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IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND RULES 408 ARIZONA RULES OF EVIDENCE	Supreme Court No. R-_____

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona respectfully petitions this Court to amend Rule 408 of the Arizona Rules of Evidence to incorporate two of three recent amendments to Rule 408 of the Federal Rules of Evidence. The proposed amendments would: (1) prohibit the use of settlement offers and settlement-related communications when offered for impeachment purposes; and (2) clarify that the protection of Rule 408 may not be waived unilaterally to allow a party to offer into evidence his or her own settlement offers and statements from settlement discussions. In addition, the amendments are intended to make the rule easier to read and understand. The proposed amended Rule 408 is attached to this petition as Exhibit A.

I. BACKGROUND: RULE 408 AND THE RECENT FEDERAL RULE CHANGES

Arizona Rule of Evidence 408 currently incorporates the language of former Federal Rule of Evidence 408 and codifies the common law exclusionary rule prohibiting the introduction of settlement offers and statements made in settlement discussions "to prove liability for or invalidity of the claim or its amount." The current rule also

recognizes the extensive authorities permitting the admission of such evidence if offered for purposes other than establishing liability for, or the invalidity of, a claim or its amount.

In 2006, Federal Rule of Evidence 408 was amended to read as follows:

> **Rule 408. Compromise and Offers to Compromise**
>
> (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 compromise 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.
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> (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.

Apart from cleaning up the rule's language to make it easier to understand, the amended rule included three substantive changes. First, it barred the use of settlement offers and statements made in settlement discussions when offered for impeachment purposes. Second, it prohibited a party from offering into evidence his or her own settlement offers and statements in settlement discussions. Third, statements made in settlement discussions "related to a claim by a public office or agency" (but not settlement

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offers) were excepted from the rule if offered in a later criminal proceeding.

For the reasons given below, the State Bar submits that the first two amendments, but not the third, are worth incorporating into the Arizona version of Rule 408, along with certain stylistic changes that would make the rule easier to understand.[1]

II. THE PROPOSED AMENDMENTS TO ARIZONA RULE OF EVIDENCE 408

A. Barring the Use of Settlements Offers and Statements for Impeachment.

Like the current federal rule, the proposed amendments would prohibit the use of settlement offers and statements made in settlement discussions when offered "to impeach through prior inconsistent statement or contradiction." If adopted, this amendment would supersede this Court's ruling in *Hernandez v. State*, 203 Ariz. 196, 52 P.3d 765 (2002), in which this Court (in a 3-2 ruling) held that Rule 408 did not prohibit the use of statements made in settlement discussions for impeachment purposes. *Hernandez* was based partly on the absence of language in the rule barring the use of such statements for impeachment, an omission that would be corrected by this proposed amendment. *Id.* at 198, 52 P.3d at 768. This Court also relied partly on pre-federal amendment federal cases allowing the

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[1] The federal amendments retain the language of the original rule barring compromise evidence only when offered to show the "validity," "invalidity," or "amount" of the disputed claim. The Advisory Committee Note to the federal rule points out that the intent was "to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim." The federal amendments and the proposed Arizona amendments retain the examples of permitted uses contained in the prior version of the rule: establishing bias or prejudice; negativing a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. (For clarification, the State Bar also added establishing motive (as a subset of bias) as a further example of a permitted use.) Due to the rewording of the rule, the amendments deleted the prior rule's third sentence – "this rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations" – as superfluous.

use of such statements for impeachment, which the Court opined was a useful source of guidance because "we look to federal law when our rule is identical to the corresponding federal rule, as is true for Rule 408." *Id.* Now that federal law has changed, that rationale is gone. Indeed, to the extent that uniformity is desirable (and it is), it favors adopting the federal rule to prevent parties' rights from being determined by the happenstance of whether the plaintiff filed his or her claim in federal or state court.

More fundamentally, the State Bar believes that the policy justifications underlying *Hernandez* should be reconsidered:

(1) The rule in *Hernandez* largely nullifies Rule 408 because any statement that the rule purports to exclude usually can be disclosed to a jury by way of impeachment. *See* Fed. R. Evid. 408, Advisory Committee's Note to 2006 Amendment (a rule allowing the use of such statements for impeachment "would tend to swallow the exclusionary rule" set forth in Rule 408). Although such evidence is purportedly offered only for the purpose of impeaching the credibility of a witness (presumably the opposing party), juries are unlikely to appreciate the subtle distinction between impeachment and substantive evidence.

(2) Because it dilutes Rule 408's substantive protections, the rule in *Hernandez* also diminishes Rule 408's value in encouraging settlement discussions. As it now stands, no well-advised party should want to depart from a carefully rehearsed script during settlement talks for fear that an off-hand remark might end up in an opposing party's evidentiary arsenal at trial.

(3) The rule also is inconsistent with the way Arizona treats statements made during mediation sessions, which "may not be discovered or admitted into evidence" unless certain narrow exceptions apply. *See* A.R.S. § 12-2238(B) (statements made during mediation "may not be discovered or admitted into evidence" unless the parties agree, it relates to a claim against the mediator, or a disclosure is required by

statute or is necessary to enforce an agreement to mediate).

(4) Last, the rule in *Hernandez* creates a trap for the unwary, as only those practitioners who are familiar with the decision will be aware that Rule 408, while purporting to protect settlement discussions, in fact affords little protection for offers and statements made during those discussions.

B. Barring a Party from Offering His/Her Own Settlement Offers/Statements.

Also like the current federal rule, the proposed amendments would exclude settlement offers and statements even when a party seeks to "waive" the protection of the rule to admit its own offers or statements into evidence. Such evidence would not be "admissible on behalf of *any* party," including the party who made the offer or statements. This limitation is warranted because disclosure by one party that he or she has engaged in settlement discussions necessarily reveals that the other party has engaged in such discussions as well. The prospect of that fact being disclosed at trial may inhibit settlement talks from starting at all, as a party may fear that a jury may interpret that party's participation in settlement discussions as an admission that other side's claims or defenses have merit. *See* Fed. R. Evid. 408, Advisory Committee's Note to 2006 Amendment ("If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations," which defeats Rule 408's intent, which is to "protect[] both parties from having the fact of negotiation disclosed to the jury.").

Allowing a party to disclose his or her own settlement offers and statements also would unnecessarily create another issue to be litigated in case, as one party's testimony about the reasonableness of his or her settlement posture necessarily will require a response in kind from the other side. Moreover, testimony related to that issue may well have to come from the parties' lawyers, raising the spectre of round-robin motions to

disqualify counsel because they are potential witnesses in the case. *Id.* ("[P]roof of statements and offers made in settlement would often have to made through the testimony of attorneys, leading to the risks and costs of disqualification.").

C. Rejection of the "Criminal Use Exclusion" in the Amended Federal Rule.

The State Bar considered, but ultimately decided against recommending the adoption of the third amendment to the federal rule: allowing the admission of settlement statements in a criminal case if they were made in "negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative or enforcement authority." Such a rule would inhibit settlement discussions with public agencies because of the fear that any statements that are made during those discussions will be used in a later criminal prosecution. Indeed, there might be a concern that a public agency's interest in starting such discussions may be motivated primarily by a desire to obtain admissions for use in such a prosecution. Additionally, it is not clear what is meant by negotiations "related" to a claim by a public office or agency. As some legal claims between private parties may also implicate a potential claim by a state or local regulatory authority, settlement discussions between private parties may prove risky if a potential public claim lurks in the background. On balance, the State Bar's assessment is that the benefits from such a rule are dubious and its drawbacks considerable.

III. CONCLUSION

For the reasons set forth above, the State Bar of Arizona respectfully petitions this Court to amend Arizona Rule of Evidence 408 to conform with the form of the rule set forth in Exhibit A.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

John Furlong
General Counsel

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 19th day of December, 2008.

by: Kathleen A. Lundgren

Exhibit A

Rule 408. Compromise and Offers to Compromise

(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 compromise or attempting to compromise the claim; and

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

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