The Federal Rule of Evidence that is Nothing but a Trap for the Unwary

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The Advisory Committees on the Rules of Evidence and Procedure sometimes explain that they have chosen to draft a rule in a certain way, or to reject a proposed alternative version, in order to minimize the risk that the rule might occasionally serve as a "trap for the unwary." The Supreme Court of the United States has frequently used the same phrase when describing its reluctance to interpret the Constitution or some federal statute in a way that might penalize even a sophisticated litigant or attorney for not correctly guessing at the details of some improbable or counterintuitive glitch buried in the law.

One of the most recent amendments to the Federal Rules of Evidence, however, tragically serves as *nothing* but a trap for the unwary, and will not alter the amount or the quality of the admissible evidence potentially available for trial except in those cases where the change catches some unsuspecting victim by complete surprise.

I. THE BACKGROUND BEHIND THE AMENDMENT

For more than a quarter of a century after it was enacted in 1975, Federal Rule of Evidence 408 assured defendants in civil litigation that statements made by them during settlement talks could not be used against them in a later proceeding to prove their liability for the claim they were trying to settle. For decades, the leading treatises and scholarly commentaries were unanimous in agreeing that the policies underlying Rule 408 require that its protections be fully available to that same defendant even in a later criminal prosecution, just as the law provided long before the Federal Rules were drafted. *Ecklund v. United States*, 159 F.2d 81 (6th Cir. 1947) (reversing a conviction because the trial court admitted evidence that the accused had settled the civil claim by the alleged victims). A few federal circuits had reached a different result, concluding that Rule 408 did not apply in any way to the admission of evidence at a criminal trial, but those poorly reasoned cases had been rejected by every leading treatise on evidence, as well as several

other circuits in much more careful analyses. *United States v. Arias*, 431 F.3d 1327, 1336-38 (11th Cir. 2005); *United States v. Bailey*, 327 F.3d 1131, 1146 (10th Cir. 2003); *see also United States v. Hays*, 872 F.2d 582, 588-89 (5th Cir. 1989).

II. THE 2006 AMENDMENT TO RULE 408

In an amendment to Rule 408 that went into effect in 2006, the Advisory Committee attempted to codify this consensus that Rule 408's protections should apply even when evidence of settlement negotiations is offered against the defendant in a later criminal case, but with an unexpected twist. In a stark departure from prior law, and at the unilateral insistence of the representative of the Justice Department on the Advisory Committee, Rule 408(a)(2) now provides for the first time that statements made by a defendant or by his attorney during civil settlement talks shall be admissible against that defendant "when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority." This result had not been the law in any federal circuit before the rule was amended; before 2006, no federal court had adopted or had even openly considered a proposal that the applicability of Rule 408 at criminal trials might depend on whether the defendant's statement was made in civil litigation brought by a government agency or by a private party.

The Committee Notes make it plain that the Committee was of course aware of this new rule's obvious potential for trapping the unwary. But what the Committee failed to either understand or to acknowledge is that this most unfortunate change will serve no other purpose, and will be *nothing* but a trap for the unwary. To illustrate this point, let us consider the two conceivable circumstances under which statements made during settlement negotiations may now be admissible against a criminal defendant in federal court under Rule 408(a)(2). It is plain that neither can provide any substantial justification for the amendment or a net improvement in the quality or fairness of the system of justice.

A. The Case of the Fearless Criminal Defense Counsel.

In a futile effort to furnish some intellectual cover for the fairness of this rule, the Advisory Committee first asserted that defendants in civil litigation with the government, unlike those involved in a purely private dispute, can "protect against the subsequent use of statements in criminal cases by way of private ordering" and through "negotiation and agreement with the civil regulator or an attorney for the government." Advisory Comm. Note to Rule 408. The Committee's fanciful insinuation is that much (or at least some) of the evidence that will be made admissible by this change in the rule will arise out of civil actions brought by the government, during arm's-length negotiations between lawyers who both know all about the new version of the rule, when the fearless defense lawyer is nevertheless willing to knowingly proceed with settlement talks, and to make potentially incriminating admissions during those talks, despite his or her inability to extract a waiver of its provisions from the government attorney handling the civil matter. (The Committee obviously assumed that some defense lawyers would choose to do that, for if *every* defense lawyer knew about Rule 408(a)(2) and were able to successfully negotiate a waiver of its provisions by the government lawyer who brought the civil case, the amendment would be a dead letter.)

But that scenario simply cannot provide any cogent justification for this change in the law. It is most unlikely that there will be many, if any, defense lawyers who will be intrepid or desperate enough to make damaging admissions during settlement talks despite their knowledge that the statements could be used against their clients in a later criminal case, despite their inability to persuade the Assistant U.S. Attorney in the civil case to enter into a little "private ordering" to make such statements inadmissible by stipulation. But that is entirely beside the point. Even if we were to make the rather extravagant assumption that such defense attorneys will be found in the real world, those brazen defense lawyers would have been just as free – and just as likely – to voluntarily enter into the same sort of precarious settlement talks at the insistence of the government lawyer *even if not one word of the rule had been amended*. Even before Rule 408 was amended in 2006, Government attorneys in civil litigation had already been perfectly free, if they wished, to insist that they would not participate in compromise negotiations

unless the defendant consented to a waiver of its rights under the former version of the rule and thus enter into an agreement that would make incriminating statements admissible by stipulation. That is the inescapable implication of *United States v. Mezzanatto*, 513 U.S. 196 (1995), which allowed prosecutors to insist upon a waiver of a criminal defendant's analogous rights under Rule 410, and the logic of which obviously applies with even greater force to Rule 408 and the attempted settlement of a civil claim.

This means that fearless defense lawyers who know about Rule 408(a)(2) but are willing to talk "on the record" and make incriminating admissions during conversations aimed at settling a civil case – assuming that such lawyers exist – could have voluntarily entered into a private arrangement with the Government lawyer that would have made their statements admissible at a criminal trial, just as Rule 408(a)(2) now provides by default, even if not one word of Rule 408 had been amended to obtain that same result.

B. The Case of the Unwary Criminal Defense Attorney.

That is why Rule 408(a)(2) will never give federal prosecutors *any* admissible evidence they could not have had just as easily without the amendment, except in the case of the many unwary defendants or lawyers who do not know about the change in this rule, and who will tragically rely at their peril on their knowledge of how this rule was worded in federal court and in more than forty states for over a quarter of a century.

In an effort to ameliorate the obvious risk that this new provision will serve as a trap for the unwary, the Advisory Committee Notes make the breathtakingly optimistic suggestion that courts may choose to exclude such evidence under Rule 403 "where the circumstances so warrant," such as, "for example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding," on the supposed theory that "its probative value in a subsequent criminal case may be minimal." ADVIS. COMM. NOTE TO RULE 408. That wishful thinking, if it were valid, would go a long way toward minimizing the unfairness of the change in the rule. But it is extremely dubious that any courts will be persuaded to exclude otherwise admissible statements by a party during settlement talks merely because he was not represented by a lawyer. All over the

nation every day of the year, judges in criminal and civil cases admit literally thousands of highly incriminating admissions that were made by criminal defendants and other parties who were not represented by counsel while talking to an investigator or the police or a government agent or an adversary or a friend or an informant – even though most of those parties are caught entirely by surprise to later learn that their supposed friend could not be trusted, or that the two were not alone, or that their phone calls were being recorded by the police, or that the rules of evidence made such statements admissible. Extremely few courts, if any, have *ever* excluded such evidence on the grounds that an alleged admission of guilt or liability has less probative value merely because it was not made in the presence of counsel. I know of no case – and the Advisory Committee has cited no case – that has ever held that the probative value of such evidence is undermined in the slightest degree merely because the party making the statement had no lawyer or was caught by surprise to later learn that his statement could be used against him, and most judges probably suspect (at least privately) just the opposite: that statements are actually more reliable if made in an unguarded moment without the assistance of counsel.

Only time will tell, of course, but this prediction about judges using Rule 403 to exclude evidence now made admissible by Rule 408(a)(2) will likely prove to be the most naïve line to be found anywhere in the Committee Notes to any of the Federal Rules. (I do not doubt that some of our finest federal judges who understood the wisdom of the old rule and the folly of the new rule may seize upon this line from the Committee Notes as an excuse for circumventing the amendment by citing "Rule 403" as the basis for excluding such evidence, but those judges will not really be applying the logic or the provisions of Rule 403 in good faith. They will be using it as a pretext for resuscitating both the policy and the language of the former version of Rule 408.)

III. CONCLUSION: THE IRONY IS UNBEARABLE

This is all unbearably ironic. Not so long ago, the United States Department of Justice tenaciously fought all the way to the Supreme Court in *Mezzanatto* to win the supposedly valuable right to extort criminal defendants and defense lawyers into giving up some of the protections written for their benefit in Rule 410 during talks aimed at

settling a criminal case. That victory plainly could have been used by the Department of Justice, if it had wished to do so, to insist that it would likewise not participate in settlement negotiations in *civil* cases unless opposing parties were willing to forgo their analogous rights under Rule 408, perhaps even in a nationwide series of arm's-length transactions.

But the Department of Justice was evidently not content to do it that way, obviously because it sensibly feared that defendants faced with such an above-board ultimatum would either be unwilling to enter into any settlement negotiations in a civil case involving matters that might later lead to a criminal prosecution, or else would be exceptionally careful to admit nothing even remotely damaging. And so the Department chose instead to use its obviously considerable weight on the Advisory Committee to insist upon an amendment to the language of Rule 408 so that it could achieve the same result entirely through stealth, and only at the expense of the unwary.