#K-410

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

REVISED TENTATIVE RECOMMENDATION

Admissibility, Discoverability, and Confidentiality of Settlement Negotiations

March 1998

This **revised** tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **July 31, 1998.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF REVISED TENTATIVE RECOMMENDATION

Under existing law (Evidence Code Sections 1152 and 1154), evidence of an offer of compromise or other negotiation to settle a civil case is inadmissible for purposes of proving or disproving liability, but not for other purposes.

In 1997, the California Law Revision Commission circulated a proposal to increase this limited protection, so as to promote candid and productive settlement negotiations. Under that proposal, evidence of settlement negotiations would be generally inadmissible against the person seeking to compromise. The proposal also provided that evidence of settlement negotiations, other than a settlement agreement, would be subject to discovery only if certain conditions relating to the need for and value of the evidence were satisfied.

Having considered the comments on the 1997 proposal, as well as the importance of fostering forthright discussion culminating in a prompt, mutually satisfactory settlement, the Commission has revised the proposal and now solicits comments on a new approach. Subject to specified exceptions, the new proposal would make evidence of settlement negotiations flatly inadmissible, not just inadmissible against the person attempting to compromise. This exclusionary rule would apply only in a civil case or other noncriminal proceeding. With exceptions, the proposal would also make settlement negotiations confidential and protect evidence of such negotiations (other than a settlement agreement) from discovery in a noncriminal proceeding, but only where the parties agree in advance in writing that these statutory protections should apply.

This revised tentative recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

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ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

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

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

(This tentative recommendation replaces an earlier proposal on the same subject that was circulated in 1997. The previous proposal made evidence of an offer of compromise or other settlement negotiation generally inadmissible against the person attempting to compromise. This evidentiary rule was applicable in both civil and criminal cases. The proposal did not address confidentiality of settlement negotiations, but did establish an explicit statutory standard for discovery of evidence relating to such negotiations.)

EXISTING LAW

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

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

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

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

The protection for settlement negotiations recommended in this proposal is not as strong as the protection for mediation communications. In a mediation, the involvement of a neutral person may promote productive discourse and exploration of new approaches to settlement. Because planning and participating in a mediation involves substantial expense and effort, a mediation usually is a serious effort to settle. A party may also disclose information to the mediator without having to disclose it directly to the other side. These special attributes of mediation increase the likelihood of successful settlement, and thus the likelihood of a benefit that offsets the cost (i.e., exclusion of relevant evidence) of making the discussion

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

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

Although broad in that respect, the existing law is limited in others. There are exceptions for certain categories of evidence.[4] More importantly, an offer to compromise or any associated conduct or statement is only inadmissible "*to prove liability* for the loss or damage to which the negotiations relate."[5] If a party offers the evidence for another purpose, such as to show bias, motive, undue delay, or knowledge, the restriction does not apply.[6]

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

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confidential The involvement of the mediator may also deter misconduct that might otherwise occur in a setting of complete confidentiality. Finally, the beginning and end of a mediation are clearer than the boundaries of what is and is not a settlement negotiation, making it is easier to determine which communications are protected. For further comparison of mediation with unassisted settlement negotiations, see Baruch Bush, *"What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators,* 12 Ohio St. J. on Disp. Resol. 1 (1996).

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

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

> (b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.3 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving additur or remittitur, or on appeal.
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> (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.
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> (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. Young v. Keele, 188 Cal. App. 3d 1090, 1093, 233 Cal. Rptr. 850 (1987) (emphasis in original).

6. *See, e.g.*, White v. Western Title Ins. Co., 40 Cal. 3d 870, 889, 710 P.2d 309, 221 Cal. Rptr. 509 (1985) (purpose of Section 1152 is "to bar the introduction into evidence of an offer to compromise a claim for the purpose of proving liability for that claim, but to permit its introduction to prove some other matter at issue"); Moreno v. Sayre, 162 Cal. App. 3d 116, 126, 208 Cal. Rptr. 444 (1984) ("While evidence of a settlement agreement is inadmissible to prove liability (see Evid. Code, § 1152), it is admissible to show bias or prejudice of an adverse party.").

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

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

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

JUSTIFICATION FOR PROTECTING SETTLEMENT NEGOTIATIONS

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

Public Policy of Promoting Settlements

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

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

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

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

[10]. *See, e.g.*, Fed. R. Evid. 408 advisory committee's note; Brazil, *supra* note 8, at 958-59; Leonard, *supra* note 9, § 3.3.3, at 3:33 ("[T]his general rationale has for many years been widely supported by the commentators as the primary justification for the exclusionary rule, and the cases following that view are legion.") (footnote omitted). The policy of promoting settlement has received some criticism, primarily from academics. *See* Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 Geo. L.J. 2663, 2663-64 (1995) (collecting authorities). *See also* Rinaker v. Superior Court, 62 Cal. App. 4th 155, 98 Cal. Daily Op. Serv. 1930, 1932 (March 16, 1998) ("That section 1119 serves an important public purpose in promoting the settlement of legal disputes through confidential mediation rather than litigation does not justify the preclusion of effective impeachment of a prosecution witness in a juvenile delinquency proceeding with statements the witness made during mediation."). But the overwhelming weight of authority holds that settlements are essential. *See, e.g.*, Cordray, *Settlement Agreements and the Supreme Court*, 48 Hastings L.J. 9, 36 (1996) ("The public policy favoring the private settlement of disputes has generally received enthusiastic support from the commentators and the courts."); Folberg, Rosenberg &

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

Fundamental Fairness to Participants

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

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

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

11. McClure v. McClure, 100 Cal. 339, 343, 34 P. 822 (1893) (settlements "are highly favored as productive of peace and goodwill in the community, and reducing the expense and persistency of litigation."); Skulnick v. Roberts Express, Inc., 2 Cal. App. 4th 884, 891, 3 Cal. Rptr. 2d 597 (1992) (same).

12. Brazil, *supra* note 8, at 959; *see also* Menkel-Meadow, *supra* note 10, at 2683 ("When representatives in a dispute have constituencies of widely different views of the case, and when meeting with the 'enemy' itself is considered a signal of weakness, negotiations will simply not occur unless they can be held in privacy."); Folberg, Rosenberg & Barrett, *supra* note 10, at 358 (according to California judges surveyed, one reason attorneys do not settle until they reach the courthouse steps is "fear that offers to compromise will be used against their clients later").

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. 1 B. Witkin, California Evidence *Circumstantial Evidence* § 424, at 398 (3d ed. 1986) ("the public policy in favor of settlement of disputes makes it inadvisable to penalize the person who seeks settlement by allowing his unaccepted offer to be used as an admission"); Carney v. Santa Cruz Women Against Rape, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990) (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

other factors. Even if the relevancy theory could be said to justify exclusion of parties' offers or demands, it plainly does not support exclusion of other statements or conduct in settlement negotiations.[16] Thus, the relevancy theory is not independently sufficient to justify provisions such as Sections 1152 and 1154.[17] To some extent, however, it supplements the other rationales for excluding evidence of settlement negotiations.

PROBLEMS WITH EXISTING LAW

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

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

Candor is often crucial in a settlement discussion and assurance of confidentiality is usually essential to candor.[21] Under Sections 1152 and 1154, such assurance is limited, because evidence of settlement negotiations is admissible for any purpose except proving or disproving liability.[22]

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

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plaintiff would have been satisfied with so little if the plaintiff regarded the claim as wholly valid. 2 D. Louisell & C. Mueller, Federal Evidence § 171, at 454 (1985).

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* , 3 Cal. 4th at 278; Leonard, *supra* note 9, § 3.1, at 3:2-3 & n.2.

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

20. Neary v. Regents of University of California, 3 Cal. 4th 275, 277, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992). For further discussion of the advantages of settlements, see Cordray, *supra* note 10, at 36-41; Menkel-Meadow, *supra* note 10 at 2671-93.

21. *See* note 12 *supra* and accompanying text.

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

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

is not absolute, but only excludes such evidence on the issue of liability.[23] The consequences can be severe. A party's admission in settlement negotiations, made on the assumption that it would be inadmissible, may become critical evidence against the party at trial and may later form the basis of a malpractice claim against the party's lawyer.

Finally, evidence of settlement negotiations that is ostensibly introduced for another purpose tends to be prejudicial as to liability, even with the use of a limiting instruction.[24] Frequently, this is the motive for introducing such evidence.[25] Regardless of whether a party offers evidence of settlement negotiations disingenuously, admitting such evidence can distort the litigation process and cause injustice.

RECOMMENDATIONS

Balancing the competing considerations in protecting evidence of settlement negotiations is a delicate endeavor. The detriments of excluding potentially relevant evidence must be weighed against the benefits of fairness and promoting mutually satisfactory settlements.[26] To achieve these benefits, the Commission recommends the following reforms:

Purposes for Introducing Evidence of Settlement Negotiations

As a general rule, evidence of settlement negotiations should be inadmissible in a civil action or other noncriminal proceeding. This will encourage openness and enhance rationality in settlement negotiations. This, in turn, will promote early settlements, as well as settlements that are more likely to be mutually satisfactory and durable than ones grounded on speculation as to opposing views.[27] The new rule will also be fairer than existing law, because a person could not be penalized for offering to settle.

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23. *See generally* J. Michaels, *Rule 408: A Litigation Mine Field*, Litigation, Fall 1992, at 34 ("Too often viewed as an unambiguous exclusionary rule, a sure protection, Rule 408 is actually a trap.").

24. M. Mendez, Evidence: The California Code and the Federal Rules § 4.08, at 105 (1995).

25. 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, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 2 Rev. of Litig. 665, 668 (1993).

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

27. Some authorities maintain that we should not blindly promote settlement but focus on promoting "desirable" settlements. *See, e.g.*, Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619 (1995); Galanter & Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994). By encouraging early settlements based on candid exchange of information, the proposed rule would serve that end. *See* 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.").

This general rule should be subject to a number of exceptions. In each of the following situations, if a court admits evidence of settlement negotiations, it should attempt to minimize the scope of settlement negotiation evidence admitted, so as to prevent chilling of candid settlement negotiations.

Bias. A settlement agreement between a witness and a party may consciously or subconsciously influence the testimony of the witness.[28] For example, suppose a settlement agreement between a witness and a defendant with limited assets requires the defendant to pay a substantial sum to the witness. This gives the witness an incentive to shelter the defendant from liability to others, so as to minimize competition for the defendant's assets. Because of this danger of bias, evidence of a settlement agreement should be admissible if a party to the agreement testifies and the evidence is introduced to show the bias of that witness.

Partial satisfaction of undisputed claim or acknowledgment of preexisting debt. Evidence of partially satisfying a claim without questioning its validity may be admissible if that evidence is offered to prove the validity of the claim.[29] Similarly, a debtor's payment or promise to pay all or part of a preexisting debt may be admissible when a party offers that evidence to prove the creation of a new duty or revival of the debtor's preexisting duty.[30] These limitations are consistent with the goal of promoting settlement: If a claim is undisputed or a debt acknowledged, there is no dispute to settle and no need to provide confidentiality.[31] The proposed law would preserve these existing exceptions to the exclusionary rule for settlement negotiations.

Cause of action, defense, or other legal claim arising from conduct during settlement negotiations. The public policy favoring settlement has limited force as to settlements and settlement overtures that involve illegality or other misconduct.[32] For example, evidence of sexual harassment during settlement negotiations should be admissible in an action for damages due to the harassment.

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

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

29. Section 1152(c)(1).

30. Section 1152(c)(2).

31. Mendez, *supra* note 24, § 4.08, at 104-05.

32. *See* Leonard, *supra* note 9, § 3.7.4, at 3:98-1 ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy.").

Similarly, evidence of a low settlement offer should be admissible to establish an insurer's bad faith in first party bad faith insurance litigation. To address situations such as these, the proposed law would not exclude evidence of settlement negotiations where the evidence is introduced to support or rebut a cause of action, defense, or other legal claim (e.g., a request for sanctions) arising from conduct during the negotiations.

Obtaining benefits of settlement. Evidence of a settlement should be admissible to bar reassertion of a claim or enforce the settlement. This exception is essential if parties are to enjoy the benefits of settling a dispute.[33] Conversely, evidence of settlement negotiations should be admissible to rebut an attempt to enforce a settlement, as by showing that there was no settlement or meeting of the minds.

Good faith settlement barring contribution or indemnity. Evidence of settlement negotiations should be admissible to prove or disprove the good faith of a settlement. This exception follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[34]

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

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

Discoverability and Confidentiality of Settlement Discussions

Because Sections 1152 and 1154 only bar use of compromise evidence on the issue of liability, counsel can readily argue for discovery of such evidence on the ground that it may be admissible for some other purpose.[35] 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 police officer), may inhibit candid settlement discussions.

To effectively serve the goal of promoting mutually satisfactory settlement, the proposed law would make evidence of a settlement negotiation confidential and protect such evidence from discovery, but only if the participants execute a written

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

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

[35]. *See* Brazil, *supra* note 8, at 996.

agreement before the negotiation, setting out the text of the statute and stating that the provision applies to the negotiation. The requirement of a written agreement would alert the participants to the extent of protection in advance of the negotiation. Evidence of the negotiation would be confidential and protected from discovery with respect to third parties, not just between the participants to the negotiations. The protection would be subject to essentially the same exceptions as for admissibility (partial satisfaction of undisputed claim or acknowledgment of preexisting debt; cause of action, defense, or other legal claim arising from conduct during settlement negotiations; obtaining benefits of settlement; good faith settlement barring contribution or indemnity; prevention of criminal act; admissibility by agreement of all parties).

Settlement agreements, as opposed to settlement offers and associated negotiations, present special considerations. For example, suppose a manufacturing plant allegedly emits a hazardous chemical and a nearby resident sues for resultant injuries. If the manufacturer and the victim enter into a purportedly confidential settlement agreement, it may be important to resolve whether other persons, particularly other victims or potential victims, are entitled to disclosure of the agreement. Such issues are controversial[36] and this proposal does not address them. The new standard for confidentiality and discovery of settlement negotiations would not apply to disclosure of settlement agreements.[37]

The new standard also has an exception to prevent disputants from using settlement negotiations to shield materials from discovery and use at trial. Evidence that would otherwise be admissible or subject to discovery would not be rendered inadmissible or protected from disclosure solely by reason of its introduction or use in a settlement negotiation.

Application to Criminal Cases

Sections 1152 and 1154 do not expressly state whether evidence of efforts to compromise a civil case is inadmissible only for purposes of proving civil liability, or also for purposes of a criminal prosecution. This is a very different question from whether to provide evidentiary protection for efforts to compromise a criminal case (i.e., plea bargaining). The latter issue is explicitly covered to some extent by other provisions[38] and is not included in this proposal.[39]

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

37. Because the new standard for confidentiality and discovery would not apply to settlement agreements, there is no need to create an exception for showing bias of a witness who is a party to a settlement agreement.

38. See Sections 1153, 1153.5.

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

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.[40] 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.[41]

The proposed legislation would not change this approach: The new restrictions on admissibility and disclosure of efforts to compromise a civil case would apply only in civil actions and other noncriminal proceedings. Although there is scholarly support for restricting admissibility in some criminal cases,[42] 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."[43] The proposed legislation avoids that and other issues by maintaining the status quo in criminal cases.

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

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

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

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

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

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

43. Cal. Const. art. I, § 28(d). The Truth-in-Evidence requirement is not absolute. It does not "affect any existing statutory or constitutional right of the press" and does not "affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103." *Id.* In addition, the Legislature may establish exceptions by a two-thirds vote. *Id.*

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

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

Humanitarian Conduct

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

The proposed provision would make evidence of "furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury" inadmissible to prove liability for the injury. Federal Rule of Evidence 409 is the same, except it covers "medical, hospital, or *similar* expenses." The proposed law uses the broader phrase "medical, hospital, or *other* expenses" to ensure coverage of acts such as an unselfish offer to pay wages lost due to an injury.[44] The rule would not extend to conduct or statements associated with such an offer, because they are likely to be incidental, not in furtherance of the offer.[45]

Unlike Section 1152, the proposed provision would not expressly require that the offer of assistance be made from "humanitarian motives." This parallels the federal approach and reflects the reality that offers of assistance are often made from a variety of motives.[46] Assistance should be encouraged regardless of the motivation.[47]

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

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

Likewise, commentators have questioned why the federal rule is limited to "medical, hospital, or *similar* expenses." *See* 23 Wright & Graham, *supra* note 41, § 5326, at 316-17; Leonard, *supra* note 9, § 4.8.3, at 4:58-4:60.

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

For commentary advocating exclusion of statements associated with offers of assistance, see 23 Wright & Graham, *supra* note 41, § 5325, at 309-14. *See also* Leonard, *supra* note 9, § 4.6.2, at 4:46-4:47.

46. *See* 23 Wright & Graham, *supra* note 41, § 5324, at 308 & n.6. The authors of this treatise suggest that the reason for not requiring proof of humanitarian motives in Federal Rule of Evidence 409 was to facilitate advance payments by insurers (immediate reimbursement of damages, without a settlement

agreement in place). This proposal would have no impact on such advance payments, because they are specifically covered by Insurance Code Section 11583.

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

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

Id. at 4:40-4:41.

PROPOSED LEGISLATION

Evid. Code §§ 1130-1141 (added). Settlement negotiations

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

CHAPTER 3. SETTLEMENT NEGOTIATIONS

§ 1130. "Settlement negotiations" defined

1130. As used in this chapter, "settlement negotiations" means any of the following:

(a) Furnishing, offering, or promising to furnish money or any other thing, act, or service to another person who has sustained or will sustain or claims to have sustained or claims will sustain loss or damage.

(b) Accepting, offering, or promising to accept money or any other thing, act, or service in satisfaction of a claim.

(c) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an action described in subdivision (a) or (b), regardless of whether a settlement is reached or an action described in subdivision (a) or (b) occurs.

(d) A settlement agreement.

Comment. Subdivision (a) of Section 1130, along with subdivision (c), is comparable to former Section 1152. Subdivision (b), along with subdivision (c), is comparable to former Section 1154.

Subdivision (d) makes explicit that, for purposes of this chapter, a reference to settlement negotiations includes a settlement agreement. For an important exception, see Section 1133 (confidentiality and discoverability of settlement negotiations), which makes clear that this chapter does not expand or limit existing law on confidentiality or discovery of a settlement agreement.

For protection of settlement negotiations, see Sections 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations).

§ 1131. Application of chapter

1131. (a) This chapter governs the admissibility, discoverability, and confidentiality of settlement negotiations to resolve a pending or prospective civil case.

(b) This chapter does not apply to either of the following:

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

(2) Evidence of an effort to obstruct a criminal investigation or prosecution, regardless of whether that effort may also be settlement negotiations as defined in Section 1130.

Comment. Section 1131 states the scope of this chapter. The chapter encompasses, but is not limited to, judicially-supervised settlement negotiations in a civil case, such as a settlement

conference pursuant to California Rule of Court 222 (1997). This chapter is made applicable to administrative adjudication by Government Code Section 11415.60.

As subdivision (b) recognizes, evidentiary protection of plea bargaining is covered by other provisions. See Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property). Where a civil case is related to a criminal prosecution, negotiations to settle the civil case are within the scope of this chapter, but the chapter does not apply to plea bargaining or an effort to obstruct a criminal investigation or prosecution (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or an agreement not to cooperate with the prosecution). The latter limitation is drawn from Rule 408 of the Federal Rules of Evidence.

For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152. For advance payments by insurers or others, see Insurance Code Section 11583.

§ 1132. Admissibility of settlement negotiations

1132. (a) Except as otherwise provided by statute, evidence of settlement negotiations is not admissible in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(b) Evidence of a settlement agreement is not inadmissible under this chapter where the evidence is introduced to show bias of a witness who is a party to the agreement.

Comment. Subdivision (a) of Section 1132 supersedes former Sections 1152(a) and 1154, which made evidence of a settlement negotiation inadmissible for the purpose of proving invalidity of the claim, but not for other purposes. To preclude abuse and foster greater candor in settlement negotiations, Section 1132(a) makes evidence of settlement negotiations in a pending or prospective civil case generally inadmissible in that case or in any other noncriminal proceeding. This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter). For evidentiary protection of plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

Subdivision (b) provides an exception to the rule of exclusion, in recognition that a settlement agreement may be evidence of bias. The danger of bias is particularly strong where there is a sliding scale recovery agreement and a defendant party to the agreement testifies. See Code Civ. Proc. § 877.5(a)(2) (additional safeguards for use of a sliding scale recovery agreement).

For other exceptions to Section 1132(a), see Sections 1134-1140. Evidence satisfying one or more of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, including the balancing test of Section 352. See also Section 1141 (extent of evidence admitted or subject to disclosure).

See Section 1130 ("settlement negotiations" defined). For guidance on confidentiality and discoverability of settlement negotiations, see Section 1133. For a provision on paying medical expenses or offering or promising to pay them, see Section 1152.

§ 1133. Confidentiality and discoverability of settlement negotiations

1133. (a) This section applies only if the persons participating in a negotiation execute an agreement in writing, before the negotiation begins, setting out the text of this section and stating that the section applies to the negotiation.

(b) Except as otherwise provided by statute, evidence of settlement negotiations is confidential and is not subject to discovery in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.

(c) This section does not apply to evidence of a settlement agreement. Nothing in this chapter affects existing law on confidentiality or discovery of a settlement agreement.

Comment. To promote candor in settlement negotiations, Section 1133 makes the negotiations confidential and restricts discovery of the negotiations, subject to statutory exceptions. See Section 1130 ("settlement negotiations" defined).

Under subdivision (a), a written agreement is necessary to invoke the protection of subdivision (b). If the participants execute the required agreement, their negotiations are confidential and protected from discovery by third parties, as well as between the participants themselves.

Under subdivision (b), evidence of settlement negotiations in a pending or prospective civil case is, with limitations, confidential and not subject to discovery in that case or in any other noncriminal proceeding. This provision does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter). For evidentiary protection of plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

Subdivision (c) makes clear that although Section 1133 restricts discovery of settlement negotiations, the provision does not apply to discovery of a settlement agreement and thus does not affect whether and to what extent the existence and terms of such an agreement may be kept confidential. For other exceptions to Section 1133, see Sections 1134-1140.

For guidance on admissibility of settlement negotiations, see Section 1132. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152 (payment of medical or other expenses).

§ 1134. Evidence otherwise admissible or subject to discovery

1134. Evidence otherwise admissible or subject to discovery independent of settlement negotiations is not made inadmissible, confidential, or protected from disclosure under this chapter solely by reason of its introduction or use in the settlement negotiations.

Comment. Section 1134 is drawn from Section 1120 (a) and Federal Rule of Evidence 408. See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations).

§ 1135. Partial satisfaction of undisputed claim or acknowledgment of preexisting debt

1135. The following evidence is not inadmissible, confidential, or protected from disclosure under this chapter:

(a) Evidence of partial satisfaction of an asserted claim or demand made without questioning its validity where the evidence is offered to prove the validity of the claim.

(b) Evidence of a debtor's payment or promise to pay all or a part of the debtor's preexisting debt where the evidence is offered to prove the creation of a new duty on the debtor's part or a revival of the debtor's preexisting duty.

Comment. Section 1135 continues former Section 1152(c) without substantive change, except that it extends the principle to discovery and confidentiality, as well as admissibility.

§ 1136. Cause of action, defense, or other legal claim arising from conduct during settlement negotiations

1136. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence is introduced or relevant to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations.

Comment. Section 1136 recognizes that the public policy favoring settlement agreements has limited force with regard to settlement agreements and offers that derive from or involve illegality or other misconduct. See D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.7.4, at 3:98-1 (1998) ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy."). For example, evidence of sexual harassment during settlement negotiations should be admissible in an action for damages due to the harassment. Similarly, evidence of a low settlement offer should be admissible to establish an insurer's bad faith in first party bad faith insurance litigation.

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

§ 1137. Obtaining benefits of settlement

1137. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where either of the following conditions is satisfied:

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

(b) The evidence is introduced or is relevant to show, or to rebut an attempt to show, the existence of a settlement barring the claim that is the subject of the settlement negotiations.

Comment. Section 1137 seeks to ensure that parties enjoy the benefits of settling a dispute. For background, see generally D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.1, at 3:124 (1998) ("[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

§ 1138. Good faith settlement barring contribution or indemnity

1138. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where the evidence is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, or is relevant to showing or rebutting an attempt to show, lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

Comment. Section 1138 follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault. Code Civ. Proc. § 877.6(c).

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

§ 1139. Prevention of criminal act

1139. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where a participant in the negotiations reasonably believes that introduction or disclosure of the evidence is necessary to prevent a criminal act.

Comment. Section 1139 is drawn from Sections 956.5 (exception to attorney-client privilege where disclosure is necessary to prevent criminal act that the lawyer likely to result in death or substantial bodily harm) and 1024 (exception to psychotherapist-patient privilege where patient is dangerous and disclosure is necessary to prevent threatened danger).

See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

§ 1140. Admissibility and disclosure by agreement of all parties

1140. Evidence of settlement negotiations is not inadmissible, confidential, or protected from disclosure under this chapter where all parties to the negotiations expressly agree in writing that the evidence may be admitted or disclosed.

Comment. Section 1140 is drawn from Section 1122, pertaining to mediation confidentiality. See Section 1130 ("settlement negotiations" defined). See also Sections 1131 (application of chapter), 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations), 1141 (extent of evidence admitted or subject to disclosure).

§ 1141. Extent of evidence admitted or subject to disclosure

1141. (a) A court may not admit evidence pursuant to Section 1132, 1136, 1137, 1138, or 1139 where the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

(b) In ordering disclosure of evidence of settlement negotiations pursuant to Section 1136, 1137, 1138, or 1139, a court shall attempt to minimize the extent of disclosure, consistent with the needs of the case, so as to prevent chilling of candid settlement negotiations.

Comment. Subdivision (a) of Section 1141 is drawn from Section 352. Exclusion pursuant to Section 1141 is mandatory, not discretionary. To prevent unnecessary chilling of settlement negotiations, Section 1141 requires a court to minimize the scope of admitted settlement negotiation evidence. For example, if the evidence is offered to rebut a defense of laches, it may only be necessary to admit evidence that ongoing potentially productive settlement negotiations occurred, without getting into the details of those negotiations. *See* D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.3, at 3:145-3:146 (1998). Under subdivision (b), the same principle applies to discovery of settlement negotiations.

Heading of Chapter 3 (commencing with Section 1150) (amended)

SEC. ____. The heading of Chapter 3 (commencing with Section 1150) of Division 9 of the Evidence Code is amended to read:

CHAPTER ~~3~~ 4. OTHER EVIDENCE AFFECTED OR EXCLUDED BY EXTRINSIC POLICIES

Evid. Code § 1152 (repealed). Offers to compromise

SEC. ____. Section 1152 of the Evidence Code is repealed.

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

~~(b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving an additur or remittitur, or on appeal.~~

~~(c) This section does not affect the admissibility of evidence of any of the following:~~

~~(1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.~~

~~(2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.~~

Comment. Former Section 1152 is superseded by Sections 1130-1141 (settlement negotiations), 1152 (payment of medical or other expenses).

Evid. Code § 1152 (added). Payment of medical or other expenses

SEC. ____. Section 1152 is added to the Evidence Code, to read:

1152. Evidence of furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury is not admissible to prove liability for the injury.

Comment. Section 1152 is drawn from Federal Rule of Evidence 409. As to humanitarian conduct, it supersedes part of former Section 1152(a). For a provision on advance payments by insurers, see Ins. Code § 11583.

For protection of settlement negotiations, see Sections 1132 (admissibility of settlement negotiations), 1133 (confidentiality and discoverability of settlement negotiations). See also Sections 1130 ("settlement negotiations" defined), 1131 (application of chapter on settlement negotiations). For evidentiary protection of plea bargaining, see Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property).

Evid. Code § 1154 (repealed). Offer to discount a claim

SEC. ____. Section 1154 of the Evidence Code is repealed.

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

Comment. Former Section 1154 is superseded by Sections 1130-1141 (settlement negotiations).

CONFORMING REVISIONS

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

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

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

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

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

Such notice shall be in writing and shall be sent by certified or registered mail, return receipt requested, to the place where the transaction occurred, such person's principal place of business within California, or, if neither will effect actual notice, the office of the Secretary of State of California.

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

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

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

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

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

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

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

(e) Attempts to comply with the provisions of this section by a person receiving a demand shall be construed to be ~~an offer to compromise and shall be inadmissible as evidence pursuant to Section 1152 of the Evidence Code; furthermore, such attempts~~ settlement negotiations under Chapter 3 (commencing with Section 1130) of Division 9 of the Evidence Code. Attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. Evidence of compliance or attempts to comply with the provisions of this section may be introduced by a defendant for the purpose of establishing good faith or to show compliance with the provisions of this section.

Comment. Subdivision (e) of Section 1782 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1141 (settlement negotiations).

Code Civ. Proc. § 1775.10 (amended). Evidence rules protecting statements in mediation

SEC. ____. Section 1775.10 of the Code of Civil Procedure is amended to read:

1775.10. All statements made by the parties during the mediation ~~shall be~~ are subject to ~~Sections 703.5 and 1152, and Chapter 2 (commencing with Section 1115)~~ Section 703.5, and Chapters 2 (commencing with Section 1115) and 3 (commencing with Section 1130) of Division 9, of the Evidence Code.

Comment. Section 1775.10 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1141 (settlement negotiations).

Evid. Code § 822 (amended). Improper bases for opinion as to value of property

SEC. ____. Section 822 of the Evidence Code is amended to read:

822. (a) In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Sections 814 to 821, inclusive, the following

matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of property:

(1) The price or other terms and circumstances of an acquisition of property or a property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, except that the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain.

(2) The price at which an offer or option to purchase or lease the property or property interest being valued or any other property was made, or the price at which such property or interest was optioned, offered, or listed for sale or lease, except that an option, offer, or listing may be introduced by a party as an admission of another party to the proceeding~~; but nothing~~. Nothing in this subdivision makes admissible evidence that is inadmissible under Chapter 3 (commencing with Section 1130) of Division 9, or permits an admission to be used as direct evidence upon any matter that may be shown only by opinion evidence under Section 813.

(3) The value of any property or property interest as assessed for taxation purposes or the amount of taxes which may be due on the property, but nothing in this subdivision prohibits the consideration of actual or estimated taxes for the purpose of determining the reasonable net rental value attributable to the property or property interest being valued.

(4) An opinion as to the value of any property or property interest other than that being valued.

(5) The influence upon the value of the property or property interest being valued of any noncompensable items of value, damage, or injury.

(6) The capitalized value of the income or rental from any property or property interest other than that being valued.

(b) In an action other than an eminent domain or inverse condemnation proceeding, the matters listed in subdivision (a) are not admissible as evidence, and may not be taken into account as a basis for an opinion as to the value of property, except to the extent permitted under the rules of law otherwise applicable.

(c) The amendments made to this section during the 1987 portion of the 1987-1988 Regular Session of the Legislature shall not apply to or affect any petition filed pursuant to this section before January 1, 1988.

Comment. Subdivision (a)(2) of Section 822 is amended to explicitly address its interrelationship with the rule s governing the admissibility of settlement negotiations. See People *ex rel.* Dep't of Pub. Works v. Southern Pac. Trans. Co., 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973) (reconciling Section 822 with former Section 1152).

Evid. Code § 1116 (amended). Effect of chapter on mediation confidentiality

SEC. ____. Section 1116 of the Evidence Code is amended to read:

1116. (a) Nothing in this chapter expands or limits a court's authority to order participation in a dispute resolution proceeding. Nothing in this chapter authorizes or affects the enforceability of a contract clause in which parties agree to the use of mediation.

(b) Nothing in this chapter makes admissible evidence that is inadmissible under ~~Section 1152~~ Chapter 3 (commencing with Section 1130) of Division 9 or any other statute.

Comment. Section 1116 is amended to reflect the repeal of former Section 1152 and the enactment of new provisions protecting settlement negotiations. See Sections 1130-1141 (settlement negotiations).

Gov't Code § 11415.60 (amended). Settlement of administrative adjudication

SEC. ____. Section 11415.60 of the Government Code is amended to read:

11415.60. (a) An agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding. Subject to subdivision (c), the settlement may be on any terms the parties determine are appropriate. ~~Notwithstanding any other provision of law, no evidence of an offer of compromise or settlement made in settlement negotiations is admissible in an adjudicative proceeding or civil action, whether as affirmative evidence, by way of impeachment, or for any other purpose, and no evidence of conduct or statements made in settlement negotiations is admissible to prove liability for any loss or damage except to the extent provided in Section 1152 of the Evidence Code~~ Chapter 3 (commencing with Section 1130) of Division 9 of the Evidence Code applies to settlement negotiations pursuant to this section. Nothing in this subdivision makes inadmissible any public document created by a public agency.

(b) A settlement may be made before or after issuance of an agency pleading, except that in an adjudicative proceeding to determine whether an occupational license should be revoked, suspended, limited, or conditioned, a settlement may not be made before issuance of the agency pleading. A settlement may be made before, during, or after the hearing.

(c) A settlement is subject to any necessary agency approval. An agency head may delegate the power to approve a settlement. The terms of a settlement may not be contrary to statute or regulation, except that the settlement may include sanctions the agency would otherwise lack power to impose.

Comment. Section 11415.60 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1141 (settlement negotiations).

Uncodified (added). Operative date

SEC. ____. (a) This act becomes operative on January 1, 2000.

(b) This act applies in an action, proceeding, or administrative adjudication commenced before, on, or after January 1, 2000.

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 2000, overruling an objection based on former Section 1152 of the Evidence Code. However, if an action, proceeding, or administrative adjudication is pending on January 1, 2000, the objecting party may, on or after January 1, 2000, and before entry of judgment in the action, proceeding, or administrative adjudication make a new request for exclusion of the evidence on the basis of this act.