one or more impartial arbitrators and present evidence and argument supporting their respective positions, and (2) the arbitrators render a decision in the form of an award that is not binding, unless the parties agree otherwise in writing.

Committee note. -- Under the Federal Arbitration Act, the Maryland Uniform Arbitration Act, at common law, and in common usage outside the context of court-referred cases, arbitration awards are binding unless the parties agree otherwise.

(c) Fee-for-service. "Fee-for-service" means that a party will be charged a fee by the person or persons conducting the alternative dispute resolution proceeding.

(d) Mediation. "Mediation" means a process in which the parties work with one or more impartial mediators who, without providing legal advice, assist the parties in reaching their own voluntary agreement for the resolution of the dispute or issues in the dispute. A mediator may identify issues and options, assist the parties or their attorneys in exploring the needs underlying their respective positions, and, upon request, record points of agreement reached by the parties. While acting as a mediator, the mediator does not engage in arbitration, neutral case evaluation, neutral fact-finding, or other alternative dispute resolution processes and does not recommend the terms of an agreement.

(e) Mediation communication. "Mediation communication" means speech, writing, or conduct made as part of a mediation, including communications made for the purpose of considering, initiating, continuing, or reconvening a mediation or retaining a mediator.

(f) Neutral case evaluation. "Neutral case evaluation" means a process in which (1) the parties, their attorneys, or both appear before an impartial person and present in summary fashion the evidence and arguments supporting their respective positions, and (2) the impartial person renders an evaluation of their positions and an opinion as to the likely outcome of the dispute or issues in the dispute if the action is tried.

(g) Neutral fact-finding. "Neutral fact-finding" means a process in which (1) the parties, their attorneys, or both appear before an impartial person and present evidence and arguments supporting their respective positions as to particular disputed factual issues, and (2) the impartial person makes findings of fact as to those issues. Unless the parties otherwise agree in writing, those findings are not binding.

(h) Settlement conference. "Settlement conference" means a conference at which the parties, their attorneys, or both appear before an impartial person to discuss the issues and positions of the parties in the action in an attempt to resolve the dispute or issues in the dispute by agreement or by means other than trial. A settlement conference may include neutral case evaluation and neutral fact-finding, and the impartial person may recommend the terms of an agreement.

Maryland Rule 17-104. QUALIFICATIONS AND SELECTION OF MEDIATORS

(a) Qualifications in general. To be designated by the court as a mediator, other than by agreement of the parties, a person must:

(1) unless waived by the court, be at least 21 years old and have at least a bachelor's degree from an accredited college or university;.

Committee note. -- This subsection permits a waiver because the quality of a mediator's skill is not necessarily measured by age or formal education.

(2) have completed at least 40 hours of mediation training in a program meeting the requirements of Rule 17-106;.

(3) complete in every two-year period eight hours of continuing mediation-related education in one or more of the topics set forth in Rule 17-106;.

(4) abide by any standards adopted by the Court of Appeals;.

(5) submit to periodic monitoring of court-ordered mediations by a qualified mediator designated by the county administrative judge; and.

(6) comply with procedures and requirements prescribed in the court's case management plan filed under Rule 16-202 b. relating to diligence, quality assurance, and a willingness to accept a reasonable number of referrals on a reduced-fee or pro bono basis upon request by the court.

(b) Additional qualifications -- Child access disputes. To be designated by the court as a mediator with respect to issues concerning child access, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;.

(2) have completed at least 20 hours of training in a family mediation training program meeting the requirements of Rule 17-106; and.

(3) have observed or co-mediated at least eight hours of child access mediation sessions conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

(c) Additional qualifications -- Business and Technology Case Management Program cases. To be designated by the court as a mediator of Business and Technology Program cases, other than by agreement of the parties, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;.

(2) within the two-year period preceding application for approval pursuant to Rule 17-107, have completed as a mediator at least five non-domestic circuit court mediations or five non-domestic non-circuit court mediations of comparable complexity (A) at least two of which are among the types of cases that are assigned to the Business and Technology Case Management Program or (B) have co-mediated, on a non-paid basis, an additional two cases from the Business and Technology Case Management Program with a mediator already approved to mediate these cases;.

(3) agree to serve as co-mediator with at least two mediators each year who seek to meet the requirements of subsection (c)(2)(B) of this Rule; and.

(4) agree to complete any continuing education training required by the Circuit Administrative Judge or that judge's designee.

(d) Additional qualifications -- Marital property issues. To be designated by the court as a mediator in divorce cases with marital property issues, the person must:

(1) have the qualifications prescribed in section (a) of this Rule;.

(2) have completed at least 20 hours of skill-based training in mediation of marital property issues; and.

(3) have observed or co-mediated at least eight hours of divorce mediation sessions involving marital property issues conducted by persons approved by the county administrative judge, in addition to any observations during the training program.

Maryland Rule 17-109. MEDIATION CONFIDENTIALITY

(a) Mediator. Except as provided in sections (c) and (d) of this Rule, a mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(b) Parties. Subject to the provisions of sections (c) and (d) of this Rule, (1) the parties may enter into a written agreement to maintain the confidentiality of all mediation communications and to require any person present or otherwise participating in the mediation at the request of a party to maintain the confidentiality of mediation communications and (2) the parties and any person present or otherwise participating in the mediation at the request of a party may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.

(c) Signed document. A document signed by the parties that reduces to writing an agreement reached by the parties as a result of mediation is not confidential, unless the parties agree in writing otherwise.

Cross-References. -- See Rule 9-205 (d) concerning the submission of a memorandum of the points of agreement to the court in a child access case.

(d) Permitted disclosures. In addition to any disclosures required by law, a mediator and a party may disclose or report mediation communications to a potential victim or to the appropriate authorities to the extent that they believe it necessary to help:

(1) prevent serious bodily harm or death, or.

(2) assert or defend against allegations of mediator misconduct or negligence.

Cross-References. -- For the legal requirement to report suspected acts of child abuse, see Code, Family Law Article, § 5-705.

(e) Discovery; admissibility of information. Mediation communications that are confidential under this Rule are privileged and not subject to discovery, but information otherwise admissible or subject to discovery does not become inadmissible or protected from disclosure solely by reason of its use in mediation.