Study K-410 December 9, 1996

First Supplement to Memorandum 96-59

Confidentiality of Settlement Negotiations: Comments

The Litigation Section of the State Bar has submitted comments (Exhibit pp. 1-3) on the draft proposal attached to Memorandum 96-59. The staff has also been in contact with Professor David Leonard of Loyola Law School and Judge Wayne Brazil of the United States District Court of the Northern District of California. They are interested in the Commission's proposal, but have not yet commented in writing.

The Litigation Section does "not agree that extensive revision of Evidence Code sections 1152 and 1154 is necessary." (Exhibit p. 1.) In its experience, "[e]xcept in mass tort cases, most litigants are not reluctant to settle or to engage in settlement negotiations merely because a settlement or the contents of negotiations will be admitted in evidence or discoverable." (*Id.*) The Litigation Section recommends

> revision of the proposal, to track the Missouri approach described at page 3 of the staff report. If the parties wish to avail themselves of a strict rule of confidentiality, they should expressly agree to be bound in a specified form of alternative dispute resolution. Absent such an express agreement, the general standards under the Evidence Code sections 1152 and 1154 should apply.
> [*Id.*]

In addition to these general comments, the Litigation Section makes the following observations about specific sections:

• *Section 1132 (Protection of an act of compromise or humanitarian act).* In drafting Section 1132, which would restrict admissibility and discovery of an act of compromise or humanitarian act, the staff attempted to avoid the controversial issue of confidential settlements. The section expressly provides that it does not affect "the right, if any, to discovery of a binding settlement." The Comment states that Section 1132 "neither sanctions nor prohibits confidential settlements." Nonetheless, the Litigation Section says that the proposal "actually takes sides"

on "the issue of whether settlements should or should not be confidential." (Exhibit p. 2.)

The Litigation Section also advises that prohibiting discovery or admissibility of compromise evidence in administrative adjudications, arbitrations, or other noncriminal proceedings "would be overbroad." (*Id.*) It points out that in administrative proceedings involving licensure, "offers in settlement, or demands may be relevant to such issues as mitigation or aggravation." (*Id.*) In administrative proceedings generally, "cutting off discovery of how similar cases have been treated will deprive respondents of the ability to discover whether they are being treated equitably." (*Id.*)

• *Section 1138 (Miscarriage of justice).* The Litigation Section warns that "the catchall provision in proposed section 1138 may be interpreted so broadly that the exception will swallow the rule." (*Id.*) The staff agrees that this is a danger to consider in drafting Section 1138.

• *Section 1139 (Least intrusive means).* The Litigation Section comments that the word "necessary" is "too subjective" in the context of Section 1139, which says that if a court admits or permits discovery of compromise evidence, it shall allow only as much of that "as is necessary under the circumstances." (Exhibit pp. 2-3.) According to the Litigation Section, the "quantum of evidence considered necessary to convince a trier of fact will vary widely between cases, between triers of fact, and between advocates." (*Id.* at 2.) Use of the word "necessary," entails "a very substantial risk that evidence may be excluded which would be relevant and might have helped a proponent satisfy the proponent's burden of proof." (*Id.*) The Litigation Section suggests that if the concept of least restrictive means is retained in the next draft, it "should be reworked and made more explicit." (*Id.* at 3.)

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

LITIGATION SECTION
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8846
Fax: (415) 561-8368

November 15, 1996

FAXED 11/15/96 to (916) 327-2186

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED
NOV 18 1996
File: K-410

re: Tentative Recommendation on Protecting Settlement Negotiations (November, 1996)

Ladies and Gentlemen:

The Litigation Section of the State Bar submits these comments regarding the draft of the tentative recommendation on evidentiary protection for settlement negotiations contained in the staff memorandum dated October 28, 1996.

We recommend revision of the proposal, to track the Missouri approach described at page 3 of the staff report. If the parties wish to avail themselves of a strict rule of confidentiality, they should expressly agree to be bound in a specified form of agreement or to a specified form of alternative dispute resolution. Absent such an express agreement, the general standards under the Evidence Code sections 1152 and 1154 should apply.

We do not agree that extensive revision of Evidence Code sections 1152 and 1154 is necessary. Except in mass tort cases, most litigants are not reluctant to settle or to engage in settlement negotiations merely because a settlement or the contents of negotiations will be admitted in evidence or discoverable. If the parties desire, they should be able to agree to be bound by explicit rules of confidentiality. If they cannot reach such an agreement, the general principles contained in Evidence Code sections 1152 and 1154 should govern.

The draft acknowledges that the proposal creates risks of depriving parties of the right to discover or to offer evidence from settlement negotiations, even if there are good reasons why the evidence should be discovered or admitted. As staff points out (Report, pp. 13-14), the proposed exceptions may be both

over-inclusive and under-inclusive, and important uses of compromise evidence may have been overlooked. Conversely, there is a risk that the catchall provision in proposed section 1138 may be interpreted so broadly that the exception will swallow the rule.

The factual circumstances which may present issues of settlement confidentiality are virtually infinite. It is not necessary for the Legislature to attempt to forecast every circumstance in which compromises or negotiations of them must or must not be discoverable or admissible. Judges should be allowed to interpret and to apply the general standards in light of the facts. We recommend that judicial discretion in this area not further be limited.

The current draft states that it avoids the issue of whether settlements should or should not be confidential (Report, pp. 12-13), but the proposal actually takes sides in that dispute. It prohibits admission in evidence and discovery of compromises or negotiations of them. This would prohibit parties from even finding out about the existence of negotiations or settlements related to other parties in the same case or in related cases. Discovery of such information could improve the likelihood of settlements in some cases. Even if the settlement negotiations or settlement agreements are not ultimately admissible in evidence at trial, knowing about negotiations and settlements as to other parties may promote the progress of settlement negotiations in particular cases. Thus, a strict prohibition of discovery may actually be contrary to the rationale of promoting out-of-court settlements and conflicts with the stated intention of not taking sides in the dispute.

The discussion draft suggests consideration of prohibiting discovery or admissibility of compromise evidence in administrative adjudications, arbitrations, or other non-criminal proceedings. This would be overbroad. To illustrate, we offer two examples. In administrative proceedings involving licensure, evidence of compromises, offers in settlement, or demands may be relevant to such issues as mitigation or aggravation. In administrative proceedings, cutting off discovery of how similar cases have been treated will deprive respondents of the ability to discover whether they are being treated equitably.

Proposed section 1139 uses the word "necessary." That word is too subjective in this context. The quantum of evidence considered necessary to convince a trier of fact will vary widely between cases, between triers of fact, and between advocates. Use of that word creates a very substantial risk that evidence may be excluded which would be relevant and might have helped a proponent satisfy the proponent's burden of proof. If it is

retained in the next draft, the concept of "least intrusive means" should be reworked and made more explicit.

Thank you for this opportunity to comment.

Very truly yours,

LITIGATION SECTION

By _____
Jerome Sapiro, Jr.

cc: Teresa Tan, Esq.
Ruth Robinson, Esq.
Larry Cox, Esq.
Ms. Janet Hayes

(1:JS:97F:mp)