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OFFICE MEMORANDUM

TO: Ad Hoc Committee on Arizona Rules of Evidence
FROM: Subcommittee on Rules 407 and 408*
DATE: May 3, 2010
RE: Rule 408 – Admissibility Of Offers To Compromise

I. INTRODUCTION

Arizona Rule of Evidence 408 (“ARE 408”) was amended by the Arizona Supreme Court in late 2009.¹ The Order made the changes effective on January 1, 2010.² The changes made ARE 408 substantially similar to current Federal Rule of Evidence 408 (“FRE 408”), which was amended in 2006.³ Unlike FRE 408, ARE 408 does not contain the “criminal use exclusion” found in subsection (a)(2). Arizona lacks case law addressing this exclusion because the current version of ARE 408 is so new. Arguments can be made both ways for adopting the exclusion, but on the whole, Arizona should not adopt the exclusion to conform with FRE 408.

II. THE TEXT OF ARE 408 DIFFERS FROM THE TEXT OF FRE 408

A. What is the explicit difference in the text?

Rule 408 involves the admissibility of offers to compromise (*i.e.*, settlement offers) for the purposes of proving a party’s liability.⁴ ARE 408 is identical to FRE 408 in all respects except for one subsection: 408(a)(2).

In Arizona, “conduct or statements made in compromise negotiations regarding the claim” are not admissible “on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim . . . or to impeach through a prior inconsistent statement or

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¹ See Order Amending Rule 408, Arizona Rules of Evidence (hereinafter, the “Order”).

² *Id.*

³ See Fed. R. Evid. 408. Specifically, the 2006 amendments to FRE 408 barred the admissibility of offers to compromise for purposes of impeachment, prevented a party from being able to “waive” the rule’s protection, and allowed the admission of settlement negotiations “related to a claim by a public office or agency in the exercise of regulatory, investigative or enforcement authority.” See Fed. R. Evid. 408 Notes of Advisory Committee on 2006 amendments.

⁴ *E.g.*, Fed. R. Evid. 408; Ariz. R. Evid. 408.

contradiction.”⁵ Under the Federal Rules of Evidence, there is an exception for “conduct or statements . . . [that are] 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.”⁶ The Arizona rule does not contain this “criminal use exclusion.”⁷

Thus, under the federal rule, conduct or statements made during negotiations to compromise may be admissible to prove liability, the amount of a claim, or to impeach, if the negotiations “related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.”

B. How did the difference come about?

The Court ordered ARE 408 be amended upon a petition by the general counsel of the State Bar of Arizona.⁸ The petition requested the Court amend ARE 408 to substantially parallel FRE 408, but it expressly requested the Court decline to adopt the criminal use exclusion of the federal rule.⁹ In its Order amending ARE 408, the Court adopted the amendment as proposed by the petition, thus creating the difference between ARE 408 and FRE 408.¹⁰

III. THE DIFFERENCE HAS YET TO IMPACT ARIZONA

Arizona lacks case law that would substantially differentiate ARE 408 from FRE 408 because the current version of ARE 408 without the criminal use exception is so new. Thus, the difference between ARE 408 and FRE 408 has yet to have an impact in Arizona.

⁵ Ariz. R. Evid. 408(a)(2). Prior to the 2006 amendments, FRE 408 did not prohibit the use of settlement discussions for purposes of impeachment. See Mark T. Pavkov, Note: *Closing the Gap, Interpreting Federal Rule of Evidence 408 to Exclude Evidence of Offers and Statements Made by Prosecutors During Plea Negotiations*, 57 CASE W. RES. L. REV. 453, 454 n.7 (Winter 2007). Likewise, the Supreme Court of Arizona explicitly found statements made in a notice of claim (which the court assumed, for the purposes of that opinion, was an offer of compromise) were admissible to impeach a criminal defendant, despite ARE 408. *Hernandez v. State*, 203 Ariz. 196, 200, 52 P.3d 765, 769 (2002). However, the current versions of ARE 408 and FRE 408 expressly provide that such statements are no longer admissible for purposes of impeachment. E.g., Fed. R. Evid. 408; Ariz. R. Evid. 408. Thus, the Supreme Court, in its Order amending ARE 408, either intentionally or implicitly overruled *Hernandez*.

⁶ Fed. R. Evid. 408(a)(2).

⁷ See Ariz. R. Evid. 408(a)(2).

⁸ Order.

⁹ Petition, at 3-6.

¹⁰ See Order.

IV. POLICIES BEHIND FRE 408 AND THE CRIMINAL USE EXCLUSION

The purpose of FRE 408 “rests upon the strong social policy of encouraging private resolution of disputes.”¹¹ The question of whether FRE 408 applied to criminal cases sharply divided the federal appellate courts.¹² Several circuits held that FRE 408 did not apply to criminal cases, so evidence of settlement discussions in civil cases would be admissible.¹³ Others held that Rule 408 applied in criminal cases to exclude evidence of settlement discussions in civil cases.¹⁴ Due to the disagreement among the circuits, between 2003 and 2005, proposals were discussed to amend FRE 408.¹⁵

A proposal from a representative of the Department of Justice that would have denied FRE 408’s applicability to all criminal cases received “uniformly negative” criticism.¹⁶ As a result, the Advisory Committee revised the language and as a “compromise measure,” introduced the 2006 amendment.¹⁷

A. Policies underlying the exclusion.

According to the Department of Justice, “statements made in civil compromise could provide critical evidence of guilt needed in a criminal case to prove that the defendant had committed a crime.”¹⁸ As a result, the Department of Justice recommended that FRE 408 not apply at all in criminal cases.¹⁹ Also, according to the Seventh Circuit, “[t]he public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes.”²⁰ By allowing the admission of compromise negotiations “related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority” in criminal cases, the current version of FRE 408 advances a middle ground from the Department of Justice proposal.²¹ This way, a defendant could not testify inconsistently, free from the threat of impeachment.²²

¹¹ Pavkov, *supra* note 5, at 471 (quoting Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 134, at 81). *See also* Mikah K. Story Thompson, *To Speak or Not to Speak? Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408*, 76 U. CIN. L. REV. 939, 945 (Spring 2008) (citing Fed. R. Evid. 408 advisory committee’s note); Robert A. Weninger, *Amended Federal Rule of Evidence 408: Trapping the Unwary*, 26 REV. LITIG. 401, 414 (Spring 2007) (discussing empirical study of attorney reactions to amended FRE 408).

¹² *See* Pavkov, *supra* note 5, at 459-461 (discussing cases).

¹³ *E.g.*, *U.S. v. Logan*, 250 F.3d 350 (6th Cir. 2001); *Manko v. U.S.*, 87 F.3d 50 (2d Cir. 1996); *U.S. v. Prewitt*, 34 F.3d 436 (7th Cir. 1994).

¹⁴ *U.S. v. Arias*, 431 F.3d 1327 (11th Cir. 2005); *U.S. v. Bailey*, 327 F.3d 1131 (10th Cir. 2003); *U.S. v. Meadows*, 598 F.2d 984 (5th Cir. 1989).

¹⁵ *See* Thompson, *supra* note 11, at 949; Weninger, *supra* note 11, at 419-422.

¹⁶ *See* Weninger, *supra* note 11, at 419-421.

¹⁷ *Id.* at 422.

¹⁸ *Id.* at 420.

¹⁹ *See id.* at 420 n.58.

²⁰ *Prewitt*, 34 F.3d at 439.

²¹ *See* Weninger, *supra* note 11, at 422.

²² *See id.* at 422 n.64.

B. Policies against the exclusion.

In its petition against recommending the criminal use exclusion, the State Bar asserted that the exclusion “would inhibit settlement discussions with public agencies because of the fear that any statements . . . made during those discussions will be used in a later criminal prosecution.”²³ Another concern arises from a public agency only initiating settlement discussions to obtain an admission for use in later prosecution.²⁴ Finally, and perhaps the most disconcerting result of the exception, “settlement discussions between private parties may prove risky if a potential public claim lurks in the background,” since “legal claims between private parties may also implicate a potential claim by a state or local regulatory authority.”²⁵

Other concerns exist as well. Due to the nature of settlement discussions, statements made in the course of negotiations “may be of only questionable value as evidence of guilt in a later criminal case.”²⁶ Settlement discussions with public agencies will also be more difficult because the exception “will inhibit a full and free exchange of information” when bargaining.²⁷ Arizona recognizes that “the purpose of Rule 408 is to foster ‘complete candor’ between parties, not to protect false representations.”²⁸ Also, the difficulty of knowing whether statements will expose an individual to criminal prosecution can lead to unexpected results and may encourage clients to retain both a civil and a criminal lawyer, which will only complicate an already more difficult settlement environment.²⁹ Finally, the exclusion “will trap the unwary or the unrepresented.”³⁰

V. RECOMMENDATION

In considering whether Arizona should adopt the criminal use exclusion of FRE 408, two questions need to be answered. First, does Arizona consider prosecuting crime as a greater public interest than the settlement of civil disputes? If so, then does Arizona believe that the policy reasons supporting the criminal use exclusion outweigh its concerns?

It goes without saying that prosecuting crime is indeed of substantial public interest. But so too is the settlement of civil disputes. Without the ability to engage in the full and free exchange of information in settlement discussions, settlement is made more difficult.³¹ Whether one outweighs the other is a judgment call and will depend on the proclivities of the decisionmaker(s).

²³ Petition, at 6.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See Weninger, *supra* note 11, at 427.

²⁷ See *id.* at 427-428.

²⁸ *Hernandez*, 203 Ariz. at 199, 52 P.3d at 768 (quoting 23 Charles Alan Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE & PROCEDURE § 5314, at 286 (1980)).

²⁹ See Weninger, *supra* note 11, at 431.

³⁰ See *id.* at 428.

³¹ See *id.* at 410. While no “positive empirical evidence” exists suggesting that the exchange of information facilitates settlements, the necessity of such communication “seems obvious.” See *id.*

Balancing all these interests, the subcommittee recommends that Arizona not adopt the exclusion. As the State Bar advised, “the benefits from such a rule are dubious and its drawbacks considerable.”³² Arizona recognizes that “Rule 408 encourages candid compromise negotiations,” and a rule inhibiting “Rule 408’s goal of encouraging truthfulness” should be discouraged.³³ Moreover, the subcommittee noted that the Court just adopted the current version of ARE 408 less than a year ago.³⁴

VI. CONCLUSION

ARE 408 explicitly differs from FRE 408 on only one key provision in subsection (a)(2): the criminal use exclusion. The policies in support of that exclusion promote the prosecution of criminals as outweighing the public interest in civil settlement. However, Arizona recognizes that ARE 408 “encourages candid compromise negotiations,” and that policy would be discouraged if Arizona adopted the exclusion. Thus, Arizona should not adopt the criminal use exclusion and should intentionally depart from FRE 408 in that respect.

³² Petition, at 6.

³³ See *Hernandez*, 203 Ariz. at 200, 52 P.3d at 769.

³⁴ See *supra* text accompanying notes 1-2.