Study K-410 September 17, 1998

Memorandum 98-62

Admissibility, Discoverability, and Confidentiality of Settlement Negotiations: Comments on Revised Tentative Recommendation

In March, the Commission approved a revised tentative recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations. The revised tentative recommendation has since been circulated to interested persons, and the Commission has received the following comments:

After briefly summarizing the history of this study and content of the revised tentative recommendation, this memorandum discusses the comments received and offers suggestions on how to proceed. Almost every provision of the Commission's proposal has elicited some comment. We are fortunate to have these suggestions to help refine the proposal.

RECAP OF THE STUDY

This study stems from the Commission's recent work on mediation confidentiality, which culminated in the enactment of a new chapter of the Evidence Code clarifying various aspects of mediation confidentiality. Evid. Code §§ 1115-1128; *see Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996). In the course of that study, the Commission concluded that the mediation confidentiality provisions should not apply to a "settlement conference pursuant to Rule 222 of the California Rules of Court." Evid. Code § 1117(b)(2). The Commission did not otherwise determine the appropriate evidentiary protection for a judicial settlement conference or unassisted settlement negotiation, as opposed to a mediation. Rather, it decided that the rules governing admissibility and discoverability of settlement negotiations other than a mediation warranted further study. The Commission is authorized to pursue that topic by virtue of its continuing authority to study the Evidence Code. (See 1965 Cal. Stat. res. ch. 130, continued in 1998 Cal. Stat. res. ch. 91.)

Under existing law (Evidence Code Sections 1152 and 1154), evidence of an offer of compromise or other negotiation to settle a civil case is inadmissible for purposes of proving or disproving liability, but may be admissible for other purposes. This rule of admissibility applies where evidence of negotiations to settle a *civil* case is offered in the same or another *civil* case. Sections 1152 and 1154 do not apply to evidence of negotiations to settle a *criminal* case (plea bargaining), nor do they apply where evidence of negotiations to settle a civil case is offered in a *criminal* case. (See *Revised Tentative Recommendation on Admissibility, Discoverability, and Confidentiality of Settlement Negotiations* (March 1998), pp. 11-12 (hereafter, "*Revised Tentative Recommendation*").)

In 1997, after considering the topic at several meetings, the Commission circulated a proposal to repeal Sections 1152 and 1154 and replace them with a new evidentiary statute on negotiations to settle a civil case. (See *Tentative Recommendation on Protecting Settlement Negotiations* (Feb. 1997).) Under the proposed new statute, evidence of such negotiations would be inadmissible in both civil and criminal cases (subject to specified exceptions), but only if it was offered against the person seeking to compromise. The proposal also provided that evidence of settlement negotiations (other than a settlement agreement) would be subject to discovery only if certain conditions relating to the need for and value of the evidence were met.

Response to this initial proposal was light but generally favorable. Magistrate Judge Wayne D. Brazil (United States District Court, Northern District of California) commented that the Commission had "done a very handsome job of crafting … a commendable balance between legitimately competing concerns." (Memorandum 97-74, Exhibit p. 5.) He offered some specific suggestions, as did two law professors who expressed support: Professor Miguel Mendez (Stanford Law School) and Professor David Leonard (Loyola Law School). Judge Carlos Bea (Superior Court, City and County of San Francisco) also proposed some revisions, but said that the Commission was "on the right track in attempting to grant greater, categorical confidentiality to settlement negotiations." (*Id.* at Exhibit p. 8.) The State Bar Litigation Section and State Bar Committee on Administration of Justice ("CAJ") did not comment on the tentative recommendation. They did, however, express reservations about the Commission's approach earlier in the study. (*See id.* at pp. 2-3.)

Upon considering the comments on its proposal, the Commission decided to prepare and circulate a revised tentative recommendation. Like the initial proposal, this revised tentative recommendation focuses on negotiations to settle a civil case (hereafter, "settlement negotiations"), not on plea bargaining. Subject to specified exceptions, evidence of such negotiations would be inadmissible in a civil case or other noncriminal proceeding, regardless of whether it is offered against the person who attempted to compromise. With exceptions, the proposal would also make settlement negotiations confidential and protect evidence of such negotiations (other than a settlement agreement) from discovery in a noncriminal proceeding, but only where the parties agree in advance in writing that these statutory protections should apply.

The comment period on the revised tentative recommendation closed on July 31, 1998. Although further input would still be welcome, it is time for the Commission to consider the overall response to the revised proposal, and then turn to the suggestions on specific aspects of the proposal.

GENERAL REACTION TO THE REVISED TENTATIVE RECOMMENDATION

There is considerable support for the revised tentative recommendation, but the proposal also prompted some opposition and suggestions for improvement.

Support

On behalf of the San Diego County Superior Court, Presiding Judge Thomas J. Whelan comments that the Commission's proposal on settlement negotiations "appears to address all areas of concern on this subject." (Exhibit p. 35.) The Legislation Committee of the Los Angeles County Municipal Court Judges' Association (representing the judges of the 24 municipal court districts in Los Angeles County) also supports the proposal without qualification. (Exhibit p. 7.) Similarly, the Bar Association of San Francisco ("BASF") "supports the recommendation, with the exception of Section 1135(a)," which the BASF board "would like to discuss in greater detail" at its next meeting. (Exhibit p. 18.) (We have since been informed that BASF is unlikely to provide further input.)

The Los Angeles County Superior Court likewise expresses approval. While requesting one specific revision, Presiding Judge Robert W. Parkin writes:

> Generally speaking, I believe it is safe to say that the judges of the Los Angeles Superior Court are in favor of the proposal. Everyone agrees that by providing for confidentiality of settlement negotiations and limiting the admissibility of settlement discussions or evidence presented in those discussions enhances the possibilities of settlement. This is especially true where a judicial officer is involved as it is essential that all of the facts and evidence be disclosed in order to have productive negotiations.

(Exhibit p. 17.)

Importantly, although Consumer Attorneys of California ("CAOC") has significant concerns about certain aspects of the proposal, it says "there is universal agreement that settlement negotiations, and discussions during mediation, should be held confidential for all time." (Exhibit p. 25.) CAOC goes on to state:

> As a general proposition, CAOC supports the proposal to make settlement negotiations fully confidential by making them inadmissible to prove liability in a civil action. CAOC also agrees that this proposal, if enforced fairly and in good faith, will increase the likelihood of settlements in civil actions and, hopefully, settlements that will occur early enough in the litigation process to reduce substantially the soaring costs of litigation.

(Exhibit p. 31.) These comments misstate the thrust of the Commission's proposal (existing law already makes settlement negotiations inadmissible to prove

liability in a civil action), but reflect support for the policy underlying the proposed reform.

Opposition

The State Bar Committee on Administration of Justice ("CAJ") opposes the Commission's proposal:

> [M]ost of the proposal is a series of attempts to reword existing Evidence Code sections 1152 and 1154, or to codify decisional law interpreting those sections, both of which we consider unnecessary. The proposals do not eliminate uncertainties in existing law, may create new ambiguities, and will cut off discovery and admissibility of evidence that should be discoverable and admissible. CAJ continues to oppose.

(Exhibit p. 24.) CAJ raises concerns about many specific aspects of the proposal. CAJ continues to suggest use of the Missouri approach: "Under that approach, the existing standards under Evidence Code sections 1152 and 1154 would be retained, but the parties could agree to be bound by a stricter rule of confidentiality if they use a specified form of agreement." (Exhibit p. 19.)

Family Law specialist Margalo Ashley-Farrand also wrote in opposition to the Commission's proposal. She states that the reform is "unnecessary and burdensome." (Exhibit p. 8.) Her objection focuses on the requirement of a written agreement to invoke confidentiality and protection from discovery. (*Id.*) She has not raised any other objection, either in her letter or in conversation with the staff.

Perhaps most significantly, the Civil and Small Claims Advisory Committee of the Judicial Council opposes the revised tentative recommendation. (Exhibit pp. 1-6.) The committee "believes that the proposed statutory changes seem to be contrary to the basic premise of the California Evidence Code that 'all relevant evidence is admissible.'" (*Id.* at 2.) The committee "does not feel that a real problem has been demonstrated to justify such a change." (*Id.*) Rather, the committee

> believes that present law, i.e., Evidence Code sections 352 and 1152 adequately protect litigants from unauthorized disclosure of settlement discussions at trial. [The committee is] informed that some of the commissioners feel that a change is needed to encourage more candor during settlement negotiations and to encourage more settlement negotiations early in the process. The

> committee feels that based upon our experience and the experience of the judges we questioned (many of whom have participated in hundreds of settlement conferences), the protections of section 1152 when combined with the judicial discretion granted in section 352 are quite adequate to promote frank and open settlement discussions and to protect the discussions from unauthorized use by one side or the other. The committee questions the empirical basis for the perceived need for these changes. Is the need based upon a real problem that occurs with some ascertainable frequency? The committee feels it is not. Before such drastic changes are contemplated, the committee suggests that a thorough investigation be conducted by way of surveys and interviews to be certain that a problem really exists.

(*Id.*) Succinctly put, "the committee feels that there is insufficient evidence that the proposed statutory changes would result in increased candor, which seems to be the basis for the commission's recommendations." (*Id.* at 5.) The committee also considers "the corollary to be true: there is a lack of any empirical evidence that current law, i.e., sections 352 and 1152, is inadequate to take care of any perceived problem that may currently exist." (*Id.*)

Other

The California Dispute Resolution Council ("CDRC") considered the Commission's proposal but "concluded that rather than offering comment on the appropriate level of confidentiality for judicially supervised direct negotiations, CDRC should defer to the courts for guidance in making that determination." (Exhibit p. 10.) Four other commentators offered input on specific aspects of the revised tentative recommendation, without taking a clear position on the overall proposal: the San Diego law firm of Epsten & Grinnell (Exhibit pp. 12-14), the State Board of Control (Exhibit pp. 15-16), the ADR Subcommittee of the California Judges Association (Exhibit p. 11), and Judge Carlos Bea, who also commented on the Commission's initial proposal (Exhibit p. 9).

Stanford Law Professor Miguel Mendez did not comment on the revised tentative recommendation, but did comment on the staff draft that preceded the revised tentative recommendation, which was very similar. (See draft attached to Memorandum 98-14; Minutes (March 19-20, 1998), pp. 12-14.) He draws a distinction between the proposed approach to admissibility and the proposed provisions on discoverability and confidentiality. (Exhibit pp. 36-38.)

With regard to admissibility, he echoes the Commission's concern that existing law (making evidence of settlement negotiations inadmissible only for purposes of proving liability) may inhibit candor in settlement negotiations:

> [T]his limited approach might discourage parties from engaging in the candor needed to reach settlements. I have been engaging in settlement conferences lately and I do watch what I say. I don't want my statements to haunt me in the guise of impeachment. If to promote settlement I admit that I wasn't wearing my glasses at the time of the accident, my opponent can use that statement to impeach me in the event the case does not settle and at the trial I testify that I was wearing my glasses. Obviously, the statement can't be received for the truth as an "admission" or even as a "prior inconsistent statement" if we are to respect the present rules. But I am not sure that such respect might not prove ephemeral. I doubt that jurors can abide by an instruction directing them to consider the evidence only for its impeachment value. Because of this doubt, I am careful about what I say at the settlement conference. Whether that circumspection prevents an appropriate settlement is something I can only speculate about. I doubt that the empirical evidence is there, one way or the other.

(*Id.* at 36.)

He expresses mixed feelings about "the key change proposed by the Commission: excluding evidence of settlement conference statements for any purpose except those listed." (*Id.*) On balance, he supports the Commission's approach to admissibility:

> The effect of this change is to eliminate the use of settlement conferences as admissions as well as for impeachment. How I feel about this change depends on whose shoes I am wearing. I certainly don't want my words at the settlement conference to reappear at the trial under the guise of impeachment. I think that the jurors will be unable to abide by the limiting instruction and will treat them as an admission. On the other hand, I would certainly want to use my opponent's words to impeach him. I can't have it both ways, however, and on balance I guess that I prefer promoting settlements even at the expense of losing some powerful impeachment material — material that derives some of its impact precisely because the jurors may not be able to abide by the limiting instruction.

(*Id.*)

With regard to discoverability and confidentiality, however, he is not convinced that the proposed provisions "add much." (*Id.* at 38.) His concerns along these lines are discussed below, as we track through the Commission's proposal analyzing the issues that have been raised about specific provisions.

SECTION 1130. "SETTLEMENT NEGOTIATIONS" DEFINED

Both CAJ and the law firm of Epsten & Grinnell have commented on proposed Evidence Code Section 1130, which defines the term "settlement negotiations":

> 1130. As used in this chapter, "settlement negotiations" means any of the following:
>
> (a) 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.
>
> (b) Accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of a claim.
>
> (c) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an action described in subdivision (a) or (b), regardless of whether a settlement is reached or an action described in subdivision (a) or (b) occurs.
>
> (d) A settlement agreement.

(All further statutory references are to the Evidence Code, unless otherwise indicated.)

CAJ's Comments

The proposed definition of "settlement negotiations" is based on existing Evidence Code Sections 1152 and 1154. CAJ points out, however, that the proposed definition does not include the existing requirement that the offer be made "in compromise or from humanitarian motives." (Exhibit p. 20.)

CAJ objects to this approach and uses a hypothetical to illustrate its point:

> Under proposed new Section 1132(a), evidence of "settlement negotiations" as newly defined would be inadmissible. … If a party said, 'I breached my contract with you, so I am giving back your $5,000,' that statement might be admissible because it is an admission, it is not made in compromise, and the statement may not have been made for humanitarian motives. It would be inadmissible under the new proposal. It is a promise to furnish

> money to a person who has sustained loss (proposed Section 1130(a)) and would be inadmissible under proposed Section 1132(a). This broadens the existing exclusionary rule.
>
> The statement made would be excluded from evidence because the statement would be part of the new definition of 'settlement negotiations' in proposed Section 1130(c) and therefore excluded under proposed Section 1132(a), even though it is an explicit admission of liability, and even if it is not offered in compromise and is not offered for humanitarian motives. This expansion of the exclusionary concept is wrong and should be opposed. An admission of liability, plus the partial making of payments to satisfy an obligation, should not be barred from evidence. These are clear admissions of liability and should be admissible, for example, if the person who breached the contract fails to complete making restitution.

(*Id.* at 20-21.)

CAJ has identified an important omission. In dropping the phrase "in compromise," the Commission did not intend to provide evidentiary protection for conduct that was not compromise-related. (Humanitarian acts are covered by proposed new Section 1152, which CAJ has not criticized.) The whole purpose of the Commission's proposal is to promote settlement of disputes, particularly early settlements that serve the interests of all parties and conserve court resources. Where the parties agree on the validity and amount of a claim, there is nothing to compromise and no need to encourage efforts to compromise. "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." (Memorandum 98-14, Exhibit p. 1 (Prof. Leonard).)

We omitted the phrase "in compromise" from Section 1130 only because it seemed unnecessary. The new chapter on settlement negotiations would govern "the admissibility, discoverability, and confidentiality of settlement negotiations *to resolve a pending or prospective civil case*." Proposed § 1131(a) (emphasis added). Implicit in that restriction is the notion of a dispute requiring resolution. This intended limitation is perhaps too subtle, however, especially in light of situations such as the one CAJ posits, in which a civil case may be necessary to recover even though there is no dispute as to liability or amount.

The staff therefore recommends including the phrase "in compromise" in proposed Section 1130, as in existing law:

1130. As used in this chapter, "settlement negotiations" means any of the following:

(a) ~~Furnishing~~, In compromise, 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.

(b) ~~Accepting~~, In compromise, accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of a claim.

(c) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an ~~action~~ act described in subdivision (a) or (b), regardless of whether a settlement is reached or an ~~action~~ act described in subdivision (a) or (b) occurs.

(d) A settlement agreement.

Epsten & Grinnell's Comments

Epsten & Grinnell, a firm that represents homeowners and homeowner associations in construction defect litigation, comments that "the present definition of "settlement negotiations" at section 1130(a) is far too broad." (Exhibit p. 12.) "As presently worded, the definition would be interpreted to include a wide array of 'acts' and 'things' which are highly relevant to a plaintiff's case in chief, and thus the effect of your tentative recommendation would be to exclude" such acts and things. (*Id.*)

Epsten & Grinnell explains that construction defect lawsuits are usually preceded by a series of homeowner-builder discussions and attempts to cure building defects:

> The homeowner complains of leaking roofs, for example, and the builder does something or says something. The builder will tell the homeowner not to worry, everything is fine. Or, the builder will implement a "repair." The process of homeowner-builder communications and builder "customer service" actions typically lasts several months before the homeowner gets fed up and seeks legal advice.

(*Id.*) "Things said and things done by the homeowners and the builder prior to the lawsuit being filed may be relevant, indeed essential, to the homeowners' case." (*Id.*)

For example, "the plaintiff must prove that he or she provided the builder notice" of the claims. (*Id.*) Once the builder is on notice, "[t]he builder's 'repairs' frequently cover up and or exacerbate the defective construction, worsening the

property damage." (*Id.*) Even if the repair efforts do not cause further harm, they may be "highly relevant to plaintiff's case to show that the defendant's expert's proposed repair has already been implemented — by the defendant himself, prior to the lawsuit — and that it has failed." (*Id.* at 13.) Evidence of promised or attempted repairs may also be relevant to rebut a statute of limitations defense. (*Id.*)

Epsten & Grinnell warns that the Commission's proposal may be interpreted to exclude these types of evidence, as well as similar prelitigation evidence in other areas of practice. (*Id.*) "[T]here needs to be some form of exception to the absolute inadmissibility imposed in the present draft and/or a more narrow definition of settlement negotiations." (*Id.*)

To some extent, the problem Epsten & Grinnell identifies already exists. In applying Section 1152 and the corresponding federal provision (Federal Rule of Evidence 408), courts have struggled to define how much of a dispute is necessary to trigger the statutory protection. There are many different approaches, such as applying the rule where:

> • the party whose statements are offered reasonably contemplated that litigation might be necessary
>
> • the parties have reached a stage of disagreement and both sides know that litigation is a clear possibility
>
> • a party has threatened litigation
>
> • a lawsuit is on file

See generally Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 Hastings Law Journal 955, 960-66 (1988). The leading California decision is a construction defect case in which the court stated:

> By March 8, 1965, the parties *had reached a stage of clear disagreement on the crucial question* whether plaintiff was entitled to a change order. Anything said in negotiations after that date could not be admitted under the rule of practical construction; it remained subject to exclusion under Evidence Code section 1152.

Warner Construction Corp. v. City of Los Angeles, 2 Cal. 3d 285, 297, 85 Cal. Rptr. 444, 466 P.2d 996 (1970) (emphasis added).

Early in this study, the Commission decided not to attempt to provide statutory guidance on this point in this reform:

> 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 the issue in the future.

(Memorandum 96-59, p. 2.) As Epsten & Grinnell point out, however, our reform would exacerbate the problem of defining settlement negotiations. Under the Commission's proposal, evidence of such negotiations would be inadmissible for any purpose (unless an exception applies), whereas now it is only inadmissible to prove liability. (Exhibit p. 13.)

The staff recommends a number of steps to address the concerns raised by Epsten & Grinnell. **First, we would make explicit that giving notice of a problem, without more, is not settlement negotiations.** Negotiations cannot occur until both sides know that a problem exists. **We would therefore revise proposed Section 1130 along the following lines:**

> 1130. (a) As used in this chapter, "settlement negotiations" means any of the following:
>
> ~~(a)~~ (1) ~~Furnishing,~~ In compromise, 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.
>
> ~~(b)~~ (2) ~~Accepting,~~ In compromise, accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of a claim.
>
> ~~(c)~~ (3) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an action described in subdivision (a) or (b), regardless of whether a settlement is reached or an action described in subdivision (a) or (b) occurs.
>
> ~~(d)~~ (4) A settlement agreement.
>
> (b) "Settlement negotiations" does not include mere notification of the existence or nature of a problem.
>
> **Comment.** ~~Subdivision (a)~~ Paragraph (a)(1) of Section 1130, along with ~~subdivision (c)~~ paragraph (a)(3), is comparable to former Section 1152. ~~Subdivision (b)~~ Paragraph (a)(2), along with ~~subdivision (c)~~ paragraph (a)(3), is comparable to former Section 1154.
>
> ~~Subdivision (d)~~ Paragraph (a)(4) makes explicit that, for purposes of this chapter, a reference to settlement negotiations includes a settlement agreement. For an important exception, see Section 1133 (confidentiality and discoverability of settlement negotiations), which makes clear that this chapter does not expand

or limit existing law on confidentiality or discovery of a settlement agreement.

Subdivision (b) expressly differentiates between providing notice of a problem and negotiating a resolution. Where a document combines notification of a problem with a settlement offer, the notification may be admissible while the settlement offer is subject to exclusion under Section 1132 (admissibility of settlement negotiations). Under these circumstances, it may be appropriate to introduce the document with the settlement offer redacted.

For protection of settlement negotiations, see Sections 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations).

This revision combines the "in compromise" limitation suggested by CAJ with addition of a new subdivision on notice. The "in compromise" limitation reinforces the concept that notice, by itself, is not settlement negotiations.

Second, we would revise proposed Section 1131(a) to incorporate the *Warner* requirement of "clear disagreement on the crucial question":

1131. (a) This chapter governs the admissibility, discoverability, and confidentiality of settlement negotiations to resolve a pending ~~or prospective~~ civil case or a prospective civil case in which the parties have reached clear disagreement on the crucial question.

….

Comment. Section 1131 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 (1997). This chapter is made applicable to administrative adjudication by Government Code Section 11415.60. The requirement of "clear disagreement on the crucial question" is drawn from Warner Construction Corp. v. City of Los Angeles, 2 Cal. 3d 285, 297, 85 Cal. Rptr. 444, 466 P.2d 996 (1970).

….

This would partially address Epsten & Grinnell's concern about prelitigation communications and conduct. The staff would not go further in exempting prelitigation activity from coverage (e.g., restricting the chapter to negotiations to resolve a pending civil case), because that would undermine the objective of encouraging early, cost-effective settlements. (See *Revised Tentative Recommendation,* p. 8 & n.27.)

Importantly, where a repair effort causes harm, evidence of the effort would be admissible even if the repair effort is considered settlement negotiations under Sections 1130 and 1131. Although evidence of settlement negotiations is generally inadmissible under the Commission's proposal (proposed Section 1132(a)), evidence of harmful repair efforts would be admissible under proposed Section 1136, which provides:

> 1136. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence is introduced or relevant to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations.

The staff would point this out in the Comment to Section 1136:

> **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. See D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.7.4, at 3:98-1 (1998) ("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."). For example, evidence of sexual harassment during settlement negotiations should be admissible in an action for damages due to the harassment. Similarly, evidence of a low settlement offer should be admissible to establish an insurer's bad faith in first party bad faith insurance litigation. Likewise, where efforts to repair defective construction constitute settlement negotiations covered by this chapter, evidence of any harm resulting from those efforts would nonetheless be admissible pursuant to this section.
>
> ….

Finally, the Commission should address the statute of limitations issue. As presently drafted, Section 1136 could already be interpreted to permit introduction of evidence of settlement negotiations to rebut a limitations defense. Such evidence may be "introduced or relevant to … rebut a … defense … arising from conduct during the negotiations" (i.e., failure to file suit). **We could make this more explicit by revising Section 1136 as follows:**

> 1136. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence is introduced or relevant to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations, including a statute of limitations defense.

SECTION 1132(a). ADMISSIBILITY OF SETTLEMENT NEGOTIATIONS

Instead of making evidence of settlement negotiations inadmissible for a specified purpose or purposes, proposed Section 1132(a) would make evidence of settlement negotiations generally inadmissible in a noncriminal case:

> 1132. (a) Except as otherwise provided by statute, evidence of settlement negotiations is not admissible in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

The intent is to encourage candor in settlement negotiations and thereby promote prompt, mutually satisfactory resolution of disputes. (*Revised Tentative Recommendation,* pp. 3, 7-8 & n.27.) To our knowledge, this is a novel approach. We are not aware of any other jurisdiction using it.

CAJ criticizes the approach, arguing that it is "a substantial change in the law and … wrong." (Exhibit p. 21.) CAJ has raised this same objection before. (Memorandum 97-10, Exhibit pp. 1-2), as has the State Bar Litigation Section (First Supplement to Memorandum 96-59, Exhibit pp. 1-2) and the Judicial Council's Civil and Small Claims Advisory Committee (Memorandum 98-14, Exhibit p. 1 (concurring in the comments of the Litigation Section)). The Civil and Small Claims Advisory Committee has expanded on its previous comments, noting that "the presumption of admissibility under current law is changed to one of inadmissibility under the proposed law." (*Id.*) "The committee strongly opposes such a change." (*Id.*) The committee is satisfied with current law, under which evidence of settlement negotiations is inadmissible to prove liability and admissible for other purposes only if it satisfies the balancing test of Evidence Code Section 352. (*Id.*) The committee believes that the proposed new approach "is an unwarranted intrusion on the principle of judicial discretion." (*Id.*)

Professor David Leonard of Loyola Law School also disapproves of the proposed approach:

> [Y]ou 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.

(Second Supplement to Memorandum 96-59, Exhibit p. 1.) Professor Leonard prefers the current, inclusionary approach "because it is not necessary to articulate in advance all possible purposes for which the evidence may be admitted." (First Supplement to Memorandum 98-14, Exhibit pp. 2-3.)

The Commission has previously considered Professor Leonard's comments and the opposition of the State Bar groups and the Civil and Small Claims Advisory Committee, and decided to stick with its general rule of exclusion. As discussed above (pp. 4-7), the Commission's proposal has elicited favorable comments from the San Diego County Superior Court, the Legislation Committee of the Los Angeles County Municipal Court Judges' Association, BASF, the Los Angeles County Superior Court, CAOC, Professor Mendez, and Magistrate Judge Brazil. **In light of this support, the staff does not recommend abandoning the approach at this point.** As this study progresses, however, the Commission should bear in mind that other approaches are possible and its approach has downsides. In particular, **the Commission and other interested persons should carefully consider the proposed exceptions, to ensure that they are neither over-inclusive nor under-inclusive.** (See Memorandum 96-59, attachment pp. 13-14.)

The examples recited in CAJ's letter (Exhibit p. 21) do not trouble the staff. In *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 271 Cal. Rptr. 30 (1990), a defendant sent a letter of apology (pursuant to a settlement), which was later used to prove another defendant's liability. Under the Commission's proposal, the letter would be inadmissible. Although this would deprive the fact-

finder of some relevant evidence, that evidence amounts to embarrassing revelations (contradictions of earlier assertions) made for the purpose of achieving settlement. Using it in court, even against another defendant, may inhibit future litigants from being candid in similar situations, thus reducing the likelihood of future settlements and apologies. Exclusion would avoid this result. (If the intent in seeking an apology was to facilitate proof of liability to others, that could be achieved under Section 1140 of the Commission's proposal by having "all parties to the negotiations expressly agree in writing that the evidence may be admitted.")

CAJ also refers to *Young v. Keele*, 188 Cal. App. 3d 1090, 233 Cal. Rptr. 850 (1987), in which the court admitted evidence of post-judgment negotiations regarding the judgment debtor's ability to pay. The court held that Section 1152 did not apply, because the debtor's liability had already been established. (*Id.* at 1093 & n. 5.) The result under the Commission's proposal would be the same. The proposed chapter on settlement negotiations would apply only to a pending or prospective civil case, not a case that has been fully resolved. (Proposed § 1131.)

CAJ further says that "in administrative adjudications, arbitrations, and other noncriminal proceedings, such as those involving licensure, professional discipline, or abatement orders, evidence of compromises or attempts to compromise may be relevant to issues such as mitigation or aggravation." (Exhibit p. 21.) At this point, the staff does not know of specific situations along these lines that would be inequitably treated under the Commission's proposal. Proposed Section 1136 seems especially apropos: "Evidence of settlement negotiations is not inadmissible … under this chapter where the evidence is introduced or relevant to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations." It would help to hear of specific problems in the areas CAJ has identified, so that the Commission can consider and address them.

CAJ ends its discussion of Section 1132 by observing that "in administrative proceedings, cutting off the discoverability of how similar cases were compromised will take away from the respondents the ability to discover whether the respondents in a given case are being treated equitably." (*Id.*) Although this is a concern about discoverability, we discuss it here because it interrelates with admissibility. The concern is misplaced, because the Commission's proposal will not restrict the discoverability of how similar cases

were compromised. "Nothing in [the proposal] affects existing law on confidentiality or discovery of a settlement agreement." (Proposed § 1133(c).) If such discovery discloses inequitable treatment of similar cases, evidence of the inequity would be admissible under proposed Section 1136, as would rebuttal evidence. This result seems appropriate.

SECTION 1133(a), (b). CONFIDENTIALITY AND DISCOVERABILITY OF SETTLEMENT NEGOTIATIONS

Proposed Section 1133(b) would establish a general rule that evidence of settlement negotiations is confidential and protected from discovery:

> (b) Except as otherwise provided by statute, evidence of settlement negotiations is confidential and is not subject to discovery in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

This general rule would apply "only if the persons participating in a negotiation execute an agreement in writing, before the negotiation begins, setting out the text of this section and stating that the section applies to the negotiation." (Proposed § 1133(a)).

These provisions have prompted two opposite criticisms. Some comments say settlement negotiations should never be confidential and protected from discovery, while others say confidentiality and protection from discovery should be automatic, not contingent on execution of a written agreement.

Objections to confidentiality and non-discoverability

Professor Mendez does not see much value in insulating settlement negotiations from discovery:

> On the whole, I do not favor immunizing settlement statements from discovery. As between the parties to the lawsuit growing out of the failed settlement negotiations, I don't see what is gained. They don't need to discover what was said; they know what was said. Moreover, I don't read the Commission's proposal as immunizing from discovery topics (as opposed to statements) made at the settlement conference. If at the settlement conference I admit that my mechanic warned me that my brakes needed to be replaced, my opponent can always attempt to prove the mechanic's warning through my mechanic. She can even do it through me, so

> long as she [is] asking me what my mechanic told me as opposed to asking me what I said at the settlement conference about what my mechanic told me.
>
> The discovery provision would benefit me only if someone other than the parties at the settlement conference wants to discover what I said about what my mechanic said to me. If, as a result of bad brakes, I injured two victims, the second one would be vitally interested in any admissions I may have made in settlement negotiations with the first victim. Under the present rule, my statement about what my mechanic said to me would be discoverable but, even if discovered still would not be admissible against me as an admission of fault in the second victim's law suit against me. Just like the first plaintiff, the second plaintiff could use the statement only for some purpose other than as an admission (for example, only to impeach me). Since this is the risk that I run with the first plaintiff, I am not sure how the discovery provision really makes any difference. Most litigation, I assume, still involves only two parties.
>
> ….
>
> In light of the change proposed by the Commission, does it make sense to retain the proposed discovery (confidentiality provisions)? If the settlement conference statements cannot be used as admissions or to impeach, of what value are they to a third person who was not a part to settlement discussions? I suppose that learning about the statements could lead in some instances to some other relevant evidence, but that would depend on the issues raised in the second suit. Thus the relevance of the statements is highly contingent, and, I suppose, their discoverability unlikely. This leads me to conclude that in most cases the parties are not concerned about whether a stranger to the litigation may someday move to discover their settlement discussions. If so, much of the vitality for the discovery protections is drained.

(Exhibit pp. 37-38.)

Professor Leonard has also voiced concerns about restricting discovery of settlement negotiations:

> I don't think it is wise to restrict discovery of compromise conduct. … [T]he 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.

(Second Supplement to Memorandum 96-59, Exhibit p. 3.)

Objections to Requirement of a Written Agreement

At the other end of the spectrum, several sources question the need for a written agreement to render settlement negotiations confidential and nondiscoverable. Family law specialist Margalo Ashley-Farrand writes:

> The provision to require a written agreement before the negotiation adds an unnecessary step which may hinder settlement discussions. Please reconsider this provision. It is hard enough to get any settlement without requiring a written agreement going back and forth before discussions can even begin.

(Exhibit p. 8.) On behalf of the Los Angeles Superior Court, Presiding Judge Parkin warns that "[r]equiring parties to agree in advance could be a trap for the unwary." (Exhibit p. 17.) He points out that "it is not unusual for discussions at status and pre-trial conferences to drift into settlement discussions." (*Id.*) The ADR Subcommittee of the California Judges Association echoes this concern and "recommends that discoverability be treated the same as admissibility." (Exhibit p. 11.)

Magistrate Judge Brazil is convinced of the need to restrict discovery of settlement negotiations:

> 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.

Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal at 999. In his opinion, the policy of promoting settlements "would be seriously jeopardized if courts routinely permitted discovery of communications made in settlement discussions." (*Id.*)

He disagrees "vigorously" with CAJ's position that, aside from the protection already provided by Sections 1152 and 1154, settlement negotiations should be protected from admissibility and discovery only when the parties agree in advance to a confidentiality contract. He explains:

> For one thing, this approach would generate yet another matter about which lawyers would be constrained to negotiate before they begin 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.

(Memorandum 97-74, Exhibit p. 2.)

Analysis

In requiring a written agreement for confidentiality and non-discoverability, but making the protection against admissibility of settlement negotiations automatic, the Commission sought to reconcile competing views. (See Memorandum 98-14, pp. 7-9.) Professor Leonard is unenthusiastic about this attempted compromise:

> 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, … that the availability of this greater protection will provide additional points of friction between parties that might undermine the goal of encouraging compromise.

(First Supplement to Memorandum 98-14, Exhibit p. 2.)

On the other hand, the approach has drawn support from the San Diego Superior Court, the Legislation Committee of the Los Angeles Municipal Court Judges Association, and BASF. (See p. 4, *supra*, & Exhibit pp. 7, 18, 35.) Notably, CAOC also seems supportive. (See pp. 4-5, *supra*, & Exhibit pp. 25, 31.) While CAJ still objects to the provision on admissibility, it says that the "proposed new procedure for confidentiality and non-discoverability of settlement negotiations (but not settlement agreements) is acceptable, but it should be available, regardless of whether the persons negotiating the settlement execute the written agreement before, during or after the negotiations have begun." (Exhibit p. 22.) "The parties should be free to adopt the procedure regardless of timing, as long as it is memorialized in writing." (*Id.*)

Although there is not much empirical evidence (due in part to the difficulty in gathering such evidence), it is very widely accepted that ensuring confidentiality encourages candor that is critical to productive settlement negotiations. *See, e.g.*, Exhibit p. 17 ("Everyone agrees that by providing for confidentiality of settlement negotiations and limiting the admissibility of settlement discussions or evidence presented in those discussions enhances the possibilities of settlement.") (Los Angeles County Superior Court); Gladstone, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 Pepp. L. Rev. 237, 238 (1989) ("Full disclosure is crucial during the settlement process. Without it, parties will not entertain meaningful discussion, and far more potentially settled cases will proceed to a possibly unnecessary trial."); Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 2 Rev. of Litig. 665, 684 ("A critical component of successful settlements is confidentiality, which encourages parties to negotiate freely without the fear that statements made in an effort to settle could be used against them at some point in the future."). Allowing discovery of settlement negotiations undermines confidentiality and thus inhibits candor. Professor Mendez essentially says that this effect would be minimal under the Commission's proposal, because parties would have little reason to seek discovery of settlement negotiations, particularly if they participated in those negotiations. As Magistrate Judge Brazil points out, however, concern about

disclosure to third parties is not uncommon. Even where a dispute involves only two parties, grounds for a party to seek discovery of negotiations between the parties may exist, such as when there has been employee turnover, a change of counsel, or just differences in perception and memory of the negotiations. The staff believes that protecting settlement negotiations from discovery would have a significant effect on candor and prospects of settlement.

This is a new step, however, and caution is appropriate to ensure that the interests in promoting settlement and ascertaining truth are properly balanced. The staff does not consider Section 1133(a)'s requirement of a written agreement a satisfactory long-term approach, but rather an interim step, as in the development of mediation confidentiality. (See Memorandum 98-14, pp. 7-8.) **We could reflect this in the proposed legislation by sunsetting the requirement after an appropriate trial period.** The staff would also **(1) implement CAJ's suggestion that the parties be permitted to execute the written agreement at any time, (2) exempt judicial settlement conferences from the requirement of a written agreement, and (3) redraft the requirement such that the parties do not have to precisely recite the statute in the written agreement** (as suggested by the ADR Subcommittee of the California Judges Association (see Exhibit p. 11)). **These changes could be achieved as follows:**

§ 1132.5. Prerequisites to confidentiality and non-discoverability

1132.5 (a) Section 1133 applies only if either of the following conditions is satisfied:

(1) The persons participating in a negotiation execute an agreement in writing, setting out the substance of Section 1133 and stating that those terms apply to the negotiation, or words to that effect.

(2) The negotiation is a settlement conference pursuant to Rule 222 of the California Rules of Court.

(b) This section shall remain in effect only until January 1, 2005, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 2005, deletes or extends that date.

§ 1133. Confidentiality and discoverability of settlement negotiations

1133. Subject to Section 1132.5:

(a) ~~This section applies only if the persons participating in a negotiation execute an agreement in writing, before the negotiation begins, setting out the text of this section and stating that the section applies to the negotiation.~~

~~(b)~~ Except as otherwise provided by statute, evidence of settlement negotiations is confidential and is not subject to discovery in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

~~(c)~~ (b) This section does not apply to evidence of a settlement agreement. Nothing in this chapter affects existing law on confidentiality or discovery of a settlement agreement.

These revisions should reduce, but probably will not eliminate, opposition to the requirement of a written agreement. If at some point such opposition seems insurmountable, the Commission will need to consider eliminating the requirement altogether, or limiting this reform to admissibility. Although a reform limited to admissibility would not be as dramatic as creating a privilege for settlement negotiations, it would still promote candid negotiations, bring the law more in line with common expectations, and help prevent disingenuous use of compromise evidence. See *Revised Tentative Recommendation*, pp. 7-8.

COMMENTS TO SECTIONS 1132 AND 1133

CAJ states that "proposed Sections 1132 and 1133 are potentially misleading because there are ethical and liability limitations on the confidentiality and discoverability of both settlement negotiations and settlement agreements which do not appear in the Evidence Code." (Exhibit p. 22.) "For example, an offer, demand, or agreement by which the lawyers for one side agree not to prosecute similar claims against the defendants on behalf of other clients is prohibited." (*Id.*., citing Rule of Professional Conduct 1-500(A).) CAJ also cites statutes prohibiting confidential settlements in certain types of cases. CAJ suggests that the Comments to Sections 1132 and 1133 "include a cautionary statement." (*Id.*)

The staff agrees that revision of these Comments may be helpful. **We would modify the last paragraph of the Comment to Section 1132 along the following lines**:

> See Section 1130 ("settlement negotiations" defined). For ~~guidance on~~ the effect of this on confidentiality and discoverability of settlement negotiations, see Section 1133. Many provisions govern conduct in settlement negotiations. *See, e.g.*, Bus. & Prof. Code §§ 802 (certain settlements must be reported to licensing authorities), 6090.5(a) (attorney may be disciplined for seeking or entering into confidential settlement of claim of professional

misconduct); Cal. Rule of Professional Conduct 1-500(A) (attorney may not offer or agree to refrain from representing other clients in similar litigation, nor may attorney seek such an agreement from another attorney). For a provision on paying medical expenses or offering or promising to pay them, see Section 1152.

We also recommend similar changes in the last paragraph of the Comment to Section 1133:

For guidance on admissibility of settlement negotiations, see Section 1132. Many provisions govern conduct in settlement negotiations. *See*, *e.g.*, Bus. & Prof. Code §§ 802 (certain settlements must be reported to licensing authorities), 6090.5(a) (attorney may be disciplined for seeking or entering into confidential settlement of claim of professional misconduct); Cal. Rule of Professional Conduct 1-500(A) (attorney may not offer or agree to refrain from representing other clients in similar litigation, nor may attorney seek such an agreement from another attorney). For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152 (payment of medical or other expenses).

SECTION 1133(c). CONFIDENTIAL SETTLEMENTS

Under proposed Section 1133(c), the general rule on confidentiality and non-discoverability of settlement negotiations would not apply to evidence of a settlement agreement:

1133. (a) This section applies only if the persons participating in a negotiation execute an agreement in writing, before the negotiation begins, setting out the text of this section and stating that the section applies to the negotiation.

(b) Except as otherwise provided by statute, evidence of settlement negotiations is confidential and is not subject to discovery in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) This section does not apply to evidence of a settlement agreement. Nothing in this chapter affects existing law on confidentiality or discovery of a settlement agreement.

Comment. To promote candor in settlement negotiations, Section 1133 makes the negotiations confidential and restricts discovery of the negotiations, subject to statutory exceptions. See Section 1130 ("settlement negotiations" defined).

Under subdivision (a), a written agreement is necessary to invoke the protection of subdivision (b). If the participants execute

> the required agreement, their negotiations are confidential and protected from discovery by third parties, as well as between the participants themselves.
>
> Under subdivision (b), evidence of settlement negotiations in a pending or prospective civil case is, with limitations, confidential and not subject to discovery in that case or in any other noncriminal proceeding. This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter). For evidentiary protection of plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).
>
> Subdivision (c) makes clear that although Section 1133 restricts discovery of settlement negotiations, the provision does not apply to discovery of a settlement agreement and thus does not affect whether and to what extent the existence and terms of such an agreement may be kept confidential. For other exceptions to Section 1133, see Sections 1134-1140.
>
> ….

In preserving existing law on confidentiality and discoverability of settlement agreements, the Commission sought to avoid a controversial area. See *Revised Tentative Recommendation*, p. 11 & n. 36.

CAOC writes, however, that the Commission's proposal "presents an excellent opportunity to debate and resolve the issue of the confidentiality or non-admissibility of settlement agreements in civil cases." (Exhibit p. 32.) In a long and carefully researched letter, CAOC discusses the history and current use of confidential settlements in California. (*Id.* at 25-34.) It explains that settlement agreements "should not be shielded from public view," particularly in contexts such as employment discrimination, product liability, toxic torts, civil rights, and environmental damage. (*Id.* at 25, 32.) "CAOC strongly urges the Commission to address this issue head-on now and to modify the Proposal to include a provision for discoverability and public record of settlement agreements." (*Id.* at 32.)

Specifically, CAOC proposes that settlement agreements should be accessible to the public unless a party shows good cause for confidentiality:

> Based upon the above historical references concerning confidentiality, and the applicable standards applying to the sealing of records and confidentiality in California, there should be a strong presumption in favor of the public filing of settlement agreements which contain the terms and settlement of resolving a dispute in a civil [case] filed in the State of California. A written

> settlement agreement, or a settlement agreement recited into the record, should be accessible to the public unless good cause is established by one or both parties demonstrating why, based upon the facts and circumstances of the particular case, the settlement agreement itself should not be public.

(*Id.* at 32.) CAOC goes on to explain its proposed good cause requirement in detail. (*Id.* at 32-33.)

We could respond to these suggestions by urging CAOC to bring its own bill on these potentially controversial points. As the Commission knows from past experience, however, CAOC is powerful enough to force inclusion of such provisions in a bill at a policy committee hearing, turn the Commission's proposal into a two-year bill, or defeat the proposal outright. It is unclear what position CAOC will take if the Commission proceeds without addressing confidential settlements.

More importantly, the use of confidential settlements is an important public issue, and CAOC is a major player in legislative debate on that issue. Instead of casually asking the Commission to get involved in the area, CAOC has made the effort to explain its position at length. Also, although the area is controversial, compromises are not out of the question. For example, the Governor is expected to sign AB 2410 (Shelley), prohibiting confidentiality as to the nonfinancial terms of reacquisitions of lemon cars. Maybe the Commission, with its open and thorough study process, could make some headway as to other types of confidential settlements and thereby perform a valuable public service.

The staff recommends that the Commission take a hard look at the matter of confidential settlements at its December meeting. For that meeting, the staff would **prepare a memorandum analyzing the case law, statutes, and commentary in the area**. The staff would also **prepare a draft recommendation incorporating decisions from the September meeting on other settlement negotiation issues**. Possible approaches include:

> (1) *No study of confidential settlements.* Finalizing a recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations at the December meeting or in early 1999, without taking a position on confidential settlements (other than preserving existing law). Introducing a bill in 1999 based on that recommendation.

(2) *Separate study*. Finalizing a recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations at the December meeting or in early 1999, without taking a position on confidential settlements (other than preserving existing law). Introducing a bill in 1999 based on that recommendation. Commencing a study of confidential settlements in December, perhaps on an accelerated basis. Issuing a separate recommendation on confidential settlements, which could be the subject of a separate bill or could be combined with the first bill (if that bill is still pending).

(3) *Combined study*. Broadening the current study to include confidential settlements. Circulating a tentative proposal on confidential settlements before issuing a final recommendation. Introducing legislation implementing the Commission's recommendation in early 2000.

For the December meeting, **the staff would solicit input from CAOC and others on which of these options is preferable**. The staff **cautions against issuing a recommendation on confidentiality and discoverability of settlements without following the Commission's usual study process**. The issues are too significant and complex to slip into a recommendation without the benefit of comments on a tentative proposal.

EXCEPTIONS TO SECTIONS 1132 AND 1133

Proposed Sections 1134 through 1140 set forth exceptions to the general rules of inadmissibility (Section 1132) and confidentiality and non-discoverability (Section 1133) of evidence of settlement negotiations. CAJ comments that several of these exceptions are "awkwardly phrased as double negatives." (Exhibit pp. 22-23.)

CAJ is correct: Most of the proposed exceptions state that certain evidence is "not inadmissible" under the new chapter of the Evidence Code. Unfortunately, this phrasing is difficult to avoid. It would not be correct to say that the evidence "is admissible," because it may be subject to exclusion on different grounds (e.g., hearsay). This is a recurring problem in the Evidence Code, resulting in frequent use of the "not inadmissible" phraseology. See, e.g., Evid. Code §§ 1201, 1220-1223, 1226-1228, 1230-1231, 1235-1251, 1253-1261.

We could minimize it in the proposed chapter on settlement negotiations by rephrasing the exceptions along the following lines:

§ 1134. Evidence otherwise admissible or subject to discovery

1134. ~~Evidence~~ Sections 1132 and 1133 do not apply where evidence otherwise admissible or subject to discovery independent of settlement negotiations is ~~not made inadmissible, confidential, or protected from disclosure under this chapter solely by reason of its introduction or use in the settlement~~ introduced or used in the negotiations.

§ 1135. Partial satisfaction of undisputed claim or acknowledgment of preexisting debt

1135. ~~The following evidence is not inadmissible, confidential, or protected from disclosure under this chapter~~ Sections 1132 and 1133 do not apply to:

(a) Evidence of partial satisfaction of an asserted claim or demand made without questioning its validity where the 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 where the 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.

§ 1136. Cause of action, defense, or other legal claim arising from conduct during settlement negotiations

1136. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence~~ Sections 1132 and 1133 do not apply where evidence of settlement negotiations is introduced or relevant to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations.

§ 1137. Obtaining benefits of settlement

1137. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter~~ Sections 1132 and 1133 do not apply where either of the following conditions is satisfied:

(a) ~~The evidence~~ Evidence of settlement negotiations is introduced or is relevant to enforce, or to rebut an attempt to enforce, a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

(b) ~~The evidence~~ Evidence of settlement negotiations is introduced or is relevant to show, or to rebut an attempt to show, the existence of a settlement barring the claim that is the subject of the settlement negotiations.

§ 1138. Good faith settlement barring contribution or indemnity

1138. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence~~ Sections 1132 and 1133 do not apply where evidence of settlement negotiations is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, or is relevant to showing or rebutting an attempt to show, lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

§ 1139. Prevention of criminal act

1139. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter~~ Sections 1132 and 1133 do not apply where a participant in ~~the~~ settlement negotiations reasonably believes that introduction or disclosure of ~~the~~ evidence of the negotiations is necessary to prevent a criminal act.

§ 1140. Admissibility and disclosure by agreement of all parties

1140. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter~~ Sections 1132 and 1133 do not apply where all parties to ~~the~~ settlement negotiations expressly agree in writing that ~~the~~ specific evidence of the negotiations may be admitted or disclosed.

SECTION 1135. PARTIAL SATISFACTION OF UNDISPUTED CLAIM OR ACKNOWLEDGMENT OF PREEXISTING DEBT

Proposed Section 1135 provides:

§ 1135. Partial satisfaction of undisputed claim or acknowledgment of preexisting debt

1135. The following evidence is not inadmissible, confidential, or protected from disclosure under this chapter:

(a) Evidence of partial satisfaction of an asserted claim or demand made without questioning its validity where the 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 where the 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. Section 1135 continues former Section 1152(c) without substantive change, except that it extends the principle to discovery and confidentiality, as well as admissibility.

As reflected in the Comment, this provision would be a continuation of existing Section 1152(c), which 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.
>
> ….
>
> (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.

CAOC urges the Commission to delete proposed Section 1135. (Exhibit p. 31.) It explains:

> Consumers often enter into negotiations with a creditor without counsel and without knowledge or appreciation of their legal rights. Any negotiations or acknowledgment about the "validity" of such a debt should not be admissible in any subsequent civil action in which the consumer debtor raises legal challenges with respect to the validity or legality of the debt. For example, there are numerous provisions of the federal Fair Debt Collection Practices Act and its California counterpart, the Robbins-Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788, et seq., which provide protection for consumers involved in such arrangements or contracts. It would disserve those statutory schemes, and the protections for consumers embodied in them, to allow the creditor to make admissible settlement negotiations or the debtor's acknowledgment of the validity or existence of the debt solely for purposes of attempting to resolve it without litigation.

(*Id.*)

At the Commission's meeting on February 27, 1997, the staff suggested deletion of the provision for a different reason. As discussed earlier in this memorandum (pp. 7-13), the focus of the Commission's proposal is to promote

cost-effective and mutually beneficial settlement of disputes. Where the validity and amount of a claim are not challenged, there is no dispute, so the proposed law would not apply. The situations in proposed Section 1135 — partial satisfaction of an undisputed debt and acknowledgment of a preexisting debt — are examples of that principle. Strictly speaking, an express exception for these situations should not be necessary, because they are already beyond the scope of the proposed law. The Commission nonetheless decided to retain the exception, so as to provide clear statutory guidance on these commonly occurring situations.

Although the proposed law would not exclude evidence of partial satisfaction of an undisputed debt or acknowledgment of a preexisting debt, **there may be other grounds for excluding such evidence**. **The staff would point this out in the Comment to Section 1135**:

> **Comment.** Section 1135 continues former Section 1152(c) without substantive change, except that it extends the principle to discovery and confidentiality, as well as admissibility. Although this chapter does not exclude evidence of partial satisfaction of an undisputed debt or acknowledgment of a preexisting debt, such evidence is not necessarily admissible or subject to disclosure. There may be other bases for exclusion. See, e.g., Section 352.

CAOC seems to be suggesting an evidentiary rule based on a policy of protecting unsophisticated debtors, rather than promoting beneficial settlements. The Commission's proposal would not preclude CAOC from introducing legislation along these lines (e.g., a proposal that where a creditor communicates with a consumer debtor who is not represented by counsel, evidence that the debtor acknowledged the debt in those communications is inadmissible in any subsequent civil action in which the consumer debtor raises legal challenges with respect to the validity or legality of the debt). Such a bill is likely to draw heavy opposition from the banking community and other creditor groups, but it would not conflict with the Commission's proposal.

SECTION 1138. GOOD FAITH SETTLEMENT BARRING CONTRIBUTION OR INDEMNITY

A good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars 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). Under proposed Evidence Code Section 1138, evidence of settlement negotiations would be admissible and discoverable on the existence of a good faith settlement:

> 1138. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, or is relevant to showing or rebutting an attempt to show, lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

Judge Carlos Bea points out, however, that Code of Civil Procedure Section 877.6 "does not apply to insurers jointly liable under contract." (Exhibit p. 9; *see also Topa Ins. Co. v. Fireman's Fund Ins. Companies,*, 39 Cal. App. 4th 1331, 1338-40, 46 Cal. Rptr. 2d 516 (1995).) Thus, proposed Section 1138 "does not cover the situation often found in large insurance coverage cases: the discoverability of the settlement agreements by non-settling carriers to prove the actual value of the settlement, to prove the insured (policyholder) has fully recovered indemnity and costs and should proceed no further against other carriers." (Exhibit p. 9.) Judge Bea explains that this is the basis of *Home Ins. Co. v. Superior Court*, 46 Cal. App. 4th 1286, 54 Cal. Rptr. 2d 292 (1996), "which makes the amounts paid and the settlement fair game" for discovery. (*Id.*) He has "entered orders making the settlements and the settlement documents open to discovery for the purposes of evaluation of the settlements — especially where there are staged or contingent payments — and ha[s] been upheld on writ proceedings by the Court of Appeal and Supreme Court." (*Id.*)

Judge Bea has drawn attention to an important area. With regard to discovery of settlements by co-insurers, the Commission's proposal would not change the law. Nothing in the proposal "affects existing law on confidentiality or discovery of a settlement agreement." (Proposed § 1133(c).)

Suppose, however, a non-settling insurer discovers that the insured has fully recovered from the settling insurers. This discovery is meaningless unless the non-settling insurer can establish it in court. Under proposed Sections 1130(d) and 1132(a), evidence of "settlement negotiations" is inadmissible in a civil case and "settlement negotiations" includes a settlement agreement. As currently

drafted, none of the proposed exceptions to the general rule of inadmissibility would seem to apply. **We could take care of this problem by revising proposed Section 1137 along the following lines**:

> 1137. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where either of the following conditions is satisfied:
>
> (a) The evidence is introduced or is relevant to enforce, or to rebut an attempt to enforce, a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.
>
> (b) The evidence is introduced or is relevant to show, or to rebut an attempt to show, the existence of, or performance pursuant to, a settlement barring the claim that is the subject of the settlement negotiations.
>
> **Comment.** Section 1137 seeks to ensure that parties enjoy the benefits of settling a dispute. For background, see generally D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.1, at 3:124 (1998) ("[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").
>
> Under subdivision (b). a party to a settlement may introduce evidence of the settlement to show that a claim is barred. The provision also permits a non-settling defendant to show that the plaintiff has fully recovered from other parties and cannot proceed against the non-settling defendant. In both situations, evidence of settlement negotiations may be used in rebuttal.
>
> See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

Another revision is also in order. After Judge Bea sent us his comments, the Legislature passed a bill (AB 2157 (Ortiz)) essentially extending the principle of Code of Civil Procedure Section 877.6 to co-insurers in pollution cases. New Code of Civil Procedure Section 877.7 would provide in part:

> 877.7. …(b) Where a successive or concurrent insurer settles with its insured as a partial settlement of the claims made against that insured in a pollution claim, and where that insurer obtains the insured's written consent to do so, that settling insurer may make an application in the court in which the pollution claim is pending for an order determining that the partial settlement is a good faith and reasonable approximation of the liability of the settling insurer

for the claims asserted against the insured in the pollution claim. ….

(d) Where the court determines, in the exercise of its discretion and based on all of the relevant factors, that the settling insurer's settlement is a good faith and reasonable approximation of its liability for the damages claimed against the insured in the pollution claim, the court shall issue the requested order. If that good faith settlement order is issued by the court, the settling insurer shall thereafter be relieved of any and all claims for equitable indemnity, contribution, or subrogation made by successive or concurrent insurers with respect to defense for and indemnity of the pollution claim. ….

The bill is awaiting the Governor's signature.

If AB 2157 is signed, proposed Section 1138 should be revised along the following lines:

1138. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence is introduced pursuant to Section 877.6 or Section 877.7 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, or is relevant to showing or rebutting an attempt to show, **good faith or** lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

Because Section 877.6(a)(2) allows a settling party to apply for a determination of good faith settlement, **the change shown in boldface should be made regardless of whether the pending bill becomes law**.

SECTION 1139. PREVENTION OF CRIMINAL ACT

Under proposed Section 1139, a participant in settlement negotiations may introduce or disclose evidence of the negotiations if the participant reasonably believes that this is necessary to prevent a criminal act:

§ 1139. Prevention of criminal act

1139. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where a participant in the negotiations reasonably believes that introduction or disclosure of the evidence is necessary to prevent a criminal act.

Comment. Section 1139 is drawn from Sections 956.5 (exception to attorney-client privilege where disclosure is necessary to prevent

> criminal act that the lawyer likely to result in death or substantial bodily harm) and 1024 (exception to psychotherapist-patient privilege where patient is dangerous and disclosure is necessary to prevent threatened danger).
>
> See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

As reflected in the Comment, this provision is drawn from similar but more limited exceptions to the attorney-client privilege and the psychotherapist-patient privilege.

CAJ objects to the breadth of proposed Section 1139:

> [T]his new exception is not limited to a criminal act likely to cause death or serious bodily harm. If the participant in the settlement negotiations, for example, infers that the other party to the negotiations may be in violation of a tax law, the party may disclose conduct during the settlement negotiations. This new approach is potentially dangerous to the innocent participant in settlement negotiations. Will that person now face potential (but expanded) Tarasoff liability because of the changed law?

(Exhibit p. 28.) CAJ "recommends that this section be deleted or substantially reworded." (*Id.*)

CAJ is correct that "criminal act" is a broad concept, encompassing minor tax violations and other technical regulatory breaches as well as more serious offenses. Although proposed Section 1139 is not intended as a potential basis for liability, we should not lightly dismiss CAJ's concern about the possibility of liability for failure to make a disclosure. **The staff recommends limiting the provision to felonies and revising the Comment to address liability for nondisclosure**:

> **§ 1139. Prevention of ~~criminal act~~ felony**
>
> 1139. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where a participant in the negotiations reasonably believes that introduction or disclosure of the evidence is necessary to prevent a ~~criminal act~~ felony.
>
> **Comment.** Section 1139 is drawn from Sections 956.5 (exception to attorney-client privilege where disclosure is necessary to prevent criminal act that the lawyer likely to result in death or substantial

bodily harm) and 1024 (exception to psychotherapist-patient privilege where patient is dangerous and disclosure is necessary to prevent threatened danger). The provision does not create a duty of disclosure.

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

This should serve the interest in preventing crime, while narrowing what might otherwise be a big loophole in the protection for settlement negotiations.

SECTION 1141. EXTENT OF EVIDENCE ADMITTED OR DISCLOSED

Proposed Section 1141 attempts to establish guiding principles in applying the new chapter on settlement negotiations:

§ 1141. Extent of evidence admitted or subject to disclosure

1141. (a) A court may not admit evidence pursuant to Section 1132, 1136, 1137, 1138, or 1139 where the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

(b) In ordering disclosure of evidence of settlement negotiations pursuant to Section 1136, 1137, 1138, or 1139, a court shall attempt to minimize the extent of disclosure, consistent with the needs of the case, so as to prevent chilling of candid settlement negotiations.

Comment. Subdivision (a) of Section 1141 is drawn from Section 352. Exclusion pursuant to Section 1141 is mandatory, not discretionary. To prevent unnecessary chilling of settlement negotiations, Section 1141 requires a court to minimize the scope of admitted settlement negotiation evidence. 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* D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.3, at 3:145-3:146 (1998). Under subdivision (b), the same principle applies to discovery of settlement negotiations.

CAJ comments that this provision "creates exceptions that might swallow the rules of admissibility under proposed Sections 1132, 1136, 1137, 1138, and 1139." (Exhibit p. 24.) In addition, says CAJ, these exceptions target courts:

> Each says "a court" may not or shall do something. Why single out courts? Are these standards inapplicable to administrative law or arbitrations?

(*Id.*) CAJ asserts that Section 1141 "should either be deleted or be made more explicit and more objective." (*Id.*)

Justice Aldrich (Chair of the Judicial Council's Civil and Small Claims Advisory Committee) is also dubious about proposed Section 1141(a), which incorporates the balancing test of Section 352 but makes exclusion mandatory. In conversation with the staff, he expressed concern that this approach is unworkable.

The Board of Control is likewise critical of Section 1141. The Board echoes CAJ's concern that the provision may result in exclusion of too much evidence. (Exhibit pp. 15-16.)

The Board of Control administers the Victims of Crime Program, "which reimburses eligible victims for pecuniary losses resulting directly from a crime." (*Id.*, citing Gov. Code §§ 13960 *et seq.*) "However, the program pays only for expenses for which the victim has not been and will not be reimbursed from any other source." (*Id.*) "The Board is entitled to a lien on any judgment, award or settlement received by the victim in the amount of program benefits paid on behalf of the victim." (*Id.*, citing Gov. Code § 13966.01(d).)

The Board is concerned about protecting its lien rights:

> Although a judgment, award or settlement of a victim's claim for damages resulting from the crime should not be satisfied without the Board of Control having a reasonable opportunity to perfect and satisfy its lien (Gov. Code, § 13966.01(d)), this is not always the case. There have been recent cases in which the parties to a victim's civil action have attempted to improperly negate the Board's lien interest within a confidential settlement agreement. In other cases, parties assert the confidentiality of settlement negotiations as a bar to the Board obtaining information necessary to pursue its lien.

(*Id.*)

While acknowledging that the "interest in encouraging settlement of disputes is important," the Board sees some danger that the Commission's proposal "will provide additional ammunition to those intent on obstructing the Board's ability to recoup funds." (*Id.*) Proposed Section 1136 (cause of action, defense, or other legal claim arising from conduct during settlement negotiations) "may provide some protection of the Board's interests if it would permit the discovery and admissibility of evidence from settlement negotiations that the parties intended to circumvent the Board's statutory lien rights." (*Id.*) The Board cautions, however, that proposed Section 1141 "embodies a strong policy that disfavors disclosure under section 1136." (*Id.*) "This poses a substantial risk that the policy protecting the confidentiality of settlement discussions would outweigh the public interest in protecting the viability of the Restitution Fund administered by the Board." (*Id.*) "This would permit a victim to be doubly compensated by receiving assistance from the Victims of Crime Program as well as a civil settlement." (*Id.*) The Board "respectfully request[s] that the Commission re-evaluate its proposal, or provide for disclosure of settlement negotiations where necessary for the Board to pursue a lien." (*Id.*)

The staff agrees that Section 1141 should be redrafted. As currently phrased, it emphasizes the interest in encouraging settlement without acknowledging competing interests, such as achieving justice in an individual case. **We would revise the provision to take a more balanced approach and give courts** (and other tribunals) **a greater degree of discretion:**

> **§ 1141. Role of court or other tribunal in applying chapter**
>
> 1141. In ruling on the admissibility or discoverability of evidence of settlement negotiations, the court or other tribunal shall consider whether the purpose for introducing or discovering the evidence could be served without breaching the privacy of the negotiations. The court or other tribunal shall apply this chapter to achieve justice and promote cost-effective, mutually beneficial settlements.
>
> **Comment.** Section 1141 affords a court or other tribunal a measure of discretion in applying this chapter. It permits tailoring of orders on the admissibility or discoverability of evidence of settlement negotiations, so as to achieve justice and promote cost-effective, mutually-beneficial settlements. For example, if evidence of settlement negotiations is offered to rebut a defense of laches, a court may admit evidence that ongoing potentially productive settlement negotiations occurred, while excluding the details of those negotiations. *See* D. Leonard, The New Wigmore: A Treatise

on Evidence, *Selected Rules of Limited Admissibility* § 3.8.3, at 3:145-3:146 (1998).

THE NEXT STEP

The Commission's proposal requires revisions to address the concerns that have been brought to our attention. **The staff proposes to redraft the proposal for the December meeting and present a detailed discussion and analysis of confidential settlements. We would also seek input on confidential settlements**, particularly on whether the Commission should study the area and whether such a study should be combined with the current study. After considering such input and materials, the Commission should be in a better position to resolve how to proceed with this study.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Judicial Council of California

HON. RONALD M. GEORGE
Chief Justice of California
Chair of the Judicial Council

WILLIAM C. VICKREY
Administrative Director of the Courts

Civil and Small Claims Advisory Committee
303 Second Street, South Tower
San Francisco, CA 94107-1366

HON. RICHARD D. ALDRICH
Chair

Ms. Mary E. Alexander
Mr. Albert Y. Balingit
Hon. Victor E. Bianchini
Hon Cecily Bond
Hon. Douglas Gilbert Carnahan
Ms. Jeanne Caughell
Ms. Mary Lou Des Rochers
Hon. Ralph J. Flageollet
Hon. Robert B. Freedman
Mr. Robert T. Harris
Ms. M. Melanie Howell
Hon. Jamie Jacobs-May
Hon. Owen Lee Kwong
Hon. John R. Lewis
Hon. Sharon Mettler
Ms. Jeanne Millsaps
Hon. Eileen C. Moore
Mr. Charles D. Ramey
Hon. Enrique Romero
Hon. Ronald M. Sabraw
Mr. Duke F. Wahlquist
Ms. Judith B. Warren

ADVISORY MEMBER
Hon. Norman L. Epstein

COMMITTEE STAFF
Ms. Cara Vonk
415-396-9124
Fax 415-396-9358
TDD 415-396-9288

MICHAEL BERGEISEN
General Counsel

September 14, 1998

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

Att: Ms. Barbara Gaal

Re: Proposed recommendations on confidentiality of settlement discussions

Dear Ms. Gaal:

I am writing as Chair of the Civil and Small Claims Advisory Committee of the Judicial Council of California. The views expressed in this letter are the views of that committee and are not necessarily the views of the Judicial Council.

The Civil and Small Claims Advisory Committee is a standing committee of the Judicial Council charged with the duty to "identify issues and concerns confronting the judiciary regarding civil procedure, practice, and case management, including small claims and suggest appropriate solutions and responses [to the Judicial Council]." These duties include recommending changes to rules of court, council forms, standards of judicial administration, and legislation (contemplated or pending), and recommending initiatives, pilot projects, or experiments testing new procedures or practices. (Cal. Rule of Court 1022.)

Our committee is composed of judges of the Courts of Appeal and the superior and municipal courts, court commissioners, court administrators, practicing attorneys, and legal secretaries, all of whom are appointed by the Chief Justice as chair of the Judicial Council. The depth and breadth of knowledge and experience on this committee is quite extensive.

The committee has discussed at length the proposal of the Law Revision Commission regarding the confidentiality of settlement discussions and has unanimously authorized me to write this letter to express our concerns. In early 1998, I appointed a working group from the committee to conduct an investigation and analysis of the proposals and to report back to the committee. On April 15, 1998, this working group spoke by teleconference with Ms. Barbara Gaal to express our concerns. Following further study and discussion, the committee voted unanimously to oppose the proposed changes for the reasons that follow.

First, the committee does not feel that a real problem has been demonstrated to justify such a change. It believes that present law, i.e., Evidence Code sections 352 and 1152,[1] adequately protect litigants from unauthorized disclosure of settlement discussions at trial. I am informed that some of the commissioners feel that a change is needed to encourage more candor during settlement negotiations and to encourage more settlement negotiations early in the process. The committee feels that based upon our experience and the experience of the judges we questioned (many of whom have participated in hundreds of settlement conferences), the protections of section 1152 when combined with the judicial discretion granted in section 352 are quite adequate to promote frank and open settlement discussions and to protect the discussions from unauthorized use by one side or the other. The committee questions the empirical basis for the perceived need for these changes. Is the need based upon a real problem that occurs with some ascertainable frequency? The committee feels it is not. Before such drastic changes are contemplated, the committee suggests that a thorough investigation be conducted by way of surveys and interviews to be certain that a problem really exists.

The committee believes that the proposed statutory changes seem to be contrary to the basic premise of the California Evidence Code that "all relevant evidence is admissible." [Evid. Code sec., 351.] Section 351 provides: "Except as otherwise provided by statute, all relevant evidence is admissible." Relevant evidence is defined in section 210 as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." [section 210.] Much of the remainder of the code deals with exceptions to this general rule of admissibility. The proposed statutory changes begin with the premise that whole categories of evidence are inadmissible whether relevant or not and irrespective of whether the ends of justice would be served by such exclusion. The committee feels this is an unwarranted intrusion on the principle of judicial discretion.

---

[1] All further statutory references are to the Evidence Code unless specifically indicated.

Under current law, evidence that a person has offered to settle a disputed claim as well as the amount or terms of the offer is inadmissible *to prove that person's liability* for the loss or damage claimed. [section 1152.] This section, however, does not preclude the introduction of such evidence for a purpose other than to prove the person's liability, e.g., to impeach perjured testimony introduced by one of the parties. If such evidence of a settlement offer becomes relevant to impeach the testimony of the person making the offer, the judge then must decide whether the probative value of such impeachment evidence "substantially outweighs the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice of confusing the issues or of misleading the jury." [section 352.] Only after overcoming this second test will the judge, in exercising his or her judicial discretion, admit or reject the evidence. The proposed statutes would impose an absolute ban on the introduction of such evidence. This may in certain circumstances have the effect of shielding perjured testimony. The committee asks what public policy would be served by excluding impeachment testimony just because the basis for the impeachment is a settlement negotiation.

Sections 1131 and 1141 of the proposed statutes are contrary to existing law. Instead of all relevant evidence being admissible, subject to exceptions, the proposed statutes start with the premise that all such evidence is inadmissible unless the proponent overcomes two burdens: first, showing that the evidence falls within one of the enumerated sections (i.e., 1135, 1136, 1137, 1138, or 1139) and second, overcoming a section 352 objection. Thus, the presumption of admissibility under current law is changed to one of inadmissibility under the proposed law. The committee strongly opposes such a change.

The commission's proposed recommendations seem to deal with settlement negotiations without making any distinction as to the forum for such discussions. If the forum for the settlement negotiations is a settlement conference, then the committee feels there is no need for the changes. The participants in a settlement conference are usually the lawyers for the parties and a neutral party, usually a judge. During the negotiation process the lawyers set out their sides of the case and demands and offers are made. It is not uncommon during such a conference for the judge to speak with each side privately. During such discussions, confidences are exchanged, and because of the judicial office and the fact that the other side is not present, there is every expectation of confidentiality and, as stated previously, existing law provides the safeguards to ensure it. [see sections 352 and 1152.] This procedure is sometimes referred to as a "zero sum exchange" because whatever one side receives the other side has to give up. In the

opinion of the committee, the confidences that are exchanged with the judge in a settlement conference have less to do with confidentiality and more to do with the negotiation strategy of the lawyer making the disclosure. In any event, the lawyer who is making a disclosure to the judge either privately or in the presence of the other attorney is in the best position to assess the legal impact of his or her statements.

A mediation, on the other hand, is a type of alternative dispute resolution process in which the parties are the main participants with a neutral third-party mediator. The job of the mediator is not to get one party to give up something to the other party; instead, the mediator is conducting an interest-based proceeding in which the real interests of the parties are ascertained and solutions are explored. In this process, the parties typically are the actual participants, not the attorneys.

Confidentiality in mediations is assured by the mediators and the parties themselves. In the mediation proceedings of which the committee is aware—such as, for example, the AAA—parties are required to sign a confidentiality agreement in advance. This takes care of any problems with improvident disclosure of settlement negotiations resulting from the mediation forum. Most, if not all, mediation societies and organizations of which the committee is aware, utilize similar confidentiality statements.

As to the perception that statutory revisions are necessary in order to promote more candor, the committee knows of no empirical data to support such a position. How much a party discloses in settlement discussions has much more to do with negotiating strategy than with fear of disclosure. It is very common for one side or the other to impart information to the settlement judge (the neutral) in confidence. It is a cardinal principle of settlement negotiation that the neutral steadfastly honor such confidences. If this confidence is absent, then no matter what laws are enacted, the parties will not confide in the neutral and the conference will be fruitless.

Finally, everyone would agree that it is preferable to have settlement discussions early in the litigation, but this is more a case management problem than one of confidentiality. Furthermore, the proposed changes don't necessarily encourage early settlement conferences.

Ms. Gaal has suggested that these proposed statutes are akin to the privilege statutes, but they are not. The privilege statutes came about in response to legal challenge. The proposed statutes are the result of no legal challenge of which we are aware. We are informed that other states follow the federal approach, which is similar to

existing California law. We agree with that approach and urge the commission to retain existing law in this regard.

The committee can appreciate the fact that well-meaning legal scholars, such as law professors and authors of law review articles, may have an honest belief that confidences may have been unjustly and irrelevantly introduced into a civil proceeding to the detriment of the opposing side. However, we feel, as a matter of statutory drafting, that it is a bad idea to enact statutes to address the exceptional situation. Before a law is drafted that will exclude evidence and limit judicial discretion, there should be some sort of affirmative showing that a real and recurring problem exists.

Finally, the committee feels that there is insufficient evidence that the proposed statutory changes would result in increased candor, which seems to be the basis for the commission's recommendations. We also feel the corollary to be true: there is a lack of any empirical evidence that current law, i.e., sections 352 and 1152, is inadequate to take care of any perceived problem that may currently exist.

The committee further wishes to point out that virtually every court has a court annexed settlement program in place, from which a great deal of information can be obtained. The commission could survey some of the judges who have participated in settlement negotiations to determine whether they perceive a problem. I have discussed this issue with 10 of my colleagues on the Court of Appeal, all of whom were previously trial court judges, and none of them perceives a problem in this area. I have personally conducted over 1,000 settlement conferences and I have *never* had a problem with confidentiality.

You have asked for the names of specific organizations and people to contact regarding this matter. The committee would suggest:

Consumer Attorneys of California
980 9th Street, Suite 200
Sacramento, CA 95814
Att: Don Green, Chief Legislative Counsel
Nancy Drabble, Senior Legislative Counsel

California Defense Counsel
1107 9th Street, Penthouse Suite
Sacramento, CA 95814

John J. Collins, Esq.
Collins, Collins, Muir & Traver
265 North Euclid Avenue, Suite 300
Pasadena, CA 91101

Karl Keener, Esq.
Baker, Silberberg & Keener
2850 Ocean Park Boulevard, Suite 300
Santa Monica, CA 90405

Consumer Attorneys of Los Angeles
3435 Wilshire Boulevard, Suite 2870
Los Angeles, CA 90010

Bruce Brusavich, Esq.
Agnew & Brusavich
20355 Hawthorne Boulevard
Torrance, CA 90503

Southern California Defense Counsel
888 South Figueroa, 16th Floor
Los Angeles, CA 90017

Hon. Richard Harris (retired)
Los Angeles Superior Court
1725 Main Street
Santa Monica, CA 90401

I hope these comments are helpful to the commission.

Sincerely,

Richard Aldrich

HON. RICHARD D. ALDRICH
Associate Justice of the Court of Appeal
Second Appellate District, Division Three
Chair, Civil and Small Claims
Advisory Committee

MUNICIPAL COURT JUDGES' ASSOCIATION
LOS ANGELES COUNTY, CALIFORNIA

July 1, 1998

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

Re: Study on Admissibility, Discoverability and Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

The Legislation Committee of the Los Angeles County Municipal Court Judges' Association has reviewed the study on Admissibility, Discoverability and Confidentiality of Settlement Negotiations. We support the Commission's current proposal to make evidence of settlement negotiations inadmissible, with the exceptions as specified.

We appreciate the opportunity to review and comment on these recommendations. For your information, the Judges' Association represents the judges of the 24 municipal court districts in Los Angeles County, including the Los Angeles Municipal Court.

Sincerely,

Alice E Altoon

Alice E. Altoon

7

COUNTY COURTHOUSE • 110 N. GRAND AVENUE, ROOM 620 • LOS ANGELES, CA 90012 • PHONE (213) 974-6709 • FAX (213) 680-9702

MARGALO ASHLEY-FARRAND
ATTORNEY & COUNSELOR AT LAW
215 NORTH MARENGO AVENUE, THIRD FLOOR
PASADENA, CALIFORNIA 91101-1504
626/792-4700 FAX 626/356-7414
MARGALO@WRITEME.COM

FAMILY LAW SPECIALIST
CERTIFIED BY STATE BAR OF CALIFORNIA

July 28, 1998

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Gentlepeople:

Regarding the tentative recommendation on Evidence Code Sections 1152 and 1154, I believe that the revision is unnecessary and burdensome.

The provision to require a written agreement before the negotiation adds an unnecessary step which may hinder settlement discussions. Please reconsider this provision. It is hard enough to get any settlement without requiring a written agreement going back and forth before discussions can even begin.

Thank you for your attention.

Very truly yours,

Margalo Ashley-Farrand

Margalo Ashley-Farrand

Date: Fri, 08 May 1998 09:12:23 +0200
From: Carlos Bea <cbea@ix.netcom.com>
Reply-To: cbea@ix.netcom.com
MIME-Version: 1.0
To: bgaal@clrc.ca.gov
Subject: Settlement Negotiations Privilege
X-Rcpt-To: bgaal@clrc.ca.gov

Dear Ms Gaal:

Your letter of May 5th catches me packing my bags for a trip and without much time to ponder the legislation.

However, one item jumps out at me: Sec. 1138 CCP (proposed) does not cover the situation often found in large insurance coverage cases: the discoverability of the settlement agreements by non-settling carriers to prove the actual value of the settlement, to prove the insured (policyholder) has fully recovered indemnity and costs and should proceed no further against other carriers. This is the basis of the HOME INSURANCE case (sorry I don't have the cite at hand), which makes the amounts paid and the settlement fair game for Discovery.

Of course, Sec. 877.6 CCP does not apply to insurers jointly liable under contract, because it applies only to joint tortfeasors.

This is something you should look at.

I have entered orders making the settlements and the settlement documents open to discovery for the purposes of evaluation of the settlements---especially where there are staged or contingent payments--and have been upheld on writ proceedings by the Court of Appeal and Supreme Court.

Yours,

Carlos Bea

California Dispute Resolution Council

promoting effective, accessible conflict resolution services statewide

July 15, 1998

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

Re: Law Revision Commission proposal on admissibility, discoverability, and confidentialty of settlement negotiations

Dear Ms. Gaal:

Thank you for extending to California Dispute Resolution Council ("CDRC") the opportunity to participate in the public comment process with regard to the above proposal.

Our Board of Directors considered the proposal at its June 13, 1998, meeting and, after considerable discussion, concluded that rather than offering comment on the appropriate level of confidentiality for judicially supervised direct negotiations, CDRC should defer to the courts for guidance in making that determination.

Again, thank you for the opportunity to consider this important issue.

Very truly yours,

Norman Brand
President

Administrative Offices: CDRC, P. O. Box 55020, Los Angeles, CA 90055 Phone: (213) 896-6540 Fax: (213) 627-1426

California Judges Association's ADR Subcommittee Recommendations on the California Law Revision Commission's Tentative Recommendation on Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

Wednesday, August 19,1998

The Committee recommends that discoverability be treated the same as admissibility. At page 10 line 29 the report recommends that settlement negotiations be protected from discovery only if the participants sign a written agreement before negotiations begin. The committee sees no need for the written agreement and this requirement would seem to be merely a trap for the unwary. For the same reasons, the committee recommends that subsection (a) of Section 1133 at page 16 be deleted entirely. (At the very least, line 43 should be amended to state "setting out the <u>following</u> text" so that the form agreement needs not recite 1133 (a).)

EPSTEN & GRINNELL APC
ATTORNEYS SERVING COMMUNITY ASSOCIATIONS™

555 West Beech Street, Suite 500 Tel 619.239.1704
San Diego, California 92101-2995 Tel 800.300.1704
epstenandgrinnell.com Fax 619.239.0403

ATTORNEYS AT LAW
Jon H. Epsten
Douglas W. Grinnell
James F. Darrow
Mary M. Howell
Susan Hawks McClintic
Mary Goodhue Deutsch
Thomas S. Gatlin
Shana L. Ballmer

J.W. Hanson
Craig S. Bickler
Debora M. Zumwalt
Kimberly L. Pidgeon
Antonina C. LoCoco
Luis E. Ventura
Kenneth H. Dillingham, Jr.
Vincent J. Sincek

OTHER OFFICE LOCATIONS:
Rancho Bernardo
Temecula
El Centro
Rancho Cucamonga

July 28, 1998

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

Re: Recommendation on Admissibility, Discoverability and Confidentiality of Settlement Negotiations

Dear Commission:

Please consider these comments on your revised tentative recommendation. Our firm, among other endeavors, represents homeowners and homeowner associations in construction defect litigation. We are concerned that the present definition of "settlement negotiations" at section 1130(a) is far too broad. As presently worded, the definition would be interpreted to include a wide array of "acts" and "things" which are highly relevant to a plaintiff's case in chief, and thus the effect of your tentative recommendation would be to exclude such "acts" and "things."

A Common Scenario

Construction defect lawsuits are usually preceded by a history of homeowner - builder communications and "acts" by the builder. The homeowner complains of leaking roofs, for example, and the builder does something or says something. The builder will tell the homeowner not to worry, everything is fine. Or, the builder will implement a "repair." The process of homeowner - builder communications and builder "customer service" actions typically lasts several months before the homeowner gets fed up and seeks legal advice.

The Importance of Pre-Litigation Communications and Acts

Things said and things done by the homeowners and the builder prior to the lawsuit being filed may be relevant, indeed essential, to the homeowners' case. For example, under a breach of warranty cause of action (express or implied) the plaintiff must prove that he or she provided the builder notice of his or claims. Then, once the builder is aware of the problems the "things" and "acts" of the builder may well be negligent in and of themselves. The builder's "repairs" frequently cover up and or exacerbate the defective construction, worsening the property damage. These "acts"

and "things" done on the homeowners' property are evidence of the builder's negligence. Under the present language such "acts" and "things" could be interpreted as "settlement negotiations," and thus excluded from evidence.

The builder's "acts" are frequently relevant for other reasons. In most construction defect cases the plaintiff's expert proposes a certain method for repairing the defective construction (for example, cut out the stucco around the window and install the flashing the way it should have been installed in the first place) and the defendant's expert proposes a different method of repair (superficially caulk around the window trim). In this common scenario it is highly relevant to plaintiff's case to show that the defendant's expert's proposed repair has already been implemented - by the defendant himself, prior to the lawsuit - and that it has failed. According to the present wording of the tentative recommendation, this important evidence would be inadmissible.

Another common scenario: the builder asserts the statute of limitations, claiming the plaintiff waited too long before filing suit. When the statute of limitations is asserted, evidence of the builder's pre-litigation "acts" and communications are relevant to rebut the defense. Under the present draft even this relevant evidence would be excluded.

We recognize that under existing law (Evidence Code section 1152) the example given above concerning a builder's negligent "customer service" could arguably be excluded just as it could be under the present draft. Both existing law and the tentative draft use the words "act" and "thing." Our experience is that trial courts admit such evidence nonetheless because it is understood that it is relevant "for other purposes." With respect to the other examples given above, i.e., proof of the proper method of repair and rebutting the statute of limitations defense, under the present wording this highly relevant evidence would be absolutely inadmissible (at least in the view of many trial judges). The present draft provides no exceptions for the examples given above. Sections 1134 through 1139 do not seem to address these common problems.

Surely, in the context of other types of litigation similar problems concerning pre-litigation communications and acts must exist. (Wrongful termination of employment; insurance bad faith; et al.) Hopefully, other commentators who practice in those areas will provide input. The point we would like to stress is that there needs to be some form of exception to the absolute inadmissibility imposed in the present draft and/or a more narrow definition of "settlement negotiations."

Thank you for your consideration of this letter.

Sincerely,

EPSTEN & GRINNELL, APC

Douglas W. Grinnell

DWG:dlr

cc: CAOC (Nancy Drabble and Lee Ann Tratton)
CAOC Homeowners Rights Committee

STATE OF CALIFORNIA PETE WILSON, Governor

STATE BOARD OF CONTROL
P.O. BOX 48
SACRAMENTO, CA 95812-0048

August 18, 1998

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

Re: **Admissibility, Discoverability and Confidentiality of Settlement Negotiations, Study K-410, Revised Tentative Recommendation (March 1998)**

Dear Mr. Sterling:

The Board of Control administers the Victims of Crime Program which reimburses eligible victims for pecuniary losses resulting directly from a crime. (Gov. Code, § 13960 et seq.) Eligible losses include medical expenses, out-patient mental health expenses, loss of income or support, and funeral and burial expenses. However, the program pays only for expenses for which the victim has not been and will not be reimbursed from any other source. Common reimbursement sources include insurance, workers' compensation benefits, state disability insurance benefits, and civil judgments. The program receives approximately 40,000 initial applications each year; and pays approximately $80 million on behalf of victims each year.

The Board is entitled to a lien on any judgment, award or settlement received by the victim in the amount of program benefits paid on behalf of the victim. (Gov. Code, § 13966.01(b).) The Board files about 35 new liens each month, and the outstanding liens total over $4 million.

Although a judgment, award or settlement of a victim's claim for damages resulting from the crime should not be satisfied without the Board of Control having a reasonable opportunity to perfect and satisfy its lien (Gov. Code, § 13966.01(d)), this is not always the case. There have been recent cases in which the parties to a victim's civil action have attempted to improperly negate the Board's lien interest within a confidential settlement agreement. In other cases, parties assert the confidentiality of settlement negotiations as a bar to the Board obtaining information necessary to pursue its lien.

The Commission's interest in encouraging settlement of disputes is important. However, there is some danger that the proposed confidentiality provisions will provide additional ammunition to those intent on obstructing the Board's ability to recoup funds. Proposed Evidence Code section 1136 may provide some protection of the Board's interests if it would permit the discovery and admissibility of evidence from settlement negotiations that the parties intended to circumvent the Board's statutory lien rights. However, proposed Evidence Code section 1141 embodies a strong

policy that disfavors disclosure under section 1136. This poses a substantial risk that the policy protecting the confidentiality of settlement discussions would outweigh the public interest in protecting the viability of the Restitution Fund administered by the Board. This would permit a victim to be doubly compensated by receiving assistance from the Victims of Crime Program as well as a civil settlement. We respectfully request that the Commission re-evaluate its proposal, or provide for disclosure of settlement negotiations when necessary for the Board to pursue a lien.

Thank you for you consideration of these important issues.

Sincerely,

JUDITH A. KOPEC
Sr. Staff Counsel

JAK/dah

The Superior Court
LOS ANGELES, CALIFORNIA 90012
CHAMBERS OF
ROBERT W. PARKIN
PRESIDING JUDGE

TELEPHONE
(213) 974-5562

July 8, 1998

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

Re: Law Revision Commission Study on Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

I have reviewed the proposal to limit admissibility and provide for confidentiality of settlement negotiations forwarded by you on behalf of the California Law Revision Commission. In addition, I have also discussed this proposal with other judges.

Generally speaking, I believe it is safe to say that the judges of the Los Angeles Superior Court are in favor of the proposal. Everyone agrees that by providing for confidentiality of settlement negotiations and limiting the admissibility of settlement discussions or evidence presented in those discussions enhances the possibilities of settlement. This is especially true where a judicial officer is involved as it is essential that all of the facts and evidence be disclosed in order to have productive negotiations.

While in agreement with the proposal, the one comment that seems to be in order is to question the need for having the parties agree in advance, in writing, that evidence of settlement negotiations will be inadmissible and that the discussions will remain confidential as contained in proposed Section 1133(a) of the Evidence Code. In reality, it is not unusual for discussions at status and pre-trial conferences to drift into settlement discussions. Requiring parties to agree in advance could be a trap for the unwary. The goal of the Commission can still be achieved by eliminating proposed sub-paragraph (a) of Section 1133.

Thank you for providing us with this opportunity to comment and if you need any additional information, please feel free to write or call.

Very truly yours,

Robert W. Parkin
Presiding Judge

RWP:gp

THE BAR ASSOCIATION OF SAN FRANCISCO

Law Revision Commission
RECEIVED

JUL 27 1998

File:_____

July 23, 1998

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

RE: Tentative Recommendation Concerning Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

I am writing to communicate the Bar Association of San Francisco's position on the California Law Revision Commission's March, 1998 tentative recommendation concerning settlement negotiations. The BASF board supports the recommendation, with the exception of Section 1135 (a), which we would like to discuss in greater detail at our next meeting.

Please let Joan Firestone know if you will extend the comment period to permit us to discuss Section 1135(a) at our August 12 board meeting. You can reach Ms. Firestone at 415 782-8910.

Very truly yours,

Lindbergh Porter, Jr.
President

The Merchants Exchange Building, 465 California Street, Suite 1100, San Francisco, CA 94104-1826
Telephone (415) 982-1600 • Telecopier (415) 477-2388 • Lawyer Referral Service (415) 989-1616 • www.sfbar.org

THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

TO: Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

FROM: Jerry Sapiro
Committee on Administration of Justice
State Bar of California

DATE: June 25, 1998

RE: CAJ 98-13: CALIFORNIA LAW REVISION COMMISSION REVISED TENTATIVE RECOMMENDATION ON ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS (March 19, 1998)

Recommend: **Disapprove**

Summary of Proposal:

Existing Evidence Code sections 1152 and 1154, Civil Code section 47(b), and decisional law affect the admissibility or inadmissibility of evidence of offers in compromise, negotiations for settlement, and statements made during settlement negotiations. In 1996, the Law Revision Commission published a tentative recommendation which would delete existing Evidence Code sections 1152 and 1154 and would substitute a new chapter in the Evidence Code on settlement negotiations, commencing with proposed new Section 1130.

In January, 1997, Denis Rice wrote to the Law Revision Commission on behalf of CAJ opposing the proposal and recommending, instead, that the Commission take the approach used in Missouri as described in the staff report. Under that approach, the existing standards under Evidence Code sections 1152 and 1154 would be retained, but the parties could agree to be bound by a stricter rule of confidentiality if they use a specified form of agreement.

The Law Revision Commission has now published a revised tentative recommendation, dated March, 1998. It rejects our recommended approach and would add new Sections 1130 through 1141 to the Evidence Code, repeal existing Section 1152, add a new Section 1152, and repeal Section 1154. It would also make conforming revisions to Civil Code section 1782, Code of Civil Procedure section 1775.1, Evidence Code sections 822 and 1116, Government Code section 11415.60, and an uncodified section for the operative date of the legislation.

Reasons for the Position Recommended:

When CAJ last considered this issue, we unanimously agreed that this legislation was not necessary. Except in mass tort cases, no member of CAJ had experienced a situation in which parties were reluctant to settle or to engage in settlement negotiations because of any fear that the settlement or the negotiations would be used in evidence or discoverable. When the parties have such a reluctance, they can agree to be bound by explicit agreements regarding confidentiality. If they cannot reach such an agreement, the general principles under existing Evidence Code sections 1152 and 1154 we considered to be adequate.

The proposal is opposed because, although it leaves much of the law unchanged, in three areas the changes which it advocates are undesirable. In the balance of this report, the proposed amendment to the code sections are discussed *seriatim*.

Proposed new Section 1130 would define "settlement negotiations." Existing Section 1152(a) does not define "settlement negotiations." Instead, it states that evidence is not admissible to prove liability for a loss or damage, if the evidence is:

1. Evidence that the party, in compromise or from humanitarian motives, furnished, offered, or promise to furnish to the adverse party money or something else of value as a compromise of the latter's claim of loss or damage; or

2. Evidence of the party's conduct or statements made during settlement negotiations between the parties, even though the statements would otherwise be admissible as an admission by the party or the conduct would be admissible as relevant circumstantial evidence of liability.

Proposed Section 1130(a) would change the first part of the current approach by deleting the requirement that the offer be made "in compromise or from humanitarian motives."

Under proposed new Section 1132(a), evidence of "settlement negotiations" as newly defined would be inadmissible. Thus, the prerequisites that the offer or payment was "in compromise or from humanitarian motives" has been deleted. If a party said, "I breached my contract with you, so I am giving back your $5,000," that statement might be admissible because it is an admission, it is not made in compromise, and the statement may not have been made for humanitarian motives. It would be inadmissible under the new proposal. It is a promise to furnish money to a person who has sustained loss (proposed Section 1130(a)) and would be inadmissible under proposed Section 1132(a). This broadens the existing exclusionary rule.

The statement made would be excluded from evidence because the statement would be part of the new definition of "settlement negotiations" in proposed Section 1130(c) and therefore excluded under proposed Section 1132(a), even though it is an explicit admission of liability, and even if it is not offered in compromise and is not offered for humanitarian motives. This expansion of the exclusionary concept is wrong and should be opposed. An admission of liability, plus the partial

making of payments to satisfy an obligation, should not be barred from evidence. These are clear admissions of liability and should be admissible, for example, if the person who breached the contract fails to complete making restitution.

Proposed Section 1130(b) includes in the definition of "settlement negotiations" accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of the claim. Proposed Section 1130(b) and (c) therefore tracks existing Section 1154.

Under existing law, evidence concerning settlement and compromise as defined in Evidence Code section 1152(a) is admissible if offered for a purpose other than to prove liability for or non-validity of the claim or its amount. In *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 271 Cal. Rptr. 301 (1990), a letter of apology was admitted to prove the falsity of statements in a newsletter, not to prove the liability of the apologist. In *Young v. Keeley*, 188 Cal. App. 3d 1090, 233 Cal. Rptr. 850 (1987), objections based on Evidence Code sections 1152 and 1154 were held not valid because those sections only preclude evidence of settlement offers when the evidence is offered to establish liability for the loss or damage. There, the purpose of the proceeding was to obtain information about a debtor's property for and in execution on a judgment. During examination of the judgment debtor, the plaintiff asked the defendant about the source of funds he was going to use to pay the first $25,000 he had previously agreed to pay under a defaulted agreement for payment of the judgment debt. The defendant objected, arguing that Evidence Code sections 1152 and 1154 barred any evidence of offers to settle or in compromise. The court of appeal held that the questions had to be answered. The purpose of the examination was to locate assets of the debtor, not to establish liability.

Conversely, proposed new Section 1132(a) would preclude the admission of all evidence of settlement negotiations (as defined) in any non-criminal proceeding. The implication is that evidence of settlement negotiations is no longer admissible if offered to prove something other than liability for the loss or damage. This is a substantial change in the law and is, in my opinion, wrong. The change would overturn the law.

This absolute bar is overbroad. For example, in administrative adjudications, arbitrations, and other non-criminal proceedings, such as those involving licensure, professional discipline, or abatement orders, evidence of compromises or attempts to compromise may be relevant to issues such as mitigation or aggravation. In addition, in administrative proceedings, cutting off the discoverability of how similar cases were compromised will take away from the respondents the ability to discover whether the respondents in a given case are being treated equitably. Statements made during settlement negotiations in civil cases may be relevant to issues other than liability.

Proposed new Section 1133 establishes a new procedure for confidentiality and non-discoverability. Under it, if persons participating in a negotiation sign a written agreement, before the negotiations begin, setting out the text of the section and stating that the new section applies to the negotiation, evidence of the settlement negotiations would be confidential and not subject to discovery in any non-criminal proceeding in which testimony can be compelled to be given. This new process would not protect against admissibility or discovery of attempts to plea bargain,

of a withdrawn guilty plea, or offer for civil resolution of a criminal matter are not admissible. Evidence Code sections 1153 and 1153.5 would not be changed.

The new procedure for an agreement regarding confidentiality and non-discoverability would not apply to evidence of a settlement agreement. The new law would not effect the confidentiality or discovery of a settlement agreement under both proposed Section 1132(b) and proposed Section 1133(c).

The proposed new procedure for confidentiality and non-discoverability of settlement negotiations (but not settlement agreements) is acceptable, but it should be available, regardless of whether the persons negotiating the settlement execute the written agreement before, during or after the negotiations have begun. The parties should be free to adopt the procedure regardless of timing, as long as it is memorialized in writing.

However, proposed Sections 1132 and 1133 are potentially misleading because there are ethical and liability limitations on the confidentiality and discoverability of both settlement negotiations and settlement agreements which do not appear in the Evidence Code. For example, an offer, demand, or agreement by which the lawyers for one side agree not to prosecute similar claims against the defendants on behalf of other clients is prohibited. Rule of Professional Conduct 1-500(A). The Comment should include a cautionary statement.

By excluding evidence of a settlement agreement from the scope of proposed Sections 1132 and 1133, the proposal would not block discovery in present litigation of a settlement agreement with a third party and would not overturn cases such as *Stephens v. Superior Court*, 41 Cal. App. 4th 1014, 1025, 49 Cal. Rptr. 2d 20, 26 (1996) [injunction by an out-of-state court enforcing a secrecy clause in a settlement agreement will not be given full faith and credit in California because it violates California public policy]; and *Westinghouse Electric Corp. v. Newman & Holzinger, P.C.*, 39 Cal. App. 4th 1194, 1282, 46 Cal. Rptr. 2d 151, 156 (1995) [no tort liability imposed on opposing counsel for disclosing materials obtained for discovery to a non-client in violation of a "secrecy clause." Inducing third party to bring litigation on a meritorious claim cannot be the basis for tort liability].

Proposed Sections 1132 and 1133 also would not effect the prohibition against confidentiality of a settlement of a claim of attorney's misconduct (Bus. & Prof. Code § 6090.5(a)) or of a medical doctor's liability exceeding $30,000 on a malpractice claim (Bus. & Prof. Code § 802).

Proposed Section 1134 provides that evidence of settlement negotiations that is otherwise admissible or subject to discovery is not made inadmissible, confidential, or protected from discovery solely by reason of use in settlement negotiations. Although awkwardly phrased as double negatives, it does preserve existing law.

Proposed Section 1135 continues existing Evidence Code section 1152(c), which provides that evidence of a partial satisfaction an unasserted claim, without questioning the validity of the claim, is admissible to prove validity of the claim; and that evidence that a debtor paid or promise to pay

all or a part of the debtor's preexisting debt is admissible when offered to prove the creation of a new duty on the part of the debtor or revival of the preexisting duty. This section also adds that the evidence of partial satisfaction, payment, or promise to pay is also discoverable and not confidential. This additional language is a statement of the obvious. On the other hand, this section highlights the fallacy of excluding evidence of admissions or disclosures made at or in connection with the partial satisfaction of the claim under proposed Section 1132(a), discussed *supra*.

Proposed Section 1136 would provide that evidence of settlement negotiations is not made inadmissible, confidential, or protected from disclosure if relevant to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations, themselves. The comment to the proposed section gives as an example sexual harassment which occurs during the settlement negotiations. Evidence of the negotiations would be admissible to prove the harassment claim. It also gives evidence of a "low ball" settlement offer which would become admissible to establish the bad faith of an insurer in a first party bad faith case. Presumably, this would permit discovery and admissibility of conduct during settlement negotiations necessary to prove a claim for fraud based on misrepresentations made during the settlement negotiations. The phrase "under this chapter" in proposed Section 1136 also (hopefully) avoids an implied position on whether statements made during settlement negotiations are privileged against tort liability under Civil Code section 47(b). Although awkwardly phrased as double negatives, this proposal is acceptable.

Proposed Section 1137 states an exception from inadmissibility, confidentiality, and discoverability in connection with attempts to enforce or prevent enforcement of a settlement. Again, it is stated as double negatives, but the concept restates existing law.

Proposed Section 1138 creates another exception in connection with proceedings under Code of Civil Procedure section 877.6 to prove or rebut a claim that the settlement was made in good faith. Except for the awkward double negatives, it is a restatement of existing law.

Proposed Section 1139 would create a new exception to the concept of inadmissibility, confidentiality, and discoverability "where a participant in the negotiations reasonably believes that introduction or disclosure of evidence is necessary to prevent a criminal act." Note that this new exception is not limited to a criminal act likely to cause death or serious bodily harm. If the participant in the settlement negotiations, for example, infers that the other party to the negotiations may be in violation of a tax law, the party may disclose conduct during the settlement negotiations. This new approach is potentially dangerous to the innocent participant in settlement negotiations. Will that person now face potential (but expanded) Tarasoff liability because of the changed law? CAJ recommends that this section be deleted or substantially reworded.

Proposed Section 1140 creates an exception if all parties to the negotiation expressly agree in writing that the evidence may be admitted or discovered. This is unremarkable, except for the awkward double negatives.

Proposed Section 1141 creates exceptions that might swallow the rules of admissibility under proposed Sections 1132, 1136, 1137, 1138, and 1139. Proposed Section 1141(a) would exclude evidence under those sections if the probative value of the evidence is "substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury." Proposed Section 1141(b) would require the court to minimize the extent of disclosure "so as to prevent chilling of candid settlement negotiations." These concepts are not further defined, and these exceptions may abrogate the rules of discoverability and admissibility. In addition, they target courts. Each says "a court" may not or shall do something. Why single out courts? Are these standards inapplicable to administrative law or arbitrations? If so, why? This proposal should either be deleted or be made more explicit and more objective.

In summary, most of this proposal is a series of attempts to reword existing Evidence Code sections 1152 and 1154, or to codify decisional law interpreting those sections, both of which we consider unnecessary. The proposals do not eliminate uncertainties in existing law, may create new ambiguities, and will cut off discovery and admissibility of evidence that should be discoverable and admissible. CAJ continues to oppose.

JAMES C. STURDEVANT

LINDA M. FONG
JACK P. HUG
MARK T. JOHNSON
STEVEN S. KAUFHOLD

THE STURDEVANT LAW FIRM
A PROFESSIONAL CORPORATION
475 SANSOME STREET, SUITE 1750
SAN FRANCISCO, CALIFORNIA 94111-3141

TELEPHONE
(415) 477-2410

FACSIMILE
(415) 477-2420

E-MAIL
sll2@hooked.net

August 7, 1998

VIA FACSIMILE (650) 494-1827 & REGULAR MAIL

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

Re: **California Law Revision Commission Proposal on "Admissibility, Discoverability and Confidentiality of Settlement Negotiations"**

Dear Members of the Commission:

The Board of Governors of the Consumer Attorneys of California ("CAOC") has reviewed and considered the California Law Revision Commission Proposal on "Admissibility, Discoverability and Confidentiality of Settlement Negotiations" ("Proposal"). While CAOC is in general agreement with the Proposal, it opposes any conclusion that the settlement agreement itself should remain confidential except in situations in which a good cause requirement is satisfied. There is universal agreement that settlement negotiations, and discussions during mediation, should be held confidential for all time. There is also substantial agreement that blanket "sealing" of confidentiality orders violates established public policy as well as case law and court rules in California.

I. INTRODUCTION

A. Background

Confidentiality orders are frequently sought by corporate defendants in employment discrimination cases as well as those involving product liability, toxic torts, civil rights and environmental damage. Although requests for sealing orders and stipulations for confidential settlement agreements reached in individual or multi-party cases have become routine, this appears to be a fairly recent phenomenon.[1] Many authors have recently noted that unnecessary protective

[1] See McHam, Texas Policy Research Forum, Secrecy in the Public Domain: A Report on Discovery, Protective Orders and Sealed Records (March 9, 1990) (studies show that most of

orders and secret settlements increasingly hinder the workings of the public civil justice system and threaten vital public interests.[2] Recent articles have noted a very disturbing trend toward resolving cases of legitimate public interest in secret. Investigative reports in the Washington Post, The Dallas Morning News, N.Y. Newsday, and Legal Times, among others, have documented that unnecessary secrecy exists at every stage of the process.[3]

Some cases are being filed under seal. Many more involve blanket protective orders which virtually conceal the entirety of the discovery process. In many of these cases, when damaging facts are discovered, cases are settled in secret. Although the public and the press generally have access to trials, since more than 90% of all civil cases settle in this country, private settlements and blanket confidentiality orders in the discovery process preclude much public knowledge. See Schultheis and Bryant, "Unnecessary Secrecy in Civil Litigation: Combating the Threat to Effective Self-Governance," 3 Maryland Journal of Contemporary Legal Issues," 49 (1991). All of these actions which private parties take in public cases filed in the civil justice system can have the effect of substantially impacting the public interest and the public's genuine interest in knowing the terms by which civil

---

the records now under seal in Texas are those pertaining to cases filed in since 1980).

[2] See Doggett and Mucchetti, Public Access to Public Courts: Discouraging Secrecy in the Public Interest, 69 Tex. L. Rev. 643 (1991); Bechamps, Sealed Out of Court Settlements: When Does the Public Have a Right to Know?, 66 Notre Dame L. Rev. 117 (1990); Fitzgerald, Sealed v. Sealed: A Public Court System Going Secretly Private, 6 J. Law & Pol. 381 (1990).

[3] See e.g. Walsh and Weiser, "Public Courts, Private Justice," Washington Post (October 23-26, 1998), at A1; Weiser, "Secrecy in Toxic Spill Case Assailed: Review of Xerox Settlement May Spur Legislation for Disclosure," Washington Post (March 22, 1989), at A16 (article notes that Senator Moynahan and New York state health officials were critical of a secret settlement between Xerox and two families over a toxic spill at a manufacturing plant in Webster, New York, in which trichloroethylene had leaked into the ground water); Meier, "Deadly Secrets: System Thwarts Sharing Data on Unsafe Products," N.Y. Newsday (April 24, 1998), at 3 (article describes how corporate defendants take measures to prevent information about a public safety problem from emerging out of product liability litigation); McConigle, "Secret Lawsuits Shelter Wealthy, Influential," Dallas Morning News (November 22, 1987), at A1 (first of two parts); Corboy, "Masked and Muzzled. Litigants Tell No Evil: Is this Blind Justice?" Legal Times (Jan. 8, 1990), at 27; Rushford, "Pfizer's Telltale Heart Valve," Legal Times (Feb. 26, 1990), at 1, and (March 5, 1990), at 6 (two articles dealing with secrecy about the danger of Pfizer's Shiley Heart valve).

cases are settled in this country.

B. Class Action Settlements

The one exception to private settlement agreements is the manner of resolution of class actions. In virtually every case of which CAOC is aware, the terms of the settlements in class actions are made public. Because they affect large numbers of people subject to the conduct or practice, the terms of the class action settlement agreement are widely disseminated through publication which reaches both class and non-class members as well, as well as individual notice to class members. Beyond the need in class actions to provide the terms of the settlement to those absent class members who were unaware of the litigation, there is a commonality between settlements in class actions and in individual actions. For example, class action settlements do not necessarily involve and resolve all disputes between all persons subject to the conduct or practice because the class definition is often limited to exclude many claims. Further, the terms of the class action settlement are public even though it is often the case that several or hundreds of class members "opt out" of the settlement after notice to preserve their own right to sue. If the purpose behind a secret settlement agreement is to prevent other potential plaintiffs from bringing claims, that concern would apply equally in the dissemination of notice of settlement terms in class cases to those absent class members who opt out and then bring their own actions.

For these reasons, there is no real difference between the settlements in class cases and in most individual cases. Most of the claims involve a pattern of conduct to which many individuals and consumers are subject in similar ways. What distinguishes the two dispute resolution vehicles is that in the individual case resolved by a secret settlement agreement, all potential claimants outside the lawsuit who are not affected directly by the resolution, are prevented from knowing about it, and do not receive any compensation for any harm that befell them.

C. California Precedents Involving Secrecy.

In California, there has been both decisional law and local court rules pertaining to confidentiality agreements and to the sealing of records. For example, in Champion v. Superior Court (Boccardo) (1988) 201 Cal.App.3d 777, 247 Cal.Rptr. 624, the Court of Appeal considered at some length the increasing practice in California of sealing documents furnished by the parties during the litigation. The court began its discussion by noting:

> [a] recent acceleration in requests to seal documents of this court and an increasing trend by litigants to assume that when the parties stipulate below or convince the trial court of the need for confidentiality, no showing of need must be made in [the appellate] court.
>
> 201 Cal.App.3d at 785.

The appellate court noted that the petition for a writ of mandate "was filed openly in this court." Id. Thereafter, the petitioner lodged with the Court of Appeal a set of 19 exhibits. A cover letter advised the Court of Appeal that although the petitioner did not view the exhibits as sensitive, the trial court has issued an order sealing the file and that other parties might consider the records sensitive. Id. at 785-86. As the court noted, none of the parties explained why the documents were sensitive, "but real parties said they contained 'information of a highly confidential nature which is the subject of confidential settlement agreements.'" Id. at 786. The real parties' opposition was filed together with a request that it be sealed followed by requests from amici, appendices to the amicus brief, rebuttal briefs, rebuttal declarations, replies and further supplemental declarations. "Finally, both petitioner and real parties apparently in a quandary similar to ours, filed applications for orders sealing all briefs, petitions, applications and all other pleadings filed in this case." Id.

In Estate of Hearst (1977) 67 Cal.App.3d 777, 136 Cal.Rptr. 821, the court "squarely faced the issue of whether a trial court could seal its files from public scrutiny." Champion at 786. In Estate of Hearst, the trustees of the estate of William Randolph Hearst filed a request which was granted to seal the probate file. On review, the court concluded that:

> to prevent secrecy in public affairs public policy makes public records and documents available for public inspection by newsmen and members of the general public alike.... Statutory exceptions exist ... as do judicially created exceptions, generally temporary in nature.... Clearly a court has inherent power to control its own records to protects rights of litigants before it but "where there is no contrary statute or countervailing public policy, the right to inspect public records must be freely allowed." . . .
>
> [C]ountervailing public policy might come into play as a result of events that tend to undermine individual security, personal liberty, or private property,

> where it injured the public or the public good.... 67 Cal.App.3d at 782-783 (citations omitted).

In Hearst, the Trustees had sought to seal the probate file to reduce the danger to family members from discovery of their identities, addresses and property holdings. The Trustees' request was filed a short time following the notorious kidnapping of Patricia Hearst. The trustees feared that other members of the family might be in danger. The Hearst court concluded that if the danger were established, "the court would have the power to protect the beneficiaries' interests by temporarily denying public access to those files." Id, at 784. But the court emphasized that "[c]lose and difficult factual questions may be involved in balancing the right of public access to public records against rights of the Hearst beneficiaries to be secure from possible terrorist attacks," and that the trial court possessed "limited power, exercisable under exceptional circumstances and on a showing of good cause, to restrict public access to portions of court records on a temporary basis." Id. at 785.

Finally, the court in Hearst noted that when "relief sought extends to sealing permanent court records and denial of access to court orders, rather than temporary limitation of access to evidentiary transcripts, the trial court must be careful to limit its denial of access by narrow and well-defined orders." Id.

Taking these factors into account, the court in Champion established the following standard with respect to a request to seal documents:

> Applying these principles in the appellate court setting, we conclude that a party seeking to lodge or file a document under seal bears a heavy burden of showing the appellate court that the interests of the party and confidentiality outweighs the public policy in favor of open court records. The law favors maximum public access to judicial proceeding and court records . . . Judicial records are historically and presumptively open to the public and there is an important right of access which should be closed except for compelling countervailing reasons." Pantos v. City and County of San Francisco (1984) 151 Cal.App.3d 258, 262-263, 190 Cal.Rptr. 489.
>
> Champion, 201 Cal.App.3d, at 788.

In addition, prior legislative efforts in California have considered the virtual elimination of secret settlements. SB 711 was passed by the California Legislature

in 1992. It prohibited the sealing or secrecy of settlement agreements involving claims of financial fraud, personal injury or wrongful death resulting in damages, and cases of environmental harm or damage. It provided that no part of a settlement agreement could be sealed unless there was an order entered following a hearing on a noticed motion in which good cause were demonstrated. The bill was passed by the Legislature in 1992 but vetoed the same year by Governor Wilson.

Soon after Champion was decided, the San Francisco Superior Court issued a local rule which established a strong presumption against sealing orders and record confidentiality. Most recently, in re-enacting the entire set of local court rules in 1998, the San Francisco Superior Court included Rule 10.5, entitled "Confidentiality and Protective Orders," with respect to this issue. Effective July 1, 1998, it provides essentially as follows:

1. That orders directing parties or others to comply with agreements to maintain the confidentiality of documents relating to a proceeding "are disfavored." (Rule 10.5A.2);

2. The showing requires either that the subject matter of the document is privileged under a provision of the Evidence Code or that the "disclosures would violate a personal, financial or other interest protected by law, and that such disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information." (Rule 10.5A and B);

3. Protective orders can be issued which are "designed to facilitate the expeditious production of documents during discovery, provided that the order permits counsel to designate as confidential under the terms of such order only those documents as to which counsel entertains a good faith belief that such document is entitled to confidentiality pursuant to [the above standard]." (Rule 10.5B) (emphasis added); and

4. That any sealing order shall carefully circumscribe "the sealing of only those documents, pages or ... those portions of documents or pages, which contain the information requiring confidentiality."

Thus, the spirit and imprimatur of San Francisco Superior Court Local Rule 10.5 strongly disfavors the confidentiality of documents related to a public proceeding, imposes a stringent showing of good cause and is limited to facilitate the production of documents in discovery. The spirit of this rule is in complete

harmony with the proposal set forth below.[4]

II. THE CALIFORNIA LAW REVISION COMMISSION PROPOSAL

The current Commission Proposal must be examined and considered in light of these precedents including Hearst, Champion, and the San Francisco Superior Local Rule regarding confidentiality.

As a general proposition, CAOC supports the proposal to make settlement negotiations fully confidential by making them inadmissible to prove liability in a civil action. CAOC also agrees that this proposal, if enforced fairly and in good faith, will increase the likelihood of settlements in civil actions and, hopefully, settlements that will occur early enough in the litigation process to reduce substantially the soaring costs of litigation. CAOC has the following concerns, however, with respect to several aspects of the proposal.

First, with respect to the exception that evidence of settlement negotiations is admissible to prove the validity of a claim where there is partial satisfaction of an undisputed claim or acknowledgment of a pre-existing debt, I do not agree. Consumers often enter into negotiations with a creditor without counsel and without knowledge or appreciation of their legal rights. Any negotiations or acknowledgment about the "validity" of such a debt should not be admissible in any subsequent civil action in which the consumer debtor raises legal challenges with respect to the validity or legality of the debt. For example, there are numerous provisions of the federal Fair Debt Collection Practices Act and its California counterpart, the Robbins-Rosenthal Fair Debt Collection Practices Act, Civil Code § 1788, et seq., which provide protection for consumers involved in such arrangements or contracts. It would disserve those statutory schemes, and the protections for consumers embodied in them, to allow the creditor to make admissible settlement negotiations or the debtor's acknowledgment of the validity or existence of the debt solely for purposes of attempting to resolve it without litigation. Thus, with respect to that exception, we believe it should be deleted.

---

[4]Other county Superior Courts in California have enacted similar rules. For example, by local rule, the Superior Court of San Diego County, California adopted a policy on confidentiality agreements and protective orders effective July 1, 1990. San Diego Sup. Ct. R. 6.9 (1994). The rule states that such practices are disfavored and should only be allowed when it is shown that there is a recognized right to secrecy, that disclosure would cause harm, and that secrecy is in the public interest.

Second, CAOC believes that the Proposal presents an excellent opportunity to debate and resolve the issue of the confidentiality or non-admissibility of settlement agreements in civil cases. In fact, the example contained in the proposal at page 11 provides an excellent example of why a settlement agreement, but not negotiations leading up to it, should be admissible, not as evidence of liability but as evidence of the terms by which a dispute has been resolved. The example contained in the Proposal illustrates the point. It supposes that a manufacturing plant emits a hazardous chemical in a nearby residence which sues for resulting injuries. If there is a resulting settlement agreement, negotiations leading up to it are confidential and protected from discovery and admissibility. However, because of the risk to other consumers or potential victims of the emission, the settlement agreement itself should be discoverable and admissible. It should not be admissible to prove liability, but only to prove terms and conditions of the resolution of that dispute.

There are a host of other examples which make the discoverability and admissibility of settlement agreements important. These include, by way of example, issues involving the sale of defective products, tobacco litigation, and consumer fraud. The settlement agreements reached in those cases should not be shielded from public view. CAOC strongly urges the Commission to address this issue head-on now and to modify the Proposal to include a provision for discoverability and public record of settlement agreements.

III. PROPOSED AMENDMENT TO THE PROPOSAL

Based upon the above historical references concerning confidentiality, and the applicable standards applying to the sealing of records and confidentiality in California, there should be a strong presumption in favor of the public filing of settlement agreements which contain the terms and settlement of resolving a dispute in a civil filed in the State of California. A written settlement agreement, or a settlement agreement recited into the record, should be accessible to the public unless good cause is established by one or both parties demonstrating why, based upon the facts and circumstances of the particular case, the settlement agreement itself should not be public. The following is CAOC's recommendation for the good cause requirement.

Many statutes and rules in California set forth a good cause requirement. For example, ex parte applications, motions for leave to amend complaints, and motions for relief from default (Code of Civil Procedure § 473) all impose a good cause requirement on the moving party. Typically, what "good cause" means in

the context of these motions is delineated in the case law concerning and resolving particular cases.[5] With respect to the confidentiality of court records and documents produced in discovery, San Francisco Superior Court Rule 10.5 already provides a standard -- i.e., that "disclosures would violate a personal, financial or other interest protected by law, and that such disclosure threatens to cause serious harm that outweighs the public interest in disclosure of such information." (Emphasis added). Rule 10.5A1 and 2.

This is an appropriate standard for trial judges to weigh the showings provided by one or both parties who seek to maintain the confidentiality. In order that the exemption from public disclosure of settlement agreements does not swallow up the general rule against the confidentiality of such agreements, the standard must be sufficiently strong to empower trial judges throughout California to enforce it. However, the unique or highly unusual facts of a particular case, with or without the idiosyncratic nature of one or both parties, would provide authority for a trial judge to seal a written settlement agreement in a particular case. Under the proposed standard, trial judges would not seal settlement agreements in cases in which there was evidence of a pattern of conduct or a practice by the defendant; or that other potential claimants, not subject to the dispute resolution, were treated in similar ways under the same process by the defendant, i.e. an employment discrimination policy or a plan to accomplish a reduction in force which was allegedly discriminatory and which gave rise to the individual lawsuit.

Finally, in cases involving multiple defendants in which settlements are reached by the plaintiff with less than all defendants, those settlement agreements could remain confidential until the case was actually resolved, either by settlement or by trial. Such a temporary confidentiality provision would protect the interests of the parties to the settlement and provide no incentive either to the settling parties or to the non-settling parties until the case was finally resolved in the trial court.

IV. CONCLUSION

It is important to remember that we continue to be participants in a public civil justice system. Despite encroachment on that system from many angles and by many players, and despite increasing efforts to encourage, indeed to mandate

---

[5] Motions to continue a trial date impose a list of factors or circumstances which do not constitute good cause. See Cal. Rule of Court 375 and section 9 of the Standards of Judicial Administration.

private dispute resolution in virtually all civil cases, the public record of dispute resolutions that emanate from the public civil justice system are matters of important public interest. Once a settlement agreement has been reached and documented, absent a showing of good cause as set forth above, those settlement agreements should become part of the public record, as much as the pleadings and orders are that exist in those cases. Allowing those cases to be resolved on a public record showing only a dismissal of the complaint with prejudice disserves the public interest and often enables the party engaged in the practice which led to the lawsuit to continue that practice against hundreds or thousands of other individuals.

Sincerely yours,

THE CONSUMER ATTORNEYS OF CALIFORNIA

BY: James C. Sturdevant

JCS/jpc

D:\168\1998C\L-CLRC2.168

Superior Court of California
County of San Diego
220 West Broadway, San Diego, CA 92101

Thomas J. Whelan
Presiding Judge

July 17, 1998

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

Re: Law Revision Commission Study on Admissiblity, Discoverability and Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

On behalf of the San Diego County Superior Court, I appreciate the opportunity to comment on the Commission's current proposal regarding settlement negotiations. The proposed legislation appears to address all areas of concern on this subject. I would not recommend any revisions at this time.

The Superior Court would appreciate being on your mailing list. Please direct any future correspondence to Supervising Research Attorney, Pam Estabrook, at the above address.

Very truly yours,

THOMAS J. WHELAN
Presiding Judge

TJW:mm

To: bgaal@clrc.ca.gove
From: Miguel Mendez <mmendez@leland.stanford.edu>
Subject: Settlement Conference Statements

March 18, 1998

Barbara, thanks for sending me a copy of the recommended changes to the rules protecting settlement conferences statements. Although you do not ask for my reaction, here it is anyway.

All the present rules are designed to do is prevent a party from offering the opponent's settlement conference statements as admissions. This means that the statements in theory can be received if offered to prove some other relevant purpose. Most of the "exceptions" you list are really examples of other relevant purposes. For example, when a party offers to promise to pay all or part of a preexisting debt, that statement is admissible because under the law of contracts the making of such a statement gives rise to a new legal obligation. Thus, the evidence is being offered, not as an admission, but as a species of verbal act which derives its significance and relevance from the law of contracts. To take advantage of this contract theory, the plaintiff has to offer the statement.

I don't read the Commission's proposal as changing this aspect of the present rule. The object is still to prevent the opponent from using the other party's settlement conference statements as admissions. From this perspective, Professor David Leonard's recommendation makes sense. The rule should simply bar the use of the statements as admissions. Such an approach makes clear that any other use that is still relevant would be admissible, if the evidence meets all other tests of admissibility.

I agree, however, that this limited approach might discourage parties from engaging in the candor needed to reach settlements. I have been engaging in settlement conferences lately and I do watch what I say. I don't want my statements to haunt me in the guise of impeachment. If to promote settlement I admit that I wasn't wearing my glasses at the time of the accident, my opponent can use that statement to impeach me in the event the case does not settle and at the trial I testify that I was wearing my glasses. Obviously, the statement can't be received for the truth as an "admission" or even as a "prior inconsistent statement" if we are to respect the present rules. But I am not sure that such respect might not prove ephemeral. I doubt that jurors can abide by an instruction directing them to consider the evidence only for its impeachment value. Because of this doubt, I am careful about what I say at the settlement conference. Whether that circumspection prevents an appropriate settlement is something that I can only speculate about. I doubt that the empirical evidence is there, one way or the other.

The Commission's confidentiality proposal does not solve this problem. That proposal would immunize the settlement statements from discovery. In my example, the opposing party does not have to engage in discovery. He knows what I said at the settlement conference. The only issue is whether he can use my statement to impeach me.

On the whole, I do not favor immunizing settlement statements from discovery. As between the parties to the lawsuit growing out of the failed settlement negotiations, I don't see what is gained. They don't need to discover what was said; they know what was said. Moreover, I don't read the Commission's proposal as immunizing from discovery topics (as opposed to statements) made at the settlement conference. If at the settlement conference I admit that my mechanic warned me that my brakes needed to be replaced, my opponent can always attempt to prove the mechanic's warning through my mechanic. She can even do it through me, so long as she asking me what my mechanic told me as opposed to asking me what I said at the settlement conference about what my mechanic told me.

The discovery provision would benefit me only if someone other than the parties at the settlement conference wants to discover what I said about what my mechanic said to me. If, as a result of bad brakes, I injured two victims, the second one would be vitally interested in any admissions I may have made in settlement negotiations with the first victim. Under the present rule, my statement about what my mechanic said to me would be discoverable but, even if discovered, still would not be admissible against me as an admission of fault in the second victim's lawsuit against me. Just like the first plaintiff, the second plaintiff could use the statement only for some purpose other than as an admission (for example, only to impeach me). Since this is the risk that I run with the first plaintiff, I am not sure how the discovery provision really makes any difference. Most litigation, I assume, still involves only two parties.

This brings me to the key change proposed by the Commission: excluding evidence of settlement conference statements for any purpose except those listed. The effect of this change is to eliminate the use of settlement conferences as admissions as well as for impeachment. How I feel about this change depends on whose shoes I am wearing. I certainly don't want my words at the settlement conference to reappear at the trial under the guise of impeachment. I think that the jurors will be unable to abide by the limiting instruction and will treat them as an admission. On the other hand, I would certainly want to use my opponent's words to impeach him. I can't have it both ways, however, and on balance I guess that I prefer promoting settlements even at the expense of losing some powerful impeachment material — material that derives some of its impact precisely because the jurors may not be able to abide by the limiting instruction.

In light of the change proposed by the Commission, does it make sense to retain the proposed discovery (confidentiality provisions)? If the settlement conference statements cannot be used as admissions or to impeach, of what value are they to a third person who was not a party to settlement discussions? I suppose that learning about the statements could lead in some instances to some other relevant evidence, but that would depend on the issues raised in the second suit. Thus, the relevance of the statements is highly contingent, and, I suppose, their discoverability unlikely. This leads me to conclude that in most cases the parties are not concerned about whether a stranger to the litigation may someday move to discover their settlement discussions. If so, much of the vitality for the discovery protections is drained.

So where does all this leave me? Probably in favor of the Commission's proposal. On balance excluding the use of settlement conference statements for impeachment will promote settlements even more. But I don't think I favor the discovery provisions. In light of the Commission's position against admissibility except for the purposes enumerated, I don't think the discovery provisions add much.

Barbara, I am open to more discussion. In light of my troubles last semester, I feel as though I am responding to the Commission's proposal for the first time. If you feel that more discussion would be helpful, give me a ring or drop me an email.