

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Admissibility, Discoverability, and
Confidentiality of Settlement Negotiations

November 1999

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

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NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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CALIFORNIA LAW REVISION COMMISSION

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November 30, 1999

To: The Honorable Gray Davis
Governor of California, and
The Legislature of California

Under existing law (Evidence Code Sections 1152 and 1154), evidence of an offer of compromise or other negotiation to settle a civil dispute is inadmissible for purposes of proving or disproving liability with regard to that dispute, but may be admissible for other purposes. These provisions do not make evidence of negotiations to settle the dispute confidential, nor do they expressly protect such evidence from discovery.

To foster forthright discussion culminating in prompt, mutually beneficial settlements, the California Law Revision Commission proposes to make evidence of negotiations to settle a pending civil action or administrative adjudication generally inadmissible in that action or any other noncriminal proceeding. With restrictions, the proposal would also make the negotiations confidential and protect evidence of the negotiations from discovery in a noncriminal proceeding.

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

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

Howard Wayne
Chairperson

ADMISSIBILITY, DISCOVERABILITY, AND CONFIDENTIALITY OF SETTLEMENT NEGOTIATIONS

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

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

EXISTING LAW

Two statutory provisions protect a settlement negotiation (other than a mediation).² Evidence Code Section 1152(a)

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

For evidentiary protection of plea bargaining, see Sections 1153 (guilty plea withdrawn, or offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property); Penal Code § 1192.4 (guilty plea withdrawn).

2. For provisions governing mediation, see Sections 703.5 (mediator competency to testify), 1115-1128 (mediation confidentiality). See also *Report of the California Law Revision Commission on Chapter 772 of the Statutes of 1997 (Assembly Bill 939): Mediation Confidentiality*, Appendix 5 to the 1997-1998

prohibits proof of liability based on an offer to compromise the alleged loss:

1152. (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, 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, existing law is limited in others. There are exceptions for certain categories of evi-

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

The protection for mediation communications is stronger than the protection recommended in this proposal for negotiations to settle a pending civil action or administrative adjudication. In a mediation, the involvement of a neutral person may promote productive discourse and exploration of new approaches to settlement. Because planning and participating in a mediation involves substantial expense and effort, a mediation usually is a serious effort to settle. A party may also disclose information to the mediator without having to disclose it directly to the other side. These special attributes of mediation increase the likelihood of successful settlement, and thus the likelihood of a benefit that offsets the cost (i.e., exclusion of relevant evidence) of making the discussion confidential. The involvement of the mediator may also deter misconduct that might otherwise occur in a setting of complete confidentiality. Finally, the beginning and end of a mediation are clearer than the boundaries of what is and is not a settlement negotiation, making it easier to determine which communications are protected. For further comparison of mediation with unassisted settlement negotiations, see Bush, “*What Do We Need a Mediator For?*”: *Mediation’s “Value-Added” for Negotiators*, 12 Ohio St. J. on Disp. Resol. 1 (1996).

3. Comment to Section 1152, as enacted in 1965 (see *Evidence Code*, 7 Cal. L. Revision Comm’n Reports 1001, 1213 (1965)). Section 1152 includes, and does not differentiate between, offers stemming from “humanitarian motives” and offers reflecting a desire to compromise. The proposed reforms would not extend to humanitarian conduct, which would continue to be governed by existing law.

dence.⁴ More importantly, an offer to compromise or any associated conduct or statement is only inadmissible to prove liability for the loss or damage to which the negotiations relate. If a party offers the evidence for another purpose, such as to show bias, motive, undue delay, or knowledge, the evidence may be admissible.⁵

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

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

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

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

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

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

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

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

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

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

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

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

This general rule of inadmissibility would apply to evidence of a settlement agreement, as well as other evidence of negotiations to settle a pending civil action or administrative adjudication. See proposed Section 1133 *infra*. In contrast, the proposed provisions on discoverability and confidentiality would not apply to evidence of a settlement agreement. See proposed Sections 1130, 1134-1135 *infra*; see also *infra* text accompanying notes 55-63. For application of the proposed law to an internal memorandum prepared for purposes of a settlement negotiation, see *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 528-30 (3d Cir. 1995) (district court properly excluded memorandum “prepared as a basis for compromise negotiations”).

8. In *Covell v. Superior Court*, the court concluded that the “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).

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 reduce litigation expenses.¹¹ If effective restrictions are in place, the

9. Another rationale, known as the contract theory, holds that a settlement offer is inadmissible because it is a promise without consideration. This theory has never gained acceptance in the United States and “has little merit.” D. Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules of Limited Admissibility* § 3.3.1, at 3:23-3:27 (1999).

10. *See, e.g.*, Fed. R. Evid. 408 advisory committee’s note; Brazil, *supra* note 8, at 958-59; Leonard, *supra* note 9, § 3.3.3, at 3:33. The policy of promoting settlement has received some criticism, primarily from academics. *See, e.g.*, Fiss, *Against Settlement*, 93 *Yale L.J.* 1073 (1984); Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 *Geo. L.J.* 2663, 2663-64 (1995) (collecting authorities). But the overwhelming weight of authority holds that settlements are essential. *See, e.g.*, Cordray, *Settlement Agreements and the Supreme Court*, 48 *Hastings L.J.* 9, 36 (1996); Gross & Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 *Mich. L. Rev.* 319, 320 (1991). For example, in a survey of California judges and court administrators, “the near unanimous preference was for more cases to settle, for cases to be settled earlier in the process, and for settlements to maximize fairness and creativity.” Folberg, Rosenberg & Barrett, *Use of ADR in California Courts: Findings & Proposals*, 26 *U.S.F. L. Rev.* 343, 357 (1992).

11. *McClure v. McClure*, 100 *Cal.* 339, 343, 34 *P.* 822 (1893); *Skulnick v. Roberts Express, Inc.*, 2 *Cal. App.* 4th 884, 891, 3 *Cal. Rptr.* 2d 597 (1992). The benefits of settlements have long been recognized. *See, e.g.*, *Von Schmidt v. Huntington*, 1 *Cal.* 55, 61 (1850) (Long-standing Mexican and Spanish legal doctrine required judges to “discourage litigation ... by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner, by refusing legal process in cases of a trivial nature, whenever it can be done without prejudicing the lawful rights of the parties; and by making use of per-

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 compro-

suation, and all other means which their discretion shall dictate, to convince the parties of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied with success.”).

12. Brazil, *supra* note 8, at 959. *See also* Fiberglass Insulators, Inc. v. Dupuy, 856 F.2d 652, 654 (4th Cir. 1988) (public policy favoring and encouraging settlement makes necessary inadmissibility of settlement negotiations to foster frank discussions); United States v. Contra Costa County Water Dist., 678 F.2d 90, 92 (9th Cir. 1982) (by preventing settlement negotiations from being admitted, full and open disclosure is encouraged, furthering policy toward settlement); Dore, *Secrecy By Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 Notre Dame L. Rev. 283, 393 (1999) (closed bargaining forum fosters full ventilation of views and give-and-take necessary to achieve compromise); Folberg, Rosenberg & Barrett, *supra* note 10, at 358 (according to California judges surveyed, one reason attorneys do not settle until they reach courthouse steps is fear that compromise offers will be used against their clients); Gladstone, Comment, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 Pepp. L. Rev. s237, s238 (1989) (without full disclosure, parties will not entertain meaningful discussion and potentially settled cases will proceed to unnecessary trial); Kerwin, Note, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 Rev. Litig. 665, 684 (1993) (critical component of successful settlements is confidentiality, which encourages parties to negotiate freely without fear that statements made in effort to settle could be used against them in future); Menkel-Meadow, *supra* note 10, at 2683 (when representatives in dispute have constituencies with widely different views of case, and meeting with “enemy” itself is considered signal of weakness, negotiations will not occur unless they can be held in privacy).

miser 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 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

13. Leonard, *supra* note 9, § 3.3.4, at 3:35-3:37. The fairness rationale is independent of, but interrelated with, the public policy of promoting settlements. Penalizing a person who seeks compromise is not only unfair, but also inconsistent with the goal of encouraging settlements. *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990) (public policy favoring settlement of disputes makes it inadvisable to penalize would-be compromiser by allowing that person's unaccepted offer to be used as admission); 1 B. Witkin, *California Evidence Circumstantial Evidence* § 424, at 398 (3d ed. 1986) (same).

14. 4 J. Wigmore, *Evidence* § 1061, at 36 (J. Chadbourn rev. 1972).

15. Fed. R. Evid. 408 advisory committee's note. Relevancy is not a persuasive basis for excluding evidence that a party offered to pay nine tenths of a claim, because the party probably would not have made such an offer without considering the claim strong. Similarly, relevancy is not grounds for excluding evidence that a plaintiff offered to accept only one tenth of the damages sought. It is unlikely that the plaintiff would have been satisfied with so little if the plaintiff regarded the claim as wholly valid. 2 C. Mueller & L. Kirkpatrick, *Federal Evidence* § 135, at 88 (2d ed. 1994). *See also* Chadbourn, *A Study Relating to the Uniform Rules of Evidence — Extrinsic Policies Affecting Admissibility*, 6 Cal. L. Revision Comm'n Reports 625, 676 (1964).

16. Brazil, *supra* note 8, at 958.

and 1154.¹⁷ To some extent, however, it supplements the other rationales for excluding evidence of settlement negotiations.

PROBLEMS WITH EXISTING LAW

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

In the past decade, courts and commentators have increasingly emphasized that out-of-court settlements are crucial if the justice system is to function effectively.¹⁸ The vast majority of civil cases are resolved without trial.¹⁹ If they were not, the backlog in the courts would become intolerable.²⁰ Settlements, particularly early settlements, not only reduce court backlogs and conserve court resources, but also spare disputants the expense, uncertainty, and stress of litigation.²¹ Although many cases already settle, the “need for settlements is greater than ever before.”²²

17. See, e.g., Leonard, *supra* note 9, § 3.3.2, at 3:30 (“the relevancy theory for excluding compromise evidence is generally invalid”).

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

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

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

21. See, e.g., Luban, *Settlements and the Erosion of the Public Realm*, 83 Geo. L.J. 2619, 2621 (1995) (“Lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, time-consuming, perhaps all-consuming. Small wonder, then, that both judges and litigants prefer settlements, which are cheaper, quicker, less public, and less all-or-nothing than adjudications.”). For further discussion of the advantages of settlements, see Cordray, *supra* note 10, at 36-41; Menkel-Meadow, *supra* note 10, at 2671-93.

22. Neary, 3 Cal. 4th at 277. See also *Judicial (Mis)use of ADR? A Debate*, 27 U. Tol. L. Rev. 885, 891 (1996) (remarks of Frank Sander) (Although 95% of cases already settle, “we should be interested in ways in which the 95% of the cases can be settled even earlier and cheaper and more satisfactorily. Moreover, if we could change the 95% to 96%, that would be a 20% decrease in the cases that are now tried (because it would be 1% out of 5%) so we are not talking about trivia here.”).

Candor is often crucial in a settlement discussion and assurance of confidentiality is usually essential to candor.²³ Under Sections 1152 and 1154, such assurance is limited, because evidence of settlement negotiations is admissible for any purpose except proving or disproving liability.²⁴ Although a court has discretion to exclude evidence of settlement negotiations where the evidence creates a danger of undue prejudice that substantially outweighs its probative value,²⁵ participants in such negotiations may be reluctant to rely on

23. See *supra* note 12 and accompanying text. See also *Daines v. Harrison*, 838 F. Supp. 1406, 1408 (D. Colo. 1993) (“Everyone agrees that confidentiality furthers settlement.”); Kerwin, *supra* note 12, at 665 (“It is only natural that the more candid and open parties are during settlement proceedings, the more likely their efforts are to be successful.”).

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

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

See also Bullock & Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 La. L. Rev. 885, 952 (1997) (rule that settlement negotiations may be offered for legitimate purpose other than proving liability or amount “constitutes a huge loophole which able counsel seeking to use the evidence can often exploit”); Gladstone, *supra* note 12, at s246 (“[T]he other purposes doctrine has the potential to completely override the policies of settlement negotiation.”); Kirtley, *The Mediation Privilege’s Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1, 13 (1995) (“Evidence Rule 408’s weakness is that it does not require exclusion of evidence from a negotiation offered for ‘another purpose’....”).

25. See Section 352.

the court to exercise this discretion,²⁶ choosing to be circumspect instead of frankly exploring the dispute and options for settlement.²⁷

Misconceptions about the extent of the protection also exist. Disputants sometimes fail to realize that the protection for evidence of settlement negotiations is not absolute, but only excludes such evidence on the issue of liability.²⁸ The consequences can be severe. A party's admission in settlement negotiations, made on the assumption that it would be inadmissible, may become critical evidence against the party at trial and may later form the basis of a malpractice claim against the party's lawyer.

Finally, evidence of settlement negotiations that is ostensibly introduced for another purpose tends to be prejudicial as to liability, even with the use of a limiting instruction.²⁹ Fre-

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

27. The magnitude of this chilling effect is difficult to quantify, but the strong consensus on the importance of confidentiality and candor in achieving settlement attests to its considerable impact. See *supra* notes 12 & 23 and accompanying text; see also Kirtley, *supra* note 24, at 16 ("overwhelming weight of scholarly authority supports the proposition that confidentiality is essential to the functioning of mediation.").

28. See generally Kobayashi, *Too Little, Too Late: Use and Abuse of Innocuous Yet Dangerous Evidentiary Doctrines*, in *Trial Evidence, Civil Practice, and Effective Litigation Techniques in Federal & State Courts*, 2 ALI-ABA Course of Study 1127, 1132 (July 1991) ("Were one to ask a group of attorneys who are not regularly engaged in active trial practice whether the statements made during settlement negotiations are inadmissible, a surprising percentage of the individuals would answer, 'yes, inadmissible' and, of course, they would be wrong."); Michaels, *Rule 408: A Litigation Mine Field*, *Litigation*, Fall 1992, at 34 ("Too often viewed as an unambiguous exclusionary rule, a sure protection, Rule 408 is actually a trap.").

29. Brazil, *supra* note 8, at 985; Kobayashi, *supra* note 28, at 1136; M. Mendez, *California Evidence* § 4.08, at 90 (1993); 2 J. Weinstein & M. Berger, *Weinstein's Federal Evidence* § 408.08[1], at 408-29 to 408-30 (2d ed. 1999).

quently, this is the motive for introducing such evidence.³⁰ 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 delicate. The detriments of excluding potentially relevant evidence must be weighed against the benefits of fairness and promoting mutually satisfactory settlements. To achieve these benefits, the Commission recommends the following reforms:

Scope of Proposal

The proposed reforms would apply to negotiations to settle a pending civil action or administrative adjudication, regardless of whether the negotiations are judicially-supervised or otherwise.³¹ The reforms would not apply in the following contexts:

See also Warner Constr. Corp. v. City of Los Angeles, 2 Cal. 3d 285, 299, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) (jury could not reasonably be expected to follow limiting instruction).

30. As one commentator has explained, the rule that compromise evidence is inadmissible on the issue of liability “provides great incentive to find creative ways to recharacterize compromise evidence If this recharacterization is successful, evidence that might clearly show liability for or invalidity of a claim or its amount, and thus directly conflict with the rule’s primary purpose, may still be admissible.” Kerwin, *supra* note 12, at 668. *See also* Kobayashi, *supra* note 28, at 1136.

31. A judicially-supervised settlement conference is not a mediation within the scope of the provisions governing mediation confidentiality. Section 1117 & Comment. A settlement conference is conducted under the auspices of the court and involves special considerations. Section 1117 Comment; Menkel-Meadow, *Ex Parte Talks with Neutrals: ADR Hazards*, 12 *Alternatives to High Cost Litig.* 109, 119 (1994) (ex parte communication is more acceptable in private ADR than when court authorizes or provides third-party neutral, because court’s third-party neutral may have “coercive” or “public power”); *Judicial (Mis)use of ADR? A Debate*, *supra* note 22, at 893 (remarks of H. William Allen)

Prelitigation settlement negotiations. Determining whether a prelitigation activity is a settlement attempt that warrants increased privacy, as opposed to an ordinary business interaction, can be challenging. Courts are struggling to draw this line in applying Sections 1152 and 1154³² and Federal Rule of Evidence 408.³³ Strengthening the privacy of prelitigation settlement negotiations would exacerbate this line-drawing problem.³⁴ It may also have unintended negative consequences, because anticipating the full breadth of prelitigation activity that would be affected is difficult if not impossible. The proposed law would therefore maintain the status quo on the privacy of prelitigation settlement negotiations.³⁵

(interposition of judge into settlement process is coercion); *see also id.* (remarks of Deborah Hensler) (negotiation with judge does not look fair to ordinary lay litigant, because it happens behind closed doors and without litigant's participation and control). Having considered the differing contexts of a mediation, a judicially-supervised settlement conference, and an unassisted settlement negotiation, the Commission recommends that a judicially-supervised settlement conference be governed by the standards proposed here for unassisted negotiations to settle a pending civil action or administrative adjudication, rather than the greater degree of confidentiality applicable to a mediation.

32. See Warner Constr. Corp. v. City of Los Angeles, 2 Cal. 3d 285, 297, 466 P.2d 996, 85 Cal. Rptr. 444 (1970) (former Section 1152 triggered where parties reached stage of clear disagreement on crucial question whether plaintiff entitled to change order); Price v. Wells Fargo Bank, 213 Cal. App. 3d 465, 481 n.3, 261 Cal. Rptr. 735 (1989) (former Section 1152 was not basis for excluding letters written before controversy arose as to meaning of loan agreements); *In re Marriage of Schoettgen*, 183 Cal. App. 3d 1, 8, 227 Cal. Rptr. 758 (1986) (discussing but not resolving proper interpretation of former Section 1152).

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

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

35. In some cases, a prelitigation settlement may be less satisfactory than a later settlement, because the parties may not be sufficiently informed about their

Criminal case. Sections 1152 and 1154 do not expressly state whether evidence of efforts to compromise a civil case is inadmissible only for purposes of proving civil liability, or also for purposes of a criminal prosecution. This is a different question from whether to provide evidentiary protection for efforts to compromise a criminal case (i.e., plea bargaining). The latter issue is explicitly covered to some extent by other provisions³⁶ and is not included in this proposal.³⁷

Case law on invoking Section 1152 or 1154 to exclude evidence in a criminal case suggests that the provisions do not apply.³⁸ The statutory references to proving “liability for the

dispute and their legal rights and obligations to reach a fair settlement before litigation commences. This is another reason to maintain, instead of strengthen, the existing level of protection for prelitigation negotiations.

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

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

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. 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.

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

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

Id. at 1515 (footnote omitted). *See also* *Manko v. United States*, 87 F.3d 50, 54 (2d Cir. 1996) (Rule 408 does not exclude evidence in criminal prosecution even

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.³⁹

The proposed legislation would not change this approach. The new rules on evidence of negotiations to settle a pending civil action or administrative adjudication would apply only to evidence offered or sought in civil actions and other non-criminal proceedings. Although there is scholarly support for restricting admissibility in some criminal cases,⁴⁰ 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.”⁴¹ The proposed leg-

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

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

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

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

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

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

Another important consideration in a criminal case is the defendant’s constitutional right to confront and impeach adverse witnesses. See, e.g., *Davis v. Alaska*, 415 U.S. 308 (1974); *People v. Hammon*, 15 Cal. 4th 1117, 938 P.2d 986, 65 Cal. Rptr. 2d 1 (1997); *Rinaker v. Superior Court*, 62 Cal. App. 4th 155,

isolation avoids that and other issues by maintaining the status quo in criminal cases.

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

As a general rule, evidence of negotiations to settle a pending civil action or administrative adjudication should be inadmissible in a civil action or other noncriminal proceeding.⁴² This will encourage openness and enhance rationality in such negotiations. This, in turn, will promote early settlements, as well as settlements that are more likely to be mutually satisfactory and durable than ones grounded on speculation as to opposing views.⁴³ The new rule will also be

74 Cal. Rptr. 2d 464 (1998); *People v. Reber*, 177 Cal. App. 3d 523, 532, 223 Cal. Rptr. 139 (1986).

42. This general rule of inadmissibility would apply to evidence of a settlement agreement, as well as other evidence of negotiations to settle a pending civil action or administrative adjudication. See proposed Section 1133 *infra*. In contrast, the proposed provisions on discoverability and confidentiality would not apply to evidence of a settlement agreement. See proposed Sections 1130, 1134-1135 *infra*; see also *infra* text accompanying notes 55-63. For application of the proposed law to an internal memorandum prepared for purposes of negotiations to settle a pending civil action or administrative adjudication, see *Affiliated Mfrs., Inc. v. Aluminum Co. of America*, 56 F.3d 521, 528-30 (3d Cir. 1995) (district court properly excluded memorandum "prepared as a basis for compromise negotiations").

43. Some authorities maintain that the law should not blindly promote settlement but should promote "desirable" settlements. See, e.g., Luban, *supra* note 21; Galanter & Cahill, "*Most Cases Settle*": *Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994). By encouraging an early settlement based on candid exchange of information, the proposed rule would serve that end. For the desirability of an early settlement resulting from frank discussion, see Folberg, Rosenberg & Barrett, *supra* note 10, at 351 ("We need a justice system that encourages satisfactory settlements early in the process, thereby minimizing costs for both the parties and the state, and resulting in informed decisions and perceived fairness."). See also Code Civ. Proc. § 128 (requiring assessment of risk that stipulated reversal will reduce incentives for pretrial settlement); *Neary*, 3 Cal. 4th at 277; *Gopal v. Yoshikawa*, 147 Cal. App. 3d 128, 130, 195 Cal. Rptr. 36 (1983); Rogers & McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations*,

fairer than existing law, because a person could not be penalized for offering to settle.

This general rule should be subject to a number of exceptions. In each of the following situations, if a court admits evidence of negotiations to settle a pending civil action or administrative adjudication, it should attempt to minimize the scope of negotiation evidence admitted, so as to prevent chilling of candid negotiations. Evidence admitted pursuant to an exception may only be used for the purposes specified in the exception.⁴⁴

Evidence otherwise admissible. An exception is necessary to prevent disputants from using negotiations to shield materials from use at trial. Under this exception, otherwise admissible evidence would not be rendered inadmissible solely by reason of its use in negotiations to settle a pending civil action or administrative adjudication.⁴⁵

13 Ohio St. J. on Disp. Resol. 831, 835-38 (1998); Sheppard & Edwards, *Litigators are Losers*, Cal. Law, April 1998, at 38, 39.

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

45. For example,

if the defendant admits at the [settlement] conference that his mechanic warned him that his brakes needed to be replaced, the plaintiff would be precluded merely from offering the defendant's admission to prove the mechanic's warning. The plaintiff, however, would be free to discover the mechanic's statement and to call the mechanic to the stand to repeat the warning he gave to the defendant.

Mendez, *supra* note 29, § 4.09, at 93.

This exception is drawn from Evidence Code Section 1120(a) and Federal Rule of Evidence 408. "The rationale behind this exception to the rule is to prevent negotiating parties from introducing otherwise admissible documentary and physical evidence during compromise negotiations in an attempt to render the evidence inadmissible." *Rule 408: Compromise and Offers to Compromise*, 12 Tuoro L. Rev. 443, 447-48 (1996). The exception does not extend to documentary evidence specifically created for use during negotiations to settle a pending civil action or administrative adjudication. See *id.* at 448 (policy for exception

Partial satisfaction of undisputed claim or acknowledgment of preexisting debt. Evidence of partially satisfying a claim without questioning its validity should not be inadmissible if that evidence is offered to prove the validity of the claim. Similarly, a debtor's payment or promise to pay all or part of a preexisting debt should not be inadmissible when a party offers that evidence to prove the creation of a new duty or revival of the debtor's preexisting duty. 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.⁴⁶

The proposed law would include an express exception for these situations, which is drawn from Section 1152(c).⁴⁷ This exception is likely to be invoked infrequently, because the proposed law would only apply if a civil action or administrative adjudication is commenced, which often is unnecessary if a claim is undisputed or a debt acknowledged.

Cause of action, defense, or other legal claim arising from conduct during negotiations to settle a pending civil action or administrative adjudication. The public policy favoring settlement has limited force as to settlements and settlement overtures that involve illegality or other misconduct.⁴⁸ For example, evidence of battery during settlement negotiations

does not apply where document would not have existed but for negotiations, because negotiations are not being exploited as device to make existing document unreachable).

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

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

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

should not be inadmissible in an action for damages due to the battery. Similarly, evidence of a low settlement offer should not be inadmissible to establish an insurer's bad faith in bad faith insurance litigation. To address situations such as these, the proposed law would not exclude evidence of negotiations to settle a pending civil action or administrative adjudication 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 enforce the settlement or bar reassertion of a claim. This exception is essential if parties are to enjoy the benefits of settling a dispute.⁴⁹ Conversely, evidence of negotiations to settle a pending civil action or administrative adjudication 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 negotiations to settle a pending civil action or administrative adjudication should not be inadmissible 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."⁵⁰

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

50. Code Civ. Proc. § 877.6(c). The exception should apply not only where evidence of negotiations to settle a pending civil action or administrative adjudication is introduced pursuant to Code of Civil Procedure Section 877.6, but also

Prevention of violent felony. Evidence of negotiations to settle a pending civil action or administrative adjudication should be admissible if a participant in the negotiations reasonably believes that disclosure is necessary to prevent a violent felony.⁵¹ For example, such evidence may be relevant to obtaining a restraining order against a battering spouse.

Bias. A settlement agreement between a witness and a party may consciously or subconsciously influence the testimony of the witness.⁵² 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, a settlement agreement should be admissible if a party to the agreement testifies and the evidence is introduced to show the bias of that witness.

In contrast to a settlement agreement, a settlement offer, or other evidence of negotiations short of a settlement agreement, is less indicative of bias. Where a party offers such evidence to show bias, it should be inadmissible, because the benefits of safeguarding the privacy of the negotiations outweigh the limited value of the evidence in establishing bias.⁵³

where such evidence is introduced pursuant to a comparable provision of another jurisdiction.

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

52. The danger of bias is particularly acute where there is a sliding scale recovery agreement (one between a plaintiff and a tortfeasor defendant, under which the defendant's liability depends on how much the plaintiff recovers from another defendant at trial) and a defendant party to the agreement testifies. For special safeguards applicable to a sliding scale recovery agreement, see Code Civ. Proc. § 877.5(a)(2).

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

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

Statutory authorization for specific purpose. The proposed law would be inapplicable where a statute expressly or by necessary implication (as opposed to ordinary implication) authorizes a court to consider evidence of settlement negotiations for a specific purpose.⁵⁴

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

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

Because Sections 1152 and 1154 only bar use of compromise evidence on the issue of liability, counsel can readily argue for discovery of such evidence on the ground that it may be admissible for some other purpose.⁵⁵ But any potential intrusion on confidentiality, whether in trial, in discovery, or apart from the litigation process (e.g., a disclosure to a news reporter or a tip to a competitor), may inhibit candid settlement discussions.⁵⁶

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

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

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

To effectively serve the goal of promoting mutually satisfactory settlement, the proposed law would protect evidence of negotiations to settle a pending civil action or administrative adjudication from discovery. This protection would be subject to essentially the same exceptions as for admissibility.⁵⁷

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 pur-

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

Brazil, *supra* note 8, at 999.

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

57. Evidence otherwise admissible or subject to discovery; partial satisfaction of undisputed claim or acknowledgment of preexisting debt; cause of action, defense, or other legal claim arising from conduct during negotiations to settle pending civil action or administrative adjudication; obtaining benefits of settlement; good faith settlement barring contribution or indemnity; prevention of violent felony; breach of confidentiality agreement; clear statutory authorization for specific purpose; admissibility by agreement of all parties. The exception for bias (proposed Section 1142) is unnecessary in the context of discovery, because this proposal would not affect the discoverability of a settlement agreement.

portedly 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 controversial⁵⁸ and this proposal does not address them. The new standard for discovery of negotiations to settle a pending civil action or administrative adjudication would not apply to disclosure of settlement agreements, which would continue to be governed by other law.

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

Although admissibility and discoverability are clearly defined concepts, the meaning of confidentiality is less sharply delineated and more context-specific.⁵⁹ The term is generally understood, however, to connote the imparting of information to another person in private, on the understanding that it will not be disclosed to others.⁶⁰ A communication ceases to be confidential if it is disseminated more widely than is anticipated at the time of disclosure.⁶¹

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

59. For example, one recent article uses this definition:

[A] distinction must be made between confidentiality and privilege. If a communication is confidential, it may not be offered as evidence in proceedings in the same case. If a communication is privileged, on the other hand, virtually any disclosure, in or out of court, is prohibited.

Bullock & Gallagher, *supra* note 24, at 951 (footnotes omitted).

60. *See, e.g.*, Webster's New World Dictionary (2d College ed. 1980), which defines "confidential" as:

1. told in confidence; imparted in secret 2. of or showing trust in another; confiding 3. entrusted with private or secret matters [a *confidential* agent]

61. For example, Section 952 defines "confidential communication between client and lawyer" to mean:

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

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

The Commission nonetheless recommends adding a statutory provision on confidentiality. This provision would not make evidence of negotiations to settle a pending civil action or administrative adjudication automatically confidential, but rather would expressly state that such evidence is confidential where the parties to the negotiations execute a written agree-

information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, *discloses the information to no third persons* other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted

(Emphasis added). Similar definitions are used in Sections 992 (confidential communication between patient and physician), 1012 (confidential communication between patient and psychotherapist), 1035.4 (confidential communication between sexual assault counselor and victim), and 1037.2 (confidential communication between domestic violence counselor and victim). See also Section 912 (privilege for confidential communications is waived “if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone”).

ment to that effect.⁶² The statute would thus alert negotiating parties that a written agreement is necessary to make evidence of their negotiations confidential.⁶³ By limiting this protection to a negotiation in which the participants have executed the required agreement, the proposed law would ensure that such protection applies only where the participants desire it.

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

Effect of the Proposed Reforms

In many instances, evidence of negotiations to settle a pending civil action or administrative adjudication would be treated the same way under the proposed law as under existing law. Evidence excluded under existing law (e.g., a settlement proposal offered for purposes of proving liability) would also be excluded under the proposed law; evidence admitted under existing law (e.g., evidence of a good faith settlement pursuant to Code of Civil Procedure Section 877.6) would also be admitted under the proposed law.

62. In contrast, mediation communications are automatically confidential. See Section 1119(c). Statutes governing privileges such as the lawyer-client privilege, the physician-patient privilege, and the psychotherapist-patient privilege do not expressly make specified communications confidential. Rather, they define the term "confidential communication" in each context, and then restrict the admissibility and discoverability of such communications. See Sections 952-954, 992, 994, 1012, 1014.

63. Disclosure of evidence in violation of this section would not be a basis for tort liability. For guidance on whether the proposed law would be a basis for disqualification of counsel, see *Barajas v. Oren Realty & Dev. Co.*, 57 Cal. App. 4th 209, 213, 67 Cal. Rptr. 2d 62 (1997).

There are, however, important differences between the proposed law and existing law. The coverage of discoverability is new. It would significantly enhance the privacy of negotiations to settle a civil action or administrative adjudication. The provision on confidentiality would also be a new development. It would alert negotiating parties to the need for a confidentiality agreement, impose restrictions on the effect of such an agreement, and provide guidance on the concept of confidentiality.

In the area of admissibility, results under the proposed law would differ from those under existing law in a number of important situations. For example, existing law does not expressly preclude a party from introducing evidence of settlement negotiations for the purpose of impeachment by a prior inconsistent statement.⁶⁴ The proposed law would make clear that evidence of negotiations to settle a pending civil action or administrative adjudication may not be used for that purpose. While this may result in the loss of some probative evidence, the benefits of encouraging candor and thus promoting prompt and durable settlements outweigh this detriment.⁶⁵ This is particularly so because the excluded

64. See *C & K Eng'g Contractors v. Amber Steel Co.*, 23 Cal. 3d 1, 13, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978). This case may be viewed as support for the proposition that Section 1152 implicitly excludes evidence of settlement negotiations that is offered for the purpose of impeachment by a prior inconsistent statement. In *C & K Engineering*, the trial court excluded certain evidence of settlement negotiations, which "might have impeached" other testimony of a witness. The California Supreme Court upheld this ruling on appeal, but did not expressly discuss whether Section 1152 excludes evidence offered for purposes of impeachment by a prior inconsistent statement. Instead, the court stressed that Section 1152 excludes conduct and statements in settlement negotiations, not just settlement offers. *Id.*

65. Many commentators caution against admitting evidence of settlement negotiations for purposes of impeachment by a prior inconsistent statement. See Brazil, *supra* note 8, at 974-78 ("To admit such statements would make a mockery of [Rule 408's] promise of confidentiality and defeat the rationale that inspires it. This follows because it is extremely difficult to articulate positions at different times that are completely consistent and because it is so easy to find

impeachment evidence may never exist absent the enhanced evidentiary protection,⁶⁶ may consist of trivial inconsistencies rather than serious mistakes or deliberate lies,⁶⁷ and may be unduly prejudicial even with the use of a limiting instruction.⁶⁸

The proposed law would also strengthen the privacy of negotiations to settle a pending civil action or administrative

some tension between virtually any two statements on the same subject.”); *see also* 1 S. Saltzburg, M. Martin & D. Capra, *Federal Rules of Evidence Manual* 603 (7th ed. 1998); Leonard, *supra* note 9, § 3.8.2, at 3:126-5; 1 M. Graham, *Modern State and Federal Evidence: A Comprehensive Reference Text* 487 (NITA 1989); *but see* 2 Mueller & Kirkpatrick, *supra* note 15, § 138, at 101. Some states have enacted statutes making evidence of settlement negotiations inadmissible to impeach a witness by a prior inconsistent statement. *See, e.g.*, Alaska Rule of Court 408 (West 1998); Maryland Rule of Evidence 5-408 (Michie 1996). Despite its express language restricting only admissibility “to prove liability for or invalidity of the claim or its amount,” some courts have interpreted Federal Rule of Evidence 408 to make evidence of settlement negotiations inadmissible for purposes of showing a prior inconsistent statement. *See, e.g.*, *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545-46 (10th Cir. 1991); *Derderian v. Polaroid Corp.*, 121 F.R.D. 9, 12 n.1 (D. Mass. 1988).

66. *See generally Jaffee*, 518 U.S. at 12 (Without a psychotherapist-patient privilege, “much of the desirable evidence to which litigants such as petitioner seek access — for example, admissions against interest by a party — is unlikely to come into being. This unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.”). *See also Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F. Supp. 2d 1164, 1177-78 (C.D. Cal. 1998); Kirtley, *supra* note 24, at 17.

67. As a commentator explained:

Human thought processes and forms of communication are so imperfect that there is a substantial risk that parties whose hearts are as pure as the driven snow will make statements at different times and in different contexts that are arguably inconsistent. In other words, since being perfectly consistent is virtually impossible, a rule that permits use of statements simply because they are not perfectly consistent would lead to massive penetration of settlement talks and could be used to penalize the pure of heart just as much as the unscrupulous.

Brazil, *supra* note 8, at 978.

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

adjudication, by making evidence of the negotiations inadmissible to show bias in most circumstances,⁶⁹ inadmissible to establish the jurisdictional classification of a claim,⁷⁰ and inadmissible not only with respect to the claim that is the subject of the negotiations but also in other contexts.⁷¹

Coupled with the other reforms, this would increase the confidentiality of negotiations to settle a pending civil action or administrative adjudication, permit participants to openly explore a variety of options, and enhance the likelihood of an early, mutually satisfactory and thus durable settlement. This in turn would spare the parties the expense, stress, and uncertainty of prolonged litigation, while also conserving the resources of the court and making those resources available to dispense a higher quality of justice in cases that do not settle.⁷²

69. See *supra* notes 52-53 and accompanying text.

70. In *Walker v. Superior Court*, 53 Cal. 3d 257, 271, 807 P.2d 418, 279 Cal. Rptr. 576 (1991), the court recognized that using evidence of settlement negotiations to resolve a jurisdictional issue would adversely affect candor in settlement negotiations. The court did not directly address whether Section 1152 makes evidence of settlement negotiations inadmissible on jurisdictional matters.

In a more recent case, an intermediate appellate court concluded that admissions in a court settlement conference may be used in determining whether to transfer a case for lack of jurisdiction. *Campisi v. Superior Court*, 17 Cal. App. 4th 1833, 1838-39, 22 Cal. Rptr. 2d 335 (1993). The proposed law would overturn this result, which may have been prompted by outrage at the tactics of counsel in the particular case. Although evidence of negotiations to settle a pending civil action or administrative adjudication would not be admissible to establish jurisdictional abuse, other evidence could be introduced for that purpose.

71. *Cf. Fieldson Assocs. v. Whitecliff Labs.*, 276 Cal. App. 2d 770, 772, 81 Cal. Rptr. 332 (1969) (Sections 1152 and 1154 do not apply unless evidence of settlement negotiations is received "to prove either liability for, or invalidity of, the claim concerning which the offer of compromise was made"). For a discussion of the importance of preventing disclosure in related cases, regardless of whether those cases involve the same claim, see *supra* note 56.

72. As one court recently explained:

A privilege that promotes conciliatory dispute resolution and alleviates the press of cases on the formal judicial system also allows the courts to devote those limited resources to fairly adjudicating those cases that do result in protracted litigation. Rather than the hasty judgments born of overcrowded dockets, the courts are able to provide more carefully considered decisions in matters of sufficient public concern that the parties submit their disputes to a court of law, having found it too difficult to reach a mutually agreeable settlement.

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

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PROPOSED LEGISLATION

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

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

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

Article 1. Definitions, Application, and Effect of Chapter

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

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) 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.

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), 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.

See Section 120 (civil action). For the effect of this chapter on admissibility of evidence of negotiations to settle a pending civil action or administrative adjudication, see Section 1133. For the effect of this chapter on discoverability of evidence of negotiations to settle a pending civil action or administrative adjudication, see Section 1134. For confidentiality of negotiations to settle a pending civil action or administrative adjudication, see Section 1135. This chapter does not expand or limit the law on confidentiality or discovery of evidence of a settlement agreement. See Sections 1134-1135.

For mediation confidentiality, see Sections 1115-1128. For advance payments by insurers or others, see Ins. Code § 11583.

§ 1131. Application of chapter

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

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

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

Comment. Section 1131 makes explicit that this chapter does not apply to plea bargaining, which is covered by other evidentiary provisions. See Sections 1153 (guilty plea withdrawn, offer to plead guilty), 1153.5 (offer for civil resolution of crimes against property);

Penal Code § 1192.4 (guilty plea withdrawn). Where a civil action is related to a criminal prosecution, negotiations to settle the civil action are within the scope of this chapter, but the chapter does not apply to plea bargaining or an effort to obstruct a criminal investigation or prosecution (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case or an agreement not to cooperate with the prosecution). The latter limitation is drawn from Federal Rule of Evidence 408.

§ 1132. Effect of chapter

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.

Comment. Section 1132 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 proving 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 of this chapter may still be inadmissible under Section 1152 or 1154 or another statute (e.g., Health & Safety Code § 25379).

Article 2. General Provisions

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

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

Comment. To foster candor in negotiating settlements and preclude abuse in using evidence of settlement discussions, Section 1133 makes

evidence of negotiations to settle a pending civil action or administrative adjudication generally inadmissible in that case or any other noncriminal proceeding. The provision applies regardless of whether the party seeking introduction of the evidence was a party to the negotiations, and regardless of whether the party opposing introduction of the evidence was a party to the negotiations.

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

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

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

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

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

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

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

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

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

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

Section 1134 does not protect evidence of attempting to compromise a criminal case (plea bargaining). See Section 1131 (application of chapter) & Comment. Section 1134 is also inapplicable to evidence of prelitigation negotiations (including negotiations to settle a contractual arbitration). See Section 1130 (negotiations to settle pending civil action or administrative adjudication) & Comment.

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

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

negotiations to settle a pending civil action or administrative adjudication, see Section 1135.

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

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

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

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

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

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

Although Section 1135 makes negotiations to settle a pending civil action or administrative adjudication confidential where its requirements are met, the provision does not apply to a settlement agreement and does

not affect whether and to what extent the existence and terms of such an agreement may be kept confidential.

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

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

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

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

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

Article 3. Exceptions

§ 1136. Evidence otherwise admissible or subject to discovery

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

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

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

1137. Article 2 (commencing with Section 1133) does not apply where either of the following conditions is satisfied:

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

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

Comment. Section 1137 is drawn from Section 1152(c).

§ 1138. Legal claim arising from conduct during negotiations

1138. Article 2 (commencing with Section 1133) does not apply where a settlement agreement or other evidence of negotiations to settle a pending civil action or administrative adjudication is introduced to support or rebut a cause of action, defense, or other legal claim arising from conduct during the negotiations, including a statute of limitations defense.

Comment. Section 1138 recognizes that the public policy favoring settlement agreements has limited force with regard to settlement agreements and offers that derive from or involve illegality or other misconduct. See D. Leonard, *The New Wigmore: A Treatise on Evidence*, *Selected Rules of Limited Admissibility* § 3.7.4, at 3:98-1 (1999) ("If the primary purpose of the exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation, it follows that the rule should not apply to situations in which the compromise the parties have reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy."). For example, evidence of sexual harassment during negotiations to settle a civil action or administrative adjudication should not be inadmissible in an action for

damages due to the harassment. Similarly, evidence of a low settlement offer should not be inadmissible to establish an insurer's bad faith in bad faith insurance litigation. *See, e.g., White v. Western Title Ins. Co.*, 40 Cal. 3d 870, 887, 710 P.2d 309, 221 Cal. Rptr. 509 (1985). Likewise, where efforts to repair defective construction constitute settlement negotiations covered by this chapter, evidence of any harm resulting from those efforts may nonetheless be admissible pursuant to this section.

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

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

§ 1139. Obtaining benefits of settlement

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

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

(b) A settlement agreement or other evidence of negotiations to settle a pending civil action or administrative adjudication is introduced or is relevant to show, or to rebut an attempt to show, the existence of, or performance pursuant to, a settlement barring the claim that is the subject of the negotiations.

Comment. Section 1139 seeks to ensure that parties enjoy the benefits of settling a dispute. For background, see generally D. Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules of Limited Admissibility* § 3.8.1, at 3:125 (1999) (“[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.”). The provision would apply, for example, where parties settle a case pursuant to Code of Civil Procedure Section 664.6 or 664.7 and the court exercises its jurisdiction to enforce the settlement.

Under subdivision (b), a party to a settlement may introduce evidence of the settlement to show that a claim is barred or performance has or has not been rendered. The provision also permits a non-settling defendant to show that the plaintiff has fully recovered from other parties and cannot proceed against the non-settling defendant. In both situations, evidence of negotiations to settle a pending civil action or administrative adjudication may be used in rebuttal.

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

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

§ 1140. Good faith settlement barring contribution or indemnity

1140. Article 2 (commencing with Section 1133) does not apply where a settlement agreement or other evidence of negotiations to settle a pending civil action or administrative adjudication is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, good faith or lack of good faith of a settlement of the loss, damage, or claim that is the subject of the negotiations.

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

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

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

§ 1141. Prevention of violent felony

1141. Article 2 (commencing with Section 1133) does not apply where a participant in negotiations to settle a pending civil action or administrative adjudication reasonably believes

that introduction or disclosure of a settlement agreement or other evidence of the negotiations is necessary to prevent a violent felony.

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

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

§ 1142. Bias

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

Comment. Section 1142 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 (additional safeguards for use of a sliding scale recovery agreement).

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

§ 1143. Breach of confidentiality agreement

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

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

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

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

§ 1144. Statutory authorization for specific purpose

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

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

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

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

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

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

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

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

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 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 the person correct, repair, replace, or otherwise rectify the goods or services alleged to be in violation of Section 1770.

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

(b) Except as provided in subdivision (c), no action for damages may be maintained under 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 the notice.

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

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

(2) All consumers so identified have been notified that upon their request the person shall make the appropriate correction,

repair, replacement, or other remedy of the goods and services.

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

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

(d) An action for injunctive relief brought under the specific provisions of Section 1770 may be commenced without compliance with subdivision (a). Not less than 30 days after the commencement of an action for injunctive relief, and after compliance with subdivision (a), the consumer may amend ~~his or her~~ *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 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, these attempts to comply with a demand shall not be considered an admission of engaging in an act or practice declared unlawful by Section 1770. *If an attempt to comply with this section is 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, the attempt shall be construed to be negotiations to settle a pending civil action or administrative adjudication under Section 1130 of the Evidence Code.* Evidence of compliance or attempts to comply with this section may be introduced by a defendant

for the purpose of establishing good faith or to show compliance with this section.

Comment. Subdivision (e) of Section 1782 is amended to reflect the enactment of new provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a pending civil action or administrative adjudication. See Evid. Code §§ 1130-1145. If parties attempt to reach a compromise that includes both pending claims (e.g., an action for injunctive relief under Section 1770) and unfiled claims (a request for damages, which has not yet been filed pursuant to Section 1782(d)), the entire attempt to compromise is subject to these new provisions. See Evid. Code § 1130(a)(3) & Comment.

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

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

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

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

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

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

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

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

~~9, of Sections 703.5, 1152, and 1154 of, 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 enactment of new provisions on the admissibility, discoverability, and confidentiality of negotiations to settle a pending civil action or other administrative adjudication. See Evid. Code §§ 1130-1145.

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

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

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

(b) Nothing in this chapter makes admissible evidence that is inadmissible under Section 1152 *or* 1154, Chapter 3 (commencing with Section 1130), or any other statute.

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

Heading of Chapter 3 (commencing with Section 1150) of Division 9 of the Evidence Code (amended and renumbered)

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

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

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

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

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

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

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

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

Comment. Section 11415.60 is amended to reflect the enactment of, and conform to, new provisions on the admissibility, discoverability, and

confidentiality of negotiations to settle a pending civil action or administrative adjudication. See Evid. Code §§ 1130-1145.

Uncodified (added). Operative date

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

(b) Nothing in this act invalidates an evidentiary determination made before January 1, 2001, overruling an objection based on Section 1152 or 1154 of the Evidence Code. However, if an action, proceeding, or administrative adjudication is pending on January 1, 2001, the objecting party may, on or after January 1, 2001, and before entry of judgment in the action, proceeding, or administrative adjudication, make a new request for exclusion of the evidence on the basis of this act.
