Study K-410 January 28, 1999

Memorandum 99-4

Confidentiality of Settlement Negotiations: Draft of Recommendation

At the September meeting, the Commission began but did not complete consideration of the comments on its revised tentative recommendation on *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations.* In December, the Commission considered the suggestion that it modify the proposal to address confidential settlements. The Commission decided to seek guidance from the Legislature on whether to study that area. As yet, we have not received a formal response from the Legislature. At this juncture, the Commission should consider the remaining comments on its proposal 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 preliminary part and 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. 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 February meeting, we plan to discuss the issues addressed in this memorandum, as well as the items marked with arrows (➡) in the Staff Notes. If other matters warrant discussion, please raise them at the 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.

(This analysis is much the same as the one we prepared for the December meeting. We have reiterated it here to assure convenient reference and incorporate information we received from Epsten & Grinnell after the earlier analysis was written.)

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 (efforts to resolve a dispute). The Commission also decided that Section 1131 should not attempt to summarize what the new chapter on settlement negotiations addresses.

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. 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." 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. Wells 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. In Memorandum 98-80 (pp. 2-8) we expressed this concern and suggested that instead of codifying *Warner*, we refer to it in the Comment to proposed Section 1130.

This would provide some guidance and continue existing law, without preventing judicial consideration of alternative approaches where appropriate. We also surmised that it would help alleviate Epsten & Grinnell's concern about prelitigation conduct, as would 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.

At the December meeting, we received a letter from Douglas Grinnell of Epsten & Grinnell confirming these suppositions but requesting that the Comment also expressly refer to *Price v. Wells Fargo Bank* and *In re Marriage of Schoettgen*. (Exhibit p. 1.) "This would give more balance to the Comment, inviting the reader to more than just one case." (*Id.*) "The intent is [to] create flexibility of the confidentiality statute based on a *body* of pre-existing law (albeit scarce)." (*Id.*)

The staff believes this is a good suggestion. **We would implement it 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). **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"); Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 481 n.3, 261 Cal. Rptr. 735 (1989) (former Section 1152 was not a basis for excluding letters "written before any controversy had arisen as to the meaning of the loan agreements"); In re Marriage of Schoettgen, 183 Cal. App. 3d 1, 8, 227 Cal. Rptr. 758 (1986) (discussing but not resolving proper interpretation of former Section 1152).**
>
> Mere notification of the existence or nature of a problem is not settlement negotiations within the meaning of this chapter. 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.

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. Except as otherwise provided by statute, evidence of settlement negotiations is confidential where 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.

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

(Again, the analysis here is very similar to the one we prepared for the December meeting. We have reiterated it for purposes of convenience, and modified it to reflect further progress on the issues.)

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 the statutory 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 (e.g., 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 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.** The staff has tried to do this in two places: (1) in the section on "Confidentiality of Settlement Discussions" that is in the preliminary part (narrative portion) of the draft recommendation, and (2) in the portions of the proposed Comment to Section 1133.5 that are shown in boldface in the draft recommendation. **The Commission should review these discussions and determine whether to make revisions**.

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.

Respectfully submitted,

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December 10, 1998

By Facsimile

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Re: Confidentiality of Settlement Negotiations

Dear Ms. Gaal:

I thank you and your staff for Memorandum 98-80 dated December 4, 1998, particularly the section concerning "Degree of Dispute Necessary to Trigger Statutory Protection." Your consideration of this issue has been thorough, indeed excellent. The staff's inclusion of the words "In compromise" last September and the inclusion of a Comment alluding to the Warner case help alleviate our concerns about pre-litigation conduct.

We would request, however, the Comment also expressly include a reference to Price v. Wells Fargo Bank, (1989) 213 Cal.App.3d 465, 481 and In re Marriage of Schoettgen, (1986) 183 Cal.App.3d 1, 8, following the reference to Warner. This would give more balance to the Comment, inviting the reader to more than just one case. The intent is create flexibility of the confidentiality statute based on a body of pre-existing law (albeit scarce).

I regret not being able to attend the meeting in San Francisco. Thank you for your consideration of this letter.

Sincerely,

EPSTEN & GRINNELL, APC

Douglas W. Grinnell

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#K-410

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

February 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF RECOMMENDATION

Under existing law (Evidence Code Sections 1152 and 1154), evidence of an offer of compromise or other negotiation to settle a civil case is inadmissible for purposes of proving or disproving liability, but not for other purposes. These provisions do not make evidence of settlement negotiations confidential, nor do they expressly protect such evidence from discovery.

To foster forthright discussion culminating in prompt, mutually beneficial settlements, the California Law Revision Commission proposes to make evidence of settlement negotiations generally inadmissible in a civil case or other noncriminal proceeding. With restrictions, the proposal would also make settlement negotiations confidential and protect evidence of such negotiations (other than a settlement agreement) from discovery in a noncriminal proceeding. By promoting early and creative settlements based on free exchange of information, these reforms would reduce court congestion, relieve stress and discord, and conserve both public and private resources.

This recommendation was prepared pursuant to Resolution Chapter 91 of the Statutes of 1998.

ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

CONTENTS

ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

A frank settlement discussion can help disputants understand each other's position and improve prospects for a successful, mutually satisfactory settlement of the dispute. A gesture of conciliation or other step towards compromise can increase the likelihood of reaching an agreement. Yet parties can be reluctant to talk openly or act freely in a settlement discussion if their words or actions will later be used against them.

Existing law addresses this concern to a limited extent by making evidence of efforts to settle a civil case inadmissible to prove or disprove liability for the damage that is the subject of the negotiations.[1] Having reexamined the existing law, the Law Revision Commission recommends increasing the confidentiality of an ordinary settlement negotiation. Encouraging candid and rational negotiations will further the administration of justice by promoting prompt, durable settlements.

EXISTING LAW

Two statutory provisions protect a settlement negotiation (other than a mediation).[2] Evidence Code Section 1152(a) prohibits proof of liability based on an offer to compromise the alleged loss:

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1. See Evid. Code §§ 1152, 1154. All further statutory references are to the Evidence Code, unless otherwise indicated. Sections 1152 and 1154 were used as a basis in drafting the corresponding federal provision, Federal Rule of Evidence 408. *See* Fed. R. Evid. 408 advisory committee's note.

For evidentiary protection of plea bargaining, see Sections 1153 (guilty plea withdrawn, or offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property), and Penal Code Section 1192.4 (guilty plea withdrawn). For settlement of an administrative adjudication, see Gov't Code § 11415.60.

2. For provisions governing mediation, see Sections 703.5 (mediator competency to testify) and 1115-1128 (mediation confidentiality). See also Appendix 5 to the *1997-1998 Annual Report*, 7 Cal. L. Revision Comm'n Reports 531, 595 (1997); *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996).

The protection for settlement negotiations recommended in this proposal is not as strong as the protection for mediation communications. In a mediation, the involvement of a neutral person may promote productive discourse and exploration of new approaches to settlement. Because planning and participating in a mediation involves substantial expense and effort, a mediation usually is a serious effort to settle. A party may also disclose information to the mediator without having to disclose it directly to the other side. These special attributes of mediation increase the likelihood of successful settlement, and thus the likelihood of a benefit that offsets the cost (i.e., exclusion of relevant evidence) of making the discussion confidential. The involvement of the mediator may also deter misconduct that might otherwise occur in a setting of complete confidentiality. Finally, the beginning and end of a mediation are clearer than the boundaries of what is and is not a settlement negotiation, making it is easier to determine which communications are protected. For further comparison of mediation with unassisted settlement negotiations, see Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1 (1996).

> 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.

To ensure the "complete candor between the parties that is most conducive to settlement," this provision protects not only an offer of compromise, but also any conduct or statements made during negotiations for settlement of a claim.[3]

Although broad in that respect, the existing law is limited in others. There are exceptions for certain categories of evidence.[4] More importantly, an offer to compromise or any associated conduct or statement is only inadmissible to prove liability for the loss or damage to which the negotiations relate. If a party offers the evidence for another purpose, such as to show bias, motive, undue delay, or knowledge, the restriction does not apply.[5]

The second provision, Section 1154, prohibits disproof of a claim through an offer to settle the claim:

> 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.

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3. Law Revision Commission Comment to Section 1152, as enacted in 1965 (originally printed in *Evidence Code*, 7 Cal. L. Revision Comm'n Reports 1001, 1213 (1965)).

4. Section 1152(b)-(c) provides:

> (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 790.3 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving 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.

5. *See, e.g.*, White v. Western Title Ins. Co., 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985) (purpose of Section 1152 is "to bar the introduction into evidence of an offer to compromise a claim for the purpose of proving liability for that claim, but to permit its introduction to prove some other matter at issue"); Young v. Keele, 188 Cal. App. 3d 1090, 1093-94, 233 Cal. Rptr. 850 (1987) (evidence of offer to compromise a claim is only inadmissible for the purpose of proving liability for that claim); Moreno v. Sayre, 162 Cal. App. 3d 116, 126, 208 Cal. Rptr. 444 (1984) ("While evidence of a settlement agreement is inadmissible to prove liability (see Evid. Code, § 1152), it is admissible to show bias or prejudice of an adverse party."); *see also* Campisi v. Superior Court, 17 Cal. App. 4th 1833, 1838, 22 Cal. Rptr. 2d 335 (1993) (In deciding to transfer case out of the superior court, there was "nothing improper" in the trial court's use of information disclosed during settlement discussions).

Like Section 1152, this provision encompasses both an offer to settle a claim and any associated conduct or statement. But the evidence is inadmissible only if a party offers it to disprove the claim.

Neither Section 1152 nor Section 1154 expressly addresses the discoverability of a settlement discussion.[6] Case authority on whether any special restrictions apply to discovery of evidence of offers to compromise, offers to discount a claim, and associated conduct and statements (hereinafter "evidence of settlement negotiations")[7] is sparse and ambiguous.[8]

JUSTIFICATION FOR PROTECTING SETTLEMENT NEGOTIATIONS

Justifications for evidentiary protection of settlement negotiations include (1) the public policy of promoting settlements, (2) fundamental fairness to the participants, and (3) their general lack of probative value.[9]

Public Policy of Promoting Settlements

The prevailing rationale for excluding evidence of settlement negotiations is the strong public policy favoring settlements.[10] Settlements improve relationships and

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6. In contrast, Section 1119 (mediation confidentiality) expressly addresses the admissibility, confidentiality, and discoverability of mediation communications.

7. The proposed law defines "settlement negotiations" to include a settlement agreement, but the proposed provisions on discoverability and confidentiality (as opposed to admissibility) would not apply to evidence of a settlement agreement. See proposed Sections 1130, 1132-1133.5, 1133.7, *infra*; see also "Discoverability of Settlement Discussions" and "Confidentiality of Settlement Discussions," *infra*. For application of the proposed law to an internal memorandum prepared for purposes of a settlement negotiation, see Affiliated Manufacturers, Inc. v. Aluminum Co. of America, 56 F.3d 521, 528-30 (3d Cir. 1995) (district court properly excluded memorandum "prepared as a basis for compromise negotiations").

8. In *Covell v. Superior Court*, the court concluded that "[t]he statutory protection afforded to offers of settlement does not elevate them to the status of privileged material." 159 Cal. App. 3d 39, 42, 205 Cal. Rptr. 371 (1984). Nonetheless, the court ruled that the trial court abused its discretion in granting discovery of settlement offers. *See id.* at 42-43. This may mean that there is a stiffer standard for discovery of a settlement negotiation than for discovery of other materials. *See* Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 1002 (1988).

9. Another rationale, known as the contract theory, holds that a settlement offer is inadmissible because it is a promise without consideration. This theory has never gained acceptance in the United States and "has little merit." D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.3.1, at 3:23-3:27 (1998).

10. *See, e.g.*, Fed. R. Evid. 408 advisory committee's note; Brazil, *supra* note 8, at 958-59; Leonard, *supra* note 9, § 3.3.3, at 3:33 ("[T]his general rationale has for many years been widely supported by the commentators as the primary justification for the exclusionary rule, and the cases following that view are legion.") (footnote omitted). The policy of promoting settlement has received some criticism, primarily from academics. *See, e.g.*, Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2663-64 (1995) (collecting authorities). *See also* Rinaker v. Superior Court, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464, 470 (1998) ("That section 1119 serves an important public purpose in promoting the settlement of legal disputes through confidential mediation rather than litigation does not justify the preclusion of effective impeachment of a prosecution witness in a juvenile delinquency proceeding with statements the witness made during mediation."). But the overwhelming weight of authority holds that settlements are essential. *See, e.g.*, Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings

reduce litigation expenses.[11] If effective restrictions are in place, the parties can speak freely, knowing that their words and actions will not be used against them. Instead of engaging in "an irrational poker game," they can share the reasoning underlying their positions, enhancing the likelihood of reaching a mutual understanding and eventual settlement.[12]

Fundamental Fairness to Participants

Fundamental fairness is another reason for excluding evidence of settlement negotiations. Making an offer to settle a contentious dispute is often emotionally difficult, and a willingness to compromise is generally well-regarded in our society. To use evidence of it against the would-be compromiser would unfairly penalize that person for taking a hard step towards resolution of the dispute.[13]

L.J. 9, 36 (1996) ("The public policy favoring the private settlement of disputes has generally received enthusiastic support from the commentators and the courts."); Folberg, Rosenberg & Barrett, *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. Rev. 343, 357 (1992) (in a survey of California judges and court administrators, "the near unanimous preference was for more cases to settle, for cases to be settled earlier in the process, and for settlements to maximize fairness and creativity"); Gross & Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 320 (1991) ("With some notable exceptions, lawyers, judges, and commentators agree that pretrial settlement is almost always cheaper, faster, and better than trial.").

11. McClure v. McClure, 100 Cal. 339, 343, 34 P. 822 (1893) (settlements "are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation."); Skulnick v. Roberts Express, Inc., 2 Cal. App. 4th 884, 891, 3 Cal. Rptr. 2d 597 (1992) (same). The benefits of settlements have long been recognized. *See, e.g.*, Von Schmidt v. Huntington, 1 Cal. 55, 61 (1850) (In the *Nueva Recopilacion* it is declared that judges "shall discourage litigation … by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner, by refusing legal process in cases of a trivial nature whenever it can be done without prejudicing the lawful rights of the parties; and by making use of persuasion, and all other means which their discretion shall dictate, to convince the parties of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied with success.").

12. Brazil, *supra* note 8, at 959. *See also* Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (4th Cir. 1988) ("The public policy favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions."); United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982) ("By preventing settlement negotiations from being admitted as evidence, full and open disclosure is encouraged, thereby furthering the policy toward settlement."); Folberg, Rosenberg & Barrett, *supra* note 10, at 358 (according to California judges surveyed, one reason attorneys do not settle until they reach the courthouse steps is "fear that offers to compromise will be used against their clients later"); Gladstone, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 Pepp. L. Rev. 237, 238 (1989) ("Full disclosure is crucial during the settlement process. Without it, parties will not entertain meaningful discussion, and far more potentially settled cases will proceed to a possibly unnecessary trial."); Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 2 Rev. of Litig. 665, 684 (1993) ("A critical component of successful settlements is confidentiality, which encourages parties to negotiate freely without fear that statements made in an effort to settle could be used against them at some point in the future."); Menkel-Meadow, *supra* note 10, at 2683 ("When representatives in a dispute have constituencies of widely different views of the case, and when meeting with the 'enemy' itself is considered a signal of weakness, negotiations will simply not occur unless they can be held in privacy.").

13. Leonard, *supra* note 9, § 3.3.4, at 3:35-3:37. The fairness rationale is independent of, but interrelated with, the public policy of promoting settlements. Penalizing a person who seeks compromise is not only unfair, but also inconsistent with the goal of encouraging settlements. Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990) (the public policy favoring settlement

Lack of Probative Value

The relevancy theory holds that courts should exclude evidence of settlement negotiations because it is irrelevant or of little probative value in establishing liability. Instead of reflecting the merits of the claim, the offer may just reflect a desire to avoid costly litigation expenses and achieve peace.[14]

The strength of this argument varies from case to case, depending on the amount of the offer relative to the size of the claim,[15] the projected litigation expenses, and other factors. Even if the relevancy theory could be said to justify exclusion of parties' offers or demands, it plainly does not support exclusion of other statements or conduct in settlement negotiations.[16] Thus, the relevancy theory is not independently sufficient to justify provisions such as Sections 1152 and 1154.[17] To some extent, however, it supplements the other rationales for excluding evidence of settlement negotiations.

PROBLEMS WITH EXISTING LAW

Provisions like Sections 1152 and 1154 do not fully achieve the goal of protecting settlement negotiations.

In the past decade, courts and commentators have increasingly emphasized that out-of-court settlements are crucial if the justice system is to function effectively.[18] The vast majority of civil cases settle before trial. If they did not, the backlog in the courts would become intolerable.[19] Settlements, particularly early settlements, not only reduce court backlogs and conserve court resources, but also spare disputants the expense, uncertainty, and stress of litigation.[20] Although many cases already settle, the "need for settlements is greater than ever before."[21]

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of disputes makes it inadvisable to penalize a would-be compromiser by allowing that person's unaccepted offer to be used as an admission); 1 B. Witkin, California Evidence *Circumstantial Evidence* § 424, at 398 (3d ed. 1986) (same).

14. 4 J. Wigmore, Evidence § 1061, at 36 (J. Chadbourn rev. 1972).

15. Fed. R. Evid. 408 advisory committee's note. Relevancy is not a persuasive basis for excluding evidence that a party offered to pay nine tenths of a claim, because the party probably would not have made such an offer without considering the claim strong. Similarly, relevancy is not grounds for excluding evidence that a plaintiff offered to accept only one tenth of the damages sought. It is unlikely that the plaintiff would have been satisfied with so little if the plaintiff regarded the claim as wholly valid. 2 D. Louisell & C. Mueller, Federal Evidence § 171, at 454 (1985); *see also* Chadbourn, *A Study Relating to the Uniform Rules of Evidence — Extrinsic Policies Affecting Admissibility*, 6 Cal. L. Revision Comm'n Reports 625, 676 (1964) (An "offer of compromise may possess some or even considerable probative force (depending, of course, upon how closely the offer approximates the full sum demanded).")

16. Brazil, *supra* note 8, at 958.

17. *See, e.g.*, Leonard, *supra* note 9, § 3.3.2, at 3:30 ("… the relevancy theory for excluding compromise evidence is generally invalid.").

18. *See, e.g.*, Neary v. Regents of University of California, 3 Cal. 4th 275, 278, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992); Leonard, *supra* note 9, § 3.1, at 3:2-3 & n.2.

19. Brazil, *supra* note 8, at 959.

20. *See, e.g.*, L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 Lectures on Legal Topics 89, 105 (1926), *quoted in* Shapiro, The Oxford Dictionary of American Legal Quotations 304

Candor is often crucial in a settlement discussion and assurance of confidentiality is usually essential to candor.[22] Under Sections 1152 and 1154, such assurance is limited, because evidence of settlement negotiations is admissible for any purpose except proving or disproving liability.[23] Although a court has discretion to exclude evidence of settlement negotiations where the evidence creates a danger of undue prejudice that substantially outweighs its probative value,[24] participants in such negotiations may be reluctant to rely on the

(1993) ("I must say that as a litigant I should dread a lawsuit beyond almost anything short of sickness and death."); Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2621 (1995) ("Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming. Small wonder, then that both judges and litigants prefer settlements which are cheaper, quicker, less public and less all-or-nothing than adjudications."). For further discussion of the advantages of settlements, see Cordray, *supra* note 10, at 36-41; Menkel-Meadow, *supra* note 10, at 2671-93.

21. *Neary*, 3 Cal. 4th at 277; *see also* Sander, Allen & Hensler, *Judicial (Mis)use of ADR? A Debate*, 27 U. Tol. L. Rev. 885, 891 (1996) (remarks of Frank Sander) (Although 95% of cases already settle, "we should be interested in ways in which the 95% of the cases can be settled even earlier and cheaper and more satisfactorily. Moreover, if we could change the 95% to 96%, that would be a 20% decrease in the cases that are now tried (because it would be 1% out of 5%) so we are not talking about trivia here.").

22. *See* note 12 *supra* and accompanying text; *see also* Daines v. Harrison, 838 F. Supp. 1406, 1408 (D. Colo. 1993) ("Everyone agrees that confidentiality furthers settlement."); Kerwin, *supra* note 12, at 665 ("It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful.").

23. *See generally* Brazil, *supra* note 8, at 996 (footnote omitted). In the context of the corresponding federal provision, Judge Brazil explains:

> By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege rationale that they purported to find so 'consistently impressive' and that they intended to make the principal underpinning of the newly formulated rule. The protection of rule 408 virtually evaporates; there are so many conceivable purposes for which settlement communications might be admissible, and counsel easily can argue that they cannot determine whether there is some permissible purpose for which the communications might be admissible at trial unless they can discover their contents.… [T]he drafters constructed a rule that is unfaithful to its own rationale.

See also Bullock & Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 La. L. Rev. 885, 952 (1997) (The rule that settlement negotiations may be offered for a legitimate purpose other than proving liability or amount "constitutes a huge loophole which able counsel seeking to use the evidence can often exploit."); Gladstone, 16 Pepp. L. Rev. at 246 ("The other purposes doctrine has the potential to completely override the policies of settlement negotiation."); Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,*, 1995 J. Disp. Resol. 1, 13 (1995) ("Evidence Rule 408's weakness is that it does not require exclusion of evidence from a negotiation offered for 'another purpose'….").

24. Section 352 ("The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will … create substantial danger of undue prejudice ….").

court to exercise this discretion,[25] choosing to be circumspect instead of frankly exploring the dispute and options for settlement.[26]

Misconceptions about the extent of the protection also exist. Disputants sometimes fail to realize that the protection for evidence of settlement negotiations is not absolute, but only excludes such evidence on the issue of liability.[27] The consequences can be severe. A party's admission in settlement negotiations, made on the assumption that it would be inadmissible, may become critical evidence against the party at trial and may later form the basis of a malpractice claim against the party's lawyer.

Finally, evidence of settlement negotiations that is ostensibly introduced for another purpose tends to be prejudicial as to liability, even with the use of a limiting instruction.[28] Frequently, this is the motive for introducing such evidence.[29] Regardless of whether a party offers evidence of settlement negotiations disingenuously, admitting such evidence can distort the litigation process and cause injustice.

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25. *See generally* Jaffee v. Redmond, 518 U.S. 1, 17-18 (1996), *quoting* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) (If an evidentiary provision is to effectively encourage communication, participants in a conversation "'must be able to predict with some degree of certainty whether particular discussions will be protected.'").

26. The magnitude of this chilling effect is difficult to quantify, but the strong consensus on the importance of confidentiality and candor in achieving settlement attests to its considerable impact. See notes 12 and 22 *supra* and accompanying text; *see also* Kirtley, *supra* note 23, at 16 (The "overwhelming weight of scholarly authority supports the proposition that confidentiality is essential to the functioning of mediation.").

27. *See generally* Kobayashi, *Too Little, Too Late: Use and Abuse of Innocuous Yet Dangerous Evidentiary Doctrines*, C607 SLI-SBS 1127, 1132 ("Were one to ask a group of attorneys who are not regularly engaged in active trial practice whether the statements made during settlement negotiations are inadmissible, a surprising percentage of the individuals would answer, 'yes, inadmissible' and, of course, they would be wrong."); J. Michaels, *Rule 408: A Litigation Mine Field*, Litigation, Fall 1992, at 34 ("Too often viewed as an unambiguous exclusionary rule, a sure protection, Rule 408 is actually a trap.").

28. Brazil, *supra* note 8, at 985 (the risks of unfair prejudice and confusion from admitting offers of compromise "could not be eliminated by limiting jury instructions."); Kobayashi, *supra* note 27, C607 ALI-ABA at 1136 (Curative instructions where evidence of settlement negotiations is admitted "will be ineffective and may cause a second ringing of the bell that one is attempting to unring."); M. Mendez, California Evidence: With Comparison to the Federal Rules of Evidence § 4.08, at 91 (1993) (In admitting evidence of settlement negotiations for purposes other than proving liability, the "danger to the objecting party is obvious: the jury may not abide by the instruction limiting their consideration of the evidence ….").
See also Warner Construction Corp. v. City of Los Angeles, 2 Cal. 3d 285, 299, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) ("… so much testimony had pertained to the letters that the jury could not reasonably be expected to follow a limiting instruction.").

29. As one commentator has explained, the rule that compromise evidence is inadmissible on the issue of liability "provides great incentive to find creative ways to recharacterize compromise evidence …. If this recharacterization is successful, evidence that might clearly show liability for or invalidity of a claim or its amount, and thus directly conflict with the rule's primary purpose, may still be admissible." Kerwin, *supra* note 12, at 668. *See also* Kobayashi, *supra* note 27, C607 ALI-ABA at 1136 (A "skillful lawyer's recharacterization of the circumstances can provide a basis for admissibility of a statement that would otherwise be inadmissible based on the presumed policy of encouraging candid discussions and disclosures and settlement negotiation.").

RECOMMENDATIONS

Balancing the competing considerations in protecting evidence of settlement negotiations is a delicate endeavor. The detriments of excluding potentially relevant evidence must be weighed against the benefits of fairness and promoting mutually satisfactory settlements.[30] To achieve these benefits, the Commission recommends the following reforms, which would apply both to judicially-supervised and unassisted settlement negotiations:[31]

Purposes for Introducing Evidence of Settlement Negotiations

As a general rule, evidence of settlement negotiations should be inadmissible in a civil action or other noncriminal proceeding. This will encourage openness and enhance rationality in settlement negotiations. This, in turn, will promote early settlements, as well as settlements that are more likely to be mutually satisfactory and durable than ones grounded on speculation as to opposing views.[32] The new rule will also be fairer than existing law, because a person could not be penalized for offering to settle.

This general rule should be subject to a number of exceptions.[33] In each of the following situations, if a court admits evidence of settlement negotiations, it

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30. *See* Leonard, *supra* note 9, § 3.4, at 3:44.

31. A judicially-supervised settlement conference is not a mediation within the scope of the provisions governing mediation confidentiality. Section 1117 & Comment. A settlement conference is conducted under the aura of the court and involves special considerations. Section 1117 Comment; Menkel-Meadow, *Ex Parte Talks With Neutrals: ADR Hazards*, 12 Alternatives to High Cost Litig. 109, 119 (1994) (ex parte communication is more acceptable "in private ADR and less so when courts authorize or provide the third-party neutral; whether a third-party in such a context can ever be seen as having no 'coercive' or 'public' power is less clear to me.")' Sander, Allen & Hensler, *supra* note 21, at 893 (remarks of H. William Allen) ("the interposition of a judge into the settlement process is coercion."); *see also id.* (remarks of Debra Hensler) ("The process that actually did not look fair to the ordinary lay litigant was the process of negotiation with the judge or without the judge, because they saw that as happening behind closed doors and without their participation and without their control."). Having considered the differing contexts of a mediation, a judicially-supervised settlement conference, and an unassisted settlement negotiation, the Commission recommends that a judicially-supervised settlement conference be governed by the standards proposed here for an unassisted settlement negotiation, rather than the greater degree of confidentiality applicable to a mediation.

32. Some authorities maintain that we should not blindly promote settlement but focus on promoting "desirable" settlements. *See, e.g.*, Luban, *supra* note 20, 83 Geo. L.J. 2619 (1995); Galanter & Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994). By encouraging early settlements based on candid exchange of information, the proposed rule would serve that end. *See Neary*, 3 Cal. 4th at 277 ("Settlement is perhaps most efficient the earlier the settlement comes in the litigation continuum."); Gopal v. YoshiKawa, 147 Cal. App. 3d 128, 130 (1983) ("Public policy has long supported pretrial settlements."); Folberg, Rosenberg & Barrett, *supra* note 10, at 351 ("We need a justice system that encourages satisfactory settlements early in the process, thereby minimizing costs for both the parties and the state, and resulting in informed decisions and perceived fairness."); Sheppard & Edwards, *Litigators are Losers*, California Lawyer 38, 39 (April 1998) ("Another change should be new rules of procedure and codes of ethics that encourage early nonlitigious resolutions of conflict.").

33. In addition to the exceptions discussed in the text and included in the proposed new chapter on settlement negotiations, the proposed rule making evidence of settlement negotiations inadmissible would be subject to exceptions "as otherwise provided by statute." For example, although evidence of an offer of

should attempt to minimize the scope of settlement negotiation evidence admitted, so as to prevent chilling of candid settlement negotiations.

Evidence otherwise admissible. An exception is necessary to prevent disputants from using settlement negotiations to shield materials from use at trial. Under this exception, otherwise admissible evidence would not be rendered inadmissible solely by reason of its introduction or use in a settlement negotiation.[34]

Partial satisfaction of undisputed claim or acknowledgment of preexisting debt. Evidence of partially satisfying a claim without questioning its validity may be admissible if that evidence is offered to prove the validity of the claim.[35] Similarly, a debtor's payment or promise to pay all or part of a preexisting debt may be admissible when a party offers that evidence to prove the creation of a new duty or revival of the debtor's preexisting duty.[36] These limitations are consistent with the goal of promoting settlement: If a claim is undisputed or a debt acknowledged, there is no dispute to settle and no need to provide confidentiality.[37] The proposed law would preserve these existing exceptions to the exclusionary rule for settlement negotiations.[38]

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compromise pursuant to Code of Civil Procedure Section 998 "cannot be given in evidence upon the trial or arbitration" (Code Civ. Proc. § 998(b)(2)), Section 998 clearly contemplates that such an offer is to be admissible in calculating a costs award. Because the proposed rule excluding evidence of settlement negotiations is subject to exceptions "as otherwise provided by statute," it would not preclude admissibility in that instance. The proposed law expressly provides, however, that where evidence of settlement negotiations is admitted pursuant to a statutory exception, it shall not be admissible on the issue of liability for the underlying claim. See proposed Section 1142 and Comment, *infra*. Thus, even if Section 998 did not prohibit use of the offer at trial, the proposed law would preclude introduction of the offer to prove or disprove liability.

34. For example,

> … If the defendant admits at the [settlement] conference that his mechanic warned him that his brakes needed to be replaced, the plaintiff would be precluded merely from offering the defendant's admission to prove the mechanic's warning. The plaintiff, however, would be free to discover the mechanic's statement and to call the mechanic to the stand to repeat the warning he gave to the defendant.

Mendez, *supra* note 28, §4.09, at 93.

This exception is drawn from Evidence Code Section 1120(a) and Federal Rule of Evidence 408. "The rationale behind this exception to the rule is to prevent negotiation parties from introducing otherwise admissible documentary and physical evidence during compromise negotiations in an attempt to render the evidence inadmissible." *Rule 408: Compromise and Offers to Compromise*, 12 Tuoro L. Rev. 443, 447 (1996). The exception does not extend to documentary evidence specifically created for use during settlement negotiations. *See id.* at 448 (The policy for this exception does not apply where the document or statement would not have existed but for the negotiations, because in that situation the negotiations are not being exploited as a device to make existing documents unreachable.).

35. Section 1152(c)(1).

36. Section 1152(c)(2).

37. Mendez, *supra* note 28, § 4.08, at 89-90; *see also* Chadbourn, *supra* note 15, at 676-77.

38. Strictly speaking, express exceptions for these situations should not be necessary, because the proposed law would apply only where there is a dispute to compromise. The Commission nonetheless recommends retention of these exceptions, so as to provide clear statutory guidance on these commonly occurring situations.

Cause of action, defense, or other legal claim arising from conduct during settlement negotiations. The public policy favoring settlement has limited force as to settlements and settlement overtures that involve illegality or other misconduct.[39] 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. To address situations such as these, the proposed law would not exclude evidence of settlement negotiations where the evidence is introduced to support or rebut a cause of action, defense, or other legal claim (e.g., a request for sanctions) arising from conduct during the negotiations.

Obtaining benefits of settlement. Evidence of a settlement should be admissible to bar reassertion of a claim or enforce the settlement. This exception is essential if parties are to enjoy the benefits of settling a dispute.[40] Conversely, evidence of settlement negotiations should be admissible to rebut an attempt to enforce a settlement, as by showing that there was no settlement or meeting of the minds.

Good faith settlement barring contribution or indemnity. Evidence of settlement negotiations should be admissible to prove or disprove the good faith of a settlement. This exception follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[41]

Prevention of felony. Evidence of settlement negotiations should be admissible if a participant in the negotiations reasonably believes that disclosure is necessary to prevent a felony. For example, such evidence may be relevant to obtaining a restraining order against a battering boyfriend.

Admissibility by agreement of all parties. Evidence of settlement negotiations should be admissible if all parties to the negotiations expressly agree in writing that the evidence may be admitted.

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39. *See* Leonard, *supra* note 9, § 3.7.4, at 3:98-1 ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy."); *see also* Brazil, *supra* note 8, at 980-81 (Federal Rule of Evidence 408 does not bar evidence of wrongful acts during negotiations).

40. *See id.*, § 3.8.1, at 3:124 ("[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").

41. Code Civ. Proc. § 877.6(c). The exception should apply not only when evidence of settlement negotiations is introduced pursuant to Code of Civil Procedure Section 877.6, but also when such evidence is introduced pursuant to a comparable provision of another jurisdiction.

Bias. A settlement agreement between a witness and a party may consciously or subconsciously influence the testimony of the witness.[42] For example, suppose a settlement agreement between a witness and a defendant with limited assets requires the defendant to pay a substantial sum to the witness. This gives the witness an incentive to shelter the defendant from liability to others, so as to minimize competition for the defendant's assets. Because of this danger of bias, evidence of a settlement agreement should be admissible if a party to the agreement testifies and the evidence is introduced to show the bias of that witness.

In contrast to a settlement agreement, evidence of a settlement offer, or other evidence of settlement negotiations short of a settlement agreement, is less indicative of bias. Where a party offers such evidence to show bias, it should be inadmissible, because the benefits of safeguarding the privacy of the settlement negotiations outweigh the limited value of the evidence in establishing bias.[43]

Evaluation of attorney's fees and class action settlements. Evidence of settlement negotiations should be admissible to a limited extent to facilitate evaluation of attorney's fees and proposed class action settlements. Extensive intrusion on the privacy of the negotiations is not necessary or appropriate, but evidence of the existence, duration, intensity, or general nature of settlement negotiations may be relevant in assessing whether attorney's fees are reasonable. Similarly, evidence of settlements in similar cases should be admissible in evaluating a proposed class action settlement, but there is no need to examine the content of the settlement discussions.

Discoverability of Settlement Discussions

Because Sections 1152 and 1154 only bar use of compromise evidence on the issue of liability, counsel can readily argue for discovery of such evidence on the ground that it may be admissible for some other purpose.[44] But any potential intrusion on confidentiality, whether in trial, in discovery, or apart from the

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42. The danger of bias is particularly acute where there is a sliding scale recovery agreement (one between a plaintiff and a tortfeasor defendant, under which the defendant's liability depends on how much the plaintiff recovers from another defendant at trial) and a defendant party to the agreement testifies. Code of Civil Procedure Section 877.5(a)(2) provides safeguards for use of a sliding scale recovery agreement:

> If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.
>
> The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

43. *See generally* Cook v. Yellow Freight System, Inc., 132 F.R.D. 548, 555 (E.D. Cal. 1990) ("[T]he existence of unaccepted [settlement] proposals alone do[es] very little to establish bias and, at any rate, any marginal relevance is outweighed by the privileged nature of settlement discussions.").

44. *See* Brazil, *supra* note 8, at 996.

litigation process (e.g., a disclosure to a news reporter or a tip to a police officer), may inhibit candid settlement discussions.[45]

To effectively serve the goal of promoting mutually satisfactory settlement, the proposed law would protect evidence of a settlement negotiation from discovery. This protection would be subject to essentially the same exceptions as for admissibility (evidence otherwise admissible; partial satisfaction of undisputed claim or acknowledgment of preexisting debt; cause of action, defense, or other legal claim arising from conduct during settlement negotiations; obtaining benefits of settlement; good faith settlement barring contribution or indemnity; prevention of felony; admissibility by agreement of all parties; evaluation of attorney's fees and class action settlements).[46]

Settlement agreements, as opposed to settlement offers and associated negotiations, present special considerations. For example, suppose a manufacturing plant allegedly emits a hazardous chemical and a nearby resident sues for resultant injuries. If the manufacturer and the victim enter into a purportedly confidential settlement agreement, it may be important to resolve whether other persons, particularly other victims or potential victims, are entitled to disclosure of the agreement. Such issues are controversial[47] and this proposal does not address them. The new standard for discovery of settlement negotiations would not apply to disclosure of settlement agreements.

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45. Often, negotiations to settle one case may be relevant to, and thus potentially discoverable in, a related case involving different parties:

> What people say in negotiations to settle one lawsuit may well be relevant to other litigation in which they are involved or in which they fear they might become involved. I have hosted many settlement conferences during which parties have expressed concerns about related cases or parallel situations involving nonparties …. It is naive not to recognize that lawyers and litigants are constantly concerned about how their statements or actions in one setting might come back to haunt them in other settings. If courts construe rules so as to increase the circumstances in which communications made during negotiations can be discovered or admitted into evidence, they create inhibiting forces that reinforce the instinct parties and lawyers already have to play their cards as close to their chests as possible.

Brazil, *supra* note 8, at 999.

In multi-party litigation, parties who participate in a settlement discussion may not want other parties to learn the content of the discussion, yet nonparticipants may have a keen interest in discovering such material. Even where a dispute involves only two parties, there may be reason for a party to desire evidence of negotiations between the parties, such as when there has been employee turnover, a change of counsel, or just differences in perception, memory, or recordkeeping of the negotiations.

46. The proposed new standard for discovery of evidence of settlement negotiations would also be subject to exceptions "as otherwise provided by statute." Thus, the proposed law would not override a constitutional provision or statute calling for disclosure of evidence of settlement negotiations.

This does not mean, however, that the general provision authorizing discovery that is reasonably calculated to lead to the discovery of admissible evidence (Code of Civil Procedure Section 2017) would prevail over the proposed law. Such an interpretation would render the proposed law meaningless and would contravene the principle that a specific provision prevails over a more general one. [Insert cites.]

47. *See, e.g.*, Senate Bill 711, introduced by Senator Lockyer in 1991. The Legislature passed the bill but the Governor vetoed it.

Confidentiality of Settlement Discussions

Although admissibility and discoverability are clearly defined concepts, the meaning of confidentiality is less sharply delineated and more context-specific.[48] The term is generally understood, however, to connote the imparting of information to another person in private, on the understanding that it will not be disclosed to others.[49] A communication ceases to be confidential if it is disseminated more widely than is anticipated at the time of disclosure.[50]

Participants in settlement negotiations often incorrectly assume that their discussions are automatically confidential in this sense. On other occasions, participants enter into agreements with each other to ensure such confidentiality, so that they can engage in candid and productive discussions. These agreements actually provide only partial protection, because they are not binding on third parties and thus do not affect the extent to which a third party is entitled to discover evidence of settlement negotiations or compel its production at trial.

By restricting the admissibility and discoverability of evidence of settlement negotiations, the proposed law would limit the extent to which a third party can gain access to such evidence. Coupling these protections with a confidentiality agreement between the negotiating parties would make a settlement negotiation private in most circumstances.

The Commission nonetheless recommends adding a statutory provision on confidentiality. This provision would not make evidence of a settlement negotiation automatically confidential, but rather would expressly state that such evidence is confidential where the parties to a negotiation execute a written

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48. For example, one recent article uses this odd definition:

> [A] distinction must be made between confidentiality and privilege. If a communication is confidential, it may not be offered as evidence in proceedings in the same case. If a communication is privileged, on the other hand, virtually any disclosure, in or out of court, is prohibited.

Bullock & Gallagher, *supra* note 23, at 951 (footnotes omitted).

49. *See, e.g.*, Webster's New World Dictionary (2d College ed. 1980), which defines "confidential" as:

> 1. told in confidence; imparted in secret 2. of or showing trust in another; confiding 3. entrusted with private or secret matters [a *confidential* agent]

50. For example, Section 952 defines "confidential communication between client and lawyer" to mean:

> …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 and 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 ….

(Emphasis added). Similar definitions are used in Sections 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1035.4 (confidential communication between sexual assault counselor and victim), and 1037.2 (confidential communication between domestic violence counselor and victim). See also Section 912 (privilege for confidential communications is waived "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.").

agreement to that effect.[51] The statute would thus alert negotiating parties that a written agreement is necessary to make evidence of their negotiation confidential.[52] By limiting this protection to a negotiation in which the participants have executed the required agreement, the proposed law would ensure that such protection applies only where the participants desire it.

The proposed provision on confidentiality of evidence of settlement negotiations would be subject to the same exceptions as the proposed provision on discoverability of such evidence (including the limitation that the provision would not apply to evidence of a settlement agreement). Participants in a settlement negotiation would not be permitted to contract around these exceptions.

Effect of the Proposed Reforms

In many instances, evidence of settlement negotiations would be treated the same way under the proposed law as under existing law. Evidence excluded under existing law (e.g., a settlement proposal offered for purposes of proving liability) would also be excluded under the proposed law; evidence admitted under existing law (e.g., evidence of a good faith settlement pursuant to Code of Civil Procedure Section 877.6) would also be admitted under the proposed law.

There are, however, important differences between the proposed law and existing law. The coverage of discoverability is new, and would significantly enhance the privacy of settlement negotiations. The provision on confidentiality would also be a new development. It would alert negotiating parties to the need for a confidentiality agreement, impose restrictions on the effect of such an agreement, and provide guidance on the concept of confidentiality.

In the area of admissibility, results under the proposed law would differ from those under existing law in a number of important situations. For example, existing law does not expressly preclude a party from introducing evidence of settlement negotiations for purposes of impeachment by a prior inconsistent statement.[53] The proposed law would make clear that evidence of settlement negotiations may not be used for that purpose. While this may result in the loss of

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51. In contrast, mediation communications are automatically confidential. See Section 1119(c). Statutes governing privileges such as the lawyer-client privilege, the physician-patient privilege, and the psychotherapist-patient privilege do not expressly make specified communications confidential. Rather, they define the term "confidential communication" in each context, and then restrict the admissibility and discoverability of such communications. [Insert cites.]

52. Disclosure of evidence in violation of this section would not be a basis for tort liability. For guidance on whether the proposed law would be 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).

53. C & K Engineering Contractors v. Amber Steel Co., 23 Cal. 3d 1, 13, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978), can be interpreted to support the proposition that Section 1152 excludes evidence of settlement negotiations that is offered for purposes of impeachment by a prior inconsistent statement. In *C & K Engineering*, the trial court excluded certain evidence of settlement negotiations, which "might have impeached" other testimony of a witness. The California Supreme Court upheld this ruling on appeal, but did not expressly discuss whether Section 1152 excludes evidence offered for purposes of impeachment. Instead, the court stressed that Section 1152 excludes conduct and statements in settlement negotiations, not just settlement offers. *Id*.

some probative evidence, the benefits of encouraging candor and thus promoting prompt and durable settlements outweigh this detriment.[54] This is particularly so because the excluded impeachment evidence may never exist absent the enhanced evidentiary protection,[55] may consist of trivial inconsistencies rather than serious mistakes or deliberate lies,[56] and may be unduly prejudicial even with the use of a limiting instruction.[57]

The proposed law would also strengthen the privacy of a settlement negotiation by making evidence of the negotiation inadmissible to show bias in most

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54. Many commentators agree that evidence of settlement negotiations should not be admissible for purposes of impeachment by a prior inconsistent statement. *See, e.g.*, Brazil, *supra* note 8, at 974-78 ("To admit such statements would make a mockery of [Rule 408's] promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are completely consistent and because it is so easy to find some tension between virtually any two statements on the same subject."); M. Graham, Modern State and Federal Evidence: A Comprehensive Reference Text 487 (NITA 1989) (insert parenthetical); S. Saltzburg, M. Martin & D. Capra, Federal Rules of Evidence Manual 512-13 (6th ed. 1994) (insert parenthetical); [insert additional cites]; *but see* [insert cites]. Some states have enacted statutes to this effect. *See, e.g.*, Alaska Rule of Court 408 (West 1998) (exclusion of compromise evidence "is required where the sole purpose for offering the evidence is to impeach a party by showing a prior inconsistent statement"); Maryland Rule of Evidence 5-408 (Michie's 1996) (same). Despite its express language restricting only admissibility "to prove liability for or invalidity of the claim or its amount," some courts have interpreted Federal Rule of Evidence 408 to make evidence of settlement negotiations inadmissible for purposes of showing a prior inconsistent statement. *See, e.g.*, Derderian v. Polaroid Corp., 121 F.R.D. 9, 12 n.1 (1988); [insert additional cites].

55. *See generally* Jaffee v. Redmond, 518 U.S. at 12 (Without a psychotherapist-patient privilege, "much of the desirable evidence to which litigants such as petitioner seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged."); Folb v. Motion Picture Industry Pension & Health Plans, 16 F. Supp. 2d 1164, ____ (C.D. Cal. 1998) ("a new federal privilege results in little evidentiary detriment where the evidence lost would simply never come into being if the privilege did not exist"); Kirtley, *supra* note 23, at 17 ("[T]he cost of the mediation privilege is not necessarily equal to the value of the evidence privileged by it. Information that is disclosed in a mediation only because of the existence of a privilege cannot be counted as a cost; 'but for' the privilege the information would be unknown.").

56. "Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent." Brazil, *supra* note 8, at 978. "In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous." *Id.*

57. As the court explained in Derderian v. Polaroid Corp., 121 F.R.D. 9, 12 n.1 (1988), evidence of settlement negotiations should not be admissible under Federal Rule of Evidence 408 for impeachment purposes

> because in the usual case, an analysis of both the nature of the claims in a case and the content of the purported statements would lead to the conclusion that such impeachment evidence would be nothing more than "camouflaged" evidence on liability. [Cite omitted.] This would be so even if the statements, although of parties and therefore admissible as substantive evidence under Rule 801(d)(2)(A), F.R.Evid., were only admitted for purposes of impeachment for purposes of judging credibility. In the usual case, the issue of credibility would concern testimony of facts directly bearing on liability, and to admit the testimony of statements made at compromise negotiations for this purpose would "… flout the most basic policies underlying Rule 408." [Cite omitted.]

See also note 28 *supra* and accompanying text.

circumstances,[58] inadmissible to establish the jurisdictional classification of a claim,[59] and inadmissible not only in the case that is the subject of the negotiations but also in other cases.[60] Perhaps most importantly, the proposed law would direct a court ruling on the admissibility or discoverability of evidence of a settlement negotiation to assess whether the purpose for introducing or discovering the evidence could be served without breaching the privacy of the negotiation. The proposed law would require the court to consider the twin goals of achieving justice and promoting cost-effective, mutually beneficial settlements, and tailor its orders accordingly.[61] While such tailoring already occurs to some extent, the express statutory directive would encourage greater effort and creativity in accommodating the competing interests.

Coupled with the other reforms, this would increase the confidentiality of a settlement negotiation, permit participants to openly explore a variety of options, and enhance the likelihood of an early, mutually satisfactory and thus durable settlement. This in turn would spare the parties from the expense, stress, and uncertainty of prolonged litigation, while also conserving the resources of the court and making those resources available to dispense a higher quality of justice in cases that do not settle.[62]

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58. See notes 42-43 *supra* and accompanying text.

59. In Walker v. Superior Court, 53 Cal. 3d 257, 271, 807 P.2d 418, 279 Cal. Rptr. 576 (1991), the Court recognized that using evidence of settlement negotiations to resolve a jurisdictional issue would adversely affect candor in settlement negotiations:

> …[T]rial courts should exercise caution to assure that information from settlement negotiations is not improperly divulged in the context of a hearing on a section 396 [jurisdictional transfer] matter. [Citation omitted.] The policy reason behind the concern is plain: inappropriate disclosure might discourage plaintiffs from offering to settle below the superior court jurisdictional amount, out of fear that their offer might later be used to divest the superior court of jurisdiction.

The Court did not directly address whether Section 1152 makes evidence of settlement negotiations inadmissible on jurisdictional matters.

In a more recent case, however, an intermediate appellate court concluded that admissions in settlement negotiations may be used in determining whether to transfer a case for lack of jurisdiction. Campisi v. Superior Court, 17 Cal. App. 4th 1833, 1838-39, 22 Cal. Rptr. 2d 335 (1993). The proposed law would overturn this result, which may have been prompted by outrage at the tactics of counsel in the particular case. Although evidence of settlement negotiations would not be admissible to establish jurisdictional abuse, other evidence could be introduced for that purpose.

60. *Cf.* Fieldson Associates v. Whitecliff Laboratories, 276 Cal. App. 2d 770, 81 Cal. Rptr. 332 (1969) (Sections 1152 and 1154 do not apply unless evidence of settlement negotiations is received "to prove either liability for, or invalidity or, the claim concerning which the offer of compromise was made."). [Insert additional cites and discussion.]

61. Proposed Section 1141, *infra*.

62. "A privilege that promotes conciliatory dispute resolution and alleviates the press of cases on the formal judicial system also allows the courts to devote those limited resources to fairly adjudicating those cases that do result in protracted litigation." Folb, 16 F. Supp. 2d at ____. "Rather than the hasty judgments born of overcrowded dockets, the courts are able to provide more carefully considered decisions in matters of sufficient public concern that the parties submit their disputes to a court of law, having found it too difficult to reach a mutually agreeable settlement." *Id*.

Application to Criminal Cases

Sections 1152 and 1154 do not expressly state whether evidence of efforts to compromise a civil case is inadmissible only for purposes of proving civil liability, or also for purposes of a criminal prosecution. This is a very different question from whether to provide evidentiary protection for efforts to compromise a criminal case (i.e., plea bargaining). The latter issue is explicitly covered to some extent by other provisions[63] and is not included in this proposal.[64]

Case law on invoking Section 1152 or 1154 to exclude evidence in a criminal case suggests that the provisions do not apply in a criminal case.[65] The statutory references to proving "liability for the loss or damage" (Section 1152) and "invalidity of the claim" (Section 1154) tend to support that interpretation, because such nomenclature is usually used in the civil and not the criminal context.[66]

The proposed legislation would not change this approach: The new restrictions on admissibility and disclosure of efforts to compromise a civil case would apply only in civil actions and other noncriminal proceedings. Although there is scholarly support for restricting admissibility in some criminal cases,[67] such an extension would trigger difficult considerations. In particular, the Legislature would need to consider the concerns underlying the Truth-in-Evidence provision of the Victims' Bill of Rights, which states in part that "relevant evidence shall not be excluded in any criminal proceeding."[68] The proposed legislation avoids that and other issues by maintaining the status quo in criminal cases.

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63. See Sections 1153, 1153.5, Penal Code § 1192.4. *See also* People v. Crow, 28 Cal. App. 4th 440, 449-52 (1994) (contrasting rules for plea bargaining with rules for settlement of civil disputes).

64. See proposed Sections 1130 ("settlement negotiations" defined), 1131 (application of chapter), *infra*. In some instances, efforts to compromise a civil case may also constitute plea bargaining (e.g., an offer to pay civil damages in exchange for dismissal of criminal charges). The proposed law would not apply to such negotiations. *Id.*

Similarly, some efforts to compromise a civil case may amount to obstruction of justice (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 proposed law would not apply in these situations. *Id.* This limitation is drawn from Federal Rule of Evidence 408. Cases construing that rule may provide guidance in interpreting this aspect of the proposed law.

65. In *People v. Muniz*, 213 Cal. App. 3d 1508, 262 Cal. Rptr. 743 (1989), the defendant contended that his offer to pay for certain medical expenses was inadmissible under Section 1152. The trial court disagreed and the court of appeal affirmed, stating:

> Muniz would have us read into the statute the word "criminal" as an alternative modifier for liability yet offers no reason for us to do so. Nor does the case law interpreting Evidence Code Section 1152 supply any support for the notion that the statute has any application to criminal cases.

Id. at 1515. *See also* Manko v. United States, 87 F.3d 50, 54 (2d Cir. 1996) (Federal Rule 408 "does not exclude relevant evidence in a criminal prosecution even where that evidence relates to the settlement of a civil claim"); United States v. Prewitt, 34 F.3d 436, 439 (7th Cir. 1994) (Federal Rule 408 "should not be applied to criminal cases").

66. *See, e.g.*, Leonard, *supra* note 9, § 3.7.3, at 3:95-3:96 & 3:95 nn. 114-15; 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure: Evidence § 5306, at 216-21 (1980).

67. *See* Leonard, *supra* note 9, § 3.7.3, at 3:91-3:92 & 3:97 n.122.

68. Cal. Const. art. I, § 28(d). The Truth-in-Evidence requirement is not absolute. It does not "affect any existing statutory or constitutional right of the press" and does not "affect any existing statutory rule of

Humanitarian Conduct

Section 1152 includes, and does not differentiate between, offers stemming from "humanitarian motives" and offers reflecting a desire to compromise. There is little case law on the protection of humanitarian conduct. The rule is intended to encourage acts such as an unselfish offer to pay another person's medical expenses. Because the rationale for protecting humanitarian conduct differs from the rationale for protecting settlement negotiations, the Commission recommends covering such conduct in a separate provision, as in Federal Rule of Evidence 409.

The proposed provision would make evidence of "furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury" inadmissible to prove liability for the injury. Federal Rule of Evidence 409 is the same, except it covers "medical, hospital, or *similar* expenses." The proposed law uses the broader phrase "medical, hospital, or *other* expenses" to ensure coverage of acts such as an unselfish offer to pay wages lost due to an injury.[69] The rule

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evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103." *Id.* In addition, the Legislature may establish exceptions by a two-thirds vote. *Id.*

A similar two-thirds vote requirement exists in the Crime Victims Justice Reform Act, which governs discovery in a criminal case. See Initiative Measure (Prop. 115), § 30, approved June 5, 1990. That requirement would be relevant if this proposal attempted to revise the extent to which settlement negotiations are discoverable in a criminal case.

Another important consideration in a criminal case is the defendant's constitutional right to confront and impeach adverse witnesses. *See, e.g.*, Davis v. Alaska, 415 U.S. 308 (1974) (statute protecting confidentiality of juvenile offender's record must yield to criminal defendant's constitutional right of confrontation); People v. Hammon, 15 Cal. 4th 1117, 938 P.2d 986, 65 Cal. Rptr. 2d 1 (1997) (constitutional right of confrontation does not entitle defendant to discover privileged psychiatric information before trial); Rinaker v. Superior Court, 62 Cal. App. 4th 155, 98 C.D.O.S. 1930 (March 16, 1998) (juvenile court should have conducted in camera hearing to weigh statutory mediation confidentiality against need for mediator's testimony to vindicate delinquency defendant's constitutional right of confrontation); People v. Reber, 177 Cal. App. 3d 523, 532, 223 Cal. Rptr. 139 (1986) (psychotherapist-patient privilege may be overridden "only if and to the extent necessary to ensure defendants' constitutional rights of confrontation").

69. At least six states have similarly deviated from the federal rule. *See* Fla. Stat. Ann. § 90.409 (West 1979 & Supp. 1998) ("Evidence of furnishing, or offering or promising to pay, medical or hospital expenses or other damages occasioned by an injury or accident is inadmissible to prove liability for the injury or accident."); Idaho R. Evid. 409 (Michie 1997) ("Evidence of furnishing or offering or promising to pay medical, hospital, funeral, or similar expenses occasioned by an injury or death, or damage to or loss of property of another, is not admissible to prove liability for the injury, death or damage."); Iowa R. Evid. 409 (West 1998) ("Evidence of furnishing or offering or promising to pay expenses occasioned by an injury is not admissible to prove liability for the injury."); La. Code Evid. Ann. art. 409 (West 1995 & Supp. 1998) ("In a civil case, evidence of furnishing or offering or promising to pay expenses occasioned by an injury to person or damage to property is not admissible to prove liability for the injury or damage nor is it admissible to mitigate, reduce, or avoid liability therefor."); Mont. Code Ann. § 26-10-Rule 409 (1997) ("Evidence of payment of expenses occasioned by an injury or occurrence is not admissible to prove liability."); N.C. R. Evid. 409 (Michie 1997) ("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.").

Likewise, commentators have questioned why the federal rule is limited to "medical, hospital, or *similar* expenses." *See* 23 Wright & Graham, *supra* note 66, § 5326, at 316-17; Leonard, *supra* note 9, § 4.8.3, at 4:58-4:60.

would not extend to conduct or statements associated with such an offer, because they are likely to be incidental, not in furtherance of the offer.[70]

Unlike Section 1152, the proposed provision would not expressly require that the offer of assistance be made from "humanitarian motives." This parallels the federal approach and reflects the reality that offers of assistance are often made from a variety of motives.[71] Assistance should be encouraged regardless of the motivation.[72]

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70. *See* Fed. R. Evid. 409 advisory committee's note. In contrast, broad protection of statements relating to an offer of compromise is necessary, because communication "is essential if compromises are to be effected." *Id.*

For commentary advocating exclusion of statements associated with offers of assistance, see 23 Wright & Graham, *supra* note 66, § 5325, at 309-14. *See also* Leonard, *supra* note 9, § 4.6.2, at 4:46-4:47.

71. *See* 23 Wright & Graham, *supra* note 66, § 5324, at 308 & n.6. The authors of this treatise suggest that the reason for not requiring proof of humanitarian motives in Federal Rule of Evidence 409 was to facilitate advance payments by insurers (immediate reimbursement of damages, without a settlement agreement in place). This proposal would have no impact on such advance payments, because they are specifically covered by Insurance Code Section 11583.

72. *See* Leonard, *supra* note 9, § 4.6.1, at 4:39-4:41. Professor Leonard explains:

> Primarily because of the inherent difficulties of determining a party's motivation in offering medical assistance, because of the important policy the rule is intended to further, and because of fairness considerations, the better view would be to place greater emphasis on the policy and fairness rationales and to exclude the evidence regardless of the circumstances surrounding the party's statements or conduct. This would avoid the need to inquire into what are almost certainly mixed and complex motives in cases of rendering medical assistance ….

Id. at 4:40-4:41.

PROPOSED LEGISLATION

☞ **Staff Note.** For organizational clarity, the staff has relocated some of the provisions proposed in the revised tentative recommendation. These changes are indicated in Staff Notes following pertinent sections. To facilitate discussion, we have minimized renumbering in this draft. When the Commission finalizes its recommendation, we will renumber the provisions in consecutive order, using whole numbers instead of decimals.

Evid. Code §§ 1130-1143 (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). **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"); Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 481 n.3, 261 Cal. Rptr. 735 (1989) (former Section 1152 was not a basis for excluding letters "written before any controversy had arisen as to the meaning of the loan agreements"); In re**

Marriage of Schoettgen, 183 Cal. App. 3d 1, 8, 227 Cal. Rptr. 758 (1986) (discussing but not resolving proper interpretation of former Section 1152).

Mere notification of the existence or nature of a problem is not settlement negotiations within the meaning of this chapter. 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 (1) revised the text of Section 1130 to make clear that the definition of "settlement negotiations" is limited to compromise-related conduct and statements, and (2) revised the Comment to explain that "settlement negotiations" does not include mere notification of the existence or nature of a problem.

Under Section 1130(d), the definition of "settlement negotiations" would include a settlement agreement. Under Section 1133.7, however, the proposed provisions on discoverability and confidentiality of evidence of settlement negotiations (Sections 1133 and 1133.5) would not apply to a settlement agreement.

The Association for California Tort Reform (ACTR) questions the Commission's authority to study settlement agreements, as opposed to settlement negotiations. (Memorandum 98-80, Exhibit p. 3.) A classic case for restricting admissibility, however, is where a litigant in a multi-party case offers evidence of a settlement agreement to prove liability or invalidity of a claim (e.g., where Defendant A proffers a settlement between Plaintiff and Defendant B to disprove Plaintiff's claim against Defendant A, or where Plaintiff A proffers a settlement between Defendant and Plaintiff B to show Defendant's liability to Plaintiff A). The staff is confident that the Commission's continuing authority to study "whether the Evidence Code should be revised" encompasses these and other points relating to the admissibility of settlement agreements.

➡ 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 99-4.

§ 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), and Penal Code Section 1192.4 (guilty plea withdrawn). 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.

§ ~~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.

➡ 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 1133.7-1143. 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.

➡ 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.

➡ ACTR states:

> [W]e appreciate the Commission's desire to clarify existing law on [settlement negotiations], 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 … in what way the proposed legislation is a desirable improvement over existing law.

(Memorandum 98-80, Exhibit p. 4.) The staff has revised the preliminary part (narrative portion) of the draft recommendation to address this point. See "Effect of the Proposed Reforms," *supra*.

§ 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 1134-1143.

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 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.

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. Except as otherwise provided by statute, evidence of settlement negotiations is confidential where 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.

Comment. Section 1133.5 alerts participants in a settlement negotiation that a written agreement is necessary to make evidence of the negotiation confidential. **Where the participants execute the required written agreement, information acquired in the negotiation may not be disclosed to third persons, unless an exception applies or disclosure is necessary to achieve settlement as contemplated during the negotiation. Disclosure of evidence in violation of this section is not a basis for tort liability. 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).**

Although Section 1133.5 makes a settlement negotiation 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 1134-1143. **A confidentiality agreement is invalid to the extent that it purports to override these exceptions.**

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).

See Section 1130 ("settlement negotiations" defined). 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 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.

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 with Sections 1131 and 1132, we have inserted language in the Comment to address this concern.

➡ Section 1133.5 is discussed at length in Memorandum 99-4. The portions of the Comment shown in boldface attempt to provide some guidance as to its effect. See also "Confidentiality of Settlement Discussions" in the preliminary part (narrative portion) of this draft recommendation. 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.

Confidential settlements are discussed at length in Memorandum 98-82. At the December meeting, the Commission decided to seek guidance from the Legislature on whether to study that area. We have not yet received a formal response. If the Legislature directs the Commission to study confidential settlements, it will be important to coordinate that work with this proposal.

§ 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.** 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.**

CAJ objected to the use of double negatives in this provision. The proposed statutory revisions are intended to address this concern.

➡ Consumer Attorneys of California (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.

(Interestingly, a Commission consultant presented essentially the same analysis when Section 1152 was originally proposed. *See* Chadbourn, *A Study Relating to the Uniform Rules of Evidence — Extrinsic Policies Affecting Admissibility*, 6 Cal. L. Revision Comm'n Reports 625, 676-77 (1964) (Exceptions in Uniform Rule of Evidence 52 for partial satisfaction of an undisputed debt and acknowledgment of a preexisting debt are unnecessary but "they are not otherwise objectionable and they are recommended for approval.")).

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.**

The State Bar Committee on Administration of Justice (CAJ) objected to the use of double negatives in this provision. The proposed revision of the first clause is intended to address this concern.

➡ Epsten & Grinnell 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.

➡ Epsten & Grinnell also 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. (*Id*.) The staff proposed to address this concern by adding a statutory clause explicitly referring to such a defense, as shown above.

ACTR supports this proposed revision, interpreting it to permit introduction of admissions "that the plaintiff was aware of a claim earlier than he asserts." The staff believes that such an interpretation would be erroneous. As explained in the Comment, Section 1136 focuses on misconduct occurring during settlement negotiations: It permits introduction of evidence "to support or rebut a cause of action, defense, or other legal claim *arising from* conduct during the negotiations." (Emphasis added.) When a plaintiff admits in a settlement negotiation that he or she was aware of a claim earlier than previously admitted, this does not constitute conduct giving rise to a new defense, but merely supports a preexisting statute of limitations defense. To encourage candor in settlement negotiations, such an admission should be inadmissible.

When, however, conduct during settlement negotiations (including failure to file suit) gives rise to a new defense (such as a limitations defense), evidence of the negotiations (e.g., a promise to

make repairs) may be relevant to rebut the defense. As Magistrate Judge Wayne Brazil has explained:

> …. Under most statutes of limitations, "the fact that one was attempting to compromise the dispute is usually no excuse for failure to file the complaint or to take whatever steps are required to comply with the statute. An exception to this generalization might arise when the evidence from the negotiations suggests that the defendant had affirmatively induced the plaintiff not to file his claim by making false promises to pay or otherwise correct the situation. When a defendant's request or promise reasonably induces the plaintiff not to file within the statutory period, the plaintiff might well be able to invoke the doctrine of equitable estoppel to make the evidence relevant.

Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings L.J. 955, 979 (1988) (footnotes omitted). The proposed new clause referring to a statute of limitations defense is intended to address this situation. The staff believes it would be a useful addition, but we are studying the matter further and urge interested parties to provide more information on this point.

§ 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.**

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. This would also address a much broader point: Ensuring that parties are able to prove performance pursuant to a settlement agreement where necessary (e.g., to establish entitlement to reimbursement).

§ 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.**

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.

§ 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.**

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.

➡ 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.

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.** 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.

§ 1142. Admissibility in evaluating attorney's fees and class action settlements

1142. Article 2 does not apply in either of the following circumstances:

(a) Where evidence of the existence, duration, intensity, or general nature of settlement negotiations is sought or introduced to prove or disprove that an attorney's fee award or other calculation of attorney's fees is reasonable.

(b) Where evidence of a settlement agreement is introduced to obtain, or to rebut an attempt to obtain, court approval of a proposed class action settlement.

Comment. Subdivision (a) of Section 1142 permits limited use of evidence of settlement negotiations to facilitate evaluation of attorney's fees. It does not authorize extensive intrusion on the privacy of a negotiation. See also Section 1131.5 (role of court or other tribunal in applying chapter).

Under subdivision (b), a party may introduce evidence of settlements in similar cases to facilitate evaluation of a proposed class action settlement, but may not disclose the content of any

settlement discussions. For the standard for approving a class action settlement, see Dunk v. Ford Motor Co., 48 Cal. App. 4th 1794, 1800-1801, 56 Cal. Rptr. 2d 483, 487 (1996) ("The court must determine the settlement is fair, adequate, and reasonable.").

See Section 1130 ("settlement negotiations" defined). See also Section 1131 (application of chapter).

☞ **Staff Note.**

➡ Proposed Section 1142 is a new provision, inserted by the staff to facilitate evaluation of attorney's fees and class action settlements. Please review it carefully to determine whether any revisions are needed.

§ 1143. Admissibility to prove liability for or show invalidity of underlying claim

1143. Where evidence of settlement negotiations is admitted pursuant to statute, it shall not be introduced to prove liability for, or show the invalidity of, the claim that is the subject of the settlement negotiations.

Comment. Section 1143 restricts the introduction of evidence that is offered pursuant to an exception to Section 1132 (admissibility of settlement negotiations), whether the exception is codified in this chapter (Sections 1133.7-1141.5) or elsewhere. The provision does not preclude a party from introducing evidence of settlement negotiations to show whether the underlying claim has been settled.

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.**

➡ Proposed Section 1143 is a new provision, inserted by the staff. We believe that this provision would be helpful, because the proposed provision making evidence of settlement negotiations generally inadmissible (Section 1132) does not apply where "otherwise provided by statute." That limitation is needed not only to make Section 1132 subject to the exceptions provided in this Article (proposed Sections 1133.7-1142), but also to ensure that it does not preclude admissibility where other statutes contemplate admissibility. For example, evidence of an offer to compromise pursuant to Code of Civil Procedure Section 998 should be admissible in calculating a costs award, but should not be admissible on the issue of liability. Although Code of Civil Procedure Section 998 directly addresses this point (the offer "cannot be given in evidence upon the trial or arbitration"), other such statutes may not. Proposed Section 1143 would help ensure that we do not inadvertently make evidence of settlement negotiations admissible on the issue of liability in such instances.

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 1130-1143 (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 1130-1143. 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 1130-1143 (settlement negotiations).

CONFORMING REVISIONS

☞ **Staff Note.** The staff is continuing its research on conforming revisions. We will incorporate additional provisions in future drafts if this appears necessary.

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~~ the person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation of Section 1770.

~~Such~~ The 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~~ the 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~~ the 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~~ similarly situated consumers has been made.

(2) All consumers so identified have been notified that upon their request ~~such~~ the 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~~ the consumers has been, or, in a reasonable time, shall be, given.

(4) ~~Such~~ The person has ceased from engaging, or if immediate cessation is impossible or unreasonably expensive under the circumstances, ~~such~~ the person will, within a reasonable time, cease to engage, in ~~such~~ the 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 §§ 1130-1143 (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 §§ 1130-1143 (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~~ the 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 1130-1143 (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 §§ 1130-1143 (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 or 1154 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.

☞ **Staff Note.** In the revised tentative recommendation, this transitional provision refers to Section 1152, but not to Section 1154. Here, the staff has corrected this oversight.