Study K-410 February 3, 1999

First Supplement to Memorandum 99-4

**Confidentiality of Settlement Negotiations: Comments of Professor Mendez**

Professor Miguel Mendez of Stanford Law School has provided comments on the staff draft recommendation attached to Memorandum 99-4. (Exhibit pp. 1-2.) He approves of the Commission's general approach to the admissibility and discoverability of evidence of settlement negotiations, but does not take a position on the confidentiality of such negotiations. (*Id.*) He agrees with the staff that "it is impossible to come up with a bright line rule" on when discussions become settlement negotiations. (*Id.*) "Raising the problem and providing examples in the comment is a good alternative." (*Id.*)

Professor Mendez also makes two other points, which require more extensive discussion.

DISCOVERY OF ADMISSIBLE EVIDENCE OF SETTLEMENT NEGOTIATIONS

With respect to discoverability, Professor Mendez raises a question:

> …. [M]ay a party or nonparty compel discovery of statements falling within the exceptions? If the proposed changes to the Evidence Code will not prohibit the disclosure at trial because of an exception, shouldn't the communication be subject to discovery? Maybe you have taken care of this problem — if it is one — and I missed it.

(*Id.* at 2.) The answer, as Professor Mendez suggests, is that we have taken care of this problem.

Each of the proposed exceptions to Section 1132 (admissibility of settlement negotiations) is an exception not just to Section 1132, but also to the entirety of proposed Article 2, which includes Sections 1133 (discoverability of settlement negotiations) and 1133.5 (confidentiality of settlement negotiations) as well as Section 1132. Thus, if evidence of settlement negotiations is admissible pursuant to one of the exceptions, it is also *potentially* discoverable pursuant to the same exception (not *necessarily* discoverable, because there may be some other basis for denying discovery). For example, Section 1134 states that "*Article 2* does not

apply where evidence otherwise admissible or subject to discovery independent of settlement negotiations is introduced or used in the negotiations." (Emphasis added.) Sections 1135 through 1140 and Section 1142 are similar.

The only deviation is Section 1141.5 (bias), which states that "*Section 1132* does not apply where evidence of a settlement agreement is introduced to show the bias of a witness who is a party to the agreement." (Emphasis added.) There is no need to refer to the provisions on discoverability and confidentiality in Section 1141.5, however, because Section 1133.7 (discoverability and confidentiality of settlement agreement) already makes those provisions wholly inapplicable to settlement agreements. "Nothing in this chapter affects existing law on discovery or confidentiality of a settlement agreement." (Proposed § 1133.7.) **Thus, the draft recommendation satisfactorily addresses Professor Mendez's concern regarding discoverability.**

SECTION 1141.5. BIAS

Professor Mendez questions the distinction the Commission has drawn between (1) use of a settlement agreement to impeach by showing bias and (2) use of other evidence of settlement negotiations to impeach by a prior inconsistent statement:

> With respect to the exceptions, you allow for the use of a settlement agreement to show bias. Bias is simply one ground for impairing the credibility of a witness. Suppose a party testifies inconsistently with statements made at a settlement conference. Should fairness also require the use of the settlement conference statement to impeach the witness, especially if the inconsistency is on a major point? In either case statements relating to settlement are being used to impeach. Should it make that much difference that in the former the impeaching party is limited to eliciting evidence that the witness entered into a settlement agreement with the opposing party? The federal rule is not limited to bias but simply cites bias [as] an example of a settlement conference statement being offered for some purpose other than to prove or disprove the contested claim. In defense of your position, one could argue that admitting a settlement conference statement for the limited purpose of impeaching a witness with his inconsistent statement simply won't work. Jurors simply could not abide by such a limiting instruction, a reason cited by the Commission for advancing a hearsay exception for such statements in California.

(Exhibit p. 1.)

The preliminary part of the draft recommendation explains why evidence of settlement negotiations should not be admissible to impeach by a prior inconsistent statement. As Professor Mendez suggests, the ineffectiveness of a limiting instruction is one of the reasons for this approach:

> …. [E]xisting law does not expressly preclude a party from introducing evidence of settlement negotiations for purposes of impeachment by a prior inconsistent statement. The proposed law would make clear the evidence of settlement negotiations may not be used for that purpose. While this may result in the loss of some probative evidence, the benefits of encouraging candor and thus promoting prompt and durable settlements outweigh this detriment. This is particularly so because the excluded impeachment evidence may never exist absent the enhanced evidentiary protection, may consist of trivial inconsistencies rather than serious mistakes or deliberate lies, and may be unduly prejudicial even with the use of a limiting instruction.

(Memorandum 99-4, Staff Draft Recommendation pp. 16-17 (footnotes omitted).)

The preliminary part of the draft recommendation also explains the Commission's approach on using evidence of settlement negotiations to show bias:

> *Bias.* A settlement agreement between a witness and a party may consciously or subconsciously influence the testimony of the witness. 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.

(Memorandum 99-4, Staff Draft Recommendation pp. 12-13 (footnotes omitted).)

While different persons may evaluate the competing interests differently, there is much to be said for the Commission's approach. **The staff would leave it as is**.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

Exhibit

# CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS: COMMENTS OF PROFESSOR MENDEZ

Date: Fri, 29 Jan 1999 15:31:57 -0800
To: bgaal@clrc.ca.gov
From: Miguel Mendez <mmendez@leland.Stanford.EDU>
Subject: Negotiation Statements

Barbara, I had a chance to review your latest memo on the inadmissibility of negotiation statements.

Your proposed rule would change the existing rules as follows: instead of prohibiting only the use of negotiation statements to prove or disprove liability, the proposed rule would prohibit the use of such statements for any purpose unless otherwise provided.

This approach strikes me as a good. My guess is that most lawyers erroneously believe that the rules protecting the sanctity of the negotiating table prohibit the use of their statements for any purpose, instead of the one purpose stated in the rules. Your change would conform the rules to the expectations of lawyers. Moreover, the inclusion of exceptions would put them on notice that their statements nonetheless can be offered under limited circumstances.

With respect to the exceptions, you allow for the use of a settlement agreement to show bias. Bias is simply one ground for impairing the credibility of a witness. Suppose a party testifies inconsistently with statments made at a settlement conference. Should fairness also require the use of the settlement conference statement to impeach the witness, especially if the inconsistency is on a major point? In either case statements relating to settlement are being used to impeach. Should it make that much difference that in the former the impeaching party is limited to eliciting evidence that the witness entered into a settlement agreement with the opposing party? The federal rule is not limited to bias but simply cites bias an example of a settlement conference statement being offered for some purpose other than to prove or disprove the contested claim. In defense of your position, one could argue that admitting a settlement conference statement for the limited purpose of impeaching a witness with his inconsistent statement simply won't work. Jurors simply could not abide by such a limiting instruction, a reason cited by the Commission for advancing a hearsay exception for such statements in California.

With respect to the problem of when discussions become settlement negotiations, I agree with you that it is impossible to come up with a bright line

rule. Raising the problem and providing examples in the comment is a good alternative.

With respect to confidentiality, I have nothing to offer. I am not familiar with the area, although I do know that whether settlement agreements should be confidential is an increasingly controversial issue. Shouldn't the public know that a particular car manufacturer has settled 100 lawsuits involving exploding gas tanks? About the term "confidential," under the privilege sections it means private in the sense that the parties to confidential communications intend for their communications to remain private among themselves. They do not intend for the world to be a party to those conversations or communications.

With respect to discoverability, again I assume that many lawyers erroneously assume that the laws shielding communications made in the course of negotiations prevent their discovery. Your change conforms the law to this expectation. It strikes me as a good change, since it makes clear that no one, even individuals who were not parties to the original controversy, can compel disclosure of things said during the negotiations. I do have a question, however: may a party or nonparty compel discovery of statements falling within the exceptions? If the proposed changes to the Evidence Code will not prohibit the disclosure at trial because of an exception, shouldn't the communication be subject to discovery? Maybe you have taken care of this problem --if it is one-- and I missed it.

Give me a call or drop me an email if you have questions or comments.