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Subject Comment on Proposed Amendment to FRE 408

I enclose a response to your call for public comment on FRE 408. I am also sending a copy of the same document by fax (which has a letterhead and a signature) but am sending this backup copy by e-mail just in case there is a problem with the fax transmission. Could you possibly write back to me and confirm whether the fax is received by you today? Thank you.

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Rule 408 letter .doc

February 15, 2005

Peter G. McCabe, Secretary
Administrative Office of the U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Dear Mr. McCabe:

I write with three observations on the proposed amendment to Federal Rule of Evidence 408 and its accompanying Advisory Committee Note. As a courtesy to the Committee, I have taken the time to review all of the public comments that were received by the Committee and posted on its website as of noon today, to make sure that I do not waste your time adding comments made by others. The three points listed here have not been made by any of the others whose comments I have been able to review.

1. Experience with the current language of Rule 408 proves that the proposed amendment is *not* sufficiently explicit in attempting to extend its reach to criminal cases.

Three different circuits of the United States Court of Appeals have already concluded that the "plain language" of Rule 408 – *in language that would not be changed by the proposed amendment* – clearly limits its reach to civil trials. Those courts have based this conclusion almost entirely on what they took to be the plain command of the fact that the rule only forbids the use of settlement efforts to prove "liability for or invalidity of the claim or its amount." *E.g.*, *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (agreeing with the Second and Seventh Circuits that "the plain language" of Rule 408 confirms that "it is inapplicable to the civil context" because the rule uses the language "validity" and "claim"); *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) ("The clear reading of this rule suggests that it should apply only to civil proceedings, specifically the language concerning validity and amount of a claim.") And they have done so, it must be remembered, despite the fact that Federal Rule of Evidence 1101(b) *already* explicitly provides that "[t]hese rules apply generally to civil actions and proceedings ... [and] to criminal cases and proceedings."

I most emphatically disagree with those courts in their interpretation of Rule 408, as well as the wisdom of the results they reached. I therefore agree with the Committee's sensible conclusion that Rule 408 should be amended to reject those cases, and to clarify that the rule also operates at criminal trials to exclude evidence of a compromise of a related civil claim, as the Committee professes it intended to do in the proposed Advisory Committee Notes.

But *nothing* has been changed in the language of the proposed amendment to make that intention sufficiently unambiguous, and the amendment would not change *one word* of the portion of the rule that has caused all the trouble! You don't change a rule merely by *claiming* that you have changed it.

What would be changed in the proposed amendment to supposedly reflect the Committee's avowed intention to apply the rule to criminal trials, and to say so even more explicitly than Rule 1101(b), which has already failed to get that point across to some federal courts? There is nothing in the amendment one can point to other than the ambiguous implications of the fact that the amendment would add a clause in Rule 408(a)(2) to provide that *statements* made in compromise negotiations are not admissible "in a *civil* case," while the rest of Rule 408(a) would continue, as it always has, to forbid the use of settlement offers with no explicit reference to either civil or criminal cases.

Obviously the Committee is willing to presume that the reference in 408(a)(2) to "a civil case" will be interpreted by the courts as an implicit but unambiguous indication that the parallel clause of Rule 408(a)(1), which makes no mention of any similar limitation to civil cases, therefore ought to be construed as applying to both civil and criminal cases. That is surely one natural construction of this contrast. But unfortunately it is not the only one. Anyone who took the view of Rule 408 that has already been adopted in the Second, Sixth and Seventh Circuits could (and presumably would) respond with equal force that "unlike Rule 408(a)(2), the clause contained in Rule 408(a)(1) had no need for an explicit statement limiting its reach to civil trials, since that result is *already* plainly accomplished by the fact that the rule only applies to evidence offered to show the *validity* of the *claim*, which (as we long ago held) logically applies only where such evidence is offered at a *civil* trial."

Notwithstanding the clarity of the proposed Committee *Note* to Rule 408, courts cannot be safely counted upon to follow that note as a sufficient basis for disregarding what some of them have *already* proclaimed to be the contrary command of the Rule's "plain language." The Supreme Court is divided over whether the Advisory Committee Notes should be given "some weight" or "no weight" in interpreting the Federal Rules of Evidence, *Williamson v. United States* , 512 U.S. 594, 602 (1994), but at least in some cases "the policy expressed in the statutory text points clearly enough in one direction that it outweighs whatever force the Notes may have." *Id.*

How will the courts rule on this matter? No honest observer can predict with confidence, but there is no good reason to leave such matters to chance. Three federal circuits have *already* concluded (even if mistakenly) that the plain and unambiguous language of Rule 408 applies only at civil trials because it only forbids the use of evidence to show "liability" for a "claim," and *that* language would be totally unchanged by the proposed amendment to what will become Rule 408(a)(1). The "arguable implication" of the four new words proposed for insertion in Rule 408(a)(2) is hardly sufficient clarification of what the Committee says it intends to accomplish, especially when so much is at stake and it is so easy to make the matter explicit. The first sentence of the Rule should be amended to explicitly provide that the evidence described in Rule 408(a)(1) is not admissible on behalf of any party *"at any civil or criminal trial."* At least three federal circuits have already made it obvious that they require something at least that plain to override what they mistakenly perceive to be the clear implications of the language and supposed policy of this rule. If Rule 1101(b) has not done the trick, it is folly to presume that the job can be entrusted to the ambiguous hints arguably buried by negative implication in the parallel structure of proposed Rules 408(a)(1) and 408(a)(2).

2. It would be disastrous to allow the admission at a criminal trial of statements made -- *or allegedly made* -- during efforts to settle a civil claim.

Judge Smith's transmittal letter dated May 15, 2004 states that the Committee voted to allow statements made during settlement talks to be admitted for any purpose in a later criminal trial, "in deference to the Justice Department's arguments that such statements can be critical evidence of guilt."

Of all the public comments on Rule 408 received by the Judicial Conference and posted on its website as of today's date, including every comment received from federal judges and magistrate judges, I note that every one has spoken out against this aspect of the Committee's proposal; not one has said anything in its support. I heartily join that unanimous opposition, for all the compelling reasons ably stated by the others, but wish to add one more critical consideration that has *not* been adequately expressed by the others.

As many others point out, the proposed amendment would pose a powerfully chilling effect on the willingness of civil parties and their lawyers to engage in the robust and uninhibited give-and-take that is common in settlement negotiations. Rule 408, just like traditional privilege law, is designed to give the participants in settlement discussions the assurance that what they say cannot be used against them at a later trial, so that they will "feel uninhibited in their communications." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).[1] In the closely analogous context of the attorney-client privilege, the Supreme Court emphatically rejected a similar proposal to make otherwise confidential statements admissible only if they later

turned out to be of substantial importance to a criminal prosecution, in part because "a client may not know at the time he discloses information to his attorney whether it will later be relevant to a civil or a criminal matter, let alone whether it will be of substantial importance." *Swidler & Berlin v. United States*, 524 U.S. 399, 409 (1998). The same problem just as clearly infects and condemns the Justice Department's proposal to make the admissibility of statements during settlement talks turn entirely upon whether they are later relevant to a criminal case brought against that party. Nobody can routinely predict such matters with confidence. As Justice Breyer has correctly noted, "the complexity of modern federal criminal law, codified in several thousand sections of the United States Code and the virtually infinite variety of factual circumstances that might trigger an investigation into a possible violation of the law, make it difficult for anyone to know, in advance, just when a particular set of statements might later appear (to a prosecutor) to be relevant to some such investigation." *Rubin v. United States*, 525 U.S. 990, __ (1998) (Breyer, J., dissenting from denial of certiorari).[2]

To this objection, the only conceivable response that the Justice Department might make in support of the proposed amendment would have to be: "You can still engage freely in vigorous settlement talks without compromising your client's rights in a later criminal case; all you need to do (provided you know about the rule) is to assiduously refrain from making any damaging or incriminating statements that amount to a confession of liability or fault."

That "defense" of the rule would be ridiculously naïve. It overlooks the fact that the proposed language of Rule 408(a)(2), although it does not say so explicitly, will inevitably pave the way for the admission of not only what a defendant says in settlement negotiations, but also all the statements that were *allegedly* made by him (or his lawyer or insurance agent or anyone else attempting to settle the case on his behalf), no matter how strenuously he may deny having said such a thing, as long as anyone else thinks they recall that he did! And *that* is where this new rule will most directly threaten the willingness of parties to engage in settlement discussions.

Settlement talks are rarely recorded in writing or on video, and are usually conducted orally. Every lawyer with any experience in litigation or negotiation knows that the human memory is notoriously imperfect at recalling the precise details of what was said in an oral conversation. (Every married person knows that too, come to think of it.) Even well intentioned and unbiased nonparty witnesses rarely agree on the precise details of what was said in an oral conversation. This phenomenon is especially pronounced in settings marked by tension or conflict, as is usually true in discussions between the adversaries in civil litigation.

To make matters worse, settlement negotiations are often characterized by extemporaneous innovation and improvisation as the parties "make

hypothetical concessions, offer creative *quid pro quos,* and generally make statements that would otherwise belie their litigation efforts." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003). Yet even the most innocuous attempts at magnanimity in settlement discussions (for example, "if you agree to hold off for now on any criminal prosecution, we will assist you in trying to locate the funds you claim that you lost") can sound terribly incriminating if the other side later recalls them with even a slight degree of inaccuracy ("he told me that his client would pay me back the stolen money if we agreed to settle out of court").

This is no idle or exaggerated fear. Every criminal defense lawyer understands that this is one of the main reasons why "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." *Watts v. Indiana,* 338 U.S. 49, 59 (1949) (opinion of Jackson, J.). Although the police warn suspects that "anything you say may be used against you," it would be far more accurate to warn them: "if you agree to talk to the police, anything you say – *and* everything that the officer later *thinks* he is pretty sure he remembers you saying – can and will be used against you."

If the disastrous proposed amendment to Rule 408 takes effect, cautious lawyers representing the defendant in *any* civil case – even in *state* court – will completely refrain from participating in any sort of oral settlement talks if there is any possibility that federal criminal charges may arise out of the same matter, for there will be no other way to avoid the terrible risk of saying something perfectly innocent that might be misunderstood or incorrectly recollected by the other participant, who sometimes might not even be a lawyer.[3]

This perfectly predictable problem has, no surprise, already emerged in the Second Circuit, the first court that decided it would allow incriminating statements allegedly made during civil settlement efforts to be used against the defendant in a later criminal case. In one recent case, after a bank suspected that it been defrauded by a customer, the customer's lawyer engaged in a telephone conversation with a bank representative in an effort to settle any civil case out of court. When the customer was later indicted on related criminal charges, the district court held that incriminating statements *allegedly* made by the lawyer were admissible against the client in the criminal fraud prosecution even though there was a "direct contradiction" as to what the attorney said in that conversation. The court reasoned that any dispute over the substance of the conversation went only to the weight of the evidence, not its admissibility. *United States v. Mercado*, 2003 WL 21756084 (S.D.N.Y. 2003). To make matters worse, over the objection of the defendant, the court also granted the Government's motion to disqualify the lawyer from remaining in the case because he had potentially become a witness by virtue of what he allegedly *might* have said in the telephone call with a bank employee. *Id.*

That sort of confusion will become rampant across the country if the

proposed rule amendment is adopted, and it will deal a lethal blow to the rule's supposed purpose of giving civil parties and their attorneys complete confidence that they can participate in settlement talks without inadvertently jeopardizing their prospects in a later criminal case. This Pandora's Box should remain nailed shut, not blasted wide open as the Committee has proposed.

Besides, the Justice Department is absurd to suggest that statements made (or allegedly made) during civil settlement talks are likely to furnish "critical evidence of guilt" under this proposed amendment. When construing rules like Rule 408 that are designed to encourage people to say damaging things in confidence that they otherwise might not say, the Supreme Court has often noted "that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place," so that "the loss of evidence is more apparent than real." *Swidler & Berlin v. United States*, 524 U.S. 399, 408 (1998). If the proposed amendment becomes law, no competent lawyers will ever again make any potentially incriminating statements during civil settlement talks – that is, if they are willing to take the risk of entering such talks at all – so the net gain to the Government of the rule change will be *zero*, except in the many cases where either (1) a careful lawyer who said nothing incriminating was misunderstood or later misquoted by an angry adversary, or (2) a damaging admission was made by a less than competent lawyer trying to settle a case, perhaps in state court, who learned all about the version of Rule 408 that was on the books for over a quarter of a century but did not hear about the trap that was sprung when Rule 408 was amended to make such statements admissible in later federal criminal prosecutions. It is obvious that *neither* of those scenarios would represent a net gain for the administration of justice, much less furnish any justification for changing the rule.

3. The Committee *must* delete the disastrous passage in the proposed Committee Notes that seemingly approves the supposed propriety of using settlements to prove the defendant's "notice" of the wrongfulness of its conduct or the conduct of its subordinates and employees.

The proposed Committee Note to the amendment to Rule 408 would add a ghastly passage that reads:

> Nor does the amendment affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin*, 54 F.3d 394 (7th Cir. 1995) (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987) (in a civil rights action alleging that a officer used excessive force, a prior settlement by

the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The minutes of the most recent meetings of the Advisory Committee confirm that these lines were included to placate the Justice Department, which had insisted that "it is often the case that through settlement of civil proceedings, a defendant is put on notice of the wrongfulness of his conduct," and that in later criminal cases such civil settlements can be "critical to prove that the defendant knew that his conduct was illegal or wrongful."[4]

This horrendous passage, if included in the Committee Notes, will surely cause incalculable confusion and mischief. It appears in no uncertain terms to ratify and approve the holdings in these two cases, when in fact those cases should be roundly condemned, and it will surely be misinterpreted by many federal courts as a green light to circumvent the language and policy of Rule 408.

Even without the encouragement of the Advisory Committee, some federal judges – apparently all of them former prosecutors -- have *already* proven to be woefully prone to accept arguments from the Justice Department that a civil settlement is admissible under Rule 408 if offered to prove that a criminal defendant had notice or knowledge that his conduct was unlawful. For example, a civil defendant's signed consent decree with the SEC was held to be properly admitted against him at his later criminal trial despite Rule 408, because it was supposedly admitted only to show that he "knew of the SEC reporting requirements involved in the decree" and had "knowledge of [his] legal obligations." *United States v. Gilbert*, 668 F.2d 94, 97 & n.1 (2d Cir. 1981). All *three* of the judges on the panel that decided the *Gilbert* case, no surprise, were former federal prosecutors. Nobody else would ever find that logic persuasive.

Holdings like *Gilbert* are still rare, at least for now, but they involve an obscene double standard. When the shoe is on the other foot and a criminal defendant offers evidence that he actually had *no* knowledge that his conduct was unlawful because he was misinformed or ignorant or even affirmatively misled about the law's requirements, the Justice Department *always* successfully objects on the grounds that the defendant's constructive knowledge of the criminal law is conclusively presumed and so his alleged ignorance of such matters is *irrelevant* as a matter of law. *E.g.*, *United States v. Funches*, 135 F.3d 1405, 1407 (11th Cir. 1998) (because "ignorance of the law" is no defense, a felon charged with illegal possession of a firearm was properly precluded from testifying that he was told by state corrections official that his civil rights had been automatically restored upon his release from prison). By that standard, the Government likewise should be absolutely precluded from attempting to circumvent Rule 408 by arguing that it has the right to put on any sort of evidence designed to show that the defendant had actual knowledge that his alleged conduct was criminal. If a defendant's actual ignorance of the law is irrelevant,

so too is his actual knowledge; the Government cannot have it both ways.[5]

Besides, even if it were ever proper for the Government to put on evidence of the defendant's actual notice of something covered in an earlier civil settlement, the "notice" comes from the filing and service of the civil *claim* (and possibly from any evidence that was offered in its support), not from the fact of its later voluntary *settlement*.

For example, the proposed Advisory Committee Note would cite *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), for the proposition that "in a civil rights action alleging that a officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers." To the extent that *Spell* supports the summary offered by the Committee, the case was such a patently egregious violation of Rule 408 that it should be *repudiated*, not ratified! In a civil rights case alleging that an officer used excessive force, a plaintiff trying to prove municipal liability may be permitted under the Federal Rules of Evidence to prove that the City had notice of the problem, among other ways, by proving that such charges were brought to the attention of the City in an earlier civil *complaint*. That proof would not run afoul of the language or the purpose of Rule 408 in any way as long as the jury was told nothing about whether or how the first case was closed. But to also tell the jury that the first case was voluntarily *settled* by the City – under the pretense that such evidence is admitted to show the City's "notice" of the aggressive behavior of its officers -- is a flagrant violation of Rule 408. Once the jury learns that the City had some notice of an apparent problem with its officers because of the first *complaint* against it and the evidence that was available to support that complaint, the additional fact of the City's willingness to *settle* that case tells the jury absolutely *nothing* of any marginal value about the extent to which the City had notice of the problem, unless of course one assumes, as the jury likely will, that the City's payment of money in settlement was itself further evidence of the validity and factual basis for the civil charges ("once the City realized that it had to pay something to settle that claim, then it *really* should have known that its officers were guilty of something") – but that is *precisely* the reasoning that Rule 408 has always explicitly forbidden![6]

The same critical point was also apparently overlooked in the other case the Advisory Committee now proposes to cite on the supposed propriety of using a civil settlement to prove "notice." The Committee Note would cite *United States v. Austin*, 54 F.3d 394 (7th Cir. 1995), for the proposition that it is supposedly proper to admit evidence of a defendant's "settlement" of a civil claim "to prove that the defendant was on notice that subsequent similar conduct was wrongful." But that is only a partial and terribly misleading summary of what the court did in *Austin*. In that case, the defendant entered into a most unusual settlement of a civil complaint filed by the FTC, in which he agreed, among other things, to do two very different things. (1) He did something almost all settling civil defendants do by agreeing to pay financial compensation to his alleged victims ($625,000, in

fact), in an example of what Rule 408 calls "valuable consideration." (2) But he also did something else quite different, something that is very rarely a condition to a civil settlement. Much like a criminal defendant appearing for allocution at a guilty plea, he appeared before the court and "signed a stipulation for judgment admitting the allegations of fraud contained in the complaint." *Id.* at 398.[7] When Austin later failed to comply with the court-ordered obligations imposed upon him as part of the consent decree and in fact engaged in further acts of fraud, he was tried on criminal fraud charges. In an opinion written by a former prosecutor, the court of appeals held that it was proper for the trial court to admit "extensive evidence relating to the FTC settlement, including the terms of the consent decree and Austin's stipulation in the settlement admitting to the allegations in the FTC's complaint." *Id.* at 399. The court held that this evidence was admissible despite Rule 408 because it was offered to prove, among other things, that he had notice that the prints he had sold (and later attempted to sell) were forgeries and that it was unlawful for him to do so. *Id.* at 400.

The opinion by the court of appeals in *Austin* gives no indication whether the court ever considered, or whether the defendant asked the court to consider, the crucial difference between the two very different portions of the consent decree reached in that case. But it is clear that the only portion of the decree that was necessary to the Government or properly admitted against the defendant would have been the part that is almost never an ingredient of a civil settlement -- the detailed judicial admissions he made as part of his signed, judicially approved stipulation for judgment, in which he admitted the allegations of fraud. Those admissions were the true evidence of his "notice" of what the law forbade, and would presumably be admissible without regard to Rule 408 no matter what they were offered to prove.[8] But the *other* portion of the consent decree in which he agreed to pay $625,000 to compensate his alleged victims (the part of the decree that almost any observer would naturally describe as the "settlement" or "compromise" of the claim against him), was an entirely different matter, and should never have been admitted for any purpose – not even to show his alleged "notice" that his conduct was wrongful or unlawful. To the extent that *Austin* held otherwise, as plainly suggested by this Committee's proposed summary of that case, the case is indefensible and cannot be reconciled with Rule 408.

The fatal error in all of these cases is their failure to recognize that a civil defendant's willingness to pay (in the words of Rule 408) "valuable consideration in compromising or attempting to compromise a claim," by itself, does not give a jury any reason to assume that the settling defendant was thereby put on *notice* that his conduct was wrongful, unless one first assumes that the payment was reliable evidence of his *liability* for the claim. But that is *exactly* the kind of reasoning that Rule 408 has always wisely forbidden.

Holdings like *Spell* and *Austin* (and *Gilbert*) are still mercifully rare, at least for now, but they will spread like a demonic wildfire if the Committee Notes are amended to put the Advisory Committee's seeming imprimatur on their heretical

corruption of Rule 408. Those cases should be rounded up and burnt at the stake, not enshrined with a permanent place of honor in the Advisory Committee Notes to the rule.

A Concluding Thought

Thank you for considering these remarks. Please do not attach undue weight to the fact that they are not joined by a large number of other signatories, as is quite common in the case of letters written to your committee by law professors. It's not as if anyone *declined* the chance to concur in these remarks; it's just that I did not ask anyone else if they wanted to do so. I have many friends and colleagues who are other law professors but did not want to get any of them in trouble by asking them to join a letter like this one.

Respectfully,

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[1] "There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of "impeachment evidence," by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos,* and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost." *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).

[2] *See also* Paul Rosenzweig, *The Over-Criminalization Of Social And Economic Conduct*, THE CHAMPION 28, 29 (Aug. 2003) ("Estimates of the current size of the body of federal criminal law vary. It has been reported that the Congressional Research Service cannot even count the current number of federal crimes. The American Bar Association reported in 1998 that there were in excess of 3300 separate criminal offenses. More than 40 percent of these laws have been enacted in just the past 30 years, as part of the growth of the regulatory state. And these laws are scattered in over 50 titles of the United States Code, encompassing roughly 27,000 pages. Worse yet, the statutory code sections often incorporate, by reference, the provisions and sanctions of administrative regulations promulgated by various regulatory agencies under congressional authorization. Estimates of how many such regulations exist are even less well settled, but the ABA thinks there are '[n]early 10,000.'") (footnotes omitted).

[3] Several of the other commentators on this proposed change in Rule 408 have correctly noted that its pernicious mischief will be especially extensive if the amendment is later copied by the large number of states that have modeled their evidence codes on the Federal Rules of Evidence. That is true, but actually a great understatement. Even if *no* state ever amends its evidence rules to borrow the proposed change in Rule 408, the adoption of that rule in federal court will immediately have a powerful impact on settlement negotiations in civil cases in every *state* court as well, as long as the claim is one that might serve as the basis for a later charge in federal court under any one of the thousands of federal criminal statutes (including, for example, the notoriously flexible federal wire fraud and mail fraud statutes). If a lawyer trying to settle a civil case in state court makes a statement that is later offered against his client in a *federal* criminal prosecution, the admissibility of that statement will be governed entirely by Federal Rule 408, regardless of what state evidence law says on the subject.

[4] MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE, April 25, 2003, at 12. *See also* MINUTES OF THE MEETING OF THE ADVISORY COMMITTEE ON THE FEDERAL RULES OF EVIDENCE, April 29-30, 2004, at 8 ("If compromise efforts can be offered in criminal cases ... to prove that the defendant by settling was made aware of the wrongfulness of his conduct, on the ground that the purpose for this kind of evidence was to prove something other than the validity or amount of the underlying claim, then much of the [Justice] Department's concerns over Rule 408 protection would be answered.")

[5] I understand and acknowledge that this generalization is subject to a special exception for the *very* small fraction of federal offenses that require the Government to

show that the defendant committed a "willful" violation of the law, but that fine and crucial distinction will surely be lost on almost anyone who reads the proposed change in the Advisory Committee Note the way it is drafted.

6 In fairness to the Fourth Circuit, although its ruling in *Spell* was a blatant violation of Rule 408, (1) the court's opinion analyzes the issue only in terms of Rule 403, thus suggesting that perhaps the defendant in that case did not have the good sense to preserve and raise a Rule 408 objection on appeal; and (2) the court's opinion also gives no indication whether the defendant objected specifically to the admission of the fact of the settlement, thus suggesting that perhaps the defendant made only a general blunderbuss objection to *all* of the details involving the prior litigation. Those two facts may go a long way toward explaining why the defendant brought that disastrous ruling on itself, but they cannot change the fact that *Spell* ought to be publicly identified as plain error, not enshrined with a permanent place of honor in the Advisory Committee Notes!

7 Before a criminal case can be settled by a guilty plea, it is always necessary for the defendant to appear before the court and formally acknowledge the truth of the charges against him. FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.") Civil cases virtually never involve such an arrangement, and in fact are almost always settled merely by the consent of the parties, *see* FED. R. CIV. P. 41(a)(1)(ii), usually with an explicit recital that the defendant denies any liability and admits nothing.

8 *That* part of the consent decree arguably would have been admissible without regard to Rule 408, no matter what it was offered to prove, since signed written judicial admissions acknowledged in open court are probably not examples of what that rule calls "conduct or statements made *in* compromise negotiations," but are rather statements to the court concerning (and following) the completion of those negotiations. They are therefore arguably analogous to admissions made by a criminal defendant at the entry of his guilty plea, which are freely admissible against him in later proceedings, even though any statements made *during* plea bargaining discussions are often inadmissible. FED. R. EVID. 410(4).