

## Memorandum 96-40

### Admissibility and Discoverability of Settlement Negotiations

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In the course of its recent study of mediation confidentiality, the Commission decided that the rules governing admissibility and discoverability of settlement discussions also warrant reexamination. The Commission is authorized to work on that topic by virtue of its continuing authority to study the Evidence Code. 1965 Cal. Stat. res. ch. 130, continued in 1995 Cal. Stat. res. ch. 87. The staff has begun preliminary research in the area and has formed some ideas about how to proceed. After describing existing law, this memorandum relates those ideas and seeks the Commission's input on: (1) whether to proceed in those directions, and (2) whether to pursue any other particular issues.

#### EXISTING LAW

The protection of Evidence Code Section 1152.5 only extends to a "mediation," a term as yet undefined in the Code. The main evidentiary protection for a settlement discussion not qualifying as a mediation is Evidence Code Section 1152, which provides:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.

(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of

good faith and fair dealing or violation of subdivision (h) of Section 790.3 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving additur or remittur, or on appeal.

(c) This section does not affect the admissibility of evidence of any of the following:

(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.

(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

Section 1152 is "based upon the public policy in favor of the settlement of disputes without litigation." Evid. Code § 1152 Comment (1965). By making offers of compromise inadmissible to prove liability, it helps facilitate candid discussion that may lead to settlement. See *Fieldson Associates, Inc. v. Whitecliff Laboratories, Inc.*, 276 Cal. App. 2d 770, 81 Cal. Rptr. 333 (1969). To ensure "the complete candor between the parties that is most conducive to settlement," Section 1152 protects not only an offer of compromise, but also any conduct or statements made in negotiating the offer. Evid. Code § 1152 Comment (1965).

Although broad in that respect, Section 1152 is limited in others. Subdivisions (b) and (c) set forth exceptions for specific contexts. Perhaps more importantly, subdivision (a) only makes settlement offers and related discussions inadmissible "to prove liability for the loss or damage to which the negotiations relate." *Young v. Keele*, 188 Cal. App. 3d 1090, 1093, 233 Cal. Rptr. 850 (1987) (emph. in original). If this type of evidence is offered for another purpose, such as to impeach a witness or show bias, Section 1152 does not apply.

Section 1154 supplements Section 1152's protection. It states: "Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it." Section 1154 "stems from the same policy of encouraging settlement and compromise that is reflected in Section 1152." Evid. Code § 1154 Comment.

Section 1152 is not expressly limited to civil cases, but such a limitation seems implicit in its language, particularly the reference to proving "liability." See generally David W. Louisell & Christopher B. Mueller, *Federal Evidence* § 170, at

444 (1985) (discussing Fed. R. Evid. 408). In what appears to be the only case squarely addressing the issue, the court rejected the notion that Section 1152 applies to criminal cases:

Muniz would have us read into the statute the word "criminal" as an alternative modifier for liability yet he offers no reason for us to do so. Nor does the case law interpreting Evidence Code section 1152 supply any support for the notion that the statute has any application to criminal cases.

[People v. Muniz, 213 Cal. App. 3d 1508, 1515, 262 Cal. Rptr. 743 (1989).]

Further support for that view comes from two statutes specifically directed to criminal cases, Evidence Code Sections 1153 and 1153.5. Under Section 1153, "[e]vidence of a plea of guilty, later withdrawn, or of an offer to plead guilty to the crime charged or to any other crime, made by the defendant in a criminal action is inadmissible in any action or in any proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals." Under Section 1153.5, evidence of an offer for civil resolution of a crime against property pursuant to Code of Civil Procedure Section 33, "or admissions made in the course of or negotiations for the offer shall not be admissible in any action." Arguably, these statutes would be unnecessary and their limitations meaningless if Sections 1152 and 1154 extended to criminal cases.

#### POSSIBLE REFORMS

The staff's preliminary ideas for reform of Sections 1152, 1153, 1153.5, and 1154 are as follows:

**(1) Put the provisions in a separate chapter.** Sections 1152, 1153, 1153.5, and 1154 are now in Chapter 2 of Division 9 of the Evidence Code, which is entitled "Other Evidence Affected or Excluded by Extrinsic Policies." There are thirteen other statutes in the same chapter, including two on mediation. The Commission's tentative recommendation on mediation confidentiality proposes to move the mediation statutes to a new chapter of Division 9 of the Evidence Code, entitled "Mediation." To facilitate reference to the statutes governing admissibility of settlement negotiations, the staff suggests moving them to a new chapter entitled "Offers to Resolve the Dispute," which would be located immediately after the proposed chapter on mediation.

**(2) Make clear that Sections 1152 and 1154 apply to all noncriminal proceedings, but not to criminal actions.** To prevent confusion about which types of proceedings Section 1152 covers (e.g., civil actions, criminal cases, administrative adjudications, arbitrations, mini-trials), it may be helpful to amend subdivision (a) as follows:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding to prove his or her liability for the loss or damage or any part of it.

Similarly, Section 1154 could be amended to read:

1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding to prove the invalidity of the claim or any part of it.

These suggested amendments would parallel changes proposed in the Commission's tentative recommendation on mediation confidentiality. See *Tentative Recommendation, Mediation Confidentiality*, at 7-8, 11-13 (May 1996).

**(3) Explore the possibility of extending Section 1152's protection beyond proof of liability.** The restriction of Section 1152(a) to proof of liability is a big loophole in protecting settlement communications. There are many other purposes for which litigants can offer such evidence, including, for example, impeachment, proof of bias, establishment of motive, showing undue delay or obstruction of justice, demonstrating good faith or bad faith in handling a claim, and proving an accord and satisfaction. On the one hand, Section 1152 would be more effective in promoting settlement if its protection extended beyond proof of liability. On the other hand, in many contexts there may be compelling reasons for continuing to allow a party to introduce evidence of a settlement offer or related negotiations. In criminal cases, there may even be restrictions of

constitutional dimension, such as when a defendant seeks to use a settlement offer to show bias of a prosecution witness. *See generally* David W. Louisell & Christopher B. Mueller, *Federal Evidence*, § 172, at 167-69.

The staff proposes to study this issue in greater depth for the Commission's next meeting. Preliminary research suggests that there has been little experimentation along these lines in other jurisdictions. Federal Rule of Evidence 408, adopted in most states, follows the same approach as California. In fact, the Advisory Committee's Note cites Section 1152 as a similar provision. Alaska has, however, experimented with precluding use of settlement offers for impeachment. *See* Alaska R. Evid. 408. The staff intends to check further on this. It may make more sense to (1) specify a number of purposes for which evidence of settlement negotiations is inadmissible, than to (2) make such evidence generally inadmissible and carve out exceptions to that rule.

**(4) Make clear how Sections 1152, 1153, 1153.5, and 1154 apply to discoverability.** By their terms, Sections 1152, 1153, 1153.5, and 1154 make specified evidence inadmissible. The statutes do not expressly say that such evidence is protected from discovery. At least one case suggests that Section 1152 accords no such protection. *See Covell v. Superior Court*, 159 Cal. App. 3d 371, 205 Cal. Rptr. 371 (1984). That approach has been criticized. *See* Wayne Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 *Hastings L.J.* 955 (1985). Regardless of which view is correct, Sections 1152, 1153, 1153.5, and 1154 should be amended to explicitly address discoverability. The staff proposes to research this point further and try to develop a coherent approach to discoverability.

#### METHOD OF PROCEEDING

The topic of mediation confidentiality is interrelated with the topic at hand. Comments on the Commission's tentative recommendation on mediation confidentiality are due by September 20, 1996. The Commission probably will be ready to introduce a bill on the subject in 1997.

It would make sense to cover the admissibility and discoverability of settlement negotiations in the same bill. To that end, the staff is inclined to prepare a draft of a tentative recommendation for the next meeting. The draft may need significant refinement before it is circulated, but it should help focus discussion and move the project along. The staff is very interested in hearing any

suggestions that the Commission or others may have about the content of the draft.

Respectfully submitted,

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