Study K-410 January 21, 1996

Second Supplement to Memorandum 96-59

Confidentiality of Settlement Negotiations: Professor Leonard's Comments

Professor David Leonard of Loyola Law School has provided comments on the staff draft tentative recommendation. (Exhibit pp. 1-5.) The staff will discuss his analysis at the Commission's upcoming meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

LOYOLA LAW SCHOOL

December 20, 1996

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Dear Ms. Gaal:

Thank you for affording me the opportunity to comment on Memorandum 96-59, a staff draft of a tentative recommendation for amendment of provisions of the California Evidence Code protecting settlement negotiations and related matters. You staff has done an excellent job of uncovering many of the issues implicated by this complex problem, and I am flattered that you have chosen to review my own work in preparation of the draft. The purpose of this letter is to discuss selected aspects of your proposal. I have chosen to focus attention on only a few issues I consider particularly important rather than attempt to canvass the entire draft. I would welcome the opportunity to testify more completely at a future hearing.

In my comments below, references to "Treatise" are to Leonard, The New Wigmore: A Treatise on Evidence, Selected Rules of Limited Admissibility (1996). References to FRE are to the Federal Rules of Evidence, and those to URE are to the Uniform Rules of Evidence.

§ 1132 (a) (design of exclusionary rule). At the outset, I note that you have made a choice to adopt a design fundamentally different from that used by FRE 408. Whereas the latter is constructed as a limited exclusionary rule applicable only when the evidence is offered for the purpose of proving "liability for or invalidity of the claim or its amount," your proposal creates a general rule of exclusion. Though followed by a series of exceptions to this rule, it is nevertheless fundamentally different from the form of FRE 408 as well as that of existing California Evidence Code § 1152, which excludes the evidence only when offered "to prove ... liability for the loss or damage or any part of it."

Your choice, while certainly defensible, does have some disadvantages. Most importantly, it pretty much obligates you to define specifically all situations in which the evidence will be admissible (all exceptions to the rule). This is, of course, very difficult to do. Your draft contains the most commonly recognized and used exceptions, but there are possibilities not embodied in your proposal. I discuss some of these briefly at Treatise

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§ 3.8.5.c., at 3:158-159. I recognize that a distinct advantage of your approach is that it should limit argument about admissibility for purposes not mentioned in the rule, but it is quite possible that some injustice would result from a rigid application of exceptions. Because the exclusionary rule presently embodied in the Code is actually very narrow, and because your draft proposal probably would not fundamentally change the scope of the rule, perhaps it is better to stay with the current form. Doing so would only necessitate changing proposed section 1132(a) to include language such as that in existing section 1152 or in FRE 408. I recommend you consider doing so.

§ 1131(a)(2)(b) (definition of "humanitarian act"). Your proposal retains the "humanitarian motives" concept embodied in the first version of the Uniform Rule of Evidence dealing with the matter (former URE 53) and embraced by current § 1152(a) of the California Evidence Code. Neither FRE 408 nor current URE 408 uses this term. In all likelihood, the perceived need for the term arises because there is no separate rule similar to FRE 409, which excludes evidence of offers to pay medical assistance and related conduct. That rule originally arose out of a desire to encourage (or at least, not to discourage) such humanitarian conduct. Even though FRE 409 is seldom invoked, it seems to me that it deals with rather different considerations than those of the compromise rule, and that it's a good idea to separate the two as done by the drafters of the Federal Rules.

Because of these considerations, I'd recommend taking the "humanitarian act" provisions out of the proposed sections dealing with compromise and setting up a separate provision for such conduct. I don't think it would be necessary to create a complex rule; most of the problems with compromise evidence are not present with respect to offers to pay medical expenses and the like. A simple rule such as FRE 409 would almost certainly suffice.

§ 1132(a) (exclusion only in civil actions). Your draft would exclude settlement behavior only when offered in civil actions. As I explain in Treatise § 3.7.3, I think a blanket allowance of such evidence in criminal cases (excludable only on § 352-type grounds) is not wise. There are some situations in which the primary purposes of the compromise rule would call for exclusion in criminal cases as well. It is only when the offer itself is repugnant that the evidence should be admitted. So, for example, if a person is charged with the crime of rape, and that conduct is also the subject of a civil action, defendant's offer of a substantial sum of money to settle the civil action in exchange for an agreement not to pursue prosecution would be admissible because a desire to prevent prosecution by silencing a vulnerable victim who no doubt already faces difficulty proceeding with the criminal case is repugnant behavior.

In other cases, however, this would not be true. As I wrote, "[w]hen the criminal defendant's offer constitutes a good faith effort to reach accord with an alleged crime victim, and defendant has no intention of interfering with the prosecution, the policy

behind the rule is invoked, and evidence of such conduct should be excluded." Treatise § 3.7.3, at 3:94. As I note in the Treatise, other writers seem to agree in general.

I would therefore favor a rule that permits the judge to exclude the evidence in criminal as well as civil cases. To the extent there is concern that criminal defendants will seek to interfere with prosecution of their alleged crimes, a provision such as that found in FRE 408 (providing that the exclusionary rule is inapplicable when the evidence is offered "for the purpose of proving an effort to obstruct a criminal investigation or prosecution" should deal adequately with the problem.

§ 1132(a) (exclusion only in civil action that is subject of compromise conduct). In a Staff Note, you ask whether broader language would be preferable, and you note that Judge Brazil's experience causes him to believe that the evidence be inadmissible in any civil action. The language of FRE 408 does not contain the restriction you have suggested, and I tend to agree with Judge Brazil that the prohibition should extend more broadly. I doubt that a great deal of relevant data would be lost, and to the extent that a broader rule would encourage compromise, I would favor it.

§ 1132(b) (discovery of compromise conduct). Your proposal treats compromise conduct in the manner of a pseudo privilege. Doing so raises the problem of whether the evidence should be discoverable, and the draft takes the position that it should not be discoverable unless the party requesting disclosure makes a "specific showing of a substantial likelihood that the disclosure will lead to the discovery of admissible evidence" and that "[d]iscovery is otherwise authorized by law."

I don't think it is wise to restrict discovery of compromise conduct. As I note in the Treatise (§ 3 4), the premise that excluding evidence of compromise promotes settlement is largely untested. It is likely that a good deal of settlement will occur even if there is no exclusionary rule. Moreover, compromise evidence is often relevant and sometimes has high probative value. Making the evidence generally discoverable might discourage some settlement behavior, but most likely to no greater extent than already occurs as a result of the many "exceptions" to the exclusionary rule. Also, if you choose to restrict discovery of compromise evidence, it is difficult to justify not also doing so with respect to evidence of subsequent remedial measures. At the very least, you can expect litigants to make such arguments.

When I consider the likely scenarios in which discovery of compromise evidence would most often be sought, I discern another reason to permit discovery more broadly. In many cases, discovery will be sought in order to obtain information relevant to the credibility of one or more of the opponent's prospective witnesses. Specifically, others involved in the conduct giving rise to the action, and who have settled or entered into settlement agreements, might have a significant bias in favor of the party with whom they settled. You recognize this, I think, in § 1132(c) ("Nothing in this section affects the

right, if any, to discovery of a binding settlement"), and in § 1137 (providing for admissibility of sliding scale recovery agreements where a party to the agreement testifies and the evidence is offered to prove bias). Undisclosed "Mary Carter" and other agreements with persons who will later testify for the party with whom they settled raise troubling problems of distortion of the factfinding process. Clever counsel will certainly invent ways of avoiding the language of proposed § 1132(c). Not having a rule restricting discovery would, I think, be wiser.

If you choose to have a rule restricting discovery of settlement conduct, I would think carefully about whether the language of proposed § 1132(b)(1) is workable. How could a party make a "specific" showing of the type you require? It is generally very difficult to determine the usefulness of evidence you do not have. If parties are required to make a specific showing, they will often be unable to do so because they will lack the necessary information. Perhaps somewhat weaker language would be better. You might consider "The party requesting disclosure makes a showing of a reasonable likelihood that the disclosure will lead to the discovery of admissible evidence." Alternatively, you might consult adopting the standard applied by the Supreme Court in a different, but arguably analogous setting. In United States v. Zolin, 491 U.S. 554 (1989), the Court held that before a trial court could conduct an in camera inspection of allegedly privileged documents to determine the application of the crime or fraud exception to the attorney-client privilege, the party seeking review "must present evidence sufficient to support a reasonable belief that in camera review may yield evidence that establishes the exception's applicability." Such a standard could be adopted for use in the context of discovery of compromise behavior by providing that the party seeking discovery "must present evidence sufficient to support a reasonable belief that disclosure will lead to the discovery of admissible evidence."

Once again, I think it would be better to omit the discovery provision altogether, but if you choose to include one, I hope these comments are useful.

§ 1138 (miscarriage of justice). Proposed section 1138 provides an escape hatch. As I understand it, the court can admit otherwise inadmissible compromise evidence if exclusion "would create a substantial likelihood of a miscarriage of justice" and if the evidence is introduced for one of the stated purposes. I think this section could prove problematic.

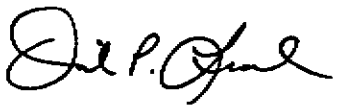
Basically, I think it is unwise to provide the escape hatch at all. I agree with the Litigation Section that allowing admission of compromise evidence under such circumstances would create a very real risk that the rule could be interpreted so broadly as to swallow the exclusionary provision. Almost certainly, different courts will interpret the standard of the escape hatch differently, leading to an unfortunate kind of inconsistency. Even in courts that would interpret the standard similarly, there is a strong likelihood of inconsistency in applying that standard to similar facts. And the very presence of an escape hatch might discourage some parties from engaging in compromise behavior, or at

the very least, of discussing compromise with the sort of frankness that leads to settlement and that the law therefore wants to promote. If the exclusionary rule is to have real bite, it is unwise to include such an uncertain and potentially broad escape hatch.

If you wish to retain the escape hatch, I think your draft limits its application in one way that might not be appropriate. That is, the rule would apply only if the evidence is offered for one of the three specified purposes. This limitation would preclude use of the provision in situations not currently foreseen but potentially as compelling. As I've already indicated, your proposed rules create an exclusionary principle with specified exceptions rather than the other way around. It is very possible that other situations will exist in which exclusion creates a miscarriage of justice. This is a disadvantage of the shape of your proposed rule. If you view an escape hatch as necessary, I would omit subdivision (b), thus leaving open the possibility of admission under circumstances no currently foreseen. But as I've indicated, I have a basic problem with the escape hatch in the first instance.

These are the most important issues I can see in your proposal. I hope I've given you some thoughts worth considering, and that you'll keep me apprised concerning the progress of the proposal and any future hearings. I'd be honored to remain involved in the comment process.

Sincerely,



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