

Memorandum 99-79

Confidentiality of Settlement Negotiations (Draft Recommendation)

Attached is a revised draft of a final recommendation on the *Admissibility, Discoverability, and Confidentiality of Negotiations to Settle a Pending Civil Action or Administrative Adjudication*. This draft differs from the immediately preceding version in the following respects:

- The Comment to proposed Evidence Code Section 1130 has been revised as the Commission directed at its October meeting. (Minutes (Oct. 14-15, 1999), p. 9.)
- Proposed Evidence Code Section 1130(a)(3)(iii) refers to “a claim that is not pending in a civil action or administrative adjudication”, instead of “a claim that has not been filed”.
- A 1999 amendment of Civil Code Section 1782 (1999 Cal. Stat. ch. 67, § 4) has been incorporated into the draft.
- An amendment of Code of Civil Procedure Section 1738 (1999 Cal. Stat. ch. 1000, § 10) has been inserted into the draft. This newly enacted provision refers to the evidentiary rules governing settlement negotiations. An amendment is necessary to reflect the Commission’s proposed new chapter on negotiations to settle a pending civil action or administrative adjudication.
- Minor typographical, stylistic, and bluebooking errors have been corrected.
- A few citations to newly enacted statutes have been added to the draft. See note 39 (citing Health & Safety Code § 25379); Comment to Evid. Code § 1132 (same); Comment to Evid. Code § 1144 (citing Ins. Code § 1871.7(f)(2)(B)).

The staff recommends that the Commission approve this draft for printing and submission to the Legislature.

Respectfully submitted,

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CALIFORNIA LAW REVISION COMMISSION

Staff Draft

RECOMMENDATION

Admissibility, Discoverability, and Confidentiality
of Negotiations to Settle a
Pending Civil Action or Administrative Adjudication

November 1999

California Law Revision Commission
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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 dispute is inadmissible for purposes of proving or disproving liability with regard to that dispute, but may be admissible for other purposes. These provisions do not make evidence of negotiations to settle the dispute 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 negotiations to settle a pending civil action or administrative adjudication generally inadmissible in that action or any other noncriminal proceeding. With restrictions, the proposal would also make the negotiations confidential and protect evidence of the negotiations from discovery in a noncriminal proceeding.

The proposed law does not address issues relating to confidential settlement agreements, and does not apply to negotiations occurring before commencement of a civil action or administrative adjudication. These matters would continue to be governed by existing law.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.

ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF NEGOTIATIONS TO SETTLE A PENDING CIVIL ACTION OR ADMINISTRATIVE ADJUDICATION

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ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF NEGOTIATIONS TO SETTLE A PENDING CIVIL ACTION OR ADMINISTRATIVE ADJUDICATION

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

7 Existing law addresses this concern to a limited extent by making evidence of
8 efforts to settle a civil case inadmissible to prove or disprove liability for the
9 damage that is the subject of the negotiations.¹ Having reexamined existing law,
10 the Law Revision Commission recommends increasing the privacy of a
11 negotiation to settle a pending civil action or administrative adjudication.
12 Encouraging candid and rational negotiations will further the administration of
13 justice by promoting prompt, durable settlements.

EXISTING LAW

14
15 Two statutory provisions protect a settlement negotiation (other than a
16 mediation).² Evidence Code Section 1152(a) prohibits proof of liability based on
17 an offer to compromise the alleged loss:

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).

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*, 27 Cal. L. Revision Comm'n Reports 531, 595 (1997); *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996).

The protection for mediation communications is stronger than the protection recommended in this proposal for negotiations to settle a pending civil action or administrative adjudication. 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 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).

1 1152. (a) Evidence that a person has, in compromise or from humanitarian
2 motives, furnished or offered or promised to furnish money or any other thing,
3 act, or service to another who has sustained or will sustain or claims that he or she
4 has sustained or will sustain loss or damage, as well as any conduct or statements
5 made in negotiation thereof, is inadmissible to prove his or her liability for the
6 loss or damage or any part of it.

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

10 Although broad in that respect, existing law is limited in others. There are
11 exceptions for certain categories of evidence.⁴ More importantly, an offer to
12 compromise or any associated conduct or statement is only inadmissible to prove
13 liability for the loss or damage to which the negotiations relate. If a party offers the
14 evidence for another purpose, such as to show bias, motive, undue delay, or
15 knowledge, the evidence may be admissible.⁵

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

18 1154. Evidence that a person has accepted or offered or promised to accept a
19 sum of money or any other thing, act, or service in satisfaction of a claim, as well
20 as any conduct or statements made in negotiation thereof, is inadmissible to prove
21 the invalidity of the claim or any part of it.

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)).

Section 1152 includes, and does not differentiate between, offers stemming from “humanitarian motives” and offers reflecting a desire to compromise. The proposed reforms would not extend to humanitarian conduct, which would continue to be governed by existing law.

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 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.

5. See, e.g., *White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985); *Campisi v. Superior Court*, 17 Cal. App. 4th 1833, 1838, 22 Cal. Rptr. 2d 335, 338 (1993); *Young v. Keele*, 188 Cal. App. 3d 1090, 1093-94, 233 Cal. Rptr. 850 (1987); *Moreno v. Sayre*, 162 Cal. App. 3d 116, 126, 208 Cal. Rptr. 444 (1984).

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

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

9 JUSTIFICATION FOR PROTECTING SETTLEMENT NEGOTIATIONS

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

13 Public Policy of Promoting Settlements

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

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

7. The proposed law would apply only to negotiations to settle a pending civil action or administrative adjudication. See proposed Sections 1130, 1133-1136, *infra*. Prelitigation settlement negotiations (including negotiations to settle a contractual arbitration) would continue to be governed by existing law. As used herein, the term “settlement negotiations” encompasses both prelitigation settlement negotiations and negotiations to settle a pending civil action or administrative adjudication.

This general rule of inadmissibility would apply to evidence of a settlement agreement, as well as other evidence of negotiations to settle a pending civil action or administrative adjudication. See proposed Section 1133, *infra*. In contrast, the proposed provisions on discoverability and confidentiality would not apply to evidence of a settlement agreement. See proposed Sections 1130, 1134-1135, *infra*; see also “Discoverability of Negotiations to Settle a Pending Civil Action or Administrative Adjudication” and “Confidentiality of Negotiations to Settle a Pending Civil Action or Administrative Adjudication,” *infra*. For application of the proposed law to an internal memorandum prepared for purposes of a settlement negotiation, see *Affiliated Mfrs., 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. 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). But the overwhelming weight of authority holds that

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

6 **Fundamental Fairness to Participants**

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

settlements are essential. *See, e.g.,* Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 36 (1996); Gross & Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 Mich. L. Rev. 319, 320 (1991). For example, 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.” Folberg, Rosenberg & Barrett, *Use of ADR in California Courts: Findings & Proposals*, 26 U.S.F. L. Rev. 343, 357 (1992).

11. McClure v. McClure, 100 Cal. 339, 343, 34 P. 822 (1893); Skulnick v. Roberts Express, Inc., 2 Cal. App. 4th 884, 891, 3 Cal. Rptr. 2d 597 (1992). The benefits of settlements have long been recognized. *See, e.g.,* Von Schmidt v. Huntington, 1 Cal. 55, 61 (1850) (Long-standing Mexican and Spanish legal doctrine required judges to “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) (public policy favoring and encouraging settlement makes necessary inadmissibility of settlement negotiations 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, full and open disclosure is encouraged, furthering policy toward settlement); Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 Notre Dame L. Rev. 283, 393 (1999) (closed bargaining forum fosters full ventilation of views and give-and-take necessary to achieve compromise); Folberg, Rosenberg & Barrett, *supra* note 10, at 358 (according to California judges surveyed, one reason attorneys do not settle until they reach courthouse steps is fear that compromise offers will be used against their clients); Gladstone, Comment, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 Pepp. L. Rev. s237, s238 (1989) (Without full disclosure, parties will not entertain meaningful discussion and potentially settled cases will proceed to unnecessary trial); Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Rev. Litig. 665, 684 (1993) (Critical component of successful settlements is confidentiality, which encourages parties to negotiate freely without fear that statements made in effort to settle could be used against them in future); Menkel-Meadow, *supra* note 10, at 2683 (When representatives in dispute have constituencies with widely different views of case, and meeting with “enemy” itself is considered signal of weakness, negotiations will 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) (public policy favoring settlement of disputes makes it inadvisable to penalize would-be compromiser by allowing that person’s unaccepted offer

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 were 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 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

to be used as 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 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 135, at 88 (2d ed. 1994). *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).

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 the Univ. of Cal., 3 Cal. 4th 273, 278, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992); Leonard, *supra* note 9, § 3.1, at 3:2-3:3.

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

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

21. *See, e.g.,* 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,

1 Candor is often crucial in a settlement discussion and assurance of
2 confidentiality is usually essential to candor.²³ Under Sections 1152 and 1154,
3 such assurance is limited, because evidence of settlement negotiations is
4 admissible for any purpose except proving or disproving liability.²⁴ Although a
5 court has discretion to exclude evidence of settlement negotiations where the
6 evidence creates a danger of undue prejudice that substantially outweighs its
7 probative value,²⁵ participants in such negotiations may be reluctant to rely on the
8 court to exercise this discretion,²⁶ choosing to be circumspect instead of frankly
9 exploring the dispute and options for settlement.²⁷

10 Misconceptions about the extent of the protection also exist. Disputants
11 sometimes fail to realize that the protection for evidence of settlement negotiations

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* *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, Professor 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*, *supra* note 12, at s246 (“[T]he 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. *See* Section 352.

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

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 & 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.”).

1 is not absolute, but only excludes such evidence on the issue of liability.²⁸ The
2 consequences can be severe. A party's admission in settlement negotiations, made
3 on the assumption that it would be inadmissible, may become critical evidence
4 against the party at trial and may later form the basis of a malpractice claim
5 against the party's lawyer.

6 Finally, evidence of settlement negotiations that is ostensibly introduced for
7 another purpose tends to be prejudicial as to liability, even with the use of a
8 limiting instruction.²⁹ Frequently, this is the motive for introducing such
9 evidence.³⁰ Regardless of whether a party offers evidence of settlement
10 negotiations disingenuously, admitting such evidence can distort the litigation
11 process and cause injustice.

12 RECOMMENDATIONS

13 Balancing the competing considerations in protecting evidence of settlement
14 negotiations is delicate. The detriments of excluding potentially relevant evidence
15 must be weighed against the benefits of fairness and promoting mutually
16 satisfactory settlements.³¹ To achieve these benefits, the Commission recommends
17 the following reforms:

18 **Scope of Proposal**

19 The proposed reforms would apply to negotiations to settle a pending civil action
20 or administrative adjudication, regardless of whether the negotiations are
21 judicially-supervised or otherwise.³² The reforms would not apply in the following
22 contexts:

28. See generally Kobayashi, *Too Little, Too Late: Use and Abuse of Innocuous Yet Dangerous Evidentiary Doctrines*, in Trial Evidence, Civil Practice, and Effective Litigation Techniques in Federal & State Courts, 2 ALI-ABA Course of Study 1127, 1132 (July 1991) ("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."); 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; Kobayashi, *supra* note 28, at 1136; M. Mendez, California Evidence § 4.08, at 90 (1993); 2 J. Weinstein & M. Berger, Weinstein's Federal Evidence § 408.08[1], at 408-29 (2d ed. 1999). See also Warner Constr. Corp. v. City of Los Angeles, 2 Cal. 3d 285, 299, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) (jury could not reasonably be expected to follow 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, at 1136.

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 Costs Litig. 109, 119

Prelitigation settlement negotiations. Determining whether a prelitigation activity is a settlement attempt that warrants increased privacy, as opposed to an ordinary business interaction, can be challenging. Courts are struggling to draw this line in applying Sections 1152 and 1154³³ and Federal Rule of Evidence 408.³⁴ Strengthening the privacy of prelitigation settlement negotiations would exacerbate this line-drawing problem.³⁵ It may also have unintended negative consequences, because anticipating the full breadth of prelitigation activity that would be affected is difficult if not impossible. The proposed law would therefore maintain the status quo on the privacy of prelitigation settlement negotiations.³⁶

Criminal case. 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 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 provisions³⁷ and is not included in this proposal.³⁸

(1994) (ex parte communication is more acceptable in private ADR than when court authorizes or provides third-party neutral, because court's third-party neutral may have "coercive" or "public power"); *Judicial (Mis)use of ADR? A Debate*, *supra* note 22, at 893 (remarks of H. William Allen) (interposition of judge into settlement process is coercion); *see also id.* (remarks of Deborah Hensler) (process that did not look fair to ordinary lay litigant was negotiation with judge, because that happens behind closed doors and without litigant's participation and 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 unassisted negotiations to settle a pending civil action or administrative adjudication, rather than the greater degree of confidentiality applicable to a mediation.

33. See *Warner Constr. 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 parties had reached stage of clear disagreement on the crucial question whether plaintiff was entitled to 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 controversy arose as to meaning of 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).

34. See, e.g., *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 527 (3d Cir. 1995); *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 50 F.3d 476, 480 (7th Cir. 1995); *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 827 (2d Cir. 1992); *Mundy v. Household Fin. Corp.*, 885 F.2d 542, 546-47 (9th Cir. 1988); *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1338, 1342 (9th Cir. 1987).

35. A similar line-drawing problem exists in determining when a contractual arbitration is pending. For this reason, and because settlement of a contractual arbitration does not reduce court backlogs or conserve judicial resources, this proposal would not apply to negotiations to settle a contractual arbitration.

36. In some cases, a prelitigation settlement may be less satisfactory than a later settlement, because the parties may not be sufficiently informed about their dispute and their legal rights and obligations to reach a fair settlement before litigation commences. This is another reason to maintain, instead of strengthen, the existing level of protection for prelitigation negotiations.

37. See Sections 1153, 1153.5; Penal Code § 1192.4. *See also* *People v. Crow*, 28 Cal. App. 4th 440, 449-52, 33 Cal. Rptr. 2d 624 (1994) (contrasting rules for plea bargaining with rules for settlement of civil disputes).

38. See proposed Sections 1130 (negotiations to settle pending civil action or administrative adjudication), 1131 (application of chapter), *infra*. In some instances, efforts to compromise a civil case

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.³⁹ 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.⁴⁰

The proposed legislation would not change this approach. The new rules on evidence of negotiations to settle a pending civil action or administrative adjudication would apply only to evidence offered or sought in civil actions and other noncriminal proceedings. Although there is scholarly support for restricting admissibility in some criminal cases,⁴¹ 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.”⁴² The proposed legislation avoids that and other issues by maintaining the status quo in criminal cases.

may also constitute plea bargaining (e.g., an offer to pay civil damages in exchange for dismissal of criminal charges). The proposed law would not apply to such negotiations. *Id.*

Similarly, some efforts to compromise a civil case may amount to obstruction of justice (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or an agreement not to cooperate with the prosecution). The proposed law would not apply in these situations. *Id.* This limitation is drawn from Federal Rule of Evidence 408. Cases construing that rule may provide guidance in interpreting this aspect of the proposed law.

39. 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 he 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) (Rule 408 does not exclude evidence in criminal prosecution even where evidence relates to settlement of civil claim); *United States v. Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) (Rule 408 should not be applied to criminal cases).

For a provision expressly making evidence of a settlement offer inadmissible in a criminal case, see Health and Safety Code Section 25379 (liability for damages for release of hazardous substance).

40. *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* § 5306, at 216-21 (1980).

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

42. 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); *People v. Hammon*, 15 Cal. 4th 1117, 938 P.2d 986, 65 Cal. Rptr. 2d 1 (1997); *Rinaker v. Superior Court*, 62 Cal. App. 4th 155, 74 Cal. Rptr. 2d 464 (1998); *People v. Reber*, 177 Cal. App. 3d 523, 532, 223 Cal. Rptr. 139 (1986).

Purposes for Introducing Evidence of Negotiations to Settle a Pending Civil Action or Administrative Adjudication

As a general rule, evidence of negotiations to settle a pending civil action or administrative adjudication should be inadmissible in a civil action or other noncriminal proceeding.⁴³ This will encourage openness and enhance rationality in such 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.⁴⁴ 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 negotiations to settle a pending civil action or administrative adjudication, it should attempt to minimize the scope of negotiation evidence admitted, so as to prevent chilling of candid negotiations. Evidence admitted pursuant to an exception may only be used for the purposes specified in the exception.⁴⁵

Evidence otherwise admissible. An exception is necessary to prevent disputants from using negotiations to shield materials from use at trial. Under this exception, otherwise admissible evidence would not be rendered inadmissible solely by reason of its use in negotiations to settle a pending civil action or administrative adjudication.⁴⁶

43. This general rule of inadmissibility would apply to evidence of a settlement agreement, as well as other evidence of negotiations to settle a pending civil action or administrative adjudication. See proposed Section 1133, *infra*. In contrast, the proposed provisions on discoverability and confidentiality would not apply to evidence of a settlement agreement. See proposed Sections 1130, 1134-1135, *infra*; see also “Discoverability of Negotiations to Settle a Pending Civil Action or Administrative Adjudication” and “Confidentiality of Negotiations to Settle a Pending Civil Action or Administrative Adjudication,” *infra*. For application of the proposed law to an internal memorandum prepared for purposes of negotiations to settle a pending civil action or administrative adjudication, see *Affiliated Mfrs., 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”).

44. Some authorities maintain that the law should not blindly promote settlement but should promote “desirable” settlements. See, e.g., Luban, *supra* note 21; Galanter & Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994). By encouraging an early settlement based on candid exchange of information, the proposed rule would serve that end. For the desirability of an early settlement resulting from frank discussion, see 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.”). See also Code Civ. Proc. § 128 (requiring assessment of risk that stipulated reversal will reduce incentives for pretrial settlement); *Neary*, 3 Cal. 4th at 277; *Gopal v. Yoshikawa*, 147 Cal. App. 3d 128, 130, 195 Cal. Rptr. 36 (1983); Rogers & McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*, 13 Ohio St. J. on Disp. Resol. 831, 835-38 (1998); Sheppard & Edwards, *Litigators are Losers*, California Lawyer 38, 39 (April 1998).

45. Sections 1152 and 1154 would remain applicable to evidence of negotiations to settle a pending civil action or administrative adjudication, as well as to evidence of humanitarian conduct or prelitigation negotiations. A limiting instruction may be appropriate. See Section 355.

46. 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

1 *Partial satisfaction of undisputed claim or acknowledgment of preexisting debt.*
2 Evidence of partially satisfying a claim without questioning its validity should not
3 be inadmissible if that evidence is offered to prove the validity of the claim.
4 Similarly, a debtor's payment or promise to pay all or part of a preexisting debt
5 should not be inadmissible when a party offers that evidence to prove the creation
6 of a new duty or revival of the debtor's preexisting duty. These limitations are
7 consistent with the goal of promoting settlement: If a claim is undisputed or a debt
8 acknowledged, there is no dispute to settle and no need to provide
9 confidentiality.⁴⁷

10 The proposed law would include an express exception for these situations, which
11 is drawn from Section 1152(c).⁴⁸ This exception is likely to be invoked
12 infrequently, because the proposed law would only apply if a civil action or
13 administrative adjudication is commenced, which often is unnecessary if a claim is
14 undisputed or a debt acknowledged.

15 *Cause of action, defense, or other legal claim arising from conduct during*
16 *negotiations to settle a pending civil action or administrative adjudication.* The
17 public policy favoring settlement has limited force as to settlements and settlement
18 overtures that involve illegality or other misconduct.⁴⁹ For example, evidence of
19 battery during settlement negotiations should not be inadmissible in an action for
20 damages due to the battery. Similarly, evidence of a low settlement offer should
21 not be inadmissible to establish an insurer's bad faith in bad faith insurance
22 litigation. To address situations such as these, the proposed law would not exclude
23 evidence of negotiations to settle a pending civil action or administrative
24 adjudication where the evidence is introduced to support or rebut a cause of action,
25 defense, or other legal claim (e.g., a request for sanctions) arising from conduct
26 during the negotiations.

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 negotiating 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, 447-48 (1996). The exception does not extend to documentary evidence specifically created for use during negotiations to settle a pending civil action or administrative adjudication. *See id.* at 448 (policy for exception does not apply where document would not have existed but for negotiations, because negotiations are not being exploited as device to make existing document unreachable).

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

48. Strictly speaking, an express exception for these situations should not be necessary, because the proposed law would apply only where there is a dispute to compromise. *See* proposed Section 1130 (negotiations to settle pending civil action or administrative adjudication), *infra*. The Commission nonetheless recommends inclusion of this exception, to provide clear statutory guidance on these situations.

49. *See* Leonard, *supra* note 9, § 3.7.4, at 3:98-1; *see also* Brazil, *supra* note 8, at 980-81.

1 *Obtaining benefits of settlement.* Evidence of a settlement should be admissible
2 enforce the settlement or bar reassertion of a claim. This exception is essential if
3 parties are to enjoy the benefits of settling a dispute.⁵⁰ Conversely, evidence of
4 negotiations to settle a pending civil action or administrative adjudication should
5 be admissible to rebut an attempt to enforce a settlement, as by showing that there
6 was no settlement or meeting of the minds.

7 *Good faith settlement barring contribution or indemnity.* Evidence of
8 negotiations to settle a pending civil action or administrative adjudication should
9 not be inadmissible to prove or disprove the good faith of a settlement. This
10 exception follows from the rule that a good faith settlement between a plaintiff and
11 a joint tortfeasor or co-obligor bars “any other joint tortfeasor or co-obligor from
12 any further claims against the settling tortfeasor or co-obligor for equitable
13 comparative contribution, or partial or comparative indemnity, based on
14 comparative negligence or comparative fault.”⁵¹

15 *Prevention of violent felony.* Evidence of negotiations to settle a pending civil
16 action or administrative adjudication should be admissible if a participant in the
17 negotiations reasonably believes that disclosure is necessary to prevent a violent
18 felony.⁵² For example, such evidence may be relevant to obtaining a restraining
19 order against a battering spouse.

20 *Bias.* A settlement agreement between a witness and a party may consciously or
21 subconsciously influence the testimony of the witness.⁵³ For example, suppose a
22 settlement agreement between a witness and a defendant with limited assets
23 requires the defendant to pay a substantial sum to the witness. This gives the
24 witness an incentive to shelter the defendant from liability to others, so as to
25 minimize competition for the defendant’s assets. Because of this danger of bias, a
26 settlement agreement should be admissible if a party to the agreement testifies and
27 the evidence is introduced to show the bias of that witness.

28 In contrast to a settlement agreement, a settlement offer, or other evidence of
29 negotiations short of a settlement agreement, is less indicative of bias. Where a
30 party offers such evidence to show bias, it should be inadmissible, because the

50. See Leonard, *supra* note 9, § 3.8.1, at 3:125 (“[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.”).

51. Code Civ. Proc. § 877.6(c). The exception should apply not only when evidence of negotiations to settle a pending civil action or administrative adjudication 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.

52. For the definition of “violent felony,” see Penal Code Section 667.5(c).

53. 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. For special safeguards applicable to a sliding scale recovery agreement, see Code of Civil Procedure Section 877.5(a)(2).

benefits of safeguarding the privacy of the negotiations outweigh the limited value of the evidence in establishing bias.⁵⁴

Breach of confidentiality agreement. Evidence of negotiations to settle a pending civil action or administrative adjudication should not be inadmissible to establish breach of an agreement to keep the negotiations confidential.

Statutory authorization for specific purpose. The proposed law would be inapplicable where a statute expressly or by necessary implication (as opposed to ordinary implication) authorizes a court to consider evidence of settlement negotiations for a specific purpose.⁵⁵

Admissibility by express written agreement of all parties. Evidence of negotiations to settle a pending civil action or administrative adjudication should be admissible if all parties to the negotiations expressly agree in writing that the evidence may be admitted.

Discoverability of Negotiations to Settle a Pending Civil Action or Administrative Adjudication

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.⁵⁶ 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.⁵⁷

54. See generally *Cook v. Yellow Freight Sys., Inc.*, 132 F.R.D. 548, 555 (E.D. Cal. 1990).

55. For example, Code of Civil Procedure Section 998 provides that in certain circumstances an unaccepted statutory offer of compromise affects entitlement to postoffer costs and costs of the services of expert witnesses. By necessary implication, evidence of the offer is admissible to establish who is responsible for paying postoffer costs and costs of the services of expert witnesses. The proposed law would not override that intent.

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

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

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

Brazil, *supra* note 8, at 999.

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

1 To effectively serve the goal of promoting mutually satisfactory settlement, the
2 proposed law would protect evidence of negotiations to settle a pending civil
3 action or administrative adjudication from discovery. This protection would be
4 subject to essentially the same exceptions as for admissibility.⁵⁸

5 Settlement agreements, as opposed to settlement offers and associated
6 negotiations, present special considerations. For example, suppose a
7 manufacturing plant allegedly emits a hazardous chemical and a nearby resident
8 sues for resultant injuries. If the manufacturer and the victim enter into a
9 purportedly confidential settlement agreement, it may be important to resolve
10 whether other persons, particularly other victims or potential victims, are entitled
11 to disclosure of the agreement. Such issues are controversial⁵⁹ and this proposal
12 does not address them. The new standard for discovery of negotiations to settle a
13 pending civil action or administrative adjudication would not apply to disclosure
14 of settlement agreements, which would continue to be governed by other law.

15 **Confidentiality of Negotiations to Settle a Pending Civil Action or Administrative** 16 **Adjudication**

17 Although admissibility and discoverability are clearly defined concepts, the
18 meaning of confidentiality is less sharply delineated and more context-specific.⁶⁰
19 The term is generally understood, however, to connote the imparting of
20 information to another person in private, on the understanding that it will not be
21 disclosed to others.⁶¹ A communication ceases to be confidential if it is
22 disseminated more widely than is anticipated at the time of disclosure.⁶²

58. 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 negotiations to settle pending civil action or administrative adjudication; obtaining benefits of settlement; good faith settlement barring contribution or indemnity; prevention of violent felony; breach of confidentiality agreement; clear statutory authorization for specific purpose; admissibility by agreement of all parties. The exception for bias (proposed Section 1142) is unnecessary in the context of discovery, because this proposal would not affect the discoverability of a settlement agreement.

59. See, e.g., Senate Bill 711, introduced by Senator Lockyer in 1991. The Legislature passed the bill in 1992, but the Governor vetoed it. A similar bill is currently pending in the Legislature (Senate Bill 1254 (Schiff)).

60. 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).

61. 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]

62. 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 or

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

8 By restricting the admissibility and discoverability of evidence of negotiations to
9 settle a pending civil action or administrative adjudication, the proposed law
10 would limit the extent to which a third party can gain access to such evidence.
11 Coupling these protections with a confidentiality agreement between the
12 negotiating parties would make the negotiations private in most circumstances.

13 The Commission nonetheless recommends adding a statutory provision on
14 confidentiality. This provision would not make evidence of negotiations to settle a
15 pending civil action or administrative adjudication automatically confidential, but
16 rather would expressly state that such evidence is confidential where the parties to
17 the negotiations execute a written agreement to that effect.⁶³ The statute would
18 thus alert negotiating parties that a written agreement is necessary to make
19 evidence of their negotiations confidential.⁶⁴ By limiting this protection to a
20 negotiation in which the participants have executed the required agreement, the
21 proposed law would ensure that such protection applies only where the
22 participants desire it.

23 The proposed provision on confidentiality would be subject to the same
24 exceptions as the proposed provision on discoverability (including the limitation
25 that the provision would not apply to evidence of a settlement agreement).
26 Participants in negotiations to settle a pending civil action or administrative
27 adjudication would not be permitted to contract around these exceptions.

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”).

63. 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 952-954, 992, 994, 1012, 1014.

64. 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 & Dev. Co.*, 57 Cal. App. 4th 209, 213, 67 Cal. Rptr. 2d 62 (1997).

Effect of the Proposed Reforms

In many instances, evidence of negotiations to settle a pending civil action or administrative adjudication 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. It would significantly enhance the privacy of negotiations to settle a civil action or administrative adjudication. 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 the purpose of impeachment by a prior inconsistent statement.⁶⁵ The proposed law would make clear that evidence of negotiations to settle a pending civil action or administrative adjudication 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.⁶⁶ This is particularly so because the excluded

65. See *C & K Eng'g Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 13, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978). This case may be viewed as support for the proposition that Section 1152 implicitly excludes evidence of settlement negotiations that is offered for the purpose 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.*

66. Many commentators caution against admitting evidence of settlement negotiations for purposes of impeachment by a prior inconsistent statement. See *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.”); see also 1 S. Saltzburg, M. Martin & D. Capra, *Federal Rules of Evidence Manual* 603 (7th ed. 1998); Leonard, *supra* note 9, § 3.8.2, at 3:126-5; 1 M. Graham, *Modern State and Federal Evidence: A Comprehensive Reference Text* 487 (NITA 1989); but see 2 Mueller & Kirkpatrick, *supra* note 15, § 138, at 101. 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); Maryland Rule of Evidence 5-408 (Michie’s 1996). 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 (D. Mass. 1988).

1 impeachment evidence may never exist absent the enhanced evidentiary
2 protection,⁶⁷ may consist of trivial inconsistencies rather than serious mistakes or
3 deliberate lies,⁶⁸ and may be unduly prejudicial even with the use of a limiting
4 instruction.⁶⁹

5 The proposed law would also strengthen the privacy of negotiations to settle a
6 pending civil action or administrative adjudication, by making evidence of the
7 negotiations inadmissible to show bias in most circumstances,⁷⁰ inadmissible to
8 establish the jurisdictional classification of a claim,⁷¹ and inadmissible not only
9 with respect to the claim that is the subject of the negotiations but also in other
10 contexts.⁷²

11 Coupled with the other reforms, this would increase the confidentiality of
12 negotiations to settle a pending civil action or administrative adjudication, permit
13 participants to openly explore a variety of options, and enhance the likelihood of
14 an early, mutually satisfactory and thus durable settlement. This in turn would
15 spare the parties the expense, stress, and uncertainty of prolonged litigation, while

67. See generally *Jaffee*, 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.”). See also *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1177-78 (C.D. Cal. 1998); *Kirtley*, *supra* note 24, at 17.

68. As a commentator explained:

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. 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.

Brazil, *supra* note 8, at 978.

69. See *Derderian*, 121 F.R.D. at 12 n.1 (evidence of settlement negotiations should not be admissible for impeachment purposes because such evidence usually constitutes “camouflaged” evidence on liability.”). See also note 30 *supra* and accompanying text.

70. See notes 53-54 *supra* and accompanying text.

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

In a more recent case, an intermediate appellate court concluded that admissions in a court settlement conference 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 negotiations to settle a pending civil action or administrative adjudication would not be admissible to establish jurisdictional abuse, other evidence could be introduced for that purpose.

72. Cf. *Fieldson Assocs. v. Whitecliff Labs.*, 276 Cal. App. 2d 770, 772, 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 of, 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 57, *supra*.

- 1 also conserving the resources of the court and making those resources available to
- 2 dispense a higher quality of justice in cases that do not settle.⁷³

73. As one court recently explained:

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. 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.

Folb, 16 F. Supp. 2d at 1177.

1 PROPOSED LEGISLATION

2 **Evid. Code §§ 1130-1145 (added). Negotiations to settle pending civil action or**
3 **administrative adjudication**

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

6 CHAPTER 3. NEGOTIATIONS TO SETTLE A PENDING CIVIL
7 ACTION OR ADMINISTRATIVE ADJUDICATION

8 Article 1. Definitions, Application, and Effect of Chapter

9 **§ 1130. Negotiations to settle pending civil action or administrative adjudication**

10 1130. (a) As used in this chapter, “negotiations to settle a pending civil action or
11 administrative adjudication” means any of the following:

12 (1) Furnishing, offering, or promising to furnish, a valuable consideration in
13 compromising or attempting to compromise a pending civil action or
14 administrative adjudication in which testimony can be compelled pursuant to law.

15 (2) Accepting, offering to accept, or promising to accept, a valuable
16 consideration in compromising or attempting to compromise a pending civil action
17 or administrative adjudication in which testimony can be compelled pursuant to
18 law.

19 (3) Conduct or statements made for the purpose of or in the course of
20 compromising or attempting to compromise a pending civil action or
21 administrative adjudication in which testimony can be compelled pursuant to law,
22 regardless of whether (i) a settlement is reached, (ii) an offer of compromise is
23 made, or (iii) the conduct or statements relate to a claim that is not pending in a
24 civil action or administrative adjudication.

25 (b) Except as provided in paragraph (3) of subdivision (a), “negotiations to settle
26 a pending civil action or administrative adjudication” does not include negotiations
27 that occur before a civil action or administrative adjudication is commenced.

28 **Comment.** Subdivision (a) of Section 1130 is intended for drafting convenience. It covers
29 efforts to compromise a pending civil action or administrative adjudication, regardless of whether
30 the claim is disputed as to liability or only as to amount.

31 This chapter encompasses, but is not limited to, judicially-supervised settlement negotiations in
32 a civil action, such as a settlement conference pursuant to California Rule of Court 222 (1999).
33 Under subdivision (a)(3), if parties attempt to reach a settlement that includes both pending
34 claims and unfiled claims (either related or unrelated to the pending claims), the entire negotiation
35 is subject to the provisions of this chapter.

36 See Section 120 (civil action). For the effect of this chapter on admissibility of evidence of
37 negotiations to settle a pending civil action or administrative adjudication, see Section 1133. For
38 the effect of this chapter on discoverability of evidence of negotiations to settle a pending civil
39 action or administrative adjudication, see Section 1134. For confidentiality of negotiations to
40 settle a pending civil action or administrative adjudication, see Section 1135. This chapter does

1 not expand or limit the law on confidentiality or discovery of evidence of a settlement agreement.
2 See Sections 1134-1135.

3 For mediation confidentiality, see Sections 1115-1128. For advance payments by insurers or
4 others, see Insurance Code Section 11583.

5 **§ 1131. Application of chapter**

6 1131. This chapter does not apply to either of the following:

7 (a) Plea bargaining, regardless of whether the bargaining may also be
8 negotiations to settle a pending civil case or administrative adjudication.

9 (b) Evidence of an effort to obstruct a criminal investigation or prosecution,
10 regardless of whether that effort may also be negotiations to settle a pending civil
11 case or administrative adjudication.

12 **Comment.** Section 1131 makes explicit that this chapter does not apply to plea bargaining,
13 which is covered by other evidentiary provisions. See Sections 1153 (guilty plea withdrawn, offer
14 to plead guilty), 1153.5 (offer for civil resolution of crimes against property); Penal Code §
15 1192.4 (guilty plea withdrawn). Where a civil action is related to a criminal prosecution,
16 negotiations to settle the civil action are within the scope of this chapter, but the chapter does not
17 apply to plea bargaining or an effort to obstruct a criminal investigation or prosecution (e.g., an
18 offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or
19 an agreement not to cooperate with the prosecution). The latter limitation is drawn from Federal
20 Rule of Evidence 408.

21 **§ 1132. Effect of chapter**

22 1132. Nothing in this chapter makes admissible evidence that is inadmissible
23 under Chapter 2 (commencing with Section 1115) of Division 9, Section 1152 or
24 1154, or any other statute.

25 **Comment.** Section 1132 clarifies the interrelationship between this chapter and Sections 1152
26 and 1154. Unlike this chapter, those provisions apply to evidence of prelitigation negotiations,
27 including negotiations to settle a contractual arbitration. They preclude admissibility of such
28 evidence (and evidence of humanitarian conduct) for purposes of proving liability (Section 1152)
29 or invalidity of a claim (Section 1154), but do not otherwise restrict admissibility and do not
30 expressly address discoverability or confidentiality. Evidence that is subject to an exception in
31 Article 3 of this chapter may still be inadmissible under Section 1152 or 1154 or another statute
32 (e.g., Health & Safety Code § 25379).

33 **Article 2. General Provisions**

34 **§ 1133. Admissibility of evidence of negotiations to settle pending civil action or** 35 **administrative adjudication**

36 1133. Except as provided in Article 3 (commencing with Section 1136), a
37 settlement agreement or other evidence of negotiations to settle a pending civil
38 action or administrative adjudication is not admissible for any purpose in a civil
39 action, administrative adjudication, arbitration, or other noncriminal proceeding in
40 which testimony can be compelled pursuant to law.

41 **Comment.** To foster candor in negotiating settlements and preclude abuse in using evidence of
42 settlement discussions, Section 1133 makes evidence of negotiations to settle a pending civil
43 action or administrative adjudication generally inadmissible in that case or any other noncriminal
44 proceeding. The provision applies regardless of whether the party seeking introduction of the

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

3 The provision does not apply to evidence of negotiations that occur before the commencement
4 of a civil action or administrative adjudication. See Section 1130 (negotiations to settle pending
5 civil action or administrative adjudication) & Comment. For the admissibility of prelitigation
6 negotiations (including negotiations to settle a contractual arbitration), see Sections 1152
7 (inadmissibility to prove liability for loss or damage) and 1154 (inadmissibility to prove invalidity
8 of claim). Sections 1152 and 1154 also continue to apply to negotiations to settle a pending civil
9 action or administrative adjudication, supplementing the protection of this chapter. See Section
10 1132 (effect of chapter).

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

13 See Section 120 (civil action). For exceptions to Section 1133, see Article 3 (Sections 1136-
14 1145). Evidence satisfying one or more of these exceptions is not necessarily admissible. See
15 Section 1132 & Comment. The evidence may still be subject to exclusion under other rules, such
16 as Section 352 (exclusion of evidence where probative value is substantially outweighed by
17 probability that admission will necessitate undue consumption of time or create substantial danger
18 of undue prejudice, confusing the issues, or misleading the jury).

19 For the effect of this chapter on discoverability of evidence of negotiations to settle a pending
20 civil action or administrative adjudication, see Section 1134. For the effect of this chapter on
21 confidentiality of negotiations to settle a pending civil action or administrative adjudication, see
22 Section 1135.

23 For mediation confidentiality, see Sections 1115-1128. For humanitarian conduct, see Section
24 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

25 For examples of provisions governing conduct in settlement negotiations, see Bus. & Prof.
26 Code §§ 802 (certain settlements must be reported to licensing authorities), 6090.5(a) (attorney
27 may be disciplined for seeking or entering into confidential settlement of claim of professional
28 misconduct); Cal. Rule of Professional Conduct 1-500(A) (attorney may not offer or agree to
29 refrain from representing other clients in similar litigation, nor may attorney seek such an
30 agreement from another attorney).

31 **§ 1134. Discoverability of evidence of negotiations to settle pending civil action or**
32 **administrative adjudication**

33 1134. (a) Except as provided in Article 3 (commencing with Section 1136),
34 evidence of negotiations to settle a pending civil action or administrative
35 adjudication is not subject to discovery in a civil action, administrative
36 adjudication, arbitration, or other noncriminal proceeding in which testimony can
37 be compelled pursuant to law.

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

41 **Comment.** To promote candor in negotiations to resolve pending civil actions and
42 administrative adjudications, Section 1134 restricts discovery of evidence of such negotiations,
43 both in the action that is the subject of the negotiations and in any other noncriminal proceeding.
44 The provision applies regardless of whether the party seeking discovery was a party to the
45 negotiations, and regardless of whether the party opposing discovery was a party to the
46 negotiations. It does not apply to discovery of evidence of a settlement agreement and does not
47 affect whether and to what extent the existence and terms of such an agreement are discoverable.

48 Section 1134 does not protect evidence of attempting to compromise a criminal case (plea
49 bargaining). See Section 1131 (application of chapter) & Comment. Section 1134 is also
50 inapplicable to evidence of prelitigation negotiations (including negotiations to settle a

1 contractual arbitration). See Section 1130 (negotiations to settle pending civil action or
2 administrative adjudication) & Comment.

3 See Section 120 (civil action). For exceptions to Section 1134, see Article 3 (Sections 1136-
4 1145). Evidence satisfying one or more of these exceptions is not necessarily discoverable. It
5 must still satisfy other prerequisites for discovery. See, e.g., Code Civ. Proc. § 2017 (scope of
6 discovery).

7 For the effect of this chapter on admissibility of evidence of negotiations to settle a pending
8 civil action or administrative adjudication, see Section 1133. For additional restrictions on
9 admissibility of such negotiations, see Sections 1152 (inadmissibility to prove liability for loss or
10 damage) and 1154 (inadmissibility to prove invalidity of claim). Those provisions also apply to
11 prelitigation negotiations. For the effect of this chapter on confidentiality of negotiations to settle
12 a pending civil action or administrative adjudication, see Section 1135.

13 For mediation confidentiality, see Sections 1115-1128. For humanitarian conduct, see Section
14 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

15 For examples of provisions governing conduct in settlement negotiations, see Bus. & Prof.
16 Code §§ 802 (certain settlements must be reported to licensing authorities), 6090.5(a) (attorney
17 may be disciplined for seeking or entering into confidential settlement of claim of professional
18 misconduct); Cal. Rule of Professional Conduct 1-500(A) (attorney may not offer or agree to
19 refrain from representing other clients in similar litigation, nor may attorney seek such an
20 agreement from another attorney).

21 **§ 1135. Confidentiality of negotiations to settle pending civil action or administrative**
22 **adjudication**

23 1135. (a) Except as provided in Article 3 (commencing with Section 1136),
24 evidence of negotiations to settle a pending civil action or administrative
25 adjudication is confidential where the persons participating in the negotiations
26 execute an agreement in writing, stating that the negotiations are confidential as
27 provided by law, or words to that effect.

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

31 **Comment.** Section 1135 alerts participants in negotiations to settle a pending civil action or
32 administrative adjudication that a written agreement is necessary to make evidence of the
33 negotiations confidential. Where the participants execute the required written agreement,
34 information acquired in the negotiations may not be disclosed to third persons, unless an
35 exception applies or disclosure is necessary to achieve settlement as contemplated during the
36 negotiations. Disclosure of evidence in violation of this section is not a basis for tort liability. For
37 guidance on whether this provision is a basis for disqualification of counsel, see *Barajas v. Oren*
38 *Realty & Dev. Co., Inc.*, 57 Cal. App. 4th 209, 213-19, 67 Cal. Rptr. 2d 62 (1997).

39 Although Section 1135 makes negotiations to settle a pending civil action or administrative
40 adjudication confidential where its requirements are met, the provision does not apply to a
41 settlement agreement and does not affect whether and to what extent the existence and terms of
42 such an agreement may be kept confidential.

43 Section 1135 does not protect evidence of attempting to compromise a criminal case (plea
44 bargaining). See Section 1131 (application of chapter) & Comment. Section 1135 is also
45 inapplicable to evidence of prelitigation negotiations (including negotiations to settle a
46 contractual arbitration). See Section 1130 (negotiations to settle pending civil action or
47 administrative adjudication) & Comment.

48 For exceptions to Section 1135, see Article 3 (Sections 1136-1145). A confidentiality
49 agreement is invalid to the extent that it purports to override these exceptions.

For the effect of this chapter on admissibility of evidence of negotiations to settle a pending civil action or administrative adjudication, see Section 1133. For additional restrictions on admissibility of such negotiations, see Sections 1152 (inadmissibility to prove liability for loss or damage) and 1154 (inadmissibility to prove invalidity of claim). Those provisions also apply to prelitigation negotiations. For the effect of this chapter on discoverability of evidence of negotiations to settle a pending civil action or administrative adjudication, see Section 1134.

For mediation confidentiality, see Sections 1115-1128. For humanitarian conduct, 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

§ 1136. Evidence otherwise admissible or subject to discovery

1136. Article 2 (commencing with Section 1133) does not apply where evidence otherwise admissible or subject to discovery independent of negotiations to settle a pending civil action or administrative adjudication is used in the negotiations.

Comment. Section 1136 is drawn from Section 1120 (a) and Federal Rule of Evidence 408. See Section 1130 (negotiations to settle pending civil action or administrative adjudication). See also Section 1131 (application of chapter).

§ 1137. Partial satisfaction of undisputed claim or acknowledgment of preexisting debt

1137. Article 2 (commencing with Section 1133) 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 1137 is drawn from Section 1152(c).

§ 1138. Cause of action, defense, or other legal claim arising from conduct during negotiations to settle pending civil action or administrative adjudication

1138. Article 2 (commencing with Section 1133) does not apply where a settlement agreement or other evidence of negotiations to settle a pending civil action or administrative adjudication is introduced 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 1138 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 negotiations to settle a civil action or administrative adjudication should not be inadmissible in an action for damages due to the harassment. Similarly, evidence of a low settlement offer should not be inadmissible to establish an insurer’s bad faith in 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 may nonetheless be admissible pursuant to this section.

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 (negotiations to settle pending civil action or administrative adjudication). See also Section 1131 (application of chapter).

§ 1139. Obtaining benefits of settlement

1139. Article 2 (commencing with Section 1133) does not apply where either of the following conditions is satisfied:

(a) A settlement agreement or other evidence of negotiations to settle a pending civil action or administrative adjudication 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 negotiations to settle a pending civil action or administrative adjudication 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 1139 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 negotiations to settle a pending civil action or administrative adjudication may be used in rebuttal.

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 (negotiations to settle pending civil action or administrative adjudication). See also Section 1131 (application of chapter).

§ 1140. Good faith settlement barring contribution or indemnity

1140. Article 2 (commencing with Section 1133) does not apply where a settlement agreement or other evidence of negotiations to settle a pending civil action or administrative adjudication 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, good faith or lack of good faith of a settlement of the loss, damage, or claim that is the subject of the negotiations.

1 **Comment.** Section 1140 follows from the rule that a good faith settlement between a plaintiff
2 and a joint tortfeasor or co-obligor bars claims against the settling tortfeasor or co-obligor for
3 equitable comparative contribution, or partial or comparative indemnity, based on comparative
4 negligence or comparative fault. Code Civ. Proc. § 877.6(c).

5 Evidence admitted pursuant to Section 1140 may only be used for the purposes specified in the
6 provision. A limiting instruction may be appropriate. See Section 355.

7 See Section 1130 (negotiations to settle pending civil action or administrative adjudication).
8 See also Section 1131 (application of chapter).

9 **§ 1141. Prevention of violent felony**

10 1141. Article 2 (commencing with Section 1133) does not apply where a
11 participant in negotiations to settle a pending civil action or administrative
12 adjudication reasonably believes that introduction or disclosure of a settlement
13 agreement or other evidence of the negotiations is necessary to prevent a violent
14 felony.

15 **Comment.** Section 1141 is drawn from Sections 956.5 (exception to attorney-client privilege
16 where disclosure is necessary to prevent criminal act that the lawyer believes is likely to result in
17 death or substantial bodily harm) and 1024 (exception to psychotherapist-patient privilege where
18 patient is dangerous and disclosure is necessary to prevent threatened danger). The provision does
19 not create a duty of disclosure.

20 See Section 1130 (negotiations to settle pending civil action or administrative adjudication);
21 Penal Code § 667.5(c) (“violent felony” defined). See also Section 1131 (application of chapter).

22 **§ 1142. Bias**

23 1142. Article 2 (commencing with Section 1133) does not apply where a
24 settlement agreement is introduced to show bias of a witness who is a party to the
25 agreement.

26 **Comment.** Section 1142 provides an exception to the rule of exclusion, in recognition that a
27 settlement agreement may be evidence of bias. The danger of bias is particularly strong where
28 there is a sliding scale recovery agreement and a defendant party to the agreement testifies. See
29 Code Civ. Proc. § 877.5 (additional safeguards for use of a sliding scale recovery agreement).

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

32 **§ 1143. Breach of confidentiality agreement**

33 1143. Article 2 (commencing with Section 1133) does not apply where a
34 settlement agreement or other evidence of negotiations to settle a pending civil
35 action or administrative adjudication is introduced or is relevant to show, or to
36 rebut an attempt to show, breach of an agreement pursuant to Section 1135 stating
37 that the negotiations are confidential as provided by law, or words to that effect.

38 **Comment.** Section 1143 facilitates proof of contractual liability for breach of an agreement
39 pursuant to Section 1135 (confidentiality of negotiations to settle pending civil action or
40 administrative adjudication).

41 Evidence admitted pursuant to Section 1143 may only be used for the purposes specified in the
42 provision. A limiting instruction may be appropriate. See Section 355.

43 See Section 1130 (negotiations to settle pending civil action or administrative adjudication).
44 See also Section 1131 (application of chapter).

1 **§ 1144. Statutory authorization for specific purpose**

2 1144. Article 2 (commencing with Section 1133) does not apply where a statute
3 expressly, or by necessary implication, authorizes a court to consider a settlement
4 agreement, or other evidence of negotiations to settle a pending civil action or
5 administrative adjudication, for a specific purpose. Evidence admitted pursuant to
6 that statute may be introduced only for the purpose specified in the statute.

7 **Comment.** Section 1144 permits a court to consider evidence of negotiations to settle a
8 pending civil action or administrative adjudication, if a statute expressly or by necessary
9 implication authorizes consideration of such evidence for a specific purpose.

10 For example, Code of Civil Procedure Section 998 provides that in certain circumstances an
11 unaccepted statutory offer of compromise affects entitlement to postoffer costs and costs of the
12 services of expert witnesses. By necessary implication, evidence of the offer is admissible to
13 establish who is responsible for paying postoffer costs and costs of the services of expert
14 witnesses. Under Section 1144, this chapter would not override that intent. For a similar example,
15 see Insurance Code Section 1871.7(f)(2)(B) (by necessary implication, evidence of proposed
16 settlement of action for violation of section is admissible to show that proposed settlement is fair,
17 adequate, and reasonable).

18 In contrast, Sections 1152(a) and 1154 specify that evidence of settlement negotiations is
19 inadmissible for purposes of proving or disproving liability. These provisions do not expressly, or
20 by necessary implication (as opposed to ordinary implication), authorize the court to consider
21 such evidence for a specific purpose. Consequently, they are not a basis for invoking Section
22 1144, even though they have been interpreted to mean that such evidence is not inadmissible for
23 other purposes.

24 See Section 1130 (negotiations to settle pending civil action or administrative adjudication).
25 See also Section 1131 (application of chapter).

26 **§ 1145. Admissibility and disclosure by express written agreement of all parties**

27 1145. Article 2 (commencing with Section 1133) does not apply where all
28 parties to negotiations to settle a pending civil action or administrative
29 adjudication expressly agree in writing that specific evidence of the negotiations
30 may be admitted or disclosed.

31 **Comment.** Section 1145 is drawn from Section 1122, pertaining to mediation confidentiality.
32 See Section 1130 (negotiations to settle pending civil action or administrative adjudication). See
33 also Section 1131 (application of chapter).

34 **CONFORMING REVISIONS AND REPEALS**

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

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

37 1782. (a) Thirty days or more prior to the commencement of an action for
38 damages pursuant to this title, the consumer shall do the following:

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

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

1 The notice shall be in writing and shall be sent by certified or registered mail,
2 return receipt requested, to the place where the transaction occurred or to the
3 person's principal place of business within California.

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

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

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

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

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

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

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

28 (e) Attempts to comply with this section by a person receiving a demand shall be
29 construed to be an offer to compromise and shall be inadmissible as evidence
30 pursuant to Section 1152 of the Evidence Code. Furthermore, these attempts to
31 comply with a demand shall not be considered an admission of engaging in an act
32 or practice declared unlawful by Section 1770. If an attempt to comply with this
33 section is made for the purpose of or in the course of compromising or attempting
34 to compromise a pending civil action or administrative adjudication in which
35 testimony can be compelled pursuant to law, the attempt shall be construed to be
36 negotiations to settle a pending civil action or administrative adjudication under
37 Section 1130 of the Evidence Code. Evidence of compliance or attempts to
38 comply with this section may be introduced by a defendant for the purpose of
39 establishing good faith or to show compliance with this section.

40 **Comment.** Subdivision (e) of Section 1782 is amended to reflect the enactment of new
41 provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a
42 pending civil action or administrative adjudication. See Evid. Code §§ 1130-1145. If parties
43 attempt to reach a compromise that includes both pending claims (e.g., an action for injunctive
44 relief under Section 1770) and unfiled claims (a request for damages, which has not yet been filed

pursuant to Section 1782(d)), the entire attempt to compromise is subject to these new provisions.
See Evid. Code § 1130(a)(3) & Comment.

Code Civ. Proc. § 1738 (amended). Evidence rules protecting statements in pilot mediation

SEC. _____. Section 1738 of the Code of Civil Procedure is amended to read:

1738. (a) All statements made by the parties during a mediation under this title shall be are subject to Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115) Section 703.5, Chapters 2 (commencing with Section 1115) and 3 (commencing with Section 1130), and Sections 1152 and 1154 of Division 9 of, the Evidence Code.

(b) Any reference to a mediation during any subsequent trial shall constitute an irregularity in the proceedings of the trial for the purposes of Section 657.

Comment. Section 1738 is amended the enactment of new provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a pending civil action or other administrative adjudication. See Evid. Code §§ 1130-1145.

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, Chapters 2 (commencing with Section 1115) and 3 (commencing with Section 1130), and Sections 1152 and 1154 of Division 9, of the Evidence Code.

Comment. Section 1775.10 is amended the enactment of new provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a pending civil action or other administrative adjudication. See Evid. Code §§ 1130-1145.

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, Sections 1152 or 1154, or any other statute.

Comment. Section 1116 is amended to reflect the enactment of new provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a pending civil action or administrative adjudication. See Evid. Code §§ 1130-1145.

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

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. 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.

(d) Chapter 3 (commencing with Section 1130) of Division 9 of, and Sections 1152 and 1154 of, the Evidence Code apply to settlement negotiations pursuant to this section.

Comment. Section 11415.60 is amended to reflect the enactment of, and conform to, new provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a pending civil action or administrative adjudication. See Evid. Code §§ 1130-1145.

Uncodified (added). Operative date

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

(b) Nothing in this act invalidates an evidentiary determination made before January 1, 2001, overruling an objection based on 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

- 1 adjudication, make a new request for exclusion of the evidence on the basis of this
 - 2 act.
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