Study K-410 March 17, 1998

First Supplement to Memorandum 98-14

Protecting Settlement Negotiations:
Comments of Professor David Leonard

Professor David Leonard of Loyola Law School has provided comments (Exhibit pp. 1-3) on the staff draft attached to Memorandum 98-14.

Professor Leonard "disagree[s] with the Commission's view that evidence of compromise should be shielded from discovery and subject to a privilege, rather than simply excluded at trial." (Exhibit p. 1.) He fears that "creating a privilege encompassing compromise evidence, and making such evidence undiscoverable, would go further than is necessary to encourage settlement." (Exhibit p. 2.)

Professor Leonard does not support the middle-ground approach taken in the draft, in which evidence of settlement negotiations would only be privileged and barred from discovery pursuant to an explicit written agreement of the parties:

> One obvious problem is that it will operate in favor of the more sophisticated parties represented by counsel aware of the rules and acting to protect clients to the fullest extent possible. Persons not yet represented by counsel, or represented by less sophisticated counsel, often will be unaware of the opportunity to protect compromise evidence in this more expansive way.
> [Exhibit p. 2.]

According to Professor Leonard, the availability of this greater protection will also provide "additional points of friction between the parties that might undermine the goal of encouraging efforts at compromise." (*Id.*)

Finally, Professor Leonard reiterates his sentiment that the rule for settlement negotiations should follow an "inclusionary" approach (making such evidence admissible except for certain purposes) instead of an "exclusionary" approach (making such evidence inadmissible except for certain purposes). "The advantage of the inclusionary approach is that it is not necessary to articulate in advance all possible purposes for which the evidence may be admitted." (Exhibit p. 3.)

Respectfully submitted,

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LOYOLA LAW SCHOOL

March 17, 1998

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Re: Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

Thank you for sending me a copy of Memorandum 98-14, dealing with confidentiality of settlement negotiations. I have had a chance to review it, and would like to make a few comments about the Commission's tentative position, taken at its last meeting, that compromise evidence should be privileged and barred from discovery. (I also have a comment about the general form of the currently proposed rule.) Please excuse any inelegance in this letter, which I have written in a hurry in order to submit my views before your March meeting.

Making compromise evidence undiscoverable and privileged:

After careful thought, I must disagree with the Commission's view that evidence of compromise should be shielded from discovery and subject to a privilege, rather than simply excluded at trial. As your memorandum clearly states, there are many reasons for the traditional rule excluding evidence of compromise (and related statements) from trial. I have little quarrel with the traditional rationales, except to note that the primary rationale, that of encouraging compromise behavior, is based on largely untested assumptions about litigative conduct. Even if empirical study were to reveal that the rule does have a favorable effect on compromise efforts, however, I think it is vitally important to remember that this and other rules of exclusion (including evidence of subsequent remedial measures, withdrawn guilty pleas, and so forth) come at the price of restricting available evidence that might help to clarify the factual record. To the extent that the exclusion of compromise evidence affects the truth-determination function of the trial, it is important to protect such evidence only so far as necessary to accomplish the policy goal.

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I fear that creating a privilege encompassing compromise evidence, and making such evidence undiscoverable, would go further than is necessary to encourage settlement. The law does not take the same steps with respect to other forms of evidence the exclusion of which is based on considerations of policy, and in the absence of empirical support for the efficacy of such a rule, I believe it is unwise to move in that direction. Unless and until there is empirical support for the *need* for such an extensive rule, I do not think it inappropriate to assume that the cost of such a broad rule is too great.

I appreciate the middle-ground approach taken in Memorandum 98-14, according to which evidence will only be privileged and barred from discovery pursuant to explicit written agreement of the parties, but I do not support this approach. One obvious problem is that it will operate in favor of the more sophisticated parties represented by counsel aware of the rules and acting to protect clients to the fullest extent possible. Persons not yet represented by counsel, or represented by less sophisticated counsel, often will be unaware of the opportunity to protect compromise evidence in this more expansive way. I also agree with Judge Brazil, quoted at page 8 of your memorandum, that the availability of this greater protection will provide additional points of friction between parties that might undermine the goal of encouraging efforts at compromise.

Finally, I am concerned that a rule of privilege raises numerous complications that do not come to mind when creating a simple rule of exclusion. Issues of waiver, effect on persons not party to the agreement, and many others lurk in the background. Without considerably more study, the scope and meaning of the privilege rule is likely to be the source of a good deal of unwanted litigation.

In sum, I believe it would be wiser for the Commission to protect efforts at compromise more in line with the practice of the federal courts and other states. Exclusion of evidence at trial can be justified, but shielding such evidence from discovery, when it would otherwise assist in developing the factual record, is considerably more difficult to support, particularly in the absence of a showing that such extensive protection is needed to serve the rule's policy goal.

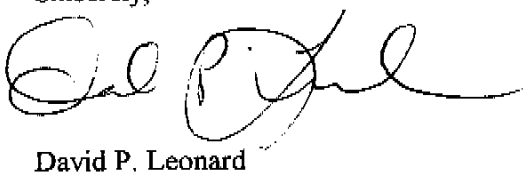
The form of the proposed rules:

As I believe I have stated in the past, I am a bit troubled by the general approach of a basic rule of exclusion followed by a series of specific exceptions (what might be called an "exclusionary" approach). This differs from the approach of the Federal Rule 410, which sets forth a specific purpose for which the evidence is *not* admissible, and potentially allows it to be admitted for any other relevant purpose (an "inclusionary" approach). As the letter you received from Richard Aldrich (Chair, Civil and Small Claims Advisory Committee, Judicial Council of California) indicates, the exclusionary approach creates the risk that courts will exclude evidence that doesn't fit neatly into one of the enumerated exceptions, but which should be excluded if the basic purpose of the rule is to be fulfilled. The advantage of the inclusionary approach is that it is not necessary to articulate in

advance all possible purposes for which the evidence may be admitted. I think the latter approach is better.

I hope these comments prove helpful to the Commission as it continues to study this difficult problem. I appreciate the opportunity to provide comment.

Sincerely,



David P. Leonard
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