Study K-410 October 28, 1996

Memorandum 96-59

Confidentiality of Settlement Negotiations

Attached is a staff draft of a tentative recommendation on evidentiary protection for settlement negotiations and other steps towards compromise of civil disputes. The staff has found the topic more complex than it initially appeared. Staff Notes in the draft following individual sections raise a number of issues. This memorandum discusses a few more points:

(1) Sources. A law review article by Judge Brazil of the United States District Court of the Northern District of California — Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955 (1988) — was extremely helpful in preparing the draft. The staff also relied on an extensive discussion of compromise evidence by Professor Leonard of Loyola Law School in Los Angeles — David P. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* 3:1 to 3:160 (1996). If any of the Commissioners would like a copy of Judge Brazil's article or Professor Leonard's work, please let the staff know.

(2) Interrelationship with the study on mediation confidentiality. The staff initially thought that it would be helpful to combine the Commission's work on this project with its proposal on mediation confidentiality. The staff's current view is that the projects should be kept separate, but coordinated. The mediation study is further along and we should be able to introduce a bill in the next legislative session. Ron Kelly and others would like that legislation to be enacted as soon as possible. Trying to combine mediation confidentiality and settlement negotiation confidentiality into a single bill may delay enactment of the mediation reforms. It may also jeopardize those reforms by injecting unrelated points of controversy. In addition, Ron Kelly reports that in the area of dispute resolution, smaller bills have been faring better than more ambitious measures.

(3) Extension beyond admissibility and discoverability. As drafted, the protection of proposed Section 1132 would only affect the admissibility and

discoverability of compromise evidence. It would not completely cloak such evidence with confidentiality. For instance, it would not preclude a litigant from informing a fire department of a serious fire hazard revealed in a settlement conference. In contrast, existing Section 1152.5(a)(3) may afford greater protection to mediation communications: "When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation *shall remain confidential."* (Emph. added.)

The staff recommends against following such an approach in the instant proposal. A mediation triggers different policy considerations than an unassisted settlement negotiation. See pages 5-6 of the attached draft. Moreover, even if the proposal only affects admissibility and discoverability, its expanded protection of compromise evidence may prove controversial. Going further may sink the proposal altogether.

(4) Degree of dispute. There are potential ambiguities regarding the degree of dispute necessary to invoke Sections 1152 and 1154. *See generally* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings Law Journal 955, 960-966 (1988) (discussing Federal Rule of Evidence 408); *see also* Young v. Keele, 188 Cal. App. 3d 1090, 233 Cal. Rptr. 850 (1987) (Sections 1152 and 1154 inapplicable to settlement negotiations that occurred after the judgment). Consistent with the Commission's general guidance at its meeting on July 11, 1996, the attached draft does not define compromise evidence more precisely than the existing statutes. The preliminary part mentions the possibility of studying that issue in the future. See page 6, n. 29.

(5) Alternative approaches. The attached draft would make compromise evidence generally inadmissible. That appears to be a novel approach. To prevent unfortunate, unintended results, the Commission should devote careful attention to the proposed exceptions (Sections 1133-1138) and consider whether any further exceptions are necessary. If at some point the Commission decides not to follow its current ambitious approach, other possibilities for expanded protection of settlement negotiations include:

• *Precluding use of compromise evidence for purposes of impeachment, not just for purposes of establishing liability*. There is considerable

support for the view that compromise evidence should be inadmissible for purposes of impeachment by a prior inconsistent statement. *See, e.g.,* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings Law Journal 955, 974-78 (1988); Michael H. Graham, Modern State and Federal Evidence: A Comprehensive Reference Text 487 (NITA 1989); Stephen A. Saltzburg, Michael M. Martin & Daniel J. Capra, Federal Rules of Evidence Manual 512-13 (6th ed. 1994). Some states already follow that approach. *See* Alaska Rule of Court 408 (exclusion of compromise evidence "is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement"); Maryland Rule of Evidence 5-408 (same).

• *Making compromise evidence generally inadmissible, but limiting the reform to particular dispute resolution programs.* Another alternative would be to make compromise evidence generally inadmissible, but to limit the reform to particular dispute resolution programs, such as a court-administered early dispute resolution program. Missouri follows such an approach, although it is unclear whether the approach is limited to mediations or extends further. *See* Missouri Supreme Ct. Rule 17.06(a) ("An early dispute resolution process undertaken pursuant to this Rule 17 shall be regarded as settlement negotiations. Any communication relating to the subject matter of such dispute made during the dispute resolution process by a participant or any other person present at the process shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery; except that, no fact independently discoverable shall be immune from discovery by virtue of having been disclosed in such confidential communication.") *See also* Murray S. Levin, *Protecting Settlement Negotiations,* Journal of Missouri Bar 355, 363-67 (July-Aug. 1990).

(6) Code organization. The statutes protecting settlement negotiations (Evidence Code Sections 1152 and 1154) are now in Chapter 2 of Division 9 of the Evidence Code, along with a variety of other statutes. Specifically, the organization is:

Division 9. Evidence Affected or Excluded By Extrinsic Policies
Chapter 1. Evidence of Character, Habit, or Custom.
Section 1100. Manner of proof of character
….
Section 1108. Evidence of another sexual offense

Chapter 2. Other Evidence Affected or Excluded By Extrinsic Policies
Section 1150. Evidence to test a verdict
Section 1151. Subsequent remedial conduct
Section 1152. Offers to compromise
Section 1152.5. Mediation
Section 1152.6. Mediator declarations or findings
Section 1153. Offer to plead guilty or withdrawn guilty plea
Section 1153.5. Offer for civil resolution of crimes against property
Section 1154. Offer to discount a claim
Section 1155. Liability insurance
Section 1156. Medical or dental study of in-hospital staff committee
Section 1156.1. Medical or psychiatric studies of quality assurance committees
Section 1157. Organized committees having responsibility of evaluation and improvement of quality of care
Section 1157.5. Organized committee of nonprofit medical care foundation or professional standards review organization
Section 1158. Inspection and copying of patient records
Section 1159. Animal experimentation in product liability actions

Instead of this hodgepodge approach, the staff suggests reorganizing the statutes as follows:

Division 9. Evidence Affected or Excluded By Extrinsic Policies
Chapter 1. Evidence of Character, Habit, or Custom
Section 1100. Manner of proof of character
….
Section 1108. Evidence of another sexual offense
Chapter 2. Mediation confidentiality (as in the Commission's tentative recommendation or a redraft of that proposal)
Section 1120. "Mediation" and "mediator" defined
….
Section 1129. Oral agreements reached through mediation
Chapter 3. Settlement Negotiations (as in the staff draft attached to this memorandum)
Section 1130. Purpose of chapter
….
Section 1139. Least intrusive means

Chapter 4. Health
Section 1140. Medical or dental study of in-hospital staff committee
Section 1141. Medical or psychiatric studies of quality assurance committees
Section 1142. Organized committees having responsibility of evaluation and improvement of quality of care
Section 1143. Organized committee of nonprofit medical care foundation or professional standards review organization
Section 1149. Inspection and copying of patient records
Chapter 5. Other Evidence Affected or Excluded By Extrinsic Policies
Section 1150. Evidence to test a verdict
Section 1151. Subsequent remedial conduct
Section 1153. Offer to plead guilty or withdrawn guilty plea
Section 1153.5. Offer for civil resolution of crimes against property
Section 1155. Liability insurance
Section 1159. Animal experimentation in product liability actions

The staff considered the possibility of moving the statutes on settlement negotiations and mediation to Division 8 (Privileges) of the Evidence Code. There are a number of reasons for leaving them in Division 9. Mediation is a special kind of settlement negotiation, so the evidentiary rules for mediation should be near the ones for settlement negotiation. The relationship between participants in a settlement negotiation is quite different from the relationships protected by the statutes in Division 8. As Judge Brazil comments:

> The traditional privileges attach to communications between persons who have ongoing, *supportive*, interdependent, nonadversarial relationships (*e.g.*, between priest and penitent, husband and wife, doctor and patient, lawyer and client). One purpose of the traditionally recognized privileges is to strengthen these relationships, relationships that society has an interest in fostering. Parties to settlement negotiations, in sharp contrast, are by definition adversaries. While in a small percentage of cases they may end up with ongoing relationships, society usually has no independent interest in nurturing close ties between adverse litigants, at least none that parallels the kind of societal interest that inspires the traditional privileges.

> [Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 990 (1988) (emph. in original).]

Further, the traditional privileges in Division 8 receive almost absolute protection from disclosure, whereas the attached draft would accord a lower (but still substantial) level of protection for settlement negotiations. This difference in degree of protection is another reason for leaving the statutes on mediation confidentiality and settlement negotiations in Division 9, rather than transferring them to Division 8.

If anyone has other thoughts on this point (or on other organizational issues relating to the attached draft), the staff would appreciate hearing them.

(7) Conforming revisions. The staff's work on conforming revisions is incomplete. The attached draft includes some conforming revisions, but others may still be necessary.

Respectfully submitted,

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#K-410

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Protecting Settlement Negotiations

November 1996

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **xxx.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would reform evidentiary provisions governing settlement negotiations in a civil action (Evidence Code Sections 1152 and 1154). In particular, the recommendation seeks to foster rational and productive settlement negotiations by making offers of compromise and other compromise evidence generally inadmissible in a civil action. The recommendation would also add an explicit statutory standard to protect against discovery of such evidence in a civil action.

This recommendation was prepared pursuant to Resolution Chapter 38 of the Statutes of 1996.

PROTECTING SETTLEMENT NEGOTIATIONS

A frank settlement discussion can help disputants understand each other's position and improve prospects for successful settlement of the dispute. A gesture of conciliation, a proposed compromise, or other step towards compromise can likewise increase the likelihood of reaching an agreement. Yet parties to a civil dispute can be reluctant to take such steps or talk openly in a settlement discussion if their words or actions will later be turned against them.

Existing law addresses this concern to a limited extent by making evidence of settlement negotiations inadmissible to prove or disprove liability for the loss, damage, or claim that is the subject of the negotiations.[1] Having reexamined the existing law, the Law Revision Commission recommends increased protection for the confidentiality of an ordinary settlement negotiation, but not the same degree of protection as the law provides for a mediation.

EXISTING LAW

The main evidentiary statutes protecting a settlement negotiation other than a mediation[2] are Evidence Code Sections 1152 and 1154. Section 1152 applies to an offer of compromise or other action or proposed action, whether in the spirit of compromise or from humanitarian motives, to alleviate another person's actual or impending loss or damage. The key part of the statute 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.

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.[3] Although broad in that

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1. See Evidence Code Sections 1152, 1154. All further statutory references are to the Evidence Code, unless otherwise indicated. Sections 1152 and 1154 were used as a basis in drafting the corresponding federal provision, Federal Rule of Evidence 408. *See* Fed. R. Evid. 408 advisory committee's note.

   For evidentiary protection of plea bargaining, see Sections 1153, 1153.5. For settlement of an administrative adjudication, see Government Code Section 11415.60 (operative July 1, 1997). As amended in 1996, that statute makes compromise offers flatly inadmissible. Evidence of conduct or statements in settlement negotiations "is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code." 1996 Cal. Stat. ch. 390 § 7.

2. Section 1152.5 is the principal statute governing mediation confidentiality. See also Sections 703.5 (mediator competency to testify) and 1152.6 (declarations or findings by a mediator).

3. Section 1152 Comment (1965).

respect, Section 1152 is limited in others. Subdivisions (b) and (c) set forth exceptions for specific contexts.[4] More importantly, subdivision (a) only makes an act of compromise or humanitarian act (or statement or conduct relating to such an act) inadmissible "*to prove liability* for the loss or damage to which the negotiations relate."[5] If a party offers this type of evidence for another purpose, such as to show bias, motive, undue delay, knowledge, or bad faith, Section 1152 does not apply.[6]

Section 1154 is a corollary to Section 1152. Whereas Section 1152 precludes proof of a liability through an offer to compromise that liability, Section 1154 prohibits disproof of a claim through an offer to discount the claim:

> 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 to prove the invalidity of the claim or any part of it.

Like Section 1152, Section 1154 encompasses both an offer or other step to discount a claim and any conduct or statement made in negotiating towards compromise. Section 1154 excludes the evidence only if a party offers it to disprove the claim.

Neither Section 1152 nor Section 1154 expressly addresses the discoverability of a settlement discussion.[7] In *Covell v. Superior Court*, the court concluded that "the statutory protection afforded to offers of settlement does not elevate them to the

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4. Sections 1152(b) and (c) provide:

(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.

5. Young v. Keele, 188 Cal. App. 3d 1090, 1093, 233 Cal. Rptr. 859 (1987) (emph. in original).

6. *See, e.g.*, California Physicians' Service v. Superior Court, 9 Cal. App. 4th 1321, 1326-27, 12 Cal. Rptr. 2d 95 (1992) ("Where the matter is offered not to establish initial liability, but only as evidence of bad faith in administering the claim (i.e., the making of a ridiculously low offer) the evidence is not excluded"); Moreno v. Sayre, 162 Cal. App. 3d 116, 126, 208 Cal. Rptr. 444 (1984) ("While evidence of a settlement agreement is inadmissible to prove liability (see Evid. Code, § 1152), it is admissible to show bias or prejudice of an adverse party").

7. In contrast, Section 1152.5 expressly addresses both the admissibility and the discoverability of mediation communications.

status of privileged material."[8] Nonetheless, the court ruled that the trial court abused its discretion in granting discovery of settlement offers.[9] Thus, California courts may apply a stiffer standard for discovery of a settlement negotiation than for discovery of other materials.[10]

ARGUMENTS FOR PROTECTING SETTLEMENT NEGOTIATIONS

Arguments advanced for evidentiary protection of settlement negotiations include (1) the relevancy rationale, (2) the public policy of promoting settlements, and (3) the fairness rationale.[11]

Relevancy Rationale

Under the relevancy rationale, a court should exclude evidence of an offer to compromise because it is irrelevant (or at least of little probative value) in establishing liability for the loss to be compromised. Instead of reflecting the merits of the claim, the offer may just reflect a desire to avoid costly litigation expenses and achieve peace.[12]

The force of this argument varies from case to case, depending on the amount of the offer relative to the size of the claim.[13] The relevancy rationale also fails to support exclusion of statements made in settlement negotiations.[14] For these reasons, it is of limited force in justifying statutes like Sections 1152 and 1154.[15]

Public Policy of Promoting Settlements

The prevailing modern rationale for excluding evidence of settlement offers is the strong public policy favoring settlements.[16] In arguing for broad construction

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8. 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371 (1984).

9. *Id.* at 42-43.

10. *See* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 1002 (1988).

11. Another rationale is the contract theory, which "has little merit." David P. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* 3:26 (1996).

12. John H. Wigmore, Evidence in Trials at Common Law § 1061(c) (1972).

13. Fed. R. Evid. 408 advisory committee's note. Relevancy is not a persuasive basis for excluding evidence that a party offered to pay nine tenths of a claim, because the party probably would not have made such an offer without considering the claim strong. Similarly, relevancy is not grounds for excluding evidence that a plaintiff offered to accept only one tenth of the damages sought. It is unlikely that the plaintiff would have been satisfied with so little if the plaintiff regarded the claim as wholly valid. David W. Louisell & Christopher B. Mueller, Federal Evidence § 171, at 454 (1985).

14. Wayne D. Brazil, *supra* note 10, at 958.

15. *See, e.g.*, David P. Leonard, *supra* note 11, at 3:30 ("the relevancy theory for excluding compromise evidence is generally invalid").

16. *See, e.g.*, Fed. R. Evid. 408 advisory committee's note; Wayne D. Brazil, *supra* note 10, at 958-59; David P. Leonard, *supra* note 11, at 3:33 ("this general rationale has for many years been widely supported by the commentators as the primary justification for the exclusionary rule and the cases following that view are legion").

of Federal Rule of Evidence 408 (the federal analog of Sections 1152 and 1154), Judge Brazil of the United States District Court for the Northern District of California persuasively explained:

> By resolving close cases in favor of admitting the evidence, courts would strike fear into the hearts of negotiating lawyers and clients and could compel them to play their settlement cards closer to their chest. Negotiations would thus become more of an irrational poker game and deprive parties of access to the reasoning that supports one another's positions. To avoid this result, counsel should argue that judges should construe the rule broadly. Broad construction of the rule would enhance the rationality of the negotiation process and improve the likelihood that litigants will understand the basis for the proposals that are put on the table; litigants would thus feel good about the terms they finally accept. Rationality promotes settlement and respect for the system, and openness of communication is essential to rationality. Every blow the courts strike against openness is a blow against the health of the system and the fundamental values on which it is based.[17]

Fairness Rationale

Fundamental fairness is another ground for excluding compromise evidence. Making a settlement offer is often difficult. To use evidence of it against the would-be compromiser would unfairly penalize that person for taking a hard step towards a peaceful resolution.[18]

REASONS FOR REEXAMINING EXISTING LAW

The fairness rationale and public policy of promoting settlements are persuasive justifications for protecting settlement discussions, but statutes like Sections 1152 and 1154 are not the only means of achieving that end. Several factors have led the Law Revision Commission to question whether those statutes still provide sufficient protection for settlement negotiations.

First, misconceptions about the extent of protection are common. Disputants often fail to realize that the protection is not absolute but only precludes use of compromise evidence on the issue of liability. The consequences can be severe.

Second, compromise evidence ostensibly introduced for another purpose tends to be highly prejudicial as to liability, even with the use of a limiting instruction. Not infrequently, this is the true motive for introducing such evidence.[19]

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17. Wayne D. Brazil, *supra* note 10, at 959-60.

18. David P. Leonard, *supra* note 11, at 3:35 to 3:36. The fairness rationale is independent of, but interrelated with, the public policy of promoting settlements. Penalizing a person who seeks compromise is not only unfair, but also inconsistent with the goal of encouraging settlements. Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990).

19. As one commentator recently explained, the rule that compromise evidence is inadmissible on the issue of liability "provides great incentive to find creative ways to recharacterize compromise evidence …. If this recharacterization is successful, evidence that might clearly show liability for or invalidity of a claim or its amount, and thus directly conflict with the rule's primary purpose, may still be admissible." Kristina M. Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond,* 12 Review of Litigation 665, 668 (1993).

Most importantly, although settlement has long been a favored means of resolving litigation,[20] in the past decade there has been steadily increasing recognition of the importance of out-of-court settlements to effective working of our justice system.[21] The vast majority of civil cases settle before trial. If they did not, "the backlog in our courts would become totally intolerable."[22] Settlements, particularly early settlements, not only reduce court backlogs and conserve court resources, but also spare disputants the expense, uncertainty, and stress of litigation. "The need for settlements is greater than ever before."[23]

The increased need for settlements is a compelling reason for reforming existing law to provide greater protection for settlement negotiations. Candor can be crucial in a settlement discussion and assurance of confidentiality can be essential to candor.[24] Precisely this reasoning underlies the Legislature's approach in the related area of mediation confidentiality.

COMPARISON WITH MEDIATION CONFIDENTIALITY

Mediation is a special form of settlement negotiation, in which a neutral person helps disputants reach a mutually acceptable agreement. Recognizing the importance of this dispute resolution tool, the Legislature has provided strong protection for mediation confidentiality. With some limitations, mediation communications are inadmissible for any purpose and immune from discovery,[25] a mediator is incompetent to testify in subsequent proceedings,[26] and the mediator of a dispute is forbidden from filing any declaration or finding regarding the dispute or the mediation.[27]

In and of itself, there is no policy interest in having a mediator resolve a dispute, rather than settling it without the assistance of a third person. In fact, if the parties are able to come to agreement on their own, they are spared the expense of finding and compensating the mediator.

Nonetheless, there a number of reasons for protecting confidentiality to a greater extent in the mediation context than in other settlement negotiations. First,

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20. *See, e.g.*, McClure v. McClure, 100 Cal. 339, 343, 34 P. 822 (1893).

21. *See, e.g.*, David P. Leonard, *supra* note 11 at 3:2 to 3:3 & 3:2 n.2.

22. Wayne D. Brazil, *supra* note 10, at 959.

23. Neary v. Regents of University of California, 3 Cal. 4th 275, 277, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992).

24. *See, e.g.*, Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990); Wayne D. Brazil, *supra* note 10, at 959-60.

25. Section 1152.5 (enacted in 1985 on recommendation of the Law Revision Commission, substantively amended in 1993 and 1996).

26. Section 703.5 (amended to include mediators in 1993)

27. Section 1152.6 (enacted in 1995).

although the beginning and end of a mediation are not without ambiguity,[28] they are more clear-cut than the boundaries of what is and is not a settlement negotiation.[29] As a result, it is easier to tell when the cloak of confidentiality should attach in a mediation, as opposed to an unassisted effort to settle.

Second, confidentiality is a two-edged sword. It can foster candor and promote rational discussions, but it can also hide collusion, strong-arm tactics, illegality, and other abuse. Involvement of a mediator may deter such misconduct. That protection does not exist in an unassisted settlement negotiation.

Finally, any exclusion of relevant evidence has a cost.[30] In shielding settlement discussions, the countervailing benefit is promoting settlement. In a mediation, the involvement of a neutral person may promote productive discourse and exploration of new approaches to settlement. Because planning and participating in a mediation involves substantial expense and effort, a mediation usually is a serious effort to settle. A party may also disclose information to the mediator without having to disclose it directly to the other side. These special attributes of mediation increase the likelihood of successful settlement, and thus the likelihood of a benefit that offsets the cost of according confidentiality to the discussion.

In sum, although mediations and other types of settlement discussions involve similar considerations, the argument for confidentiality has greater force in the mediation context. More caution is warranted in extending confidentiality beyond that setting.

RECOMMENDATIONS

Balancing the competing considerations in protecting compromise evidence is a delicate endeavor. The Commission recommends the following reforms:

Purposes for Introducing Compromise Evidence

Sections 1152 and 1154 make compromise evidence inadmissible only on the issue of liability for the claim at stake. Because a court may admit compromise evidence for "any one of an almost limitless number of other purposes," participants in a settlement negotiation have little assurance that they can talk freely without adverse consequences.[31] Without that assurance, settlement may not occur, or may not occur until late in the litigation process.

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28. *Compare* Regents of University of California v. Sumner, __ Cal. App. 4th __, 50 Cal. Rptr. 2d 200 (1996) (Section 1152.5 does not protect oral statement of settlement terms) *with* Ryan v. Garcia, 27 Cal. App. 4th 1006, 33 Cal. Rptr. 2d 158 (1994) (Section 1152.5 protects oral statement of settlement terms).

29. *See generally*, Wayne D. Brazil, *supra* note 10, at 960-966. This recommendation does not attempt to define the scope of statutorily protected settlement negotiations more clearly than under existing law. That may be the subject of future study.

30. *See generally* David P. Leonard, *supra* note 11, at 3:44.

31. *See generally*, Wayne D. Brazil, *supra* note 10, at 996. In the context of the corresponding federal provision, Judge Brazil explains:

Instead of being inadmissible on the limited issue of liability, evidence of an act of compromise should be flatly inadmissible in a civil action for the loss, damage, or claim that is the subject of that act.[32] That approach would promote settlement and preserve fairness.

A number of exceptions are necessary. In each of the following situations, if a court admits compromise evidence, it should limit it as much as possible.

(1) *Partial satisfaction; preexisting debt.* Under Section 1152, evidence of partially satisfying a claim without questioning its validity is not inadmissible if that evidence is offered to prove the validity of the claim.[33] Similarly, Section 1152 does not make a debtor's payment or promise to pay all or part of a preexisting debt inadmissible when a party offers that evidence to prove the creation of a new duty or revival of the debtor's preexisting duty.[34] These limitations are consistent with the goal of promoting settlement: If a claim is undisputed or a debt acknowledged, there is no dispute to settle and no need to provide confidentiality.

(2) *Misconduct.* Evidence of an act of compromise should be admissible to show, or to rebut a contention of, misconduct or irregularity in negotiating or undertaking that act. For example, a settlement should not stand if it was obtained at gunpoint. The public policy favoring settlement agreements has limited force as to settlement agreements and overtures that derive from or involve illegality or other misconduct or irregularity.[35]

(3) *Obtaining benefits of settlement.* Evidence of a settlement should be admissible to bar a claim or otherwise enforce the settlement. This exception is essential if parties are to enjoy the benefits of settling a dispute.[36] For the same reason, evidence of consideration tendered pursuant to a settlement should be

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> By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege rationale that they purported to find so 'consistently impressive' and that they intended to make the principal underpinning of the newly formulated rule. The protection of rule 408 virtually evaporates; there are so many conceivable purposes for which settlement communications might be admissible, and counsel easily can argue that they cannot determine whether there is some permissible purpose for which the communications might be admissible at trial unless they can discover their contents. … [T]he drafters constructed a rule that is unfaithful to its own rationale.
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> [*Id.*]

32. The same rule should apply to a humanitarian act and any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act.

33. Section 1152(c)(1).

34. Section 1152(c)(2).

35. *See generally* David P. Leonard, *supra* note 11, at 3:97 ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy").

36. *See generally, id.* at 3:120 to 3:122 ("the law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible").

admissible in seeking reimbursement of that consideration. Conversely, evidence of settlements negotiations should be admissible to rebut an attempt to enforce a settlement or obtain reimbursement, as by showing that there was no settlement.

(4) *Good faith.* Evidence of efforts to compromise a claim should be admissible to prove or disprove the good faith of a settlement of the claim. This exception follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[37]

(5) *Sliding scale recovery.* A sliding scale recovery agreement is one between a plaintiff and a tortfeasor defendant, under which the defendant's liability depends on how much the plaintiff recovers from another defendant at trial.[38] If the first defendant testifies at trial, the testimony may affect how much that defendant has to pay. That potential effect may consciously or subconsciously influence the defendant's testimony. Because of this danger of bias, evidence of a sliding scale recovery agreement should be admissible, but only if a signatory defendant testifies and the evidence is introduced to show bias of that defendant.[39]

(6) *Miscarriage of justice.* Evidence of an act of compromise should also be admissible to show state of mind, rebut a contention of undue delay, or assist in calculation of punitive damages, prejudgment interest, costs, or fees rendered in connection with a dispute, but only if exclusion of the evidence would create a substantial likelihood of a miscarriage of justice.

Discoverability of Unassisted Settlement Discussions

Because Sections 1152 and 1154 only bar use of compromise evidence on the issue of liability, counsel can readily argue for discovery of such evidence on the ground that it may be admissible for some other purpose.[40] Existing law does not provide a clear standard governing such a discovery request.

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37. Code Civ. Proc. § 877.6(c). To account for comparable rules in other jurisdictions, the exception should apply not only when evidence of settlement negotiations is introduced pursuant to Code of Civil Procedure Section 877.6, but also when such evidence is introduced pursuant to a similar provision.

38. Code Civ. Proc. § 877.5(b).

39. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of a sliding scale recovery agreement:

> If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.
>
> The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

40. *See* Wayne D. Brazil, *supra* note 10, at 996.

Any potential intrusion on confidentiality, whether in trial or in discovery, may inhibit settlement discussions.[41] To effectively serve the goal of promoting settlement, the law should (1) limit discovery of compromise evidence to the minimum necessary under the circumstances, and (2) allow discovery only if the party requesting disclosure makes a specific showing of a substantial likelihood that the disclosure will lead to the discovery of admissible evidence. These requirements will provide significant protection from discovery, especially if compromise evidence is generally inadmissible.

Binding settlements present special considerations. For example, suppose a manufacturing plant emits a hazardous chemical and a nearby resident sues for resultant injuries. If the manufacturer and the victim enter into a purportedly confidential settlement, should others, particularly other victims or potential victims, be entitled to disclosure of the settlement? Such issues are controversial[42] and this reform does not address them. The new standard for discovery of compromise evidence would not apply to binding settlements. Existing law in that area would remain intact.

The new standard would also have an exception to prevent disputants from using settlement negotiations to shield materials from discovery and use at trial. Evidence that would otherwise be admissible or subject to discovery would not be rendered inadmissible or protected from disclosure solely by reason of its introduction or use in a settlement negotiation.

41. *See id.*

42. *See, e.g.*, SB 701, introduced by Senator Lockyer in 1991. The Legislature passed the bill but the Governor vetoed it.

PROPOSED LEGISLATION

Evid. Code §§ 1130-1139 (added). Settlement negotiations

SEC. __. Chapter 2 (commencing with Section 1130) is added to Division 9 of the Evidence Code, to read:

CHAPTER 2. SETTLEMENT NEGOTIATIONS

§ 1130. Purpose of chapter

1130. The purpose of this chapter is to promote rational and productive settlement negotiations in a civil action or dispute. This chapter does not protect plea bargaining.

Comment. Section 1130 defines the scope of this chapter. For evidentiary protection of plea bargaining, see Sections 1153, 1153.5. For settlement of an administrative adjudication, see Government Code Section 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390 § 7.

§ 1131. "Act of compromise" and "humanitarian act" defined

1131. (a) For purposes of this chapter, an "act of compromise" occurs if either of the following conditions is satisfied:

(1) In compromise, a person furnishes, offers, or promises to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, or who will or claims will sustain loss or damage.

(2) A person accepts, offers, or promises to accept a sum of money or any other thing, act, or service in satisfaction of a claim.

(b) For purposes of this chapter, a "humanitarian act" occurs if, from humanitarian motives, a person furnishes, offers, or promises to furnish money or any other thing, act, or service to another who has sustained or claims to have sustained loss or damage, or who will or claims will sustain loss or damage.

Comment. Subdivision (a)(1) and subdivision (b) are drawn from former Section 1152. Subdivision (a)(2) is drawn from former Section 1154.

For protection of an act of compromise or humanitarian act, see Section 1132. For evidentiary protection of plea bargaining, see Sections 1153, 1153.5. For settlement of an administrative adjudication, see Government Code Section 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390 § 7.

§ 1132. Protection of an act of compromise or humanitarian act

1132. (a) Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or a humanitarian act, is inadmissible in a civil action for the loss, damage, or claim that is the subject of the act of compromise or humanitarian act.

(b) Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or a humanitarian act, is not subject to discovery, and disclosure of this evidence shall not be compelled, in a civil action, unless both of the following conditions are satisfied:

(1) The party requesting disclosure makes a specific showing of a substantial likelihood that the disclosure will lead to the discovery of admissible evidence.

(2) Discovery is otherwise authorized by law.

(c) Nothing in this section affects the right, if any, to discovery of a binding settlement.

(d) Evidence otherwise admissible or subject to discovery outside of a negotiation of an act of compromise is not inadmissible or protected from disclosure solely by reason of its introduction or use in the negotiation.

Comment. Section 1132 supersedes former Sections 1152(a) and 1154, which made evidence of a settlement negotiation inadmissible for the purpose of proving invalidity of the claim, but not for other purposes. To preclude abuse and foster greater candor in settlement negotiations, Section 1132 eliminates that distinction.

Like former Section 1152, subdivision (a) does not restrict admissibility in a criminal proceeding. *Cf.* People v. Muniz, 213 Cal. App. 3d 1508, 1515-16, 262 Cal. Rptr. 743 (1989) (former Section 1152 inapplicable to criminal cases); *see also* United States v. Prewitt, 34 F.3d 436 (7th Cir. 1994) (Federal Rule 408 inapplicable to criminal cases). For exceptions to Section 1132(a), see Sections 1133 (partial satisfaction; preexisting debt), 1134 (misconduct or irregularity), 1135 (obtaining benefits of settlement), 1136 (good faith), 1137 (sliding scale recovery agreement), and 1138 (miscarriage of justice). Evidence satisfying one (or more) of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, including the balancing test of Section 352 ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, confusing the issues, or misleading the jury"). See also Section 1139 (least intrusive means).

Consistent with Section 1132's underlying rationale of promoting out-of-court settlement, subdivision (b) establishes a stiff threshold for discovery of settlement negotiations. For background, see Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 987-1002 (1988) ("To truly serve the privilege rationale, a rule would have to offer at least presumptive protection from both discovery and admissibility in most circumstances"). See also Covell v. Superior Court, 159 Cal. App. 3d 39, 205 Cal. Rptr. 371 (1984) (former Section 1152 restricted admissibility, not discoverability, but trial court abused its discretion in granting discovery of settlement offers).

Subdivision (c) makes clear that although subdivision (b) restricts discovery of settlement negotiations, it neither sanctions nor prohibits confidential settlements.

Subdivision (d) is drawn from Section 1152.5(a)(6) and Federal Rule of Evidence 408.

See Sections 120 ("'Civil action' includes civil proceedings"), 1131 ("act of compromise" and "humanitarian act" defined). For evidentiary protection of plea bargaining, see Sections 1153, 1153.5. For settlement of an administrative adjudication, see Government Code Section 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390 § 7.

☞ **Staff Note.**

(1) Subdivision (a) would make a settlement overture inadmissible in any civil action "for the loss, damage, or claim that is the subject of" the overture. Would broader language be preferable? Judge Brazil comments:

> What people say in negotiations to settle one lawsuit may well be relevant to other litigation in which they are involved or in which they fear they might become involved. I have hosted many settlement conferences during which parties have expressed concerns about related cases or parallel situations involving nonparties, or in which one party has been unwilling to settle unless it is assured that the terms will not be disclosed to others who might be encouraged to file new claims or hold out for more money in cases already docketed. It is naive not to recognize that lawyers and litigants are constantly concerned about how their statements or actions in one setting might come back to haunt them in other settings. If courts construe rules so as to increase the circumstances in which communications made during negotiations can be discovered or admitted into evidence, they create inhibiting forces that reinforce the instinct parties and lawyers already have to play their cards as close to their chests as possible.
>
> [Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings Law Journal 955, 999 (1988).]

In light of these considerations, the staff initially drafted subdivision (a) such that a settlement overture would be inadmissible in any civil action. The staff abandoned that approach because it seemed to necessitate too many exceptions to be workable. For example, evidence of payments, whether made pursuant to a settlement agreement, tendered under protest, or given from humanitarian motives, may be important in numerous contexts, such as an action for violation of tax laws, a proceeding for noncompliance with financial reporting requirements, or a suit against a former employee for misappropriation of company funds. Is the staff being overly pessimistic about extending subdivision (a) to all civil actions? Does the Commission have any suggestions, such as a possible middle ground?

(2) In drafting subdivision (b)'s standard for discoverability of settlement negotiations ("a specific showing of a substantial likelihood that such discovery will lead to the discovery of admissible evidence"), the staff was inspired by the following discussion in *Bottaro v. Hatton Associates*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982):

> Given the strong public policy of favoring settlements and the congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions, we … require *some particularized showing of a likelihood that admissible evidence will be generated* by the dissemination of the terms of a settlement agreement.
>
> [Emphasis added.]

Bottaro is quoted and discussed at length with approval in the portion of Judge Brazil's article cited in the proposed Comment. The staff decided against citing *Bottaro* itself because *Bottaro* pertains to discovery of a settlement agreement, rather than discovery of a settlement negotiation. Judge Brazil does not attempt to precisely draft a proposed standard for discoverability, but he does say:

> Courts should acknowledge that the public policies reflected in rule 408 create a substantial presumption against discovery of settlement material. Moreover, courts should permit rebuttal of this presumption only after a strong showing that the competing interests clearly outweigh the interests and the policies favoring confidentiality and that the competing interests cannot be satisfied in some other, less intrusive manner.
>
> [Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 1001 (1988).]

Is the staff's proposed formulation ("a specific showing of a substantial likelihood that such discovery will lead to the discovery of admissible evidence") sound? Can the Commission (or anyone else) suggest another approach that would work better?

(3) There is strong sentiment in the Legislature against confidential settlements. In 1991, Senator Lockyer introduced a bill (SB 711) that would have sharply restricted the availability of such arrangements. Both the Assembly and the Senate passed the bill, but the Governor vetoed it and

the Legislature did not override the veto. Rather than take a stance on this potentially controversial point, the staff drafted Section 1132 to avoid the issue.

(4) In a case involving a governmental entity, a measure such as the Freedom of Information Act, the Brown Act (Gov't Code §§ 54950-54962), or the California Public Records Act (Gov't Code §§ 6250-6265) might be construed to require disclosure of settlement materials. See Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 1002-1010 (1988). The staff has not yet researched this area sufficiently to propose a means of reconciling the "government in sunshine" interest underlying these measures with the interest in promoting candor in settlement negotiations.

(5) By its terms, Section 1132 would restrict admissibility only in a civil action. It would not restrict admissibility in a criminal case. Is there any sentiment to make evidence of settlement negotiations inadmissible in a related criminal case? The staff has not thoroughly researched the applicable policy considerations. We suspect, however, that any proposed extension to criminal cases would encounter serious opposition. Even the Commission's tentative recommendation on mediation confidentiality would not extend that far.

A related issue is whether evidence of settlement negotiations in a civil action should be inadmissible in a related administrative adjudication. This is different from deciding whether settlement negotiations in an administrative adjudication should be admissible in subsequent proceedings. The Commission addressed the latter question in its study of administrative adjudication. See Gov't Code § 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390 § 7. The Commission could resolve the former question by adding language similar to that in its tentative recommendation on mediation confidentiality:

> 1132. (a) Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or a humanitarian act, is inadmissible in a civil action, administrative adjudication, arbitration, or other noncriminal proceeding in which testimony can be compelled, for the loss, damage, or claim that is the subject of the act of compromise or humanitarian act.
>
> (b) Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or a humanitarian act, is not subject to discovery, and disclosure of this evidence shall not be compelled, in a civil action, administrative adjudication, arbitration, or other noncriminal proceeding in which testimony can be compelled, unless both of the following conditions are satisfied:
>
> (1) The party requesting disclosure makes a specific showing of a substantial likelihood that the disclosure will lead to the discovery of admissible evidence.
>
> (2) Discovery is otherwise authorized by law.
>
> (c) Subdivision (b) does not restrict discovery of a binding settlement.
>
> (d) Evidence otherwise admissible or subject to discovery outside of a negotiation of an act of compromise is not inadmissible or protected from disclosure solely by reason of its introduction or use in the negotiation.

This would inject another issue into the proposal, but would provide guidance on a significant point.

(6) "[T]here are innumerable … purposes for which counsel might seek to introduce evidence from settlement negotiations …." Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 982 (1988). Sections 1133-1138 set forth exceptions to Section 1132. In drafting those exceptions, the staff attempted to identify purposes that are sufficiently compelling to override the public interest in encouraging settlements through promoting candor in settlement negotiations.

The list may be overinclusive: The staff tried to raise issues for Commission consideration rather than omitting them from the draft. The list may also be underinclusive: The staff may have

overlooked important uses of compromise evidence. In reviewing Sections 1133-1138, please consider not only whether those exceptions are appropriate, but also whether additional exceptions are necessary.

§ 1133. Partial satisfaction; preexisting debt

1133. Section 1132 does not affect the admissibility of either of the following:

(a) Evidence of partial satisfaction of an asserted claim or demand without questioning its validity when that evidence is offered to prove the validity of the claim.

(b) Evidence of a debtor's payment or promise to pay all or a part of the debtor's preexisting debt when that evidence is offered to prove the creation of a new duty on the debtor's part or a revival of the debtor's preexisting duty.

Comment. Subdivision (a) of Section 1133 is drawn from former Section 1152(c)(1). Subdivision (b) is drawn from former Section 1152(c)(2).

§ 1134. Misconduct or irregularity

1134. Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act, is not inadmissible under Section 1132 if the evidence is introduced to show, or to rebut a contention of, fraud, duress, illegality, mistake, malpractice, libel, breach of the covenant of good faith and fair dealing, or other misconduct or irregularity in negotiating or undertaking the act of compromise or humanitarian act.

Comment. Section 1134 recognizes that the public policy favoring settlement agreements has limited force with regard to settlement agreements and overtures that derive from or involve illegality or other misconduct or irregularity. See David P. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* 3:97 (1996) ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy").

See Section 1131 ("act of compromise" and "humanitarian act" defined). See also Sections 1130 (purpose of chapter), 1139 (least intrusive means).

☞ **Staff Note.** "Existing Section 1152 (reproduced *infra*) refers to introduction of compromise evidence in an action for "violation of subdivision (h) of Section 790.03 of the Insurance Code." The staff has not included such a reference in Section 1134, because there is no private right of action for violation of Insurance Code Section 790.03. See Moradi-Shalal v. Fireman's Fund Ins. Co., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988); Maler v. Superior Court, 220 Cal. App. 3d 1592, 270 Cal. Rptr. 220 (1990). If that changes, the language of Section 1134 would be broad enough to cover an action for violation of Section 790.03 even though such an action is not specifically mentioned.

§ 1135. Obtaining benefits of settlement

1135. (a) Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act, is not inadmissible under Section 1132 if either of the following conditions is satisfied:

(1) The evidence is introduced to enforce, or to rebut an attempt to enforce, a settlement or alleged settlement of the loss, damage, or claim that is the subject of the act of compromise or humanitarian act.

(2) The evidence is introduced to show, or to rebut an attempt to show, the existence of a settlement barring the claim that is, or claims for the loss or damage that is, the subject of the act of compromise or humanitarian act.

(b) Evidence of a binding settlement and performance pursuant to that settlement is not inadmissible under Section 1132 if the evidence is introduced to obtain, or to rebut an attempt to obtain, from a joint tortfeasor, co-obligor, insurer, reinsurer, or other person, reimbursement of consideration tendered pursuant to the settlement.

Comment. Section 1135 seeks to ensure that parties enjoy the benefits of settling a dispute. For background, see generally David P. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* 3:120 to 3:122 (1996) ("the law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible").

See Section 1131 ("act of compromise" and "humanitarian act" defined). See also Sections 1130 (purpose of chapter), 1139 (least intrusive means).

§ 1136. Good faith

1136. Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act, is not inadmissible under Section 1132 if the evidence is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a similar provision to show, or to rebut an attempt to show, the good faith of a settlement of the loss, damage, or claim that is the subject of the act of compromise or humanitarian act.

Comment. Section 1136 follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault." Code Civ. Proc. § 877.6(c). To account for comparable rules in other jurisdictions, the exception applies not only when evidence of settlement negotiations is introduced pursuant to Code of Civil Procedure Section 877.6, but also when such evidence is introduced pursuant to "a similar provision."

See Section 1131 ("act of compromise" and "humanitarian act" defined). See also Sections 1130 (purpose of chapter), 1139 (least intrusive means).

§ 1137. Sliding scale recovery agreement

1137. Evidence of an agreement or covenant providing for a sliding scale recovery agreement between one or more, but not all, alleged defendant tortfeasors and the plaintiff is not inadmissible under Section 1132 if a defendant party to the agreement testifies and the evidence is introduced to show bias of that defendant.

Comment. Section 1137 reflects the danger of bias inherent in a sliding scale recovery agreement. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of a sliding scale recovery agreement: (1) "If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this

disclosure will create substantial danger of undue prejudice, confusing the issues, or of misleading the jury," and (2) "The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness."

☞ **Staff Note.** At its meeting on July 11, 1996, the Commission tentatively concluded that compromise evidence should not be admissible for the purpose of proving bias. Sliding scale recovery agreements present special considerations. Are the safeguards in Code of Civil Procedure Section 877.5 adequate? Should the Legislature give more weight to the interest in promoting settlements? The staff is inclined not to tamper with the existing law on this point.

Another special situation is when a settlement in a multi-party case requires the settling defendant to testify. In *Everman v. Superior Court*, 8 Cal. App. 4th 466, 473, 10 Cal. Rptr. 2d 176 (1992), the court said that such a settlement "is not subject to disapproval solely because it provides for continuing participation in the trial of the lawsuit by a settling defendant." The court further commented that "as a general rule, the possible bias of such a participating defendant should be disclosed to the jury …." *Id.* Should this proposal preserve that approach? Alternatively, is Section 1138 (miscarriage of justice), *infra*, adequate to handle a settlement requiring continuing participation? The staff is tentatively inclined to rely on Section 1138, rather than creating an exception specifically addressing a settlement requiring continuing participation.

§ 1138. Miscarriage of justice

1138. Evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act, is not inadmissible under Section 1132 if both of the following conditions are satisfied:

(a) Exclusion of the evidence would create a substantial likelihood of a miscarriage of justice.

(b) The evidence is introduced for any of the following purposes:

(1) To show bias, motive, knowledge, or other state of mind.

(2) To rebut a contention of undue delay.

(3) To assist in calculation of punitive damages, prejudgment interest, costs, attorneys' fees, expert's fees or other fees for services rendered in connection with a dispute.

Comment. Under Section 1138, evidence introduced for certain purposes may be admissible if "[e]xclusion of the evidence would create a substantial likelihood of a miscarriage of justice." In applying that standard, the court should consider the strong public interest in promoting candid settlement discussions, the probative value of the proffered evidence, the likelihood of undue prejudice or confusion of the issues if the evidence is introduced, and the potential effectiveness of a limiting instruction. *See generally* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings Law Journal 955 (1988); David P. Leonard, *supra*, at 3:1 to 3:160.

See Section 1131 ("act of compromise" and "humanitarian act" defined). See also Sections 1130 (purpose of chapter), 1139 (least intrusive means).

☞ **Staff Note.** " Does it make sense to include a provision along these lines? If so, should it be broadened to be a general catchall? On the one hand, that may lead to inconsistencies in application and seriously undercut the goal of promoting candor in settlement negotiations. On the other hand, there may be compelling reasons for admitting settlement materials that we are unable to foresee in drafting this proposal. A catchall provision would provide a means of protecting against inequities that might otherwise result.

If the Commission opts in favor of including a provision like Section 1138, it should consider whether the proposed standard ("a substantial likelihood of a miscarriage of justice") is

adequately phrased. In addition, it may want to expand or elaborate on the list of factors in the Comment.

§ 1139. Least intrusive means

1139. (a) If a court admits evidence of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act, it shall admit only as much of that evidence as is necessary under the circumstances.

(b) If a court allows discovery of an act of compromise or a humanitarian act, or any conduct or statement made for the purpose of, or in the course of, or pursuant to negotiation of an act of compromise or humanitarian act, it shall allow only as much of that discovery as is necessary under the circumstances.

Comment. To prevent unnecessary chilling of settlement negotiations, Section 1139 requires a court admitting or allowing discovery of compromise evidence to do so in the least invasive manner that will suffice in the particular circumstances of the case. For example, if the evidence is offered to rebut a defense of laches, it may only be necessary to admit evidence that ongoing, potentially productive settlement negotiations occurred, without getting into the details of those negotiations. *See* David P. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* 3:145 to 3:146 (1996).

Heading of Chapter 2 (commencing with Section 1150) (amended)

SEC. __. The heading of Chapter 2 (commencing with Section 1150) of Division 9 of the Evidence Code is amended to read:

CHAPTER ~~2~~ 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Comment. The chapter heading is renumbered to reflect the addition of new Chapter 2 (Settlement Negotiations).

Evid. Code § 1152 (repealed). Offers to compromise

SEC. __. Section 1152 of the Evidence Code is repealed.

~~(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 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, 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.~~

Comment. Former Section 1154 is superseded by Sections 1130-1139.

Evid. Code § 1154 (repealed). Offer to discount a claim

SEC. __. Section 1154 of the Evidence Code is repealed.

~~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 to prove the invalidity of the claim or any part of it.~~

Comment. Former Section 1154 is superseded by Sections 1130-1139.

CONFORMING REVISIONS

Civ. Code. § 1782 (amended). Prerequisites

SEC. __. Section 1782 of the Civil Code is amended, to read:

1782. (a) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.

(2) Demand that ~~such person~~ the alleged violator correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, ~~such person's~~ the alleged violator's principal place of business within California, or, if neither will effect actual notice, the office of the Secretary of State of California.

(b) Except as provided in subdivision (c), no action for damages may be maintained under the provisions of Section 1780 if an appropriate correction, repair, replacement or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of ~~such~~ the notice.

(c) No action for damages may be maintained under the provisions of Section 1781 upon a showing by a person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 that all of the following exist:

(1) All consumers similarly situated have been identified, or a reasonable effort to identify ~~such other~~ similarly situated consumers has been made.

(2) All consumers so identified have been notified that upon their request ~~such person~~ the alleged violator shall make the appropriate correction, repair, replacement or other remedy of the goods and services.

(3) The correction, repair, replacement or other remedy requested by ~~such~~ the consumers has been, or, in a reasonable time, shall be, given.

(4) ~~Such person~~ The alleged violator has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, ~~such person~~ the alleged violator will, within a reasonable time, cease to engage, in such methods, act or practices.

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with the provisions of subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of subdivision (a), the consumer may amend ~~his~~ the complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.

(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be construed to be an ~~offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code~~ act of compromise under Chapter 2 (commencing with Section 1130) of Division 9 of the Evidence Code; furthermore, ~~such~~ those attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section.

Comment. Subdivision (e) of Section 1782 is amended to reflect the repeal of former Evidence Code Section 1152 and the addition of new Evidence Code statutes protecting settlement negotiations. See Evid. Code §§ 1130-1139. Section 1782 is also amended to make technical changes.

Code Civ. Proc. § 1775.10 (amended). Evidence rules protecting statements in the mediation

SEC. __. Section 1775.10 of the Code of Civil Procedure is amended, to read:

1775.10. All statements made by the parties during the mediation shall be subject to ~~Sections 1152 and 1152.5~~ Section 1152.5 and Chapter 2 (commencing with Section 1130) of Division 9 of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the repeal of former Evidence Code Section 1152 and the addition of new Evidence Code statutes protecting settlement negotiations. See Evid. Code §§ 1130-1139.

Evid. Code § 822 (amended). Matter upon which opinion may not be based

SEC. __. Section 822 of the Evidence Code is amended, to read:

822. (a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, except that the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain.

(2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which ~~such~~ the property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding; but nothing in this subdivision excuses compliance with Chapter 2 (commencing with Section 1130) of Division 9 or permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.

(c) The amendments made to this section during the 1987 portion of the 1987-1988 Regular Session of the Legislature shall not apply to or affect any petition filed pursuant to this section before January 1, 1988.

Comment. Section 822(a)(2) is amended to explicitly address its interrelationship with the exclusionary rule for settlement negotiations. See People ex rel. Dep't of Public Works v. Southern Pacific Transportation Co., 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973)

(reconciling Section 822 with former Evidence Code Section 1152). Section 822 is also amended to make a technical change.

☞ **Staff Note.** In *People ex rel. Dep't of Public Works v. Southern Pacific Transportation Co.*, 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973), the court examined the relationship between Government Code Section 822(a)(2) and Evidence Code Section 1152. It concluded:

> There is an inherent conflict between Evidence Code Sections 822 and 1152 if each is construed to its broadest scope. An offer to purchase property which is about to become the subject of an eminent domain proceeding could be an offer by a party within the meaning of section 821 and admissible as a limited admission although made in the course of settlement negotiations. Section 1152 would bar such evidence.
>
> The two sections are reconcilable only if offers in the course of efforts to settle eminent domain proceedings are treated as any other settlement offers and barred from evidence by section 1152. Policy considerations compel the same result. Where evidence is generally inadmissible based upon strong public policy, it is admissible pursuant to an exception to the generality only if its probative value outweighs the policy considerations for its exclusion. Offers of compromise and statements made in the course of settlement negotiations are barred from evidence to promote the high public policy of encouraging settlement of lawsuits including those in eminent domain. Conversely, the evidentiary effect of an offer to purchase property made by a party to an eminent domain proceeding is so circumscribed as to give it little probative value.
>
> We thus conclude that the trial court erred in receiving evidence of condemner's offer in compromise to purchase the subject property.
>
> [*Id.* at 969 (citations omitted).]

The above amendment of Section 822(a)(2) would essentially codify the result in *People ex rel. Dep't of Public Works v. Southern Pacific Transportation Co.* Does it make sense to include such a reform as part of this proposal? The answer depends in part on how important it is to eliminate the ambiguity in Section 822. Mr. Skaggs in particular may have thoughts on that. Another consideration is how critical it is to streamline this proposal, avoiding unnecessary issues.

Evid. Code § 1152.5 (amended). Mediation confidentiality

SEC. __. Section 1152.5 of the Evidence Code is amended, to read:

1152.5. (a) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:

(1) Except as otherwise provided in this section, evidence of anything said or of any admission made in the course of a consultation for mediation services or in the course of the mediation is not admissible in evidence or subject to discovery, and disclosure of this evidence shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

(2) Except as otherwise provided in this section, unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the mediation, or copy thereof, is admissible in evidence or subject to discovery, and disclosure of such a document shall not be compelled, in any civil action or proceeding in which, pursuant to law, testimony can be compelled to be given.

(3) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the course of a consultation for mediation services or in the mediation shall remain confidential.

(4) All or part of a communication or document which may be otherwise privileged or confidential may be disclosed if all parties who conduct or otherwise participate in a mediation so consent.

(5) A written settlement agreement, or part thereof, is admissible to show fraud, duress, or illegality if relevant to an issue in dispute.

(6) Evidence otherwise admissible or subject to discovery outside of mediation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation.

(b) This section does not apply where the admissibility of the evidence is governed by Section 1818 or 3177 of the Family Code.

(c) Nothing in this section makes admissible evidence that is inadmissible under ~~Section 1152 or any other statutory provision, including, but not limited to, the sections listed in subdivision (d)~~ Chapter 2 (commencing with Section 1130) of Division 9 or any other statutory provision. Nothing in this section limits the confidentiality provided pursuant to Section 65 of the Labor Code.

(d) If the testimony of a mediator is sought to be compelled in any action or proceeding as to anything said or any admission made in the course of a consultation for mediation services or in the course of the mediation that is inadmissible and not subject to disclosure under this section, the court shall award reasonable attorney's fees and costs to the mediator against the person or persons seeking that testimony.

(e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not to take a default in a pending civil action.

Comment. Subdivision (c) of Section 1152.5 is amended to reflect the repeal of former Section 1152 and the addition of new statutes protecting settlement negotiations. See Sections 1130-1139.

☞ **Staff Note.** This amendment does not reflect any of the Commission's proposed reforms relating to mediation confidentiality. As this project and the Commission's interrelated work on mediation confidentiality progress, they will need to be coordinated. See the discussion in Memorandum 96-59.

Gov't Code § 11415.60 (amended). Settlement of administrative adjudication

SEC. __. Section 11415.60 of the Government Code is amended, to read:

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative

evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in ~~Section 1152~~ Chapter 2 (commencing with Section 1130) of Division 9 of the Evidence Code. Nothing in this subdivision makes inadmissible any public document created by a public agency.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Comment. Section 11415.60 is amended to reflect the repeal of former Evidence Code Section 1152 and the addition of new statutes protecting settlement negotiations. See Evid. Code §§ 1130-1139.

Uncodified (added). Operative date

SEC. __. (a) This act is operative on January 1, 1999.

(b) This act applies in an action or proceeding commenced before, on, or after January 1, 1999.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 1999, overruling an objection based on Section 1152 of the Evidence Code. However, if an action or proceeding is pending on January 1, 1999, the objecting party may, on or after January 1, 1999, and before entry of judgment in the action or proceeding, make a new request for exclusion of the evidence on the basis of this act.