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Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Rule 408 of the Federal Rules of Evidence

Dear Secretary:

I am writing in my capacity as a criminal defense practitioner to offer the following comments regarding proposed amendments to Rule 408 of the Federal Rules of Evidence.

The Advisory Committee proposes to prohibit the use of settlements and statements made during settlement negotiations as prior inconsistent statements for impeachment purposes. This is a wise decision insofar as it protects and promotes the settlement process, as explained by the Committee in its Note and as set forth in detail in Fred S. Hjelmeset, *Impeachment of Party by Prior Inconsistent Statement in Compromise Negotiations: Admissibility Under Federal Rule of Evidence 408*, 43 CLEV. ST. L. REV. 75 (1995).

The Committee also proposes to clarify that the prohibition against using compromises or offers to compromise to prove a claim applies in criminal as well as civil cases. This is also a wise decision, for the reasons cited by the Committee.

Unfortunately, these two improvements to the Rule are seriously undercut by the Committee's proposal to limit the prohibition against using "conduct or statements made in compromise negotiations" to civil cases. The same reasons that weigh in favor of this prohibition in civil cases weigh equally if not more strongly in favor of extending the prohibition to criminal cases.

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As the Committee Note explains, the two reasons justifying Rule 408 are: (1) evidence of statements made pursuant to settlement negotiations is not a reliable indicator of guilt or fault; and (2) if such statements are not protected, then civil settlements will be seriously discouraged.

The Committee appears to assume without any concrete evidence that statements of fault made during settlement negotiations are more reliable indicators of guilt than is the fact of settlement itself. This assumption overlooks the reality that such statements may be made merely to encourage settlement, or may be demanded as a condition of settlement. Given this fact, and given the fact that the result of a wrongful criminal conviction (i.e., imprisonment and numerous collateral consequences) based on a statement of fault is far more onerous than the result of a wrongful civil judgment, there is no rational basis for favoring civil litigants in the manner proposed here.

The Advisory Committee Report indicates that this amendment has been proposed "in deference to the Justice Department's arguments that [statements of fault made during settlement negotiations] can be critical evidence of guilt." As noted above, I respectfully disagree with the Justice Department's faith in the evidentiary value of such statements. Additionally, even if they were reliable, there is ample precedent (in, for example, statutory privileges and the exclusionary rule) for excluding reliable evidence from criminal trials on public policy grounds. The Justice Department's desire to use all evidence it deems critical in criminal trials should not alone be deemed sufficient to override the strong policy interests underlying Rule 408. And the public's interest in promoting civil settlements does not necessarily conflict with the public's interest in prosecuting crimes, as the latter interest surely does not include a desire to promote wrongful convictions.

A final note: often the employee suspected of embezzlement will hire a civil lawyer to answer his or her employer's civil claim. That civil lawyer may not fully understand the criminal consequences of statements made during settlement negotiations. By allowing admission of these statements in a future criminal case, the proposed rule puts an additional burden on civil lawyers to anticipate and understand how their representation in a civil matter might leave their clients vulnerable to future criminal prosecution.

Thank you for this opportunity to comment on this proposed rule.

Very truly yours,

DANIEL E. MONNAT

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