Study K-410 November 6, 1997

Memorandum 97-74

Confidentiality of Settlement Negotiations: Comments on Tentative Recommendation

This memorandum considers comments on the Law Revision Commission's tentative recommendation on protecting settlement negotiations, which was distributed in August. The Commission has received the following letters:

Exhibit pp.

1. Prof. David P. Leonard, Loyola Law School (Apr. 23) 1
2. Honorable Wayne D. Brazil, United States District Court in and for the Northern District of California (June 5) 2
3. Prof. Miguel A. Mendez, Stanford Law School (Aug. 14) 6
4. Honorable Carlos Bea, Superior Court in and for the City and County of San Francisco (Sept. 18) 7

This memorandum discusses and analyzes those comments. A copy of the tentative recommendation is attached to Commissioners' copies of this memorandum.

OVERALL REACTION

Response to the Commission's proposal has been generally but not uniformly favorable. Magistrate Judge Wayne D. Brazil of the United States District Court for the Northern District of California "endorse[s] enthusiastically the Commission's efforts in this area and hope[s] that legislation substantially along the lines proposed in February will be adopted." (Exhibit p. 5.) He offers some specific suggestions, but states that the Commission has "done a very handsome job of crafting … a commendable balance between legitimately competing concerns." (*Id.*) Similarly, Professor Miguel Mendez of Stanford Law School writes:

> I agree that the prohibition needs to be expanded in the ways that you suggest; otherwise, parties have a strong incentive to find some "other purpose" for the offers and statements. Jurors, as you point out, are unlikely to abide by the limiting instruction and treat the evidence as admissions.

(Exhibit p. 6.)

Professor David Leonard of Loyola Law School states that "the changes made in the draft proposal are quite sensible" and "the Commission has made substantial progress." Whether he actually supports the proposal in its current form is not entirely clear. Although the Commission incorporated many of his earlier suggestions in its tentative recommendation, it did not follow all of his advice. In particular, Professor Leonard suggested leaving the rule on admissibility of settlement negotiations in its current form rather than creating a general rule of exclusion. He acknowledged, however, that the Commission's choice was "certainly defensible." (Second Supplement to Memorandum 96-59 at Exhibit pp. 1-2.) We are hoping that Professor Leonard will provide further input and perhaps attend the Commission's meeting in Los Angeles.

Judge Carlos Bea of the Superior Court for the City and County of San Francisco writes that the Commission is "on the right track in attempting to grant greater, categorical confidentiality to settlement negotiations." (Exhibit p. 8.) As discussed below, however, he suggests revisions of the Commission's approach.

Finally, the State Bar Litigation Section did not comment on the tentative recommendation, but did express serious concern about the Commission's proposal at an earlier stage of this study:

> We recommend revision of the proposal, to track the Missouri approach …. 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 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.

(Exhibit pp. 9-10.) The State Bar Committee on Administration of Justice ("CAJ") raised the same concern. (Memorandum 97-10 at Exhibit pp. 1-2.)

The Commission considered these comments earlier in this study, but decided to proceed with the concept of making evidence of settlement negotiations generally inadmissible against the person seeking to compromise, subject to specified exceptions. "This will encourage openness and enhance rationality in settlement negotiations, and be fairer than existing law, because a person could not be penalized for offering to settle." Tentative Recommendation on *Protecting Settlement Negotiations,* p. 5 (Feb. 1997). Judge Brazil "disagree[s] vigorously" with the position of the Litigation Section and CAJ:

> The notion that the best way to address these issues is to say nothing and to offer protection only when the parties to settlement negotiations agree in advance to a specific form of a confidentiality contract strikes me as counterproductive. For one thing, this approach would generate yet another matter about which lawyers would be constrained to negotiate before they began negotiating about the substance of settlement proposals. Creating additional points of potential friction is not conducive to advancing settlement generally and would cost clients more money. Such an approach also would create uncertainty about the status of inquiries designed only to raise the issue of settlement, or to see if an opponent has any interest at all in even the most tentative, exploratory conversation about whether there is any reason to set up a serious negotiation. In other words, I believe that if the law moved toward the notion that no protection exists unless there is a clear contract in advance, there would be more fear even of raising the subject of settlement and less settlement activity. I believe that adding a set of statutory provisions that address these matters directly and that define the circumstances under which protection would presumptively attach is likely to much better advance society's interest both in promoting settlement and in reducing expense and delay in civil litigation.
>
> I also believe that offering protection to settlement communications will, on balance, promote our interest in settlement much more than it will harm that interest.

(Exhibit pp. 2-3.) Despite this strong expression of support, the Commission should bear in mind the views of CAJ and the Litigation Section as it continues to work on this study.

SECTION 1130: APPLICATION OF CHAPTER

In the tentative recommendation, proposed Evidence Code Section 1130 provides:

> 1130. (a) This chapter governs the admissibility and discoverability of "settlement negotiations," which are negotiations to settle a pending or prospective civil case. As used in this chapter, "settlement negotiations" means any of the following:
>
> (1) Furnishing, offering, or promising to furnish money or any other thing, act, or service to another person who has sustained or will sustain or claims to have sustained or claims will sustain loss or damage.
>
> (2) Accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of a claim.
>
> (3) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an action described in paragraph (1) or (2), regardless of whether a settlement is reached or an action included in paragraph (1) or (2) occurs.
>
> (b) This chapter does not apply to plea bargaining. This chapter does not affect the admissibility or discoverability of evidence of an effort to obstruct a criminal investigation or prosecution, regardless of whether that effort may also be "settlement negotiations" within the meaning of subdivision (a).

Judge Brazil, commenting on an earlier version of the proposal, urges the Commission to make clear that "communications made in connection with settlement conversations are protected even if no specific or clear or definitive offer or demand is made." (Exhibit p. 3.) Subdivision (a)(3) now addresses this point, clarifying that settlement negotiations include conduct or statements "made for the purpose of, or in the course of, or pursuant to negotiation of an action described in paragraph (1) or (2), *regardless of whether a settlement is reached or an action included in paragraph (1) or (2) occurs."* (Emphasis added.) No further revision appears necessary.

Judge Brazil also encourages the Commission to "make clear the status of communications made during (or in connection with) settlement conferences conducted by judges, commissioners, or referees." (Exhibit p. 4.) "Such

communications presumably should be as fully protected as communications made during a mediation — so it might be more appropriate to track that statutory approach, but some express coverage of settlement conference communications seems essential." (*Id.*)

The Commission struggled with this important issue in its study of mediation confidentiality, eventually concluding that the mediation confidentiality provisions should not apply to a settlement conference pursuant to Rule 222 of the California Rules of Court. See Evid. Code § 1117(b)(2) (effective Jan. 1, 1998). The Commission's Comment to Section 1117 states that "a court settlement conference is not a mediation within the scope of this chapter," as it "is conducted under the aura of the court and is subject to special rules."

Although the Commission opted against extending the mediation confidentiality provisions to settlement conferences, its tentative recommendation on confidentiality of settlement negotiations (unlike the earlier draft that Judge Brazil reviewed) makes clear that the settlement negotiation provisions do apply to settlement conferences:

> **Comment.** Section 1130 states the scope of this chapter. The chapter encompasses, but is not limited to, judicially supervised settlement negotiations in a civil case, such as a settlement conference pursuant to California Rule of Court 222.
>
> ….

This may suffice to address the issue, but the staff believes the matter deserves further attention. In particular, we will ask the Judicial Council for input on this important point.

SECTIONS 1131 AND 1132: ADMISSIBILITY AND DISCOVERABILITY

Sections 1131 and 1132 are the crux of the Commission's proposal. Section 1131 (admissibility and discoverability in noncriminal proceeding) provides:

> 1131. Except as otherwise provided by statute, in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding, the following rules apply:
>
> (a) Evidence of settlement negotiations is not admissible against the person attempting to compromise.
>
> (b) Evidence of settlement negotiations is not subject to discovery, and disclosure of the evidence may not be compelled, unless all 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) The request for disclosure is not unreasonably cumulative or duplicative.

(3) The requested information is not obtainable from another source that is more convenient, less burdensome, less expensive, or less intrusive on settlement negotiations.

(4) The likely benefit of the proposed discovery outweighs its burden and expense, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(5) Discovery is otherwise authorized by law.

Section 1132 (admissibility and discoverability in criminal action) is identical, except that it applies in a criminal action. As Judge Brazil suggests (Exhibit pp. 3-4), each of these provisions begins with a qualifying phrase ("Except as otherwise provided by statute …"), to avoid creating the misimpression that the protection is absolute. The provisions for criminal actions and noncriminal proceedings are separated rather than combined, because special considerations apply to the provision for criminal actions. See Tentative Recommendation on *Protecting Settlement Negotiations,* at pp. 8-9 (Feb. 1997).

Judge Bea's Comments

Judge Bea raises some questions about Section 1131, which would seem to apply equally to Section 1132. In particular, he points out that the requirement of a "specific showing" in subdivision (b)(1) is ambiguous. (Exhibit p. 7.) He urges the Commission to substitute more precise language, such as a requirement that the party requesting disclosure, upon noticed motion, proves by a preponderance of the evidence (or clear and convincing evidence) that …." (*Id.*) The staff agrees that more precise drafting is desirable. It also seems advisable to move the requirement into the introductory clause of subdivision (b), so that it modifies (b)(1) through (b)(5), not just (b)(1):

(b) Evidence of settlement negotiations is not subject to discovery, and disclosure of the evidence may not be compelled, unless the party requesting disclosure, on noticed motion, proves by a preponderance of the evidence that all of the following conditions are satisfied:

> (1) ~~The party requesting disclosure makes a specific showing of~~ There is a substantial likelihood that the disclosure will lead to the discovery of admissible evidence.
>
> (2) The request for disclosure is not unreasonably cumulative or duplicative.
>
> (3) The requested information is not obtainable from another source that is more convenient, less burdensome, less expensive, or less intrusive on settlement negotiations.
>
> (4) The likely benefit of the proposed discovery outweighs its burden and expense, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.
>
> (5) Discovery is otherwise authorized by law.

Judge Bea also raises a more fundamental issue. He believes that subdivision (b) "sets up an altogether too malleable or flexible standard," which "frankly includes elements which should not be the subject of an adversary proceeding where participants are treated equally." (Exhibit p. 7.) For example, he questions what "the parties' resources" have to do with whether evidence is discoverable:

> Do settlement negotiations become discoverable by a litigant *in propria persona* but not by the Government or a large corporation? This seems incompatible with the concept that parties are equal before the law.

(*Id.*) He urges the Commission to abandon the criteria of subdivision (b) and instead "use the developed case law of Federal attorney work product [*Hickman v. Taylor;* FRCP Rule 26]" as a guide:

> As I remember it, an attorney's "work product" was *not* absolutely privileged from discovery and proof, as were attorney-client communications. The movant for discovery or the offeror in proof of such "work product" had to satisfy a rigorous standard: the evidence was relevant but otherwise *unavailable.* It was insufficient to prove another method of discovery or proof would be easier, cheaper or more convenient.

(Exhibit p. 8.)

Judge Bea's suggestion deserves serious consideration. The work product standard to which he refers is found in Federal Rule of Civil Procedure 26(b)(3), which provides in relevant part that

> a party may obtain discovery of documents and tangible things … prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) *only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.* In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

(Emphasis added.)

The immediately preceding portion of the same rule (Federal Rule of Civil Procedure 26(b)(2)) is the source of the language Judge Bea finds objectionable:

> …The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The Commission's tentative recommendation strengthens this standard, by making settlement negotiations discoverable only if the specified requirements are met.

The work product standard Judge Bea proposes would be even more stringent, yet also simpler and perhaps easier to apply. It could be implemented by revising Sections 1131(b) and 1132(b) to read along the following lines:

> (b) Evidence of settlement negotiations is not subject to discovery, and disclosure of the evidence may not be compelled, unless the party requesting disclosure, on noticed motion, proves by a preponderance of the evidence that the party has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

If the Commission is interested in this approach, it may want to seek further input (at least from the persons who have submitted comments) before finalizing its recommendation.

Criminal Actions

Professor Leonard praises the Commission's decision to make evidence of settlement negotiations inadmissible in a criminal action, as well as in a noncriminal proceeding:

> Addition of a section that allows exclusion in a limited number of criminal cases is, of course, a compromise between the competing values of discovering truth and promoting settlement. But as I indicated previously, blanket admission of such evidence would be unwise in at least some cases.

(Exhibit p. 1.)

In contrast, Judge Brazil is "anxious about the attempt to add a provision here that would cover settlement negotiations or plea bargaining in criminal cases." (Exhibit p. 2.) As may clearer from the current draft than from the draft Judge Brazil reviewed, however, the Commission's proposal would not apply to plea bargaining (i.e., efforts to compromise a criminal case). Section 1130 (b) & Comment.

Rather, the proposal would make evidence of efforts to compromise a *civil* case inadmissible not only for purposes of proving civil liability, but also for purposes of a criminal prosecution. The reasoning underlying this approach is explained at pages 8-9 of the tentative recommendation:

> Where the same conduct is subject to both civil and criminal prosecution, … the defendant will be reluctant to engage in efforts to compromise the civil case, if evidence of those efforts will be admissible in the criminal case. As a result, resolution of the victim's suit for restitution or other relief may be delayed until after the defendant's assets are depleted by defending against the criminal charges. The victim's quest for relief becomes a fruitless expenditure of personal and judicial resources.
>
> The proposed legislation would address this problem by making the new restrictions on admissibility and discoverability of efforts to compromise a civil case applicable in criminal actions, as well as in noncriminal proceedings.

In determining whether to continue with this approach, the Commission should weigh the significance of the problem it is trying to address, the potential for controversy, the likelihood of satisfying the two-thirds vote requirement mandated by the Truth-in Evidence provision of the Victims' Bill of Rights (see page 9 of the tentative recommendation), and the impact of the provision on prospects for enactment of the remainder of the Commission's proposal.

SECTION 1136: MISCONDUCT OR IRREGULARITY

Proposed Section 1136 provides:

> 1136. Evidence of settlement negotiations is not inadmissible under Section 1131 or 1132 where 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 the negotiations.
>
> **Comment.** Section 1136 recognizes that the public policy favoring settlement agreements has limited force with regard to settlement agreements and offers that derive from or involve illegality or other misconduct or irregularity. See D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.7.4, at 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 1130 (application of chapter). See also Section 1140 (extent of evidence admitted).

Judge Brazil has raised two issues pertaining to this section.

Professional Misconduct

Professional misconduct (e.g., violation of the State Bar Rules of Professional Conduct) is not expressly mentioned in Section 1136. Although the phrase "other misconduct or irregularity in the negotiations" is broad enough to encompass professional misconduct, it may be helpful to insert the phrase "professional misconduct" after the word "malpractice" in Section 1136.

Judge Brazil questions, however, whether some lawyers might be hesitant to report attorney misconduct in settlement negotiations to a court or to the State Bar. (Exhibit pp. 4-5.) He goes on to say that since "the Commission's proposed

rules are rules of evidence, not of professional conduct," his concern that "lawyers might feel intimidated into not meeting their reporting duties should be misplaced …." (*Id.*) Nonetheless, perhaps "language should be added that addresses what a lawyer should/can do when the way an opposing counsel has behaved triggers a duty to report attorney misconduct to a court and/or to the state bar." (*Id.*)

As Judge Brazil points out, proposed Sections 1131 and 1132 would govern admissibility and discoverability of settlement negotiations, but would not make settlement negotiations confidential for all purposes. Adding a paragraph like the following to the Comments to Sections 1131 and 1132 may help clarify the impact of those provisions:

> Section 1131 [1132] governs the extent to which settlement negotiations are admissible and discoverable in a noncriminal proceeding [criminal action]. The provision does not establish a general requirement that settlement negotiations must remain confidential for all purposes. Thus, for example, it does not preclude an attorney from complying with a professional duty to report another attorney's misconduct in settlement negotiations to the State Bar.

Participation in Court-ordered Alternative Dispute Resolution

Judge Brazil also expresses concern about whether the exception making evidence of settlement negotiations admissible to show misconduct or irregularity in the negotiations (now Section 1136) is broad enough to allow admission of evidence demonstrating whether a party participated in good faith in a court-ordered alternative dispute resolution program. As he states, "to determine whether a party or lawyer should be sanctioned for failing to participate in good faith in a court-sponsored ADR proceeding," I "must order the parties to disclose the contents of communications made and nature of acts taken during the course of the settlement-oriented proceeding." (Exhibit p. 4.) He suggests explicitly addressing this issue in the Comment to Section 1136. (*Id.*)

This is an important, but difficult, issue. In studying mediation confidentiality, the staff became convinced that allowing courts to inquire into whether parties participated in good faith in a mediation would seriously undermine mediation confidentiality, *unless* the criteria for assessing good faith were purely objective measures such as whether the party attended the mediation or whether the person representing a party at the mediation had

settlement authority. Allowing exploration of the substance of the mediation, such as whether a party made an offer and, if so, whether that offer was reasonable, merely on an allegation of failure to participate in good faith would destroy the assurance of confidentiality necessary for effective mediation.

The same concern applies to settlement negotiations, so the staff is reluctant to expressly make evidence of settlement negotiations admissible for purposes of establishing whether a party participated in good faith in a court-ordered alternative dispute resolution program. On the other hand, there are a great variety of such programs, so it may be equally inadvisable to state unequivocally that evidence of settlement negotiations is not admissible for that purpose. Leaving the issue to the courts to resolve may be the best approach, particularly because the extent to which parties may be compelled to participate in alternative dispute resolution is controversial, as the Commission is well aware from its study of mediation confidentiality.

SECTION 1152: HUMANITARIAN CONDUCT

Proposed Section 1152 would govern the admissibility of humanitarian conduct:

> 1152. Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury.

Professor Leonard is pleased that the Commission included this provision. (Exhibit p. 1.)

Professor Mendez urges the Commission to extend the provision to cover statements associated with offers of humanitarian aid. He explains:

> Lawyers will limit their statements to [offers of humanitarian aid], but lay people are likely to say the following: "Look, it was my fault; let me pay your medical bills."
>
> Under your proposal and current law, the first part of the statement can be used as an admission because it was not made as part of an effort to settle the claim; it is simply a "bald" admission. The second part is protected for the reasons you give. But of what value is that protection if such statements are likely [to] be accompanied by other statements that qualify as admissions? Isn't the sense that "I may have been wrong" the inducement for making the humanitarian proposal? Isn't that "sense" also what drives parties through their lawyers to want to settle their cases? Why

> then protect such statements if made by a lawyer at a settlement conference ("Look, my client admits that it may have been his fault.") but not by the defendant if made at the scene of the accident.

The rationale for protecting statements associated with offers of humanitarian aid, but not statements associated with settlement offers, is that the latter are likely to be in furtherance of the offer, while the former are likely to be incidental. Fed. R. Evid. 409 advisory committee's note; see also page 10 of the tentative recommendation. As Professor Mendez's comments make clear, however, it seems incongruous to protect statements made by a lawyer offering payment once a claim is made, yet deny the same protection to statements made by an unsophisticated person offering payment where there is no claim. Thus, the staff recommends revising proposed Section 1152 along the following lines:

> 1152. Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury, and any associated conduct or statements, is not admissible to prove liability for the injury.
>
> **Comment.** Section 1152 is drawn from Federal Rule of Evidence 409, but it protects statements and conduct associated with an offer of humanitarian aid, as well as the offer itself. As to humanitarian conduct….

HOW TO PROCEED

The Commission has received constructive comments on its proposal, but there are areas in which further input may be helpful and areas that may benefit from additional analysis. Instead of finalizing its recommendation at this meeting, it may be better to have the staff prepare another draft for consideration at the Commission's December meeting. If the Commission finalizes its recommendation at that meeting, it would still be possible to introduce legislation for the 1998 session.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

LOYOLA LAW SCHOOL

April 23, 1997

Barbara S. Gaal
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Dear Ms. Gaal:

Thank you for keeping me apprised about the progress you have made on the subject of confidentiality of settlement negotiations. From your letter of March 20, it appears that the Commission has made substantial progress.

I think the changes made in the draft proposal are quite sensible. In particular, deletion of Section 1138 (Miscarriage of justice) should avoid needless litigation. Addition of a section that allows exclusion in a limited number of criminal cases is, of course, a compromise between the competing values of discovering truth and promoting settlement. But as I indicated previously, blanket admission of such evidence would be unwise in at least some cases. I am also glad to see that a section explicitly providing for exclusion of evidence of payment of medical or other expenses. This section would bring California in line with the Federal Rules. I doubt that the use of the term "other" in place of "similar" would cause any interpretive problems. Even if the term were to be read more broadly than "similar," I would not be troubled, as the rule would then encourage all types of help with expenses "occasioned by an injury."

It has been a pleasure participating in this process. If you think my attendance at any future meetings might be helpful, please let me know.

Sincerely,

David P. Leonard
Professor of Law and
William M. Rains Fellow

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CHAMBERS OF
WAYNE D. BRAZIL
UNITED STATES MAGISTRATE JUDGE

June 4, 1997

Barbara S. Gaal, Staff Counsel
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Ms. Gaal:

I apologize for responding so tardily to your request for comments about the Commission's proposed legislation about the confidentiality of settlement negotiations. I have had to struggle through two huge and pressing projects this winter and spring, and every other call on my time, outside core essentials of my job, has had to take a back seat. I am not sure where this project stands at this point, so there is a real risk that the very modest inputs I offer below will be too late. Again, I am sorry.

Presumably it will come as no great surprise to you, given what I have written on this subject in the past, and given the substantial time I commit to settlement work in my job, that I applaud the Commission's effort to address this problem and generally endorse the substance of the most recent proposals (the draft that was the subject of the Commission's deliberations in late February).

I have a few reactions and suggestions. First, I disagree vigorously with the position taken by the State Bar Committee on Administration of Justice in its letter of January 22, 1997. The notion that the best way to address these issues is to say nothing and to offer protection only when the parties to settlement negotiations agree in advance to a specific form of a confidentiality contract strikes me as counterproductive. For one thing, this approach would generate yet another matter about which lawyers would be constrained to negotiate before they began negotiating about the substance of settlement proposals. Creating additional points of potential friction is not conducive to advancing settlement generally and would cost clients more money. Such an approach also would create uncertainty about the status of inquiries designed only to raise the issue of settlement, or to see if an opponent has any interest at all in even the most tentative,

exploratory conversation about whether there is any reason to set up a serious negotiation. In other words, I believe that if the law moved toward the notion that no protection exists unless there is a clear contract in advance, there would be more fear even of raising the subject of settlement and less settlement activity. I believe that adding a set of statutory provisions that address these matters directly and that define the circumstances under which protection would presumptively attach is likely to much better advance society's interest both in promoting settlement and in reducing expense and delay in civil litigation.

I also believe that offering protection to settlement communications will, on balance, promote our interest in settlement much more than it will harm that interest. I really think the State Bar Committee on Administration of Justice has the balance quite backward on this question -- and that one has to strain quite a bit to find any significant number of circumstances in which the rules you have proposed would cause any significant harm to the settlement interest.

With respect to the specific provisions in the proposed legislation, I would like to preface my remarks by emphasizing that I am not familiar with the California statutory environment in which you are working (I am appreciably more knowledgeable about the federal rule environment), and I do not have time to do the research that would position me to offer reliable comments about the specifics of proposed words or phrases. So my reactions are of a general character and may be way off base.

I have had to work harder than would be optimal to begin understanding the dynamic between the definition of an "act of compromise" (as defined in section 1131) and the protections offered in proposed section 1132. I appreciate from the Notes that you were instructed to follow this two-step format, but if you were working on a cleaner slate, this might well not be the preferred approach. For one thing, it is not as clear as it should be that communications made in connection with settlement conversations are protected even if no specific or clear or definitive offer or demand is made. I hope it is not the Commission's intention to offer protection only when a party clearly commits to a specific offer or demand -- such an approach would discourage the give and take, and the exploratory and tentative offers/demands that are the life-blood of the settlement dynamic in many cases. Such an approach also would invite lots of litigation about whether a specific proposal or commitment was made.

I also would suggest, at least if you were working from scratch, that section 1132 begin with a qualifying phrase, like

"Except as otherwise provided in this chapter . . . . " This suggestion is driven by the fact that, as cast back in February, section 1132 seems to offer absolute protection, and one is required to read other sections to learn that that is not at all true.

I am anxious about the attempt to add a provision here that would cover settlement negotiations or plea bargaining in criminal cases. That is such a different legal environment that I would have no confidence that rules that reflect a wise balancing of competing considerations for civil cases could be transported reliably into the criminal setting, where the competing interests that need to be balanced can be quite different.

I would hope that the Commission would make clear the status of communications made during (or in connection with) settlement conferences conducted by judges, commissioners, or referees. Such communications presumably should be as fully protected as communications made during a mediation -- so it might be more appropriate to track that statutory approach, but some express coverage of settlement conference communications seems essential. These communications can include, of course, written settlement conference statements (submitted prior to and for use during a judicially hosted settlement conference), as well as ex parte communications, some over the phone, with the judge before and/or after a formal settlement conference.

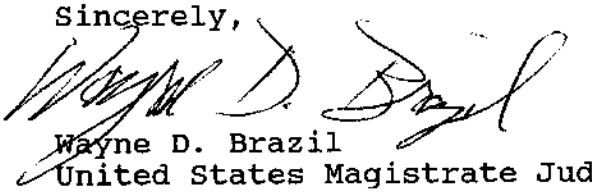
I had two thoughts about the possible exceptions to the general grant of protection. The first concern probably would arise only in a court-sponsored or ordered settlement conference, ADR proceeding, or negotiation. Sometimes I am called upon to determine whether a party or lawyer should be sanctioned for failing to participate in good faith in a court-sponsored ADR proceeding. To make such a determination, I must order the parties to disclose the contents of communications made and nature of acts taken during the course of the settlement-oriented proceeding. I can imagine a similar problem arising if a state court ordered parties to participate in settlement negotiations, then one complained that the other did not comply with the order (by not participating in good faith). I assume that this problem would be covered by proposed section 1134, but it might be advisable to make the notes more explicit about this.

Somewhat similarly, I wonder if language should be added that addresses what a lawyer should/can do when the way an opposing counsel has behaved triggers a duty to report attorney misconduct to a court and/or to the state bar? Since the Commission's proposed rules are rules of evidence, not of professional conduct,

my concern that lawyers might feel intimidated into not meeting their reporting duties should be misplaced, but I wonder if thought has been given to this issue?

Except as otherwise suggested in the preceding paragraphs, I endorse enthusiastically the Commission's efforts in this area and hope that legislation substantially along the lines proposed in February will be adopted. You have done a very handsome job of crafting what I believe is a commendable balance between legitimately competing concerns. Again, please accept my apology for responding so late to your request for comments.

Sincerely,



Wayne D. Brazil
United States Magistrate Judge

August 14, 1997

To: Barbara Gaal
From: Miguel A. Méndez
Re: Settlement Statements

Barbara, thanks for sending me the tentative recommendation on changes to the rules protecting the use of settlement offers and related statements from use as admissions.

I agree that the prohibition needs to be expanded in the ways that you suggest; otherwise, parties have a strong incentive to find some "other purpose" for the offers and statements. Jurors, as you point out, are unlikely to abide by the limiting instruction and treat the evidence as admissions.

My only question is this: in the case of offers of humanitarian aid, why not extend the protection to associated statements. Lawyers will limit their statements to such offers, but lay people are likely to say the following: "Look, it was my fault; let me pay your medical bills."

Under your proposal and current law, the first part of the statement can be used as an admission because it was not made as part of an effort to settle the claim; it is simply a "bald" admission. The second part is protected for the reasons you give. But of what value is that protection if such statements are likely be accompanied by other statements that qualify as admissions? Isn't the sense that "I may have been wrong" the inducement for making the humanitarian proposal? Isn't that "sense" also what drives parties through their lawyers to want to settle their cases? Why then protect such statements if made by a lawyer at a settlement conference ("Look, my client admits that it may have been his fault.") but not by the defendant if made at the scene of the accident?

With regard to my availability for a meeting, I will be here the balance of the summer and all of the academic year. I will be tied up preparing for a conference in late September. Why don't we get together after that? Give me a call at 723-0613.

Best regards.

From the Chambers of
Judge Carlos Bea

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September 18, 1997

California Law Revision Commission
4000 Middlefield Road, Room D-1
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With respect of your proposed changes in the law regarding settlement negotiations' discovery and proof, a few comments:

1. Proposed Sec. 1131 attempts to *limit* Discovery and Proof of settlement negotiations. Does it?

- (b)(1) requires the party requesting disclosure "*makes a specific showing...*".

What does that mean? Does that include an offer of proof at a deposition when a witness refuses to answer a question? The language is imprecise.

Better it should read: "The party requesting disclosure, upon noticed motion, proves by [take your choice] a preponderance of the evidence/ clear and convincing evidence, that...."

The "showing" language is redolent of disparate impact discrimination cases in which imprecise language has caused enough problems. Please don't repeat it here.

- (b)(1)-(5) sets up an altogether too malleable or flexible standard and frankly includes elements which should not be the subject of an adversary proceeding where participants are treated equally.

For instance, take subsection (4).

What is the objective content of the phrase "..needs of the case..."? Does the case have a life of its own? I would have thought the case is what the parties make it to be. When a judge imbues the case with "needs", he gives it a reason for being outside of the striving of the parties. In an adversary system, is that wise?

If "..needs of the case..."simply means the desires of a party, it is superfluous and possibly misleading.

Second, what does "..the parties resources.." have to do with whether something otherwise privileged is discoverable? Do settlement negotiations become discoverable by a litigant in *propria persona* but not by the Government or a large corporation? This seems incompatible with the concept that parties are equal before the law.

Third, does "..the amount in controversy..." affect whether settlement negotiations should be uncovered? How? If it is a "really big" claim, is discovery granted? Or, vice versa? What is "really big"? For that matter, what is vice versa?

Conclusion.

You are on the right track in attempting to grant greater, categorical confidentiality to settlement negotiations.

Why not use the developed case law of Federal attorney work product [*Hickman v Taylor*; FRCP Rule 26] as a guide?

As I remember it, an attorney's "work product" was *not* absolutely privileged from discovery and proof, as were attorney-client communications. The movant for discovery or the offeror in proof of such "work product" had to satisfy a rigorous standard: the evidence was relevant but otherwise *unavailable*. It was insufficient merely to prove another method of discovery or proof would be easier, cheaper or more convenient. [1]

Thank you for giving me the opportunity of commenting.

Very truly yours,

Carlos Bea
Judge of the Superior Court

callawrv.1131

[1]. Considerations that would be relevant under your proposed Sec. 1131 (b)(1)-4).

LITIGATION SECTION
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November 15, 1996

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California Law Revision Commission
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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)