04-EV-014

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TO: The Advisory Committee on Evidence Rules

RE: Comments on Proposed Amendments, with particular reference to Rules 408 and 609

I write to comment on the proposed amendments to the Federal Rules Evidence, and particularly the proposed amendments to Rules 408 and 609.[1] In my judgment, the proposed amendments are inadequately considered, and should not be sent forward without substantial further study, if ever. My comments are in accord with those of Judge Weinstein, and others, who have questioned the soundness of these proposals. Particularly with respect to Rule 408, the proposed amendments seem very likely to degrade the quality of the truth-seeking process, and to undermine the important underlying policies of encouraging candid and conciliatory efforts to settle litigated matters and discouraging sharp practices of chicanery and subterfuge in this context.

Rule 408

The proposed amendment is described as making three changes to the rule: (1) excluding its application in criminal cases to conduct or statements made in the course of compromise negotiations in a civil matter, as distinguished from the fact or terms of the compromise itself; (2) clarifying the applicability of the rule to impeachments by contradiction or self-contradiction;

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[1] The other two proposed amendments, to Rules 404 and 606, are relatively more innocuous but still unnecessary, in my opinion. The issues addressed in these amendments have been handled satisfactorily by the case law. No amendment to rule text is required, and could be detrimental, by closing off potentially instructive case law development under both rules. For example, under Rule 404(a), it is perhaps unwise to absolutely close off the possibility, suggested by a case like *Perrin v. Anderson*, 784 F.2d 1040 (10th Cir. 1986), that some civil cases present a situation analogous to that facing a criminal defendant. For these reasons, I would recommend that the Committee not send forward any of the amendments proposed in 2004. This Committee's own history in proposing rules amendments has been one of admirable restraint, which should be followed again this year. Stability is a virtue in procedural rules, which should outweigh all but the most compelling need for a rule amendment.

and (3) forbidding waiver of the rule by the party making the statement or settlement offer. The second of these three is unnecessary and perhaps too rigid; the other two are likely to be harmful.

Rule 408 touches upon a subject of fundamental importance to the operation of the legal system in the United States, at both the federal and state levels. It also is one of the few Federal Rules of Evidence that has not been amended since its original enactment by Congress in 1975, after substantial debates in both the House and the Senate over the provisions of the rule, in which arguments by Executive branch agencies (including the Department of Justice) very similar to those now made by that same Department in support of the proposed amendments were rejected by Congress.[2] Therefore, even if the proposed amendments were well-considered, I would urge the Committee's reticence to endorse a substantive policy choice inconsistent with the one made by the enacting Congress.[3] However, these amendments are not well-considered.

Rule 408 rests on three policies: (1) relevance; (2) encouraging settlement, and (3) discouraging sharp practices. First, neither settlements nor settlement discussions have a high degree of probative value on matters of liability or damages. Second, settlement is an extraordinarily important aspect of our litigation system, accounting for over 90% of dispositions of pending cases, and untold numbers of other disputes that never mature to filed cases. Third, and in order to reinforce the other two objectives, the rule should provide a disincentive to stage "negotiations" in whole or in part for the purpose of extracting damaging "admissions" from the opposing party. Preserving this last feature of the rule was the rationale for selecting a relatively broader rule of exclusion, to avoid creating "a trap for the unwary" Sen. Rep. No. 93-1277, 93d Cong. 2d Sess. 10 (1974).

On the face of Rule 408, there seems little doubt that the enacting Congress assumed its applicability to criminal as well as civil cases. One of the exclusions from the rule given in its last sentence obviously contemplates such applications. Why should criminal cases be different? All of the same policies apply with equal, or perhaps greater, force in that context. Postulating the proffer of such statements in a criminal rather than a civil case does not make them any more reliable or probative than they were before. Attaching potential criminal liability to unguarded

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[2] For a treatment of the Congressional debates, see 23 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5301. The Treasury Department, the EEOC, and the Justice Department had proposed changes that would preserve their option, said to be the common-law rule, to use "factual admissions" made in the context of settlement negotiations. The House accepted that proposal, but the Senate rejected it, and the Conference settled on the Senate version, which added the third sentence of the current rule, to clarify that facts disclosed during settlement discussions could be pursued by other means, but that admissions during those discussions would be excluded.

[3] Rule 408 is one of the Evidence rules that may be considered "substantive," as it rests in part, like the rules of privilege, on a policy of encouraging certain extrinsic activities through policies of evidential exclusion.

statements in settlement discussions discourages settlement even more than attaching civil liability, given the harshness of the criminal sanction. And permitting damaging admissions for use in criminal cases to be extracted from civil settlement discussions would seem to exacerbate the problem of chicanery. The Committee should note that, under the proposed amendment, it is not even clear that the common law rule of excluding statements made hypothetically or "without prejudice" would be restored. As these statements presumably would be offered as party admissions, either personal or vicarious,[4] then they presumably would come in without any foundational showing that they were intended to be factual.[5] The opportunities for ripping even hypothetical statements out of context, and then arguing inferences in the highly charged atmosphere of a criminal trial, are legion, and they will lead to abuses. Furthermore, there is nothing in the proposed rule requiring that the compromise negotiations be conducted by government agents, or even that they be conducted in good faith. Abuse of this rule amendment by the use of shills and all manner of subterfuge and trickery is predictable, and likely if this amendment becomes law.

In the Committee's release of the proposed amendment, it is said that the exclusion of criminal cases from the full operation of Rule 408 is "in deference to the Justice Department's arguments that such statements can be critical evidence of guilt." No further details are given. I fail to see why such arguments should be permitted to outweigh the long-standing and important policies of the rule. There is no explanation of why such evidence, even if "critical" to a finding of guilt, is particularly reliable or probative, as opposed to prejudicial. Obtaining convictions based upon unguarded statements in the context of settlement discussions hardly seems consistent with the public interest in criminal law enforcement, which ultimately is not to ease the prosecutor's path to convictions, but rather is to promote the truthful and just disposition of cases. Part of the rationale for excluding statements made in the context of settlement is that they are unfairly prejudicial. Given their context, they are unlikely to have a high probative value. Indeed, one of the features of the settlement process is an effort to be more conciliatory in order to promote a negotiated resolution. Thus, one method of settlement is to make concessions to the opposing side, rather than adhere to formalistic and legalistic litigating "positions." It is for this

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[4] As Frank Dunham's comment points out, there is nothing in the rule that would prevent the admissibility of settlement discussions among lawyers, who presumably are agents "authorized by the party to make a statement concerning the subject," Fed. R. Evid. 801(d)(2)(C). This would create precisely the same problem as allowing the settlements themselves, as involving negotiating lawyers in testifying against their own clients.

[5] *See* Advisory Committee Note to Rule 801(d)(2)(referring to "[t]he freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness . . . and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge.") *See also, e.g., Mahlandt v. Wild Canid Survival & Research Center, Inc.*, 588 F. 2d 626 (8th Cir. 1978) (no showing of any basis for personal knowledge required). Nor is it even required that the negotiating party actually say anything at all. Conduct, or admissions by silence, may also be used.

reason that evidence law traditionally has assigned lower probative weight to such statements, and rightly so. That factor does not change merely because it is a prosecutor rather than a private litigant who seeks to introduce the statements.

Furthermore, in order to protect the policy objective of encouraging settlement, it is important to have broad and unvarying coverage of the context of subsequent litigation. None of the other privileges and pseudo-privileges (e.g., Rule 407) draws the distinction that is sought to be introduced here. The entire point is that, at the time of the original settlement discussions, the parties may not foresee the potential use of such statements in a future case, be it civil or criminal. By now requiring bargainers to draw those distinctions, and to say nothing that conceivably could be misused in some possible future prosecution, much of the policy of the rule is undermined. Under the proposed amendment, litigants attempting to do what the system encourages them to do now must be more wary than ever, or else fall into a trap for the unwary. It is predictable that they may become so wary that there will be less settlement in all cases, precisely the opposite of the what the rule intends to promote. Note that this effect will apply to all civil and administrative cases, state or federal, and therefore could have a broadly destructive impact. Given the breadth of potential prosecution under vague federal criminal statutes, such as the mail and wire fraud statutes, it is difficulty to imagine any case that would not be covered.

There is virtual unanimity among contemporary commentators on evidence law that the exclusion of criminal cases from Rule 408's coverage is unwise and unjustified. *See*, e.g., Graham, *Handbook of Federal Evidence* § 408.1; 23 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5302; Mueller & Kirkpatrick, *Federal Evidence* § 138 (2d ed.) (also noting the potential for sharp practices). Nor is there anything in the reported cases to suggest that the proposed amendment would serve any important countervailing policy. Most of those cases actually did not require the application of Rule 408, as written. They are a poor foundation for changing the rule.

The one case cited in the proposed Advisory Committee note, *United States v. Prewitt,* 34 F.3d 436 (7th Cir. 1994), does not appear to have required the application of Rule 408 as written. What was involved in the case were two inconsistent statements made to a state investigator, introduced in a subsequent federal criminal trial as damaging admissions that the defendant's use of corporate funds was unauthorized. It does not appear from the facts that the statements in question actually were made in the context of compromise discussions, and therefore Rule 408 was not applicable.[6] Furthermore, there seems to be nothing "critical" about the statements: either the withdrawn funds were applied for personal use or for corporate use; the defendant's inconsistent ex post characterizations had little probative bearing on either the underlying event or his contemporaneous intent; however, they did have a prejudicial effect. Similarly, *United States v. Hauert,* 40 F.3d 197 (7th Cir. 1994), involved a prejudicial use of statements made in the context of an IRS audit to prove wilfulness in a tax evasion case through the abandonment of points raised in connection with certain years under audit. It is not clear that this case was

[6] The same factor is present in *United States v. Logan*, 250 F.3d 350 (6th Cir. 2001).

subject to Rule 408 as written (on the view that an audit is not a compromise negotiation), and it is still not clear whether it would be subject to the rule under the proposed amendment, which necessitates a new distinction between the ultimate fact or terms of compromise, and the preceding compromise negotiations.[7] Most things that end up in a final settlement agreement were articulated during the negotiations. The proposed amendment provides no guidance as to how that distinction is to be applied.

Some of the other existing cases give a preview of future abuses. In *United States v. Bailey*, 327 F.3d 1131 (10th Cir. 2003), the government was permitted to put on one party to the underlying civil dispute to testify to admissions allegedly made by the other, in the course of compromising an intra-firm dispute. This is precisely the type of abuse of the settlement process that was intended to be foreclosed by Rule 408, but will now be encouraged–indeed, multiplied into a systematic pattern of abuse–by the proposed amendment. Sophisticated parties will be made all the more wary by the knowledge that they can not bargain forthrightly with even their business partners, and unsophisticated parties will be entrapped by a staged atmosphere of amicability and conciliation. Neither result serves the public interest or contributes to the just and truthful disposition of criminal trials. The proposed amendment should be rejected, or at least tabled for more careful study.

Rule 609

The proposed amendment to this rule seeks to expand the scope of the *crimen falsi* category of impeachment of witnesses by prior conviction, by allowing qualifying offenses to be characterized by reference to charging documents rather than the elements of the crime. This amendment also is unwise and unjustified. Charging documents are mere allegations; they are not evidence of anything, and often contain more extravagant contentions than can not be proved. Ordinarily, motions to strike such surplusage will not be granted in the original instance case, on the rationale that any prejudice is harmless. The proposed amendment would create that prejudice, retroactively. This hardly seems justified, given the very limited role played by such impeachments, which by definition are collateral to the case at hand.

Impeachments by reference to *crimen falsi* convictions can be particularly prejudicial, as they are not subject to the balancing test otherwise prescribed by Rule 609. Given the alternative basis for impeachment by reference to felony convictions, the only cases affected by this amendment would be either felony convictions that actually are so prejudicial that they would be excluded by the general test, or misdemeanor offenses that do not inherently involve dishonesty. I see no explanation for why these particular categories are thought to justify a rules amendment: the first is obviously an evasion of the prejudice screen; and the second opens up a vast potential for abuse. For example, suppose a misdemeanor conviction for a traffic violation, in which the charging document alleges that the defendant falsely denied guilt. Is this the type of *crimen falsi*

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[7] A similar problem exists with a case like *United States v. Gonzalez*, 748 F.2d 74 (2d Cir. 1984), involving a statement in a document entitled "confession of judgment." Is this the settlement itself, now excluded by Rule 408, or only a "statement," and therefore admissible?

that is sought to be included, without an opportunity to challenge an unfairly prejudicial effect? It would seem so, as nothing else is included in the scope of the proposed amendment.

To the extent that the proposed amendment does not create palpable unfairness, it is likely to create satellite disputes over the reliability of the *crimen falsi* classification. In either case, this amendment is not a worthy subject for this Committee's action. It too should be tabled.

Respectfully submitted,

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