Staff Memorandum

EXECUTIVE COMMITTEE
Agenda Item #15

REQUESTED ACTION: Approval of an affirmative legislative proposal from the Committee on Civil Practice Law and Rules to amend CPLR 4547.

Attached is proposed legislation from the Committee on Civil Practice Law and Rules to amend CPLR 4547 to conform to Rule 408 of the Federal Rules of Evidence. As set forth in the supporting memorandum, CPLR 4547 was enacted in 1998 upon the recommendation of the New York State Bar Association to broaden the scope of protection of settlement discussions. As originally adopted, it conformed to Rule 408 of the Federal Rules of Evidence. In 2006 Rule 408 was amended, and the two provisions are no longer in conformity. Accordingly, the committee is recommending amendments to restore conformity. As noted by the committee, this will enable a common body of law and understanding with respect to settlement discussions.

The report was published on the Reports Group website (now the House of Delegates Reports Group Community) in June 2013. The New York City Bar has indicated that it supports the proposal. The Commercial and Federal Litigation Section has submitted the attached comment letter supporting the proposal in part and opposing in part.

This report was deferred from the November 2013 meeting in order to permit additional time for review and comment. No additional comments have been received.

The report will be presented by committee chair Robert P. Knapp, III.

Proposed Legislation

Section 1. CPLR 4547, as enacted by Chapter 317 of the Laws of 1998, is amended to read as follows:

(a) Prohibited Uses. Evidence of ~~(a)~~ the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

> (1) furnishing, promising, or offering ~~or promising to furnish, or (b)~~ — or accepting, ~~or offering or~~ promising to accept, ~~any~~ or offering to accept — a valuable consideration in ~~compromising or attempting~~order to compromise ~~a claim which is disputed as to either validity or amount of damages, shall be inadmissible as proof of liability for or invalidity of~~ the claim ~~or the amount of damages. Evidence of any~~; and
>
> (2) conduct or a statement made during compromise negotiations ~~shall also be inadmissible.~~about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The ~~provisions of~~court may admit this ~~section shall not require the exclusion of any~~ evidence ~~, which is otherwise discoverable, solely because such evidence was presented during the course of compromise negotiations. Furthermore, the exclusion established by this section shall not limit the admissibility of such evidence when it is offered~~ for another purpose, such as proving a witness's bias or prejudice ~~of a witness~~, negating a contention of undue delay, or ~~proof of~~proving an effort to obstruct a criminal investigation or prosecution.

Section 2. This act shall take effect December 1, 2011.

Supporting Memorandum

This proposal seeks to amend CPLR 4547 to conform to Rule 408 of the Federal Rules of Evidence. CPLR 4547 was enacted in 1998 at the suggestion of the New York State Bar Association Committee on Civil Practice Law and Rules. It was designed to broaden the scope of protection of settlement discussions, which previously protected only the offer itself, and to make the New York and federal law identical. As the supporting memorandum submitted by the Committee pointed out, having the two rules worded identically "would aid courts in interpretation of the rule, afford an easy understanding of its scope, and

would permit the same set of rules to govern the settlement of a dispute where the underlying controversy might be ultimately litigated in state or federal court."[1]

In 2006, FRE 408 was substantially rewritten and as a result, the two measures are now worded differently. The revision to FRE 408 was designed to make the rule more easily understood and to resolve certain issues that had divided federal courts. A further amendment of FRE 408 took effect on December 1, 2011, and was part of an overall effort to improve the style and clarity of the rule and not intended to change the substance. The 2006 federal amendment did resolve a split that had appeared in federal courts, although not New York, over whether settlement offers and negotiations would be excluded in a criminal case. See 9 Weinstein-Korn-Miller ¶ 4547.11. The single New York case to address this issue concurred with the view codified in the 2006 amendment. See *People v. Forbes-Haas*, 32 Misc.3d 685, 926 N.Y.S.2d 872 (Co.Ct.Onondaga Co. 2011) (CPLR 4547 not applicable to criminal prosecutions); See also 9 Weinstein-Korn-Miller ¶ 4547.11 (CPLR 4547 was enacted to make New York law, previously more narrow in its protection, conform to the federal rule, not to provide a broader exclusion).

In order to fulfill the policy goal of keeping both rules identical, it is necessary to amend CPLR 4547 to conform to FRE 408. This will enable a common body of law and understanding with respect to settlement discussions, which remains as important now as it was in 1998. Indeed, often settlement discussions occur in the context of controversies that might be litigated in federal or state court, or both, and a common set of easily understood rules, applicable to both, remains important.

[1] Report 123-A, New York State Bar Association, S. 6415/A.1985-A (June 16, 1998) ("NYSBA Report") (NY Bill Jacket, 1998 S.B. 6415, Ch. 317).

NEW YORK STATE BAR ASSOCIATION

NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

COMMERCIAL AND FEDERAL LITIGATION SECTION

2013-2014 Officers

GREGORY K. ARENSON
Chair
Kaplan Fox & Kilsheimer LLP
850 Third Avenue – Suite 1400
New York, NY 10022
212/687-1980
FAX 212/687-7714
garenson@kaplanfox.com

PAUL D. SARKOZI
Chair-Elect
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
212/508-7524
FAX 212/937-5207
sarkozi@thsh.com

JAMES M. WICKS
Vice-Chair
Farrell Fritz PC
1320 RXR Plaza
Uniondale, NY 11556-1320
516/227-0617
FAX 516/336-2204
jwicks@farrellfritz.com

JACLYN H. GRODIN
Secretary
Tannenbaum Helpern Syracuse & Hirschtritt LLP
900 Third Avenue
New York, NY 10022
212/508-7524
FAX 212/937-5207
grodin@thsh.com

DEBORAH E. EDELMAN
Treasurer
60 Centre Street – Room 232
New York, NY 10007
646/386-3214
FAX 212/748-7793
dedelman@courts.state.ny.us

Delegates to the House of Delegates
Gregory K. Arenson
Tracee E. Davis
David H. Tennant
Vincent J. Syracuse, Alternate

FORMER CHAIRS:
Robert L. Haig
Michael A. Cooper
Shira A. Scheindlin
Harry P. Trueheart, III
P. Kevin Castel
Mark H. Alcott
Gerald G. Paul
Mark C. Zauderer
Bernice K. Leber
John M. Nonna
Jack C. Auspitz
Sharon M. Porcellio
Jay G. Safer
Cathi A. Baglin
Lewis M. Smoley
Lauren J. Wachtler
Stephen P. Younger
Lesley F. Rosenthal
Carrie H. Cohen
Peter Brown
Vincent J. Syracuse
Jonathan D. Lupkin
David H. Tennant
Tracee E. Davis

October 14, 2013

VIA E-MAIL

New York State Bar Association
Reports Communication Group
One Elk Street
Albany, NY 12207

Re: Proposal to Amend CPLR § 4547

Dear Sir/Madam:

The Commercial and Federal Litigation Section submits the enclosed report regarding proposals to amend CPLR § 4547 in response to the recommendation from the Committee on Civil Practice Law and Rules to amend CPLR § 4547. While the Section supports much of the recommendation, the Section has reservations about the portion of the proposal that permits statements in compromise negotiations to be offered in a criminal case in certain limited circumstances.

If members of the Executive Committee of the Association or members of the Committee on Civil Practice Law and Rules wish to discuss the Commercial and Federal Litigation Section's views, I would be pleased to do so.

Sincerely yours,

Gregory K. Arenson

Gregory K. Arenson
Chair

cc: Robert P. Knapp, III, Esq., Chair
Committee on Civil Practice Law and Rules (via-email)

COMMERCIAL AND FEDERAL LITIGATION SECTION

October 8, 2013

REPORT REGARDING PROPOSAL TO AMEND CPLR § 4547

For the reasons stated below, the Commercial and Federal Litigation Section APPROVES, in part, the proposal put forward by the Association's Committee on Civil Practice Law and Rules (the "Standing Committee") to amend CPLR § 4547 to conform the language of that section to the current language of Rule 408 of the Federal Rules of Evidence (regarding the admissibility *vel non* of statements or conduct made in settlement negotiations), thereby embracing certain substantive amendments made to Rule 408 in 2006, as well as non-substantive amendments made in 2011 to simplify and clarify the language of the rule, but DISAPPROVES the proposal insofar as it recommends adoption of one of the changes to Rule 408 permitting the admission into evidence, in a subsequent criminal proceeding, of a party's conduct or statements made in negotiation of a settlement in a prior civil dispute between the defendant and a government agency.

CPLR § 4547 was enacted in 1998 at the recommendation of the Standing Committee; the goals of the amendment were both to broaden the protections available for settlement-related communications and to establish a rule that would be substantively identical to the corresponding federal rule, so that courts and litigants could benefit from the interpretation of the rule in multiple jurisdictions.

In 2006, Rule 408 was amended to clarify and resolve a number of issues that had arisen in the application of the rule in federal courts:

- the 2006 amendment prohibited the use of statements made in settlement discussions for purposes of impeachment, an issue not directly addressed by the original rule (or by CPLR § 4547); as the Advisory Committee noted, "[s]uch broad use of impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements." *Id.*;

- the 2006 amendment also clarified that the prohibition against introduction of settlement communications applies with equal force against a party's attempt to introduce his or her own statements. "If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiations disclosed to the jury." *Id.*; and

- finally, Rule 408 was amended to clarify that it "does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute" involving a claim by a "government regulatory, investigative, or enforcement agency." *Advisory Committee Comment to 2006 Amendment to Fed. R. Evid. 408*;

As a result of these changes, CPLR § 4547 – which was originally intended to read identically to Rule 408, now looks and feels quite different, and does not specifically incorporate any of the 2006 amendments to the federal rule. Nor does CPLR § 4547 benefit from the clarifying and simplifying amendments made to the federal rule in 2011.

The Standing Committee, in its supporting memorandum, states that, "[i]n order to fulfill the policy goal of keeping both rules identical, it is necessary to amend CPLR 4547 to conform to FRE 408. This will enable a common body of law and understanding with respect to settlement discussions, which remains as important now as it was in 1998. Indeed, often settlement discussions occur in the context of controversies that might be litigated in federal or state court, or both, and a common set of easily understood rules, applicable to both, remains important."

This Section acknowledges that courts and parties may benefit from having a common understanding in New York and federal courts of the scope and limitations of the protections afforded to settlement communications; the Section further notes that the specific changes to the federal rule adopted in 2006 regarding the prohibition against (a) using settlement communications for purposes of impeachment and (b) a party's introduction of its own settlement offers appear to be valuable extensions of the rule and appropriate for adoption in New York as well. Accordingly this Section APPROVES those portions of the Standing Committee's proposed amendment to CPLR § 4547.

However, insofar as the proposed amendment calls for the adoption of that portion of FRE 408 addressing the use of otherwise protected communications or conduct in criminal proceedings (which appears as section (a)(2) of the proposed amendment), this Section believes that that proposal is unwise as a matter of policy and should not be adopted. As the Advisory Committee comments note, a defendant who is ably represented in settlement negotiations could readily avoid making any statements or engaging in any conduct that would later be admissible in a criminal matter, and thus the amendment would primarily serve as a trap for the unwary or unrepresented. Moreover, the Section is concerned that the amendment, if adopted, would have a potential chilling effect on efforts to settle civil matters brought by government agencies where the subject matter of the dispute might later become the subject of criminal proceedings. In the Section's view, this would be a highly undesirable result.

The Section notes that the only New York State case of which we are aware that has addressed this issue is *People v. Forbes-Haas*, 926 N.Y.S.2d 872 (County Court, Onondaga County 2011), a case which ultimately held that CPLR § 4547 had *no* application to criminal proceedings, and as a result permitted the introduction into evidence in a criminal proceeding statements that the defendant had made in a prior settlement of a civil dispute – a result that would goes beyond the uses that would be permitted by section (a)(2) of the proposed amendment. To avoid any confusion in this area, the Section recommends that the proposed amendment be changed as follows:

First, by deleting section (a)(2) as proposed and replacing it with the following (the effect of which is to delete the language permitting introduction of prior statements in a criminal case):

> "conduct or a statement made during compromise negotiations about the claim;" and

Second, by adding new language after section (a)(2), applicable to both (a)(1) and (a)(2), stating as follows:

> "regardless of whether such evidence is offered in a civil, criminal, administrative, or other adjudicative proceeding."

Conclusion: For the reasons stated, the Commercial and Federal Litigation Section APPROVES, in part, and DISAPPROVES, in part, the amendment to CPLR § 4547 proposed by the Association's Standing Committee on Civil Practice Law and Rules.

COMMERCIAL & FEDERAL LITIGATION SECTION
PROPOSED REVISIONS TO THE AMENDMENT OF CPLR § 4547
SUGGESTED BY THE COMMITTEE ON CIVIL PRACTICE LAW & RULES

Section 1. CPLR 4547, as enacted by Chapter 317 of the Laws of 1998, is amended to read as follows:

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in order to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim;

regardless of whether the negotiations related to a civil claim or claim by a public office in the exercise of its regulatory, investigative, or enforcement authority, or whether such evidence is offered in a civil, criminal, administrative, or other adjudicative proceeding.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Section 2. This act shall take effect December 31, 2013.

Committee on Civil Practice Law and Rules
Response to Report of the Commercial and Federal Litigation Section on Proposal to Amend CPLR 4547

October 31, 2013

The Committee on Civil Practice Law and Rules of the New York State Bar Association (the "Standing Committee") has reviewed the report of the Commercial and Federal Litigation Section concerning the Standing Committee's proposal to amend CPLR 4547 to conform to FRE 408. The Section has supported the proposal except that the Section *opposes* the amendment to the extent it would adopt FRE 408(a)(2), permitting admission of "conduct or a statement made during compromise negotiations about the claim … when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." The federal rule was explicitly amended to permit such use. The Standing Committee continues to believe that New York should adopt the federal amendment *in toto.*

The position of the federal drafters was set forth in the Notes of Advisory Committee on the 2006 amendments:

> Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment provides that Rule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt,* 34 F.3d 436, 439 (7th Cir. 1994) (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.
>
> 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. But there is no absolute exclusion imposed by Rule 408.
>
> In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. 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.

The Commercial and Federal Litigation Section concludes that this portion of the federal amendment is "unwise as a matter of policy and should not be adopted. As the Advisory committee comments note, a defendant who is ably represented in a settlement could readily avoid making any statements or engaging in conduct that would later be admissible in a criminal matter, and thus the amendment would primarily serve as a trap for the unwary of unrepresented." The Section also expresses concern about the "potential chilling effect on efforts to settle civil matters brought by government agencies where the subject matter of the dispute might later be the subject of criminal procedures."

The Commercial and Federal Litigation thus proposes to alter the Standing Committee's proposal and to amend CPLR 4547 to preclude admission of "conduct or a statement made during compromise negotiations about the claim regardless of whether such evidence is offered in a civil, criminal, administrative or other adjudicative proceeding." The Section's proposal would thus be different from the federal rule, and less favorable to the government and state prosecutors than either the federal rule or present New York law.

The Standing Committee believes that the federal rule is carefully balanced between the desire to protect settlement discussions and the need to prosecute crimes. The federal rule prohibits use of settlement discussions in a criminal case except "when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." Settlement discussions in the context of a private dispute still cannot be used in a criminal case (except as provided in FRE 408(b) – and in existing CPLR 4547 – including proving "an effort to obstruct a criminal investigation or prosecution. The proposed amendment would not alter this language.) But statements made to a public official to resolve a public investigation could be so used under the proposed amendment (except where the parties have explicitly agreed to the contrary, see 2006 Notes of Advisory Committee, *supra*) and in most situations, such use would be appropriate.

The sole New York case on this subject, *People v. Forbes-Haas*, 32 Misc.3d 685, 926 N.Y.S.2d 872 (Co. Ct. Onondaga Co. 2011) holds that CPLR 4547 is not applicable to criminal prosecutions. See also 9 Weinstein-Korn-Miller ¶ 4547.11 (CPLR 4547 was enacted to make New York law, previously more narrow in its protection, conform to the federal rule, not to provide a broader exclusion). The Commercial and Federal Litigation Section would thus be a substantial expansion of CPLR 4547 beyond what is provided for under federal law and current New York State law. The current version of FRE 408 reflects a careful balance, precluding the

use of most settlement negotiations in criminal cases except where the settlement relates to a public investigation or claim.

There is a substantial policy interest in keeping the federal and state rules identical. Very often, a criminal prosecution can be commenced either on a federal or state level. While it is important to protect settlement discussions, unless the two rules are identical, confusion will result. Under the Section's proposal, the same statement could be freely used in a federal case but could not be used at all by a state prosecutor or government agency. The Standing Committee believes it is unwise to put New York state agencies and prosecutors at such a disadvantage. Furthermore, the "trap for the unwary" comment relied upon by the Section was note made in connection with the 2006 amendment but rather the original enactment of FRE 408.

The Standing Committee would therefore continue to recommend amending CPLR 4547 so that it is identical to FRE 408.

October 31, 2013