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CLOSING THE GAP: INTERPRETING FEDERAL RULE OF EVIDENCE 408 TO EXCLUDE EVIDENCE OF OFFERS AND STATEMENTS MADE BY PROSECUTORS DURING PLEA NEGOTIATIONS

I. INTRODUCTION

Imagine you are a prosecutor trying a major public corruption case involving a high profile public official and several other important business leaders. Attempting to secure more evidence to ensure conviction of the major players in the corruption, you extend an offer to a low-level conspirator to allow her to plead guilty to a lesser offense and avoid jail time if she will testify at trial against the other conspirators. You also offer another conspirator immunity for her role in the conspiracy in exchange for her testimony against the others. Both the conspirators, however, reject your offers. Then, at their subsequent trials, they seek to introduce into evidence the details of your plea offers and their rejection of them as evidence in their defense, and you promptly object that this evidence is inadmissible.

In ruling on your objection, the trial judge likely would consider Federal Rule of Evidence 410.¹ Typically, Rule 410 governs the ad-

¹ Rule 410 states:

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of *nolo contendere*;
- (3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or
- (4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

missibility of evidence of an offer to compromise a criminal charge,² generally referred to as plea bargaining.³ This rule excludes evidence of un consummated plea negotiations and statements made in connection thereto when offered in a criminal or civil case against the defendant who participated in the negotiations.⁴ Rule 410, however, does not exclude such evidence when offered by the defendant against the government in a criminal trial.⁵ Accordingly, in the hypothetical described above, Rule 410 would not bar the admission of evidence of the prosecutor's plea and immunity offers when offered as evidence by the criminal defendants. Indeed, this was the conclusion reached by a court faced with this question in a similar case.⁶ The problem with this result is easy to see. If a defendant may introduce evidence of a rejected plea or immunity offer in her favor at trial, a prosecutor may be reluctant to make such an offer.

There is, however, a ready solution to this dilemma. This Note argues that when a defendant offers evidence of a plea offer or negotiation against the government, courts should consider the admissibility of such evidence under Federal Rule of Evidence 408.⁷ Rule 408 gen-

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

FED. R. EVID. 410.

² See Pamela Bennett Louis, Note, *United States v. Mezzanatto: An Unheeded Plea To Keep the Exclusionary Provisions of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) Intact*, 17 PACE L. REV. 231 (1996); Adam Robison, Comment, *Waiver of Plea Agreement Statements: A Glimmer of Hope To Limit Plea Statement Usage to Impeachment*, 46 S. TEX. L. REV. 661 (2005).

³ This Note uses the terms "plea bargaining," "plea negotiations," and "plea offers" interchangeably to refer to the process by which a prosecutor and criminal defendant attempt to resolve criminal charges by reaching a negotiated agreement "whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor." BLACK'S LAW DICTIONARY 1190 (8th ed. 2004). Although an offer of immunity is not included in this definition of plea bargaining, the distinction between the two is not relevant to this Note's discussion of compromises in criminal cases. For an analysis of the plea bargaining process, see Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997).

⁴ FED. R. EVID. 410.

⁵ See FED. R. EVID. 410; see also 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 410.05 (Joseph M. McLaughlin ed., 2d ed. 2006) ("Nothing in the rule bars the defendant from offering these statements in his or her own behalf."). Rule 410 also does not address the admissibility of evidence of a plea or plea bargain that is offered as evidence in a subsequent civil trial against someone other than the criminal defendant who engaged in the plea discussion. See FED. R. EVID. 410.

⁶ See *United States v. Biaggi*, 909 F.2d 662, 690-94 (2d Cir. 1990).

⁷ Rule 408 states:

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 attempt-

erally bars evidence of offers or negotiations made in compromising a claim, as well as any statements made in such negotiations, from being introduced at trial to prove “liability for or invalidity of” the claim.⁸ Rule 408 is similar to Rule 410 in policy⁹ and function.¹⁰

In its current form, however, it is unclear whether Rule 408 excludes evidence of efforts to compromise disputed criminal charges or, alternatively, whether the rule excludes only evidence of efforts to compromise disputed civil claims. This Note focuses on the relationship between Rules 408 and 410 and argues that, with some limitations,¹¹ Rule 408 bars evidence of compromise offers and negotiations, whether it involves a disputed civil claim or a disputed criminal charge and whether it is offered as evidence in a civil or criminal case.

The following chart is helpful in understanding this thesis and illustrating the relationship between Rules 408 and 410 in protecting offers and statements made in compromise negotiations:

ing 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, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

FED. R. EVID. 408. [Editors’ Note: An amendment to Rule 408 went into effect on December 1, 2006, immediately prior to the publication of this Note. Therefore, references in the text to Rule 408 refer to the rule that was in force prior to December 1, 2006, and references to the “proposed amendment” refer to the rule that is currently in force. Other than this grammatical difference, the change in the rule does not affect the substantive discussion, premise, or thesis of this Note. *See infra* Section VI.]

⁸ *Id.*

⁹ *See* 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5342, at 353 (1980) (“The policy of [Rule 410], then, is the same as that of Rule 408.”).

¹⁰ Rule 410 bars evidence of the plea bargaining process, a compromise of a criminal charge, and Rule 408 bars evidence of compromise and offers to compromise generally.

¹¹ *See infra* Section IV.C.

		Context in which compromise statement or offer was made	
		Civil	Criminal
Context in which the evidence is offered	Civil	Box A	Box B1
			Box B2
	Criminal	Box C	Box D1
			Box D2

This Note will refer to the different boxes in this chart to clarify for the reader the types of evidence being discussed. Box A represents evidence of a civil compromise effort that is offered as evidence in a civil case, and Box C represents the same evidence when offered in a criminal case. Box B1 represents evidence of a criminal compromise effort that is offered as evidence in a civil case against the defendant who participated in the plea negotiation, and Box D1 represents the same when offered in a criminal case. Box B2 represents evidence of a criminal compromise effort that is offered as evidence in a civil case against a party other than the defendant in the criminal case, and Box D2 represents the same when offered in a criminal case.

Rule 408 clearly governs Box A, where evidence of offers or statements to compromise a civil claim is offered in a civil case.¹² The circuits are currently split as to whether Rule 408 governs the admissibility of evidence in Box C, where evidence of offers or statements to compromise a civil claim is offered in a criminal case, and a proposed amendment to Rule 408 adopts the position that Rule 408 governs this situation.¹³ Rule 410 clearly governs Boxes B1 and D1, where evidence of offers or statements to compromise a criminal case (plea bargaining) is offered in either a civil or criminal case against "the defendant who made the plea or was a participant in the plea discussions."¹⁴ By its own language, however, Rule 410 does not go-

¹² See 23 WRIGHT & GRAHAM, *supra* note 9, § 5306.

¹³ See *infra* Section II.

¹⁴ FED. R. EVID. 410.

vern evidence in Boxes B2 and D2, where evidence of offers or statements to compromise a criminal case is offered against a party other than the defendant. This Note argues that in these situations (Boxes B2 and D2), Rule 408 governs and excludes evidence of compromise offers and statements that would be excluded under Rule 410 if offered against the defendant (Boxes B1 and D1).

Section II of this Note reviews the current split in the circuit courts of appeals as to whether Rule 408 applies in criminal cases to exclude evidence of civil compromise offers or statements (Box C) and the proposed amendment to Rule 408 that addresses the circuit split. Section II also examines how the proposed amendment's resolution of that conflict fails to address whether Rule 408 excludes evidence of criminal compromise offers or negotiations in either civil or criminal trials (Boxes B2 and D2). Section III summarizes the prevailing approach courts use to resolve admissibility questions of evidence of criminal compromise offers and negotiations that are not covered by Rule 410 (Boxes B2 and D2) and examines a few of the decisions that have addressed Rule 408 in this context. Section IV analyzes the policy reasons supporting the application of Rule 408 to exclude evidence of offers and statements made in plea negotiations that are offered against a party other than the defendant who participated in the plea negotiations (Boxes B2 and D2) and outlines the limitations on the application of Rule 408 to bar such evidence. Finally, Section V addresses the primary counterarguments to the interpretation of Rule 408 asserted in this Note.

II. ADMISSIBILITY OF EVIDENCE OF CIVIL COMPROMISE NEGOTIATIONS OFFERED IN CRIMINAL TRIALS AND THE PROPOSED AMENDMENT TO RULE 408

In 2005, the United States Judicial Conference's Standing Committee on Rules of Practice and Procedure approved a proposed amendment to Federal Rule of Evidence 408¹⁵ that addresses "three

¹⁵ The proposed amendment was transmitted to the Supreme Court for approval in November 2005. Absent contrary congressional action, the amendment will become effective December 1, 2006. The amendment states:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

- (1) furnishing or offering or promising to furnish—or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related

important and longstanding conflicts in the courts about the admissibility of statements and offers made in compromise negotiations.”¹⁶ One of these “longstanding conflicts” concerns the issue of whether Rule 408 bars evidence of offers to compromise civil claims when offered as evidence in a subsequent criminal prosecution (Box C).¹⁷ Indeed, the circuit courts have split on this issue. The Second, Sixth, and Seventh Circuits have concluded that Rule 408 does not apply in the criminal context, while the Fifth and Tenth Circuits have held that Rule 408 applies in both civil and criminal proceedings.¹⁸

The first part of this section reviews the decisions of these courts because the reasoning employed by the Second, Sixth, and Seventh Circuits underlies a primary objection to interpreting Rule 408 to bar

to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses—This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness’s bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

Amendments to Federal Rule of Evidence 408 at 2–3, available at http://www.uscourts.gov/rules/supct1105/EV_Clean.pdf (last visited Oct. 19, 2006) [hereinafter Proposed Amendment]. [Editors Note: This amendment to Rule 408 was not altered by Congress and went into effect on December 1, 2006, immediately prior to the publication of this Note. References in the text to Rule 408 refer to the rule in effect prior to December 1, 2006, and references to the “proposed amendment” refer to the rule that is currently in force. Other than this grammatical difference, the change in the rule, however, does not affect the substantive discussion, premise, or thesis of this Note. See *infra* Section VI.]

¹⁶ ADVISORY COMMITTEE ON EVIDENCE RULES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 2 (2004), available at <http://www.uscourts.gov/rules/comment2005/EVMay04.pdf#page=1> [hereinafter PRELIMINARY ADVISORY COMMITTEE REPORT]. The three conflicts the amendment purports to resolve are: (1) the application of Rule 408 to bar evidence of civil compromise offers offered as evidence in criminal trials, (2) the admissibility of statements made in compromise negotiations for impeachment purposes, and (3) the ability of a party to introduce evidence of his or her own statements or offers to compromise. *Id.* at 2–4.

¹⁷ *Id.* at 2 (discussing proposed amendment to Rule 408 and noting “[c]ourts are in dispute over whether statements and offers made in compromise negotiations [of civil cases] are admissible in subsequent criminal litigation.”).

¹⁸ See *infra* notes 20–43 and accompanying text; see also *State v. O’Connor*, 119 P.3d 806 (Wash. 2005) (collecting cases). Other circuits have addressed Rule 408 in criminal cases without explicitly deciding whether the Rule does or does not apply in criminal cases. See, e.g., *United States v. Pendergraft*, 297 F.3d 1198 (11th Cir. 2002) (admitting videotape of civil settlement between co-defendants under Rule 408 to show their cooperation); *United States v. Sayakhom*, 186 F.3d 928 (9th Cir. 1999) (rejecting Rule 408 argument under plain error review); *United States v. Graham*, 91 F.3d 213, 219 (D.C. Cir. 1996) (“The subject of [Rule 408] is the admissibility of evidence (in a civil or criminal case)”); *United States v. Peed*, 714 F.2d 7 (4th Cir. 1983) (rejecting defendant’s Rule 408 argument because statements were not part of a negotiation to resolve a civil dispute). State courts have also split on the issue when interpreting similar state rules of evidence. Compare, e.g., *O’Connor*, 119 P.3d 806 (concluding that the rule does not apply in criminal cases), and *State v. Mead*, 27 P.3d 1115 (Utah 2001) (same), with *State v. Gano*, 988 P.2d 1153 (Haw. 1999) (concluding that the rule applies in criminal cases).

evidence of compromises or offers of criminal charges.¹⁹ The second part of this section discusses how the proposed amendment to Rule 408 resolves the current split among the circuits but fails to clarify the rule's application to evidence of compromises of criminal charges (Boxes B2 and D2).

A. Current Case Law and Circuit Split

1. Circuits Holding Rule 408 Does Not Bar Admission of Evidence of Civil Compromises in a Subsequent Criminal Trial

In *United States v. Gonzalez*,²⁰ the Second Circuit opined in dicta that “the primary policy justification for Rule 408’s exclusion in the civil context does not apply to criminal prosecutions.”²¹ In *Gonzalez*, the defendant faced wire and mail fraud charges for obtaining two five million dollar loans from two different banks by forging promissory notes.²² At trial, the district court allowed testimony from a bank attorney that Gonzalez admitted that the note was forged in a meeting concerning the bank’s claims against him and the court admitted into evidence a Confession of Judgment signed by Gonzalez stating that he was “personally liable” for the full debt of the note.²³ In rejecting Gonzalez’s objection to the admission of this evidence under Rule 408, the Second Circuit held that the trial court properly admitted the evidence for the purpose of establishing the commission of a crime, which is a purpose other than that prohibited under Rule 408.²⁴ The court stated that the premise behind Rule 408—that encouraging settlement of civil claims justifies the rule’s exclusion of evidence—“does not justify exclu[sion] . . . in criminal prosecutions . . . [because t]he public interest in the disclosure and prosecution of crime is surely greater than the public interest in the settlement of civil disputes.”²⁵

The Second Circuit reaffirmed this analysis twelve years later in *Manko v. United States*.²⁶ In a criminal trial regarding allegedly improper tax deductions, the trial court in *Manko* barred the defendant under Rule 408 from introducing evidence of a prior civil settlement with the IRS as an admission by the IRS that certain deductions were partially justified.²⁷ The Second Circuit reversed and reaffirmed *Gon-*

¹⁹ See *infra* note 145 and accompanying text.

²⁰ 748 F.2d 74 (2d Cir. 1984).

²¹ *Id.* at 78.

²² *Id.* at 75–76.

²³ *Id.* at 77.

²⁴ *Id.* at 78.

²⁵ *Id.*

²⁶ 87 F.3d 50 (2d Cir. 1996).

²⁷ *Id.* at 52.

zalez, holding that Rule 408 does not apply in criminal cases because of "the need for accurate determinations in criminal cases where the stakes are higher."²⁸

In *United States v. Prewitt*,²⁹ the Seventh Circuit followed the Second Circuit's reasoning and held that Rule 408 is inapplicable in criminal cases. In *Prewitt*, the defendant appealed his conviction for mail fraud arguing that the trial court violated Rule 408 by admitting testimony from an investigator from the Securities Division of the Indiana Secretary of State who had engaged in settlement negotiations with the defendant.³⁰ The Seventh Circuit, in affirming the conviction, noted that "[t]he clear reading of [Rule 408] suggests that it should apply only to civil proceedings," and relied on the Second Circuit's rationale in holding that "Rule 408 should not be applied to criminal cases."³¹

The Sixth Circuit followed the Second and Seventh Circuits' reasoning. In *United States v. Logan*,³² the court rejected the defendants' appeal under Rule 408 and affirmed the trial court's admission of the prosecution's evidence of a settlement agreement that resolved an administrative action against the defendants.³³ The court held that the "plain language of Rule 408 makes it inapplicable in the criminal context" and found that the risk of "a chilling effect on administrative or civil settlement negotiations [resulting from its holding in the case] . . . is heavily outweighed by the public interest in prosecuting criminal matters."³⁴

2. Circuits Holding Rule 408 Applies in Criminal Cases to Bar Evidence of Compromise Offers or Statements Made in Prior Civil Claims

In contrast to the conclusions reached by the Second, Sixth, and Seventh Circuits, the Fifth Circuit has applied Rule 408 in criminal cases with little or no discussion of the policy behind the rule or examination of whether it should apply in the criminal context. In *United States v. Meadows*,³⁵ the Fifth Circuit affirmed the trial court's admission of the defendant's statements over the defendant's objection based on Rule 408. In holding there was no violation of the Rule,

²⁸ *Id.* at 54.

²⁹ 34 F.3d 436 (7th Cir. 1994).

³⁰ *Id.* at 439.

³¹ *Id.*

³² 250 F.3d 350 (6th Cir. 2001).

³³ *Id.* at 367.

³⁴ *Id.*

³⁵ 598 F.2d 984 (5th Cir. 1979).

the court assumed that Rule 408 applied in the case “to govern the admission of related civil settlement negotiations in a criminal trial.”³⁶

Similarly, in *United States v. Hays*,³⁷ the Fifth Circuit directly applied Rule 408 without raising or addressing the question of whether the rule applies in criminal cases. In a criminal trial for conspiracy, the trial court admitted evidence of a civil settlement agreement offered by the government to “assist[] the jury in its understanding of the breadth of the conspiracy.”³⁸ In reversing the trial court’s admission of the evidence, the Fifth Circuit held that the government’s purpose for introducing the evidence of the civil settlement “stands at direct odds with the clear mandates of Rule 408.”³⁹

In *United States v. Bailey*,⁴⁰ the Tenth Circuit faced the issue as a question of first impression. In a criminal trial stemming from the defendant’s illegal transfer and misappropriation of funds from an investment partnership he managed, the government introduced evidence of the defendant’s civil settlement with his partners, which resolved the civil claims against him for his misconduct.⁴¹ After conducting a comprehensive review of the issue, the court rejected the Second, Sixth, and Seventh Circuits’ “plain language” interpretation, noting that “nothing in the language of the Rule explicitly excludes its application to criminal proceedings,”⁴² and concluded that Rule 408 does “bar settlement evidence in both criminal and civil proceedings.”⁴³

B. Resolution of the Circuit Split by the Proposed Amendment to Rule 408

As the cases above demonstrate, most courts simply frame the issue before them in terms of whether Rule 408 applies in the criminal context.⁴⁴ This generalization, however, “confuse[s] two related but distinct questions.”⁴⁵ First, whether Rule 408 applies in criminal cases to bar evidence of offers and statements made in an effort to com-

³⁶ *Id.* at 989.

³⁷ 872 F.2d 582 (5th Cir. 1989).

³⁸ *Id.* at 589.

³⁹ *Id.*

⁴⁰ 327 F.3d 1131 (10th Cir. 2003).

⁴¹ *Id.* at 1135–37.

⁴² *Id.* at 1145–46.

⁴³ *Id.* at 1146.

⁴⁴ See, e.g., *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001) (“[T]he plain language of Rule 408 makes it inapplicable in the criminal context.”); *Manko v. United States*, 87 F.3d 50, 54–55 (2d Cir. 1996) (“[T]he underlying policy considerations of Rule 408 are inapplicable in criminal cases.”).

⁴⁵ 23 WRIGHT & GRAHAM, *supra* note 9, § 5308, at 115 (Supp. 2006).

promise civil claims (Box C). And second, whether Rule 408 applies in a criminal or civil case to bar evidence of offers and statements made during plea bargaining in an effort to compromise criminal charges (Boxes B and D).⁴⁶ The foregoing cases address only the first question in ruling on the admissibility of civil compromises in criminal trials.⁴⁷ The Advisory Committee sought to resolve this issue in the proposed amendment to Rule 408.⁴⁸

Initially, the Advisory Committee on Evidence Rules drafted the proposed amendment to adopt the view taken by the Second, Sixth, and Seventh Circuits.⁴⁹ In response to public criticism of this position,⁵⁰ the Committee changed the proposed amendment to its current form:⁵¹

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except 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.

⁴⁶ *Id.*

⁴⁷ See *supra* notes 20–43 and accompanying text.

⁴⁸ See PRELIMINARY ADVISORY COMMITTEE REPORT, *supra* note 16, at 2–3.

⁴⁹ See *id.* at 2 (noting the proposed amendment was drafted in deference to the Justice Department so that it would not bar admissions of fault in a subsequent criminal case). The Committee Note to the originally proposed amendment to Rule 408, drafted before public comment, stated that “the amendment clarifies that Rule 408 does not protect against the use of statements and conduct during civil settlement negotiations when offered in a criminal case.” *Id.* at 12.

⁵⁰ See ADVISORY COMMITTEE ON EVIDENCE RULES, REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES 11–17 (2005), reprinted in REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE app. E, at 17–27, available at <http://www.uscourts.gov/rules/Reports/ST09-2005.pdf#page=305> [hereinafter FINAL ADVISORY COMMITTEE REPORT] (summarizing public comments).

⁵¹ See *id.* at 11 (“In response to public comment, the proposed amendment was changed to provide that statements and conduct during settlement negotiations are to be admissible in subsequent criminal litigation only when made during settlement discussions of a claim brought by a government regulatory agency.”).

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.⁵²

The amended rule excludes offers and statements in civil compromise negotiations when offered in subsequent criminal cases, except when the "negotiations relate[] to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."⁵³ The Committee thus implicitly adopted the conclusions of the Fifth and Tenth Circuits—that Rule 408 applies in criminal cases—but added an exception for compromise negotiations concerning civil claims with the government.⁵⁴

While clarifying this first question, however, the proposed amendment ignores the second question—whether Rule 408 excludes those statements and offers made during plea bargaining in an effort to compromise a criminal charge. Like the current rule, the proposed amendment to Rule 408 is silent as to whether Rule 408 excludes evidence of compromise offers and negotiations regarding only civil claims or whether the rule also covers such offers and negotiations regarding criminal charges as well.⁵⁵ Had the amendment adopted the view that Rule 408 never applies in the criminal context as initially proposed, it would be clear that Rule 408 would not bar evidence of compromises of disputed criminal charges when offered in criminal trials.

Instead, by generally allowing Rule 408's exclusion to apply in criminal cases, the proposed amendment complicates but fails to answer the second question. As noted above, the proposed amendment does not bar evidence of "conduct or statements made in compromise negotiations . . . 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."⁵⁶ This exception seems to apply to the second question—whether Rule 408 excludes those statements and offers made during plea bargaining in an effort to compromise a criminal charge—as it arguably covers plea negotia-

⁵² Proposed Amendment, *supra* note 15.

⁵³ *Id.*

⁵⁴ See FINAL ADVISORY COMMITTEE REPORT, *supra* note 50, at 7.

⁵⁵ See Proposed Amendment, *supra* note 15; 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 134, at 81 (noting that Rule 408 is silent concerning application to criminal charges).

⁵⁶ Proposed Amendment, *supra* note 15.

tions as they relate to a claim (the criminal charge) by a public office (the United States Attorney's Office) in the exercise of enforcement authority. While this may be a reasonable interpretation of the language of the proposed amendment, the Committee did not believe it was addressing this question in adopting the amendment. Discussing this exception, the Advisory Committee's note to the proposed amendment states that the rule does not bar in a criminal case evidence of "statements or conduct during compromise negotiations regarding a *civil* dispute by a government regulatory, investigative, or enforcement agency."⁵⁷ Therefore, if the exception in the proposed amendment applies to the plea negotiation context, this result was unintended by the Rule's drafters.

Regardless of whether the proposed amendment's exception in part (a)(2) applies to the plea bargaining process, the proposed amendment still does not fully resolve the question of whether Rule 408 applies in a criminal or civil case to bar evidence of offers and statements made during plea bargaining (Boxes B and D). The proposed amendment fails to answer this question for two reasons. First, the amendment's exception to the prohibition of Rule 408 does not extend to part (a)(1) of the proposed rule.⁵⁸ Because the exception would not apply to evidence of an offer or promise to compromise a criminal charge made during the plea bargaining process, Rule 408 could still exclude such evidence. Second, by its language, the exception does not apply to evidence offered in a civil trial. Thus, the exception to the exclusion of Rule 408 would not apply to evidence of conduct or statements made in the plea bargaining process if offered in a civil trial against a party other than the defendant (Box B2)⁵⁹ who participated in the plea bargaining, and this evidence could be barred by Rule 408.⁶⁰ Therefore, despite any unintended effects of the proposed amendment's exception, the amendment ultimately fails to address or resolve the issue of whether Rule 408 excludes evidence of compromise statements or offers made in compromising criminal claims.

⁵⁷ See FINAL ADVISORY COMMITTEE REPORT, *supra* note 50, at 7 (emphasis added).

⁵⁸ Proposed Amendment, *supra* note 15.

⁵⁹ Rule 410 bars evidence of conduct or statements made in the plea bargaining process if offered against the defendant who participated in the plea bargaining. FED. R. EVID. 410.

⁶⁰ This illustrates another unintended consequence of the proposed amendment. The exception of part (a)(2) in the amendment to Rule 408 indicates that the Rule does not require an identity between the *legal* "claims" referred to in Rule 408. Proposed Amendment, *supra* note 15. The exception makes no sense if the Rule's prohibition applies only if there is a legal identity of the legal "claim" being compromised and the "claim" in which the evidence is offered, even though a plain reading of the current language of Rule 408 seems to indicate an opposite conclusion.

III. CURRENT CASE LAW ON THE ADMISSIBILITY OF OFFERS AND STATEMENTS IN COMPROMISE OF CRIMINAL CLAIMS

When faced with the issue, most courts do not analyze the admissibility of evidence of offers or statements made in compromising disputed criminal claims, not otherwise barred by Rule 410, under Rule 408. This perhaps is one reason why the proposed amendment does not address the issue. This section reviews the case law addressing the admissibility of such evidence and the typical analysis courts employ in resolving the issue.

*United States v. Biaggi*⁶¹ is perhaps the leading case on the issue. In *Biaggi*, the district court barred one of the defendants in a public corruption trial from introducing evidence at trial that he had rejected the government's offer of immunity from the current charges in exchange for information regarding the illegal acts of others.⁶² The defendant asserted that the evidence of the immunity negotiations was admissible to prove his "consciousness of innocence"—that he was unaware of the criminal acts occurring around him.⁶³ The Second Circuit rejected the government's argument that the evidence of immunity negotiation should be barred just as evidence of plea negotiations is barred under Rule 410. The court highlighted the fact that Rule 410's exclusion of evidence of plea negotiations "against the defendant"⁶⁴ "does not necessarily [mean] that the Government is entitled to a similar shield."⁶⁵ Instead, the court weighed the admissibility of the evidence of the rejected immunity offer under Federal Rules of Evidence 401,⁶⁶ 402⁶⁷ and 403.⁶⁸ The court declined to decide whether a rejected plea bargain is admissible as evidence of a defendant's "consciousness of innocence," but it stated that evidence of a rejected immunity offer "is probative of a state of mind devoid of guilty knowledge,"⁶⁹ and thus is relevant under Rule 401.⁷⁰ The court

⁶¹ 909 F.2d 662 (2d Cir. 1990).

⁶² *Id.* at 690.

⁶³ *Id.*

⁶⁴ *Id.* (citing FED. R. CIV. P. 11(e)(6); FED. R. EVID. 410).

⁶⁵ *Id.*

⁶⁶ Rule 401 states: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

⁶⁷ Rule 402 states: "All relevant evidence is admissible . . . Evidence which is not relevant is not admissible." FED. R. EVID. 402.

⁶⁸ Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

⁶⁹ *Biaggi*, 909 F.2d at 690.

⁷⁰ *Id.* at 691.

noted that the question of whether the evidence should have been excluded under Rule 403 because of the “danger of unfair prejudice, confusion, or delay” was “closer”⁷¹ but concluded that the trial court erred in excluding the evidence.⁷²

The Fifth Circuit also employed the same analysis in resolving similar evidentiary questions. In *United States v. Maloof*,⁷³ the defendant offered evidence that he rejected two offers of immunity. The court held:

We conclude that the trial court correctly applied Fed. R. Evid. 401, 410 and 403 as interpreted in *Biaggi* by allowing [the defendant] to testify to the sum and substance of the offers and rejections of immunity; and did not abuse its discretion under Fed. R. Evid. 403 to bar embellishing details on the grounds that their probative value was outweighed by the danger of unfair prejudice, confusion, or delay.⁷⁴

This decision represents the way most courts handle the admissibility of evidence of plea or immunity offers and statements made by the government in discussing such offers.⁷⁵ Evidence of compromise offers or negotiations in the criminal context that are not covered by Rule 410 are typically admitted or excluded based upon the court’s considerations of the relevance of the evidence under Rules 401 and 402 and the probative value of the evidence balanced by its risk of prejudice, confusion, or delay under Rule 403.

A few courts, however, have addressed the applicability of Rule 408 in this context. In *United States v. Baker*,⁷⁶ the defendant attempted to exclude statements he made about making a “deal” to FBI agents who seized stolen goods in his possession.⁷⁷ The Second Circuit held that it is “fairly evident” that Rule 408 “applies only to civil litigation” because the language of Rule 408⁷⁸ “does not easily

⁷¹ *Id.*

⁷² *Id.* In *United States v. Samaria*, 239 F.3d 228 (2d Cir. 2001), the Second Circuit was faced with the question it declined to rule on in *Biaggi*: whether the defendant’s rejection of a plea bargain is admissible in his defense. Although the court again declined to rule on the issue, it reaffirmed *Biaggi*’s analysis that the admissibility of the evidence involves “the issue of relevance, under [Rule] 401, and balancing, under [Rule] 403.” *Id.* at 242.

⁷³ 205 F.3d 819 (5th Cir. 2000).

⁷⁴ *Id.* at 825.

⁷⁵ *See, e.g.*, *United States v. Fell*, 372 F. Supp. 2d 773 (D. Vt. 2005); *Wiggins v. Corcoran*, 164 F. Supp. 2d 538 (D. Md. 2001), *rev’d on other grounds*, 288 F.3d 629 (4th Cir. 2002), *rev’d on other grounds*, 539 U.S. 510 (2002).

⁷⁶ 926 F.2d 179 (2d Cir. 1991).

⁷⁷ *Id.* at 180.

⁷⁸ Specifically the court referred to the language, “a claim which was disputed as to either validity or amount.” *Id.* (quoting FED. R. EVID. 408).

embrace an attempt to bargain over criminal charges” and the existence of Federal Rule of Criminal Procedure 11(e)(6), which is identical to Rule 410, further shows that Rule 408 applies only to civil cases.⁷⁹

Similarly, in *United States v. Graham*,⁸⁰ when the defendant attempted to exclude statements made during his post-conviction bargaining with the government, the District of Columbia Circuit Court held that Rule 408 “does not address the admissibility of evidence concerning negotiations to ‘compromise’ a criminal case.”⁸¹ The court stated, “[i]n the context of a criminal case, Rule 410 (rather than Rule 408) strikes the balance between the interest in admitting all relevant evidence, [under] Rule 402, and the interest in resolving disputes without litigation.”⁸²

While most courts reject Rule 408’s application to bar evidence of compromises in a criminal case, as in *Baker* and *Graham*, or simply do not address Rule 408 in this context at all, as in *Biaggi* and *Mallof*, the Eighth Circuit has accepted the application of Rule 408 in this context. In *United States v. Verdoorn*,⁸³ the defendants sought to introduce evidence of the government’s plea offer, which included a reduction in charges or lighter sentencing offered in exchange for their testimony against co-defendants.⁸⁴ Noting the important policy considerations favoring plea bargains, the court held that “[u]nder the rationale of [Rule] 408, which relates to the general inadmissibility of compromises and offers to compromise, government proposals concerning pleas should be excludable.”⁸⁵ Moreover, in *United States v. Greene*,⁸⁶ the court extended its holding in *Verdoorn* to conclude that Rule 408 bars the admission of evidence that a defendant rejected an offer of immunity. The court declined to follow *Biaggi* and held that evidence of a rejected immunity offer is inadmissible under Rule 408 because there is no “relevant distinction between plea agreements and immunity agreements”⁸⁷

Although the Eighth Circuit rejected *Biaggi* and applied Rule 408 to exclude offers and statements made in the compromise of criminal charges, it is the only circuit that has done so.⁸⁸ Thus, the circuits are

⁷⁹ *Id.*

⁸⁰ 91 F.3d 213 (D.C. Cir. 1996).

⁸¹ *Id.* at 218.

⁸² *Id.* at 219.

⁸³ 528 F.2d 103 (8th Cir. 1976).

⁸⁴ *Id.* at 107.

⁸⁵ *Id.*

⁸⁶ 995 F.2d 793 (8th Cir. 1993).

⁸⁷ *Id.* at 798.

⁸⁸ *But cf.* *United States v. Kemp*, 362 F. Supp. 2d 591, 594 (E.D. Pa. 2005) (“[T]he Third

split as to whether Rule 408 applies to exclude evidence of efforts to compromise a criminal claim that occurs in the plea bargaining process when offered against the government (Boxes B2 and D2). Most courts, however, simply have not addressed the issue. Instead, they judge the admissibility of evidence of plea or immunity offers and other compromise efforts of criminal cases under Rules 401, 403, or 410.⁸⁹ This is an unsatisfactory way of dealing with this issue, and strong policy reasons support the application of Rule 408 to bar evidence of compromises and settlements of disputed criminal charges.

IV. JUSTIFICATION TO EXTEND RULE 408 TO EXCLUDE COMPROMISE OFFERS AND NEGOTIATIONS MADE IN AN EFFORT TO RESOLVE CRIMINAL CHARGES

Rule 410's exclusion of evidence of pleas and plea negotiations rests upon policy considerations intended to promote plea bargaining by preventing evidence of plea discussions and negotiations from being introduced at trial.⁹⁰ The rule's exclusion, however, is limited to evidence offered "against the defendant."⁹¹ This bars a defendant's statements made during the plea bargaining process with the prosecutor from being later admitted against him at trial, but the rule provides no similar protection for the prosecutor.⁹² Accordingly, some commentators have noted that Rule 408 could be used by the prosecutor in this context to "close the gap" of protection that exists in Rule 410 and exclude evidence of plea offers or negotiations offered against the government.⁹³ This section further advances this argument by showing that the similar policy considerations behind Rules 408 and 410 justify this interpretation of Rule 408. This section also shows why, in consideration of these policy justifications, Rule 403 offers a prosecutor insufficient protection against admission of this evidence. Finally,

Circuit has not adopted, and will not adopt, the holding in *United States v. Biaggi* . . .").

⁸⁹ Because most courts analyze the admissibility of such evidence under Rules 401 and 403, ignoring the potential application of Rule 408, the divergence between the circuits on this issue has not been as pronounced as the split between the circuits reviewed in the preceding section regarding the application of Rule 408 to bar evidence of civil compromise offers and settlements in criminal trials. This further explains why the Advisory Committee fails to address this conflict and issue in the proposed amendment to Rule 408.

⁹⁰ See FED. R. EVID. 410 advisory committee's note.

⁹¹ FED. R. EVID. 410.

⁹² See MUELLER & KIRKPATRICK, *supra* note 55, § 143, at 139-40; PAUL F. ROTHSTEIN, PRACTICE COMMENTS, RULES OF EVIDENCE FOR THE UNITED STATES COURTS AND MAGISTRATES 110-11 (1977); WRIGHT & GRAHAM, *supra* note 9, § 5348, at 402-03.

⁹³ MUELLER & KIRKPATRICK, *supra* note 55, § 134, at 81; ROTHSTEIN, *supra* note 92.

this section notes three limitations on the application of Rule 408 to exclude evidence of compromises in the criminal context.

A. Policy Favoring Application of Rule 408 to Compromises of Criminal Cases

Plea bargaining plays an important and essential role in our criminal justice system.⁹⁴ In 2003, guilty and no-contest pleas accounted for ninety-six percent of all convictions and eighty-five percent of all dispositions of criminal cases filed in district courts.⁹⁵ The Supreme Court has noted that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”⁹⁶ Indeed, in 1990, a study found that a five percent decrease in the number of federal cases resolved by guilty pleas would result in a thirty-three percent increase in the number of trials.⁹⁷

Even the Supreme Court has noted the importance of plea bargaining in our justice system and the policy considerations supporting it:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called “plea bargaining,” is an essential component of the administration of justice. Properly administered, it is to be encouraged. . . .

Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.⁹⁸

The Supreme Court enumerated four benefits plea bargaining achieves: (1) faster resolution of criminal cases; (2) a reduction of lengthy pre-trial detentions of criminal defendants; (3) increased protection of the public by limiting the time that dangerous criminal de-

⁹⁴ See Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 8 (2002) (“Plea bargaining constitutes a vital feature of the American criminal justice system”); George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857, 860 (2000) (“[P]lea bargaining has so fast a grip on our institutions of justice that antagonistic institutions cannot survive.”); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1122 (1998) (accepting plea bargaining as a given in our criminal justice system).

⁹⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 59, 62 tbl. 4.2 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs0304.pdf>.

⁹⁶ *Santobello v. New York*, 404 U.S. 257, 260 (1971).

⁹⁷ W. John Moore, *Courting Disaster*, 22 NAT’L J. 502, 505 (1990) (exploring the impact of the Speedy Trial Act on an overworked court system).

⁹⁸ *Santobello*, 404 U.S. at 260–61.

defendants spend on pre-trial release; and (4) an improved chance that defendants will be rehabilitated by incarceration.⁹⁹

Moreover, Rule 410 itself solidifies the importance of plea bargaining in our system of justice. The Advisory Committee's note to the first draft of the rule clearly states the policy rationale behind the exclusion of Rule 410: "Exclusion of offers to plead guilty rests upon . . . [the] promotion of disposition of criminal cases by compromise."¹⁰⁰ The Advisory Committee, quoting a prominent commentator, further noted that "[e]ffective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."¹⁰¹ Congress also approved of the policy considerations behind Rule 410, noting, "[s]uch a rule is clearly justified as a means of encouraging pleading."¹⁰² Thus, the policy behind Rule 410 embodies a congressional intent to encourage the use and improve the effectiveness of the plea bargaining process to resolve criminal cases through compromise.¹⁰³

In light of the importance of plea bargaining in our justice system and the strong policy favoring it, if the process is to be protected, it is essential that statements and offers made during the plea bargaining process not be admitted as evidence against the maker of the statements or offers.¹⁰⁴ As the Eighth Circuit stated, "[i]f such a policy [of plea bargaining] is to be fostered, it is essential that plea negotiations remain confidential to the parties if they are unsuccessful."¹⁰⁵ Rule 410 does not fully provide this confidentiality to the plea bargaining process, however, because the rule's exclusion, limited to evidence offered "against the defendant,"¹⁰⁶ leaves a gap in the protection provided by the rule. This gap is problematic because "[m]eaningful dialogue between the parties [participating in plea discussions] would, as a practical matter, be impossible if either party

⁹⁹ *Id.* at 261.

¹⁰⁰ *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 241 (1969) (advisory committee's note to Proposed Rule 4-10).

¹⁰¹ *Id.* (quoting CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 251, at 543 (1954)).

¹⁰² FED. R. EVID. 410 Notes of Committee on the Judiciary, reprinted in *FEDERAL RULES OF EVIDENCE*, S. REP. NO. 93-1277, at 10-11 (1974).

¹⁰³ See 2 WEINSTEIN AND BERGER, *supra* note 5, § 410.03(2) ("Rule 410's exclusion . . . represents a substantive policy to promote the disposition of criminal cases by compromise.").

¹⁰⁴ See 2 MCCORMICK ON EVIDENCE § 266, at 237 (Kenneth S. Broun et al. eds., 6th ed. 2006) ("Public policy accordingly encourages compromise [involved in plea bargaining], and as in civil cases, that policy is furthered by protecting from disclosure at trial not only the offer but also statements made during negotiations.").

¹⁰⁵ *United States v. Verdood*, 528 F.2d 103, 107 (8th Cir. 1975).

¹⁰⁶ FED. R. EVID. 410.

had to assume the risk that plea offers would be admissible in evidence.”¹⁰⁷

Accordingly, Rule 408 is needed to supplement Rule 410 to fully protect and encourage plea bargaining. Rule 408 properly provides this protection as it is based on extrinsic policy considerations, similar to Rule 410, of encouraging compromise negotiations.¹⁰⁸ While the Advisory Committee noted that one basis for the rule’s exclusion of evidence of offers or statements made in compromise, is that such evidence may be irrelevant, it further stated “[a] more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.”¹⁰⁹ Congress also noted that “[t]he purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.”¹¹⁰

Thus, the policy considerations underlying Rule 408 are similar to those of Rule 410. Rule 408 “rests upon the strong social policy of encouraging private resolution of disputes.”¹¹¹ Rule 408, like Rule 410, is designed to foster the settlement of disputes, in part, because of the judicial system’s need to resolve cases before trial.¹¹² While Rule 410 is founded on the public interest in fostering compromise negotiations of criminal charges or plea bargaining, Rule 408 is founded upon the public interest fostering compromise negotiations generally.¹¹³ Thus, as noted by other commentators, “[t]he policy of . . . [Rule 410], then, is the same as that of Rule 408.”¹¹⁴ Indeed, even the original Advisory Committee’s note for proposed Rule 410, then Rule 4-10, stated: “As with compromise offers generally, Rule 4-08, free communication is needed, and security against having an offer of compromise admitted in evidence effectively encourages it.”¹¹⁵ Thus, given the similar policy goals, it is

¹⁰⁷ *Verdoorn*, 528 F.2d at 107.

¹⁰⁸ MUELLER & KIRKPATRICK, *supra* note 55, § 134, at 80.

¹⁰⁹ FED. R. EVID. 408 advisory committee’s note (citing MCCORMICK, *supra* note 104, at §§ 76, 251).

¹¹⁰ FED. R. EVID. 408 Notes of Committee on the Judiciary, *reprinted in* FEDERAL RULES OF EVIDENCE, S. REP. NO. 93-1277, at 10 (1974).

¹¹¹ MUELLER & KIRKPATRICK, *supra* note 55, § 135, at 86.

¹¹² See Todd W. Blanche, Note, *When Two Worlds Collide: Examining the Second Circuit’s Reasoning in Admitting Evidence of Civil Settlements in Criminal Trials*, 67 BROOK. L. REV. 527, 532 (2001) (“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. So the judicial system has a practical reason for doing everything possible to encourage parties to settle.”).

¹¹³ See MUELLER & KIRKPATRICK, *supra* note 55, § 134, at 80; 23 WRIGHT & GRAHAM, *supra* note 9, § 5307, at 222–24.

¹¹⁴ 23 WRIGHT & GRAHAM, *supra* note 9, § 5342, at 353.

¹¹⁵ *Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates*, 46 F.R.D. 161, 241–42 (1969) (advisory committee’s note to Proposed Rule 4-10).

appropriate to apply Rule 408 to fill the gap left open by Rule 410 and bar evidence of plea offers or statements not covered by Rule 410.

Moreover, the language of Rule 408 does not preclude the application of Rule 408 in this context. Nothing in the plain language of Rule 408 is inconsistent with an interpretation of the rule that would provide additional protection to the plea bargaining process.¹¹⁶ Therefore, considering the important role plea bargaining has in our criminal justice system and the similar policy considerations behind Rules 410 and 408, it is easy to see why courts should "close the gap" of protection for plea negotiations in Rule 410 by applying Rule 408 to exclude offers or statements made in plea negotiations when offered against the government.¹¹⁷

B. Problems with Applying Rule 403 Instead of Rule 408 to Exclude Evidence of Plea Offers and Negotiations Not Governed by Rule 410

Some commentators might argue that the interpretation of Rule 408 suggested above is unnecessary because Rule 403 may exclude evidence of plea offers and negotiations not excluded under Rule 410. A reconsideration of *Biaggi*, however, reveals the inadequacy of Rule 403 to further the public policy favoring plea negotiations.

In *Biaggi*, the court properly rejected the government's argument that Rule 410 excludes the evidence of its immunity offer because Rule 410 clearly prohibits the admission of evidence only when it is offered "against the defendant."¹¹⁸ Then, applying Rules 401 and 403, the court admitted the immunity offer to show the "consciousness of innocence" of the defendant.¹¹⁹ The balancing analysis employed by the court under Rule 403, however, fails to account for the strong public policy supporting plea negotiations.¹²⁰ Rule 403 provides a trial judge with discretionary power to admit or exclude evidence based on a balancing of the considerations listed in the rule.¹²¹ These

¹¹⁶ See *infra* notes 140–52 and accompanying text. Even the heading of Rule 408, "Compromise and Offers to Compromise," fits squarely with the hallmarks of the plea bargaining process. FED. R. EVID. 408; see also Hollander-Blumoff, *supra* note 3 (analyzing the plea bargaining process).

¹¹⁷ MUELLER & KIRKPATRICK, *supra* note 55, § 134, at 81.

¹¹⁸ *United States v. Biaggi*, 909 F.2d 662, 690 (2d Cir. 1990).

¹¹⁹ *Id.* at 690–92.

¹²⁰ See *supra* Section IV.A.

¹²¹ See 22 WRIGHT & GRAHAM, *supra* note 9, § 5212 (noting the discretionary nature of Rule 403). Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation

considerations, however, do not take into account the public policy favoring plea bargaining.

The balancing nature of Rule 403 promotes the truth-finding process of the courts.¹²² In contrast, evidence rules that are based upon extrinsic policy considerations, such as Rules 408 and 410, sacrifice the truth-finding process in favor of promoting the social policies that underlie these rules.¹²³ Thus, the decision to admit or exclude evidence under the balancing test of Rule 403 fails to account for the important public policy considerations embodied in Rules 408 and 410, which protect both general efforts to compromise disputes out of court and efforts to plea bargain.

Due to the differences in the nature of these exclusionary rules, it is clear that the application of Rule 403 might inhibit plea negotiations. In *Biaggi*, Rule 403 did not exclude evidence of compromise efforts undertaken by a prosecutor in a criminal case.¹²⁴ It is easy to see how the inclusion of such evidence would “chill” the plea bargaining process by curbing a prosecutor’s desire to offer immunity or plea bargains that might lead a jury to conclude the defendant did not commit one of the crimes charged or any crime at all. Just as in a civil case, “[i]t 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,”¹²⁵ so too in a criminal case, it is easy to envision a juror who retires to deliberate with the notion that if the defendant had committed the crime, the prosecutor would not have offered immunity or such a favorable plea bargain. This result demonstrates the inadequacies of Rule 403 to protect the public policy favoring plea negotiations.

of cumulative evidence.” FED. R. EVID. 403.

¹²² See, e.g., Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used To Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 894 (1988) (describing Rule 403 as “calculated to facilitate accurate fact-finding and the search for truth.”); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1252 (2005) (noting Rule 403 is an example of an “intrinsic exclusionary rule[]” [that] exclude[s] relevant information on the ground that its omission will promote accurate fact finding.”).

¹²³ See Wistrich, Guthrie & Rachlinski, *supra* note 122, at 1252.

¹²⁴ *Biaggi*, 909 F.2d 662.

¹²⁵ *United States v. Hays*, 872 F.2d 582, 589 (5th Cir. 1989).

*C. Limitations on Applying Rule 408 to Compromises of
Criminal Cases*

Applying Rule 408 to bar evidence of compromise efforts in criminal cases furthers the policies behind Rules 408 and 410. Such an interpretation of Rule 408, however, must come with three limitations. First, Rule 408's exclusion of evidence of plea offers or negotiations must obviously yield to admit evidence when an exclusion would raise constitutional issues. Consider a plea discussion in which a corrupt prosecutor, in order to coerce a defendant into accepting a plea offer, informs the defendant that she intends to use perjured testimony as her primary evidence to obtain a conviction at trial. Despite the fact that the evidence of this exchange could be excluded by Rule 408 under the interpretation asserted above, such evidence should be admissible under constitutional considerations that supersede the application of evidentiary rules.¹²⁶

Second, Rule 408 should exclude evidence of compromise offers and negotiations in a criminal case only when such evidence is offered against a party other than the defendant who participated in the plea negotiations (Boxes B2 and D2). Rule 410 explicitly covers such evidence offered "against the defendant" (Boxes B1 and D1),¹²⁷ and interpreting Rule 408 to cover such evidence could lead to the exclusion of evidence under Rule 408 that Congress intended to be admissible according to the lines carefully drawn under Rule 410.

The Advisory Committee's note to the 1979 Amendment to Federal Rule of Criminal Procedure 11(e)(6) (a provision identical to Rule 410)¹²⁸ made it clear that Rule 410 excluded evidence of a defendant's plea discussions with a prosecutor but did not exclude evidence of a defendant's discussions with law enforcement officials.¹²⁹ The Committee's differentiation between plea bargains and statements made to law enforcement agents demonstrates its intent to ex-

¹²⁶ See, e.g., *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973) (holding that applying a state evidentiary rule to exclude reliable evidence of the defendant's innocence denied the defendant due process under the Constitution). See generally EDWARD J. IMWINKELRIED & NORMAN M. GARLAND, *EXCULPATORY EVIDENCE* (3d ed. 2004) (providing a thorough discussion of a defendant's constitutional right to present exculpatory evidence and the balancing test courts employ to determine the scope of this right).

¹²⁷ FED. R. EVID. 410.

¹²⁸ Federal Rule of Evidence 410 was amended to contain identical language to Federal Rule of Criminal Procedure 11(e)(6) as enacted in 1975. See FED. R. EVID. 410 advisory committee's notes. The 2002 amendments to Federal Rule of Criminal Procedure 11 deleted the duplicative language and added a cross reference to Federal Rule of Evidence 410. See FED. R. CRIM. P. 11(f).

¹²⁹ See FED. R. CRIM. P. 11 advisory committee's note (noting that the amendment protects plea negotiations made in proceedings authorized under Rule 11 "without attempting to deal with confrontations between suspects and law enforcement agents.").

clude evidence of the former to further the policy of plea bargaining but not exclude evidence of the latter, as it “involve[s] problems of quite different dimensions” unrelated to plea bargaining.¹³⁰ Accordingly, while Rule 408 may exclude evidence of efforts to compromise a criminal case, it should not exclude evidence offered against a criminal defendant that Congress specifically intended to be admissible under Rule 410.¹³¹

*United States v. Baker*¹³² provides an illustration of this point. In *Baker*, the defendant attempted to use Rule 408 to exclude evidence of statements he made to FBI agents about making a “deal.”¹³³ The Advisory Committee’s note to Rule 410 squarely addresses this type of evidence of a discussion between a defendant and law enforcement agent and clearly displays the Committee’s intention that such evidence be admissible under that rule.¹³⁴ Thus, the court in *Baker* reached the proper result in admitting the evidence.¹³⁵

Finally, altering the facts of *Baker* demonstrates the need for a third limitation on the application of Rule 408 to bar evidence of compromise efforts in criminal cases. Consider, if in *Baker*, instead of the defendant making a statement offering to make a deal, the FBI agents had initiated a compromise discussion with the defendant. Then at trial, the defendant had attempted to introduce the statements of the FBI agents as evidence in his favor. Rule 408 would not bar such evidence when offered against the defendant because Congress specifically intended Rule 410 to cover this situation,¹³⁶ thus Rule 408 should not bar such evidence when offered against the government and in favor of the accused.

In light of the public policy considerations behind Rules 408 and 410 and the inadequacies of Rule 403 to account for these policy considerations, the interpretation of the relationship between Rules 408 and 410 set out above is a better interpretation of the rules than the predominant view of the courts. This view is captured in Justice (then Judge) Ginsburg’s statement in *Graham*: “In the context of a criminal case, Rule 410 (rather than Rule 408) strikes the balance between the

¹³⁰ *Id.*

¹³¹ See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228–29 (1957) (“Specific terms prevail over the general in the same or another statute which otherwise might be controlling.” (quoting *Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932)).

¹³² 926 F.2d 179 (2d Cir. 1991).

¹³³ *Id.* at 180.

¹³⁴ See FED. R. CRIM. P. 11 advisory committee’s note.

¹³⁵ Although it reached the correct result, the *Baker* court relied on reasoning that is inconsistent with the thesis of this Note and which has been rejected by the proposed amendment to Rule 408. See *infra* notes 141–53 and accompanying text.

¹³⁶ See *supra* notes 129–32 and accompanying text.

interest in admitting all relevant evidence . . . and the interest in resolving disputes without litigation."¹³⁷ Thus, the principal view is that Rule 408 applies to compromise efforts of civil claims and Rule 410 applies to compromise efforts of criminal claims. While this interpretation of the relationship between Rules 408 and 410 prevails in most courts, it fails to properly weigh the public policy favoring plea negotiations and their important role in our criminal justice system.

Therefore, there is a better interpretation of the relationship between Rules 408 and 410: Rule 410 strikes the balance between the interest in admitting relevant evidence and the interest in resolving disputes without litigation when evidence of plea offers or negotiations are offered "against the defendant" in either a criminal or civil proceeding (Boxes B1 and D1), and Rule 408 strikes that balance concerning all other evidence of negotiations or compromises, whether regarding a civil dispute or a criminal charge when offered against a party other than the criminal defendant and whether such evidence is offered in a civil or criminal proceeding (Boxes A, B2, C and D2). This is the appropriate conceptual framework from which to view the relationship between Rule 408 and Rule 410. This framework protects the important policy goals underlying the rules and closes the gap left open by Rule 410.

V. A RESPONSE TO COUNTERARGUMENTS

The previous section set out an argument in favor of utilizing Rule 408 to bar admission of evidence of plea offers or statements made during plea negotiations when offered by a defendant against the government. While some commentators agree with this interpretation of Rule 408¹³⁸ and at least one court has adopted this interpretation of Rule 408,¹³⁹ other courts and commentators have pointed to several flaws in this application of Rule 408. This section responds to the primary counterarguments raised in opposition to the thesis of this Note.

First, some courts and commentators assert Rule 408 does not exclude evidence of efforts to compromise a criminal case because the rule includes language that is not typically used in the criminal context.¹⁴⁰ The Second Circuit summarized the thrust of this criticism:

¹³⁷ *United States v. Graham*, 91 F.3d 213, 219 (D.C. Cir. 1996).

¹³⁸ *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 55, § 135, at 86, 90-91; ROTHSTEIN, *supra* note 92, at 107-12.

¹³⁹ *See United States v. Verdoorn*, 528 F.2d 103 (8th Cir. 1976).

¹⁴⁰ *See* MUELLER & KIRKPATRICK, *supra* note 55, § 134, at 81; WRIGHT & GRAHAM, *supra* note 9, § 5306, at 218.

The reference to “a claim which was disputed as to either validity or amount” does not easily embrace an attempt to bargain over criminal charges. Negotiations over immunity from criminal charges or a plea bargain do not in ordinary parlance constitute discussions of a “claim” over which there is a dispute as to “validity” or “amount.”¹⁴¹

Indeed, the use of the word “claim,” which Rule 408 centers around, implies that Rule 408 applies only to civil compromises because, as other commentators have noted, the Federal Rules of Evidence use the word “charge”¹⁴² in other rules to refer to a criminal context.¹⁴³ If the drafters of Rule 408 had included the language “claim or charge” instead of just “claim,” there would be no doubt that Rule 408 could be used in the manner proposed in this Note.

The fact that this result was not made explicit by the language of the rule, however, does not mean that it is not a reasonable interpretation. The language at issue in the rule is offering or accepting “a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount”¹⁴⁴ The language “*validity or amount*” is readily applicable to the criminal context. Plea negotiations typically take place because a criminal defendant disputes the *validity* of a criminal charge against him by pleading not guilty, and the government will often offer a plea deal in an attempt to reach a compromise solution to the dispute and avoid the need for trial. Additionally, in cases where a defendant is charged with larceny or fraud, plea negotiations often center on the *amount* of monetary loss caused by the larceny or fraud that the defendant will plead guilty to because the *amount* may potentially affect the sentence imposed.¹⁴⁵ One commentator asserts that the language of Rule 408 includes compromises in the criminal context, noting, “[t]he criminal context is within the policy of [Rule] 408, and in a real sense there is

¹⁴¹ *United States v. Baker*, 926 F.2d 179, 180 (2d Cir. 1991). Although the Second Circuit made this statement in holding that Rule 408 does not bar evidence of civil compromises from being introduced into subsequent criminal cases, the language quoted from the rule by the court is used to define the type of compromises and not the type of cases (civil or criminal) to which the rule applies. Thus, the statement properly summarizes the argument that the rule’s language does not cover criminal compromises.

¹⁴² See FED. R. EVID. 405(b).

¹⁴³ 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 171, at 466 (1985).

¹⁴⁴ FED. R. EVID. 408.

¹⁴⁵ See Blanche, *supra* note 112, at 544–45; see also U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2004) (recommending the base offense level be increased when the loss from theft exceeds \$5,000).

'consideration' on both sides of plea bargaining and a 'claim' (the charge) whose 'validity' is disputed."¹⁴⁶

As stated above,¹⁴⁷ the Second Circuit concluded that Rule 408 did not apply in criminal cases, even to bar evidence of civil settlements, because of the language of the rule.¹⁴⁸ The Sixth Circuit reached the same conclusion, stating that the "plain language of Rule 408 makes it inapplicable in the criminal context."¹⁴⁹ With the proposed amendment to Rule 408, however, the Advisory Committee has made it clear that this conclusion is improper and not intended by the language of the rule. Although the proposed amendment employs the same language as the current rule, including reference to a "claim that was disputed as to validity or amount,"¹⁵⁰ the proposed amended rule clearly applies in the criminal context in at least some circumstances, contrary to the holdings of the Second and Sixth Circuits.¹⁵¹ Thus, the conclusion by the Second and Sixth Circuits that the plain language of Rule 408 is inapplicable to the criminal context is not a proper interpretation of the language of the rule. Although Rule 408 does not utilize language that is easily seen as covering compromises of criminal cases, the language does not prohibit that result. Therefore, the rule may be reasonably interpreted as covering compromises in the criminal context.¹⁵²

A second argument made by commentators against the interpretation of Rules 408 and 410 set forth in this Note is that, because Rule 410 specifically addresses the exclusion of evidence of plea bargains and compromises in criminal cases, any such evidence not excluded by the rule was intentionally not excluded; thus, Rule 408 should not be used to supplement the exclusion of Rule 410.¹⁵³ The authors of

¹⁴⁶ ROTHSTEIN, *supra* note 92.

¹⁴⁷ See *supra* Section II.A.

¹⁴⁸ See *United States v. Baker*, 926 F.2d 179, 180 (2d Cir. 1991).

¹⁴⁹ *United States v. Logan*, 250 F.3d 350, 367 (6th Cir. 2001).

¹⁵⁰ Proposed Amendment, *supra* note 15.

¹⁵¹ See FINAL ADVISORY COMMITTEE REPORT, *supra* note 50, at 7.

¹⁵² One commentator's interpretation of the language of Rule 408 leads to a conclusion contrary to this Note's thesis that Rule 408 may exclude evidence of plea negotiations. See PAUL R. RICE & ROY A. KATRIEL, *COMMON LAW AND FEDERAL RULES OF EVIDENCE* 260 (5th ed. 2005) (noting that the language of Rule 408, which states that evidence of compromises "is not admissible," when compared to the language of Rule 410, which states that evidence concerning pleas is not admissible "in any civil or criminal proceeding," leads to the conclusion that Rule 408 does not apply in any criminal proceeding). This position is severely undermined, however, by the proposed amendment to Rule 408 that clearly indicates the intention that Rule 408 apply to bar compromise evidence in at least some criminal proceedings. See FINAL ADVISORY COMMITTEE REPORT, *supra* note 50, at 7 ("[S]tatements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation . . .").

¹⁵³ See MUELLER & KIRKPATRICK, *supra* note 55, § 149, at 167; ROTHSTEIN, *supra* note 92 (citing Daniel J. Capra, *Admissibility of Statements Made in Plea Negotiations*, 211 N.Y.L.J. 3 (1994)); see also STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, *FEDERAL*

one treatise argue that “since the exclusion of prosecutorial protection from Rule 410 is so clear, it is difficult to imagine that the Advisory Committee was unaware of this gap; thus it seems probable that it was intentional.”¹⁵⁴ Similarly, the District of Columbia Circuit Court stated, “[i]n the context of a criminal case, Rule 410 (rather than Rule 408) strikes the balance between the interest in admitting all relevant evidence . . . and the interest in resolving disputes without litigation.”¹⁵⁵

The Advisory Committee notes to Rule 410 and Federal Rule of Criminal Procedure 11(e)(6), however, do not support this conclusion. The Advisory Committee note to the rule proposed in 1972 noted that the rule’s exclusion was limited to use against the accused, “since the possibility of use for or against other *persons* will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster.”¹⁵⁶ The use of the word “persons” in the Committee’s note shows that the Committee considered and rejected broadening the exclusion of Rule 410 to protect other individuals besides the criminal defendant engaged in the plea negotiations; it does not, however, demonstrate that the Committee similarly considered or rejected any exclusionary rule protecting the government.

Moreover, the Advisory Committee note explained that “the purpose of [the rule] is to not ‘discourage *defendants* from being completely candid and open during plea negotiations.’”¹⁵⁷ Considering then that Rule 410 was drafted to protect the criminal defendant who engages in plea bargaining, it is not surprising that the rule would omit discussion of whether evidence of plea negotiations is admissible against the government or in favor of the criminal defendant. Thus, Rule 410’s omission of protection for the government does not prevent Rule 408 from providing this protection.

Indeed, the rule’s legislative history refutes the argument that the omission of governmental protection from Rule 410 prevents use of Rule 408 to provide this protection.¹⁵⁸ The Committee note to the

RULES OF EVIDENCE MANUAL 537 (6th ed. 1994) (“[I]f part of bargaining relates to criminal charges, Rule 410 should govern. This ensures that all of the protection provided by Congress will exist in practice, as well as in theory.”). Additionally, a form of this argument was echoed by the Courts of Appeals that held that Rule 408 does not apply in criminal cases at all. *See, e.g., Baker*, 926 F.2d at 180 (“The very existence of Rule [410] strongly supports the conclusion that Rule 408 applies only to civil matters.”).

¹⁵⁴ WRIGHT & GRAHAM, *supra* note 9, § 5306, at 218.

¹⁵⁵ *United States v. Graham*, 91 F.3d 213, 219 (D.C. Cir. 1996).

¹⁵⁶ FED. R. EVID. 410 advisory committee’s note (emphasis added).

¹⁵⁷ FED. R. CRIM. P. 11 advisory committee’s note (quoting H.R. REP. NO. 94-247, at 7 (1975)).

¹⁵⁸ *See* ROTHSTEIN, *supra* note 92 (noting that the Advisory Committee’s note to Rule 410

1979 amendment to Rule 11(e)(6) expresses a clear intention that Rule 410's limitation to evidence of plea negotiations offered "against the defendant" does not preclude the application of Rule 408 to exclude evidence of plea negotiations that are offered by the defendant against the government.¹⁵⁹ Noting that the rule's exclusion is limited to evidence offered "against the defendant," the Committee note then states: "[the rule] does not also provide that the described evidence is inadmissible 'in favor of' the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. *Specifically, no disapproval is intended of such decisions as United States v. Verdoorn.*"¹⁶⁰

Thus, although Rule 410 leaves a gap in the protection of the plea bargaining process by limiting its exclusion to evidence offered "against the defendant,"¹⁶¹ the Advisory Committee note demonstrates that this limitation of Rule 410 was not intended to prevent the application of Rule 408 to close this gap of protection. Had the drafters of Rule 410 intended to preclude this application of Rule 408, they would not have cited approvingly the decision of *Verdoorn*, which held that Rule 408 excluded evidence of plea negotiations offered against the government by the defendant.¹⁶² Consequently, rather than preventing the application of Rule 408 to bar evidence of plea negotiations, the Committee note instead indicates the Committee's approval of such an application of Rule 408, as it furthers the policy behind Rule 410 of protecting and facilitating plea negotiations.

VI. CONCLUSION

The proposed amendment to Rule 408 resolves the conflict regarding the applicability of Rule 408 in criminal cases to bar evidence of civil compromise efforts (Box C), but it leaves uncertain the application of Rule 408 to attempted compromises during criminal cases (Boxes B2 and D2). This may be because the issue does not arise often or because courts often fail to consider the application of Rule 408 when the situation arises. In any event, the proposed amendment perpetuates the uncertainty regarding the application of

suggests no intention that Rule 410 precludes the application of Rule 408 in the context of criminal compromise offers and statements).

¹⁵⁹ See FED. R. CRIM. P. 11 advisory committee's note.

¹⁶⁰ *Id.* (emphasis added).

¹⁶¹ FED. R. EVID. 410.

¹⁶² See *United States v. Verdoorn*, 528 F.2d 103 (8th Cir. 1976).

Rule 408 to evidence of compromises of criminal cases and disputes. This uncertainty could easily be clarified two different ways. If the words “or charge” were added to the rule after “claim” in the phrase “in compromising or attempting to compromise a claim,” Rule 408 clearly would apply to evidence of compromise negotiations of criminal charges. On the other hand, if the word “civil” was added before “claim,” Rule 408 clearly would not apply to evidence of compromise negotiations of criminal charges. Until this uncertainty is resolved by a specific change in the wording of the rule, it will remain disputed whether Rule 408 applies to evidence of criminal compromises.

This Note argues that Rule 408, in its current form, and under the proposed amendment, may bar evidence of attempted compromises in criminal cases that are not specifically addressed by Rule 410 (Boxes B2 and D2).¹⁶³ This application of the rule furthers the important policy goals that Rules 408 and 410 protect—that of encouraging the plea bargaining process and the settlement of disputes outside of a formal trial. This will further protect government prosecutors engaged in criminal plea bargaining by ensuring that criminal defendants cannot use to their advantage the prosecutor’s attempt to settle the case quickly and without trial. Although it is not often that a criminal defendant will break off plea negotiations and then attempt to introduce evidence of such negotiations at trial, when this does occur, the admission of such evidence at trial could undermine the policy behind Rules 408 and 410 and could have a chilling effect on the use of plea negotiations. Therefore, the conceptual framework of Rule 408 should be viewed as covering all evidence of compromise negotiations, regardless of whether the compromise is to resolve a civil or criminal dispute, unless the evidence is specifically covered by Rule 410.

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¹⁶³ Editors’ Note: An amendment to Rule 408 went into effect on December 1, 2006, immediately prior to the publication of this Note. Therefore, references in the text to Rule 408 refer to the rule that was in force prior to December 1, 2006, and references to the “proposed amendment” refer to the rule that is currently in force. Other than this grammatical difference, the change in the rule does not affect the substantive discussion, premise, or thesis of this Note.

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