Study K-410 April 12, 2000

Memorandum 2000-22

SB 1370: Confidentiality of Settlement Negotiations

SB 1370 (Ortiz) would implement the Commission's recommendation on the admissibility, discoverability, and confidentiality of settlement negotiations. This memorandum is an update on the status of the bill.

STATUS

The bill is pending in the Senate Judiciary Committee. It was set for hearing on March 28, 2000, but the hearing was postponed at the request of the committee. A new hearing date has not yet been set.

SUPPORT

The Civil Justice Association of California ("CJAC") has written a letter in support of the bill. The bill has not received any other official support as yet.

OPPOSITION

Importantly, Consumer Attorneys of California ("CAOC") has informed Commission staff that CAOC plans to oppose SB 1370, although CAOC has not yet submitted an opposition letter. Commission staff and a member of Senator Ortiz's staff are scheduled to meet with a representative of CAOC before the Commission meeting on Thursday. We will report to the Commission on the results of this discussion.

Like CAOC, the Judicial Council has not yet taken an official position on the bill, but the Judicial Council's Civil and Small Claims Advisory Committee has opposed the proposal throughout this study and continues to oppose it. Their main concerns are that the reform is unnecessary and unduly restricts judicial discretion in admitting evidence of settlement negotiations. The Policy Committee of the Judicial Council is scheduled to meet on Tuesday, April 18, 2000, to consider the bill and determine the official position of the Judicial Council.

The only opposition letter submitted thus far is from the California Judges Association ("CJA"). (Exhibit p. 1.) CJA expresses three basic concerns, which are similar to the concerns expressed by the Civil and Small Claims Advisory Committee:

> (1) The bill "is unnecessary because its fundamental premise, that settlements are being lost because of the threat of admissibility of settlement discussions, is not a problem seen by trial judges."
>
> (2) The bill "removes relevant evidence from the fact finder's consideration, without a sufficient countervailing public policy consideration."
>
> (3) The bill "would inappropriately remove flexibility from the trial judge in resolving evidence admissibility questions where two competing policies conflict (admissibility of relevant facts vs. inadmissibility of settlement discussions)."

(*Id.*) Commission staff has replied to each of these concerns, explaining the reasons for the Commission's proposal (Exhibit pp. 2-3). CJA staff has informed us that CJA may be willing to work with the Commission on the bill.

In that regard, it is appropriate to consider whether any amendments are in order to alleviate the concerns expressed. The determination of whether the reform is necessary is a fundamental premise of the Commission's proposal. While reasonable persons may disagree on this point, there does not appear to be any room for compromise.

The other two concerns are interrelated. The Commission's proposal is intended to promote optimal settlements. It reflects a determination that this interest is important enough to justify exclusion of evidence of negotiations to settle a pending civil action or administrative adjudication. To the extent that CJA or others disagree with this assessment, it may be possible to alleviate their concern by expanding the exceptions to the proposed rule of inadmissibility.

In particular, the Commission might consider adding a "catchall" exception that would preserve a measure of judicial discretion and thus address the concern about that point, as well as the general concern about exclusion of evidence. For example, the Commission could add a provision along the following lines, which would be similar to provisions in drafts of the Uniform Mediation Act:

> 1146. Article 2 (commencing with Section 1133) does not apply in an extraordinary situation where both of the following conditions are satisfied:
>
> (1) The evidence offered is not otherwise available.
>
> (2) The state policy favoring effective settlement negotiations is so outweighed by the need for disclosure that the interests of justice will be served only if disclosure is compelled.
>
> **Comment.** Section 1146 is drawn from drafts of the Uniform Mediation Act. It affords a measure of judicial discretion in construing this chapter, but requires courts to take into account the long-term interest and strong public policy in encouraging candid settlement discussions.

Early in this study, the Commission considered whether to include a similar exception, which would have made evidence of settlement negotiations admissible for certain purposes where "[e]xclusion of the evidence would create a substantial likelihood of a miscarriage of justice." (Memorandum 96-59, Attachment pp. 8, 16.) The approach was criticized and ultimately rejected. (First Supplement to Memorandum 96-59, p. 2 & Exhibit pp. 1-2 (State Bar Litigation Section); Second Supplement to Memorandum 96-59, Exhibit pp. 4-5 (Prof. David Leonard of Loyola Law School); Memorandum 97-10, Exhibit p. 2 (State Bar Committee on Administration of Justice) & Attachment p. 16; Minutes (Feb. 27, 1997), p. 7.) **Although the Commission's current approach has distinct advantages (see Exhibit p. 3), it may be worth revisiting the concept of a catchall exception and exploring it with the interested parties.**

REQUESTED AMENDMENTS

The California Dispute Resolution Council ("CDRC") is taking no position on SB 1370, but has requested "two technical amendments to clarify that the changes proposed in [the bill] are not intended to weaken mediator confidentiality provisions in current law." (Exhibit p. 4.) In particular, CDRC suggests adding a new provision stating that "Nothing in this Article shall make any evidence admissible which is inadmissible under Chapter 2 (commencing with Section 1115)." (*Id.*) CDRC's other suggestion is more vague, but similarly focuses on ensuring that the proposed new provisions on settlement negotiations do not "open a significant exception to mediation confidentiality." (*Id.*)

Although clarifying the relationship between the proposed new provisions on settlement negotiations and the existing provisions on mediation confidentiality

(Evid. Code §§ 1115-1128) is important, **no amendment appears necessary to address CDRC's concern.** Rather, the matter is already explicitly addressed in proposed Evidence Code Section 1132:

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

(Emphasis added.)

To provide further assurance to CDRC, however, it may be helpful to revise the Comment to Section 1132 along the following lines:

> **Comment.** Section 1132 clarifies the interrelationship between this chapter and provisions on mediation confidentiality (Sections 1115-1128). This chapter does not in any way limit the evidentiary protection for evidence of a mediation. Evidence that is subject to an exception in Article 3 of this chapter may still be inadmissible under the mediation confidentiality provisions, particularly Section 1119 (admissibility, discoverability, and confidentiality).
>
> Section 1132 also clarifies the interrelationship between this chapter and Sections 1152 and 1154. Unlike this chapter, those provisions apply to evidence of prelitigation negotiations, including negotiations to settle a contractual arbitration. They preclude admissibility of such evidence (and evidence of humanitarian conduct) for purposes of providing liability (Section 1152) or invalidity of a claim (Section 1154), but do not otherwise restrict admissibility and do not expressly address discoverability or confidentiality. Evidence that is subject to an exception in Article 3 may still be inadmissible under Section 1152 or 1154 or another statute (e.g., Health & Safety Code § 25379).

OTHER COMMENTS

By phone and by email, Judge Stephen Petersen (Los Angeles Superior Court) shared his views on SB 1370 with Commission staff. Speaking as an individual, not on behalf of any organization, he questioned the need for the reform and the wisdom of restricting judicial discretion in admitting evidence of settlement negotiations. The overlap between these concerns and the concerns raised by CJA is not coincidental: Judge Petersen is a member of the CJA committee that voted to oppose SB 1370.

As an individual, however, Judge Petersen also raised some points that CJA did not make in its opposition letter. In particular, he queried how the proposed law would apply in a number of specific situations:

Apportionment or setoff of pre-trial settlements

Judge Petersen inquired whether the proposed law would permit the court to admit evidence of pre-trial settlements to show apportionment or setoff. The answer is that it would.

Specifically, where a plaintiff sues more than one defendant for the same damage, and obtains full or partial recovery by settling with fewer than all of the defendants, the nonsettling defendant(s) may introduce evidence of the settlement(s) and amount(s) obtained pursuant to proposed Evidence Code Section 1139(b):

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

As the Comment explains:

> 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.**

(Emphasis added.) **To eliminate any doubt that proof of partial recovery is also permitted, the Comment should be revised to read:**

> ….The provision also permits a non-settling defendant to show that the plaintiff has fully <u>or partially</u> recovered from other parties and cannot proceed against the non-settling defendant.

In addition, **the leadline for Section 1139 should be revised to make more clear that the provision covers offset:**

§ 1139. Offset and obtaining benefits of settlement

Communication that is mixed in content, with part of the communication relevant to another issue

Judge Petersen also asked how the proposed law would apply to a communication that is "mixed in content, with part of the communication relevant to another issue." (Email from Judge Petersen to Barbara Gaal (Feb. 14, 2000). As examples of this type of situation, Judge Petersen referred to "an on-going business relationship, the interpretation or modification of an executory contract (*cf. Price v. Wells Fargo Bank* (1989) 213 Cal. App. 3d 465, 479-483), a business transaction made where part of the consideration is settlement of a prior dispute, pre-trial 'accommodations' in major construction defect litigation, warranty repairs, etc." (*Id.*)

SB 1370 would not affect most of these situations, because it applies only to negotiations to settle a pending civil action or administrative adjudication, not prelitigation negotiations. (See proposed Evid. Code § 1130.) Where a negotiation includes discussion of both pending claims and unfiled claims, however, he proposed reforms would apply to the entire negotiation. (See proposed Evid. Code § 1130 (a)(3)(C), (b) & Comment.) For example, suppose a buyer sues a seller for fraud. The parties engage in settlement negotiations, in which the seller seeks release of the fraud claim, as well as other claims arising from the same transaction or occurrence (e.g., a potential negligence claim based on the same factual allegations). The entire negotiation would be governed by the provisions of SB 1370, even though the negligence claim was not filed at the time of the negotiation. Otherwise, the proposed evidentiary protection would be illusory, because parties virtually always negotiate for release of all claims arising from a transaction or occurrence, not just the particular claims that have been pled.

As currently drafted, the proposed reforms would also apply where negotiations to settle a pending civil action or administrative adjudication include discussion of an unfiled claim that is not related to the pending claims. This is meant to facilitate creative settlements optimizing satisfaction for all parties.

In light of Judge Petersen's query, however, as well as concerns that CAOC has expressed regarding prelitigation negotiations, **it may be helpful to narrow the coverage of unfiled claims:**

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

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

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

(3) Conduct or statements made for the purpose of or in the course of compromising or attempting to compromise a pending civil action or administrative adjudication in which testimony can be compelled pursuant to law, regardless of whether ~~(A)~~ a settlement is reached~~, (B)~~ or an offer of compromise is made~~, or (C) the conduct or statements relate to a claim that is not pending in a civil action or administrative adjudication~~.

(b) ~~Except as provided in paragraph (3) of subdivision (a), "negotiations to settle a pending civil action or administrative adjudication" does not include negotiations that occur before a civil action or administrative adjudication is commenced~~. Except as provided in subdivision (c), "negotiations to settle a pending civil action or administrative adjudication" does not include a compromise or attempt to compromise a cause of action that has not been pled in a civil action or administrative adjudication.

(c) "Negotiations to settle a pending civil action or administrative adjudication" includes negotiations to settle a cause of action that has not been pled in a civil action or administrative adjudication, if both of the following conditions are satisfied:

(1) The negotiations attempt to compromise both the cause of action that has not been pled and a cause of action that is pending in a civil action or administrative adjudication.

(2) The cause of action that has not been pled arises out of the same transaction or occurrence as the cause of action that is pending in a civil action or administrative adjudication.

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

This chapter encompasses, but is not limited to, judicially-supervised settlement negotiations in a civil action, such as a settlement conference pursuant to California Rule of Court 222 (1999). Under ~~subdivision (a)(3)~~ subdivisions (b) and (c), if parties attempt to reach a settlement that includes both pending claims and unfiled claims ~~(either related or unrelated to the pending claims)~~,

the entire negotiation is subject to the provisions of this chapter, but only if the unfiled claims arise out of the same transaction or occurrence as the pending claims.

….

Showing value of a subject of prior litigation

Judge Petersen further inquired whether the proposed law would restrict introduction of evidence showing the value of a subject of prior litigation (e.g., "a bid for real property during prior litigation in a subsequent condemnation proceeding, or assertion of right to property that is subject to later litigation, ownership disputes arising in probate.") (Email from Judge Petersen to Barbara Gaal (Feb. 14, 2000).

To the extent that such evidence consists of statements made in negotiations to settle a pending civil action or administrative adjudication, it would be inadmissible under proposed Evidence Code Section 1133, unless one of the exceptions applies (proposed Evid. Code §§ 1136-1145). Importantly, however, the excluded evidence may never exist absent the enhanced evidentiary protection, and no independently acquired evidence would be excluded, only statements made in negotiations (proposed Evid. Code § 1136). In the condemnation context, a bid made in negotiations to settle a prior lawsuit may be admissible pursuant to proposed Section 1144 (statutory authorization for specific purpose) and existing Section 822(a)(2) (with restrictions, "an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding"). **No revision appears necessary.**

Showing financial ability or opportunity

Judge Petersen's next issue was whether the proposed law would limit the introduction of evidence showing financial ability or opportunity. As with the preceding issue, the proposed law would only apply to statements made in negotiations to settle a pending civil action or administrative adjudication, not to other evidence of financial ability or opportunity. Again, to the extent that parties make damaging admissions regarding their financial circumstances in such negotiations, this evidence may never exist absent the enhanced evidentiary protection proposed by the Commission. **No revision appears necessary.**

Showing identity of persons bound by a settlement

Finally, Judge Petersen inquired how the proposed law would apply to evidence of the identity of persons bound by a settlement. Under proposed Evidence Code Section 1139, such evidence would clearly be admissible:

> 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.

No revision appears necessary.

RELATED LEGISLATION

A bill on expressions of sympathy or benevolence has been introduced in the Assembly (AB 2804 (Papan)). it would add a new provision to the Evidence Code, as follows:

> 1160. (a) Statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission on liability in a civil action.
>
> (b) For purposes of this section:
>
> (1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.
>
> (2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.
>
> (3) "Family" means the spouse, parent, grandparent, stepmother, stepfather, child, grandchild, brother, sister, half brother, half sister, adopted children of parent, or spouse's parents of an injured party.

Notably, this provision would make benevolent gestures inadmissible "as evidence of an admission of liability in a civil action," but presumably would not make such evidence inadmissible for purposes other than proving liability. **Because Assembly Member Papan's bill addresses a subject similar to the Commission's pending proposal, the Commission will track its progress.** At this point, no action to coordinate the two proposals appears necessary.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel

California Judges Association

301 Howard Street
Suite 1040
San Francisco
California 94105-2254

(415) 495 1999
(415) 974 1209 Fax

1999-2000
Executive Board

Hon. David J. Danielsen
President
Hon. Joseph E. Biafore, Jr.
Vice President
Hon. Ana Maria Luna
Vice President
Hon. Mark R. Forcum
Secretary Treasurer

Hon. Rafael A. Arreola
Hon. Richard E. Behn
Hon. Bob S. Bowers, Jr.
Hon. Stephen D. Bradbury
Hon. Harold F. Bradford
Hon. Connie M. Callahan
Hon. Morrison C. England, Jr.
Hon. Michael S. Goodman
Hon. William C. Harrison
Hon. Margaret M. Hay
Hon. James A. Jackman
Hon. Rodney S. Melville
Hon. Douglas P. Miller
Hon. John P. Moran
Hon. S. James Otero
Hon. Mel Red Recana
Hon. Philip M. Saeta
Hon. George P. Schiavelli
Hon. Diana Becton Smith
Hon. Roy L. Wonder

Constance Dove
Executive Director

March 21, 2000

The Honorable Adam Schiff
Chair, Senate Judiciary Committee
Capitol Building, Room 5080
Sacramento, CA 95814

RE: SB 1370 (Ortiz) Civil action or administrative adjudications: settlement negotiations
Oppose

Dear Senator Schiff:

I am writing to you on behalf of the California Judges Association (CJA) in opposition to SB 1370. This bill is scheduled for hearing in your committee on March 28, 2000.

CJA believes that this bill is unnecessary because its fundamental premise, that settlements are being lost because of the threat of admissibility of settlement discussions, is not a problem seen by trial judges.

CJA also finds that this bill, by definition, removes relevant evidence from the fact finder's consideration, without a sufficient countervailing public policy consideration.

SB 1370 would inappropriately remove flexibility from the trial judge in resolving evidence admissibility questions where two competing public policies conflict (admissibility of relevant facts vs. inadmissibility of settlement discussions)

Based on the above, CJA respectfully urges opposition to SB 1370.

Sincerely,

Robert L. Waring, Esq.
Legislative Counsel

c: Members, Senate Judiciary Committee
The Honorable Deborah V. Ortiz
Mike Belote, Esq. California Advocates, Inc.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION
4000 MIDDLEFIELD ROAD, ROOM D-1
PALO ALTO, CA 94303-4739
650-494-1335

March 23, 2000

VIA FAX
Jodi Remke, Counsel
Senate Committee on Judiciary
State Capitol, Room 2205
Sacramento, CA 95814

Re: SB 1370 (Ortiz)

Dear Jodi:

I received a copy of a letter that the California Judges Association ("CJA") sent to Senator Schiff regarding SB 1370. Here are a few comments in response:

(1) *SB 1370 is necessary to promote optimal settlements*. CJA asserts that SB 1370 "is unnecessary because its fundamental premise, that settlements are being lost because of the threat of admissibility of settlement discussions, is not a problem seen by trial judges." CJA appears to assume that because most cases already settle, there is no need for reform.

This perspective is too narrow. There is a big difference between:

- A barely satisfactory settlement that the parties reluctantly accept on the eve of trial after having spent major litigation costs on discovery and pretrial procedures, and
- An early settlement that spares the parties the expense and stress of prolonged litigation, effectively and creatively addresses their interests, *and conserves judicial resources*.

Based on their experience in practice, the respected attorneys on the Law Revision Commission (including a former superior court judge) determined that the proposed reforms are necessary to promote candid discussion culminating in optimal settlements. As detailed in the Commission's report (pp. 355-56 & n. 12, 359 & n. 23), many sources agree that enhancing the privacy of settlement discussions fosters open communication and furthers satisfactory settlement.

(2) *SB 1370 is tailored so as not to unnecessarily limit the introduction of relevant evidence*. CJA further contends that SB 1370 "removes relevant evidence from the fact finder's consideration, without a sufficient countervailing public policy consideration." As the Legislature is well aware, however, enhancing public satisfaction with the justice system is an important priority. By promoting optimal settlements, SB 1370 is a step in that direction.

In drafting the proposal, the Law Revision Commission carefully weighed the competing interests, limiting the scope of the reform to achieve an appropriate balance. (See pp. 361-65 of the Commission's report.) The proposed

law also incorporates a series of exceptions to ensure that critical evidence is available to the factfinder (proposed Evid. Code §§ 1136-1145).

Although the proposed law would exclude some probative evidence that is admissible under existing law, the benefits of encouraging candor and promoting prompt and durable settlements outweigh this detriment. This is particularly so because:

- No independently acquired evidence would be excluded, only statements made in negotiations (proposed Evid. Code § 1136).
- The excluded evidence may never exist absent the enhanced evidentiary protection.
- The excluded evidence may consist of trivial inconsistencies rather than serious mistakes or deliberate lies.
- The excluded evidence may be unduly prejudicial even with the use of a limiting instruction.

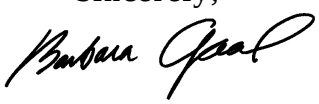
(3) *SB 1370 reasonably restricts judicial discretion*. Finally, CJA asserts that SB 1370 "would inappropriately remove flexibility from the trial judge." There are, however, important reasons for limiting judicial discretion in admitting evidence of settlement negotiations:

- Judges may be unduly influenced by the facts of the case before them, and give too little weight to the long-term interest and strong public policy in encouraging candid settlement discussions.
- Participants in settlement negotiations may be reluctant to rely on the court to exercise its discretion to exclude evidence of their negotiations. Without clear assurance of confidentiality, they may choose to be circumspect, rather than frankly exploring the dispute and options for settlement.
- Giving trial judges discretion in admitting evidence of settlement negotiations may lead to inconsistent results.

While judges may prefer not to be subject to restrictions, SB 1370 would provide important guidance in evaluating evidence of settlement negotiations.

I hope that these comments are helpful in analyzing the comments of CJA. Please let me know if I can be of any assistance.

Sincerely,



Barbara S. Gaal
Staff Counsel

File: SB 1370
cc: Consuelo Hernandez (via FAX)
Robert Waring (via FAX)

April 4, 2000

Honorable Deborah Ortiz
Room 4032
State Capitol
Sacramento, CA 95814

RE: AB 1370: Request for Amendments

Dear Senator Ortiz:

On behalf of my client, the California Dispute Resolution Council (CDRC), I am writing to you regarding their concerns about your measure, AB 1370. While CDRC is taking no position on the subject matter of the bill, CDRC is requesting that you consider two technical amendments to clarify that the changes proposed in AB 1370 are not intended to weaken mediator confidentiality provisions in current law.

The first amendment is very technical and may be a matter of interpretation. The bill states in Sections 2 and 3 that in certain mediations, statements "are subject to" both Evidence Code Sections 1115 et seq and the proposed new Evidence Code Sections 1130 et seq. While Sections 1115 et seq exclude statements in mediation, Sections 1130 et seq exclude settlement negotiations with exceptions. If Sections 1130 et seq apply only to settlement negotiations outside of mediation, then there is no problem. The problem may arise if Sections 2 and 3 are construed to make Sections 1130 et seq applicable to statements in mediation. That could open a significant exception to mediation confidentiality. CDRC is requesting that the sponsor of this measure, the California Law Revision Commission, consider this concern and report back on whether or not a clarifying amendment is needed.

CDRC would also like to suggest an amendment that adds a new section to the bill in Section 5 stating the following: "Add Section 1146 to the Evidence Code. Nothing in this Article shall make any evidence admissible which is inadmissible under Chapter 2 (commencing with Section 1115)." Although it may seem redundant, the need to clarify and protect mediation confidentiality is so important that CDRC believes it bears repeating.

If you have any questions or concerns, please do not hesitate to contact me at my office.

Sincerely,

DONNE BROWNSEY

Government Relations - Strategic Planning - Negotiations - Attorney At Law
1005 - 12th Street, Suite 10 Sacramento, CA 95814 PH 916.448.2260 FAX 916.448.2554