Study K-410 December 4, 1998

Memorandum 98-80

Confidentiality of Settlement Negotiations: Issues on Recommendation

At the September meeting, the Commission began but did not complete consideration of the comments on its revised tentative recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations. (Memorandum 98-62.) Since that meeting, we have received the following new comments:

At the December meeting, the Commission should consider these comments and the unresolved points with a view towards developing a final recommendation.

To that end, a redraft of the proposed legislation is attached to this memorandum. To facilitate review, differences between the statutory text of the revised tentative recommendation and the proposed new statutory text are shown in strikeout and underscore. We have not used strikeout and underscore in the Comments, because the extent of reorganization made this prohibitively time-consuming.

Two important issues are discussed in this memorandum: (1) The degree of dispute triggering the statutory protection for settlement negotiations, and (2) the merits of making settlement negotiations statutorily confidential, not just restricting admissibility and discoverability. A separate memorandum (Memorandum 98-82) discusses confidential settlements, a matter that was raised by the Consumer Attorneys of California (CAOC). Other points are covered in Staff Notes in the attached draft. Some of these notes are purely explanatory; others raise issues for decision. At the December meeting, we plan to discuss the issues addressed in this memorandum and in Memorandum 98-82, as well as the items marked with arrows (➡) in the Staff Notes. If other matters warrant discussion, please raise them at the meeting.

NEW COMMENTS

The ADR Subcommittee of the California Judges Association has provided clarification of its position on the Commission's proposal:

> "We review potential legislation primarily for its impact on the courts. This proposal appears to clarify some vague areas and to put into statutory form existing practices of case law. The members that reviewed the proposal generally supported it, but because of the time deadline we could not submit it to the full board for an official CJA position."

(Exhibit p. 1.)

The Commission also received a letter from attorney Bruce Brusavich, whom we contacted at the suggestion of Justice Richard Aldrich (Chair of the Judicial Council's Civil and Small Claims Advisory Committee). Mr. Brusavich agrees with the comments submitted by Justice Aldrich on behalf of the Civil and Small Claims Advisory Committee. (Exhibit p. 2.) As discussed in Memorandum 98-62 (pp. 5-6), the Civil and Small Claims Advisory Committee opposed the Commission's proposal, maintaining that no reform is necessary. Mr. Brusavich also "agree[s] with or would have nothing to add to" CAOC's comments. (Exhibit p. 2.) Unlike the Civil and Small Claims Advisory Committee, CAOC was generally supportive of the Commission's proposal, but raised two specific concerns. (See Memorandum 98-82, Exhibit pp. 1-10; Memorandum 98-62, pp. 4-5, 25-28, 30-32.) Presumably, Mr. Brusavich means to convey that he concurs in CAOC's concerns.

Finally, the Commission received a letter from Fred J. Hiestand on behalf of the Association for California Tort Reform, which arrived too late to be analyzed in this memorandum. (Exhibit pp. 3-5.) We will discuss this letter at the December meeting.

DEGREE OF DISPUTE NECESSARY TO TRIGGER STATUTORY PROTECTION

A key issue discussed but not resolved at the September meeting was how to determine whether prelitigation communications constitute "settlement negotiations" warranting protection under the Commission's proposed provisions on admissibility, discoverability, and confidentiality. In the discussion below, we recap the concerns raised, actions taken, and research requested, and then report our findings and recommendation.

Background

The revised tentative recommendation includes the following definition of "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.

The revised tentative recommendation also provides: "This chapter governs the admissibility, discoverability, and confidentiality of settlement negotiations to resolve a pending or prospective civil case." (Proposed Evid. Code § 1131(a).)

Both the State Bar Committee on Administration of Justice ("CAJ") and Epsten & Grinnell (a firm representing homeowners in construction defect litigation) criticized the proposed definition of settlement negotiations, stating that it was overly broad. See Memorandum 98-62, pp. 8-15. At the September meeting, the Commission addressed CAJ's concern by directing the staff to revise Section 1130 to "make clear that the definition of 'settlement negotiations' is limited to compromise-related conduct and statements (i.e., efforts to resolve a dispute)." (Minutes, p. 7.) The Commission also decided that Section 1131 should not attempt to summarize what the new chapter on settlement negotiations addresses. (*Id.*)

The Commission did not fully discuss the points made by Epsten & Grinnell, however, because CAOC indicated that it would try to have a construction defect lawyer attend the December meeting to provide further input on those matters. The thrust of Epsten & Grinnell's comments was that construction defect lawsuits are usually preceded by a series of homeowner-builder discussions and attempts to cure building defects, evidence of which might be excluded under the Commission's proposal. (Memorandum 98-62, pp. 10-15 & Exhibit pp. 12 -14.) The Commission considered the staff's suggestion to address this problem by

limiting the chapter on settlement negotiations to "negotiations to resolve a pending civil case or a prospective civil case in which the parties have reached clear disagreement on the crucial question." (*Id.* at 13.) That standard stems from *Warner Construction Corp. v. City of Los Angeles*, 2 Cal. 3d 285, 297, 466 P.2d 996, 85 Cal. Rptr. 444 (1970), which concerned application of Evidence Code Section 1152, the existing provision on admissibility of settlement negotiations. (Unless otherwise noted, all further statutory references are to the Evidence Code.) The Commission concluded, however, that further research on possible standards for triggering the evidentiary protection would be helpful.

Research Results

Having now more thoroughly researched the degree of dispute necessary to invoke Section 1152 and similar statutes, the staff has found little new guidance in California law. Aside from *Warner*, we are aware of one case following *Warner*, *Price v. Well Fargo Bank*, 213 Cal. App. 3d 465, 481 n.3, 261 Cal. Rptr. 735 (1989), in which the court concluded that Section 1152 was not a basis for excluding letters that "were written before any controversy had arisen as to the meaning of the loan agreements." In another case, *In re Marriage of Schoettgen*, 183 Cal. App. 3d 1, 8, 227 Cal. Rptr. 758 (1986), the court discussed *Warner* and the possibility of using a looser standard for triggering Section 1152, but did not resolve which standard was correct:

> Ordinarily, until there is a dispute, there is no controversy to negotiate. When Husband prepared his list he was in agreement with Wife as to community property ownership. If there was even a borderline "controversy," it would result from his suggested manner of dividing the property or value placed upon it. The parties had separated and were trying to avoid the cost of attorney fees. When the list was prepared the parties had not "reached a stage of clear disagreement." [*Warner*] This is so if we look only to the thoughts of the parties concerning property ownership.
>
> More realistically, Husband was preparing for a possible argument over the division of property, and thus may well have started a process of "negotiation" which brought his list within the protection of the law. "The purpose of section 1152 [is] to promote candor in settlement negotiation …." (Ibid.) We need not resolve this close question because Husband was not prejudiced by the court's ruling.

Although few California decisions discuss how much of a dispute is necessary to trigger Section 1152, federal courts have explored the issue at length in the context of the corresponding federal provision, Federal Rule of Evidence 408. "It is often difficult to determine whether an offer is made 'in compromising or attempting to compromise a claim.'" *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992). "Both the timing of the offer and the existence of a disputed claim are relevant to the determination." *Id.*; *Walsh v. First Unum Life Ins. Co.*, 982 F. Supp. 929, 931 (W.D.N.Y. 1997); *see also National Presto Industries, Inc. v. West Bend Co.*, 76 F.3d 1185, 1197 (Fed. Cir. 1996) ("exclusion of evidence under Rule 408 is limited to 'actual disputes over existing claims'").

There is some authority suggesting that only discussions after a threat of litigation are settlement negotiations covered by Rule 408; earlier interactions are mere business communications. *See Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co.*, 561 F.2d 1365, 1373 (10th Cir. 1977), *cert. dismissed*,, 434 U.S. 1052 (1978); *see also* W. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 960-66 (1988) (analyzing cases). More recent decisions "make clear that the Rule 408 exclusion applies where an actual dispute or a difference of opinion exists, rather than when discussions crystallize to the point of threatened litigation." *Affiliated Manufacturers, Inc. v. Aluminum Co. of America*, 56 F. 3d 521, 527 (3d Cir. 1995). "[T]he meaning of 'dispute' as employed in the rule includes both litigation and less formal stages of a dispute …." *Id.*

"[W]here a party is represented by counsel, threatens litigation and has initiated the first administrative steps in that litigation, any offer made between attorneys will be presumed to be an offer within the scope of Rule 408." *Pierce*, 955 F.2d at 827. Where, however, an offer is made before a clear difference of opinion is established, the rule does not apply. "A dispute arises only when a claim is rejected at the initial or some subsequent level." *S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 50 F.3d 476, 480 (7th Cir. 1995). Thus, in *Healy* Rule 408 did not apply to a statement that was made after the plaintiff claimed a price adjustment, but before the sewage authority rejected that claim:

> Had the sewage authority accepted Healy's claim for a price adjustment, no dispute would have arisen. And it follows that until the rejection of that claim, no dispute had arisen.

Id. "Thus, the 'trigger' for application of Rule 408, the existence of an actual dispute as to existing claims, appears to be whether the parties have rejected each

other's claims for performance, … or, to put it another way, whether the parties have reached a clear difference of opinion as to what performance is required." *Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388, 392 (N.D. Iowa 1998). "When this point is reached depends upon the circumstances …." *Id.*

Employment cases provide further insight. Courts have drawn a distinction between offers made contemporaneously with termination and offers made after an employee has been terminated. Offers made after termination "are inadmissible to prove liability pursuant to Rule 408." *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *see also Penny v. Winthrop-University Hospital*, 883 F. Supp. 839, 846 (E.D.N.Y. 1995); *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548, 554 (E.D. Cal. 1990). Where, however, "the employer tries to condition severance pay upon the release of potential claims, the policy behind Rule 408 does not come into play." *Cassino*, 817 F.2d at 1343; *see also Mundy v. Household Finance Corp.*, 885 F.2d 542, 546-47 (9th Cir. 1988). Rule 408

> should not be used to bar relevant evidence concerning the circumstances of the termination itself simply because one party calls its communication with the other party a "settlement offer."
>
> Such communications may also tend to be coercive rather than conciliatory.

Cassino, 817 F.2d at 1343. Whether this rule for pretermination offers applies if the employee has threatened litigation before termination is not entirely clear. *See Austin v. Cornell University*, 891 F. Supp. 740, 751 (N.D.N.Y. 1995).

Further, where a dispute exists but a party insists on full recovery instead of offering to compromise, Rule 408 may not apply:

> Although there is a difference of view between the parties as to the validity of Plaintiff's claim, no compromise negotiations or offers to settle occurred. Ms. Sandler's letter was not an offer to settle a claim, but a demand for a tenure-track faculty appointment, accompanied by a threat of legal action. …Keller's response, inviting the Plaintiff to file charges with the EEOC, was not a statement made in compromise negotiations.

Kraemer v. Franklin & Marshall College, 909 F. Supp. 267, 268 (E.D. Pa. 1995). Somewhat similarly, an unconditional offer of reinstatement has been held beyond the scope of the rule. "It is precisely because an unconditional offer of reinstatement is not made 'in compromising or attempting to compromise a

claim' that true unconditional offers of reinstatements clearly fall outside the coverage of Federal Rule of Evidence 408." *Holmes v. Marriott Corp.*, 831 F. Supp. 691, 711 (S.D. Iowa 1993). "Indeed, otherwise it would be impossible for an employer to establish that an unconditional offer of reinstatement was made." *Id.*

Recommendation

Where does all this take us? The abundance of litigation and complexity of case law on triggering Rule 408 suggests that establishing a satisfactory bright-line test for use in California would be difficult. Although the staff originally suggested codifying the standard enunciated in *Warner*, we now fear that would rigidify a judicial doctrine that may require flexibility in different contexts. **Instead of codifying *Warner*, the staff suggests referring to it in the Comment to proposed Section 1130, as shown in boldface below**:

> 1130. As used in this chapter, "settlement negotiations" means any of the following:
>
> (a) 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) 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 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.
>
> **Comment.** Subdivision (a) of Section 1130, along with subdivision (c), is comparable to former Section 1152. Subdivision (b), along with subdivision (c), is comparable to former Section 1154.
>
> Subdivision (d) makes explicit that, for purposes of this chapter, a reference to settlement negotiations includes a settlement agreement. For an important exception, see Section 1133.7 (discoverability and confidentiality of settlement agreement), which makes clear that this chapter does not expand or limit existing law on confidentiality or discovery of a settlement agreement.
>
> This 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).
>
> Mere notification of the existence or nature of a problem is not settlement negotiations within the meaning of this chapter. **For**

guidance on when discussions become settlement negotiations as opposed to business communications, see Warner Construction Corp. v. City of Los Angeles, 2 Cal. 3d 285, 297, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) (former Section 1152 was triggered where "the parties had reached a stage of clear disagreement on the crucial question whether plaintiff was entitled to a change order"). 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 general rules governing settlement negotiations, see Sections 1132 (admissibility of settlement negotiations), 1133.5 (confidentiality of settlement negotiations).

This chapter is made applicable to administrative adjudication by Government Code Section 11415.60. For mediation confidentiality, see Sections 1115-1128. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

This would provide some guidance and continue existing law, without preventing judicial consideration of alternative approaches where appropriate. It should help alleviate Epsten & Grinnell's concern about prelitigation conduct, as should two decisions made at the Commission's September meeting: (1) the insertion of language in Section 1130 ("In compromise…") expressly limiting the definition of "settlement negotiations" to compromise-related conduct and statements, and (2) the revision of the Comment to explain the distinction between settlement negotiations and notification of a problem. See also the Staff Note to proposed Section 1136 in the attached draft, which discusses additional revisions to meet Epsten & Grinnell's concerns.

STATUTORY CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

Another issue extensively discussed at the September meeting was whether to make settlement negotiations statutorily confidential, not just inadmissible and non-discoverable. In the revised tentative recommendation, execution of a written agreement is necessary to invoke the provision on discoverability and confidentiality of settlement negotiations. Several commentators, including Margalo Ashley-Farrand, the Los Angeles Superior Court, the ADR

Subcommittee of the California Judges Association, and Professor David Leonard (Loyola Law School) expressed concerns about this requirement of a written agreement. (Memorandum 98-62, pp. 20-22.) In response to those concerns, the Commission decided to treat discoverability and confidentiality differently: A written agreement would be necessary to make settlement negotiations confidential, but would not be a prerequisite to protect evidence of such negotiations from discovery. (Minutes, p. 7.) Although it reached this decision, the Commission expressed a desire to reflect further on the matter.

In the redraft attached to this memorandum, the staff has made revisions to implement the Commission's decision. Proposed Section 1133.5 provides:

> 1133.5. (a) This section applies only if the persons participating in a negotiation execute an agreement in writing, setting out the substance of this section and stating that those terms apply to the negotiation, or words to that effect.
>
> (b) Except as otherwise provided by statute, evidence of settlement negotiations is confidential.

In evaluating this approach, examination of other provisions of the Evidence Code may be helpful.

Mediation Confidentiality

As originally enacted on Commission recommendation, former Evidence Code Section 1152.5 made mediation communications inadmissible and non-discoverable, but did not address confidentiality. 1985 Cal. Stat. ch. 731. A written agreement was necessary to invoke this protection.

In 1993, the Legislature deleted the requirement of a written agreement, and added language making mediation communications "confidential," a term that was not defined:

> 1152.5. (a)(3) When persons agree to conduct or participate in mediation for the sole purpose of compromising, settling, or resolving a dispute, in whole or in part, all communications, negotiations, or settlement discussions by and between participants or mediators in the mediation shall remain confidential.

The Commission was not involved in this reform.

When the Commission studied mediation confidentiality in 1996-1997, it considered the possibility of providing guidance on the meaning of the term "confidential," such as whether it provides a basis for liability and whether it

precludes all disclosures or admits of certain exceptions, such as disclosure to a spouse or accountant or disclosure of evidence of potential child abuse. Although some commentators sought statutory guidance, the Commission left the substance of the provision essentially intact. See Section 1119(c). The reasoning was that "attempting to flesh out its meaning may embroil this reform in controversy and delay or jeopardize it, leaving other serious ambiguities unaddressed." (Memorandum 96-75, p. 16; see also Memorandum 97-33, p. 5 & Exhibit pp. 19-20.)

In *Barajas v. Oren Realty & Development Co., Inc.*, 57 Cal. App. 4th 209, 213, 67 Cal. Rptr. 2d 62 (1997), the court of appeal considered whether former Section 1152.5(a)(3) "mandates that an attorney who represents a plaintiff in a mediation is disqualified from representing a different plaintiff in a related case against the same defendant." The court of appeal determined that the trial court erred in considering the confidentiality provision a basis for disqualification: "We conclude that an attorney who mediates one case is generally not disqualified from litigating later cases against the same party." *Id.* at 211.

Barajas provides no guidance on what the confidentiality provision means, only on what it *does not* mean. Aside from *Barajas*, the staff is not aware of any decisions interpreting former Section 1152.5(a)(3) or existing Section 1119(c).

Privileges

Unlike the mediation confidentiality statute, the statutes governing privileges such as the lawyer-client privilege, the physician-patient privilege, and the psychotherapist-patient privilege, do not expressly make certain communications "confidential." Rather, they define the term "confidential communication" in each context, and then provide that the holder of the privilege has a privilege to refuse to disclose, and to prevent another from disclosing, such a "confidential communication." Thus, they provide light on what it means for a communication to be "confidential." For example, Section 952 defines "confidential communication between client and lawyer:"

> 952. As used in this article, "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary

> for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship. A communication between a client and his or her lawyer is not deemed lacking in confidentiality solely because the communication is transmitted by facsimile, cellular telephone, or other electronic means between the client and his or her lawyer.

See also Evid. Code §§ 992 ("confidential communication between patient and physician"), 1012 ("confidential communication between patient and psychotherapist"), 1035.4 ("confidential communication between the sexual assault counselor and the victim"), 1037.2 ("confidential communication" between domestic violence counselor and victim).

In general, a communication ceases to be "confidential" and is no longer privileged "if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone." Evid. Code § 912. "Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." *Id.*

Because the privilege statutes do not expressly create a duty of nondisclosure, they do not seem to provide a basis for liability for disclosure. The staff has done only limited research, but is not aware of any decisions imposing such liability. In contrast, provisions such as Business and Professions Code Section 6068 make it an attorney's duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." An attorney who makes disclosures in violation of this obligation may be subject to disciplinary sanctions. *General Dynamics v. Superior Court*, 7 Cal. 4th 1164, 1191, 876 P.2d 487, 32 Cal. Rptr. 2d 1 (1994); *Dixon v. State Bar*, 32 Cal. 3d 728, 739, 653 P.2d 321, 187 Cal. Rptr. 30 (1982).

Analysis

Under existing law, parties can and frequently do contractually agree that their settlement negotiations are confidential. In the context of mediation, the statute automatically making mediation communications confidential reduces the need for such a contractual agreement. Mediation participants are restricted (to an undefined extent) from disclosing mediation communications to non-participants, regardless of whether they execute such an agreement.

In contrast, the effect of the Commission's proposed approach to confidentiality of settlement negotiations is less clear. Because a written agreement would be necessary to invoke statutory confidentiality, proposed Section 1133.5 would not eliminate the need for a written agreement. Although a statute is binding on third parties and a contract is not, to gain access to evidence of settlement negotiations third parties would have to seek discovery or compel testimony. These situations are already covered by proposed Sections 1131 (admissibility of settlement negotiations) and 1132 (discoverability of settlement negotiations).

What, then, would proposed Section 1133.5 add to or improve on the option of contractual confidentiality that is already available? Possible answers include at least the following:

> The statute would alert parties to the need to execute an agreement to obtain confidentiality. As the Commission has repeatedly observed, many lawyers incorrectly assume that settlement negotiations are automatically confidential. Proposed Section 1133.5 may help alleviate this misconception.
>
> The statute may be construed as a limit on the extent to which parties may contractually provide for confidentiality of settlement negotiations. For example, it may be construed to preclude a contract that prohibits parties from disclosing wrongful conduct occurring during settlement negotiations. See proposed Section 1136 (cause of action, defense, or other legal claim arising from conduct during settlement negotiations). If this is the intent, we may wish to express it more explicitly.
>
> The statute may be instrumental where disclosure of settlement negotiations is sought in a coercive atmosphere short of compelled testimony or discovery. For example, an individual being interrogated by police or responding to a public agency's request for information may feel a need to disclose settlement negotiations, even though no subpoena has been issued or formal discovery requested. Proposed Section 1133.5 may give individuals a measure of confidence in declining to provide such information.
>
> The statute may be construed to provide an actionable basis for liability for disclosure of evidence of settlement negotiations. We could attempt to preclude such a construction by addressing this point in the Comment or even in the statutory text.

The statute may be construed to provide a basis for disqualification of counsel, as was argued but rejected in *Barajas*. Again, we could attempt to preclude such a construction by addressing this point in the Comment or in the statutory text.

The statute may be construed to import a definition of "confidential" comparable to the definitions in the privilege statutes, generally precluding disclosure to third persons but allowing disclosures that are in furtherance of the purpose of the communication (e.g., disclosure of a proposed offer to an accountant for evaluation of the possible tax consequences before determining whether to accept the offer) and similar disclosures that are consistent with the goal of encouraging settlement.

The statute may be construed to extend the provisions on admissibility and discoverability to a criminal action. The staff considers such an interpretation unlikely. (See Memorandum 96-75, pp. 16-17.)

Recommendation

The concept of "confidentiality" is complicated. **If the Commission decides to make evidence of settlement negotiations statutorily "confidential" under specified circumstances, we should attempt to provide guidance as to what this means.**

As a matter of simplicity and expediency, it may be best to limit the proposed reform to admissibility and discoverability. This would avoid difficult issues that may be easier to address once the concept of "confidentiality" has been more thoroughly fleshed out in the context of mediation confidentiality.

If the Commission decides to retain proposed Section 1133.5, the staff would revise the narrative portion (preliminary part) of the Commission's recommendation to more thoroughly explain the concept of "confidentiality." Revisions of the statutory language or Comment may also be helpful. Some suggestions are set forth in the Staff Note on Section 1133.5 in the attached draft. Further ideas may surface as we work on the issue.

Respectfully submitted,

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October 22, 1998

Ms. Barbara S. Gaal
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Palo Alto, CA 94303-4739

Dear Ms. Gaal:

I am writing you in response to your request for clarification on CJA's position on the California Law Revision Commission's Tentative Recommendation on Admissibility, Discoverability, and Confidentiality of Settlement Negotiations. Judge Darrel W. Lewis, Chair, CJA's ADR Subcommittee has provided me with the following response to your inquiry:

"We review potential legislation primarily for its impact on the courts. This proposal appears to clarify some vague areas and to put into statutory form existing practices of case law. The members that reviewed the proposal generally supported it, but because of the time deadline we could not submit it to the full board for an official CJA position."

I hope that this provides you with some clarity on the ADR Subcommittee's position on your recommendation. Should you have any questions, please feel free to contact me or Rob Waring, CJA Legislative Counsel at (415) 495-1999.

Sincerely,

Sean P. Griffith
Legislative & Program Assistant

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October 14, 1998

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4000 Middlefield Road, Rm. D-1
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Re: Law Revision Commission Study of the Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

Thank you for forwarding me the Commission's current proposal on the above-referenced matter along with the comments already received.

After reviewing the comments received already, I agree with or would have nothing to add to the comments provided by James C. Sturdevant of the Sturdevant Law Firm on behalf of the Consumer Attorneys of California. I also agree with the comments submitted by Justice Richard D. Aldrich on behalf of the Civil and Small Claims Advisory Committee of the Judicial Council.

Very truly yours,

AGNEW & BRUSAVICH
A Professional Corporation

BRUCE M. BRUSAVICH

BMB/jmk

ASSOCIATION FOR CALIFORNIA TORT REFORM

December 1, 1998

SENT VIA FACSIMILE (650) 494-1827 & REGULAR MAIL

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

Attention: Barbara S. Gaal, Staff Counsel

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

Dear Members of the Commission:

The Association for California Tort Reform ("ACTR") has reviewed and considered the above tentative recommendation (#K-410), including supplemental Memoranda 98-62 about it and the more recently released 98-81 on "confidential settlements." We generally agree with the Commission's thoughtful and well considered tentative recommendation that settlement negotiations and discussions should remain confidential and not subject to discovery except under specific limited circumstances. We believe that settlement agreements, however, are not within the ambit of the Commission's authority as directed by the Legislature pursuant to Resolution Chapter 102 of the Statutes of 1997 and that, accordingly, the Commission should not engage in a separate study or combine its ongoing study of settlement discussions and negotiations with one on settlement agreements absent express Legislative authorization to do so.

We offer the following more specific comments for the Commission's consideration:

Two principal assumptions animate ACTR's thoughts about the Commission's recommendation on confidentiality of settlement negotiations. First, settlement of litigation is "highly favored as productive of peace and good will in the community, as well as reducing the expense and persistency of litigation." [Citation] The need for settlements is greater than ever before. 'Without them our system of civil adjudication would quickly break down.' (Lynch, California Negotiation and Settlement Handbook (1991), p. vii [foreword by California Supreme Court Chief Justice Malcolm M. Lucas].) Settlement is perhaps most efficient the earlier the settlement comes in the litigation continuum." (*Neary v. Regents of the University of California* (1992) 3 Cal.4th 273, 277.) Second, confidentiality of settlement discussions and negotiations is essential to achieve settlement. An absence of assurance of confidentiality surrounding settlement

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negotiations would have a "chilling effect" on settlements.

Commission's Recommendation on Settlement Negotiations

While we appreciate the Commission's desire to clarify existing law on this general subject, but are unaware of any situation identified by the Commission where settlement discussions would be admissible under present law but not under the proposed legislation. If we are correct in this observation, ACTR does not see, given our above stated assumptions, in what way the proposed legislation is a desirable improvement over existing law.

One aspect of settlement negotiations not covered by the initial recommendation but discussed in memorandum 98-62 concerns the admissibility to prove undue delay. In a personal injury case, for example, defendant may contend that the claim is time barred while the plaintiff argues that the statute of limitations should be tolled based on delayed discovery. If there is evidence from settlement negotiations that the plaintiff was aware of the claim earlier than he asserts, that should be admissible and the proposed revision to Section 1136 would make this clear.

ACTR agrees with the ADR Subcommittee of the California Judges Association that "discoverability [of settlement discussions and negotiations] be treated the same as admissibility." In other words, the Commission's middle-ground approach of distinguishing the discoverability of settlement negotiations from the admissibility of same by protecting the former only when there is a written agreement amongst the parties to do so is, as others have commented, impractical, a trap for the unwary and would impede settlement. Settlement negotiations should be confidential in terms of discovery without the need for a separate contract to that effect.

Commission Staff's Consideration of Including Settlement Agreements in its Recommendations

The proposal by the Consumer Attorneys of California (CAOC) that the Commission include settlement agreements in its proposal and make them presumptively subject to disclosure is a "can of worms." The Commission should decline this invitation to fix something that "ain't broke" until directed by the Legislature to undertake such a study.

A significant substantive reason to defer to the judiciary respecting the public

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accessibility of settlement agreements approved by a court[1] is that this issue requires the balancing of competing constitutional rights, a task best left to the courts, not the Legislature. Of paramount importance is the right of parties to a settlement agreement to privacy as guaranteed by the Cal. Const., art. I, § 1, a right that extends fully to corporations as "persons." "Privacy can be a matter of concern to the plaintiff, the defendant, and nonparties in a wide variety of lawsuits." (Miller, *Confidentiality, Protective Orders, and Public Access to the Courts* (1991) 105 *HARV. L. REV.* 427, 464.) Against this right is that of the public to access to judicial records under Cal. Const., art. I, § 29(a). As the Commission staff points out, "the nuances of precisely which balancing test applies under which legal theory are not entirely clear." (Memorandum 98-81, p. 9.) Clarity in the balancing of competing constitutional rights is best done by the courts who have familiarity and expertise in this field and can better protect individual rights without being subject to the same hydraulic pressures applicable to the representative branch of government.

ACTR looks forward to sharing additional thoughts and concerns with the Commission on these important matters as you consider them in future meetings.

Cordially,

Fred J. Hiestand

FJH:wp

[1]ACTR agrees with the Commission staff that there is no persuasive authority favoring public disclosure of private settlement agreements, and that the only arguable settlement agreements subject to public disclosure are those presented to and reviewed by a court.

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PROPOSED LEGISLATION

Evid. Code §§ 1130-1141.5 (added). Settlement negotiations

SEC. ____. Chapter 3 (commencing with Section 1130) is added to Division 9 of the Evidence Code, to read:

CHAPTER 3. SETTLEMENT NEGOTIATIONS

Article 1. Definitions and Application of Chapter

§ 1130. "Settlement negotiations" defined

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 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.

Comment. Subdivision (a) of Section 1130, along with subdivision (c), is comparable to former Section 1152. Subdivision (b), along with subdivision (c), is comparable to former Section 1154.

Subdivision (d) makes explicit that, for purposes of this chapter, a reference to settlement negotiations includes a settlement agreement. For an important exception, see Section 1133.7 (discoverability and confidentiality of settlement agreement), which makes clear that this chapter does not expand or limit existing law on confidentiality or discovery of a settlement agreement.

This 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).

Mere notification of the existence or nature of a problem is not settlement negotiations within the meaning of this chapter. **For guidance on when discussions become settlement negotiations as opposed to business communications, see Warner Construction Corp. v. City of Los Angeles, 2 Cal. 3d 285, 297, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) (former Section 1152 was triggered where "the parties had reached a stage of clear disagreement on the crucial question whether plaintiff was entitled to a change order").** 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 general rules governing settlement negotiations, see Sections 1132 (admissibility of settlement negotiations), 1133 (discoverability of settlement negotiations), 1133.5 (confidentiality of settlement negotiations).

This chapter is made applicable to administrative adjudication by Government Code Section 11415.60. For mediation confidentiality, see Sections 1115-1128. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

☞ **Staff Note.**
As discussed at the September meeting, we have revised the text of Section 1130 to make clear the definition of "settlement negotiations" is limited to compromise-related conduct and statements. See Minutes, p. 7. We have also revised the Comment to explain that "settlement negotiations" does not include mere notification of the existence or nature of a problem. See *id*.

➡ For discussion of the portion of the Comment shown in boldface (concerning the degree of dispute necessary to trigger the statutory provisions on settlement negotiations), see Memorandum 98-80.

§ 1131. Application of chapter

1131. ~~(a) This chapter governs the admissibility, discoverability, and confidentiality of settlement negotiations to resolve a pending or prospective civil case.~~

~~(b)~~ This chapter does not apply to either of the following:

~~(1)~~ (a) Plea bargaining, regardless of whether the bargaining may also be settlement negotiations as defined in Section 1130.

~~(2)~~ (b) Evidence of an effort to obstruct a criminal investigation or prosecution, regardless of whether that effort may also be settlement negotiations as defined in Section 1130.

Comment. Section 1131 makes explicit that this chapter does not apply to plea bargaining, which is covered by other evidentiary provisions. See Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property). Where a civil case is related to a criminal prosecution, negotiations to settle the civil case are within the scope of this chapter, but the chapter does not apply to plea bargaining or an effort to obstruct a criminal investigation or prosecution (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or an agreement not to cooperate with the prosecution). The latter limitation is drawn from Rule 408 of the Federal Rules of Evidence.

☞ **Staff Note.** As discussed at the September meeting, we have deleted the first sentence of Section 1131 and have not attempted to summarize the scope of the chapter elsewhere. See Minutes, p. 7.

~~§ 1141. Extent of evidence admitted or subject to disclosure~~ § 1131.5. Role of court or other tribunal in applying chapter

~~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.~~

1131.5. 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 1131.5 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 court may also use limiting instructions as appropriate. See Section 355.

☞ **Staff Note.**

For organizational clarity, the staff recommends moving proposed Section 1141 to Article 1 (Definitions and Application of Chapter) as shown here.

➡ As discussed in Memorandum 98-62, the State Bar Committee on Administration of Justice (CAJ), Justice Aldrich of the Judicial Council's Civil and Small Claims Advisory Committee, and the Board of Control all expressed concern about proposed Section 1141. CAJ commented that the provision "creates exceptions that might swallow the rules of admissibility under proposed Sections 1132, 1136, 1137, 1138, and 1139." (Memorandum 98-62, Exhibit p. 24.) The State Board of Control echoed CAJ's concern that the provision might result in exclusion of too much evidence. Proposed Section 1141 "embodies a strong policy that disfavors disclosure under section 1136." (*Id.* at Exhibit p. 15-16.) Justice Aldrich cautioned that the proposed approach (incorporating the balancing test of Section 352 but making exclusion mandatory) would prove unworkable. (*Id*. at 38.)

The staff considers these criticisms valid. As phrased in the revised tentative recommendation, Section 1141 emphasizes the interest in encouraging settlement without acknowledging competing interests, such as achieving justice in an individual case. We would revise the provision as shown above to take a more balanced approach and give courts (and other tribunals) a greater degree of discretion.

Article 2. General Provisions

§ 1132. Admissibility of settlement negotiations

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~~.

~~(b) Evidence of a settlement agreement is not inadmissible under this chapter where the evidence is introduced to show bias of a witness who is a party to the agreement.~~

Comment. Section 1132 supersedes former Sections 1152(a) and 1154, which made evidence of a settlement negotiation inadmissible for the purpose of proving invalidity of the claim, but not for other purposes. To preclude abuse and foster greater candor in settlement negotiations, Section 1132 makes evidence of settlement negotiations in a pending or prospective civil case generally inadmissible in that case or in any other noncriminal proceeding. The provision applies regardless of whether the party seeking introduction of the evidence was a party to the

negotiations, and regardless of whether the party opposing introduction of the evidence was a party to the negotiations.

This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter). For evidentiary provisions on plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

For exceptions to Section 1132, see Sections 1133.7-1141.5. Evidence satisfying one or more of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, including the balancing test of Section 352. See also Section 1131.5 (role of court or other tribunal in applying chapter).

See Section 1130 ("settlement negotiations" defined). **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 the effect of this chapter on discoverability of settlement negotiations, see Section 1133. For the effect of this chapter on confidentiality of settlement negotiations, see Section 1133.5.

For mediation confidentiality, see Sections 1115-1128. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

☞ **Staff Note.**

For organizational clarity, the staff recommends moving the substance of subdivision (b) to Article 3 (Exceptions) and renumbering it, as shown here and on page 11. We have deleted the phrase "to be given" because it is unnecessary.

➡ As discussed in Memorandum 98-62, CAJ has pointed out 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." (Memorandum 98-62, pp. 24-25 & Exhibit p. 22.) CAJ suggests that the Comments to Sections 1132 and 1133 "include a cautionary statement." The portion of the Comment shown in boldface is the staff's recommended response to this concern.

§ 1133. ~~Confidentiality and discoverability~~ Discoverability of settlement negotiations

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 restricts discovery of the negotiations. Subject to statutory exceptions, evidence of settlement negotiations in a civil case is not subject to discovery in that case or in any other noncriminal proceeding. This rule applies regardless of whether the party seeking discovery was a party to the negotiations, and

regardless of whether the party opposing discovery was a party to the negotiations. See Section 1130 ("settlement negotiations" defined).

This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter). For evidentiary provisions on plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

Although Section 1133 restricts discovery of settlement negotiations, the provision does not apply to discovery of a settlement agreement and does not affect whether and to what extent the existence and terms of such an agreement may be kept confidential. See Section 1133.7 (discoverability and confidentiality of settlement agreement). For other exceptions to Section 1133, see Sections 1134-1141.5.

For the effect of this chapter on admissibility of settlement negotiations, see Section 1132. For the effect of this chapter on confidentiality of settlement negotiations, see Section 1133.5. **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 mediation confidentiality, see Sections 1115-1128. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

☞ **Staff Note.**

As discussed at the September meeting we have separated the concepts of discoverability and confidentiality and made the provision on discoverability automatic, not contingent on execution of a written agreement. See Minutes, p. 7; proposed Section 1133.5 below.

For organizational clarity, the staff recommends moving the substance of subdivision (c) to Article 3 (Exceptions) and renumbering it, as shown here and on page 6. We have deleted the phrase "to be given" from subdivision (b) because it is unnecessary.

As discussed in Memorandum 98-62, CAJ has pointed out 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." (Memorandum 98-62, pp. 24-25 & Exhibit p. 22.) CAJ suggests that the Comments to Sections 1132 and 1133 "include a cautionary statement." The portion of the Comment shown in boldface is the staff's recommended response to this concern.

§ 1133.5. Confidentiality of settlement negotiations

1133.5. (a) This section applies only if the persons participating in a negotiation execute an agreement in writing, stating that the negotiation is confidential as provided by law, or words to that effect.

(b) Except as otherwise provided by statute, evidence of settlement negotiations is confidential.

Comment. To promote candor in settlement negotiations, Section 1133.5 makes the negotiations confidential. See Section 1130 ("settlement negotiations" defined). **For guidance on whether this provision is a basis for disqualification of counsel, see Barajas v. Oren Realty & Development Co., Inc., 57 Cal. App. 4th 209, 213, 67 Cal. Rptr. 2d 62 (1997).**

This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter). For evidentiary provisions on plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

Under subdivision (a), a written agreement is necessary to invoke the protection of subdivision (b). **Disclosure of evidence in violation of subdivision (b) is not a basis for tort liability.**

Although Section 1133.5 makes settlement negotiations confidential, the provision does not apply to a settlement agreement and does not affect whether and to what extent the existence and terms of such an agreement may be kept confidential. See Section 1133.7 (discoverability and confidentiality of settlement agreement). For other exceptions to Section 1133, see Sections 1134-1141.5.

For the effect of this chapter on admissibility of settlement negotiations, see Section 1132. For the effect of this chapter on 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 mediation confidentiality, see Sections 1115-1128. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

☞ **Staff Note.**

As discussed at the September meeting we have separated the concepts of discoverability and confidentiality and made the provision on confidentiality contingent on execution of a written agreement. See Minutes, p. 7; proposed Section 1133 above. We have also modified the requirement of a written agreement to implement CAJ's suggestion that the parties be permitted to execute the agreement at any time, as well as a suggestion from the ADR Subcommittee of CJA that the parties should not have to precisely recite the statute in their written agreement.

As discussed in Memorandum 98-62, CAJ has pointed out 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." (Memorandum 98-62, pp. 24-25 & Exhibit p. 22.) CAJ suggests that the Comments to Sections 1132 and 1133 "include a cautionary statement." As in Sections 1131 and 1132, we have modified the Comment to Section 1133.4 to address this concern.

➡ Section 1133.5 is discussed at length in Memorandum 98-80. The portions of the Comment shown in boldface attempt to provide some guidance as to its effect. The Commission needs to resolve whether to retain Section 1133.5, and, if so, what ends it is meant to achieve.

Article 3. Exceptions

§ 1133.7. Discoverability and confidentiality of settlement agreement

1133.7. Sections 1133 and 1133.5 do not apply to evidence of a settlement agreement. Nothing in this chapter affects existing law on discovery or confidentiality of a settlement agreement.

Comment. Section 1133.7 makes explicit that this chapter is inapplicable to discovery and confidentiality of a settlement agreement. For admissibility of a settlement agreement, see Sections 1130 ("settlement negotiations" defined), 1132 (admissibility of settlement negotiations).

☞ **Staff Note.**

For organizational clarity, the staff recommends moving proposed Section 1133(c) to Article 3 (Exceptions) and renumbering it, as shown here and on page 4.

➡ CAOC's position on this provision is discussed at length in Memorandum 98-82.

§ 1134. Evidence otherwise admissible or subject to discovery

1134. ~~Evidence~~ Article 2 does 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.

Comment. Section 1134 is drawn from Section 1120 (a) and Federal Rule of Evidence 408. See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.** As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed revisions are intended to address this concern.

§ 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~~ Article 2 does 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.

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.**

☞ **Staff Note.**

As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed statutory revisions are intended to address this concern.

➡ As discussed at pages 30-32 of Memorandum 98-62, CAOC urges the Commission to delete proposed Section 1135. 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.

(Memorandum 98-62, Exhibit p. 31.)

At the Commission's meeting on February 27, 1997, the staff suggested deletion of the provision for a different reason. 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 recommends pointing this out in the Comment, as shown in boldface.

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. 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.

§ 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~~ Article 2 does 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, including a statute of limitations defense.

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. *See, e.g.*, White v. Western Title Ins. Co., 40 Cal. 3d 870, 887, 710 P.2d 309, 221 Cal. Rptr. 509 (1985). **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.**

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.**

As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed revision of the first clause is intended to address this concern.

➡ As discussed at pages 10-15 of Memorandum 98-62, Epsten & Grinnell expressed concern that the Commission's proposal would exclude evidence of promised or attempted repairs that may be relevant to rebut a statute of limitations defense. The staff would address this concern by adding a statutory clause explicitly referring to such a defense, as shown above.

➡ Epsten & Grinnell also expressed concern that the Commission's proposal would exclude evidence of repair efforts that cause further harm. (Memorandum 98-62, pp. 10-15.) We could address this concern by adding language to the Comment to Section 1136 as shown in boldface.

§ 1137. Obtaining benefits of settlement

1137. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter~~ Articles 2 does not apply 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 or performance has been rendered. 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), 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.**

As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed revision of the first clause is intended to address this concern.

➡ As discussed at pages 32-35 of Memorandum 98-62, Judge Carlos Bea (San Francisco Superior Court) pointed out that co-insurers may obtain discovery of settlement agreements to show that an insured has fully recovered and should proceed no further against other carriers. See Home Ins. Co. v. Superior Court, 46 Cal. App. 4th 1286, 54 Cal. Rptr. 2d 292 (1996). The Commission's proposal would not affect this situation, because it would leave existing law on the discoverability of settlement agreements intact. See Section 1133.7 (discoverability and confidentiality of settlement agreement).

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, 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(b) and the Comment as shown in boldface above.

§ 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~~ Article 2 does 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, **good faith or** lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

Comment. Section 1138 follows from the rule that 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).

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.**

As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed revision of the first clause is intended to address this concern.

The revision shown in boldface should be made because Code of Civil Procedure Section 877.6(a)(2) allows a settling party to apply for a determination of good faith settlement.

➡ It may be necessary to revise this provision to permit introduction of evidence of settlement negotiations, or at least evidence of settlement agreements, to show the fairness or adequacy of a proposed settlement or attorney's fee award. The staff is still working on this point.

§ 1139. Prevention of ~~criminal act~~ felony

1139. ~~Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter~~ Article 2 does 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~~ 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), 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.**

As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed revisions (except the replacement of "criminal act" with "felony") are intended to address this concern.

➡ As discussed at pages 35-37 of Memorandum 98-62, CAJ also objected to the breadth of 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?

(Memorandum 98-62, 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 as shown in boldface to address liability for nondisclosure. This should serve the interest in preventing crime, while narrowing what might otherwise be a big loophole in the protection for settlement negotiations.

§ 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~~ Article 2 does 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.

Comment. Section 1140 is drawn from Section 1122, pertaining to mediation confidentiality. See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.** As discussed at pages 28-30 of Memorandum 98-62, CAJ objected to the use of double negatives in this provision. The proposed revisions are intended to address this concern and eliminate ambiguities.

§ 1141.5. Bias

1141.5. Section 1132 does not apply where evidence of a settlement agreement is introduced to show bias of a witness who is a party to the agreement.

Comment. Section 1141.5 provides an exception to the rule of exclusion, in recognition that a settlement agreement may be evidence of bias. The danger of bias is particularly strong where there is a sliding scale recovery agreement and a defendant party to the agreement testifies. See Code Civ. Proc. § 877.5(a)(2) (additional safeguards for use of a sliding scale recovery agreement).

See Section 1131.5 (role of court or other tribunal in applying chapter).

☞ **Staff Note.** For organizational clarity, the staff recommends moving proposed Section 1132(b) to Article 3 (Exceptions) and renumbering it, as shown here and on page 3.

Heading of Chapter 3 (commencing with Section 1150) (amended)

SEC. ____. The heading of Chapter 3 (commencing with Section 1150) of Division 9 of the Evidence Code is amended to read:

CHAPTER ~~3~~ 4. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Evid. Code § 1152 (repealed). Offers to compromise

SEC. ____. Section 1152 of the Evidence Code is repealed.

~~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.~~

~~(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or~~

~~damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.~~

~~(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.~~

Comment. Former Section 1152 is superseded by Sections 1130-1141.5 (settlement negotiations), 1152 (payment of medical or other expenses).

Evid. Code § 1152 (added). Payment of medical or other expenses

SEC. ____. Section 1152 is added to the Evidence Code, to read:

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

Comment. Section 1152 is drawn from Federal Rule of Evidence 409. As to humanitarian conduct, it supersedes part of former Section 1152(a). For a provision on advance payments by insurers, see Ins. Code § 11583.

For evidentiary provisions on settlement negotiations, see Sections 1130-1141.5. For mediation confidentiality, see Sections 1115-1128. For evidentiary provisions on plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

Evid. Code § 1154 (repealed). Offer to discount a claim

SEC. ____. Section 1154 of the Evidence Code is repealed.

~~1154. Evidence that a person has accepted or offered or promised to accept a sum of money or any other thing, act, or service in satisfaction of a claim, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove the invalidity of the claim or any part of it.~~

Comment. Former Section 1154 is superseded by Sections 1130-1141.5 (settlement negotiations).

CONFORMING REVISIONS

Civ. Code. § 1782 (amended). Prerequisites to action for damages

SEC. ____. Section 1782 of the Civil Code is amended to read:

1782. (a) Thirty days or more prior to the commencement of an action for damages pursuant to the provisions of this title, the consumer shall do the following:

(1) Notify the person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 of the particular alleged violations of Section 1770.

(2) Demand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within California, or, if neither will effect actual notice, the office of the Secretary of State of California.

(b) Except as provided in subdivision (c), no action for damages may be maintained under the provisions of Section 1780 if an appropriate correction, repair, replacement or other remedy is given, or agreed to be given within a reasonable time, to the consumer within 30 days after receipt of such notice.

(c) No action for damages may be maintained under the provisions of Section 1781 upon a showing by a person alleged to have employed or committed methods, acts or practices declared unlawful by Section 1770 that all of the following exist:

(1) All consumers similarly situated have been identified, or a reasonable effort to identify such other consumers has been made.

(2) All consumers so identified have been notified that upon their request such person shall make the appropriate correction, repair, replacement or other remedy of the goods and services.

(3) The correction, repair, replacement or other remedy requested by such consumers has been, or, in a reasonable time, shall be, given.

(4) Such person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, such person will, within a reasonable time, cease to engage, in such methods, act or practices.

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with the provisions of subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with the provisions of subdivision (a), the consumer may amend ~~his~~ the complaint without leave of court to include a request for damages. The appropriate provisions of subdivision (b) or (c) shall be applicable if the complaint for injunctive relief is amended to request damages.

(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be construed to be ~~an offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code; furthermore, such attempts~~ settlement negotiations under Chapter 3 (commencing with Section 1130) of Division 9 of the Evidence Code. Attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the

purpose of establishing good faith or to show compliance with the provisions of this section.

Comment. Subdivision (e) of Section 1782 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new evidentiary provisions on settlement negotiations. See Evid. Code §§ 1130-1141.5 (settlement negotiations).

Code Civ. Proc. § 1775.10 (amended). Evidence rules protecting statements in mediation

SEC. ____. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation ~~shall be~~ are subject to ~~Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115)~~ Section 703.5, and Chapters 2 (commencing with Section 1115) and 3 (commencing with Section 1130) of Division 9, of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new evidentiary provisions on settlement negotiations. See Evid. Code §§ 1130-1141.5 (settlement negotiations).

Evid. Code § 822 (amended). Improper bases for opinion as to value of property

SEC. ____. Section 822 of the Evidence Code is amended to read:

822. (a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, except that the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain.

(2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding~~; but nothing~~. Nothing in this subdivision makes admissible evidence that is inadmissible under Chapter 3 (commencing with Section 1130) of Division 9, or permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.

(c) The amendments made to this section during the 1987 portion of the 1987-1988 Regular Session of the Legislature shall not apply to or affect any petition filed pursuant to this section before January 1, 1988.

Comment. Subdivision (a)(2) of Section 822 is amended to explicitly address its interrelationship with the rule s governing the admissibility of settlement negotiations. See People *ex rel.* Dep't of Pub. Works v. Southern Pac. Trans. Co., 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973) (reconciling Section 822 with former Section 1152).

Evid. Code § 1116 (amended). Effect of chapter on mediation confidentiality

SEC. ____. Section 1116 of the Evidence Code is amended to read:

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under ~~Section 1152~~ Chapter 3 (commencing with Section 1130) of Division 9 or any other statute.

Comment. Section 1116 is amended to reflect the repeal of former Section 1152 and the enactment of new evidentiary provisions on settlement negotiations. See Sections 1130-1141.5 (settlement negotiations).

Gov't Code § 11415.60 (amended). Settlement of administrative adjudication

SEC. ____. Section 11415.60 of the Government Code is amended to read:

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. ~~Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code~~ Chapter 3 (commencing with Section 1130) of Division 9 of

the Evidence Code applies to settlement negotiations pursuant to this section. Nothing in this subdivision makes inadmissible any public document created by a public agency.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Comment. Section 11415.60 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new evidentiary provisions on settlement negotiations. See Evid. Code §§ 1130-1141.5 (settlement negotiations).

Uncodified (added). Operative date

SEC. ____. (a) This act becomes operative on January 1, 2000.

(b) This act applies in an action, proceeding, or administrative adjudication commenced before, on, or after January 1, 2000.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2000, overruling an objection based on former Section 1152 of the Evidence Code. However, if an action, proceeding, or administrative adjudication is pending on January 1, 2000, the objecting party may, on or after January 1, 2000, and before entry of judgment in the action, proceeding, or administrative adjudication make a new request for exclusion of the evidence on the basis of this act.