Study K-410 March 24, 1999

Memorandum 99-23

Confidentiality of Settlement Negotiations: Draft of Recommendation

Attached for the Commission's review is a new draft of a final recommendation on the *Admissibility, Discoverability, and Confidentiality of Settlement Negotiations.* As discussed at the February meeting, we are soliciting comments on this draft from interested parties. To allow ample time for comment, we suggest waiting until the June meeting to finalize a recommendation.

A few drafting issues are discussed below. Staff Notes in the draft some additional, more minor points. Please review the draft carefully to determine if the Commission should discuss any other issues at its April meeting.

DEFINITIONS

The draft that the Commission considered in February defined "settlement negotiations" to include a settlement agreement. At the February meeting, the Commission decided that this might be misleading. The Commission asked the staff to address this problem, perhaps by deleting "settlement agreement" from the definition of "settlement negotiations" and adding a provision that would define "evidence of settlement negotiations" to include a settlement agreement. (Minutes, pp. 9-10.) The Commission also directed the staff to attempt to make the new draft user-friendly. (*Id.* at 9.)

The draft attached to this memorandum includes the following provision:

> **§ 1130. Definitions**
>
> 1130. As used in this chapter:
>
> (a) "Evidence of settlement negotiations" includes but is not limited to a settlement agreement.
>
> (b) "Settlement negotiations" means any of the following:
>
> (1) Furnishing, offering, or promising to furnish, a valuable consideration in compromising or attempting to compromise a disputed claim.
>
> (2) Accepting, offering to accept, or promising to accept, a valuable consideration in compromising or attempting to compromise a disputed claim.

(3) Conduct or statements made for the purpose of or in the course of compromising or attempting to compromise a disputed claim, regardless of whether a settlement is reached or an offer of compromise is made.

To make the draft user-friendly, the staff has also included an explicit reference to settlement agreements wherever the term "evidence of settlement negotiations" appears. For example, Section 1132 states in part that "*a settlement agreement or other evidence of settlement negotiations* is not admissible for any purpose …." (Emphasis added.) Sections 1137-1139, 1142, and 1143 are similar. Along the same lines, Sections 1133 and 1134 make "evidence of settlement negotiations" non-discoverable and confidential, respectively, but expressly state that these rules do "not apply to evidence of a settlement agreement."

In light of the express references to settlement agreements in Sections 1132-1134, 1137-1139, 1142, and 1143, the staff now wonders whether Section 1130(a) is really necessary. In the interest of simplicity, **we suggest that it be deleted**.

BACKSTOP PROVISION ON PROOF OR DISPROOF OF LIABILITY

At the February meeting, the Commission considered whether its proposal should include the following backstop provision:

§ 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.

….

The Commission decided that the concept of this provision was good, but the drafting should be improved, perhaps by moving the substance into Section 1132, which at that time made evidence of settlement negotiations inadmissible except "as otherwise provided by statute."

Having since experimented with that and other approaches, however, the staff now recommends against including such a backstop provision. It is likely to create considerable confusion, yet it would apply only in a very limited — perhaps even nonexistent — set of circumstances.

The vast majority of situations would be covered by the general rule making evidence of settlement negotiations inadmissible, subject to statutory exceptions. Although Article 3 states exceptions to that rule, those exceptions either (1) state specific purposes for admitting evidence of settlement negotiations, which do not include proof of liability (see, e.g., Sections 1138, 1139, 1141), or (2) should apply regardless of whether the evidence is offered for purposes of proving liability or for some other purpose (see, e.g., Section 1135). Thus, the backstop provision would only come into play where a statute outside our proposed new chapter on settlement negotiations expressly or impliedly makes evidence of settlement negotiations admissible, and that statute does not preclude admissibility of such evidence on the issue of liability.

The staff does not know whether any such statutes actually exist. Code of Civil Procedure Section 998 directs a court to consider an unaccepted statutory offer of compromise in calculating a costs award, but it expressly states that a statutory offer of compromise "cannot be given in evidence upon the trial or arbitration." Code of Civil Procedure Sections 664.6 and 664.7 authorize a court to retain jurisdiction to enforce a settlement in specified circumstances. If a case has been settled, however, then liability is no longer an issue, negating the possibility that evidence of settlement negotiations will be used in determining liability. Perhaps somewhere in some code (maybe the Family Code?) we might eventually find a statute that would trigger application of the proposed backstop provision.

Having struggled to draft the provision, however, the staff is not persuaded that the benefits of protecting against this vague possibility outweigh the potential for confusion that would arise from having two rules governing the admissibility of evidence of settlement negotiations (the general rule and the backstop rule), rather than one. **After internal discussions and much thought, we suggest instead**:

> (1) Revising the general provisions on admissibility, discoverability, and confidentiality such that they are subject to the exceptions in Article 3, rather than to exceptions "as otherwise provided by statute."

(2) Referring to Code of Civil Procedure Sections 664.6 and 664.7 in the Comment to Section 1139.

(3) Adding proposed Section 1143, which would cover statutory offers of compromise, as well as any statute that expressly authorizes a court to consider evidence of settlement negotiations.

(4) Revising the Comments to Sections 1137-1139, 1141, and 1142, to emphasize that if evidence is admitted pursuant to one of those provisions, it may only be used for the purposes specified in the provision.

Does the Commission agree with this approach?

CONFIDENTIAL SETTLEMENTS

Assembly Member Sheila Kuehl (Chair of the Assembly Judiciary Committee) has responded to the Commission's request for guidance on whether a study of confidential settlements would be an appropriate use of Commission resources. After complimenting the Commission's work, she writes that "an objective and thorough study of [secret settlements] and other settlement procedures could prove helpful to policy-makers as they consider the benefits and liabilities of various settlement tools." (Exhibit p. 1.) She questions, however, whether the Commission is the appropriate entity to conduct such a study:

> … I am not at all certain that the Commission is the most appropriate entity to conduct this type of review, given the politically-charged nature of this issue. The Commission has established a well-deserved reputation over the years of providing the Legislature with objective analyses on relatively non-controversial but important legal issues. I have seen the presumption by my colleagues that if it is a "Commission" bill or study, it is not only meticulously researched and developed, but is also not an issue that is considered to be very controversial. I would be concerned that a study of this conflicted issue might inadvertently threaten this perception of the Commission's generally non-controversial work in other areas, or at least make the non-political nature of the Commission's work, and its traditional mandate, less clear to policy-makers.

(*Id.*) She "therefore would urge the Commission to consider carefully the potential political dynamics that might arise in the study of this difficult but

important subject in weighing whether, and where, this issue should fall in the Commission's purview." (*Id.* at 2.)

As yet, we have not received a formal response from Senator Schiff (Chair of the Senate Judiciary Committee) to our request for guidance on studying confidential settlements. He has, however, introduced a bill (SB 1254) on the subject, which is much like Senator Lockyer's 1991 bill (SB 711) that Governor Wilson vetoed. The staff is following the progress of that bill, to ensure that we properly account for it in the instant study (if need be).

Respectfully submitted,

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February 4, 1999

Arthur K. Marshall
Chairperson, California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Proposed Study of Confidential Settlements

Dear Chairperson Marshall:

Thank you for your letter of December 21, 1998, asking my views about the desirability of the Commission undertaking a study of confidential settlements. I appreciate the chance to provide you with my initial thoughts about this issue. I also want to take this opportunity to compliment the Commission's efforts in helping to improve our legal system and keep our laws technically "well-tuned." I find the Commission's work to be very useful, and look forward to working together during this legislative session.

Regarding the issue of so-called "secret settlements," I want to note at the outset that I am committed in my new role as Chairperson of the Assembly Judiciary Committee to help reform court procedures and practices that may unintentionally reduce or eliminate public "oversight" and understanding of our justice system. I therefore believe an objective and thorough study of this and other settlement procedures could prove helpful to policy-makers as they consider the benefits and liabilities of various settlement tools.

That said, I am not at all certain that the Commission is the most appropriate entity to conduct this type of review, given the politically-charged nature of this issue. The Commission has established a well-deserved reputation over the years of providing the Legislature with objective analyses on relatively non-controversial but important legal issues. I have seen the presumption by my colleagues that if it is a "Commission" bill or study, it is not only meticulously researched and developed, but is also not an issue that is considered to be very controversial. I would be concerned that a study of this conflicted issue might inadvertently threaten this perception of the Commission's generally non-controversial work in other areas, or at least make the non-political nature of the Commission's work, and its traditional mandate, less clear to policy-makers.

I therefore would urge the Commission to consider carefully the potential political dynamics that might arise in the study of this difficult but important subject in weighing whether, and where, this issue should fall in the Commission's purview.

Sincerely,

SHEILA JAMES KUEHL
Chair

#K-410

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

April 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 in the case, but may be admissible 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 from discovery in a noncriminal proceeding.

The proposed law does not address issues concerning confidential settlement agreements, which would continue to be governed by existing law.

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 may 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 privacy 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:

> 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,

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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); Penal Code § 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).

> 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 "evidence of 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, 1133-1134, *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 (1999).

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 encouraging frank 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 are resolved without trial.[19] If they did not, the backlog in the courts would become intolerable.[20] Settlements, particularly early settlements, not only reduce court backlogs and conserve court resources, but also

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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. *See, e.g.*, Folberg, Rosenberg & Barrett, *supra* note 10, at 350-51.

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

spare disputants the expense, uncertainty, and stress of litigation.[21] Although many cases already settle, the "need for settlements is greater than ever before."[22]

Candor is often crucial in a settlement discussion and assurance of confidentiality is usually essential to candor.[23] Under Sections 1152 and 1154, such assurance is limited, because evidence of settlement negotiations is admissible for any purpose except proving or disproving liability.[24] 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,[25] participants in such negotiations may be reluctant to rely on the

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21. *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 (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.

22. *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.").

23. *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.").

24. *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'….").

25. 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,[26] choosing to be circumspect instead of frankly exploring the dispute and options for settlement.[27]

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.[28] 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.[29] Frequently, this is the motive for introducing such evidence.[30] Regardless of whether a party offers evidence of settlement

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26. *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.'").

27. 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 23 *supra* and accompanying text; *see also* Kirtley, *supra* note 24, at 16 (The "overwhelming weight of scholarly authority supports the proposition that confidentiality is essential to the functioning of mediation.").

28. *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.").

29. 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 28, 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 …."); 2 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 408.08[1], at 408-29 (2d ed. 1998) ("The almost unavoidable impact of the disclosure of [a settlement offer or agreement] is that the jury will consider the offer or agreement as evidence of a concession of liability."). *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.").

30. 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 28, 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.").

negotiations disingenuously, admitting such evidence can distort the litigation process and cause injustice.

RECOMMENDATIONS

Balancing the competing considerations in protecting evidence of settlement negotiations is delicate. The detriments of excluding potentially relevant evidence must be weighed against the benefits of fairness and promoting mutually satisfactory settlements.[31] To achieve these benefits, the Commission recommends the following reforms, which would apply both to judicially-supervised and unassisted settlement negotiations:[32]

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.[33] 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. In each of the following situations, if a court admits evidence of settlement negotiations, it

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

32. 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 auspices 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 22, 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.

33. Some authorities maintain that the law should not blindly promote settlement but should promote "desirable" settlements. *See, e.g.*, Luban, *supra* note 21, 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.").

should attempt to minimize the scope of settlement negotiation evidence admitted, so as to prevent chilling of candid settlement negotiations. Evidence admitted pursuant to an exception may only be used for the purposes specified in the exception.[34]

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.[35]

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.[36] 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.[37] 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.[38] The proposed law would preserve these existing exceptions to the exclusionary rule for settlement negotiations.[39]

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

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34. A limiting instruction may be appropriate. See Section 355.

35. 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 29, §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.).

36. Section 1152(c)(1).

37. Section 1152(c)(2).

38. Mendez, *supra* note 29, § 4.08, at 89-90; *see also* Chadbourn, *supra* note 15, at 676-77.

39. 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.

misconduct.[40] For example, evidence of battery during settlement negotiations should be admissible in an action for damages due to the battery. 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.[41] 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."[42]

Prevention of violent felony. Evidence of settlement negotiations should be admissible if a participant in the negotiations reasonably believes that disclosure is necessary to prevent a violent felony.[43] For example, such evidence may be relevant to obtaining a restraining order against a battering boyfriend.

Bias. A settlement agreement between a witness and a party may consciously or subconsciously influence the testimony of the witness.[44] For example, suppose a

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40. *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).

41. *See* Leonard, *supra* note 9, § 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.").

42. 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.

43. For the definition of "violent felony," see Penal Code Section 667.5(c).

44. 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

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, 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, 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.[45]

Breach of confidentiality agreement. Evidence of settlement negotiations should be admissible to establish breach of an agreement to keep the negotiations confidential.

Statutory offer of compromise or express statutory provision. An unaccepted statutory offer of compromise should be admissible in determining liability for postoffer costs or costs of the services of expert witnesses.[46] Similarly, the proposed law would be inapplicable where a statute expressly authorizes a court to consider evidence of settlement negotiations.[47]

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.

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.[48] But any potential intrusion on confidentiality, whether in trial, in discovery, or apart from the litigation process (e.g., a disclosure to a news reporter or a tip to a competitor), may inhibit candid settlement discussions.[49]

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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.

45. *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.").

46. See Code Civ. Proc. § 998.

47. Evidence admitted pursuant to such a statute could not be used in determining liability unless the statute expressly authorized the court to consider the evidence for that purpose.

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

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

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.[50]

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[51] and this proposal does not address them. The new standard for discovery of settlement negotiations would not apply to disclosure of settlement agreements, which would continue to be governed by other law.

Confidentiality of Settlement Discussions

Although admissibility and discoverability are clearly defined concepts, the meaning of confidentiality is less sharply delineated and more context-specific.[52] 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

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> 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.

50. Evidence otherwise admissible or subject to discovery; 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 violent felony; breach of confidentiality agreement; statutory offer of compromise or express statutory provision; admissibility by agreement of all parties.

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

52. For example, one recent article uses this 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 24, at 951 (footnotes omitted).

disclosed to others.[53] A communication ceases to be confidential if it is disseminated more widely than is anticipated at the time of disclosure.[54]

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 agreement to that effect.[55] The statute would thus alert negotiating parties that a written agreement is necessary to make evidence of their negotiation confidential.[56] 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.

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53. *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]

54. 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.").

55. 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. See Sections 953-954, 992, 994, 1012, 1014.

56. 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).

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.[57] 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 some probative evidence, the benefits of encouraging candor and thus promoting prompt and durable settlements outweigh this detriment.[58] This is particularly so

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57. 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 by a prior inconsistent statement. Instead, the court stressed that Section 1152 excludes conduct and statements in settlement negotiations, not just settlement offers. *Id.*

58. Many commentators caution against admitting evidence of settlement negotiations 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."); Leonard, *supra* note 9, § 3.8.2, at 3:126-5 ("If the evidence of settlement offers or statements made in the course of settlement discussions were later admissible to impeach by contradiction, parties might be unduly wary of discussing settlement before they had investigated the facts to such a degree that they had little reason to fear unintentionally making incorrect factual assertions during negotiations."); M. Graham, Modern State and Federal Evidence: A Comprehensive Reference Text 487 (NITA 1989) ("[P]olicy considerations underlying Rule 408 are best served by not admitting prior inconsistent conduct or statements made during compromise negotiations solely to impeach the credibility

because the excluded impeachment evidence may never exist absent the enhanced evidentiary protection,[59] may consist of trivial inconsistencies rather than serious mistakes or deliberate lies,[60] and may be unduly prejudicial even with the use of a limiting instruction.[61]

The proposed law would also strengthen the privacy of a settlement negotiation by making evidence of the negotiation inadmissible to show bias in most circumstances,[62] inadmissible to establish the jurisdictional classification of a

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of the declarant."); *see also* S. Saltzburg, M. Martin & D. Capra, Federal Rules of Evidence Manual 602-03 (7th ed. 1994) ("Opening the door to impeachment evidence on a regular basis may well result in more restricted — or more stilted, with every statement preceded by an 'assuming arguendo' — negotiations."); *but see* D. Louisell & C. Mueller, *supra* note 15, § 172, at 470 ("[P]rotecting the settlement process to the point of shielding apparently perjured testimony seems excessive."). Some states have enacted statutes making evidence of settlement negotiations inadmissible to impeach a witness by a prior inconsistent statement. *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.*, EEOC v. Gear Petroleum, Inc., 948 F.2d 1542, 1545-46 (10th Cir. 1991); Derderian v. Polaroid Corp., 121 F.R.D. 9, 12 n.1 (1988).

59. *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, 1177-78 (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 24, 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.").

60. "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*.

61. 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 29 *supra* and accompanying text.

62. See notes 44-45 *supra* and accompanying text.

claim,[63] and inadmissible not only with respect to the claim that is the subject of the negotiations but also in other contexts.[64]

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 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.[65]

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[66] and is not included in this proposal.[67]

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63. 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.

64. *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."). For discussion of the importance of preventing disclosure in related cases, regardless of whether those cases involve the same claim, see note 49, *supra*.

65. "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 1177. "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.*

66. 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).

67. See proposed Sections 1130 (definitions), 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.*

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.[68] 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.[69]

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,[70] 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."[71] The proposed legislation avoids that and other issues by maintaining the status quo in criminal cases.

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.

68. 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").

69. *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).

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

71. 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 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, 74 Cal. Rptr. 2d 464 (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-

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.[72] The rule 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.[73]

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.[74] Assistance should be encouraged regardless of the motivation.[75]

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patient privilege may be overridden "only if and to the extent necessary to ensure defendants' constitutional rights of confrontation").

72. 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 69, § 5326, at 316-17; Leonard, *supra* note 9, § 4.8.3, at 4:58-4:60.

73. *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 69, § 5325, at 309-14. *See also* Leonard, *supra* note 9, § 4.6.2, at 4:46-4:47.

74. *See* 23 Wright & Graham, *supra* note 69, § 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.

75. *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

Evid. Code §§ 1130-1144 (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. Definitions

1130. As used in this chapter:

(a) "Evidence of settlement negotiations" includes but is not limited to a settlement agreement.

(b) "Settlement negotiations" means any of the following:

(1) Furnishing, offering, or promising to furnish, a valuable consideration in compromising or attempting to compromise a disputed claim.

(2) Accepting, offering to accept, or promising to accept, a valuable consideration in compromising or attempting to compromise a disputed claim.

(3) Conduct or statements made for the purpose of or in the course of compromising or attempting to compromise a disputed claim, regardless of whether a settlement is reached or an offer of compromise is made.

Comment. Subdivision (a) of Section 1130 is intended for drafting convenience. For the effect of this chapter on admissibility of evidence of settlement negotiations, see Section 1132. For the effect of this chapter on discoverability of evidence of settlement negotiations, see Section 1133. For confidentiality of settlement negotiations, see Section 1134. This chapter does not expand or limit the law on confidentiality or discovery of evidence of a settlement agreement. See Sections 1133-1134.

Subdivision (b) is drawn from Federal Rule of Evidence 408 and former Sections 1152 and 1154. It covers efforts to compromise a claim that was disputed as to liability, as well as efforts to compromise a claim that was disputed only as to amount.

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 evidence of settlement negotiations). Under these

circumstances, it may be appropriate to introduce the document with the settlement offer redacted.

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.

§ 1131. Application of chapter

1131. This chapter does not apply to either of the following:

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

(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); Penal Code § 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 Federal Rule of Evidence 408.

Article 2. General Provisions

§ 1132. Admissibility of evidence of settlement negotiations

1132. Except as provided by Article 3 (commencing with Section 1135), a settlement agreement or other evidence of settlement negotiations is not admissible for any purpose in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which testimony can be compelled pursuant to law.

Comment. To preclude abuse and foster 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.

Section 1132 does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter) & Comment.

For exceptions to Section 1132, see Article 3 (Sections 1135-1144). Evidence satisfying one or more of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, such as Section 352 (exclusion of evidence where probative value is substantially outweighed by probability that admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury).

[Where evidence of settlement negotiations is offered pursuant to an exception, the court should try to tailor its order so as to achieve justice while also promoting cost-effective, mutually-beneficial settlements. For example, if evidence of settlement negotiations is offered to rebut a defense of laches, it may be sufficient to 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 (1999). The court may also use limiting instructions as appropriate. See Section 355.]

See Section 1130 (definitions). For the effect of this chapter on discoverability of evidence of settlement negotiations, see Section 1133. For the effect of this chapter on confidentiality of settlement negotiations, see Section 1134.

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.

For examples of provisions governing conduct in settlement negotiations, see 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).

☞ **Staff Note.** The portion of the Comment shown in brackets is new language proposed by the staff. We believe it would be a helpful addition. Does the Commission agree?

§ 1133. Discoverability of evidence of settlement negotiations

1133. (a) Except as provided by Article 3 (commencing with Section 1135), evidence of settlement negotiations is not subject to discovery in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which testimony can be compelled pursuant to law.

(b) Subdivision (a) does not apply to evidence of a settlement agreement. Nothing in this chapter affects the law on discovery of a settlement agreement or discovery of evidence of a settlement agreement.

Comment. To promote candor in settlement negotiations, Section 1133 restricts discovery of evidence of the negotiations, both in the case that was the subject of the negotiations and in any other noncriminal proceeding. The provision 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. It does not apply to discovery of evidence of a settlement agreement and does not affect whether and to what extent the existence and terms of such an agreement are discoverable.

Section 1133 does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter) & Comment.

For exceptions to Section 1133, see Article 3 (Sections 1135-1144). Evidence satisfying one or more of these exceptions is not necessarily discoverable. It must still satisfy other prerequisites for discovery. See, e.g., Code Civ. Proc. § 2017 (scope of discovery).

[Where discovery of evidence of settlement negotiations is sought pursuant to an exception, the court should try to tailor its order so as to achieve justice while also promoting cost-effective, mutually-beneficial settlements. For example, if discovery of evidence of settlement negotiations is sought to establish that an attorney's fee for participating in the negotiations is unreasonable, it may be sufficient to permit discovery of the duration, intensity, and general nature of the negotiations, without requiring disclosure of all of the details of the negotiations. *See generally* D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.3, at 3:145-3:146 (1999).]

See Section 1130 (definitions). For the effect of this chapter on admissibility of evidence of settlement negotiations, see Section 1132. For the effect of this chapter on confidentiality of settlement negotiations, see Section 1134.

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.

For examples of provisions governing conduct in settlement negotiations, see 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).

☞ **Staff Note.** The portion of the Comment shown in brackets is new language proposed by the staff. We believe it would be a helpful addition. Does the Commission agree?

§ 1134. Confidentiality of settlement negotiations

1134. (a) Except as provided by Article 3 (commencing with Section 1135), evidence of settlement negotiations is confidential where the persons participating in the negotiations execute an agreement in writing, stating that the negotiations are confidential as provided by law, or words to that effect.

(b) Subdivision (a) does not apply to evidence of a settlement agreement. Nothing in this chapter affects the law on confidentiality of a settlement agreement or confidentiality of evidence of a settlement agreement.

Comment. Section 1134 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 1134 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.

Section 1134 does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter) & Comment.

For exceptions to Section 1134, see Article 3 (Sections 1135-1144). A confidentiality agreement is invalid to the extent that it purports to override these exceptions.

See Section 1130 (definitions). For the effect of this chapter on admissibility of evidence of settlement negotiations, see Section 1132. For the effect of this chapter on discoverability of evidence of settlement negotiations, see Section 1133.

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.

For examples of provisions governing conduct in settlement negotiations, see 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).

Article 3. Exceptions

§ 1135. Evidence otherwise admissible or subject to discovery

1135. Article 2 (commencing with Section 1132) does not apply where evidence otherwise admissible or subject to discovery independent of settlement negotiations is used in the negotiations.

Comment. Section 1135 is drawn from Section 1120 (a) and Federal Rule of Evidence 408. See Section 1130(b) ("settlement negotiations" defined). See also Section 1131 (application of chapter).

§ 1136. Partial satisfaction of undisputed claim or acknowledgment of preexisting debt

1136. Article 2 (commencing with Section 1132) does not apply where either of the following conditions is satisfied:

(a) Evidence of partial satisfaction of an asserted claim or demand made without questioning its validity is offered or sought 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 is offered or sought to prove the creation of a new duty on the debtor's part or a revival of the debtor's preexisting duty.

Comment. Section 1136 continues former Section 1152(c) without substantive change, except that it extends the principle to discovery and confidentiality, as well as admissibility.

§ 1137. Cause of action, defense, or other legal claim arising from conduct during settlement negotiations

1137. Article 2 (commencing with Section 1132) does not apply where a settlement agreement or other 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 1137 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 (1999) ("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.

Evidence admitted pursuant to Section 1137 may only be used for the purposes specified in the provision. A limiting instruction may be appropriate. See Section 355.

See Section 1130 (definitions). See also Section 1131 (application of chapter).

§ 1138. Obtaining benefits of settlement

1138. Article 2 (commencing with Section 1132) does not apply where either of the following conditions is satisfied:

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

(b) A settlement agreement or other evidence of settlement negotiations 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 negotiations.

Comment. Section 1138 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 3:125 (1999) ("[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible."). The provision would apply, for example, where parties settle a case pursuant to Code of Civil Procedure Section 664.6 or 664.7 and the court exercises its jurisdiction to enforce the settlement.

Under subdivision (b), a party to a settlement may introduce evidence of the settlement to show that a claim is barred or performance has or has not 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.

Evidence admitted pursuant to Section 1138 may only be used for the purposes specified in the provision. A limiting instruction may be appropriate. See Section 355.

See Section 1130 (definitions). See also Section 1131 (application of chapter).

§ 1139. Good faith settlement barring contribution or indemnity

1139. Article 2 (commencing with Section 1132) does not apply where a settlement agreement or other 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 1139 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).

Evidence admitted pursuant to Section 1139 may only be used for the purposes specified in the provision. A limiting instruction may be appropriate. See Section 355.

See Section 1130 (definitions). See also Section 1131 (application of chapter).

§ 1140. Prevention of violent felony

1140. Article 2 (commencing with Section 1132) does not apply where a participant in the settlement negotiations reasonably believes that introduction or disclosure of a settlement agreement or other evidence of settlement negotiations is necessary to prevent a violent felony.

Comment. Section 1140 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 (definitions); Penal Code § 667.5(c) ("violent felony" defined). See also Section 1131 (application of chapter).

§ 1141. Bias

1141. Article 2 (commencing with Section 1132) does not apply where a settlement agreement is introduced to show bias of a witness who is a party to the agreement.

Comment. Section 1141 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).

Evidence admitted pursuant to Section 1141 may only be used for the purposes specified in the provision. A limiting instruction may be appropriate. See Section 355.

§ 1142. Breach of confidentiality agreement

1142. Article 2 (commencing with Section 1132) does not apply where a settlement agreement or other evidence of settlement negotiations is introduced or is relevant to show, or to rebut an attempt to show, breach of an agreement pursuant to Section 1134 stating that the negotiations are confidential as provided by law, or words to that effect.

Comment. Section 1142 facilitates proof of contractual liability for breach of an agreement pursuant to Section 1134 (confidentiality of settlement negotiations).

Evidence admitted pursuant to Section 1142 may only be used for the purposes specified in the provision. A limiting instruction may be appropriate. See Section 355.

See Section 1130 (definitions). See also Section 1131 (application of chapter).

§ 1143. Statutory offer of compromise or express statutory provision

1143. (a) Article 2 (commencing with Section 1132) does not apply where evidence of an offer pursuant to Code of Civil Procedure Section 998 is introduced or sought in determining liability for postoffer costs or costs of the services of expert witnesses.

(b) Article 2 (commencing with Section 1132) does not apply where a statute expressly authorizes a court to consider a settlement agreement or other evidence of settlement negotiations. Evidence admitted pursuant to this subdivision may not be considered in determining liability unless a statute expressly authorizes the court to consider the evidence for that purpose.

Comment. Subdivision (a) of Section 1143 makes a statutory offer of compromise admissible to establish who is responsible for paying postoffer costs and costs of the services of expert witnesses.

Subdivision (b) permits a court to consider evidence of settlement negotiations if a statute expressly (not impliedly) authorizes the court to do so. The second sentence of subdivision (b) is drawn from former Sections 1152 and 1154 and Federal Rule of Evidence 408.

See Section 1130 (definitions). See also Section 1131 (application of chapter).

§ 1144. Admissibility and disclosure by agreement of all parties

1144. Article 2 (commencing with Section 1132) does not apply where all parties to the settlement negotiations expressly agree in writing that specific evidence of the negotiations may be admitted or disclosed.

Comment. Section 1144 is drawn from Section 1122, pertaining to mediation confidentiality. See Section 1130 (definitions). See also Section 1131 (application of chapter).

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 of 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 1130-1144. 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).

CONFORMING REVISIONS AND REPEALS

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 §§ 1130-1144 (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 §§ 1130-1144 (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. Transp. 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 1130-1144 (settlement negotiations).

Heading of Chapter 3 (commencing with Section 1150) of Division 9 of the Evidence Code (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 1130-1144 (settlement negotiations), 1152 (payment of medical or other expenses).

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 1130-1144 (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 §§ 1130-1144 (settlement negotiations).

Uncodified (added). Operative date

SEC. ____. (a) This act becomes operative on January 1, 2001.

(b) This act applies in an action, proceeding, or administrative adjudication commenced before, on, or after January 1, 2001.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2001, 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, 2001, the objecting party may, on or after January 1, 2001, 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.