Brooklyn Law Review

Volume 67
Issue 2
THE SECOND CIRCUIT REVIEW: 2000-2001 TERM

Article 9

12-1-2001

When Two Worlds Collide: Examining the Second Circuit's Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials

Todd W. Blanche

WHEN TWO WORLDS COLLIDE: EXAMINING THE SECOND CIRCUIT'S REASONING IN ADMITTING EVIDENCE OF CIVIL SETTLEMENTS IN CRIMINAL TRIALS*

INTRODUCTION

This Note will examine the Second Circuit's reasoning in a line of cases allowing civil settlements and negotiations into evidence during a criminal trial. Federal Rule of Evidence 408 generally bars the use of such evidence at trial. However, the Rule does provide for certain exceptions where settlement or settlement negotiations is allowed into evidence if offered for some purpose other than to prove amount or liability.[1] The significance of Rule 408 is not in what it does say, but in what it does not say. The Rule does not specify whether it is applicable to criminal proceedings, and this lack of clarity has prompted litigation and confusion in many courts, including the Second Circuit.

A hypothetical can illustrate how this seemingly minor point can lead to a significant problem for a defendant in a criminal case. If an employee steals checks from his company and deposits them in a bank, he may be committing fraud.[2] But often, when a supervisor learns that an employee is stealing from the company, the employee is fired and the company will seek reimbursement from the employee. Often, this happens before any criminal charges are made or even before the FBI or local law enforcement are aware that a crime has taken place. At this point, the employee may get a lawyer because he risks being sued by his former company. A good lawyer may

---

[1] *See generally* FED. R. EVID. 408.

[2] *See, e.g.*, 18 U.S.C. §§ 1341, 1343, 1344 (2000).

recommend that the employee, if in fact he did steal from the company, arrange a settlement agreement whereby the money is paid back. However, the negotiations and the settlement itself could be introduced by the government against the employee at a later criminal trial, where the potential sanction is prison. The prosecutor may introduce evidence of a defendant's participation in a civil settlement and the accompanying negotiations as compelling evidence of guilt, suggesting to the jury that the defendant would not have settled the civil claim if the defendant had not committed the alleged crime.[3]

The legislative and committee notes show that Rule 408 was enacted to encourage parties to settle by allowing unobstructed negotiations without either party risking that the proposed settlement could later be used as an admission to an alleged act.[4] However, neither the text, nor the history of Rule 408 resolves whether the Rule applies to both criminal and civil cases, or only to civil litigation. Apparently, the framers of this Rule did not anticipate an example like the one above when drafting Rule 408.

The distinction between the civil and criminal docket is important because the Federal Rules of Evidence generally apply to *both civil and criminal* proceedings.[5] Most other courts and leading evidence treatises conclude that settlements and negotiations should be protected under Rule 408 not only in civil trials, but also in criminal proceedings.[6] Nearly all circuit and state courts that have examined the issue have tended toward a liberal reading of the Rule, erring on the side of

---

[3] *See* United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. July 17, 2000) (order denying defendant's motion to set aside the guilty verdict in his criminal trial); Transcript of Pre-Trial Conference at 16, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Apr. 3, 2000).

[4] *See* FED. R. EVID. 408 advisory committee's notes; Leslie T. Gladstone, *Rule 408: Maintaining the Shield for Negotiations in Federal and Bankruptcy Courts*, 16 PEPP. L. REV. 237, 238 (1989).

[5] FED. R. EVID. 1101(b) ("[Federal Rules of Evidence] apply generally to civil actions and proceedings .[and] to criminal cases and proceedings ").

[6] *See, e.g.*, United States v. Hays, 872 F.2d 582 (5th Cir. 1989); United States v. Meadows, 598 F.2d 984 (5th Cir. 1979); United States v. Verdoorn, 528 F.2d 103 (8th Cir. 1976); Ecklund v. United States, 159 F.2d 81 (6th Cir. 1947); United States v. Skeddle, 176 F.R.D. 254 (N.D. Ohio 1997); State v. Gano, 988 P.2d 1153 (Haw. 1999).

caution and a judicial policy that favors settlement.[7] Courts are willing to endorse this policy by rejecting attempts by the opposition to introduce evidence of settlements, despite the various exceptions allowed by the Rule.[8] However, the Second Circuit admits settlement evidence in criminal trials for a number of public policy reasons that override the objectives and goals of Rule 408 as applied to civil litigation.[9]

The focus of this Note is whether the Second Circuit has properly interpreted Rule 408 in finding that it does not apply to criminal litigation. Two issues must be addressed to begin to answer this question. The first is whether society's interest in prosecuting crimes outweighs the judicial system's preference to have private parties settle their disputes without going through the complete litigious process of a court case. The second is whether a court is at liberty to make this distinction in light of the advisory committee's explanations for Rule 408 and the limitations courts are required to adhere to when applying Congressional acts such as the Federal Rules of Evidence.[10]

As this Note will show, the precedential cases before the Second Circuit and other courts are not the types of cases that make the admissibility of settlements in criminal trials appear harmful to society or the judicial system. Most of these defendants were guilty, or likely so, and appear to be settling

---

[7] *See* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 964-65, 998 (1988) (citing cases that find the policies that justify Rule 408 can be at odds with other public policies, sometimes leading to a narrow interpretation of Rule 408). Brazil's article also gives weight to the advisory committee's notes, leaving little question that Rule 408 was designed to "encourage communication about a broad range of settlement-related matters, not just about offers or demands." *Id.* at 998.

[8] FED. R. EVID. 408 ("This Rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This Rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.").

[9] *See, e.g.*, United States v. Recalde, 172 F.3d 39 (2d Cir. 1999); Manko v. United States, 87 F.3d 50 (2d Cir. 1996); United States v. Baker, 926 F.2d 179 (2d Cir. 1991); United States v. Gonzalez, 748 F.2d 74 (2d Cir. 1984). The Seventh Circuit also concurs with the Second Circuit. *See* United States v. Prewitt, 34 F.3d 436 (7th Cir. 1994). *See also* State v. Szawronski, 665 A.2d 1156 (N.J. 1995).

[10] *See generally* Brogan v. United States, 522 U.S. 398 (1998) (holding that courts are not permitted to substitute their own policy objectives for those of Congress).

because they were wrong. However, there are certainly situations where a company or individual will settle a dispute for reasons other than guilt, such as to avoid litigation costs and stress, or, simply, to make peace. It will be interesting to see how the Second Circuit applies its holdings to these types of situations.

This Note will first detail the parameters and application of Rule 408 to criminal proceedings by examining the legislative history and reasoning behind Rule 408. Next, this Note will examine Second Circuit cases that establish the precedent circuit holding that Rule 408 does not apply to criminal litigation. A sub-section of this Part will discuss two recent cases tried in the Southern District of New York where this issue was raised. Finally, this Note will briefly study other circuit, district, and state courts that follow a more protective policy toward settlements and hold that Rule 408 applies to both civil and criminal proceedings. The conclusion reasons that the Second Circuit has improperly interpreted Rule 408 by allowing settlements and settlement negotiations into evidence of a criminal trial. The conclusory result reached by the Second Circuit that public policy favors prosecuting crimes over settling claims may be correct. However, the means to achieve this result should come from the legislature, not from judicial interpretation of an ambiguous federal rule. Until the advisory committee amends Rule 408, the Second Circuit should recognize the extreme prejudicial effect evidence of a settlement will have on a jury weighing criminal charges against a defendant and thus find it inadmissible.

I. POLICY JUSTIFICATIONS FOR RULE 408 VERSUS THE GOALS OF THE CRIMINAL JUSTICE SYSTEM

The primary distinction courts draw upon in deciding whether or not to apply Rule 408 to criminal proceedings is rooted in the differing policy goals of civil litigation and the criminal justice system. On the one hand, since common law, our judicial system encourages parties to settle their disputes. On the other hand, the criminal justice system is responsible to

the public to enforce the law Rule 408 is an example of the complexities that can arise when balancing the goals of civil litigation with those of the criminal docket.[11]

This section of the Note will first examine the policy reasons behind Rule 408 and discuss how various evidence treatises have explained this Rule. Next, this section will address the various interpretations courts have applied to this Rule and how scholars view these interpretations.

A. *Policy Justifications for Rule 408*

While the text of Rule 408 does not expressly state whether it applies to criminal litigation, the advisory committee, along with the Congressional reports, did detail the necessity for this Rule and the reasoning behind it. Although this commentary was vague and created differing interpretations of the Rule, it does shed light on the justification for this Rule.

Rule 408 states that settlements are "not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible."[12] The advisory committee noted two reasons for this Rule. First, settlement evidence is irrelevant for evidentiary purposes because one party may offer to settle as a peaceful gesture, not out of "weakness."[13] The desire for peace is often one motivation for

---

[11] *See* Tannuzzo v. Johnson, 1996 WL 1057169 (E.D.N.Y. Nov. 21, 1996); *Manko*, 87 F.3d at 54.

[12] FED. R. EVID. 408. The complete Rule follows:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This Rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This Rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Id.

[13] FED. R. EVID. 408 advisory committee's note.

settlement, but one must be realistic when using this as a justification for excluding evidence of a settlement. As the advisory committee notes in the sentence following this reason, the size of the settlement compared to the amount asked for by the plaintiff influences the validity of this position.[14] For instance, if a plaintiff seeks $10,000 and settles for $8,000, one can argue that the defendant at least recognizes the legitimacy of the claim, even if this is not an outright admission of guilt.

The advisory committee's second reason for Rule 408 is to encourage parties to settle.[15] Judges, lawyers, and commentators throughout the legal community agree that an aggressive policy toward settlement is a necessity.[16] Empanelling a jury is expensive and exhausts resources, not to mention the money both sides are forced to spend on lawyers and trial preparation. The system will collapse if settlements and plea agreements do not end litigation long before trial in the majority of both civil and criminal litigation.[17] Although most cases today are resolved in some way other than a trial, the American judicial system is still clogged with both civil and criminal cases.[18] So the judicial system has a practical reason for doing everything possible to encourage parties to settle. To

---

[14] *Id.*

[15] *Id.* ("A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.").

[16] Bank of Am. v. Hotel Rittenhouse Assocs., 800 F.2d 339, 349, 350 (3d Cir. 1986); *but see* Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlement is not always preferable to judgment).

[17] *See generally Bank of Am.*, 800 F.2d at 345; Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976) ("With today's burgeoning dockets and the absolute impossibility of Courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises sheparded by competent counsel, whose experience as advocates makes them reliable predictors of litigation were it pursued to the bitter end.").

[18] *See* Marc Galenter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 27-28 (1983); Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality*, 41 ADMIN. L. REV. 315, 316 (1989) (stating that ninety-five percent of the Environmental Protection Agency's enforcement suits settle, which is close to the percentage of federal cases that are disposed of before trial). One study found that of all the cases that become lawsuits, only nine percent go to trial. *Bank of Am.*, 800 F.2d at 344.

foster settlement, the judicial system has changed structurally by giving judges more leeway in encouraging parties to settle.[19]

As settlements become more common in our judicial system, it is important to keep in mind that the idea of resolving disputes by means other than a trial is often at odds with the goals of the criminal justice system. Enforcing the laws of the state by prosecuting individuals or entities that have violated these laws, while ensuring fair treatment and due process for the accused, does not fit into a discussion about getting parties *out* of the system by peaceful compromise. Although judicial efficiency and economy play a role in the criminal justice system, many argue these necessities should take a back seat to fairness, equality, and the enforcement of the laws of the state.[20]

A concerted effort has also been made to ease the burden on criminal courts. State sentencing structures and the Federal Sentencing Guidelines[21] give criminal defendants credit for pleading guilty by giving them more lenient sentences. The main reason for this is allocation of resources. By accepting responsibility for a crime and pleading guilty at an early stage of the litigation process, a defendant saves the judicial system money and resources. A judge still has some discretion in determining a sentence, and it makes sense that a judge is more likely to be lenient on a defendant who admits guilt and saves the judicial system time and resources than a defendant who invokes his constitutional right to a trial and is convicted.

Some commentators and judges give other justifications for Rule 408. For instance, settlements do not necessarily include an admission of guilt. There are a number of reasons

---

[19] The Federal Rules of Civil Procedure Rule 16 now gives a judge more power in encouraging settlement. In addition, encouraging settlement is now an explicit purpose of a pre-trial conference. FED. R. CIV. P. 16(a)(5).

[20] *See generally Manko*, 87 F.3d at 54 ("The policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher.").

[21] The Federal Sentencing Guidelines were established in 1984 but not applied until 1987. The Guidelines deduct "points" from a defendant's sentence range for "acceptance of responsibility" when a defendant pleads guilty. Even more credit is given to a defendant who pleads guilty early on in his litigation. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (2000).

for an individual to choose settlement over a public trial.[22] The advisory committee's point that an offer is not an admission is often cited as a justification for the Rule.[23] In addition, statements made during settlement negotiations are not necessarily stated for the veracity or truthfulness of them, but rather are offered by one party to encourage the other party to settle.[24]

B. *The Courts' Attempt to Reconcile the Contrasting Goals of Rule 408 and the Criminal Justice System*

Obviously, this is not the only time the criminal justice system conflicts with other policy interests, leaving judges and policymakers with the unwelcome task of deciding which interests should be given priority Different courts have reached different conclusions regarding Rule 408. The Second Circuit opines that the public interest in "disclosure and prosecution of crime" is greater than the public interest in encouraging settlement.[25] Other courts and commentators disagree, finding that an individual should not be given the privilege of protection in one forum, only to have the veil lifted because the docket is criminal rather than civil.[26] As one district court noted, even if the policy justifications for Rule 408 are more aptly applied to civil proceedings than criminal, it does not follow that settlements derived from a civil context

---

[22] *See* Olin Corp. v. Ins. Co. of N. Am., 603 F Supp. 445, 450 (S.D.N.Y. 1985) (finding that settlement negotiations were intended to "avoid the litigation of a potentially costly and complex suit").

[23] 2 MCCORMICK ON EVID. § 266 (John W. Strond ed., 5th ed. 1999). McCormick emphasizes that the importance placed on the settlement often depends on the amount of the settlement. "[A] very small offer of payment to settle a very large claim being much more readily construed as a desire for peace rather than an admission of weakness of position. Relevancy would increase, however, as the amount of the offer approaches the amount claimed." *Id.*, *see also supra* notes 14, 15 and accompanying text.

[24] From an evidentiary standpoint, this is true. However this may be one reason not to protect the information, because by protecting this information from disclosure at trial, parties know they do not have to be entirely truthful or forthcoming in settlements because assertions made can not be introduced at trial. *See Olin*, 603 F Supp. at 450.

[25] *Gonzalez*, 748 F.2d at 78.

[26] *See* Gladstone, *supra* note 4, at 239 (discussing the fact that Rule 408 may in fact be a privilege).

lose their protection when raised in a criminal proceeding.[27] The decisions of these courts will be scrutinized in later sections of this Note; but with these ideas in mind, it is helpful to examine another Federal Rule of Evidence that seeks to accomplish similar goals as Rule 408 by protecting plea negotiations and agreements in criminal cases.

Federal Rule of Evidence 410[28] was enacted to permit "unrestricted candor" in plea discussions by excluding offers to plead guilty from evidence.[29] Although Rule 410 is similar to Rule 408 in many respects, an important distinction is that Rule 410 specifically states that it applies in both civil and criminal proceedings.[30] Both rules emphasize the importance of the forum in which the negotiation takes place, whether it be a plea agreement or a settlement.[31] The context in which the negotiation is to be admitted at trial is not the determining factor for a court to consider, but rather the forum in which the original negotiation took place.[32] For instance, an admission made by a defendant to a law enforcement agent is not protected even if the defendant thinks they are engaging in plea negotiations. Rule 410 specifically states that only plea-related discussions made directly to a *government attorney* are protected, not discussions with other members of law enforcement.[33] On the other hand, Rule 408 only applies when the parties are engaging in settlement negotiations, although it is more liberal in that it does not matter to whom the settlement negotiations are presented. As long as the discussion occurs in the course of civil litigation or potential litigation, Rule 408 precludes their admission at a later trial,

---

[27] *Skeddle*, 176 F.R.D. at 256-57.

[28] FED. R. EVID. 410 advisory committee's note.

[29] *See generally* FED. R. EVID. 410 advisory committee's note. Federal Rule of Evidence 410 corresponds to Federal Rule of Criminal Procedure 11(e)(6). Rule 410 is titled The Inadmissibility of Pleas, Offers of Pleas, Plea Discussions, and Related Statements, and declares inadmissible a guilty plea which is later withdrawn, a plea of holo contender, statements made in any Rule 11 procedure or similar state procedure, and statements made in the course of plea discussions with a government attorney, which do not result in a plea of guilty. The Rule also explicitly states that this evidence is inadmissible "in any civil or criminal proceeding." FED. R. EVID. 410.

[30] *Id.* ("in any civil or criminal proceeding [evidence of guilty pleas is not] admissible).

[31] *Skeddle*, 176 F.R.D. at 256-57.

[32] *Id.*

[33] *Id.* at 254; *see also* FED. R. EVID. 410.

or at least in a later civil trial.[34] Nevertheless, the actual forum in which the discussion takes place is operative to the application of both Rule 408 and 410. Why the drafters included in Rule 410 its applicability to *both* civil and criminal trials and did not put that language in Rule 408 is open to debate. This omission in Rule 408 is considered by some judges and commentators to be determinative that the drafters intended the Rule to apply to both civil and criminal cases.[35] Others follow the Second Circuit and use this omission to bolster its interpretation that the authors intended Rule 408 to apply only to civil cases.[36]

One district court in the Second Circuit recognized that Rule 408 "does not demand a reflective or mechanistic approach; rather, in deciding whether to admit evidence of settlement negotiations for a purpose other than to prove or disprove liability, the trial judge 'should weigh the need for such evidence against the potentiality of discouraging future settlement negotiations.'"[37] Prior to that trial, the judge excluded the evidence about a handshake agreement entered into by the parties, but during the trial, he reversed himself because of testimony elicited by the plaintiffs on direct examination.[38] Balancing the different equities and issues of

---

[34] *Skeddle*, 176 F.R.D. at 257.

[35] *Id.* ("the drafters of the Federal Rules of Evidence were aware of the scope and breadth of the rules and that these rules would be applied in criminal cases."); Memorandum of Law in Support of Defendant Diviney's Motion In Limine to Exclude Evidence of a Civil Settlement at 8, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Mar. 30, 2000) ("[i]t is apparent that, when the drafters wanted to limit the application of Rule 408 under certain circumstances, they did so. Likewise, when the drafters wanted to limit the application of one of the rules to civil cases or to criminal cases, they did so explicitly. The drafters' failure to limit Rule 408 to civil cases is incontrovertible evidence that the rule precluding evidence of settlements and settlement offers is equally applicable to criminal cases such as this one.").

[36] *See* Government's Memorandum of Law in Opposition to the Post-Trial Motion of Defendant at 27 n.3, *Diviney*, 99 Cr. 871 (AKH) (July 12, 2000) ("Rule 408's inapplicability to criminal cases is confirmed by comparing that Rule to Rule 410, which explicitly prohibits pleas, plea discussions, and related statements 'in any civil or criminal proceeding'"); Chicago v. Envtl. Defense Fund, 511 U.S. 328, 338 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely' when it 'includes particular language in one section of a statute but omits it in another.'") (quoting Keene Corp. v. United States, 508 U.S. 200, 208 (1993).

[37] Tannuzzo v. Johnson, 1996 WL 1057169 at *6 (E.D.N.Y. Nov. 21, 1996) (quoting Trebor Sportswear Co. v. The Limited Stores, Inc., 865 F.2d 506, 510-11 (2d Cir. 1989)).

[38] *Id.* at *6, *7.

this Rule is difficult, even more so when the stakes are raised in the criminal setting.

C. *The Second Circuit's Interpretation of Rule 408*

Second Circuit opinions interpret Rule 408 to only apply to civil proceedings for reasons based on both the text of the Rule and policy considerations. The Second Circuit has relied on three assumptions. First, "[t]he public interest in the disclosure and prosecution of crime" is "greater than the public interest in the settlement of civil disputes."[39] Second, the wording of Rule 408 indicates that the Rule aptly applies to civil proceedings, not criminal.[40] Finally, a comparison to Federal Rule of Criminal Procedure 11(e)(6), which excludes plea negotiations from criminal or civil trials to Rule 408, shows that the very existence of this criminal Rule "strongly supports the conclusion that Rule 408 applies only to civil matters."[41]

However, the Second Circuit's reasoning is open to dispute. For example, the last sentence of Rule 408 states that the Rule "does not require exclusion when the evidence is offered for another purpose, such as proving an effort to obstruct a criminal investigation or prosecution."[42] Commentators and others have questioned why this exception for obstruction of justice would be necessary if Rule 408 did not apply to criminal cases.[43] Commentators and one court have noted that Rule 408 also protects the government in criminal cases where a defendant seeks to offer testimony about offers

---

[39] *Gonzalez*, 748 F.2d at 78.

[40] *Manko*, 87 F.3d at 54; United States v. Baker, 926 F.2d 179, 180 (2d Cir. 1991).

[41] *Baker*, 926 F.2d at 180.

[42] FED. R. EVID. 408.

[43] 29 AM. JUR. 2D EVID. § 512 (1994) (citing LOUISELL & MUELLER, FEDERAL EVIDENCE § 170 (1978)); Memorandum of Law in Support of Defendant Diviney's Motion In Limine to Exclude Evidence of a Civil Settlement at 7, 99 Cr. 871 (AKH) ("if Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases.") (quoting United States v. Skeddle, 176 F.R.D. 254, 257 (N.D. Ohio 1997)).

made by the government during plea negotiations.[44] Rule 410, which protects a defendant from the government admitting plea agreements that were later withdrawn and plea negotiations made to a government attorney, does not protect the government from the defendant introducing the same evidence.[45] To the extent that courts rule that statements and plea offers made by the government during plea negotiations are not admissible, they rely on Rule 408, and conclusively, apply the Rule to criminal trials.[46]

Still another treatise singles out the Second Circuit's *Gonzalez* decision as having an adverse effect on the goals of Rule 408.[47] In a footnote, the author states,

> The decision may have unfortunate consequences. 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. If widely followed, *Gonzalez* could make it much more difficult for the victims of questionable conduct to obtain timely compensation for what they have lost.[48]

Even before Rule 408 went into effect, federal courts held that proposed settlements or accepted compromises could not be admitted as evidence of an admission of the validity or invalidity of a crime.[49] The justice system recognized the importance and value of protecting the arena of settlements

---

[44] United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976) (finding that under Rule 408, government plea offers should be excluded); MUELLER & KIRKPATRICK, EVIDENCE PRACTICE UNDER THE RULES § 4.25, at 347 (2d ed. 1999).

[45] *See generally* FED. R. EVID. 410; MUELLER & KIRKPATRICK, *supra* note 44, § 4.25, at 347; *see also* sources cited *supra* notes 28-36 and accompanying text.

[46] LOUISELL & MUELLER, *supra* note 43, § 170; *see* Trial Transcript at 84-87, United States v. Ortega, 00 Cr. 432 (DLC) (S.D.N.Y. Jan. 23, 2001) (denying defendant's application to admit evidence about plea negotiations); *but see* United States v. Biaggi 909 F.2d 662, 690 (2d Cir. 1990) (finding that the district court abused its discretion and denied the defendant a fair trial by excluding evidence of immunity negotiations where defendant refused to testify against others and denied any wrong doing).

[47] FISHMAN, JONES ON EVIDENCE, CIVIL AND CRIMINAL, § 22:16 (7th ed. 2000).

[48] *Id.* at 119 n.83.

[49] WEINSTEIN'S FEDERAL EVIDENCE, § 408.03[1] at 10 n.1 (2d ed. 2001) (citing West v. Smith, 101 U.S. 263 (1879) (mere offer of compromise cannot prejudice rights of plaintiff); Home Ins. Co. v. Baltimore Warehouse Co., 93 U.S. 527, 548 (1876) (offer of compromise by defendant's agent not admissible); Ins. Cos. v. Weides, 81 U.S. (14 Wall.) 375, 381 (1872) ("[a] compromise proposed or accepted is not evidence of an admission of the amount of the debt").

long before Rule 408. As one attorney recently argued in federal court in the Southern District of New York, "[I]t is hard to imagine a situation where a party accused of wrongdoing would agree to a civil settlement requiring the payment of money if the party knows that his entering into a settlement could be used against him in a later criminal prosecution."[50] Modern policy also favors private dispositions, as evidenced by some state statutes that authorize private settlement of a misdemeanor if a civil remedy for the victim is available.[51]

Some commentators apply Rule 408 to both civil and criminal proceedings without debate. Wright and Miller's *Federal Practice and Procedure on Evidence* says that "Rule 408 would make covered compromise evidence inadmissible in criminal as well as civil proceedings."[52] Addressing whether Rule 408 bars the use of evidence of civil compromise negotiations in a criminal prosecution, the treatise answers "clearly 'yes.'"[53] Another states that "[i]f the transaction on which the prosecution is based also gives rise to a civil cause of action, a compromise or offer of compromise to the civil claim should be privileged when offered at the criminal trial if no agreement to stifle the criminal prosecution was involved."[54]

II. THE SECOND CIRCUIT OPINIONS AND RULE 408

This section examines the Second Circuit cases that establish the precedent that Rule 408 only applies to civil litigation. The three cases are *United States v. Gonzalez*,[55] *United States v. Baker*,[56] and *Manko v. United States*.[57]

The second part of this section is a case study of two recent trials in the Southern District of New York. In both

---

[50] Memorandum of Law in Support of Defendant Diviney's Motion In Limine to Exclude Evidence of a Civil Settlement at 10, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Mar. 30, 2000).

[51] OR. REV. STAT. § 135.703 (1999); MUELLER & KIRKPATRICK, *supra* note 44, § 138, at 104 (suggesting that when a state law would protect a settlement arrangement, then Rule 408 should protect that in federal court).

[52] 23 WRIGHT & MILLER, FED. PRAC. AND PROC. EVID. § 5308 (2000 Supp.).

[53] *Id.*

[54] MCCORMICK, *supra* note 23, § 266.

[55] 748 F.2d 74 (2d Cir. 1984).

[56] 926 F.2d 179 (2d Cir. 1991).

[57] 87 F.3d 50 (2d Cir. 1996).

cases, the district court allowed evidence of settlements and settlement negotiations into evidence at trial. The cases, *United States v. Recalde*[58] and *United States v. Divinev*,[59] resulted in convictions that were either affirmed or not appealed. One gets a sense that the predictions made by many of the commentators regarding the potency of this evidence have practical truths. Evidence of compromise, in both of these cases, was damaging to the defendant and certainly should give pause to readers, no matter on which side of the issue they fall.

A. *United States v. Gonzalez*

The precedential Second Circuit case on the application of Rule 408 to the criminal docket is *United States v. Gonzalez*.[60] The court held that policy considerations behind Rule 408 do not apply to excluding settlement offers in criminal cases. The defendant in *Gonzalez* was charged and convicted of wire fraud and mail fraud in connection with his solicitation of a loan from a Spanish bank. The trial court allowed testimony from an attorney for the bank that the defendant admitted his knowledge of the existence of false and forged documents. The trial judge also allowed into evidence a confession of judgment executed by the defendant, It stated that the defendant was "personally liable for the full amount of the debt owing to [the Spanish bank]."[61]

The *Gonzalez* court gave two reasons why the trial court correctly allowed the testimony and documents surrounding the defendant's settlement and negotiations.[62] First, evidence was offered for an excepted purpose under Rule 408.[63] Because the evidence was offered to establish that the defendant committed a crime, whether the bank had a valid civil claim against the defendant was simply not relevant to reaching that conclusion.[64] The court also gave a policy justification for Rule

---

[58] 96 Cr. 057 (KMW).
[59] 99 Cr. 871 (AKH).
[60] 748 F.2d 74 (2d Cir. 1984).
[61] *Id.* at 77.
[62] *Id.*
[63] *Id.* at 78.
[64] *Id.*

408. The court stated that the premise of Rule 408 is that "encouraging settlement of civil claims justifies excluding otherwise probative evidence from civil lawsuits."[65] However, the court cautioned that "encouraging settlement does not justify excluding probative and otherwise admissible evidence in criminal prosecutions."[66] The court reasoned,

> The public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes. It follows that since nothing in the Rule specifically prohibits receiving in evidence the admissions and statements made at a conference to settle claims of private parties, they are admissible in any criminal proceeding.[67]

The Second Circuit correctly distinguishes between the differing policy approaches involved in Rule 408. The justice system has a big incentive to encourage parties to settle, thus avoiding the laborious lawsuit process.[68] However, this reasoning by the *Gonzalez* court is confusing because the court first suggests that Rule 408 does apply to this criminal case, but nonetheless allows the evidence in under an exception to the Rule.[69] Moreover, the next paragraph states that "the primary policy justification for Rule 408's exclusion in the civil context does not apply to criminal prosecutions."[70] The court finds that since nothing in Rule 408 "specifically prohibits receiving in evidence the admissions and statements made at a conference to settle claims of private parties, they are admissible in any criminal proceeding."[71]

The *Gonzalez* court does not rest its holding on the legislative history of Rule 408. While the intent of the advisory committee is clear, the notes and legislative history do not state specifically the forum in which Rule 408 applies. The *Gonzalez* court does cite the advisory committee notes explaining the policy reasons for the Rule as they apply to civil

---

[65] *Gonzalez*, 748 F.2d at 78.
[66] *Id.*
[67] *Id.*
[68] *See generally supra* notes 15-24 and accompanying text.
[69] *Gonzalez*, 748 F.2d at 78.
[70] *Id.*
[71] *Id.*

claims.[72] Aside from this, however, the court gives only brief and conclusory policy reasons as to why Rule 408 should not apply to criminal prosecutions. The broad statement the court makes is that "[t]he public interest in the disclosure and prosecution of crime is *surely greater* than the public interest in the settlement of civil disputes."[73] The court cites no Congressional finding to support this proposition. This reasoning may also be contrary to a recent Supreme Court case which curbs the judiciary from choosing its own policy considerations over that of Congress.[74] To the extent that the statement may be true, there are many limitations put on a prosecution regarding evidence that impedes on the "public interest in the disclosure and prosecution of crime."[75] The Supreme Court recently recognized that even if a guilty defendant goes free in some circumstances, some well-grounded policies are necessary.[76] Certainly, the fruit of the poisonous tree doctrine concedes that evidence gained from illegal means is generally not admissible.[77]

The *Gonzalez* court cites no cases to support its holding, nor does the court discuss in any detail the reasoning behind its holding beyond the policy statement that the justification for Rule 408's exclusion in the civil context does not apply to criminal prosecutions.[78]

---

[72] *Id.*

[73] *Id.* (emphasis added).

[74] *See Brogan*, 522 U.S. at 408 (holding that the language of 18 U.S.C. § 1001 permitted no exception for an "exculpatory no," and stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so ").

[75] *Gonzalez*, 748 F.2d at 78.

[76] Dickerson v. United States, 530 U.S. 428, 431 (2000) (discussing Miranda v. Arizona, 384 U.S. 436 (1966)).

[77] Mark S. Bransdorfer, *Miranda Right-To-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1064 (1987).

[78] *Gonzalez*, 748 F.2d at 78.

B. *United States v. Baker*

The Second Circuit revisited this issue in *United States v. Baker*[79] and once again held that Rule 408 only applies to civil litigation.[80] The defendant was convicted for possessing stolen electronic equipment. When federal agents went to the defendant's house, the defendant showed them to the basement where the stolen merchandise was stored, and asked the agents if they knew of another agent who "made deals for other people in the past."[81] The defendant asked the agent that was present if she would speak with the other agent so they could "get together and make some sort of deal for myself."[82] At trial, the defendant sought to have these statements precluded under Rule 408.[83] The district court admitted the statements and the defendant was convicted. The Second Circuit affirmed the district court's decision not to suppress the statements.

Although this decision came seven years after *Gonzalez*, the Second Circuit did not cite *Gonzalez* or use its reasoning. Rather, the court relied on two entirely different principles. The court first discussed the text of the Rule itself, which emphasizes "a *claim* which was *disputed* as to *validity* or *amount*."[84] This language, according to the Second Circuit, is only applicable to civil proceedings, since disputed claims dealing with validity and amount normally only refer to civil proceedings.[85] This is a good example of the confusing nature of this Rule. This question would be resolved if the drafters of Rule 408 simply stated their intention explicitly in the Rule or in the advisory committee's notes.[86]

---

[79] 926 F.2d 179 (2d Cir. 1991).

[80] *Id.* at 180.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] FED. R. EVID. 408 (emphasis added); *see also Baker*, 926 F.2d at 180; Government's Memorandum of Law in Opposition to the Post-Trial Motion of Defendant Earl Diviney, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. July 12, 2000) ("the words employed by the drafters—e.g., 'liability,' 'claim' and 'amount'—make it clear that Rule 408 was intended to apply strictly to civil proceedings").

[85] *Baker*, 926 F.2d at 180.

[86] Many Federal Rules of Evidence do state that they apply to either criminal or civil proceedings, or both. *See* FED. R. EVID. 301, 302, 404(a)(1), 413, 414, 714(b); *see also* FED. R. EVID. 1101(b) (providing that the Federal Rules of Evidence apply to both civil and criminal actions).

This text-based conclusion does not take into account the numerous situations where the amount and validity of the claim is the crux of criminal plea negotiations. For example, the actual amount of loss is very important in determining a sentence for a fraud conviction.[87] Fraud loss in a criminal case is the amount of proceeds the government alleges an accused either received or attempted to receive by committing the crime. If a defendant is accused of attempting to deposit a counterfeit check for $10,000, but is only able to withdraw $100 before the authorities freeze the account, the fraud loss amount is still $10,000, even though the defendant only personally benefited $100. Because of this, when a defendant engages in plea discussions with the government, the amount of fraud loss the government intends to charge is always an issue. Often a defendant chooses to go to trial because the amount of fraud loss claimed by the government is too great and will result in a sentence that is longer or harsher than what the defendant is willing to accept.

In addition, the difference between a felony and a misdemeanor is often determined by the amount of loss "agreed to" in a plea agreement.[88] The Second Circuit's reasoning does not reflect how plea negotiations work in conjunction with the Federal Sentencing Guidelines.[89] In many situations, the amount agreed to by the prosecution and the defendant as the fraud loss amount will determine whether the defendant will plead guilty or choose to go to trial. Even though the Second Circuit's interpretation of the wording of Rule 408 is true for

---

[87] *See generally* U.S. SENTENCING GUIDELINES, *supra* note 21, § 2F1.1. The Sentencing Guidelines, for fraud and deceit cases, give a base level of six points, and then add up to eighteen points for the fraud loss amount. So a defendant who has no criminal history faces anywhere from zero to six months in jail at the lowest level to fifty-one to sixty-three months at the higher level, depending on the fraud loss amount. *Id. See also* Kate Stith & Steve Y. Kohlson, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

[88] *See* U.S. SENTENCING GUIDELINES, *supra* note 21, at 101.

[89] *See* Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 502-03 (1992) (discussing the inherent unfair discretion that prosecutors have in determining sentences, and finding that although the *U. S. Sentencing Guidelines Manual* is supposed to reduce disparity in federal sentencing, it only limits the courts and the judges, not the prosecutors, in discretional decisions during plea negotiations).

most common law crimes, it cannot be accurately stated that "disputed claims" *only* apply to civil proceedings.[90]

The second reason the *Baker* court provided is the result of a comparison of Rule 408 to Federal Rule of Criminal Procedure 11(e)(6).[91] Under Rule 11(e)(6) the government cannot introduce at trial evidence of plea negotiations that do not result in guilty pleas and other admissions or facts that suggest a defendant is guilty The court stated that "[t]he very existence of [Federal Rule of Criminal Procedure] 11(e)(6) strongly supports the conclusion that Rule 408 applies only to civil matters."[92] Rule 11(e)(6) explicitly states that it applies to both civil and criminal proceedings, removing any ambiguity as to whether a civil plaintiff could introduce evidence such as plea negotiations with a government attorney in a civil trial.[93] The court's analysis is interesting, but unpersuasive, because it does not explore why Congress passed these two Rules, and what relationship they should have with each other.

The court opined that the existence of Rule 11(e)(6) supported its view that Rule 408 only applies to civil proceedings, but the court did not address the commonly held view that Rule 11(e)(6) only protects the defendant from the government introducing statements made during plea discussions. The Rule does not protect the prosecution from the defendant introducing government offers made to the defendant during plea discussions.[94] A court is endorsing, either intentionally or by default, the applicability of Rule 408 in criminal proceedings when it refuses to allow the defendant to introduce offers made by the government during plea discussions.[95] As the Eighth Circuit stated in *United States v. Verdoorn*,[96] "[m]eaningful dialogue between the parties would,

---

[90] *See generally* FED. R. EVID. 408.

[91] *Baker*, 926 F.2d at 180; *see supra* notes 28-36 and accompanying text; *see generally* FED. R. EVID. 410.

[92] *Baker*, 926 F.2d at 180.

[93] *See generally* FED. R. CRIM. P 11(e)(6).

[94] *See supra* notes 43-46 and accompanying text.

[95] *Id.*

[96] 528 F.2d 103 (8th Cir. 1976) (holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact that the prosecution had entered into plea negotiations with them). This recently was also an issue during a trial in the Southern District of New York. The defendant asked to introduce the fact that he had refused a five year offer from the prosecution, even though he more than doubled his time in jail if he went to trial and was convicted. The trial judge refused to

as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."[97]

C. *Manko v. United States*

The Second Circuit recently re-affirmed its position in *Manko v. United States*.[98] The defendant was convicted of tax fraud related to interest expense deductions arising from sham transactions. In this case, it was the defendant who sought to introduce evidence that the Internal Revenue Service ("IRS") and the defendant had settled civil tax claims that were based on the same facts and theory as the criminal charges. This evidence, the defendant claimed, was an admission by the IRS that the defendant was at least partially justified in deducting the losses that were claimed to be fraudulent in the criminal trial. However, the trial judge did not let the defendant present this evidence, in part because the judge rendered it inadmissible under Rule 408. The Second Circuit concluded that the district court erred by excluding the IRS settlement under Rule 408, holding again that Rule 408 does not apply to criminal proceedings.[99]

The Second Circuit decision gives a detailed justification why Rule 408 does not apply to the criminal docket. The *Manko* court explicitly stated that it was balancing the policy goals of the criminal and civil justice systems to determine whether Rule 408 should apply to criminal proceedings: "The policy favoring the encouragement of civil settlements, sufficient to bar their admission in civil actions, is insufficient, in our view, to outweigh the need for accurate determinations in criminal cases where the stakes are higher."[100]

---

admit this evidence, citing the unfairness to the prosecution because they are not allowed to introduce the evidence under Federal Rule of Criminal Procedure 11(e)(6). *See* Trial Transcript at 84-87, United States v. Ortega, 00 Cr. 432 (DLC), (S.D.N.Y. Jan. 23, 2001) (denying, under Rule 403, defendant's application to elicit testimony that the defendant rejected a five year offer by the government).

[97] *Verdoorn*, 528 F.2d at 107.

[98] 87 F.3d 50 (2d Cir. 1996).

[99] *Id.* at 52, 55.

[100] *Id.* at 54.

The court also specifically overruled a decision that predates the enactment of Rule 408, *United States v. Ecklund*,[101] and reaffirmed *Gonzalez* by holding that the underlying policy considerations of Rule 408 are inapplicable in criminal cases.[102]

The *Manko* court noted that based on the advisory committee's notes the primary purpose of Rule 408 is to promote "compromise and settlement of disputes."[103] The court added that this policy "does not apply" to the criminal docket.[104] The court held that the probative value of this evidence in a criminal trial outweighs the policy considerations of excluding this evidence under Rule 408.

1. The Conflict Between *Manko's* Reasoning and Congressional Intent

The reasoning of the *Manko* court may be absolutely correct and in line with what society expects from its judicial system. However, a recent Supreme Court decision affirmed that courts are not allowed to substitute their own policy reasons for that of Congress.[105] The *Manko* court seemingly did just that by determining that the policy considerations of Rule 408 do not apply to criminal proceedings. The Supreme Court

---

[101] 159 F.2d 81 (2d Cir. 1947). The defendant was convicted of selling an automobile above the maximum price allowed under O.P.A. regulations. The defendant had entered into a settlement with the victims of the overpriced car, and at trial the government elicited this testimony. The trial court allowed this testimony about the settlement into evidence. *Ecklund*, 159 F.2d at 83, 84; *see infra* notes 166-169 and accompanying text.

[102] *Manko*, 87 F.3d at 54-55.

[103] *Id.* at 54 (quoting FED. R. EVID. 408 advisory committee's note).

[104] *Id.*

[105] *Brogan*, 522 U.S. at 408 (holding that the language of 18 U.S.C. § 1001 permitted no exception for an "exculpatory no," and stating that "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so"). The Second Circuit addressed the *Brogan* holding in an unpublished opinion that will be discussed at a later point in this note, but reached no conclusion on the matter because they found the evidence of subsequent settlement negotiations after a confession by the defendant harmless error. The appellant asked the Second Circuit to overturn *Manko* as it is inconsistent with the Supreme Court decision in *Brogan*, but the court did not consider the argument because "even if accepted, [it] would not justify reversal of [the defendants's] conviction." United States v. Recalde, 172 F.3d 39 (2d Cir. 1999) (discussed *infra* notes 124-38 and accompanying text).

curbed the promotion of policies by the judiciary, leaving it to the legislature to promote policies and laws that the justice system will then enforce. If we as a society want to promote putting compelling evidence of guilt ahead of encouraging parties to compromise, the legislature, not the judiciary, should decide that.

The question then is whether the judiciary, in interpreting Rule 408, is exceeding its authority because of the Rule's ambiguous language and the lack of guidance in the committee notes and legislative history.[106] To avoid any ambiguity in the Rule's application, Congress and the advisory committee typically draft the rules to include the forum to which the rule applies.[107] Congress probably did not anticipate ambiguity in Rule 408's application, and, as the district court in *United States v. Skeddle*[108] stated, "Nothing in Rule 408 limits its application to civil litigation that was preceded by or included settlement negotiations."[109] Whether the advisory committee intentionally failed to address the issue of forum or if they simply did not see the ambiguity in the language, the fair application of this Rule favors inclusion in criminal cases.

First, according to Rule 1101(b), unless otherwise stated, the Federal Rules of Evidence apply to *both civil and criminal* proceedings.[110] In addition, the actual text of Rule 408 cites an exception to exclusion when the evidence is introduced to "prov[e] an effort to obstruct a criminal investigation or prosecution."[111] This sentence would not be necessary if the Rule did not apply to criminal cases.[112]

Second, courts can also justify applying the Rule to criminal proceedings by recognizing the Supreme Court's warning that the judiciary should not substitute Congress' policies for its own. The ambiguity in the Rule's language has

---

[106] *See generally id.*, FED. R. EVID. 408 advisory committee notes.

[107] *See* FED. R. Evid. 410; *see supra* note 100.

[108] 176 F.R.D. 254 (N.D. Ohio 1997).

[109] *Skeddle*, 176 F.R.D. at 256.

[110] *See generally* FED. R. EVID. 1101(b); *supra* note 84.

[111] FED. R. EVID. 408.

[112] Memorandum of Law in Support of Defendant Diviney's Motion In Limine to Exclude Evidence of a Civil Settlement at 7, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Mar. 30, 2000) ("if Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases.") (quoting *Skeddle*, 176 F.R.D. at 257 (N.D. Ohio 1997)).

forced the judicial system to rely on the advisory committee notes, as well as the Rule's legislative history, to determine whether Congress and the committee intended this Rule to apply to criminal litigation.[113] The notes following the Rule plainly detail the public policy interest in encouraging parties to settle and the absolute necessity of this protection to allow parties to engage in meaningful deliberations.[114] It is obvious from the committee notes that the Rule's drafters weighed public policy concerns before adopting Rule 408. Yet the Second Circuit, by citing a greater "public interest in the disclosure and prosecution of crime,"[115] trumps the advisory committee's policy reasons with its own balancing of the public's interests.

Although the *Manko* court did discuss the policy justifications behind Rule 408, it only addressed the public policy interest with respect to one justification for the Rule. Other courts and the advisory committee found other policy reasons for this Rule.[116] Evidence of settlement and negotiation may be irrelevant or minimally relevant to the issue of actual liability [117] Parties settle for any number of reasons, such as to avoid costly litigation, avoid embarrassment, or to simply make peace.[118] As one court framed this issue, "It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back."[119] In their treatise,

---

[113] *See* FED. R. EVID. 408 advisory committee's notes; *supra* notes 12-24 and accompanying text.

[114] *Id.*

[115] *Manko*, 87 F.3d at 54 (quoting *Gonzalez*, 748 F.2d at 78 (citations omitted)).

[116] *See* United States v. Hays, 872 F.2d 582 (5th Cir. 1989) (discussed *infra* notes 160-66 and accompanying text); Ecklund v. United States, 159 F.2d 81 (6th Cir. 1947) (discussed *infra* notes 167-70 and accompanying text); United States v. Skeddle, 176 F.R.D. 254 (N.D. Ohio 1997) (discussed *infra* notes 171-97 and accompanying text).

[117] *See generally* FED. R. EVID. 408 advisory committee's notes; *Hays*, 872 F.2d at 589; Memorandum of Law in Support of Defendant Diviney's Motion In Limine to Exclude Evidence of a Civil Settlement at 7, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Mar. 30, 2000).

[118] *See generally* FED. R. EVID. 408 advisory committee's notes; Memorandum of Law in Support of Defendant Diviney's Motion to Set Aside the Verdict at 18, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. June 8, 2000) (arguing that the court erred in not allowing the defendant to cross-examine a company lawyer regarding the high cost of litigation as being the reason for a settlement).

[119] *Hays*, 872 F.2d at 589; *see also* Wayne D. Brazil, *Protecting the*

Professors Louisell and Mueller recognize the prejudicial effect of receiving settlement information as "such that often Rule 403 and the underlying policy of Rule 408 require exclusion even when a permissible purpose can be discerned."[120]

2. The Post-*Manko* Fall Out

After *Manko*, the Second Circuit requires a trial court to determine the admissibility of settlements and accompanying negotiations under a Rule 403 analysis.[121] Federal Rule of Evidence 403 allows otherwise relevant evidence to "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] misleading the jury "[122] In so holding, the Second Circuit recognizes the potency this evidence may have on a jury Any type of evidence, no matter what the content, may be excluded under this Rule. A trial judge nearly always considers whether to admit relevant evidence in light of possible unintended adverse consequences of admitting the evidence.[123]

This issue does not arise as often as other evidentiary considerations, but it has been a factor in at least two cases that this Note will examine next. Both cases were decided in the Southern District of New York. The first involved a scam to defraud Kenny Anderson, a professional basketball player. The second and more recent case involved a mid-level professional who was convicted of stealing money from his company using his position in the payroll department. These two case studies will show how the Second Circuit's holding on this issue is playing out on the trial level.

Confidentiality of Settlement Negotiations, 39 HASTINGS L.J. 955, 972 (1988) (discussing the "substantial prejudice" that can result from settlement evidence being admitted for the jury to consider and suggesting that judges have to weigh this prejudice when deciding on Rule 408, even if the evidence is offered for an exception to the Rule).

[120] LOUISELL & MUELLER, *supra* note 43, § 170, at 272.

[121] *Manko*, 87 F.3d at 55; *see also* Transcript of Pre-Trial Conference, at 15-16, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Apr. 3, 2000) (The Court: "I should have added this because 403 analysis is demanded by the Second Circuit in the Manko case I rule under Rule 403 that the relevant evidence is not outweighed by the danger of unfair prejudice, confusion or misleading the jury.").

[122] FED. R. EVID. 403.

[123] *See supra* note 138.

a. *United States v. Recalde*

Angel Recalde was indicted for bank fraud on January 26, 1996, by a federal grand jury sitting in the Southern District of New York. He was tried over an eight-day period starting September 15, 1997 He was convicted and sentenced to a term of twenty-one months imprisonment, to be followed by three years of supervised release, and ordered to pay restitution in the amount of $98,200.[124] The evidence at trial suggested that Recalde forged the signature of Kenny Anderson, a professional basketball player for the New Jersey Nets, on thirty-three checks drawn on Anderson's account. Recalde was an employee of the Nets, doing odd jobs for players and the general manager.[125]

At trial, Recalde admitted that he signed Anderson's name to the various checks and that he used the proceeds for his own benefit. Recalde, however, claimed that Anderson gave him permission to do so.[126] The scheme was uncovered when Anderson's accountant noticed the canceled checks and asked Anderson about them. Anderson said he knew nothing about them and that his name had been forged.[127]

Anderson's attorney, along with his accountant, arranged a meeting with Recalde during which Anderson's attorney placed the thirty-three checks on a table in front of Recalde and asked Recalde if he could explain the checks. Recalde allegedly began to cry, confessed to the crime, and offered to give some of the more expensive items he allegedly stole (including two cars and a large screen television) back to Anderson and to make restitution at a rate of $500 per month.[128]

Recalde subsequently hired an attorney and engaged in settlement negotiations over a two-month period. Many different settlement packages were discussed, although no agreement was reached. At trial, a government witness testified about the statements made by Recalde and the

---

[124] Adapted from the Brief for the United States at 1-3, United States v. Recalde, No. 98-1128 (June 2, 1998).

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

subsequent settlement negotiations. The defense called several character witnesses, including other professional basketball players who employed Recalde at various times. Recalde also testified, claiming that he signed Kenny Anderson's name to the thirty-three checks and took the $98,200 as part of a "salary" provided by Anderson for his services. Recalde claimed that Anderson demanded that Recalde forge Anderson's name and pay his own salary to conceal the fact that Recalde worked full-time for Anderson.[129]

During deliberations, the jury only asked to have the testimony about the settlement and the settlement negotiations read back to them. Following that testimony and evidence, the jury convicted Recalde. The defense attorney assigned to the case only appealed *one* issue after this eight-day trial, that is, the admission of the settlement and accompanying negotiations. The jury note itself is very telling. It states, "Please read back testimony of [Anderson's attorney], Recalde, and [Recalde's attorney] regarding restitution discussions."[130]

The district court granted the Government's in limine motion to admit the settlement negotiations, concluding that Rule 408 was inapplicable to criminal cases and that under Rule 403, the relevance of the restitution evidence was not substantially outweighed by the dangers of unfair prejudice, juror confusion, or waste of time.[131]

On appeal, the Second Circuit affirmed the district court's decision. The defendant argued that the Second Circuit should overrule its earlier decisions based on *United States v. Brogan*[132] because the Second Circuit reached its conclusions on "policy grounds."[133] The Second Circuit did not address whether *Brogan* overruled its prior precedents, finding that it was at worst "harmless error" for the settlement negotiations to be admitted.[134]

---

[129] Brief for the United States at 1-3, *Recalde*, No. 98-1128.

[130] Ct. Ex. # 6, United States v. Recalde, 96 Cr. 057 (KMW) (Sept. 23, 1997).

[131] Brief for Appellant Angel Recalde at 9, United States v. Recalde, No. 98-1128 (2d Cir. May 1, 1998).

[132] 522 U.S. 398 (1998); *see supra* note 120 and accompanying text.

[133] Defendant's Petition for Rehearing and Rehearing En Banc, United States v. Recalde, No. 98-1128 (2d Cir. Mar. 2, 1998).

[134] United States v. Recalde, 172 F.3d 39 (2d Cir. 1999).

The attorney who defended Recalde believes that the only reason the defendant was convicted was because the testimony about the restitution was admitted. The defense case suggested that the defendant was *authorized* to write the checks as part of his salary Mr. Recalde's attorney believed that because there was evidence that the defendant did have the authority to sign other players' names, the jury would have a difficult time convicting, except for the settlement negotiations.[135] Essentially, the defendant was punished and put in jail in part for trying to end the civil dispute between himself and Kenny Anderson. He was convicted of criminal charges and sent to jail for twenty-one months.

The Second Circuit affirmed the district court's decision in an unpublished opinion.[136] The court did not apply *United States v. Brogan* to its analysis because the court found that even if the policy-based rationale used in *Manko* was reversible, "the evidence that [Recalde] confessed his theft and offered to return the money when first confronted with the forged checks, the evidence of subsequent settlement negotiations was, at worst, harmless error."[137] This conclusion was reached despite the fact that the jury, during deliberations, asked only for the settlement testimony, and the prosecutor emphasized the fact that Recalde had attempted to settle his claim repeatedly during summation and rebuttal.[138]

b. *United States v. Diviney*

Earl Diviney was indicted by a grand jury sitting in the Southern District of New York for conspiracy to make forged securities and the substantive offense of forging securities for the company that he worked for. On April 12, 2000, following a five-day jury trial, Diviney was convicted of both counts. The evidence at trial showed that there was a conspiracy to steal money from a mid-sized company The participants wrote

---

[135] Interview with Robert Baum, Esq., The Legal Aid Society, Federal Defender Division (Jan. 18, 2002).

[136] 172 F.3d 39 (2d Cir. 1999).

[137] *Id.*

[138] Brief for Appellant Angel Recalde at 12-14, *Recalde*, No. 98-1128 (2d Cir. May 1, 1998).

payroll adjustment checks when no money was owed to the employee. The payroll system allowed for extra checks to be written when an employee had been shortchanged. Diviney was the payroll manager and allegedly the ring leader of the conspiracy to steal from the company [139]

The defendant left the company to work for Smith Barney in New York, but continued to perform some tax work for the company when the payroll adjustment scheme was discovered. When the company approached other individuals involved in the conspiracy, they accused Diviney of being involved as well.[140] Diviney denied the allegations at first, but when the company's attorney claimed that over $100,000 had been stolen, the defendant allegedly claimed "there was no [expletive] way, that it wasn't that much money, that he only got certain amounts."[141] The defendant would not sign any papers admitting to his role in the scam, but did retain a law firm to engage in settlement negotiations. Diviney agreed to pay the company $60,000, in exchange for a general release from the company [142] The agreement also provided that Diviney's payment "does not constitute an admission of any liability but rather is being made for the sole purpose of resolving all outstanding disputes between the parties without the need for engaging in costly litigation."[143]

When the district court denied the defendant's request to suppress the evidence of the settlement and accompanying negotiations, the judge stated,

> I rule that Rule 408 is by its terms focused on civil liability, and even though the Federal Rules of Evidence, as [the defense attorney] argued in his brief, is intended to cover both civil and criminal cases, the wording of Rule 408 to the criminal law has to be a very narrow one.[144]

---

[139] Facts adapted from Government's Memorandum of Law in Opposition to the Post-Trial Motion of Defendant Earl Diviney at 5-8, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. July 7, 2000).

[140] *Id.* at 13.

[141] *Id.* at 14 (quoting Trial Transcript at 489, United States v. Diviney, 99 Cr. 871 (AKH) (S.D.N.Y. Apr. 10, 2000).

[142] *Id.*

[143] Government Exhibit 26, at 1, United States v. Diviney, 99 Cr. 871 (AKH) (Govt. Ex. 26 is a copy of the settlement agreement entered into by the defendant and his former employer).

[144] Transcript of Pre-Trial Conference at 14, United States v. Diviney, 99 Cr.

The judge later followed *Manko* by conducting a Rule 403 analysis and found that the proffered evidence was highly probative and not outweighed by the dangers of unfair prejudice, confusion, or potential to mislead the jury [145]

The defendant did not appeal the judge's ruling and served more than a year in jail for his crimes. During this trial there was evidence from cooperators who alleged the defendant's involvement in the scheme, along with evidence of irregular cash deposits into the defendant's bank account. But without question, the most convincing evidence was the testimony from the company's lawyer about the settlement agreement and the settlement itself. The defendant's attorney tried to point out that civil litigation would have been much more expensive then just settling with the company Another reason proposed by the defendant for settling was the fact that he had started working for a new company and did not want to deal with any accusations from his former employer. However, the jury did not accept these explanations, either because they did not believe them or because they were not informed of the expenses of civil litigation, and the defendant was convicted.

III. COURTS OUTSIDE THE SECOND CIRCUIT ADDRESSING RULE 408'S APPLICATION TO CRIMINAL AND CIVIL CASES

Although the case law on this issue is relatively sparse,[146] other courts outside the Second Circuit have addressed Rule 408's application to criminal and civil cases.[147] An often cited case is *United States v. Hays*,[148] but other courts have addressed the applicability of Rule 408 to criminal cases.

---

871 (AKH) (S.D.N.Y. Apr. 3, 2000).

[145] *Id.* at 15, 16 (the court, in making this determination, found that "if someone is confronted with a statement that you stole $60,000 and says it wasn't that much, that indicates a criminal state of mind admitting stealing. If someone pays back $60,000 [which the defendant had previously done after the settlement] when charged with having stolen $60,000, there is an argument that, well, I did it because I didn't want litigation, I was going on to another job, I was doing something else, I was making a lot of money, and so on, but I think it's for the jury to understand.").

[146] *Manko*, 87 F.3d at 54.

[147] *See generally* United States v. Hays, 872 F.2d 582 (5th Cir. 1989); United States v. Meadows, 598 F.2d 984 (5th Cir. 1979); United States v. Skeddle, 176 F.R.D. 254 (N.D. Ohio 1997).

[148] 872 F.2d 582 (5th Cir. 1989).

This section of the Note will examine the reasoning various courts have used in determining whether Rule 408 should apply to civil and criminal proceedings.

A. *United States v. Prewitt*

In *United States v. Prewitt*,[149] the Seventh Circuit summarily agreed with the Second Circuit that the protections afforded under Rule 408 only apply to civil proceedings. The defendants in *Prewitt* were convicted of mail fraud arising out of sham security deals. At trial, an investigator for the state of Indiana testified about statements made during settlement negotiations where one of the defendants admitted that a number of the checks at issue in the case were for the defendant's own benefit.[150]

The *Prewitt* court found that the "clear" interpretation of Rule 408 suggested that it should apply only to civil proceedings.[151] Following this statement, the court quoted from both the *Gonzalez* and the *Baker* decisions in holding that, from a policy standpoint, the "public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes."[152]

B. *United States v. Meadows*

In *United States v. Meadows*, the Fifth Circuit addressed the applicability of Rule 408 to criminal prosecutions.[153] In a criminal case tried in the Northern District of Georgia, the defendant was convicted of fraudulently receiving funds which were the subject of a grant pursuant to the Comprehensive Employment and Training Act. At trial, the government introduced statements made by the defendant to a government official when he was confronted with the alleged

---

[149] 34 F.3d 436 (7th Cir. 1994).

[150] *Id.* at 438.

[151] *Id.* at 439. The court was specifically alluding to the language in the Rule concerning validity and amount of a claim.

[152] *Id.*

[153] 598 F.2d 984 (5th Cir. 1979).

fraud. On cross-examination, the defense counsel elicited testimony that the defendant had agreed to a repayment schedule.[154]

Two separate factual issues in this case implicated Rule 408. The first was the defendant's alleged admission of guilt when he was confronted with his involvement in the fraud scheme. On this issue, the court found that this admission was not in the course of any settlement negotiations and that it was an admission by the defendant. The second fact and issue was the actual repayment of the money The court concluded that the repayment was a settlement and as such was governed by Rule 408.[155] Furthermore, because the defense counsel had elicited testimony about the settlement the court held that it was a "calculated, tactical defense decision,"[156] and therefore could not be called unduly prejudicial.

The court seemed to suggest that instead of a bright-line rule of exclusion, Rule 408 gives a party a privilege that can be waived.[157] The court first stated that the settlement was governed by Rule 408, even though the forum was criminal.[158] At this point the court could have held the evidence inadmissible under Rule 408, since the Rule plainly states that evidence of a settlement is not admissible.[159] But the court allowed the evidence to be admitted because the defendant's counsel elicited the testimony Thus, the court allowed evidence of a settlement to be both a shield and a sword for the defendant, in that the prosecution was not allowed to admit settlement evidence, but the defendant, if so inclined, was allowed to elicit the testimony

C. *United States v. Hays*

In the midst of the savings and loan crisis of the mid-1980s, the Fifth Circuit once again addressed the applicability

---

[154] *Id.* at 986, 989.

[155] *Id.* at 989.

[156] *Id.*

[157] *See generally* WEINSTEIN'S FEDERAL EVIDENCE § 408.02[4][a], at 9. Weinstein says it makes sense to treat Rule 408 as a privilege, but notes that the Rule itself reads as if it were an absolute exclusion.

[158] *Meadows*, 598 F.2d at 989.

[159] FED. R. EVID. 408.

of Rule 408 to criminal proceedings. In *United States v. Hays*,[160] the defendants were convicted of fraudulent loan dealings and with misapplication of funds belonging to a savings and loan. At trial the government introduced into evidence, among other things, both a settlement entered into by the defendants and testimony from civil depositions in which the defendants discussed the settlement. The government wanted to use the evidence to assist the jury in understanding "the breadth of the conspiracy"[161] The Fifth Circuit soundly rejected this reasoning, stating that "this purpose stands at direct odds with the clear mandates of Rule 408."[162]

The Fifth Circuit applied Rule 408 to this criminal case without any justification, stating that the situation at bar was "clearly contemplated" by the framers of Rule 408.[163] The *Hays* court recognized that the potential impact of settlement evidence is profound.[164] The court applied a realist approach, envisioning the prejudice undoubtedly faced by a defendant whose jury has heard he settled a civil case the underlying charges of the instant criminal case.[165]

This decision is interesting because of the direct and swift way the court applied Rule 408 to criminal proceedings. The court dismissed the government's contention that this evidence will assist the jury in understanding how the conspiracy worked. The court recognized the overwhelming prejudicial effect a civil settlement would have on a jury deciding criminal charges arising out of the same set of circumstances. However, this case is analogous to *Gonzalez*[166] in that the court did not go into a lengthy discussion or analysis of the policy of Rule 408. Rather, the court simply applied the Federal Rules of Evidence and found that nothing within Rule 408 limited the Rule's application to the criminal docket.

---

[160] 872 F.2d 582 (5th Cir. 1989).
[161] *Id.* at 589.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Hays*, 872 F.2d at 589.
[166] United States v. Gonzalez, 748 F.2d 74 (2d Cir. 1984).

D. *United States v. Ecklund*

As noted in Section II.C of this Note, the *Manko* court specifically declined to follow a 1947, pre-Rule 408 decision handed down by the Sixth Circuit, *Ecklund v. United States*.[167] While the precedential value of *Ecklund* is negligible, the opinion does give interesting policy reasons for settlements which pre-date Rule 408's enactment. Surely, the questions raised and answered in this opinion are still at issue today, despite and because of Rule 408. The court found it well-settled that "evidence of an effort to compromise is inadmissible in a civil case."[168] The Sixth Circuit then questioned why this evidence should be admitted in a criminal case "where the essential ingredients of [civil] liability are wholly at variance"[169]

The *Ecklund* court reversed and remanded the decision because the court found that by receiving settlement evidence, the jury was under the impression that the settlement by the defendant of his civil liability was evidence that he is guilty of the charges returned by a grand jury.[170] Similar to the *Hays* decision, the court took a realist approach by questioning the practical effect this evidence might have on a jury when they deliberate.

E. *United States v. Skeddle*

One of the most detailed decisions on Rule 408's limitations does not come from a circuit court decision, but from a district court judge ruling on a motion in limine to exclude statements made to a corporation and to a firm hired by the corporation to investigate allegations of fraud within the company. This case is not binding on any court, but it is by far the most detailed opinion directly on the issue. As discussed throughout this Note, other opinions do not give detailed explanations on the numerous issues involved in the

---

[167] 159 F.2d 81 (6th Cir. 1947).
[168] *Id.* at 84.
[169] *Id.* at 84-85.
[170] *See id.* at 85.

applicability of Rule 408 to criminal proceedings.[171] The judge in *United States v. Skeddle*[172] accepted the defendants' arguments that they had submitted to questioning by the corporation's investigators because they were making an effort to settle the dispute. The defendants claimed that if they had known that notes from the investigation would end up in the government's hands, they would never have consented to an interview [173]

The judge read Rule 408 literally and found that "[n]othing in Rule 408 limits its application to civil litigation " and therefore held the statements inadmissible.[174] The *Skeddle* opinion found Rule 1101(b) binding on the court.[175] "Looking only at the text of Rule 408 in the context required by Rule 1101(b) leads to the conclusion that exclusion of the defendants' statements is required."[176] In addition, the court, in a footnote, addressed the distinction between direct evidence of a settlement and evidence of statements made during negotiations, but found that neither the Rule nor case law treats evidence of a settlement or evidence of settlement negotiations differently [177]

The court then took issue with contrary holdings. Addressing the *Manko* case first, the court disagreed with the proposition that, since the policy underlying Rule 408 does not apply to criminal prosecutions, then the Rule itself does not apply to criminal proceedings.[178] The court held that "just because the policy of encouraging settlements may be

---

[171] *See generally* Manko v. United States, 87 F.3d 50 (2d Cir. 1996); United States v. Baker, 926 F.2d 179 (2d Cir. 1991); United States v. Gonzalez, 748 F.2d 74 (2d Cir. 1984).

[172] 176 F.R.D. at 255.

[173] *Id.* at 256.

[174] *Id.*

[175] *Id. See supra* note 84.

[176] *Skeddle*, 176 F.R.D. at 256.

[177] *Id.* at 256 n.3. Treating settlements and settlement negotiations the same makes sense. They are, essentially, a distinction without a difference because both are protected by the Rule and attempting to distinguish by allowing one or the other into evidence would render the Rule worthless. A defendant gains little if the prosecution is allowed to introduce negotiations where concessions may have been made but not allowed to introduce the settlement itself. Conversely, introducing a settlement agreement gives the prosecution an advantage that the Rule does not allow because the jury knows the defendant settled the claims civilly even if they hear no testimony about the negotiations, so the damage is done to the defendant.

[178] *Skeddle*, 176 F.R.D. at 256-57.

irrelevant in a criminal prosecution does not mean that settlement statements derived from a civil context suddenly lose the protection by Rule 408 when the forum changes to a criminal context."[179] Later in the opinion, the court addressed the forum issue once again: "In determining exclusion under Rule 408, attention must be directed to the context in which the statements are made, not the context in which the statements are sought to be admitted."[180]

The *Skeddle* opinion also addressed other opinions which exclude Rule 408 from criminal trials, but distinguished the case at bar because the statements were made to a *private* investigator, rather than to a government official.[181] The court found that Rule 410 is narrower than Rule 408, in that Rule 410 excludes only statements made to a government attorney in the course of plea discussions, not admissions to any government agent or official.[182] Rule 408, on the other hand, excludes any statement made during a settlement negotiation, no matter to whom the statement is made.[183]

Further, the court addressed the plain language of the Rule and agreed that if "Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases."[184] The court credited the drafters of the *Federal Rules of Evidence* for knowing that the rules they enact will apply generally to both civil and criminal cases, and noted that "[f]ailure to limit Rule 408 to civil litigation"[185] specifically shows the drafters' intention that the Rule apply jointly to civil and criminal litigation.

Many evidence treatises have addressed the policy issues and complexities of Rule 408. Virtually all find that Rule 408 should apply equally to both civil and criminal cases.

---

[179] *Id.*

[180] *Id.* at 257; *see supra* notes 30-35 and accompanying text.

[181] The court is specifically addressing *United States v. Prewitt*, 34 F.3d 436 (7th Cir. 1994) (discussed *supra* notes 149-152 and accompanying text), and *United States v. Baker*, 926 F.2d 179 (2d Cir. 1991) (discussed *supra* notes 79-97 and accompanying text).

[182] *Skeddle*, 176 F.R.D. at 257.

[183] *Id.*

[184] *Id.* The court is referring to the last sentence of Rule 408, discussed *supra* notes 42-43, which states that "[t]his rule also does not require exclusion when the evidence is offered for another purpose, such as proving an effort to obstruct a criminal investigation or prosecution." FED. R. EVID. 408.

[185] *Skeddle*, 176 F.R.D. at 257.

Mueller and Kirkpatrick's treatise highlights modern society's tendency to favor private settlement of disputes, even in the criminal forum.[186] "The modern philosophy is somewhat more favorably disposed to such private arrangements," they argue, "at least in connection with relatively minor property offenses."[187] The treatise gives examples of some jurisdictions that have given statutory authority to parties to settle misdemeanor crimes.[188] This treatise takes specific issue with the precedential Second Circuit decision *United States v. Gonzalez*:[189]

> The *Gonzalez* decision is truly unfortunate, and it will make it very hard for victims of crime to reach a settlement of civil claims against the perpetrator whenever there is any appreciable risk of prosecution. The decision cannot help but chill negotiations in this context. *Gonzalez* runs against the grain of the modern trend of encouraging settlement between perpetrator and victim, which often produces better results than criminal sanction.[190]

Another leading evidence treatise[191] also questions the accuracy of *Gonzalez* in holding that society has a greater interest "in the disclosure and prosecution of crime" than "in the settlement of civil disputes."[192] The treatise author, David P Leonard, discusses a South Carolina decision[193] in which the court admitted evidence that the defendant had told another individual that he would pay in order to end the legal battle.[194] According to Leonard, this decision and others like it assume that society is not concerned with compensating victims of crime and also ignore "the reality that society requires the settlement of criminal cases and that virtually all such matters are compromised by plea bargain and without the necessity of

---

[186] MUELLER & KIRKPATRICK, *supra* note 43, § 138.

[187] *Id.* § 138, at 104.

[188] *Id.* The treatise cites an Oregon statute that authorizes private settlement of certain misdemeanors. In light of this, it makes sense that "[w]hen a person settles a claim in compliance with applicable state law, the settlement (and accompanying conduct and statements) should be excludable under [Rule] 408." *Id.* § 138, n. 16.

[189] 748 F.2d 74 (2d Cir. 1984).

[190] MUELLER & KIRKPATRICK, *supra* note 43, § 138 n. 17 (2d ed. 1994).

[191] LEONARD, THE NEW WIGMORE, A TREATISE ON EVIDENCE, SELECTED RULES OF LIMITED ADMISSIBILITY § 3.7.3 (2000 Supp.).

[192] *Gonzalez*, 748 F.2d at 78.

[193] State v. Wideman, 46 S.E. 769 (S.C. 1904).

[194] *Id.* at 770.

formal trial."[195] A Rule that finds compromise evidence admissible in criminal cases "adopts the position that all such cases are alike and that there are no situations in which the interests of society or the victim (or both) are served by encouraging compromise efforts."[196] Leonard's treatise recognizes the confusion in the language of Rule 408 and finds that the drafters probably did not consider this issue when developing this Rule.[197]

CONCLUSION

The Second Circuit has gone further than any other court to explain its reasoning in limiting Rule 408 to civil proceedings. The Second Circuit places a high value on the goals of the criminal justice system and is willing to sacrifice the possible added expenses and strain that increased litigation might impose if parties shy away from settling because of fear of future implications in the criminal arena. This reasoning may reflect the will of Congress more than commentators recognize. However, even if the end result is correct, the means by which the Second Circuit has arrived at this conclusion is flawed. Indeed, other courts and many commentators have criticized these decisions for violating the rule's text and proper application.

The courts should not make up for Congress' possible oversights and mistakes by invoking their own interpretation of the Federal Rules of Evidence. Rule 408 has been in existence for almost three decades. As it is written now, nothing limits Rule 408 to civil litigation. A party should not be protected by this Rule while engaging in civil litigation with a private party, only to have the veil lifted when the forum changes to criminal. If the Rule should apply only to civil cases, then Congress and the advisory committee should amend the Rule to reflect that.

The argument put forth by the Second Circuit that public policy in criminal cases is greater than judicial policies of encouraging parties to settle is compelling because in many

---

[195] LEONARD, *supra* note 191, § 3.7.3, 3:91.
[196] *Id.* § 3.7.3., at 3:91-92.
[197] *Id.* § 3.7.3., at 3:96.

of the cases that this Note examined one is not left with the sense that the defendant was *wrongly* convicted. For the judicial system to compel Congress and the advisory committee to settle Rule 408's applicability, often a moral, rather than procedural, injustice must occur. Society does not feel sorry for Angel Recalde or Earl Diviney because it believes they are guilty because they settled their claims and willingly gave thousands of dollars to their accusers. But this is exactly the point. Even if they were guilty of defrauding their employers, they attempted to settle their disagreements. Society and the judicial system must do everything possible to encourage parties to settle, and this procedural guarantee of protection, lifted in the criminal arena, is nothing more than a trap for the unwary party that is willing to compromise. The tough negotiator who admits nothing benefits; the party that settles and negotiates disputes pays the price of having his admissions used against him when the forum changes to criminal. If the judicial system, Congress, and the advisory committee do conclude that despite the potential costs to the system, this compelling evidence of guilt should be presented to the jury, at the very least the Rule itself should state this.

This issue does not arise often, which is perhaps why the outcry to resolve the ambiguity is not louder. But as evidenced in the case studies of *United States v. Recalde* and *United States v. Diviney*, this interpretation may be the difference between a defendant being convicted or acquitted. A practicing attorney in the Second Circuit is ill-advised to recommend settlement of civil litigation if the client's actions could give rise to a criminal proceeding. For litigators, unchartered waters come with the territory, but an attorney should not have to choose between advising a client to engage in settlement negotiations and the potential criminal implications that may come as a result of the negotiations. The clear voice from Congress and the judicial system is that the system cannot function without settlements occurring in the majority of both civil and criminal cases. Parties must, therefore, know what they are giving up when they engage in settlement negotiations. If society and the judicial system believe that settlement evidence should be admitted, then at the very least, attorneys and their clients should be informed so that they can act under proper advice and caution. Whether

the Second Circuit has correctly or incorrectly interpreted Rule 408 is not as important as having a consistent interpretation from Congress.

Todd W. Blanchet

† Brooklyn Law School, J.D. Candidate, June 2004.