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To Speak or Not to Speak: Navigating the Treacherous Waters of Parallel Investigations Following the Amendment of Federal Rule of Evidence 408

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TO SPEAK OR NOT TO SPEAK? NAVIGATING THE TREACHEROUS WATERS OF PARALLEL INVESTIGATIONS FOLLOWING THE AMENDMENT OF FEDERAL RULE OF EVIDENCE 408

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I. INTRODUCTION

On December 1, 2006, the Advisory Committee on Evidence Rules surprised many scholars when it amended Federal Rule of Evidence 408, which concerns the admissibility of offers of compromise.[1] Prior to its amendment, Rule 408 generally prohibited the admissibility of statements made during settlement talks when offered to prove or disprove liability.[2] While the newly amended Rule 408 maintains this general exclusion as to statements made to private litigants during settlement talks, it creates an exception for statements made to government officials.[3] Under the new Rule 408, any statement made to a government official during settlement talks, which typically occurs when the official is acting in a civil capacity, is admissible in a later criminal trial.[4]

A hypothetical fact pattern can demonstrate the difference between the two rules. Assume the government has charged three defendants with mail and wire fraud, money laundering, and tax evasion.[5] The three defendants were formerly President and Executive Vice Presidents in an investment company, LOF.[6] Prior to the indictment, counsel for LOF filed a civil lawsuit against the three officers and hired a private investigation firm to look into allegations that the three officers had

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1. *See infra* Part II.B.

2. *See* FED. R. EVID. 408, 28 U.S.C. app. § 870 (2000) (amended 2006). *See infra* text accompanying note 34.

3. *See* FED. R. EVID. 408. *See infra* text accompanying note 80.

4. *See id.*

5. These are the facts of *United States v. Skeddle*, 176 F.R.D. 254 (N.D. Ohio 1997).

6. *See id.* at 255.

stolen money from LOF.[7] The private investigation firm interviewed each of the three officers, and during those interviews, the three officers made incriminating statements.[8] The investigation firm drafted written summaries of the interviews.[9] Counsel for LOF and the three officers agree that the interviews were the first step toward negotiating a settlement between LOF and the three officers.[10] LOF eventually turned over the interview summaries to the government, and the officers were indicted.[11] At trial, both the old Rule 408 and the new Rule 408 would prevent the government from introducing evidence of the defendants' incriminating statements to prove criminal liability. However, a small change in the fact pattern would affect the outcome of the hypothetical. Rather than a private investigation firm, assume that a government agency, acting in its civil capacity, investigated the three officers and drafted written summaries of interviews between the officers and the government agency. Under the old Rule 408, the presence of the government agency would not affect the admissibility of the evidence. However, under the new 408, the statements made to the government agency would be admissible in a later criminal trial involving these three defendants, even though all parties agree that the statements were a first step toward settlement between the government agency and the officers.

For reasons discussed later in this Article, the drafters of the new Rule 408 believe that statements made to private litigants during settlement talks deserve greater protection than statements made to government officials in the same context. More importantly, this new amendment creates an inconspicuous trap awaiting any person who is the subject of a civil investigation by a governmental body. Even where a defendant successfully settles a civil dispute with the government, he must now recognize that any admissions of fault made during those settlement talks can become the basis for a later criminal proceeding.

This Article demonstrates that the drafters erred when they decided to hinge the admissibility of evidence upon the presence or non-presence of the government. Part II discusses the history of the Federal Rules of Evidence and Rule 408 specifically, as well as the circuit split that precipitated amendment of the rule. Part III addresses the many situations in which the government may act in both a criminal and civil capacity. Part IV discusses the safeguards, if any, that protect an individual or corporation facing both criminal and civil liability at the

7. *See id.*
8. *See id.*
9. *See id.*
10. *See id.*
11. *See id.*

hands of the government. Part V addresses whether a settlement communications privilege might provide adequate protection to defendants facing simultaneous civil and criminal liability. Part V also proposes a solution that protects the rights of individuals who seek to cooperate with civil governmental investigations while allowing for the admissibility of relevant evidence. Part VI provides a conclusion.

II. THE FEDERAL RULES OF EVIDENCE

The Federal Rules of Evidence were enacted in 1975.[12] Forty-two states have adopted codes based on the Federal Rules of Evidence.[13] The rules concern the admissibility of evidence at trial. Professors Mueller and Kirkpatrick state several reasons for the existence of the rules, including a basic mistrust of juries, a guarantee of accurate fact-finding, and an effort to control the scope and duration of trials.[14] The authors write that the Federal Rules of Evidence exclude certain types of evidence because jurors may be unable to make a proper evaluation of them.[15] Professor Fisher calls the rules a type of "quality control at the front end."[16] While the trial judge may be unable to control what jury does with the evidence it receives,[17] the trial judge can ensure that certain types of evidence never reach the jury.[18] Another reason for the rules, according to Professors Mueller and Kirkpatrick, involves a quest for accurate fact-finding. Several rules of evidence exist to ensure that the jury reviews only relevant and reliable evidence.[19] Finally, the rules of evidence exist to control the scope and duration of trials. The federal rules allow a trial judge to "control the sequence of proof and manner of examining witnesses"[20] and "exclude evidence because it would take more time than it is worth and might confuse the jury."[21]

The rules are divided into several articles, which group rules by their subject matter. The next subpart addresses Article IV, "Relevancy and

12. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926.

13. *See* 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5009 (2d ed. 2005) (noting that the only states which have not adopted some form of the Rules are California, Georgia, Illinois, Kansas, Massachusetts, Missouri, New York, and Virginia).

14. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 2 (3d ed. 2003).

15. *Id.*

16. GEORGE FISHER, EVIDENCE 16 (2002).

17. *See* United States v. Tanner, 483 U.S. 107, 116–27 (1987) (finding that Rule 606(b) generally prevents the court from delving into the goings-on in the jury deliberation room).

18. *See* FISHER, *supra* note 16.

19. MUELLER & KIRKPATRICK, *supra* note 14, at 2.

20. *Id.* (citing Rule 611, which empowers the trial judge to control the courtroom).

21. *Id.* (citing Rule 403, which excludes evidence that may confuse the jury or waste the court's time).

Its Limits".

A. Article IV of the Federal Rules of Evidence

Article IV of the Federal Rules of Evidence concerns the admissibility of relevant evidence. Rule 401 defines "relevant evidence" as "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,"[22] while Rule 402 states that relevant evidence is generally admissible while irrelevant evidence is not admissible.[23] These two rules allow for the admissibility of all evidence that is relevant, unless the evidence is excluded by the U.S. Constitution, an Act of Congress, other Federal Rules of Evidence, or other rules created by the U.S. Supreme Court.[24]

Rule 403 provides for the first exclusion of relevant evidence. The text of Rule 403 is as follows: "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."[25] Rule 403 authorizes judges to balance the probative value[26] of a piece of evidence against the likelihood that the evidence will unfairly harm a party, confuse the jury or waste the court's time. Rule 403 balancing most often involves assessing the probative value of a piece of evidence against the risk of unfair prejudice to a party. The Advisory Committee Notes following Rule 403 define unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[27]

According to the Advisory Committee Notes following Rule 403, the remaining rules in Article IV of the Federal Rules of Evidence are concrete applications of Rule 403. Each of the remaining rules concerns a situation where the unfair prejudice, confusion of the issues, or redundancy resulting from a piece of evidence substantially outweighs

22. FED. R. EVID. 401.

23. FED. R. EVID. 402.

24. *Id.*

25. FED. R. EVID. 403.

26. The Advisory Committee defines "probative value" in the following manner: "The standard of probability under the rule is 'more . . . probable than it would be without the evidence.'" FED. R. EVID. 401 advisory committee's note.

27. FED. R. EVID. 403 advisory committee's note. *See also* Old Chief v. United States, 519 U.S. 172, 180 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

any probative value associated with the evidence.[28] For example, Rule 404, which concerns character evidence, creates a general exclusion of character evidence when offered to show that a person has a propensity to act in a certain manner.[29] Thus, Rule 404 would exclude evidence that a criminal defendant, charged with murder, has a character for violence, when such evidence is offered to show that the defendant acted in conformity with that character trait on the occasion in question.[30] In drafting Rule 404, Congress pre-determined that any evidence of this nature would unfairly prejudice the defendant such that the evidence should be excluded despite its relevance, thereby satisfying Rule 403's balancing test regardless of the facts of each case.[31]

The remaining rules in Article IV cover a variety of situations where the unfair prejudice of type of evidence outweighs its probative value.[32] The next subpart of this Article addresses Rule 408, which concerns settlement offers and agreements.

B. Rule 408

Rule 408 of the Federal Rules of Evidence, entitled "Compromise and Offers to Compromise," addresses the admissibility of offers to settle claims and conduct or statements made during compromise negotiations.[33] The rule was amended on December 1, 2006. The old Rule 408, enacted in 1974, provided:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed

28. FED. R. EVID. 403 advisory committee's note.

29. FED. R. EVID. 404 ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion . . . .").

30. *See* 40A AM. JUR. 2D *Homicide* § 291 (2007). As the Supreme Court has stated:

> The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States, 335 U.S. 469, 475–76 (1948) (footnote omitted).

31. FED. R. EVID. 404 advisory committee's note.

32. *See, e.g.*, FED. R. EVID 407 (excluding evidence of subsequent remedial measures); FED. R. EVID. 409 (excluding evidence of offers to pay medical expenses); FED. R. EVID. 410 (excluding withdrawn pleas of guilty); FED. R. EVID. 411 (excluding evidence of the existence or non-existence of liability insurance); FED. R. EVID. 412 (excluding evidence of an alleged victim's past sexual behavior or sexual predisposition).

33. FED. R. EVID. 408.

> as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.[34]

The old Rule 408 had some preliminary requirements before its exclusion would apply to a piece of evidence, and these requirements remain in the new rule. First, the Rule only applies to claims that are disputed as to validity or amount.[35] Thus, where no lawsuit has been filed and no dispute exists as to the validity or amount of a claim, Rule 408 does not apply.[36] However, where parties enter into settlement negotiations in hopes of avoiding the filing of a lawsuit, Rule 408 would protect statements made during those negotiations.[37] Additionally, the rule only applies where the purpose of the evidence is to establish one party's culpability.[38] If the purpose of the evidence is to establish anything other than one party's culpability, Rule 408 will not bar the evidence. Some of the permissible purposes for evidence of settlement negotiations are (1) proving bias or prejudice of a witness, (2) negating a claim of undue delay, or (3) proving that a party has tried to obstruct a criminal investigation or prosecution.[39] In a sense, Rule 408 functions as a rule of inclusion. It states that, as a general matter, evidence of offers to compromise is admissible unless the purpose of the evidence is to establish a party's culpability.

Under the old Rule 408, offers to settle claims and statements or conduct made during compromise negotiations were not admissible to prove or disprove liability.[40] For example, assume that plaintiff has sued defendant for personal injuries suffered as a result of an automobile accident. Further assume that plaintiff and defendant and their

34. FED. R. EVID. 408, 28 U.S.C. app. § 870 (2000) (amended 2006).

35. *Id.*

36. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 408.06 (Joseph M. McLaughlin ed., 2d ed. 2007).

37. Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp., 817 F. Supp. 225, 228–29 (D.N.H. 1993) ("The language of Rule 408 contains no 'bright-line' rule requiring that a complaint be filed, and the court believes such a 'bright-line' rule would undermine the purpose of Rule 408.").

38. FED. R. EVID. 408, 28 U.S.C. app. § 870 (2000) (amended 2006) ("This rule . . . does not require exclusion when the evidence is offered for another purpose . . . .").

39. *Id.*

40. *Id.*

respective attorneys have decided to meet to discuss settlement of the matter. If, during the settlement negotiations, defendant admits he was intoxicated on the day in question, Rule 408 would prohibit the plaintiff from offering defendant's admission into evidence to prove defendant's fault.

The U.S. Supreme Court, drafters of the old Rule 408, based the rule's evidentiary exclusions on two grounds. First, the drafters thought that evidence of an offer to settle is irrelevant.[41] In essence, the drafters opined that an offer to settle has no tendency to make defendant's liability more or less probable, because the offer could be "motivated by a desire for peace rather than from any concession of weakness of position."[42] Like several of the other rules found in Article IV, Rule 408 demonstrates concrete application of Rule 403's balancing test. Evidence of an offer to settle lacks probative value, but jurors might place too much weight on such an offer. If evidence of the offer is allowed into evidence, the party making the offer would suffer unfair prejudice.

The drafters also found that the exclusions of Rule 408 promote the public policy favoring the settlement of disputes.[43] If courts generally allowed offers to settle into evidence, parties would be less likely to enter into settlement talks or make settlement offers. The drafters wanted to avoid admitting evidence that might encourage parties to proceed to trial without considering settlement.

While the drafters' arguments may have justified the exclusion of offers to settle and actual settlement agreements, their findings did not necessarily justify the exclusion of conduct or statements made during compromise negotiations.[44] Indeed, the legislative history of the old Rule 408 indicates that Congress had some reservations about the proposed rule's exclusion of conduct and statements made during settlement talks. The House Committee on the Judiciary initially amended the proposed rule to exclude actual admissions of fault without excluding "unqualified factual assertions" made during settlement

41. *See* FED. R. EVID. 408 advisory committee's note, 28 U.S.C. § app. 870 (2000) (amended 2006).

42. *Id.*

43. *Id.*

44. Consider Rule 409, which concerns offers to pay medical expenses. While evidence of the actual offer to pay medical expenses is excluded, any factual statements or conduct incident to the offer are not excluded. *See* FED. R. EVID. 409 advisory committee's note. The Advisory Committee found that communication is not essential to an offer to pay, so broad protection of statements made incident to an offer to pay is unnecessary. *Id.* Thus, any admission of fault made just before or just after an offer to pay medical expenses is admissible.

talks.[45] The House Committee noted that a party could ensure statements made during settlement talks would remain inadmissible by "couching them in hypothetical conditional form."[46] Thus, in the above personal injury hypothetical, defendant's statement, "I was intoxicated at the time of the accident," would be admissible because it is an unqualified factual assertion and not an actual admission of fault; however, the same statement made in hypothetical or conditional form would be inadmissible under the House Committee's amendment to proposed Rule 408.

Ultimately, the Senate Committee on the Judiciary disagreed with the House Committee, finding that the failure to exclude factual assertions would chill settlement negotiations because the parties would be discouraged from communicating freely.[47] The Senate Committee deleted the House Committee's amendment, restoring the proposed rule to its original form as submitted by the Supreme Court.[48] The House Committee adopted the amendment, [49] and the old Rule 408 was borne.

It is fair to say that the portion of the rule related to statements or conduct made during settlement talks exists to protect the public policy encouraging settlements; however, that portion of the rule is probably not a concrete application of Rule 403. While evidence of an offer to settle is not probative of the offeror's culpability,[50] an actual statement of fault holds more probative value.[51] Furthermore, the risk of unfair prejudice is lower where a statement of fault is involved. The drafters of 408 wanted to ensure that jurors would not place too much significance on an offer to settle. However, where a statement of fault is involved, any resulting prejudice to the speaking party may not be unfair at all.[52]

Rule 408 remained unchanged for roughly thirty-one years.

45. H.R. REP. NO. 93-650, at 8 (1973), *as reprinted in* 1974 U.S.C.C.A.N. 7075, 7081.

46. *Id.* at 7082.

47. S. REP. NO. 93-1277, at 10 (1974), *as reprinted in* 1975 U.S.C.C.A.N. 7051, 7056–57.

48. *Id.* at 7057. The Senate Committee also added an amendment that was ultimately adopted by the House and added to the final version of the old Rule 408. The amendment, added as the third sentence of the rule, stated: "This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations." FED. R. EVID. 408, 28 U.S.C. app. § 870 (2000) (amended 2006). The Senate Committee added the sentence to discourage parties from turning over discoverable and likely incriminating documents during the course of settlement negotiations to ensure their inadmissibility at trial. S. REP. NO. 93-1277, at 10 (1974), *as reprinted in* 1975 U.S.C.C.A.N. 7051, 7057.

49. H.R. REP. NO. 93-1597, at 6 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7099.

50. *See supra* notes 41–42 and accompanying text.

51. *See* White v. Honeywell, Inc., 141 F.3d 1270, 1276 (8th Cir. 1998) (finding that party's admission in a racial discrimination lawsuit was highly probative on the issue of liability).

52. *See* United States v. Bonds, 12 F.3d 540, 567 (6th Cir. 1993) ("Unfair prejudice 'does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence . . . .'" (quoting United States v. Schrock, 855 F.2d 327, 335 (6th Cir. 1988))).

However, following enactment of the rule, some controversy arose regarding the rule's applicability to criminal proceedings. In *United States v. Prewitt*, for example, the issue arose in a mail fraud case.[53] In *Prewitt*, the government accused defendant Smillie of defrauding investors in an insurance business venture.[54] Prior to Smillie's indictment for mail fraud, the Securities Division of the Indiana Secretary of State's office commenced an investigation of his business practices and ultimately issued a cease and desist order commanding that Smillie's company stop doing business in the state of Indiana.[55] Smillie entered into settlement negotiations with the Securities Division, and investigators interviewed him on two occasions.[56] Two years later, the government indicted Smillie for mail fraud.[57] At trial, the government sought to introduce statements that Smillie made to a Securities Division investigator during his negotiations with the agency.[58] In the statements, Smillie admitted that he had utilized the investors' money to pay for his personal expenses.[59]

Smillie was convicted, and he based his appeal on the language of Rule 408.[60] Smillie claimed that the trial court should have excluded his statements to the Securities Division investigator because they were made during compromise negotiations.[61] The Seventh Circuit disagreed, finding that the old Rule 408 was not applicable to criminal proceedings.[62] The court held that the rule's reference to validity and amount of claim signaled it was only applicable to civil proceedings.[63] Additionally, the court noted that public policy actually called for admission of the statements in this case because "[t]he public interest in the prosecution of crime is greater than the public interest in the settlement of civil disputes."[64] Therefore, even though the original proceedings between Smillie and the Securities Division were civil in nature, the court found that Smillie's statements were admissible in the later criminal proceeding.[65] Likewise, the Second and Sixth Circuits

53. 34 F.3d 436 (7th Cir. 1994).
54. *Id.* at 438.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 439.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

have held that the old Rule 408 only applied to civil proceedings.[66]

In *United States v. Bailey*, the Tenth Circuit came to a different conclusion.[67] In *Bailey*, defendant was convicted of wire fraud and money laundering.[68] Like Smillie, Bailey was accused of using investors' funds for his own personal benefit. Virtually all investors in Bailey's partnership lost their investments, and two investors filed civil lawsuits against Bailey.[69] The suits were eventually certified as class actions and consolidated. Ultimately, the civil suit was settled.[70] However, at Bailey's criminal trial, the government offered the testimony of Wilgers, Bailey's former partner and a plaintiff in the civil suit.[71] Wilgers testified that, during settlement talks, Bailey admitted he had withdrawn and used $1.3 million from the partnership accounts without the permission of his fellow partners.[72]

Bailey was convicted, and on appeal, he argued that Wilgers' testimony should have been excluded based on the old Rule 408.[73] The Tenth Circuit commenced its analysis by citing Federal Rule of Evidence 1101(b), which provides that the Federal Rules of Evidence generally apply to criminal cases and proceedings.[74] Next, the court looked to Rule 408 itself and found that nothing in the language of the rule prohibited its use in criminal proceedings.[75] Additionally, the court cited the final sentence of the old Rule 408, which provided that the rule "does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."[76] According to the Tenth Circuit, the final phrase regarding criminal investigations or prosecutions would be rendered superfluous if the court were to find the rule only applicable to

66. *See* United States v. Logan, 250 F.3d 350, 367 (6th Cir. 2001); Manko v. United States, 87 F.3d 50, 54–55 (2d Cir. 1996).

67. 327 F.3d 1131 (10th Cir. 2003).

68. *Id.* at 1137.

69. *Id.*

70. *Id.*

71. *Id.* at 1144.

72. *Id.*

73. *Id.*

74. *Id.* at 1145.

75. *Id.* at 1146.

76. *Id.* (quoting FED. R. EVID. 408, 28 U.S.C. app. § 870 (2000) (amended 2006)). The Advisory Committee's Notes following the old Rule 408 indicate that this sentence was added so that evidence of "[a]n effort to 'buy off' the prosecution or a prosecuting witness in a criminal case" would not be excluded under the rule. FED. R. EVID. 408 advisory committee's note, 28 U.S.C. app. § 870 (2000) (amended 2006).

civil proceedings.[77] Finally, the Tenth Circuit found that public policy called for exclusion of settlement evidence in later criminal proceedings, noting that "the potential prejudicial effect of the admission of evidence of a settlement can be more devastating to a criminal defendant than to a civil litigant."[78] The Fifth and Eleventh Circuits agreed that the old Rule 408 was applicable in both civil and criminal cases.[79]

To settle the split between the circuits, the Advisory Committee amended Rule 408. It 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 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.[80]

The new Rule 408, enacted on December 1, 2006, is similar to the old Rule 408 in that it excludes from admissibility settlement offers and acceptances where such evidence is offered to prove liability.[81] However, unlike the old Rule 408, the new rule does not exclude all conduct and statements made during compromise negotiations. Rather, the rule generally excludes such evidence but allows for the admissibility of conduct or statements "offered in a criminal case [where] the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority."[82]

77. *Bailey*, 327 F.3d at 1146.

78. *Id. Accord* United States v. Hays, 872 F.2d 582, 589 (5th Cir. 1989) ("It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back.").

79. *See* United States v. Arias, 431 F.3d 1327, 1336 (11th Cir. 2005); *Hays*, 872 F.2d at 588–89.

80. FED. R. EVID. 408.

81. *Compare* FED. R. EVID. 408, *with* FED. R. EVID. 408, 28 U.S.C. app. § 870 (2000) (amended 2006).

82. FED. R. EVID. 408.

In essence, the new Rule 408 settles the circuit split by stating that the ban on statements and conduct made during settlement talks applies equally to civil and criminal proceedings, except where the government plays the role of civil litigant. Where a civil defendant makes incriminating statements to government officials working in a regulatory, investigative or enforcement capacity, those statements are admissible in a later criminal proceeding.

The Notes following the new Rule 408 provide a great deal of information regarding the Advisory Committee's decision to amend. The Notes indicate that the new rule provides no protection for statements made to government officials because "[w]here an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected."[83]

The new Rule 408 distinguishes statements made to government officials from statements made to private parties. According to the Advisory Committee Notes, when private parties enter into settlement talks, it is impossible for either party to ensure that statements made during those talks will not be disclosed.[84] As a result, the new Rule 408 protects such statements from disclosure in both civil and criminal cases because the failure to do so would greatly chill settlement negotiations and be contrary to the policy of Rule 408.[85] However, the Notes state that where a defendant seeks to protect statements made during compromise negotiations with the government, the defendant should seek to enter into an agreement with the government agency that would prohibit subsequent disclosure.[86]

While the amendment to Rule 408 may seem minor on its face, its impact is great. The next section of this Article explores the various scenarios in which the government acts as civil litigant, both investigating private individuals and negotiating civil settlements with those persons, all the while failing to alert them of their potential criminal liability.

II. THE GOVERNMENT'S ROLE IN PARALLEL PROCEEDINGS

Various federal and state agencies are charged with enforcing statutes that carry both civil and criminal penalties. Where a single act of misconduct creates the possibility of both criminal and civil liability, the actor may face parallel criminal and civil proceedings that occur

83. FED. R. EVID. 408 advisory committee's note.

84. *Id.*

85. *Id.*

86. *Id.*

simultaneously or successively.[87] This Article focuses on the civil and criminal enforcement power of the Securities and Exchange Commission (SEC)[88] and the Internal Revenue Service (IRS).[89] While each of these entities possesses enforcement authority through statute, the agencies' powers are not identical.

A. The Enforcement Authority of the SEC

The SEC is responsible for enforcement of the federal securities laws.[90] The SEC has four divisions including the Enforcement Division, which investigates alleged violations of the securities laws.[91] There are several alleged violations of the securities laws which may lead to an investigation by the Enforcement Division. Those alleged violations include insider trading, misrepresentation or omission, manipulation of market prices of securities, stealing customers' funds or securities, unfair treatment of customers by broker-dealers, and the sale of securities without registration.[92]

Congress has provided the SEC with several tools to carry out its charge including investigative and subpoena powers as well as the

87. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980). There is no requirement that the civil proceeding is stayed pending resolution of the criminal proceeding. *See infra* Part IV.B. *See also* Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 52 (1912) ("An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power."). However, some federal agencies suspend their civil investigations as a matter of policy. *Dresser*, 628 F.2d at 1379.

88. President Franklin D. Roosevelt created the SEC following the stock market crash of 1929 to restore confidence in the markets. How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, http://www.sec.gov/about/whatwedo.shtml#create (last visited Sept. 3, 2007). The SEC consists of five Commissioners appointed by the President, four divisions, and eighteen offices. *Id.* There are approximately 3,800 SEC staff members. *Id.*

89. The IRS, a bureau of the Department of the Treasury, dates back to 1862, when President Abraham Lincoln and Congress created an income tax structure to finance the Civil War. Brief History of IRS, http://www.irs.gov/irs/article/0,,id=149200,00.html (last visited Sept. 3, 2007). Today, the IRS is made up of one commissioner, two deputy commissioners, four operating divisions, and five other principal offices. *Id.*

90. Specifically, the SEC is responsible for enforcement of the following statutes: Securities Act of 1933, 15 U.S.C. §§ 77a–77mm (2000); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78mm (2000); Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa–77bbbb (2000); Investment Company Act of 1940, 15 U.S.C. §§ 80a-1–80a-64 (2000); Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1–80b-21 (2000); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.).

91. *See* How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, *supra* note 88. The other divisions of the SEC are the Division of Corporation Finance, which regulates corporate disclosure to the public, the Division of Market Regulation, which establishes and maintains standards for the markets, and the Division of Investment Management, which regulates investment companies like mutual funds. *Id.*

92. *Id.*

power to bring a civil lawsuit against any individual or corporation it believes has violated the federal securities laws.[93] The SEC's subpoena power is significant, allowing the Commission to compel the attendance of witnesses and the production of documents.[94] The failure of any person to comply with an SEC subpoena constitutes a misdemeanor and subjects the individual to up to one year in prison and a fine of up to $1,000.[95]

The SEC's power to bring a civil lawsuit is also notable. The Commission may seek injunctive relief, monetary penalties, or both in federal district court against any person who has committed or is about to commit a violation of the federal securities laws.[96] The Commission also has the power to prohibit persons from serving as officers and directors of corporations due to violations of the securities laws.[97] Finally, the Commission has the power to enter into settlements with "[a]ny person who is notified that a proceeding may or will be instituted against him or her, or any party to a proceeding already instituted . . . ."[98] Thus, even where the SEC is in its investigative stages and has not filed a civil complaint, it has the authority to settle with any person who is the subject of an SEC investigation.

Despite its broad authority in the realm of civil enforcement, the SEC has no power to bring criminal charges based on violation of the federal securities laws. Rather, the Commission has the authority to transmit any relevant evidence to the U.S. Attorney General, who may, in his or her discretion, pursue criminal penalties.[99] To that end, the Director of the SEC's Division of Enforcement and the SEC's General Counsel possess the authority to recommend certain cases to the U.S. Department of Justice (DOJ or Justice) for criminal prosecution.[100] Even where the SEC chooses not to make a formal recommendation to the DOJ, it may notify Justice of cases with potential criminal liability by granting the

93. *See* 15 U.S.C. § 78u (Supp. IV 2004). The SEC also has the power to bring enforcement actions before an Administrative Law Judge. *See* How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, *supra* note 88.

94. *Id.* § 78u(b).

95. *Id.* § 78u(c).

96. *Id.* § 78u(d).

97. *Id.* § 78u(d)(2).

98. 17 C.F.R. § 201.240(a) (2007).

99. 15 U.S.C. § 78u(d)(1). *See also* 17 C.F.R. § 240.24c-1(b)(1) (2007) (authorizing the Commission to disclose nonpublic information to federal, state, local or foreign governments as it deems necessary).

100. 17 C.F.R. § 200.19b (2007). The SEC has the option of formally recommending certain cases to the DOJ for criminal prosecution or simply opening up SEC investigative files for review by the DOJ, which is a much more informal process. *See* 17 C.F.R. § 202.5(b) (2007).

DOJ access to SEC files.[101] Thus, even though the SEC lacks the power to bring criminal charges, it plays a very significant role in the DOJ's decision to do so through its production of evidence to the DOJ as well as its recommendation that certain cases are ripe for criminal prosecution.

Following a recommendation of criminal prosecution, the SEC may continue its civil investigation and issue any necessary subpoenas.[102] The Commission is not required to stay its civil proceedings pending resolution of any criminal case that involves the same individual.[103] Indeed, it may be inappropriate for the Commission to suspend a civil investigation due to the pendency of criminal charges. The Commission's investigations often involve the dissemination of false and misleading information to the public that should be enjoined immediately,[104] and the failure to seek a civil injunction promptly could result in irreparable harm to a company's investors.[105]

B. The Enforcement Authority of the IRS

Similar to the SEC, the IRS possesses the power to enforce the federal tax laws. Title 26, Section 7601 of the U.S. Code charges the Secretary of the Treasury with the duty of canvassing the country in search of persons who may be liable for violations of the federal tax laws.[106] In order to assist the IRS in carrying out this mission, Congress provided the agency with a broad subpoena power, authorizing the IRS to examine relevant documents, summon persons relevant to its investigation, and administer oaths to and take testimony of relevant witnesses.[107] Like the SEC, the IRS may enforce its summonses through the federal district courts.[108] A person's failure to respond to an IRS summons constitutes a misdemeanor, exposing the individual to up to one year in prison and a fine of no more than $1,000.[109]

101. *See* 17 C.F.R. § 202.5(b) (stating that the SEC "may also, on some occasions . . . grant requests for access to its files made by . . . domestic and foreign governmental authorities"). *See also* 5 ALAN R. BROMBERG & LEWIS D. LOWENFELS, BROMBERG & LOWENFELS ON SECURITIES FRAUD & COMMODITIES FRAUD § 12:98 (2d ed. 1994 & Supp. 2006) (noting that SEC and DOJ collaboration has increased since the SEC began opening its files to the DOJ).

102. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1377 (D.C. Cir. 1980).

103. *Id.* at 1377.

104. *Id.*

105. *Id.*

106. 26 U.S.C. § 7601(a) (2000).

107. *Id.* § 7602(a).

108. *Id.* § 7604(b).

109. *Id.* § 7210.

Sections 7206 and 7207 of the Internal Revenue Code create criminal liability for any person who willfully makes false statements on a tax return or willfully furnishes the IRS with fraudulent tax returns.[110] Like the SEC, the IRS has no power to bring criminal charges against a taxpayer accused of violating these laws.[111] Yet unlike the SEC, the IRS, in each of its district offices, has a criminal investigation (CI) division.[112] The CI division of the IRS utilizes its summons power to investigate conduct that may eventually result in criminal charges.[113] However, the U.S. Supreme Court has held that the IRS must also have a concurrent civil purpose for the issuances of any summons, such as the potential assessment of civil penalties.[114] Thus, "[T]he IRS at that stage is empowered to issue investigative summonses under Section 7602, even though the fruits of such summonses may be useful for the illegitimate purpose of 'filing criminal charges against citizens' as well as the legitimate purposes of determining and collecting taxes."[115] If the CI division determines that a taxpayer's violations rise to the level of criminal conduct, it may recommend criminal prosecution to the DOJ.[116]

Another route to a criminal prosecution recommendation is through a collection investigation. While an investigation into the collection of taxes is completely civil in nature, collection employees and the CI division may agree to commence parallel investigations that might ultimately result in a recommendation to Justice.[117]

110. *Id.* §§ 7206–7207 (2000 & Supp. IV 2004).

111. *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 312 (1978).

112. *See* Criminal Investigation (CI) At-a-Glance, http://www.irs.gov/irs/article/0,,id =98398,00.html (last visited Sept. 3, 2007). Special agents of the CI unit are authorized to execute search and arrest warrants and carry firearms. IRS, DEP'T OF THE TREASURY, INTERNAL REVENUE MANUAL §§ 9.1.2.4, 9.1.2.4.1 (2008), *available at* http://www.irs.gov/irm/part9/ch01s02.html.

113. *See* Criminal Investigations (CI) At-a-Glance, *supra* note 112.

114. *LaSalle*, 437 U.S. at 313–14. Following the *LaSalle* decision, Congress amended the tax summons statute to provide that prior to a recommendation of criminal prosecution to the DOJ, the IRS could use its summons power to inquire into "any offense connected with the administration or enforcement of the internal revenue laws." 26 U.S.C. § 7602(b). Several courts have held that the amendment allows the issuance of an IRS summons for either a civil or criminal purpose prior to referral of the case to the DOJ. *See, e.g.*, La Mura v. United States, 765 F.2d 974, 980 n.9 (11th Cir. 1985); Pickel v. United States, 746 F.2d 176, 183–85 (3d Cir. 1984). However, other courts have held that it is still unlawful for the IRS to issue summonses for solely criminal purposes. *See* United States v. Michaud, 907 F.2d 750, 752 (7th Cir. 1990) (en banc); Hintze v. IRS, 879 F.2d 121, 127 n.8 (4th Cir. 1989), *overruled on other grounds by* Church of Scientology of Cal. v. United States, 506 U.S. 9, 15–17 (1992); United States v. Lawn Builders of New Eng., Inc., 856 F.2d 388, 391–92 (1st Cir. 1988). The circuit split will remain until the Supreme Court rules on the issue.

115. SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1379 (D.C. Cir. 1980).

116. *See* 26 U.S.C. § 7602(d).

117. INTERNAL REVENUE MANUAL, *supra* note 112, §§ 5.1.5.1, 5.1.5.2, *available at* http://www.irs.gov/irm/part5/ch01s06.html. The IRS may also decide to pursue the criminal and collection investigations simultaneously, sharing information whenever possible. *Id.* § 5.1.5.8. Indeed,

The dual uses of the IRS's summons power result in an unavoidable intermingling of civil and criminal investigations. As the U.S. Supreme Court has noted, a single IRS investigation can result in criminal misconduct and a civil tax penalty.[118] The Court has also stated that Congress realized and intended that the IRS summons power would be used for both criminal and civil purposes when it drafted the tax laws.[119] Indeed, the Service's summons power is not conditioned upon the criminal or civil nature of the investigation.[120] As the High Court has noted, "Congress has not categorized tax fraud investigations into civil and criminal components."[121]

Yet, a recommendation of criminal prosecution greatly affects the investigative powers of the IRS. According to the Internal Revenue Code, while the IRS may continue any civil investigation commenced prior to a recommendation of criminal prosecution to the DOJ,[122] the Service may not issue summonses.[123] Congress prohibits the issuance of summonses in this situation for several reasons. First, any such summons might infringe upon the role of the grand jury as the "principal tool of criminal accusation."[124] Clearly, Congress preferred that the grand jury use its subpoena power to gather information that might be used to indict an individual. Second, Congress suspended the summons power of the IRS following a recommendation for criminal prosecution in order to ensure that the IRS's civil summons power would not be used to gather evidence for a criminal case.[125] Although the grand jury subpoena power is quite broad,[126] the government's discovery rights are

the *Internal Revenue Manual* requires quarterly coordination meetings between collection and criminal investigators who are pursuing a common person or entity. *Id.* § 5.1.5.5.

118. *LaSalle*, 437 U.S. at 309.

119. *Id.* at 310, 311 n.14 ("The interrelated nature of fraud investigations thus was apparent as early as 1864. Section 14 of the 1864 Act permitted the issuance of a summons to investigate a suspected fraudulent return. It also prescribed a 100% increase in valuation as a civil penalty of falsehood.").

120. 26 U.S.C. § 7602(a).

121. *LaSalle*, 437 U.S. at 311.

122. *Id.* at 311–12 ("The Government does not sacrifice its interest in unpaid taxes just because a criminal prosecution begins.").

123. 26 U.S.C. § 7602(d)(1) ("No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person."). The Code states that a Justice Department referral is in effect if "the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws." *Id.* § 7602(d)(2)(A)(i).

124. *LaSalle*, 437 U.S. at 312.

125. *Id.*

126. *See* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 606 (1994) ("The IRS cannot procure anything by way of a summons that a grand jury cannot obtain by use of its subpoena power. Civil

greatly restricted once the grand jury returns an indictment. The Federal Rules of Criminal Procedure's discovery provisions are much more limited than a civil litigant's discovery rights under the Federal Rules of Civil Procedure.[127] For example, under Rule 16 of the Federal Rules of Criminal Procedure, the government is entitled to the production of documents in a criminal case only if the defendant requests and receives documents from the government.[128] However, under Rule 16's civil counterpart, Federal Rule of Civil Procedure 34, any party is allowed to request documents from any other party, and the party receiving the request must object to the request, produce the documents, or face sanctions under Rule 37.[129] Thus, Congress suspended the summons power of the IRS in order to avoid the abusive use of the summons power during the preparation of criminal cases.

Another effect of a recommendation for criminal prosecution involves the Service's power to settle cases. Prior to recommendation, the IRS possesses the power to settle any criminal or civil case arising out of violations of the tax laws.[130] However, a recommendation to the DOJ divests the Service of the power to negotiate settlement in either the civil or the criminal case and gives that power to Justice.[131] It should be noted that settlement of a civil tax suit is not likely while a criminal case is pending. According to U.S. Attorney's Tax Resource Manual, the DOJ has a policy of refusing to settle civil cases while criminal charges are pending.[132] The DOJ prefers to give priority to the criminal case and

summons power simply is not any broader than a grand jury's criminal discovery through compulsory process, which extends to anything of conceivable relevance to the investigation and prosecution of a criminal case.").

127. Campbell v. Eastland, 307 F.2d 478, 482 (5th Cir. 1962) ("While the Federal Rules of Civil Procedure have provided a well-stocked battery of discovery procedures, the rules governing criminal discovery are far more restrictive."). The *Campbell* court pointed out three justifications for the restrictive nature of criminal discovery:

> First, there has been a fear that broad disclosure of the essentials of the prosecution's case would result in perjury and manufactured evidence. Second, it is supposed that revealing the identity of confidential government informants would create the opportunity for intimidation of prospective witnesses and would discourage the giving of information to the government. Finally, it is argued that since the self-incrimination privilege would effectively block any attempts to discover from the defendant, he would retain the opportunity to surprise the prosecution whereas the state would be unable to obtain additional facts. This procedural advantage over the prosecution is thought to be undesirable in light of the defendant's existing advantages.

Id. at 487, n.12 (quoting *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1052 (1961)).

128. FED. R. CRIM. P. 16.

129. FED. R. CIV. P. 34, 37(a)(2)(B).

130. 26 U.S.C.A. § 7122(a) (2006).

131. *Id.*

132. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 6-6.200 (2007), *available*

will not consider settlement of the civil case until the individual has been sentenced in the criminal case.[133]

C. An Explanation of the Differences in Agency Power

The SEC possesses the power to vigorously pursue its civil investigations following a recommendation to the DOJ while the IRS loses its power following such a recommendation.[134] The statutory grants of authority and the risk of harm to the public are two factors that may explain the difference in power. As stated earlier, Congress provided the SEC with unwavering authority to investigate civil violations of the securities laws, even following a recommendation to the DOJ.[135] Yet, with regard to the IRS, Congress stripped the IRS of many of its investigative powers following a recommendation to Justice.[136] Several courts have focused on the language of the authority-granting statutes to justify the dissimilarity in power following a recommendation to the DOJ.[137] According to the District of Columbia Court of Appeals, "Unlike the Internal Revenue Code . . . , the securities laws offer no suggestion that the scope of the SEC's investigative authority shrinks when a grand jury begins to investigate the same matters."[138]

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at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title6/6mtax.htm#6-6.200.

133. *Id.* While the DOJ's policy may have its critics, it is consistent with DOJ policy in similar circumstances. For example, the DOJ will usually refuse to enter plea agreements in criminal tax cases where the defendant is willing to make financial restitution. *See id.* § 6-4.360, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title6/4mtax.htm#6-4.360 ("If it is concluded that there is a reasonable probability of conviction and that prosecution would advance the administration of the internal revenue laws, any decision to forgo prosecution on the ground that the taxpayer is willing to pay a fixed sum to the United States, would be susceptible to the attack that a taxpayer who is able to pay whatever amount of money the government demanded had been given preferential treatment."). Additionally, the DOJ has a long-standing policy against approving plea agreements in criminal cases that include global settlements—that is, settlement of the civil tax liability as well as the criminal tax liability. *See* Memorandum from Stanley F. Krysa, Dir., Criminal Enforcement Sections, to All CES Attorneys (June 3, 1993), *in* U.S. DEP'T OF JUSTICE, CRIMINAL TAX MANUAL (2001), *available at* http://www.usdoj.gov/tax/readingroom/2001ctm/03ctax.htm #CIVIL%20SETTLEMENTS.

134. Note, however, that courts are cognizant of the possibility that SEC subpoenas could be used to subvert the restrictive Federal Criminal Procedure Rules that limit discovery following grand jury indictment. *See infra* notes 141–142 and accompanying text.

135. *See supra* notes 102–103 and accompanying text.

136. *See supra* notes 122–123 and accompanying text.

137. *See, e.g.*, SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1379 (D.C. Cir. 1980) ("But IRS investigative and enforcement proceedings are not analogous to those of the SEC. The language of the securities laws and the nature of the SEC's civil enforcement responsibilities require that the SEC retain full powers of investigation and civil enforcement action, even after Justice has begun a criminal investigation into the same alleged violations.").

138. *Id.* at 1380.

Another reason for the disparity involves the public harm associated with violations of the securities laws versus the lack of harm to the public involved when the tax laws are violated. The SEC's need to move swiftly to enjoin fraud on the public is, in the eyes of the courts, more important than the IRS's need to collect outstanding taxes:

> Unlike the IRS, which can postpone collection of taxes for the duration of parallel criminal proceedings without seriously injuring the public, the SEC must often act quickly, lest the false or incomplete statements of corporations mislead investors and infect the markets. Thus the Commission must be able to investigate possible securities infractions and undertake civil enforcement actions even after Justice has begun a criminal investigation. For the SEC to stay its hand might well defeat its purpose.[139]

The differences in agency power following a recommendation of criminal prosecution to the DOJ are significant for purposes of this Article. At least in the case of the IRS, where the agency loses the power to negotiate upon a recommendation to Justice, it seems that the Service would be highly motivated to settle any pending civil tax case prior to the recommendation. Otherwise, the power to settle the civil matter is left to the DOJ, which may decide to handle the civil and criminal matters simultaneously or solely pursue the criminal case. Taxpayers who find themselves in settlement talks with the IRS regarding civil tax liability must recognize that they can negotiate both the civil and criminal aspects of their cases with the IRS.[140] This may prove difficult for many individuals, especially when the civil negotiations take place prior to the convening of a grand jury or the filing of any criminal charges against the individual. Where the defendant, or the defendant's counsel, does not realize the possibility of criminal charges being filed, the defendant may make incriminating statements during settlement of the civil case that could re-surface to become the basis for later criminal charges.

Even if the SEC is the investigating agency, the Commission may be motivated to settle cases prior to recommendation to Justice. Although the SEC maintains its investigative power following such a recommendation, the SEC's subpoena power may be limited following indictment of an individual by the grand jury. Following indictment, courts must ensure that the SEC's subpoena power is not used to expand the prosecution's discovery rights beyond those allowed under the strict

139. *Id.*

140. *See supra* note 130 and accompanying text.

Federal Rules of Criminal Procedure.[141] Therefore, where the SEC is a "mere conduit for a future criminal prosecution,"[142] the Commission's subpoena power is uncertain following a grand jury indictment. Due to this limitation, the SEC may delay the recommendation of a case to Justice until it has completed its civil investigation. It also may decide to negotiate the civil case without mentioning the possibility of criminal charges. The negotiation of a pending civil case without mention that the agency plans to recommend criminal charges to Justice sets a trap for any person who does not realize the impact of the new Rule 408.

Due to the strong likelihood that administrative agencies will gather information that the DOJ could use in a subsequent criminal prosecution, one might expect that certain safeguards are in place to protect persons who are the subjects of existing or possible parallel proceedings. As the next section demonstrates, current constitutional and evidentiary safeguards do not provide a great deal of shelter to individuals who face concurrent civil and criminal liability at the hands of the government.

IV. PROTECTIONS AVAILABLE FOR THE SUBJECTS OF PARALLEL PROCEEDINGS

This Part of the Article addresses the array of constitutional, evidentiary, and contractual protections that likely come to mind when counsel considers how to properly defend a person who is the subject of parallel proceedings. This Part demonstrates that these protections are not nearly as strong as one might expect.

A. The Constitutionality of Parallel Proceedings

1. Double Jeopardy

Initially, counsel may wonder if parallel proceedings unconstitutionally subject individuals to multiple punishments for the same act. The Double Jeopardy Clause of the Fifth Amendment states: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[143] Although the language of clause appears to be fairly straightforward, "this deceptively plain language has given

141. *See Dresser*, 628 F.2d at 1391 (Edwards, J., concurring). *Accord* SEC v. Zimmerman, 854 F. Supp. 896 (N.D. Ga. 1993). *See also supra* notes 125–129 and accompanying text.

142. *Zimmerman*, 854 F. Supp. at 900.

143. U.S. CONST. amend. V.

rise to problems both subtle and complex."[144] For example, the clause appears to solely address situations where one's "life or limb" is at stake. Yet, the Supreme Court found in 1873 that the clause applies to all criminal offenses, whether misdemeanors or felonies.[145] Additionally, while the clause prohibits one from being *tried* twice for the same offense, [146] it also prohibits one from being *punished* twice for the same offense.[147]

The concept of punishment for the same offense provides the basis for a potential objection to parallel proceedings. Counsel for an individual facing parallel proceedings could argue that the client is facing two punishments for the same offense. If the IRS settles a civil suit for the repayment of back taxes plus a penalty,[148] counsel has a colorable argument that a subsequent criminal indictment and prosecution for the same Tax Code violations might constitute Double Jeopardy. To be sure, it is well established that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Double Jeopardy Clause.[149] However, where the civil sanction rises to the level of punishment, a later criminal prosecution for the same act might violate the Double Jeopardy Clause.[150] For purposes of this Article, the attachment of Double Jeopardy to a settlement with a government agency would absolve any harm caused by the new Rule 408. If Double Jeopardy attaches to most, if not all, settlements between civil defendants and government agencies, then there would be no practical need to be concerned with the later use of a defendant's incriminating statements. A look at the jurisprudence on this issue will quickly show that the Double Jeopardy Clause does not apply to most civil proceedings.

In *Hudson v. United States*, the High Court addressed the issue of whether the Double Jeopardy Clause prevented parallel proceedings

144. Crist v. Bretz, 437 U.S. 28, 32 (1978).

145. *Ex parte* Lange, 85 U.S. 163, 172–73 (1873).

146. *Crist*, 437 U.S. at 35 (holding that jeopardy attaches when a trial jury is empaneled and sworn). However, in bench trials, jeopardy attaches when the first witness is sworn. *Id.* at 37 n.15 (citing Serfass v. United States, 420 U.S. 377, 388 (1975)).

147. *Lange*, 85 U.S. at 173. *Accord* United States v. Ursery, 518 U.S. 267, 273 (1996) ("The Clause serves the function of preventing both 'successive punishments and . . . successive prosecutions.'" (alteration in original) (quoting United States v. Dixon, 509 U.S. 688, 696 (1993))).

148. Oftentimes, the IRS assesses a large tax penalty for those who violate the Tax Code. *See* 26 U.S.C. § 6651 (2000).

149. Helvering v. Mitchell, 303 U.S. 391, 399 (1938).

150. *See generally Ursery*, 518 U.S. at 267 (considering the question of whether an in rem civil forfeiture action, following a criminal prosecution for the same act, constitutes a violation of the Double Jeopardy Clause).

related to an alleged bank fraud.[151] The defendants were officers of two banks. In the late 1980s, the Office of the Comptroller of Currency (OCC) commenced an investigation of the defendants to determine if they had violated various banking laws.[152] Ultimately, the OCC determined that the defendants had violated certain banking statutes and regulations. The agency assessed penalties against the defendants and commenced proceedings to bar the defendants from "further participation in the conduct of any insured depository institution."[153] In October 1989, the defendants entered into a consent order with the OCC. By signing the order, the defendants agreed to pay a total of $44,000 in assessments. The defendants also agreed to debarment—that is, they agreed not to participate in the affairs of any depository institution without written approval from the OCC and all other relevant regulatory agencies.[154] Approximately three years after settlement of the OCC matter, the defendants were indicted on charges of conspiracy, misapplication of bank funds, and making false bank entries.[155] The federal charges were based on the same transactions that formed the basis for the OCC investigation. The defendants moved to dismiss the indictment, arguing that the subsequent criminal charges violated the Double Jeopardy Clause.[156]

The Supreme Court commenced its Double Jeopardy analysis by addressing whether the OCC assessment was criminal in nature.[157] The Court found that one might initially answer this question by looking to the authority-granting statute. Where lawmakers expressly label a penalty as civil, this designation should carry some weight in determining whether the punishment is civil or criminal.[158] However, the analysis does not end with a review of a penalty's statutory construction. According to the Court, even a penalty labeled as civil may implicate the Double Jeopardy Clause where "'the statutory scheme [is] so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'"[159] The

151. 522 U.S. 93 (1997).

152. *Id.* at 96.

153. *Id.* at 97 (internal quotation omitted).

154. *Id.*

155. *Id.*

156. *Id.* at 98.

157. *Id.* at 99.

158. *Id.*

159. *Id.* (citation omitted) (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980); Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)). The *Hudson* Court identified seven factors that should be used to evaluate whether a civil statute has been transformed into a criminal statute. They are:

(1) "[w]hether the sanction involves an affirmative disability or restraint"; (2) "whether it

Court noted that "only the clearest proof" will override the intent of the legislature and transform a civil penalty into a criminal penalty.[160]

Looking to the facts of the case, the *Hudson* Court found that Congress designated the applicable monetary penalty statutes as civil in nature.[161] Additionally, even though Congress did not label the debarment statute as civil, the Court found that the statute's grant of authority to the federal banking institutions, rather than courts of law, is prima facie evidence that Congress intended the sanction of debarment to be civil.[162] Next, the Court found that the defendants had failed to provide sufficient proof that the monetary and debarment penalties were so punitive as to transform them into criminal penalties.[163] According to the Court, neither type of penalty has historically been viewed as punitive.[164] Indeed, the Court noted that "'revocation of a privilege voluntarily granted,' such as a debarment, 'is characteristically free of the punitive criminal element.'"[165] Thus, the *Hudson* Court found that Double Jeopardy did not apply despite the fact that defendants were subjected to civil and criminal penalties for the same conduct.[166]

In the context of parallel proceedings involving the SEC, the outcome is similar. In *United States v. Van Waeyenberghe*, the Seventh Circuit Court of Appeals addressed whether a prior SEC lawsuit and settlement would bar a later criminal indictment.[167] In *Van Waeyenberghe*, the defendant was indicted for conspiracy, mail fraud, wire fraud, and money laundering, all in relation to an investment company he created.[168] The defendant was found guilty on all counts. On appeal, defendant argued that the Double Jeopardy Clause should have prevented the filing of the criminal charges considering a settlement

> has historically been regarded as a punishment"; (3) "whether it comes into play only on a finding of *scienter*"; (4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence"; (5) "whether the behavior to which it applies is already a crime"; (6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and (7) "whether it appears excessive in relation to the alternative purpose assigned."

Id. at 99–100 (alteration in original) (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963)).

160. *Id.* at 100 (quoting *Ward*, 448 U.S. at 249).

161. *Id.* at 103.

162. *Id.*

163. *Id.* at 104.

164. *Id.*

165. *Id.* (quoting and citing Helvering v. Mitchell, 303 U.S. 391, 399, 399 n.2 (1938)).

166. *Id.* at 105.

167. 481 F.3d 951 (7th Cir. 2007).

168. *Id.* at 953.

agreement he had entered into with the SEC.[169] The SEC and the DOJ conducted parallel investigations of the defendant, and the defendant entered into a consent decree with the SEC about eighteen months before he was indicted on the criminal charges.[170] The consent decree required defendant to disgorge profits of $24.5 million and pay $6.8 million in prejudgment interest in addition to a $110,000 civil penalty.[171] The court applied the two-part *Hudson* test, first finding that SEC penalties are prima facie civil in nature.[172] Next, the court found that the defendant failed to provide "the clearest proof" that the SEC's civil remedy has been transformed into a criminal penalty.[173] The court found that disgorgement, injunction, and restitution are equitable in nature and create no obstacle to a later criminal prosecution.[174] As for the civil penalty of $110,000, the court found that the amount was not so excessive as to transform the civil penalty into a criminal penalty.[175] Thus, the Double Jeopardy Clause generally does not provide protection against parallel proceedings involving the SEC.

Likewise, parallel proceedings involving the IRS typically will not create a Double Jeopardy violation. In *Morse v. Commissioner*, the Eighth Circuit Court of Appeals considered the issue of Double Jeopardy in the context of tax penalties.[176] In *Morse*, the defendant was indicted for filing a false tax return for the years 1991 through 1994.[177] The charges resulted in a conviction, and defendant was ordered to pay $61,000 in restitution.[178] The defendant fully paid the restitution by September of 1999.[179] In August of 2000, defendant learned that the IRS was pursuing tax deficiencies and civil penalties against him for the tax years 1991 through 1994.[180] The tax court ordered the defendant to pay tax deficiencies of $51,000 and civil fraud penalties of $38,000,

169. *Id.* at 953, 956.

170. *Id.* at 956.

171. *Id.*

172. *Id.* at 958 (citing United States v. Polichemi, 219 F.3d 698, 711 (7th Cir. 2000); United States v. Perry, 152 F.3d 900, 904 (8th Cir. 1998) ("SEC disgorgement remedies are not criminal punishments."); United States v. Gartner, 93 F.3d 633, 635 (9th Cir. 1996); SEC v. Bilzerian, 29 F.3d 689, 696 (D.C. Cir. 1994)).

173. *Id.* at 959.

174. *Id.* at 958–59.

175. *Id.* at 959.

176. 419 F.3d 829 (8th Cir. 2005).

177. *Id.* at 831.

178. *Id.* The defendant was also sentenced to eighteen months in prison and ordered to pay a $10,000 fine and $3,379.62 for prosecution costs. *Id.* at 831–32.

179. *Id.* at 832.

180. *Id.*

calculated as seventy-five percent of tax deficiencies.[181] On appeal, the defendant claimed that the tax court order constituted a violation of his Double Jeopardy rights because he had previously been convicted of filing false tax returns for the same tax years.[182]

The court applied the *Hudson* factors in determining that the tax court order did not violate defendant's Double Jeopardy rights.[183] The court found that tax penalties are civil on their face because they are imposed by an administrative agency rather than a court of law.[184] Next, the court found that civil tax fraud penalties are remedial rather than punitive in nature, because they are "enacted 'primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud.'"[185] Thus, even though the civil fraud penalty required that defendant pay his tax deficiency plus an additional amount equaling seventy-five percent of the tax deficiency, the court did not find the penalty to be a criminal punishment such that Double Jeopardy would attach.[186]

It should be noted that it is not impossible for a civil penalty to be so punitive that it is transformed into a criminal punishment. In *Department of Revenue v. Kurth Ranch*, the Supreme Court found that a civil tax was tantamount to a criminal penalty, thereby determining that the state had violated defendant's right against Double Jeopardy by assessing the tax.[187] Defendants in the case were arrested and convicted of possession of marijuana with intent to sell after a raid of their farm.[188] Following the defendants' convictions, the Montana Department of Revenue assessed $900,000 in taxes against the defendants under Montana's Dangerous Drug Tax Act.[189] The Act imposed a tax on the possession and storage of dangerous drugs.[190] The Department of Revenue determined the tax amount by assessing the market value of the confiscated drugs.[191] The Act instructed the state treasurer to allocate the tax proceeds to youth evaluation and chemical abuse programs.[192]

181. *Id.*
182. *Id.* at 834.
183. *Id.* at 834–35.
184. *Id.* at 835.
185. *Id.* (quoting Helvering v. Mitchell, 303 U.S. 391, 401 (1938)).
186. *Id.* at 835.
187. 511 U.S. 767, 783 (1994).
188. *Id.* at 771–72.
189. *Id.* at 773.
190. *Id.* at 770.
191. *Id.*
192. *Id.*

The defendants in *Kurth Ranch* argued that the tax assessment violated their Double Jeopardy rights, and the Supreme Court agreed.[193] It found that the Montana tax was very different from other taxes.[194] First, it was conditioned upon where the taxpayer had committed a crime.[195] The Court found that this condition indicated that the tax had a punitive rather than a remedial or revenue-gathering purpose.[196] Additionally, the Act required that the tax be assessed "only after the taxpayer has been arrested for the precise conduct that gives rise to the tax obligation in the first place."[197] Thus, the entire class of taxpayers subject to the Act was people who had been arrested for marijuana possession.[198] Finally, the Court took issue with the tax because it was assessed on goods the taxpayer no longer owned or possessed.[199] Indeed, the goods were oftentimes destroyed before the tax was assessed.[200] For these reasons, the Court found the Montana tax to be "a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purpose of double jeopardy analysis."[201]

In summary, the Double Jeopardy argument is usually unavailable to a defendant who finds himself the subject of parallel proceedings. The tax in *Kurth Ranch* was an outlier in that its punitive nature was clear. However, when one considers statutes involving the IRS, SEC, and other federal agencies, it becomes obvious that the Double Jeopardy Clause does not protect defendants facing parallel proceedings. The next section of this Article discusses whether the privilege against self-incrimination serves as a protection for persons involved in civil governmental actions that have the potential to become criminal actions.

2. *Miranda* and the Privilege against Self-Incrimination

At the outset, it is important to discuss whether forcing an individual to endure parallel proceedings creates a violation of the privilege against self-incrimination. Defendants facing parallel proceedings have unsuccessfully argued that having to deal with both proceedings

193. *Id.* at 773, 776.

194. *Id.* at 781.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 781–82.

199. *Id.* at 783.

200. *Id.*

201. *Id.* Note that the *Kurth Ranch* Court did not engage in the two-part *Hudson* test. *Kurth Ranch* pre-dated *Hudson* by three years but remains good law.

simultaneously creates constitutional problems.[202] Specifically, defendants have argued that contending with parallel proceedings forces an individual into an unfair situation. The individual must choose between preserving his Fifth Amendment privilege against self-incrimination by not testifying in the civil lawsuit or testifying in the civil suit, thereby making potentially incriminating statements that could later become the basis for criminal charges.[203] Courts typically reject this argument, finding that such a defendant is not forced to invoke the privilege against self-incrimination, for "although he may have been denied his most effective defense by remaining silent, there is no indication that invocation of the fifth amendment [will] necessarily result[] in an adverse judgment."[204] To make matters worse, it is well settled that once a civil defendant invokes his privilege against self-incrimination, the jury may draw an adverse inference of liability on the defendant's part.[205] Despite the negative inference associated with use of the self-incrimination privilege in a civil setting, no constitutional barrier prevents the commencement of parallel proceedings.[206]

Although a civil defendant facing parallel proceedings is entitled to invoke his Fifth Amendment privilege, the defendant may not be aware of this right. In the context of civil investigations that culminate in criminal indictments, several courts have discussed whether an individual facing investigation by a government agency is entitled to a warning regarding the use of self-incriminating statements. In *Miranda v. Arizona*, the Supreme Court held that persons subject to custodial interrogations by law enforcement officers are entitled to certain

202. *See, e.g.*, Diebold v. Civil Serv. Comm'n, 611 F.2d 697, 701 (8th Cir. 1979).

203. *See* United States v. White, 589 F.2d 1283, 1286 (5th Cir. 1979). *See also* SARA SUN BEALE ET AL., GRAND JURY LAW & PRACTICE § 10:4 (2d ed. 2006) (noting that a defendant facing parallel proceedings "may invoke his Fifth Amendment privilege with respect to both proceedings. If he does that, however, he may impair his ability to defend the civil case. On the other hand, he may testify in his own behalf in the civil action in order to defend that action adequately. If he does that, however, he may incriminate himself in the criminal case.").

204. *White*, 589 F.2d at 1286.

205. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) ("Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a *civil cause*.'" (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2272, at 439 (John T. McNaughton rev. 1961)).

206. *See* SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir. 1980). *See also* United States v. Kordel, 397 U.S. 1, 11 (1970) ("It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.").

warnings.[207] Such an individual is entitled to be warned "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."[208] One could argue that a *Miranda* warning would cure the problem created by the new Rule 408. If defendants are warned that their statements could be used against them in a later criminal trial, then there may be no problem with the new Rule 408. In actuality, *Miranda* warnings do not adequately protect individuals facing parallel investigations.

Most importantly, the case law demonstrates that *Miranda* warnings are usually not required for civil investigations conducted by governmental agencies. In *Beckwith v. United States*, the Supreme Court held that a defendant who was interviewed by IRS agents was not entitled to a reading of his *Miranda* warnings even though his statements to the agents became the basis for a criminal prosecution for income tax evasion.[209] The Court found that the defendant had failed to prove he was in the midst of an in-custody interrogation, which is one of the requirements of *Miranda*.[210] Rather, the IRS agents questioned the defendant in his home and the record showed that the conversation between the agents and the defendant was "friendly" and "relaxed."[211] Additionally, the record showed that the agents did not force the defendant to answer questions he could not or chose not to answer.[212] Because the questioning of the defendant was not "initiated by law enforcement officers *after* [the defendant had] been taken into custody or otherwise deprived of his freedom of action in any significant way," the requirements of *Miranda* did not apply.[213] The Court based its reasoning on the lack of a custodial interrogation even while acknowledging that tax investigations rarely result in pretrial custody of the defendant.[214] The holding in *Beckwith* hurts defendants engaged in settlement talks with governmental agencies because those talks would likely be non-custodial. Thus, the investigators are not required to warn defendants that statements made during settlement talks could later be used against them.

207. 384 U.S. 436 (1966).

208. *Id.* at 444.

209. 425 U.S. 341, 347–48 (1976).

210. *Id.* at 346.

211. *Id.* at 343.

212. *Id.*

213. *Id.* at 347 (quoting Miranda v. Arizona, 384 U.S. 436, 444 (1966)).

214. *Id.* at 345. It is the lack of an in-custody interrogation, not the lack of a criminal charge or indictment, that causes the inapplicability of *Miranda*. *See* Mathis v. United States, 391 U.S. 1, 4 (1968) (holding that *Miranda* warnings do apply to in-custody interviews conducted by the IRS).

While *Miranda* warnings are not constitutionally required when agency investigators conduct interviews, the SEC and the IRS do provide *Miranda*-type warnings to their interviewees. The SEC's Form 1662 is entitled "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena."[215] The SEC provides the form to all testifying witnesses.[216] It states that interviewees and witnesses may assert their Fifth Amendment privilege against self-incrimination and that any information provided may be used against them.[217] The IRS offers similar warnings to its interviewees. The IRS provides its agents with two scripts, a Non-Custody and an In-Custody Statement of Rights.[218] The In-Custody Statement of Rights mirrors the warnings set out in *Miranda*.[219] The Non-Custody Statement of Rights is very similar to the SEC warning in that it informs interviewees of their privilege against self-incrimination and informs them that their statements may be used against them.[220]

Because the IRS and SEC warnings are not constitutionally required, several courts have found that the agencies' failure to inform individuals of their rights will have no bearing on the admissibility of any self-incriminating statements. In *United States v. Caceres*, the Supreme Court found that the IRS's failure to follow its internal procedures regarding authorization for electronic surveillance did not call for suppression of defendant's recorded statements.[221] The Court based its holding on the fact that the agency regulations were not constitutionally or statutorily required.[222] The Court also stated that agencies are entitled to exercise discretion in applying their own procedural rules.[223] Finally, the Court noted that excluding evidence for an agency's failure to follow its own guidelines might "have a serious deterrent impact" on the

215. SEC FORM 1662, *available at* http://www.sec.gov/about/forms/sec1662.pdf.

216. *See* United States v. Stringer, 408 F. Supp. 2d 1083, 1086 (D. Or. 2006), *vacated in part and rev'd in part*, 521 F.3d 1189 (9th Cir. 2008).

217. FORM 1662, *supra* note 215, at 2 ("Information you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States, to give any information that may tend to incriminate you or subject you to fine, penalty or forfeiture.").

218. *See* IRS, DEP'T OF THE TREASURY, IN-CUSTODY STATEMENT OF RIGHTS (2001), *available at* http://www.irs.gov/irm/part9/36208003.html; IRS, DEP'T OF THE TREASURY, NON-CUSTODY STATEMENT OF RIGHTS, *available at* http://www.irs.gov/irm/part9/36208004.html.

219. *See* IN-CUSTODY STATEMENT OF RIGHTS, *supra* note 218.

220. *See* NON-CUSTODY STATEMENT OF RIGHTS, *supra* note 218.

221. 440 U.S. 741, 744 (1979).

222. *Id.* at 749–50.

223. *Id.* at 754.

creation of new regulations.[224] In the Court's opinion, "it is far better to have rules like those contained in the IRS Manual, and to tolerate occasional erroneous administration of the kind displayed by this record, than either to have no rules except those mandated by statute, or to have them framed in a mere precatory form."[225] Based on the holding in *Caceres*, at least one court has held that an IRS agent's failure to read the agency's *Miranda*-like warnings to a non-custodial interviewee did not call for suppression of the interviewee's statements.[226]

B. Motion for Stay

A defendant facing parallel proceedings may be unable to suppress incriminating statements on constitutional grounds, but the defendant may be successful in seeking a stay of the civil proceedings pending resolution of the criminal case. Although a stay of civil proceedings is not constitutionally required where criminal charges are pending or likely,[227] courts have the discretion to stay civil cases where justice so requires.[228] However, a stay is an extraordinary remedy.[229]

Several courts have articulated factors that should be applied to determine whether a stay of a civil proceeding is appropriate pending resolution of a companion criminal case. These factors include the extent to which the facts of the civil and criminal cases overlap,[230]

224. *Id.* at 755–56.

225. *Id.* at 756.

226. United States v. Bencs, 28 F.3d 555, 559 (6th Cir. 1994) ("The suppression of evidence does not depend on whether agents violate internal operating procedures, but on whether those procedures are required by either the Constitution or federal law." (citing *Caceres*, 440 U.S. at 749–55)). *But see* United States v. Gardner, 611 F.2d 770, 777 (9th Cir. 1980) ("In unusual circumstances, a failure of the IRS substantially to comply with the requirements of this published procedure might provide grounds for the suppression of the fruits of the improperly conducted interview." (citing *Caceres*, 440 U.S at 755–57)).

227. Ashworth v. Albers Med., Inc., 229 F.R.D. 527, 530 (S.D. W. Va. 2005) ("Because of the frequency with which civil and regulatory laws overlap criminal laws, American jurisprudence contemplates the possibility of simultaneous parallel proceedings and the Constitution does not mandate the stay of civil proceedings in the face of parallel criminal proceedings." (citing SEC v. Dresser Indus., Inc., 628 F.2d 1368, 1374–75 (D.C. Cir. 1980); Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995))).

228. United States v. Kordel, 397 U.S. 1, 12 n.27 (1970) (collecting cases). *See also* Landis v. N. Am. Co., 299 U.S. 248, 254–55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." (citing Kan. City S. Ry. v. United States, 282 U.S. 760, 763 (1931); Enelow v. N.Y. Life Ins. Co., 293 U.S. 379, 382 (1935))).

229. Weil v. Markowitz, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987).

230. Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd., 7 F. Supp. 2d 523, 526–27 (D.N.J. 1998) (citing

whether the defendant has been indicted in the criminal case,[231] the extent to which the defendant's privilege against self-incrimination is implicated,[232] whether a delay would cause significant prejudice to plaintiffs, and the burden imposed on defendants.[233] In *SEC v. Sandifur*, the U.S. District Court for the Western District of Washington applied these factors to determine whether a civil lawsuit brought by the SEC should be stayed due to a criminal investigation involving the defendant.[234] In *Sandifur*, the defendant moved to stay SEC proceedings against him after a co-defendant in the civil case was indicted.[235] Although the defendant had not yet been indicted, he argued that criminal charges were imminent and that a stay was required on this basis.[236] Applying the above-referenced factors, the court found that the two investigations "overlap[ped] 100%."[237] Additionally, it was undisputed that the SEC and DOJ had worked together to investigate the defendant.[238] Despite these findings, the court ruled that a stay was unnecessary, especially considering that the defendant had not yet been indicted.[239] Moreover, the court found that even if defendant had already been indicted, the SEC's and the public's interest in resolving the civil case outweighed any burden to the defendant.[240] The *Sandifur* court's ruling makes clear that those persons affected by the new Rule 408 are very unlikely to win a motion to stay the administrative proceeding. The individuals most negatively affected by the new Rule 408 are unindicted. They are merely facing the <u>possibility</u> of criminal prosecution. Without an indictment, such a defendant will have a difficult time obtaining a stay.

Trs. of Plumbers and Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc., 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995)).

231. *Id.*

232. Keating v. Office of Thrift Supervision, 45 F.3d 322, 324 (9th Cir. 1995).

233. *Id.*

234. No. C05-1631C, 2006 WL 1719920 (W.D. Wash. June 19, 2006).

235. *Id.* at *1.

236. *Id.*

237. *Id.* at *2.

238. *Id.*

239. *Id. Accord* Walsh Sec., Inc. v. Cristo Prop. Mgmt., Ltd., 7 F. Supp. 2d 523, 527 (D.N.J. 1998) ("[B]ecause there is less risk of self-incrimination, and more uncertainty about the effect of a delay on the civil case, *pre* indictment requests for a stay are generally denied." (citing United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc., 811 F. Supp. 802, 805 (E.D.N.Y. 1992))).

240. *Sandifur*, 2006 WL 1719920, at *2. *See also id.* at *3 (finding that "the public's interest in deterring future wrongdoing and in having confidence in the integrity of the securities markets is best served by prompt resolution of this case").

C. The Effect of Government Deception

1. The Government's Duty to Warn

Counsel for a defendant facing a regulatory investigation may wonder if the government agency is under an affirmative duty to alert the defendant that a criminal investigation is underway. The case law is clear in stating that the agency had no obligation to inform a defendant that a criminal investigation is pending or that an indictment is likely. For example, in *United States v. Irvine*, the First Circuit Court of Appeals addressed the issue of whether an agency carries an obligation to warn a civil defendant that criminal charges are looming.[241] In that case, the defendant was charged with criminal tax violations. The charges were based in large part on statements the defendant made to an IRS agent who failed to inform the defendant that he was conducting a criminal investigation.[242] Because the agent's omission violated IRS procedure, the defendant in *Irvine* moved for suppression of several self-incriminating statements he made to the agent.[243] Despite the agent's breach of IRS policy, the First Circuit found "[n]o case holds that an IRS agent breaches a constitutional duty when he obtains information merely by failing to state specifically that he is conducting a criminal investigation."[244] Rather, an investigator runs afoul of the law only if he makes "fairly serious *affirmative* misrepresentations" of fact.[245] Another case in accord with this approach is *United States v. Parrott*.[246] In *Parrott*, Judge Weinfeld of the Southern District of New York found that the filing of the civil suit by the SEC "was ample notice that [defendants'] conduct, the continuance of which was sought to be enjoined, may well have run afoul of the criminal laws as well."[247] Judge Weinfeld found that once the agency informs civil defendants of their self-incrimination privilege, it has no affirmative duty to inform them that criminal charges may follow.[248]

Courts provide much greater protection to defendants where the governmental agency has made affirmative misrepresentations in order

241. 699 F.2d 43 (1st Cir. 1983).

242. *Id.* at 44.

243. *Id.*

244. *Id.* at 46.

245. *Id.* (citing United States v. Robson, 477 F.2d 13 (9th Cir. 1973); United States v. Lehman, 468 F.2d 93 (7th Cir. 1972); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970)).

246. 315 F. Supp. 1012 (S.D.N.Y. 1969).

247. *Id.* at 1015.

248. *Id.*

to obtain evidence. For example, where a defendant specifically asks a government agent about the possibility of criminal charges prior to commencement of the interview, courts have held that the agent's failure to disclose the involvement of the DOJ should result in suppression of any statements or other evidence obtained.[249]

Likewise, the case law provides some protection for defendants facing civil regulatory investigations that improperly merge with criminal investigations. In *United States v. Scrushy*, the defendant was charged with perjury.[250] At trial, an SEC examiner testified regarding his deposition of the defendant during a parallel civil investigation.[251] The government argued that defendant committed perjury during the SEC deposition.[252] The defendant moved to suppress his deposition based on a claim of government deception.[253] Specifically, the defendant claimed that the SEC's civil investigation was a disguise for the DOJ's criminal investigation of the defendant.[254] To support his claim, defendant established that the SEC examiner had taken instructions from the DOJ regarding his examination of defendant.[255] The U.S. Attorney's office instructed the SEC examiner to avoid certain questions so that the defendant would not be alerted of the criminal investigation against him.[256] Additionally, the SEC moved defendant's deposition to Birmingham, Alabama at the request of the DOJ, ensuring that the U.S. Attorney's office would have favorable venue for resolution of the perjury charges.[257]

Based on these facts, the court in *Scrushy* found that the SEC's investigation and the subsequent criminal charges "depart[ed] from the proper administration of justice."[258] According to the court, the two

249. United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977) ("From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material."). IRS policy is in accord with this jurisprudence. The *Internal Revenue Manual* instructs agents conducting civil tax investigations that "[u]nder no circumstances should the revenue officer inform the taxpayer that the case has been referred to Criminal Investigation (CI). This is CI's responsibility." INTERNAL REVENUE MANUAL, *supra* note 112, § 5.1.5.6, *available at* http://www.irs.gov/irm/part5/ch01s06.html. Yet, the *Internal Revenue Manual* also instructs its agents to provide accurate information and avoid misleading the taxpayer. *Id.*

250. 366 F. Supp. 2d 1134, 1135 (N.D. Ala. 2005).

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.* at 1137–38.

255. *Id.* at 1138.

256. *Id.*

257. *Id.*

258. *Id.* at 1140.

investigations ceased to be parallel when the DOJ recruited the SEC examiner to become involved in the criminal investigation.[259] The court also noted the significant prejudice facing a civil defendant who is unaware that criminal charges are imminent: "[T]he danger of prejudice flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is unaware of the pending criminal charge."[260] The court found that the only solution to the government's "cloak and dagger activities" was suppression of defendant's deposition testimony.[261]

Another recent case involving a similar issue of government deception is *United States v. Stringer*.[262] In *Stringer*, defendants moved to dismiss the indictment against them because the SEC failed to alert them of a pending criminal investigation. The district court found that the FBI intentionally suspended its active investigation of the defendants to allow the SEC an opportunity to obtain incriminating statements from the defendants.[263] Despite the government's argument that SEC Form 1662 constituted adequate notice that criminal charges were possible against the defendants,[264] the court held that the commingling of the two investigations was an abuse of process and violated the defendant's due process rights.[265] The court dismissed the indictment against the defendants, finding that the government's conduct was "so grossly shocking and so outrageous as to violate the universal sense of justice."[266]

On appeal, the Ninth Circuit reversed, finding that Form 1662 provided the defendants with sufficient notice of the possibility of criminal charges.[267] The Ninth Circuit disagreed with the lower court's finding that the SEC had attempted to obtain incriminating evidence

259. *Id.* at 1139.

260. *Id.* at 1139 (quoting United States v. Parrott, 248 F. Supp. 196, 200 (D.D.C. 1965)).

261. *Id.* at 1139–40.

262. 408 F. Supp. 2d 1083 (D. Or. 2006), *vacated in part and rev'd in part*, 521 F.3d 1189 (9th Cir. 2008).

263. *Id.* at 1084–85.

264. *See supra* text accompanying notes 215–217.

265. *Stringer*, 408 F. Supp. 2d at 1088–89 ("It would be a 'flagrant disregard of individuals' rights' to 'deliberately deceive, or even lull' someone into incriminating themselves in the civil context when 'activities of an obvious criminal nature are under investigation.'" (quoting United States v. Grunewald, 987 F.2d 531, 534 (8th Cir. 1993))).

266. *Id.* at 1089 (quoting United States v. Smith, 924 F.2d 889, 897 (9th Cir. 1991); United States v. Ramirez, 710 F.2d 535, 539 (9th Cir. 1983)). The court found that merely suppressing the evidence obtained by the deception was not a sufficient remedy for defendants. *Id.* Rather, the only appropriate remedy was dismissal. *Id.*

267. United States v. Stringer, 521 F.3d 1189, 1197 (9th Cir. 2008).

against the defendants in bad faith.[268] Additionally, although the SEC took steps to prevent the defendants from learning of the criminal investigation against them by instructing its personnel not to mention it,[269] the Ninth Circuit found that the agency made no affirmative misrepresentation that the SEC investigation was exclusively civil in nature.[270]

While courts seem to provide some protection to defendants facing parallel proceedings, they first require proof of strong government deception and manipulation. In *Scrushy* for example, not only did the SEC fail to inform the defendants of the pending criminal investigations against them, but the agency also allowed the DOJ to have a hand in the execution of the SEC investigation.[271] This level of DOJ interference is uncommon. For example, in *United States v. Mahaffy*, a defendant moved for the suppression of statements he made to the SEC during a civil investigation.[272] The court analyzed the facts of *Scrushy* and *Stringer* but ultimately concluded that the government had not engaged in egregious conduct.[273] The facts of *Mahaffy* established that the SEC made its own decision to pursue a civil investigation of the defendant.[274] Additionally, the SEC was unaware of the DOJ investigation against the defendant for the first six months of the SEC investigation.[275] The *Mahaffy* court found that because the defendant and his attorney were aware of the DOJ investigation prior to appearing for questioning regarding the civil case, they were put on notice that their statements could be used against them.[276]

The courts clearly will protect defendants who face prejudice as a result of government deception, but a defendant seeking protection from the courts carries a heavy burden. Unless a defendant facing parallel investigations can show outrageous or egregious conduct on the part of the government, the court is unlikely to suppress incriminating statements the defendant makes during settlement talks with a government agency. The agency is under no obligation to inform a defendant of the pendency or possibility of a criminal investigation. The

268. *Id.* at 1197.

269. The court noted that an SEC staff attorney instructed court reporters not to mention the DOJ during defendants' depositions. *Id.* at 1198.

270. *Id.* at 1199.

271. *See supra* text accompanying notes 255–257.

272. 446 F. Supp. 2d 115, 123 (E.D.N.Y. 2006).

273. *Id.* at 126.

274. *Id.*

275. *Id.*

276. *Id.* ("There are no facts to suggest that the USAO hid behind or manipulated the S.E.C. with the intention of misrepresenting its true intentions to the defendants.").

courts will step in to protect such defendants only where the government makes an affirmative misrepresentation or uses the civil investigation as a subterfuge for the criminal investigation.

2. Contractual Agreements with the Government

The Advisory Committee Notes seek to the justify the amendment to Rule 408 by advising defendants that they can ensure any statements made will not become the basis for criminal proceedings by contracting with the government agency to ensure non-disclosure.[277] This subpart analyzes the likelihood that a defendant might successfully contract with the government to prevent the later use of incriminating statements made during settlement negotiations.

Regulatory agencies and the DOJ routinely share information about the subjects of parallel investigations. In recent years, the DOJ has sought greater cooperation with regulatory agencies. The US Attorney Manual encourages its employees to "consult with the government attorneys on the civil side and appropriate agency officials regarding the investigative strategies to be used in their cases."[278] Indeed, the Manual encourages regular communication between Assistant U.S. Attorneys and regulatory attorneys, especially "when the civil case is developing ahead of the criminal prosecution."[279] Additionally, SEC policy allows for the disclosure of files to the DOJ and other law enforcement authorities even where the SEC has not yet made a formal recommendation of criminal prosecution.[280] Likewise, IRS policy strongly encourages cooperation between agency representatives and DOJ lawyers. The Internal Revenue Manual advises its agents that "[s]haring information between revenue officers and government attorneys assigned to the case is a key ingredient in developing civil and

277. FED. R. EVID. 408 advisory committee's note ("The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.").

278. Memorandum from the Atty Gen. to All United States Attorneys, All Assistant United States Attorneys, All Litigation Divisions, All Trial Attorneys (July 28, 1997), *in* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, *supra* note 132, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title1/doj00027.htm#27.

279. *Id.*

280. *See* 17 C.F.R. § 202.5(b) (2007). According to SEC regulations, "The Commission may also, on some occasions, refer the matter to, or grant requests for access to its files made by, domestic and foreign governmental authorities or foreign securities authorities, self-regulatory organizations such as stock exchanges or the National Association of Securities Dealers, Inc., and other persons or entities." *Id. See also* 5 BROMBERG & LOWENFELS, *supra* note 101, at § 12:98 ("SEC and DOJ collaboration has grown substantially since the 1970s when SEC shifted from formal criminal reference of cases to less formal granting of DOJ requests for access to SEC investigative files.").

criminal cases simultaneously and efficiently."[281] The Manual states that the sharing of information between civil and criminal authorities is always appropriate unless disclosure on the part of the DOJ would violate grand jury secrecy laws.[282] These various authorities make clear that governmental agencies and the DOJ all but require the sharing of information. A defendant facing possible criminal charges would probably have a difficult time negotiating a non-disclosure agreement where agency and DOJ policy so strongly encourages disclosure and cooperation. The Advisory Committee was sorely mistaken in its belief that non-disclosure agreements were available to most defendants.[283]

While a defendant would likely be unsuccessful in negotiating an agreement for non-disclosure, the defendant would have an even more difficult time obtaining a promise not to prosecute. In *Dresser Industries, Inc. v. United States*, the plaintiff corporation sued the SEC, claiming that the Commission violated an agreement not to prosecute the plaintiff for alleged criminal violations.[284] The Fifth Circuit held that any such contract would be unenforceable because the SEC lacks any authority to bind the DOJ.[285] The court noted that any person entering into a contract with the government takes a risk that the government actor may lack authority to bind the government or may be acting beyond the scope of his authority.[286] The court found, "If the rule were

281. INTERNAL REVENUE MANUAL, *supra* note 112, § 5.1.5.8, *available at* http://www.irs.gov/irm/part5/ch01s06.html#d0e5755.

282. *Id.*

283. The Advisory Committee made another mistake regarding the issue of non-disclosure. The Committee reasoned that incriminating statements made during civil litigation between private parties should remain excluded under the rule despite the availability of a non-disclosure agreement. FED. R. EVID. 408 advisory committee's note. The Committee found:

> When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

Id. The Committee incorrectly assumed that a non-disclosure agreement with a regulatory agency could bind the DOJ and prevent use of the statements, which is untrue. *See infra* text accompanying notes 285–287. Indeed, a regulatory agency has just as much power to bind the DOJ as a private litigant has—none. At best, private plaintiffs and civil regulators can promise that they will not disclose the statements. Such a promise is not enough to protect the policy behind 408. The Advisory Committee realized that non-disclosure agreements were not the answer in one context but mistakenly relied upon them in the other.

284. 596 F.2d 1231, 1236 (5th Cir. 1979)..

285. *Id. See also id.* at 1237 ("No statute authorizes agents of the SEC to grant immunity from prosecution or to curtail the prosecutorial discretion of the Department of Justice and United States Attorneys.").

286. *Id.* at 1236 (citing Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384 (1947); Posey v. United States, 449 F.2d 228, 234 (5th Cir. 1971); Jackson v. United States, 573 F.2d 1189, 1197–98 (Ct. Cl.

otherwise, a minor government functionary hidden in the recesses of an obscure department would have the power to prevent the prosecution of a most heinous criminal simply by promising immunity in return for the performance of some act which might benefit his department."[287]

One type of promise that courts will enforce is an agency promise not to recommend prosecution. The First Circuit dealt with this issue in *United States v. Rodman*.[288] In *Rodman*, a defendant claimed he made incriminating statements to the SEC in exchange for a promise that that the SEC would strongly recommend non-prosecution to the DOJ.[289] The SEC never fulfilled its promise. Indeed, the SEC attorney assigned to the case was actually preparing a criminal reference at the time he made the promise.[290] The court held that the SEC's failure to comply with its agreement called for dismissal of the indictment.[291]

It is important to note that the defendant in *Rodman* had significant bargaining power. His statements were not only self-incriminating, but they also led to the filing of civil and criminal charges against other individuals he incriminated.[292] Counsel would be wise to create such a quasi-immunity deal during settlement negotiations with the SEC. However, where the defendant cannot implicate others, counsel may have a difficult time obtaining a promise not to recommend criminal prosecution.

Although the case law allows civil defendants to make some contracts with the government regarding the non-disclosure of information or a promise of non-referral, government agencies make such promises on a case-by-case basis. Certain defendants, especially those with savvy and experienced counsel, have a better chance of negotiating a civil settlement that might protect against the later use of incriminating statements. However, pro se defendants, defendants who lack the resources to obtain an experienced attorney, and defendants who cannot implicate others in exchange for quasi-immunity may have a tough time obtaining such promises from government agencies.

1978)).

287. *Id.* at 1236–37.

288. 519 F.2d 1058 (1st Cir. 1975).

289. *Id.* at 1059.

290. *Id.*

291. *Id.* Even where an agency is willing to promise non-referral, courts have held that the promise must be explicit. *See* United States v. Bloom, 450 F. Supp. 323, 334 (E.D. Pa. 1978) ("[I]f [attorneys] wish to condition their client's participation or cooperation in a civil proceeding, conducted by the SEC, upon an agreement by the SEC not to make a criminal reference, it is the obligation of counsel to make that specific request, and then be guided by the SEC's response to it." (quoting United States v. Fields, No. 76 Cr. 1022, 1977 WL 1022 (S.D.N.Y. June 3, 1977))).

292. *Rodman*, 519 F.2d at 1059.

D. The Effect of Rule 403

The final protection that may be available to defendants facing parallel proceedings comes in the form of another evidentiary rule, Federal Rule of Evidence 403. As stated earlier, Rule 403 excludes relevant evidence where the probative value of that evidence is 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."[293] In anticipation of criticism about the new change to Rule 408, the Advisory Committee stated that Rule 403 would protect persons subject to the new rule. According to the Advisory Committee,

> Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal.[294]

This section of the article demonstrates that, in actuality, Rule 403 provides no protection for a pro se defendant facing parallel proceedings.

1. Applicability Based on the Plain Language of Rule 403

The main problem with the Advisory Committee's argument is that Rule 403, by its text, would not logically exclude incriminating statements simply because the speaker is unrepresented by counsel. Rule 403 excludes relevant evidence where its probative value is outweighed by the risk that (1) the defendant will suffer unfair prejudice, (2) the evidence will confuse or mislead the jury, or (3) the presentation of the evidence will waste the court's time.[295] None of these risks surface only where a pro se defendant makes incriminating statements.

As previously stated, the exclusion of offers to settle in Rule 408 reflects the drafters' belief that this evidence would always be excluded by Rule 403.[296] The unfair prejudice of such evidence would always outweigh its probative value because individuals may have many reasons to settle other than their belief in their own culpability.[297] However, the same logic does not apply to incriminating statements

293. FED. R. EVID. 403.

294. FED. R. EVID. 408 advisory committee's note.

295. FED. R. EVID. 403.

296. *See supra* Part II.B.

297. *See supra* text accompanying notes 41–42.

made during settlement talks. Such statements are highly probative on the question of an individual's culpability.[298] Rule 403 would only exclude incriminating statements where their highly probative value is outweighed by the factors listed in the rule.

Most often, defendants argue that Rule 403 should exclude relevant evidence because the unfair prejudice that would result from admission of the evidence substantially outweighs its probative value. As stated earlier, the Advisory Committee defines unfair prejudice as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[299] The Supreme Court defines unfair prejudice in relation to a criminal defendant as "the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."[300] In essence, unfair prejudice exists where it is likely that the jury will place too much significance upon a piece of evidence.

With regard to a defendant's incriminating statements, the defendant would likely have a difficult time establishing that the unfair prejudice associated with the statements substantially outweighs their probative value, even if he can show that he spoke with government officials without an attorney. The absence of an attorney does not make incriminating statements any less probative, and the lack of an attorney hardly creates unfair prejudice as defined by the Advisory Committee and the Supreme Court. Where a defendant's statements establish his involvement in or knowledge of a crime, any prejudice associated with those statements is hardly unfair.[301] As the Fifth Circuit has held, "Of course, 'unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material."[302] For the evidence to be excludable under Rule 403, the prejudice must be unfair.[303] Courts have found that a certain level of prejudice will always result when a defendant

298. *See* FED. R. EVID. 408 advisory committee's note ("But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt.").

299. FED. R. EVID. 403 advisory committee's note.

300. Old Chief v. United States, 519 U.S. 172, 180 (1997).

301. *See* United States v. Munoz, 36 F.3d 1229, 1233 (1st Cir. 1994). *Munoz* involved the admissibility of the defendant's spontaneous confession. In response to defendant's argument that the confession was highly prejudicial, the court stated: "The damage done to the defense is not a basis for exclusion; the question under Rule 403 is 'one of "unfair" prejudice—not of prejudice alone.'" *Id.* (quoting United States v. Moreno Morales, 815 F.2d 725, 740 (1st Cir. 1987)).

302. Dollar v. Long Mfg., N.C., Inc., 561 F.2d 613, 618 (5th Cir. 1977). *Accord* United States v. Haney, 914 F.2d 602, 607 (4th Cir. 1990) ("[The evidence] was prejudicial to the defendants in the sense that it bolstered the prosecution's case, but under that definition, all incriminating evidence is prejudicial.").

303. *Dollar*, 561 F.2d at 618.

voluntarily makes incriminating statements.[304] Additionally, the highly probative value of the statements often vitiates any excessive prejudice.[305] Thus, under the plain language of Rule 403, the absence of an attorney does not qualify as "unfair prejudice" such that highly probative incriminating statements should be excluded.

2. Applicability of Rule 403 Based on Public Policy

It is possible that, in stating that Rule 403 should exclude a pro se defendant's incriminating statements made during settlement talks, the Advisory Committee was hinting to trial judges that they should base their admissibility decisions on notions of fairness. For example, a trial judge could find that Rule 403 should exclude defendant's incriminating statements simply because admitting the statements where the defendant was unrepresented by a lawyer is unfair. There are at least two problems with this approach.

First, a court's decision to apply Rule 403 to ensure fairness is at odds with the purpose of the rule. According to Professor Imwinkelried, the purpose of Rule 403 is as follows:

> An item of evidence can be excluded under the rule when its admission realistically would jeopardize logical jury decisionmaking. The item could distort the fact-finding process by inducing the jury to err at one of the steps in its inferential process. The judge must attempt to predict the likely effect of the evidence on the jury's reasoning process. Drawing on his knowledge of juror psychology, the judge tries to forecast the probable response of the typical juror to the item of evidence.[306]

With this purpose in mind, Imwinkelried argues that Rule 403 is concerned with management of the fact-finding and trial process.[307] In contrast, nothing in the text of Rule 403 suggests that extrinsic social policies like fairness should play a role in a judge's decision to admit or exclude evidence under Rule 403.[308] Indeed, Imwinkelried argues that the use of Rule 403 to enforce extrinsic social policies "can lead to the exclusion of relevant, reliable evidence and can handicap the jury's

304. *See* United States v. Wilson, 798 F.2d 509, 514 (1st Cir. 1986) (finding that a certain level of prejudice "necessarily inheres in any freely made, extra-judicial admission by a defendant").

305. *Id.*

306. 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, 894–95 (1988).

307. *Id.* at 897.

308. *Id.*

reasoning process."[309] Traditionally, the evidentiary privileges, rather than Rule 403, have been the vehicle by which courts exclude relevant, reliable evidence for extrinsic policy reasons.[310] Allowing trial judges to use Rule 403 to enforce extrinsic policy expands the power of the judiciary and distorts the fact-finding process.[311]

Another problem with the Advisory Committee's reasoning centers on the Sixth Amendment right to an attorney. It is possible that the Advisory Committee thought Rule 403 should function as a corollary to the Sixth Amendment. Under the Sixth Amendment to the constitution, criminal defendants hold a right to be represented by counsel.[312] If the government fails to inform a criminal defendant of this right[313] or continues to question a defendant who has made a request for an attorney,[314] courts will suppress any incriminating statements.[315] The problem with application of the Sixth Amendment rule in the context of parallel proceedings is that a civil defendant has no Sixth Amendment right to counsel.[316] Therefore, courts could not justify the exclusion of

309. *Id.* at 898.

310. *Id.* at 900.

311. *Id.* at 907 ("[W]hen a judge excludes relevant evidence to promote an extrinsic social policy other than the policies inspiring an evidentiary privilege, the judge encroaches on the legislative function of formulating extrinsic policy.").

312. U.S. CONST. amend. VI. The amendment states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id. According to the Supreme Court, the amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." Johnson v. Zerbst, 304 U.S. 458, 462–63 (1938).

313. *See* Miranda v. Arizona, 384 U.S. 436, 473 (1966) ("In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him."). Of course, as stated in an earlier section of this article, *Miranda* warnings are only required for in-custody interrogations. *See supra* Part IV.A.2.

314. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) ("We further hold that an accused, such as [defendant], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

315. *See, e.g.*, Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (reversing defendant's conviction where he confessed after his request for counsel was denied).

316. *See* U.S. CONST. amend. VI (referring only to criminal prosecutions). *See also* Austin v. United States, 509 U.S. 602, 607–08 (1993) ("The protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.'" (citing United States v. Ward, 448 U.S. 242, 248 (1980))). *Accord* United States v. 6 Fox St., 480 F.3d 38, 45 (1st Cir. 2007) ("[T]he Sixth Amendment's

highly probative statements on the ground that the person against whom they are offered did not arrive at the settlement table with an attorney. Indeed, the case law is clear that, in most circumstances, pro se parties should not be given special treatment simply because they have chosen to proceed without counsel.[317] Additionally, even if the Advisory Committee were correct in believing that the Sixth Amendment should exclude a civil defendant's incriminating statements, Rule 403 is not the proper tool for exclusion of the evidence.

V. POTENTIAL SOLUTIONS

Although some safeguards are in place to protect persons who find themselves the subject of a parallel investigation, tougher protection is necessary. Initially, this Part demonstrates that the creation of an evidentiary privilege for settlement communications is probably unreasonable and insufficient to protect the rights of defendants. Additionally, it proposes a solution that keeps defendants abreast of their rights while ensuring that relevant evidence remains admissible.

A. The Viability of a Settlement Communications Privilege

The creation of an evidentiary privilege for settlement communications could provide great protection for defendants facing

guaranty of effective assistance of counsel in criminal proceedings does not extend to civil proceedings." (citation omitted)); Johnson v. Johnson, 466 F.3d 1213, 1217 (10th Cir. 2006) (same); United States v. Leahy, 438 F.3d 328, 333 (3d Cir. 2006) (same); Stanciel v. Gramley, 267 F.3d 575, 581 (7th Cir. 2001) (same).

317. *See* McNeil v. United States, 508 U.S. 106, 113 (1993) (holding that although pro se litigants who are incarcerated may be given leeway as to application of procedural rules, "we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel"). *Accord* O'Brien v. United States, 137 F. App'x 295, 301 (11th Cir. 2005); Iwachiw v. N.Y. State Dep't of Motor Vehicles, 396 F.3d 525, 529 n.1 (2d Cir. 2005); Smith v. Cooper, 83 F. App'x 837, 839–40 (7th Cir. 2003) ("[P]ro se litigants are not excluded from the rules of evidence and procedure at trial . . . ." (quoting Members v. Paige, 140 F.3d 699, 702 (7th Cir. 1998))); Cormier v. U.S. Dep't of Labor, No. 94-1061, 1994 WL 390120, at *3 (1st Cir. July 19, 1994); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981) ("The right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law. One who proceeds pro se with full knowledge and understanding of the risks involved acquires no greater rights than a litigant represented by a lawyer . . . . Rather, such a litigant acquiesces in and subjects himself to the established rules of practice and procedure." (citations omitted) (citing to Faretta v. California, 422 U.S. 806, 834 n.46 (1975); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977))); United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977) ("The hazards which beset a layman when he seeks to represent himself are obvious. . . . [T]he trial court is under no obligation to become an 'advocate' for or to assist and guide the *pro se* layman through the trial thicket." (citing Garrison v. Lacey, 362 F.2d 798 (10th Cir. 1966); Murphy v. Citizens Bank of Clovis, 244 F.2d 511 (10th Cir. 1957); Carrigan v. Cal. State Legislature, 263 F.2d 560 (9th Cir. 1959); Barnes v. United States, 241 F.2d 252 (9th Cir. 1956))).

possible parallel investigations. Not only would the government be unable to introduce evidence of defendant's incriminating statements at trial, but the statements would be wholly undiscoverable based on the language of Federal Rule of Civil Procedure 26(b)(1).[318] Unfortunately, neither case law nor public policy supports the implementation of such a privilege.

1. Support for the Creation of a Settlement Communications Privilege

Parties who have advocated for an evidentiary privilege for settlement communications sometimes base their claims on the language of Rule 408. These parties have argued that the old Rule 408 itself functions as a privilege. In *In re Subpoena Issued to Commodity Futures Trading Commission*,[319] an energy company moved to strike a subpoena issued by a government agency.[320] The subpoena sought certain documents related to settlements between the energy company and third parties.[321] The energy company argued that Rule 408 functions as a privilege that should bar production of the settlement documents.[322] The court disagreed, finding that Rule 408 governs the *admissibility* rather than the *discoverability* of settlement materials.[323] Indeed, the court found that Rule 408 is a rule which actually allows for the admissibility of settlement materials for certain purposes.[324] This, according to the court, makes it "unlikely that Congress anticipated that discovery into such documents would be impermissible."[325] The court noted that Congress, rather than the courts, is authorized to amend the scope of protection provided by Rule 408.[326] The district court's rejection of the argument that Rule 408 constitutes an evidentiary privilege is in accord with several federal opinions addressing the issue.[327]

318. FED. R. CIV. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . .").

319. 370 F. Supp. 2d 201 (D.D.C. 2005).

320. *Id.* at 204.

321. *Id.* at 207.

322. *Id.* at 210.

323. *Id.* at 211.

324. *Id. See also* FED. R. EVID. 408 ("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.").

325. *In re Subpoena*, 370 F. Supp. 2d at 211.

326. *Id.* ("It is not for this Court to rewrite Rule 408 to craft a broader remedy for the precise problem that Congress was attempting to address." (citing Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998))).

327. *See, e.g.*, United States v. Union Pac. R.R., No. CIV 06-1740, 2007 WL 1500551, at *6 (E.D.

While Rule 408, by its terms, does not function as an evidentiary privilege, Rule 501 allows federal courts to create new evidentiary privileges "in the light of reason and experience."[328] Although Rule 501 allows for the creation of new privileges, the Supreme Court is very reluctant to do so because privileges "contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'"[329] Thus, the Court has stated that it will recognize a new privilege only when it "promotes sufficiently important interests to outweigh the need for probative evidence."[330]

In *Jaffee v. Redmond*, the Court utilized Rule 501 to recognize a privilege for communications between a psychotherapist and her patient.[331] In recognizing the privilege, the Court found that the psychotherapist-patient privilege was very similar to the attorney-client and spousal privileges in that each of them is "rooted in the imperative need for confidence and trust."[332] The Court found that a psychotherapist-patient privilege was essential to ensure proper treatment.[333] According to the Court, the proper treatment of mental and emotional problems not only helps the individual patient but also helps society, thereby serving the public interest.[334] Also significant to the Court was the fact that all fifty states and the District of Columbia had already enacted some form of the psychotherapist-patient privilege. The

Cal. May 23, 2007) (stating that the court "is not in a position to rewrite Rule 408 to automatically protect from discovery all documents generated during or upon conclusion of settlement discussions"); Sippel Dev. Co. v. W. Sur. Co., No. 05-46, 2007 WL 1115207, at *2 (W.D. Pa. Apr. 13, 2007) ("In our view, the courts which have addressed this question have correctly determined that Federal Rule of Evidence 408 does not create a discovery privilege but, rather, addresses whether evidence relating to settlement discussions is admissible at trial." (citing Morse/Diesel, Inc. v. Fid. & Deposit Co., 122 F.R.D. 447, 449 (S.D.N.Y. 1988); Morse/Diesel, Inc. v. Trinity Indus., Inc., 142 F.R.D. 80, 83–85 (S.D.N.Y. 1992); Ctr. for Auto Safety v. Dep't of Justice, 576 F. Supp. 739, 749 n.23 (D.D.C. 1983); NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985))); Bank Brussels Lambert v. Chase Manhattan Bank, N.A., Nos. 93 Civ. 5298, 93 Civ. 8270, 1996 WL 71507, at *3 (S.D.N.Y. Feb. 20, 1996) ("[Rule 408] is not designed to lock away settlement documents, forever shielding them from view by those not party to the agreement. While it is true that the rule seeks to encourage the settlement process, it accomplishes that purpose not by making the settlement information unavailable, but by limiting abusive use of positions taken during the process. . . . The policy behind Rule 408 thus does not require any special restriction on Rule 26 because the discovery rules do not affect admissibility."); NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dept of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985) (same).

328. FED. R. EVID. 501.

329. Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (alteration in original) (quoting Trammel v. United States, 445 U.S. 40, 50 (1980)).

330. Trammel v. United States, 445 U.S. 40, 51 (1980).

331. 518 U.S. 1, 15 (1996).

332. *Id.* at 10 (quoting *Trammel*, 445 U.S. at 51).

333. *Id.*

334. *Id.* at 11.

Court found that the existence of a consensus among the various jurisdictions provided even greater support for recognition of the privilege.[335] Finally, the Court noted the fact that the psychotherapist-patient privilege was one of nine specific privileges that the Advisory Committee recommended for inclusion in the Federal Rules of Evidence.[336] Although Congress did not enact any specific privileges as part of the Federal Rules of Evidence,[337] the Court in *Jaffee* found that the Advisory Committee's inclusion of the psychotherapist-patient privilege indicated its view that the privilege "serve[d] a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[338]

In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, the Sixth Circuit determined that reason and experience called for the creation of a settlement communications privilege.[339] The court found that a settlement communications privilege would serve a "strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations."[340] The court stated that settlements "foster[] a more efficient, more cost-effective, and significantly less burdened judicial system."[341] Yet, for settlement negotiations to end in agreement, the parties must feel free to "make statements that would otherwise belie their litigation efforts."[342] The court also noted that settlement negotiations are often unreliable because they are "typically punctuated with numerous instances of puffing and posturing."[343] Based on the public policy favoring settlements and the inherent unreliability of settlement statements, the *Goodyear* court held that settlement negotiations were privileged and undiscoverable.[344]

Although some courts agree that a settlement communications

335. *Id.* at 13.

336. *Id.* at 14. *See* Proposed FED. R. EVID., 56 F.R.D. 183, 234–58 (Proposed Official Draft 1972) (adopting Rule 502 (required reports privilege), Rule 503 (attorney-client privilege), Rule 504 (psychotherapist-patient privilege), Rule 505 (spousal testimonial privilege), Rule 506 (clergy-communicant privilege), Rule 507 (political vote privilege), Rule 508 (trade secrets privilege), Rule 509 (secrets of state privilege), and Rule 510 (identity of informant privilege)).

337. Rather than enacting specific privileges, Congress enacted Rule 501, which was intended to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis." 120 CONG. REC. 40891 (1974) (statement of Rep. Hungate), *quoted in* Trammel v. United States, 445 U.S. 40, 47 (1980).

338. *Jaffee*, 518 U.S. at 15 (quoting *Trammel*, 445 U.S. at 50).

339. 332 F.3d 976, 983 (6th Cir. 2003).

340. *Id.* at 980.

341. *Id.*

342. *Id.*

343. *Id.* at 981.

344. *Id.*

privilege is proper,[345] many courts have criticized the *Goodyear* opinion. Several courts have noted that the *Goodyear* court failed to apply the factors utilized by the Supreme Court in *Jaffee*.[346] The factors used by the Supreme Court in *Jaffee* include the following: (1) whether a significant public and private interest supports recognition of the privilege; (2) whether there is a consensus among the states as to the existence of the privilege; (3) whether the privilege is on the list proposed by the Advisory Committee during creation of the Federal Rules of Evidence.[347] The Supreme Court has also applied a fourth factor in other cases concerning the creation of new privileges: whether Congress has considered the relevant competing concerns and failed to create a privilege.[348] Application of these four factors in the context of a settlement communications privilege actually militates against creation of the privilege.

Looking to the first factor, a public interest clearly supports some protection for settlement negotiations. The *Goodyear* court was correct in stating that parties will be much more reluctant to engage in a frank and open settlement discussion if they know their statements will remain forever hidden.[349] However, Rule 408, at least in its pre-amendment form, provided adequate protection for parties who engage in settlement discussions.[350]

Next, there is clearly no consensus regarding the creation of a settlement communications privilege. While a few courts have approved

345. *See* Therapeutic Research Faculty v. NBTY, Inc., No. Civ.S-05-2322, 2006 WL 3371856, at *1 (E.D. Cal. Nov. 21, 2006) (denying motion to compel certain documents based on a privilege relating to settlement communications); Allen County, Ohio v. Reilly Indus., Inc., 197 F.R.D. 352, 354 (N.D. Ohio 2000) (same); Cook v. Yellow Freight Sys., Inc., 132 F.R.D. 548, 554 (E.D. Cal. 1990) ("[T]he [negotiating] parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sorts of 'facts' would be highly misleading if allowed to be used for purposes other than settlement." (citing Wyatt v. Sec. Inn Food & Beverage, Inc., 819 F.2d 69, 71 (4th Cir.1987))), *overruled on other grounds by* Jaffee v. Redmond, 518 U.S. 1 (1996).

346. *See, e.g.*, JZ Buckingham Invs. LLC v. United States, 78 Fed. Cl. 15, 24 (2007) (citing *Goodyear* and stating that "[m]ost courts recognizing a settlement privilege have failed to carefully evaluate [the *Jaffee*] factors" (citing Matsushita Elec. Indus. Co. v. MediaTek, Inc., No. C-05-3148, 2007 WL 963975, at *4 (N.D. Cal. Mar. 30, 2007))); Matsushita v. MediaTek, No. C-05-3148, 2007 WL 963975, at *5 (N.D. Cal. Mar. 30, 2007) ("[T]he court in *Goodyear* did not analyze each of the important factors identified by the United States Supreme Court in order to determine whether a new privilege should be implied under Rule 501.").

347. *Matsushita*, 2007 WL 963975, at *4 (citing *Jaffee*, 518 U.S. at 11, 12–13 (1996); United States v. Gillock, 445 U.S. 360, 367–68 (1980)).

348. Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990).

349. *See Goodyear*, 332 F.3d at 980.

350. *See, e.g.*, WEINSTEIN & BERGER, *supra* note 36, § 408.02[3] ("Rule 408 reflects the judgment that free and frank discussions in negotiations leading toward settlement should be fostered, in order to protect the courts against excessive litigation.").

of such a privilege,[351] several federal and state courts have held that recognition of settlement communications privilege is unjustifiable.[352] Indeed, at least one district court in the Sixth Circuit has expressed its disapproval of the new privilege even though lower courts are now bound to recognize and apply the privilege.[353] Additionally, some courts have taken a position in the middle. These courts have held that although settlement communications are discoverable, the party seeking the evidence must make a particularized showing that the settlement communications will likely lead to admissible evidence.[354] Thus, no consensus exists among the various jurisdictions regarding the propriety of a settlement communications privilege.

The third factor requires courts to examine whether the proposed privilege was included in the nine privileges that the Advisory Committee proposed during the drafting of the Federal Rules of Evidence. A privilege for settlement communications was not included,[355] which again suggests that no agreement exists regarding the necessity of the privilege.

The final factor involves an examination of whether Congress

351. *See supra* note 345 and accompanying text.

352. *See In re* Gen. Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1124 n.20 (7th Cir. 1979) (finding that discoverability of settlement negotiations is consistent with the letter and spirit of Rule 408); JZ Buckingham Invs. LLC v. United States, 78 Fed. Cl. 15, 23 (2007); Performance Aftermarket Parts Group, Ltd. v. TI Group Auto. Sys., Inc., No. H-05-4251, 2007 WL 1428628, at *3 (S.D. Tex. May 11, 2007); Heartland Surgical Specialty Hosp., LLC v. Midwest Division, Inc., No. 05-2164, 2007 WL 1246216, at *4 (D. Kan. Apr. 27, 2007); Sippel Dev. Co. v. W. Sur. Co., No. 05-46, 2007 WL 1115207, at *2 (W.D. Pa. Apr. 13, 2007); *Matsushita*, 2007 WL 963975, at *6; *In re* Subpoena Issued to Commodity Futures Trading Comm'n, 370 F. Supp. 2d 201, 212 (D.D.C. 2005); Bank Brussels Lambert v. Chase Manhattan Bank, N.A., Nos. 93 Civ. 5298, 93 Civ. 8270, 1996 WL 71507, at *3 (S.D.N.Y. Feb. 20, 1996); NAACP Legal Def. & Educ. Fund, Inc. v. U.S. Dep't of Justice, 612 F. Supp. 1143, 1146 (D.D.C. 1985). *Accord* Citizens Commc'ns Co. v. Attorney Gen., 931 A.2d 503, 506 (Me. 2007); Ohio Consumers' Counsel v. Pub. Utils. Comm'n, 856 N.E.2d 213, 235 (Ohio 2006).

353. *See* Grupo Condumex, S.A. de C.V. v. SPX Corp., 331 F. Supp. 2d 623, 629 n.3 (N.D. Ohio 2004) ("Regardless of any latent misgivings I might have about the propriety of the rule announced by the Sixth Circuit in *Goodyear*, I am bound to apply governing Sixth Circuit precedent." (citing City of Toledo v. Beazer Materials & Servs., Inc., 923 F. Supp. 1013, 1023 (N.D. Ohio 1996))).

354. *See* Bottaro v. Hatton Assocs., 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (holding that the party seeking the evidence must base its request on something more than "the hope that [the settlement communications] will somehow lead to admissible evidence"). *See also* Morse/Diesel, Inc. v. Trinity Indus., Inc., 142 F.R.D. 80, 84 (S.D.N.Y. 1992) ("*Bottaro* attempts not to formulate the basis of a privilege under Rule 408 but, rather, to formulate a framework for establishing the relevance of settlement-related materials under Rule 26(b)(1) . . . ."). *But see* Rates Tech., Inc. v. Cablevision Sys. Corp., No. 05-CV-3583, 2006 WL 3050879, at *3 n.3 (E.D.N.Y. Oct. 20, 2006) (finding *Bottaro*'s requirement of a particularized showing at odds with Rule 26, which allows discovery of any information reasonably calculated to lead to the discovery of admissible evidence).

355. *See In re Subpoena*, 370 F. Supp. 2d at 211 (noting that a settlement communications privilege was not listed among the nine privilege proposed by the Advisory Committee (citing Proposed FED. R. EVID., 56 F.R.D. 183, 234–58 (Proposed Official Draft 1972))).

considered the relevant competing concerns and failed to create a privilege. Again, this factor suggests that a settlement privilege is unnecessary. In creating Rule 408, Congress recognized the importance of settlements and chose to enact a rule that would limit the admissibility of settlement communications. However, Congress stopped short of creating a privilege that would make settlement communications undiscoverable. The rule itself indicates that Congress had no problem with the use of settlement communications at trial where they were used to prove anything other than culpability or non-culpability.[356] Based on each of the factors used by the Supreme Court in analyzing the necessity of new privileges, it is clear that a settlement communications privilege cannot stand.

2. A Settlement Privilege as Protection for Defendants Facing Parallel Investigations

While it may seem that a settlement communications privilege would provide significant protection to defendants in parallel proceedings, such a privilege actually provides no greater protection than the old Rule 408 provided.

First, a settlement communications privilege that protects the discoverability of settlement talks would be of little aid to a defendant concerned about the possibility of parallel investigations. Oftentimes, a settlement communications privilege would work to prevent the disclosure of settlement materials to third parties. In *Goodyear*, for example, the appellants joined the action in an effort to convince the trial court to vacate a confidentiality order put in place to protect confidential negotiations between Goodyear and the original defendant.[357] Thus, the appellants were seeking access to settlement negotiations to which they were not a party. In such a circumstance, a privilege prohibiting discovery of the settlement negotiations provides a great deal of protection to the negotiating parties. Not only is evidence of the settlement negotiations inadmissible at trial, but it would be non-discoverable to third parties. However, in the context of parallel investigations, the government can likely prove defendant's criminal culpability without the use of discovery. Where a defendant has made incriminating statements to a government agency, the DOJ has the

356. *See* FED. R. EVID. 408(b) (allowing the use of settlement communications for other purposes, including "proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution").

357. *See* Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 977 (6th Cir. 2003).

ability to call as witnesses in the criminal case any of the agency employees who were present when the defendant made the statements. Any such testimony is not hearsay, but admissible in court as an admission by a party-opponent.[358] The old Rule 408 would have prevented the government's use of the evidence at trial, thereby providing sufficient protection to defendants facing parallel proceedings. A settlement communications privilege would provide no greater benefit to such a defendant. Clearly, a settlement communications privilege is not the coat of armor that one might expect it to be, especially in the context of parallel investigations.

Additionally, a settlement communications privilege would provide little protection to defendants in parallel proceedings because the privilege is likely waivable.[359] Government agencies like the SEC frequently require the subjects of their investigations to waive their attorney-client privilege before settlement negotiations can commence.[360] This so-called "compelled voluntary disclosure" would likely result in waiver of the settlement communications privilege as well. Government agencies could require a waiver before any settlement negotiations begin, and defendants, hoping to appear cooperative and failing to realize the significant likelihood of criminal charges, would probably sign away their privilege just as many defendants have signed away their attorney-client privilege. Considering the strong possibility that most defendants in parallel proceedings would waive their settlement communications privilege if required to do so by the government, the old Rule 408 actually provided greater protection to these defendants because the rule is not a privilege

358. *See* FED. R. EVID. 801(d)(2)(A). *See also* United States v. Simmons, 374 F.3d 313, 321 (5th Cir. 2004) (affirming trial court's admission of defendant's incriminating statements under Rule 801(d)(2)(A)); United States v. McElhiney, 85 Fed. App'x 112, 115 (10th Cir. 2003) (same). Indeed, even where the defendant's statements are not incriminating, they are admissible simply because the statements were made by defendant and offered by the government. *See* United States v. Reed, 227 F.3d 763, 770 (7th Cir. 2000) ("Therefore, the mere fact that the admitted testimony consisted of statements made by Reed, but offered by the government in its prosecution of him, makes Reed's testimony admissible under Rule 801(d)(2)(A).").

359. *See* Scotts Co. v. Liberty Mut. Ins. Co., No. 2:06-CV-899, 2007 WL 1723506, at *2–3 (S.D. Ohio June 11, 2007) (recognizing that the settlement communications privilege is waivable); Grupo Condumex, S.A. de C.V. v. SPX Corp., 331 F. Supp. 2d 623, 629 (N.D. Ohio 2004) (same).

360. *See* Harry J. Weiss et al., *Privilege and Cooperation*, 1609 PLI/CORP 179, 181 (2007) ("Federal government investigators have long sought waiver of the attorney-client privilege despite the long history of the privilege in our legal system. In particular, the Securities and Exchange Commission has sought waiver over the past twenty-five years . . . ."); Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 898 (2006) (noting the "increased vigilance of certain government agencies to obtain voluntary waivers of the attorney-client privilege and work product protection in exchange for possible prosecutorial or regulatory leniency").

and thus unwaivable.

B. The Solution—A Multi-Pronged Approach

The current state of the law demonstrates that a settlement communications privilege is not widely accepted. Indeed, the privilege would probably not go far in protecting defendants who face the possibility of parallel proceedings. The old Rule 408 treated all negotiating parties equitably, and, ideally, a reversal of the amendment to Rule 408 is a favorable solution. Until that occurs, the amended Rule 408 is the framework in which defendants must function.

1. A Warning Regarding the Use of Defendant's Statements

As stated earlier, *Miranda* warnings are not constitutionally required for most settlement negotiations between regulatory agencies and defendants,[361] but the SEC and the IRS provide *Miranda*-like warnings to defendants as part of agency policy.[362] However, the current warnings are general in nature and do not specifically address the impact of incriminating statements made during settlement talks.[363] Additionally, there is no guarantee that agency officials will provide the current warnings at the commencement of settlement negotiations as opposed to any other time during the investigative process. It is only fair that defendants facing parallel proceedings receive something more. These defendants are especially vulnerable because they may be blindsided by the effect of the new Rule 408. Defendants facing parallel investigations would benefit from knowing that the government has the right to use their settlement communications against them. Thus, Part I of the proposed warning would inform defendants that any incriminating statements that they make during settlement negotiations may become the basis for a later criminal action.

In addition to a warning regarding the use of settlement communications, defendants facing parallel proceedings deserve to know that government agencies routinely share information with law enforcement agencies.[364] This prong of the warning provides defendants with a certain level of transparency regarding the investigative process. It also provides clear notice to defendants that disclosure to a government agency equals disclosure to the DOJ and state and local law

361. *See supra* text accompanying notes 209–214.

362. *See supra* text accompanying notes 215–220.

363. *See id.*

364. *See supra* text accompanying notes 278–282.

enforcement agencies.

Finally, defendants facing parallel proceedings deserve to be notified of any pending criminal investigations against them. As one court has stated, "[T]he danger of prejudice flowing from testimony out of a defendant's mouth at a civil proceeding is even more acute when he is unaware of the pending criminal charge."[365] Disclosure of the existence of any pending criminal investigations is necessary because it alerts defendants that they are exposed to criminal liability and that they should proceed cautiously.

The proposed multi-pronged warning states as follows:

Settlement Negotiation Warning

On December 1, 2006, Federal Rule of Evidence 408 was amended. Section (a)(2) of the new rule provides that the following is admissible in court: "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." Under the amended Rule, any conduct or statements made during settlement negotiations with the government are admissible in any criminal case that is filed against you. This document shall serve as a warning that any incriminating statements made by you can be used against you. This document shall also serve as notice that:

(1) This agency:
____ has shared or made plans to share information regarding your case with federal, state or local law enforcement agencies, including the Department of Justice;
or
____ has not shared or made plans to share information regarding your case with federal, state or local law enforcement agencies, including the Department of Justice;

and,

(2) This agency
____ is aware of pending criminal investigation(s) against you.
____ is not aware of any pending criminal investigation(s) against you.

365. United States v. Scrushy, 366 F. Supp. 2d 1134, 1139 (N.D. Ala. 2005) (quoting United States v. Parrott, 248 F. Supp. 196, 200 (D.D.C. 1965)).

2. Enforcement of the Warning

As stated earlier, courts do not typically suppress evidence because it was obtained in violation of agency policy.[366] However, the proposed warning is a bit different from the agency regulations addressed in *Caceres*. In discussing the surveillance authorization regulation that the IRS violated, the *Caceres* Court noted that it was not a situation where "an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency."[367] Arguably, an agency's failure to provide the proposed settlement warning is the type of regulation that the *Caceres* Court would have enforced because it would function as an agency regulation promulgated for the benefit of defendants facing parallel proceedings rather than an internal regulation upon which the defendant does not rely. The dissent in *Caceres* agreed with this reasoning. Justice Marshall, joined by Justice Brennan, argued that the failure of an agency to follow its own regulations is a due process violation, especially where individual interests are implicated.[368] Justice Marshall advocated that "where internal regulations do not merely facilitate internal agency housekeeping, but rather afford significant procedural protections," the Court must insist on agency compliance.[369]

An agency's failure to provide the proposed settlement warning may indeed constitute a violation of due process. In *Montilla v. Immigration and Naturalization Service*, the Second Circuit found a due process violation where an INS hearing officer failed to require an alien to state on the record whether or not he desired an attorney.[370] INS policy required the hearing officer to get an affirmative or negative response from the alien, although the statement was not constitutionally required.[371] The court found that due process called for a reversal of the deportation order because the agency's failure to follow its own procedure affected the rights and interests of the defendant rather than internal agency procedures.[372] According to the court, "Careless observance by an agency of its own administrative processes weakens its effectiveness in the eyes of the public because it exposes the possibility of favoritism and of inconsistent application of the law."[373]

366. *See supra* notes 221–226 and accompanying text.

367. United States v. Caceres, 440 U.S. 741, 752–53 (1979).

368. *Id.* at 758 (Marshall, J., dissenting).

369. *Id.* at 760 (citiation omitted).

370. 926 F.2d 162, 166 (2d Cir. 1991).

371. *Id.*

372. *Id.* at 167.

373. *Id.* at 169 (citing McKart v. United States, 395 U.S. 185, 195 (1969)).

Even if the failure to provide the settlement warning does not rise to the level of a due process violation, promulgation of the warning in the federal statutes or the Federal Rules of Civil Procedure would likely give the warning much more force. In contrast of their treatment of agency regulations, several courts have suppressed evidence where agencies have violated statutory requirements.[374] The difference in treatment is probably explained by the fact that Congress, rather than the agencies themselves, promulgate statutory requirements. Where Congress sees fit to require agency action through legislation, courts tend to place more significance upon agency violations of the laws. Thus, not only is the proposed settlement warning suitable for placement in agency regulations, but also in federal statute or the Federal Rules of Civil Procedure.

3. Impact of the Warning

Undoubtedly, the proposed warning will chill settlement negotiations. Following receipt of the warning, a defendant will likely avoid a great deal of communication with the government, thereby reducing the likelihood that the parties will reach a settlement prior to trial. Yet the settlement warning is necessary because it ensures that defendants will be notified of their exposure to criminal liability.

Another consequence of the warning is that it allows for the admissibility of highly probative evidence. As stated earlier, the drafters of the old Rule 408 recognized that evidence of settlement offers was of very low probative value.[375] However, where a defendant makes incriminating statements during settlement talks, those statements are highly probative on the issue of defendant's culpability.[376] If a

374. *See, e.g.*, United States v. Soto-Soto, 598 F.2d 545, 550 (9th Cir. 1979) (suppressing evidence where FBI violated statutory law in conducting border searches); United States v. Tabi, No. 05 CR. 471, 2007 WL 582731, at *2 (S.D.N.Y. Feb. 23, 2007) ("*Caceres* is distinguishable from the present case in that there, the violation was one of agency regulations (relating to electronic surveillance) only, not of a statute, as here."), *adhered to on reconsideration by* No. 05 CR. 471, 2007 WL 1791257 (S.D.N.Y. June 19, 2007). However, several courts have held that the suppression of evidence should be reserved for constitutional rather than statutory violations committed by the government. *See, e.g.*, United States v. Smith, 196 F.3d 1034, 1040 (9th Cir. 1999) ("The use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights." (citing United States v. Harrington, 681 F.2d 612, 615 (9th Cir. 1982))); United States v. Ware, 161 F.3d 414, 424 (6th Cir. 1998) (finding that a statutory violation did not call for suppression of evidence where no constitutional violation was found). Contrary to the holdings of these cases, the Supreme Court found many years ago that the suppression of evidence was an available remedy for violations of the constitution, federal statutes and federal rules of procedure. United States v. Blue, 384 U.S. 251, 255 (1966).

375. *See supra* text accompanying notes 41–42.

376. *See supra* text accompanying notes 51, 298.

defendant voluntarily makes incriminating statements following notification of the settlement warning, the opponents of the amended Rule 408 can find some solace in the fact that the defendant was aware of the potential impact of his statements.

VI. CONCLUSION

While the proposed settlement warning will provide adequate notice to defendants facing parallel proceedings, it will certainly chill settlement negotiations, which is the outcome Rule 408 seeks to prevent. Unfortunately, without a reversal of the new rule, negotiations between government agencies and defendants will suffer. The only defendants who will be willing to engage in open and frank discussions with the government will be those defendants ignorant of the amendment who do not realize their exposure to criminal liability. If nothing else, the proposed warning places all parties on equal footing regarding the impact of their negotiations. Although the proposed warning leaves defendants without a safety net, it alerts them of the net's absence *before* they leap.