

Memorandum 97-10**Confidentiality of Settlement Negotiations: Revised Staff Draft Tentative Recommendation**

Attached is a revised staff draft of a tentative recommendation on evidentiary protection for settlement negotiations and other steps towards compromise of civil disputes. Also attached is a letter from the State Bar Committee on Administration of Justice (Exhibit pp. 1-3), which is virtually identical to a letter previously submitted by the State Bar Litigation Section (First Supplement to Memorandum 96-59, Exhibit pp. 1-3).

The attached draft includes some conforming revisions, but others may still be necessary. The staff is also exploring whether there should be any special rules to account for measures such as the Freedom of Information Act, the Brown Act (Gov't Code §§ 54950-54962), or the California Public Records Act (Gov't Code §§ 6250-6265).

Staff Notes in the attached draft raise points for discussion. If anyone has additional concerns, please raise them at the Commission's meeting.

Respectfully submitted,

Barbara S. Gaal
Staff Counsel



THE COMMITTEE ON ADMINISTRATION OF JUSTICE
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

January 22, 1997

Law Revision Commission
RECEIVED

JAN 27 1997

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

File: _____

re: Tentative Recommendation on Protecting
Settlement Negotiations (November, 1996)

Ladies and Gentlemen:

By this letter, the State Bar Committee on Administration of Justice delivers to you its recommendations and comments regarding the draft of the tentative recommendation on evidentiary protection for settlement negotiations contained in the staff memorandum dated October 28, 1996. For the reasons hereinafter stated, we strongly recommend that the proposal not be adopted in its current form and that it substantially be amended and circulated for further comment before it is presented to the Legislature.

Instead of the approach taken in the October 28, 1996, staff memorandum, we recommend that the Commission take the Missouri approach described at page 3 of the staff report. Specifically, if the parties wish to avail themselves of a strict rule of confidentiality, they should expressly agree to be bound in a specified form of agreement or to a specified form of alternative dispute resolution. Absent such an express agreement, the general standards under existing Evidence Code sections 1152 and 1154 should continue to apply.

We are not persuaded that there is a need for wholesale revision of Evidence Code sections 1152 and 1154. Except in mass tort cases, parties are not generally reluctant to settle or to engage in settlement negotiations for fear that the settlement or the negotiations will be used in evidence or discoverable. If the parties in the case have such a reluctance, however, they should be afforded reasonable opportunity to agree to be bound by explicit rules of confidentiality. If they cannot reach such an agreement, the general principles espoused by existing Evidence Code sections 1152 and 1154 should govern and be applied in case-by-case decisions on admissibility or discoverability.

As recognized in several parts of the staff draft, the proposal creates the risk of cutting off the ability of counsel to discover or to offer evidence from settlement negotiations in circumstances in which there may be legitimate reasons why the evidence should be admitted. As staff points out (Report,

pp. 13-14), the exceptions in the current draft may be both over-inclusive and under-inclusive, and important uses of compromise evidence may have been overlooked. Conversely, there is a risk that the catchall provision in proposed Section 1138 may be interpreted so broadly that the exception will swallow the rule.

The variety of factual circumstances which may confront the parties and judges in applying standards of settlement confidentiality to particular cases is virtually infinite. It is not necessary for the Legislature to attempt to forecast every circumstance in which compromises or negotiations of them must or must not be discoverable or admissible. After all, judges are appointed to interpret and to apply laws to the infinite factual circumstances presented, and we do not recommend that judges be deprived of such discretions in these circumstances.

Although the staff draft tentative recommendation recites that staff has drafted proposed Section 1132 to avoid the issue of whether settlements should or should not be confidential (Report, pp. 12-13), in fact the proposal does take sides in that dispute by prohibiting admissibility or discoverability of compromises or negotiations of them. The existing approach would prohibit parties from even finding out about the existence of negotiations or settlements related to other parties, even if the negotiations or settlement are in the pending case. Discovery of such information could improve the likelihood of settlements in some cases. Although the contents of the settlement negotiations or the contents of actual settlements ultimately may not be admissible in evidence, knowing about negotiations and settlements as to other parties may promote the progress of settlement negotiations in particular cases. Thus, a strict prohibition of discovery may actually be contrary to the rationale or promoting out-of-court settlements.

The staff memorandum suggests consideration of an extension of the prohibitions against discovery or admissibility of compromise evidence from just civil actions to civil actions, administrative adjudications, arbitrations, or other non-criminal proceedings. This extension on a blanket basis would be overbroad. For example, in administrative proceedings involving licensure, evidence of compromises or attempts to compromise may be relevant to such issues as mitigation or aggravation. In administrative proceedings, cutting off discovery of how similar cases have been treated will deprive respondents of the ability to discover

whether they are being treated equitably. Many other examples of potential flaws in that approach could be given.

In proposed Section 1139, the word "necessary" appears. We consider that word too subjective to be appropriate in this context. The quantum of evidence considered necessary to convince a trier of fact is going to vary so widely between cases, between triers of fact, and between advocates, that the word "necessary" is too subjective in this context. Use of that word creates a very substantial risk that evidence may be excluded which would be relevant and might have helped a proponent satisfy the proponent's burden of proof. We recommend that the concept of "least intrusive means" be rethought and made more explicit.

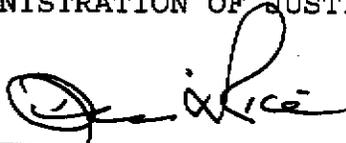
Because the draft is merely preliminary, and because of the limited time available for comment, we have not attempted to suggest specific rewording of the proposal. Instead, we have restricted our comments to substantive issues. If you have questions regarding any of these comments, please do not hesitate to contact us.

Thank you for this opportunity to comment.

Very truly yours,

COMMITTEE ON ADMINISTRATION OF JUSTICE

By:



Denis T. Rice

(1:9930.04:107:vy)

Jennifer Feres
Andrew J. Guilford
Ann M. Ravel
Paulene A. Weaver
Diane Yu
Monroe Baer
Robert L. Fisher
David C. Long
Jerome Sapiro, Jr.
Robert C. Vanderet

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Revised Staff Draft

TENTATIVE RECOMMENDATION

Protecting Settlement Negotiations

February 1997

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

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN ____.

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

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
415-494-1335 FAX: 415-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

This recommendation would reform evidentiary provisions governing settlement negotiations in a civil action (Evidence Code Sections 1152 and 1154). In particular, the recommendation seeks to foster rational and productive settlement negotiations by making offers of compromise and other compromise evidence generally inadmissible in a civil action. The recommendation would also add an explicit statutory standard to protect against discovery of such evidence in a civil action.

This recommendation was prepared pursuant to Resolution Chapter 38 of the Statutes of 1996.

1 PROTECTING SETTLEMENT NEGOTIATIONS

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

8 Existing law addresses this concern to a limited extent by making evidence of
9 settlement negotiations inadmissible to prove or disprove liability for the loss,
10 damage, or claim that is the subject of the negotiations.¹ Having reexamined the
11 existing law, the Law Revision Commission recommends increasing the
12 confidentiality of an ordinary settlement negotiation. By encouraging candid and
13 rational negotiations, this will promote settlements, which are essential to the
14 functioning of the judicial system.

15 EXISTING LAW

16 Two evidentiary provisions protect a settlement negotiation other than a
17 mediation.² Evidence Code Section 1152 prohibits proof of a liability through an
18 offer to compromise the alleged loss:

19 1152. (a) Evidence that a person has, in compromise or from humanitarian
20 motives, furnished or offered or promised to furnish money or any other thing,
21 act, or service to another who has sustained or will sustain or claims that he or she
22 has sustained or will sustain loss or damage, as well as any conduct or statements
23 made in negotiation thereof, is inadmissible to prove his or her liability for the
24 loss or damage or any part of it.

25 To ensure the “complete candor between the parties that is most conducive to
26 settlement,” the provision protects not only an offer of compromise, but also any
27 conduct or statements made in negotiating the offer.³

1. See Evidence Code Sections 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 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). For settlement of an administrative adjudication, see Government Code § 11415.60 (operative July 1, 1997). As amended in 1996, that provision makes compromise offers flatly inadmissible in an adjudicative proceeding or civil action. It also states that “no evidence of conduct or statements 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.” 1996 Cal. Stat. ch. 390, § 7.

2. Section 1152.5 is the principal statute governing mediation confidentiality. See also Sections 703.5 (mediator competency to testify) and 1152.6 (declarations or findings by a mediator).

3. Section 1152 Comment (1965).

1 Although broad in that respect, the provision is limited in others. There are
2 exceptions for specific contexts.⁴ More importantly, an act of compromise is only
3 inadmissible “to prove liability for the loss or damage to which the negotiations
4 relate.”⁵ If a party offers the evidence for another purpose, such as to show bias,
5 motive, undue delay, knowledge, or bad faith, the provision does not apply.⁶

6 Section 1154 is a corollary provision, which prohibits disproof of a claim
7 through an offer to discount the claim:

8 1154. Evidence that a person has accepted or offered or promised to accept a
9 sum of money or any other thing, act, or service in satisfaction of a claim, as well
10 as any conduct or statements made in negotiation thereof, is inadmissible to prove
11 the invalidity of the claim or any part of it.

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

15 Neither Section 1152 nor Section 1154 expressly addresses the discoverability of
16 a settlement discussion.⁷ Case authority on this point is sparse and ambiguous.⁸

4. Sections 1152(b) and (c) provide:

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

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

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

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

5. *Young v. Keele*, 188 Cal. App. 3d 1090, 1093, 233 Cal. Rptr. 859 (1987) (emph. in original).

6. *See, e.g., California Physicians' Service v. Superior Court*, 9 Cal. App. 4th 1321, 1326-27, 12 Cal. Rptr. 2d 95 (1992) (“Where the matter is offered not to establish initial liability, but only as evidence of bad faith in administering the claim (i.e., the making of a ridiculously low offer) the evidence is not excluded”); *Moreno v. Sayre*, 162 Cal. App. 3d 116, 126, 208 Cal. Rptr. 444 (1984) (“While evidence of a settlement agreement is inadmissible to prove liability (see Evid. Code, § 1152), it is admissible to show bias or prejudice of an adverse party”).

7. In contrast, Section 1152.5 expressly addresses both the admissibility and the discoverability of mediation communications.

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. *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 Law Journal 955, 1002 (1988).

1 ARGUMENTS FOR PROTECTING SETTLEMENT NEGOTIATIONS

2 Arguments advanced for evidentiary protection of settlement negotiations
3 include the relevancy rationale, the fairness rationale, and the public policy of
4 promoting settlements.⁹

5 **Relevancy Rationale**

6 The relevancy theory holds that courts should exclude compromise evidence
7 because such evidence is irrelevant (or at least of little probative value) in
8 establishing liability for the loss to be compromised. Instead of reflecting the
9 merits of the claim, the offer may just reflect a desire to avoid costly litigation
10 expenses and achieve peace.¹⁰

11 Although superficially appealing, the strength of this argument varies from case
12 to case, depending on the amount of the offer relative to the size of the claim.¹¹
13 The argument also fails to support exclusion of statements made in settlement
14 negotiations.¹² Consequently, it is not a persuasive justification for provisions such
15 as Sections 1152 and 1154.¹³

16 **Fairness Rationale**

17 Fundamental fairness is a more compelling ground for excluding compromise
18 evidence. Making a settlement offer is often difficult. To use evidence of it against
19 the would-be compromiser would unfairly penalize that person for taking a hard
20 step towards a peaceful resolution.¹⁴

21 **Public Policy of Promoting Settlements**

22 The prevailing modern rationale for excluding evidence of settlement offers is
23 the strong public policy favoring settlements.¹⁵ In contrast to litigation, settlements

9. Another rationale is the contract theory, which “has little merit.” Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules of Limited Admissibility* 3:26 (1996).

10. Wigmore, *Evidence in Trials at Common Law* § 1061(c) (1972).

11. 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. Louisell & Mueller, *Federal Evidence* § 171, at 454 (1985).

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

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

14. Leonard, *supra* note 9, at 3:35-3:36. 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).

15. *See, e.g.*, Fed. R. Evid. 408 advisory committee’s note; Brazil, *supra* note 8, at 958-59; Leonard, *supra* note 9, at 3:33 (“this general rationale has for many years been widely supported by the

1 can promote peace and goodwill in the community, while also reducing the
2 expense and persistency of litigation.¹⁶ Restricting admissibility of compromise
3 evidence fosters productive settlement negotiations. If effective restrictions are in
4 place, the parties can speak freely, knowing that their words and actions will not
5 be used against them. Instead of engaging in “an irrational poker game,” they can
6 share the reasoning underlying their positions, enhancing the likelihood of
7 reaching a mutual understanding and eventual settlement.¹⁷

8 PROBLEMS WITH EXISTING LAW

9 The fairness rationale and public policy of promoting settlements are persuasive
10 justifications for protecting settlement discussions, but provisions like Sections
11 1152 and 1154 are not the only means of achieving that end. Several factors led
12 the Law Revision Commission to question whether those provisions still provide
13 sufficient protection for settlement negotiations.

14 Most importantly, although settlement has long been a favored means of
15 resolving litigation,¹⁸ in the past decade there has been steadily increasing
16 recognition of the importance of out-of-court settlements to effective working of
17 the justice system.¹⁹ The vast majority of civil cases settle before trial. If they did
18 not, “the backlog in our courts would become totally intolerable.”²⁰ Settlements,
19 particularly early settlements, not only reduce court backlogs and conserve court
20 resources, but also spare disputants the expense, uncertainty, and stress of
21 litigation. “The need for settlements is greater than ever before.”²¹

22 That development is a strong impetus for reforming existing law to provide
23 greater protection for settlement negotiations. Candor can be crucial in a
24 settlement discussion and assurance of confidentiality can be essential to candor.²²
25 Under Sections 1152 and 1154 such assurance is limited, because compromise
26 evidence is admissible if it is not offered on the issue of liability.²³

commentators as the primary justification for the exclusionary rule and the cases following that view are legion”).

16. *McClure v. McClure*, 100 Cal. 339, 343 (1893); *Skulnick v. Mackey*, 2 Cal. App. 4th 884, 891, 3 Cal. Rptr. 2d 597 (1992).

17. *Brazil*, *supra* note 8, at 959-60.

18. *See, e.g.*, *McClure v. McClure*, 100 Cal. 339, 343, 34 P. 822 (1893).

19. *See, e.g.*, *Leonard*, *supra* note 9 at 3:2-3:3 & 3:2 n.2.

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

21. *Neary v. Regents of University of California*, 3 Cal. 4th 275, 277, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992).

22. *See, e.g.*, *Carney v. Santa Cruz Women Against Rape*, 221 Cal. App. 3d 1009, 1023, 271 Cal. Rptr. 30 (1990); *Brazil*, *supra* note 8, at 959-60.

23. *See generally*, *Brazil*, *supra* note 8, at 996. In the context of the corresponding federal provision, Judge Brazil explains:

By leaving open the possibility that settlement communications could be admitted for any one of an almost limitless number of other purposes, the drafters of the rule in essence eviscerated the privilege

1 Misconceptions about the extent of protection also exist. Disputants sometimes
2 fail to realize that the protection is not absolute but only precludes use of
3 compromise evidence on the issue of liability.²⁴ The consequences can be severe.

4 Finally, compromise evidence ostensibly introduced for another purpose tends to
5 be highly prejudicial as to liability, even with the use of a limiting instruction. Not
6 infrequently, this is the true motive for introducing such evidence.²⁵ Regardless of
7 whether a party offers compromise evidence disingenuously, admitting such
8 evidence can result in distortion of the litigation process and ultimate injustice.

9 RECOMMENDATIONS

10 Balancing the competing considerations in protecting compromise evidence is a
11 delicate endeavor. Any exclusion of relevant evidence has a cost.²⁶ In shielding
12 settlement discussions, the countervailing benefits are promoting settlement and
13 fairness. To effectively achieve those benefits, the Commission recommends the
14 following reforms:²⁷

15 **Purposes for Introducing Compromise Evidence**

16 Instead of being inadmissible on the limited issue of liability, evidence of an act
17 of compromise should be flatly inadmissible against the person engaging in the act
18 of compromise. That approach would foster settlement to a greater degree than

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.

[Id.]

24. See generally, Michaels, *Rule 408: A Litigation Mine Field*, *Litigation* 34 (fall 1992) (“Too often viewed as an unambiguous exclusionary rule, a sure protection, Rule 408 is actually a trap”).

25. As one commentator recently explained, the rule that compromise evidence is inadmissible on the issue of liability “provides great incentive to find creative ways to recharacterize compromise evidence If this recharacterization is successful, evidence that might clearly show liability for or invalidity of a claim or its amount, and thus directly conflict with the rule’s primary purpose, may still be admissible.” Kerwin, *The Discoverability of Settlement and ADR Communications: Federal Rule of Evidence 408 and Beyond*, 12 *Review of Litigation* 665, 668 (1993).

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

27. The recommended degree of protection is not as strong as the existing protection for mediation communications. See Evid. Code §§ 703.5, 1152.5, 1152.6. 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 of according complete confidentiality to the discussion. The involvement of the mediator may also deter misconduct that might otherwise occur in a setting of complete confidentiality. Finally, the beginning and end of a mediation are clearer than the boundaries of what is and is not a settlement negotiation, making it is easier to determine which communications are protected.

1 existing law: By providing greater assurance of confidentiality, it would more
2 effectively encourage openness and enhance rationality in settlement negotiations.
3 The approach would also be more fair than existing law, because a person could
4 not be penalized for offering to settle, and because a compromise offer could not
5 be introduced to unduly prejudice a determination of liability.

6 A number of exceptions are necessary. In each of the following situations, if a
7 court admits compromise evidence, it should recognize and attempt to minimize
8 the potential negative impact on achievement of settlements and perceptions of
9 fairness.

10 *Partial satisfaction; preexisting debt.* Under Section 1152, evidence of
11 partially satisfying a claim without questioning its validity is not inadmissible if
12 that evidence is offered to prove the validity of the claim.²⁸ Similarly, Section
13 1152 does not make a debtor's payment or promise to pay all or part of a
14 preexisting debt inadmissible when a party offers that evidence to prove the
15 creation of a new duty or revival of the debtor's preexisting duty.²⁹ These
16 limitations are consistent with the goal of promoting settlement: If a claim is
17 undisputed or a debt acknowledged, there is no dispute to settle and no need to
18 provide confidentiality.

19 *Misconduct.* Evidence of an act of compromise should be admissible to show,
20 or to rebut a contention of, misconduct or irregularity in negotiating or undertaking
21 that act. The public policy favoring settlement has limited force as to settlements
22 and settlement overtures that derive from or involve illegality or other misconduct
23 or irregularity.³⁰

24 *Obtaining benefits of settlement.* Evidence of a settlement should be
25 admissible to bar a claim or otherwise enforce the settlement. This exception is
26 essential if parties are to enjoy the benefits of settling a dispute.³¹ Conversely,
27 evidence of settlements negotiations should be admissible to rebut an attempt to
28 enforce a settlement, as by showing that there was no settlement.

29 *Lack of good faith.* Evidence of efforts to compromise a claim should be
30 admissible to prove or disprove the good faith of a settlement of the claim. This
31 exception follows from the rule that a good faith settlement between a plaintiff and
32 a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from
33 any further claims against the settling tortfeasor or co-obligor for equitable

28. Section 1152(c)(1).

29. Section 1152(c)(2).

30. See generally Leonard, *supra* note 9, at 3:97 ("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").

31. See generally, *id.* at 3:120 to 3:122 ("the law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible").

1 comparative contribution, or partial or comparative indemnity, based on
2 comparative negligence or comparative fault.”³²

3 *Sliding scale recovery.* A sliding scale recovery agreement is one between a
4 plaintiff and a tortfeasor defendant, under which the defendant’s liability depends
5 on how much the plaintiff recovers from another defendant at trial.³³ If the first
6 defendant testifies at trial, the testimony may affect how much that defendant has
7 to pay. That potential effect may consciously or subconsciously influence the
8 defendant’s testimony. Because of this danger of bias, evidence of a sliding scale
9 recovery agreement should be admissible, but only if a signatory defendant
10 testifies and the evidence is introduced to show bias of that defendant.³⁴

11 *Miscarriage of justice.* Evidence of an act of compromise should also be
12 admissible to rebut a contention of undue delay, or assist in calculation of punitive
13 damages, prejudgment interest, costs, or fees rendered in connection with a
14 dispute, but only if exclusion of the evidence would create a substantial likelihood
15 of a miscarriage of justice.

16 **Discoverability of Settlement Discussions**

17 Because Sections 1152 and 1154 only bar use of compromise evidence on the
18 issue of liability, counsel can readily argue for discovery of such evidence on the
19 ground that it may be admissible for some other purpose.³⁵ But any potential
20 intrusion on confidentiality, whether in trial or in discovery, may inhibit settlement
21 discussions.³⁶

22 To effectively serve the goal of promoting settlement, the proposed law would
23 limit discovery of compromise evidence to the minimum necessary under the
24 circumstances. There would also be a heightened standard for obtaining discovery
25 of such evidence: The party requesting disclosure must make a specific showing of
26 a substantial likelihood that the disclosure will lead to the discovery of admissible
27 evidence. These requirements will provide significant protection from discovery,
28 especially in light of the rule making compromise evidence generally inadmissible.

32. Code Civ. Proc. § 877.6(c). To account for comparable rules in other jurisdictions, the exception should apply not only when evidence of settlement negotiations is introduced pursuant to Code of Civil Procedure Section 877.6, but also when such evidence is introduced pursuant to a similar provision.

33. Code Civ. Proc. § 877.5(b).

34. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of a sliding scale recovery agreement:

If the action is tried before a jury, and a defendant party to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that this disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

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

36. See *id.*

1 Binding settlements present special considerations. For example, suppose a
2 manufacturing plant emits a hazardous chemical and a nearby resident sues for
3 resultant injuries. If the manufacturer and the victim enter into a purportedly
4 confidential settlement, it may be important to resolve whether other persons,
5 particularly other victims or potential victims, are entitled to disclosure of the
6 settlement. Such issues are controversial³⁷ and this reform does not address them.
7 The new standard for discovery of compromise evidence would not apply to
8 binding settlements. Existing law in that area would remain intact.

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

14 **Humanitarian conduct**

15 Section 1152 includes, and does not differentiate between, offers stemming from
16 humanitarian motives and offers reflecting a desire to compromise. There is a
17 dearth of case law on the protection of humanitarian conduct, which is intended to
18 encourage acts such as an unselfish offer to pay another person's medical
19 expenses. Because the rationale for protecting humanitarian conduct differs from
20 the rationale for protecting settlement negotiations, the Commission recommends
21 covering such conduct in a separate provision, as in the Federal Rules of
22 Evidence.³⁸

23 The proposed provision would make evidence of "furnishing or offering or
24 promising to pay medical, hospital, or similar expenses occasioned by an injury"
25 inadmissible to prove liability for the injury.³⁹ The rule would not extend to
26 associated conduct or statements, because they are likely to be incidental, not in
27 furtherance of the offer.⁴⁰

28 The proposed provision would become new Section 1152, and the provisions on
29 compromise evidence would be a new chapter of the Evidence Code.⁴¹ These
30 reforms would help eliminate court congestion, promote peaceable resolution of
31 disputes, and make the legal system more fair and just.

37. See, e.g., SB 701, introduced by Senator Lockyer in 1991. The Legislature passed the bill but the Governor vetoed it.

38. See Fed. R. Evid. 409.

39. This is the same language as in Fed. R. Evid. 409.

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

41. This recommendation does not attempt to define the scope of statutorily protected settlement negotiations more clearly than under existing law. That may be the subject of future study.

PROPOSED LEGISLATION

1 **Evid. Code §§ 1130-1139 (added). Settlement negotiations**

2 SEC. __. Chapter 2 (commencing with Section 1130) is added to Division 9 of
3 the Evidence Code, to read:

4 **CHAPTER 2. SETTLEMENT NEGOTIATIONS**

5 **§ 1130. Purpose of chapter**

6 1130. The purpose of this chapter is to promote rational and productive
7 settlement negotiations in a civil action or dispute. This chapter does not protect
8 plea bargaining.

9 **Comment.** Section 1130 defines the scope of this chapter. For evidentiary protection of plea
10 bargaining, see Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for
11 civil resolution of crimes against property). For settlement of an administrative adjudication, see
12 Government Code § 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390, §
13 7. For a provision on paying medical expenses or offering or promising to pay such expenses, see
14 Section 1152 (payment of medical or similar expenses).

15  **Staff Note.** The staff considered but rejected the possibility of moving the provisions on
16 settlement negotiations from Division 9 (Evidence Affected or Excluded by Extrinsic Policies) to
17 Division 8 (Privileges) of the Evidence Code. The relationship between participants in a
18 settlement negotiation is quite different from the relationships protected by the provisions in
19 Division 8. “The traditional privileges attach to communications between persons who have
20 ongoing, *supportive*, interdependent, nonadversarial relationships,” relationships that “society has
21 an interest in fostering.” Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39
22 *Hastings Law Journal* 955, 990 (1988) (emph. in original). In contrast, parties to settlement
23 negotiations are necessarily adversaries. “While in a small percentage of cases they may end up
24 with ongoing relationships, society usually has no independent interest in nurturing close ties
25 between adverse litigants, at least none that parallels the kind of societal interest that inspires the
26 traditional privileges.” *Id.*

27 Further, the traditional privileges in Division 8 receive almost absolute protection from
28 disclosure, whereas this proposal would accord a lower (but still substantial) level of protection
29 for settlement negotiations. This difference in degree of protection is another reason for leaving
30 the provisions on settlement negotiations in Division 9, rather than transferring them to Division
31 8.

32 If anyone has other thoughts on this point (or on other organizational issues relating to the
33 attached draft), please share them at the Commission’s meeting. The staff does not plan to raise
34 this matter.

35 **§ 1131. “Act of compromise” defined**

36 1131. For purposes of this chapter, an “act of compromise” occurs if either of the
37 following conditions is satisfied:

38 (a) In compromise, a person furnishes, offers, or promises to furnish money or
39 any other thing, act, or service to another who has sustained or claims to have
40 sustained loss or damage, or who will or claims will sustain loss or damage.

1 (b) A person accepts, offers, or promises to accept a sum of money or any other
2 thing, act, or service in satisfaction of a claim.

3 **Comment.** Subdivision (a) is drawn from former Section 1152. Subdivision (b) is drawn from
4 former Section 1154.

5 For protection of an act of compromise, see Section 1132 (protection of act of compromise).
6 For evidentiary protection of plea bargaining, see Sections 1153 (offer to plead guilty or
7 withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). For
8 settlement of an administrative adjudication, see Government Code § 11415.60 (operative July 1,
9 1997), as amended by 1996 Cal. Stat. ch. 390, § 7. For a provision on paying medical expenses or
10 offering or promising to pay such expenses, see Section 1152 (payment of medical or similar
11 expenses).

12 ☞ **Staff Note.** There are potential ambiguities regarding how much of a dispute is necessary
13 before an act can be considered an attempt to compromise. *See generally* Brazil, *Protecting the*
14 *Confidentiality of Settlement Negotiations*, 39 Hastings Law Journal 955, 960-966 (1988)
15 (discussing Federal Rule of Evidence 408); Michaels, *Rule 408: A Litigation Mine Field*,
16 *Litigation* 34, 35-36 (fall 1992) (same); *see also* Young v. Keele, 188 Cal. App. 3d 1090, 233 Cal.
17 Rptr. 850 (1987) (Sections 1152 and 1154 inapplicable to settlement negotiations that occurred
18 after the judgment). There are many possible approaches, such as insisting on actual or threatened
19 litigation, requiring a probability of litigation, or demanding only the existence of an implicit
20 dispute between the parties.

21 Consistent with the Commission's instructions at its meeting on July 11, 1996, the attached
22 draft does not define compromise evidence more precisely than the existing provisions. The
23 preliminary part mentions the possibility of studying that issue in the future. See footnote 41. The
24 staff considers this an important issue, which may warrant statutory guidance at some point.

25 § 1132. Protection of act of compromise

26 1132. (a) In a civil action, evidence of an act of compromise, or any conduct or
27 statement made for the purpose of, or in the course of, or pursuant to negotiation
28 of an act of compromise, is not admissible against the person engaging in the act
29 of compromise.

30 (b) In a civil action, evidence of an act of compromise, or any conduct or
31 statement made for the purpose of, or in the course of, or pursuant to negotiation
32 of an act of compromise, is subject to discovery, and disclosure of this evidence
33 may be compelled, only if both of the following conditions are satisfied:

34 (1) The party requesting disclosure makes a specific showing of a substantial
35 likelihood that the disclosure will lead to the discovery of admissible evidence.

36 (2) Discovery is otherwise authorized by law.

37 (c) Nothing in this section affects the right, if any, to discovery of a binding
38 settlement.

39 (d) Evidence otherwise admissible or subject to discovery outside of a
40 negotiation of an act of compromise is not inadmissible or protected from
41 disclosure solely by reason of its introduction or use in the negotiation.

42 **Comment.** Section 1132 supersedes former Sections 1152(a) and 1154, which made evidence
43 of a settlement negotiation inadmissible for the purpose of proving invalidity of the claim, but not
44 for other purposes. To preclude abuse and foster greater candor in settlement negotiations,
45 Section 1132 eliminates that distinction.

46 Like former Section 1152, subdivision (a) does not restrict admissibility in a criminal
47 proceeding. *Cf.* People v. Muniz, 213 Cal. App. 3d 1508, 1515-16, 262 Cal. Rptr. 743 (1989)

1 (former Section 1152 inapplicable to criminal cases); *see also* Manko v. United States, 87 F.3d 50
 2 (2d Cir. 1996) (Federal Rule 408 “does not exclude relevant evidence in a criminal prosecution
 3 even where that evidence relates to the settlement of a civil claim”); United States v. Prewitt, 34
 4 F.3d 436 (7th Cir. 1994) (Federal Rule 408 “should not be applied to criminal cases”). For
 5 exceptions to Section 1132(a), see Sections 1133 (partial satisfaction; preexisting debt), 1134
 6 (misconduct or irregularity), 1135 (obtaining benefits of settlement), 1136 (good faith), 1137
 7 (sliding scale recovery agreement), 1138 (miscarriage of justice). Evidence satisfying one (or
 8 more) of these exceptions is not necessarily admissible. It may still be subject to exclusion under
 9 other rules, including the balancing test of Section 352 (“The court in its discretion may exclude
 10 evidence if its probative value is substantially outweighed by the probability that its admission
 11 will (a) necessitate undue consumption of time or (b) create substantial danger of undue
 12 prejudice, confusing the issues, or misleading the jury”). See also Section 1139 (least intrusive
 13 means).

14 Consistent with Section 1132’s underlying rationale of promoting out-of-court settlement,
 15 subdivision (b) establishes a stiff threshold for discovery of settlement negotiations. For
 16 background, see Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 Hastings
 17 Law Journal 955, 987-1002 (1988) (“To truly serve the privilege rationale, a rule would have to
 18 offer at least presumptive protection from both discovery and admissibility in most
 19 circumstances”). See also Covell v. Superior Court, 159 Cal. App. 3d 39, 205 Cal. Rptr. 371
 20 (1984) (former Section 1152 restricted admissibility, not discoverability, but trial court abused its
 21 discretion in granting discovery of settlement offers).

22 Subdivision (c) makes clear that although subdivision (b) restricts discovery of settlement
 23 negotiations, it neither sanctions nor prohibits confidential settlements.

24 Subdivision (d) is drawn from Section 1152.5(a)(6) and Federal Rule of Evidence 408.

25 See Sections 120 (“Civil action” includes civil proceedings), 1131 (“act of compromise”
 26 defined). For evidentiary protection of plea bargaining, see Sections 1153 (offer to plead guilty or
 27 withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). For
 28 settlement of an administrative adjudication, see Government Code § 11415.60 (operative July 1,
 29 1997), as amended by 1996 Cal. Stat. ch. 390, § 7. For a provision on paying medical expenses or
 30 offering or promising to pay such expenses, see Section 1152 (payment of medical or similar
 31 expenses).

32  **Staff Note.**

33 (1) *Criminal cases.* At its meeting in January, the Commission briefly discussed, but did not
 34 make any decisions regarding, application of this proposal to criminal cases. There are two
 35 categories of issues to consider.

36 First, this draft only covers settlement negotiations in a civil case. It does not cover plea
 37 bargaining, which is presently addressed in Sections 1153 (offer to plead guilty or withdrawn
 38 guilty plea) and 1153.5 (offer for civil resolution of crimes against property). If the Commission
 39 is interested in reforming the rules for plea bargaining, the staff suggests handling that as a
 40 separate study.

41 The second set of issues concerns whether evidence of attempts to compromise a civil case
 42 should be admissible in a subsequent criminal case. The current draft would only restrict
 43 admissibility in a subsequent civil case. In *People v. Muniz*, 213 Cal. App. 3d 1508, 1515-16, 262
 44 Cal. Rptr. 743 (1989), the court interpreted existing Section 1152 similarly.

45 Professor Leonard suggests that a “blanket allowance” of compromise evidence in criminal
 46 cases “is not wise.” (Second Supp. to Mem. 96-59, Exhibit p. 2.) He would “favor a rule that
 47 permits the judge to exclude the evidence in criminal as well as civil cases.” (*Id.* at Exhibit p. 3.)
 48 “To the extent there is concern that criminal defendants will seek to interfere with prosecution of
 49 their alleged crimes,” he believes that “a provision such as that found in FRE 408 (providing that
 50 the exclusionary rule is inapplicable when the evidence is offered ‘for the purpose of proving an
 51 effort to obstruct a criminal investigation or prosecution’ should deal adequately with the
 52 problem.” (*Id.*)

1 On the one hand, Professor Leonard's approach would be more consistent with the goal of
2 promoting settlement than the staff's current approach. As Senator Kopp pointed out in January, a
3 criminal defendant has little incentive to settle a related civil case, if the settlement could be used
4 against the defendant in the criminal case.

5 On the other hand, restricting admissibility of relevant evidence conflicts with the interest in
6 ascertaining truth in a criminal case. That strong state interest underlies the Truth-in Evidence
7 provision of the Victims' Bill of Rights, Cal. Const. art. 1, § 28(d), which states in part:

8 Except as provided by statute hereafter enacted by a two-thirds vote of the membership in
9 each house of the Legislature, relevant evidence shall not be excluded in any criminal
10 proceeding Nothing in this section shall affect any existing statutory rule of evidence
11 relating to privilege

12 In light of that provision, a statute generally restricting use of compromise evidence in a criminal
13 case probably would be constitutional only if it was "enacted by a two-thirds vote of the
14 membership in each house of the Legislature." Thus, if the Commission decides to follow
15 Professor Leonard's suggestion, it may want to handle that as a separate reform, or at least add a
16 severability clause to this proposal.

17 (2) *Administrative adjudications, arbitrations, and other noncriminal proceedings.* A further
18 issue is whether evidence of settlement negotiations in a civil action should be inadmissible in a
19 related administrative adjudication. This is different from deciding whether settlement
20 negotiations in an administrative adjudication should be admissible in subsequent proceedings.
21 The Commission addressed the latter question in its study of administrative adjudication. See
22 Gov't Code § 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390, § 7. The
23 Commission could resolve the former question by adding language similar to that in its tentative
24 recommendation on mediation confidentiality:

25 1132. (a) In a civil action, administrative adjudication, arbitration, or other noncriminal
26 proceeding, evidence of an act of compromise, or any conduct or statement made for the
27 purpose of, or in the course of, or pursuant to negotiation of an act of compromise, is not
28 admissible against the person engaging in the act of compromise.

29 (b) In a civil action, administrative adjudication, arbitration, or other noncriminal
30 proceeding, evidence of an act of compromise, or any conduct or statement made for the
31 purpose of, or in the course of, or pursuant to negotiation of an act of compromise, is subject
32 to discovery, and disclosure of this evidence may be compelled only if both of the following
33 conditions are satisfied:

34

35 The State Bar Litigation Section (First Supp. to Mem. 96-59, Exhibit p. 2) and Committee on
36 Administration of Justice (Exhibit pp. 2-3) advise against that approach, stating that it would be
37 "overbroad." They warn that in administrative proceedings involving licensure, compromise
38 evidence may be relevant to issues such as mitigation or aggravation. They also state that in
39 administrative proceedings, "cutting off discovery of how similar cases have been treated will
40 deprive respondents of the ability to discover whether they are being treated equitably." (Exhibit
41 pp. 2-3; First Supp. to Mem. 96-59, Exhibit p. 2.)

42 These concerns are not unique to administrative adjudications. To some extent, they may have
43 been addressed by the Commission's decision last month to narrow Section 1132, such that an
44 offer of compromise is inadmissible only if it is proffered against the person who made the offer.
45 The staff continues to believe that it would be helpful to provide guidance on whether Section
46 1132 applies to a subsequent arbitration or administrative adjudication.

47 (3) *Extension beyond admissibility and discoverability.* As drafted, the protection of proposed
48 Section 1132 would only affect the admissibility and discoverability of compromise evidence. It
49 would not make such evidence confidential for all purposes. For instance, it would not preclude a

1 litigant from informing a fire department of a serious fire hazard revealed in a settlement
2 conference. In contrast, existing Section 1152.5(a)(3) may afford greater protection to mediation
3 communications: “When persons agree to conduct or participate in mediation for the sole purpose
4 of compromising, settling, or resolving a dispute, in whole or in part, all communications,
5 negotiations, or settlement discussions by and between participants or mediators in the mediation
6 shall remain confidential.” (Emph. added.)

7 The staff recommends against following such an approach in the instant proposal. A mediation
8 triggers different policy considerations than an unassisted settlement negotiation. See footnote 27
9 of the attached draft. Moreover, even if the proposal only affects admissibility and
10 discoverability, its expanded protection of compromise evidence may prove controversial. Going
11 further may sink the proposal altogether.

12 (4) *Confidential settlements.* There is strong sentiment in the Legislature against confidential
13 settlements. In 1991, Senator Lockyer introduced a bill (SB 711) that would have sharply
14 restricted the availability of such arrangements. Both the Assembly and the Senate passed the bill,
15 but the Governor vetoed it and the Legislature did not override the veto. Rather than take a stance
16 on this potentially controversial point, the staff attempted to draft Section 1132 to avoid the issue.

17 The State Bar Litigation Section (First Supp. to Mem. 96-59, Exhibit p. 2) and Committee on
18 Administration of Justice (Exhibit p. 2) maintain that the draft nonetheless takes sides in the
19 dispute:

20 The current draft states that it avoids the issue of whether settlements should or should
21 not be confidential ..., but the proposal actually takes sides in that dispute. It prohibits
22 admission in evidence and discovery of compromises or negotiations of them. This would
23 prohibit parties from even finding out about the existence of negotiations or settlements
24 related to other parties in the same case or in related cases. Discovery of such information
25 could improve the likelihood of settlements in some cases. Even if the settlement negotiations
26 or settlement agreements are not ultimately admissible in evidence at trial, knowing about
27 negotiations and settlements as to other parties may promote the progress of settlement
28 negotiations in particular cases. Thus, a strict prohibition of discovery may actually be
29 contrary to the rationale of promoting out-of-court settlements and conflicts with the stated
30 intention of not taking sides in the dispute.

31 The staff does not fully understand these comments, because Section 1132(c) expressly states:
32 “Nothing in this section affects the right, if any, to discovery of a binding settlement.”

33 Although the draft would not directly affect discovery of confidential settlements, it could have
34 an indirect effect, through the revisions of the standard for admissibility of compromise evidence.
35 Discovery must be “reasonably calculated to lead to the discovery of admissible evidence.” Code
36 Civ. Proc. § 2017. By stiffening the standard for admissibility of compromise evidence, the draft
37 may to some extent make it more difficult to meet this requirement, which would apply to
38 discovery of a confidential settlement. The staff is not certain how significant this effect would
39 be, and is not sure whether and how to address it.

40 **§ 1133. Partial satisfaction; preexisting debt**

41 1133. Section 1132 does not affect the admissibility of either of the following:

42 (a) Evidence of partial satisfaction of an asserted claim or demand without
43 questioning its validity when that evidence is offered to prove the validity of the
44 claim.

45 (b) Evidence of a debtor’s payment or promise to pay all or a part of the debtor’s
46 preexisting debt when that evidence is offered to prove the creation of a new duty
47 on the debtor’s part or a revival of the debtor’s preexisting duty.

48 **Comment.** Subdivision (a) of Section 1133 is drawn from former Section 1152(c)(1).
49 Subdivision (b) is drawn from former Section 1152(c)(2).

1 **§ 1134. Misconduct or irregularity**

2 1134. Evidence of an act of compromise, or any conduct or statement made for
3 the purpose of, or in the course of, or pursuant to negotiation of an act of
4 compromise, is not inadmissible under Section 1132 if the evidence is introduced
5 to show, or to rebut a contention of, fraud, duress, illegality, mistake, malpractice,
6 libel, breach of the covenant of good faith and fair dealing, or other misconduct or
7 irregularity in negotiating or undertaking the act of compromise.

8 **Comment.** Section 1134 recognizes that the public policy favoring settlement agreements has
9 limited force with regard to settlement agreements and overtures that derive from or involve
10 illegality or other misconduct or irregularity. See Leonard, *The New Wigmore: A Treatise on*
11 *Evidence, Selected Rules of Limited Admissibility* 3:97 (1996) (“If the primary purpose of the
12 exclusionary rule is to encourage parties to reach compromise and thus avoid protracted litigation,
13 it follows that the rule should not apply to situations in which the compromise the parties have
14 reached, or have sought to reach, is illegal or otherwise offends some aspect of public policy”).

15 See Section 1131 (“act of compromise” defined). See also Sections 1130 (purpose of chapter),
16 1139 (least intrusive means).

17  **Staff Note.** Existing Section 1152 (reproduced *infra*) refers to introduction of compromise
18 evidence in an action for “violation of subdivision (h) of Section 790.03 of the Insurance Code.”
19 The staff has not included such a reference in Section 1134, because there is no private right of
20 action for violation of Insurance Code Section 790.03. See *Moradi-Shalal v. Fireman’s Fund Ins.*
21 *Co.*, 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988); *Maler v. Superior Court*, 220 Cal.
22 *App.* 3d 1592, 270 Cal. Rptr. 220 (1990). If that changes, the language of Section 1134 would be
23 broad enough to cover an action for violation of Section 790.03 even though such an action is not
24 specifically mentioned. The staff sees no need for discussion of this point. If anyone has concerns
25 about it, please raise them at the Commission’s meeting.

26 **§ 1135. Obtaining benefits of settlement**

27 1135. Evidence of an act of compromise, or any conduct or statement made for
28 the purpose of, or in the course of, or pursuant to negotiation of an act of
29 compromise, is not inadmissible under Section 1132 if either of the following
30 conditions is satisfied:

31 (a) The evidence is introduced to enforce, or to rebut an attempt to enforce, a
32 settlement or alleged settlement of the loss, damage, or claim that is the subject of
33 the act of compromise.

34 (b) The evidence is introduced to show, or to rebut an attempt to show, the
35 existence of a settlement barring the claim that is, or claims for the loss or damage
36 that is, the subject of the act of compromise.

37 **Comment.** Section 1135 seeks to ensure that parties enjoy the benefits of settling a dispute. For
38 background, see generally Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules*
39 *of Limited Admissibility* 3:120-3:122 (1996) (“the law would hardly encourage compromise by
40 adopting an evidentiary rule essentially making proof of the compromise agreement impossible”).

41 See Section 1131 (“act of compromise” defined). See also Sections 1130 (purpose of chapter),
42 1139 (least intrusive means).

43 **§ 1136. Good faith**

44 1136. Evidence of an act of compromise, or any conduct or statement made for
45 the purpose of, or in the course of, or pursuant to negotiation of an act of

1 compromise, is not inadmissible under Section 1132 if the evidence is introduced
2 pursuant to Section 877.6 of the Code of Civil Procedure or a similar provision to
3 show, or to rebut an attempt to show, lack of good faith of a settlement of the loss,
4 damage, or claim that is the subject of the act of compromise

5 **Comment.** Section 1136 follows from the rule that a good faith settlement between a plaintiff
6 and a joint tortfeasor or co-obligor bars “any other joint tortfeasor or co-obligor from any further
7 claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or
8 partial or comparative indemnity, based on comparative negligence or comparative fault.” Code
9 Civ. Proc. § 877.6(c). To account for comparable rules in other jurisdictions, the exception
10 applies not only when evidence of settlement negotiations is introduced pursuant to Code of Civil
11 Procedure Section 877.6, but also when such evidence is introduced pursuant to “a similar
12 provision.”

13 See Section 1131 (“act of compromise” defined). See also Sections 1130 (purpose of chapter),
14 1139 (least intrusive means).

15 § 1137. Sliding scale recovery agreement

16 1137. Evidence of an agreement or covenant providing for a sliding scale
17 recovery agreement between one or more, but not all, alleged defendant tortfeasors
18 and the plaintiff is not inadmissible under Section 1132 if a defendant party to the
19 agreement testifies and the evidence is introduced to show bias of that defendant.

20 **Comment.** Section 1137 reflects the danger of bias inherent in a sliding scale recovery
21 agreement. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of
22 a sliding scale recovery agreement: (1) “If the action is tried before a jury, and a defendant party
23 to the agreement is called as a witness at trial, the court shall, upon motion of a party, disclose to
24 the jury the existence and content of the agreement or covenant, unless the court finds that this
25 disclosure will create substantial danger of undue prejudice, confusing the issues, or of
26 misleading the jury,” and (2) “The jury disclosure herein required shall be no more than necessary
27 to inform the jury of the possibility that the agreement may bias the testimony of the witness.”

28 ☞ **Staff Note.** At its meeting on July 11, 1996, the Commission tentatively concluded that
29 compromise evidence should not be admissible for the purpose of proving bias. Sliding scale
30 recovery agreements present special considerations. For example, suppose a plaintiff and a
31 defendant (D1) enter into a sliding scale recovery agreement, under which the amount due from
32 D1 to the plaintiff depends on how much the plaintiff recovers from another defendant (D2) at
33 trial. D1 testifies for the plaintiff at trial, and D2 wants to introduce evidence of the sliding scale
34 recovery agreement to show that D1 is biased. Under Section 1132, D2 could not do that, because
35 the sliding scale recovery agreement is a compromise by the plaintiff that is being offered against
36 the plaintiff. Section 1137 would create an exception allowing introduction of the sliding scale
37 recovery agreement. If this proposal does not include such an exception, Section 1132 will clash
38 with Code of Civil Procedure Section 877.5, under which a sliding scale recovery agreement must
39 be disclosed to the jury if a defendant party to the agreement testifies and the disclosure will not
40 “create substantial danger of undue prejudice, confusing the issues, or of misleading the jury.”

41 Are the safeguards in Code of Civil Procedure Section 877.5 appropriate? Should the
42 Legislature give more weight to the interest in promoting settlements? The staff is inclined to
43 preserve existing law on sliding scale settlement agreements. Section 1137 is directed to that end.

44 A related issue is whether to broaden Section 1137 to cover other agreements that may create a
45 danger of bias. For example, the provision could be revised to read: “Evidence of an agreement is
46 not inadmissible under Section 1132 if a party to the agreement testifies and the evidence is
47 introduced to show bias of that party.” The staff is inclined against such an approach, because it
48 would dilute the protection for compromise evidence, undermining the goal of promoting
49 settlement.

1 **§ 1138. Miscarriage of justice**

2 1138. Evidence of an act of compromise, or any conduct or statement made for
3 the purpose of, or in the course of, or pursuant to negotiation of an act of
4 compromise, is not inadmissible under Section 1132 if both of the following
5 conditions are satisfied:

6 (a) Exclusion of the evidence would create a substantial likelihood of a
7 miscarriage of justice.

8 (b) The evidence is introduced for either of the following purposes:

9 (1) To rebut a contention of undue delay.

10 (2) To assist in calculation of punitive damages, prejudgment interest, costs,
11 attorney's fees, expert's fees or other fees for services rendered in connection with
12 a dispute.

13 **Comment.** Under Section 1138, evidence introduced for certain purposes may be admissible if
14 "[e]xclusion of the evidence would create a substantial likelihood of a miscarriage of justice." In
15 applying that standard, the court should consider the strong public interest in promoting candid
16 settlement discussions, the probative value of the proffered evidence, the likelihood of undue
17 prejudice or confusion of the issues if the evidence is introduced, and the potential effectiveness
18 of a limiting instruction. *See generally* Brazil, *Protecting the Confidentiality of Settlement*
19 *Negotiations*, 39 *Hastings Law Journal* 955 (1988); Leonard, *The New Wigmore: A Treatise on*
20 *Evidence, Selected Rules of Limited Admissibility* 3:1-3:160 (1996).

21 See Section 1131 ("act of compromise" defined). See also Sections 1130 (purpose of chapter),
22 1139 (least intrusive means).

23 ☞ **Staff Note.** The State Bar Litigation Section (First Supp. to Mem. 96-59, Exhibit p. 2) and
24 Committee on Administration of Justice (Exhibit p. 2) warn that Section 1138 "may be
25 interpreted so broadly that the exception will swallow the rule." Professor Leonard also urges the
26 Commission to delete the provision:

27 Almost certainly, different courts will interpret the standard of the escape hatch differently,
28 leading to an unfortunate kind of inconsistency. Even in courts that would interpret the
29 standard similarly, there is a strong likelihood of inconsistency in applying that standard to
30 similar facts. And the presence of an escape hatch might discourage some parties from
31 engaging in compromise behavior, or at the very least, of discussing compromise with the
32 sort of frankness that leads to settlement and that the law therefore wants to promote. If the
33 exclusionary rule is to have real bite, it is unwise to include such an uncertain and potentially
34 broad escape hatch.

35 [Second Supp. to Mem. 96-59, Exhibit pp. 4-5.]

36 The staff agrees with these concerns, but has included Section 1138 in this draft for discussion
37 purposes. The provision has serious downsides, but there may be compelling reasons for
38 admitting settlement materials that we are unable to foresee in drafting this proposal. Section
39 1138 may provide a means of protecting against inequities that might otherwise result,
40 particularly if it is broadened to be a general escape hatch.

41 At this point in the Commission's study, another way of dealing with the possible need for
42 additional exceptions would be to omit Section 1138 from the tentative recommendation, but
43 include a note soliciting suggestions on whether any further exceptions to Section 1132 are
44 necessary. The staff is inclined towards that direct approach.

45 **§ 1139. Least intrusive means**

46 1139. (a) If a court admits evidence of an act of compromise, or any conduct or
47 statement made for the purpose of, or in the course of, or pursuant to negotiation

1 of an act of compromise, it shall admit only as much of that evidence as is
2 necessary under the circumstances.

3 (b) If a court allows discovery of an act of compromise, or any conduct or
4 statement made for the purpose of, or in the course of, or pursuant to negotiation
5 of an act of compromise, it shall allow only as much of that discovery as is
6 necessary under the circumstances.

7 **Comment.** To prevent unnecessary chilling of settlement negotiations, Section 1139 requires a
8 court admitting or allowing discovery of compromise evidence to do so in the least invasive
9 manner that will suffice in the particular circumstances of the case. For example, if the evidence
10 is offered to rebut a defense of laches, it may only be necessary to admit evidence that ongoing,
11 potentially productive settlement negotiations occurred, without getting into the details of those
12 negotiations. *See* Leonard, *The New Wigmore: A Treatise on Evidence, Selected Rules of Limited*
13 *Admissibility* 3:145-3:146 (1996).

14 ☞ **Staff Note.** The State Bar Litigation Section (First Supp. to Mem. 96-59, Exhibit pp. 2-3) and
15 Committee on Administration of Justice (see Exhibit p.3) urge the Commission to rework this
16 provision:

17 Proposed section 1139 uses the word “necessary.” That word is too subjective in this
18 context. The quantum of evidence considered necessary to convince a trier of fact will vary
19 widely between cases, between triers of fact, and between advocates. Use of that word creates
20 a very substantial risk that evidence may be excluded which would be relevant and might
21 have helped a proponent satisfy the proponent’s burden of proof. If it is retained in the next
22 draft, the concept of “least intrusive means” should be reworked and made more explicit.

23 Neither State Bar group suggests alternative language or proposes a specific approach. The staff
24 is open to the idea of reworking Section 1138, but recommends against dropping the concept of
25 least intrusive means altogether.

26 The preliminary part (page 8) states that “if a court admits compromise evidence, it should
27 recognize and attempt to minimize the potential negative impact on achievement of settlements
28 and perceptions of fairness.” Perhaps some language along these lines would be preferable to the
29 current wording of Section 1138.

30 **Heading of Chapter 2 (commencing with Section 1150) (amended)**

31 SEC. __. The heading of Chapter 2 (commencing with Section 1150) of Division
32 9 of the Evidence Code is amended to read:

33 CHAPTER 2 3. OTHER EVIDENCE AFFECTED OR EXCLUDED BY
34 EXTRINSIC POLICIES

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

36 SEC. __. Section 1152 of the Evidence Code is repealed.

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

1 ~~(b) In the event that evidence of an offer to compromise is admitted in an action~~
2 ~~for breach of the covenant of good faith and fair dealing or violation of subdivision~~
3 ~~(h) of Section 790.03 of the Insurance Code, then at the request of the party~~
4 ~~against whom the evidence is admitted, or at the request of the party who made the~~
5 ~~offer to compromise that was admitted, evidence relating to any other offer or~~
6 ~~counteroffer to compromise the same or substantially the same claimed loss or~~
7 ~~damage shall also be admissible for the same purpose as the initial evidence~~
8 ~~regarding settlement. Other than as may be admitted in an action for breach of the~~
9 ~~covenant of good faith and fair dealing or violation of subdivision (h) of Section~~
10 ~~790.03 of the Insurance Code, evidence of settlement offers shall not be admitted~~
11 ~~in a motion for a new trial, in any proceeding involving an additur or remittitur, or~~
12 ~~on appeal.~~

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

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

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

20 **Comment.** Former Section 1152 is superseded by Sections 1130-1139 (settlement
21 negotiations), 1152 (payment of medical or similar expenses).

22 **Evid. Code § 1152 (added). Payment of medical or similar expenses**

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

24 1152. Evidence of furnishing or offering or promising to pay medical, hospital,
25 or similar expenses occasioned by an injury is not admissible to prove liability for
26 the injury.

27 **Comment.** Section 1152 is drawn from Federal Rule of Evidence 409. As to humanitarian
28 conduct, it supersedes former Section 1152. For protection of an act of compromise, see Section
29 1132 (protection of act of compromise). For evidentiary protection of plea bargaining, see
30 Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of
31 crimes against property). For settlement of an administrative adjudication, see Government Code
32 § 11415.60 (operative July 1, 1997), as amended by 1996 Cal. Stat. ch. 390, § 7.

33 ☞ **Staff Note.** Proposed Section 1152 is taken verbatim from Federal Rule of Evidence 409. The
34 staff was unable to find any cases interpreting the “humanitarian conduct” aspect of Section 1152.
35 At this point, it tends to agree with Professor Leonard that a “simple rule such as FRE 409” will
36 suffice. (Second Supp. to Mem. 96-59, Exhibit p. 2.)

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

38 SEC. __. Section 1154 of the Evidence Code is repealed.

39 ~~1154. Evidence that a person has accepted or offered or promised to accept a~~
40 ~~sum of money or any other thing, act, or service in satisfaction of a claim, as well~~
41 ~~as any conduct or statements made in negotiation thereof, is inadmissible to prove~~
42 ~~the invalidity of the claim or any part of it.~~

1 **Comment.** Former Section 1154 is superseded by Sections 1130-1139 (settlement
2 negotiations).

3 CONFORMING REVISIONS

4 **Civ. Code. § 1782 (amended). Prerequisites**

5 SEC. __. Section 1782 of the Civil Code is amended, to read:

6 1782. (a) Thirty days or more prior to the commencement of an action for
7 damages pursuant to the provisions of this title, the consumer shall do the
8 following:

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

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

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

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

22 (c) No action for damages may be maintained under the provisions of Section
23 1781 upon a showing by a person alleged to have employed or committed
24 methods, acts or practices declared unlawful by Section 1770 that all of the
25 following exist:

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

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

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

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

36 (d) An action for injunctive relief brought under the specific provisions of
37 Section 1770 may be commenced without compliance with the provisions of
38 subdivision (a). Not less than 30 days after the commencement of an action for
39 injunctive relief, and after compliance with the provisions of subdivision (a), the
40 consumer may amend his the complaint without leave of court to include a request

1 for damages. The appropriate provisions of subdivision (b) or (c) shall be
2 applicable if the complaint for injunctive relief is amended to request damages.

3 (e) Attempts to comply with the provisions of this section by a person receiving
4 a demand shall be construed to be an offer to compromise and shall be
5 inadmissible as evidence pursuant to ~~Section 1152 of the Evidence Code~~ act of
6 compromise under Chapter 2 (commencing with Section 1130) of Division 9 of
7 the Evidence Code; furthermore, such attempts to comply with a demand shall not
8 be considered an admission of engaging in an act or practice declared unlawful by
9 Section 1770. Evidence of compliance or attempts to comply with the provisions
10 of this section may be introduced by a defendant for the purpose of establishing
11 good faith or to show compliance with the provisions of this section.

12 **Comment.** Subdivision (e) of Section 1782 is amended to reflect the repeal of former Evidence
13 Code Section 1152 and the addition of new Evidence Code provisions protecting settlement
14 negotiations. See Evid. Code §§ 1130-1139 (settlement negotiations).

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

16 SEC. __. Section 1775.10 of the Code of Civil Procedure is amended, to read:

17 1775.10. All statements made by the parties during the mediation shall be
18 subject to ~~Sections 1152 and 1152.5~~ Section 1152.5 and Chapter 2 (commencing
19 with Section 1130) of Division 9 of the Evidence Code.

20 **Comment.** Section 1775.10 is amended to reflect the repeal of former Evidence Code Section
21 1152 and the addition of new Evidence Code provisions protecting settlement negotiations. See
22 Evid. Code §§ 1130-1139 (settlement negotiations).

23 **Evid. Code § 822 (amended). Matter upon which opinion may not be based**

24 SEC. __. Section 822 of the Evidence Code is amended, to read:

25 822. (a) In an eminent domain or inverse condemnation proceeding,
26 notwithstanding the provisions of Sections 814 to 821, inclusive, the following
27 matter is inadmissible as evidence and shall not be taken into account as a basis for
28 an opinion as to the value of property:

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

36 (2) The price at which an offer or option to purchase or lease the property or
37 property interest being valued or any other property was made, or the price at
38 which such property or interest was optioned, offered, or listed for sale or lease,
39 except that an option, offer, or listing may be introduced by a party as an
40 admission of another party to the proceeding; but nothing in this subdivision
41 makes admissible evidence that is inadmissible under Chapter 2 (commencing
42 with Section 1130) of Division 9, or permits an admission to be used as direct

1 evidence upon any matter that may be shown only by opinion evidence under
2 Section 813.

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

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

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

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

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

19 (c) The amendments made to this section during the 1987 portion of the 1987-
20 1988 Regular Session of the Legislature shall not apply to or affect any petition
21 filed pursuant to this section before January 1, 1988.

22 **Comment.** Section 822(a)(2) is amended to explicitly address its interrelationship with the
23 exclusionary rule for settlement negotiations. See *People ex rel. Dep't of Public Works v.*
24 *Southern Pacific Transportation Co.*, 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973)
25 (reconciling Section 822 with former Evidence Code Section 1152).

26 ☞ **Staff Note.** In *People ex rel. Dep't of Public Works v. Southern Pacific Transportation Co.*,
27 33 Cal. App. 3d 960, 968-69, 109 Cal. Rptr. 525 (1973), the court examined the relationship
28 between Government Code Section 822(a)(2) and Evidence Code Section 1152. It concluded:

29 There is an inherent conflict between Evidence Code Sections 822 and 1152 if each is
30 construed to its broadest scope. An offer to purchase property which is about to become the
31 subject of an eminent domain proceeding could be an offer by a party within the meaning of
32 section 821 and admissible as a limited admission although made in the course of settlement
33 negotiations. Section 1152 would bar such evidence.

34 The two sections are reconcilable only if offers in the course of efforts to settle eminent
35 domain proceedings are treated as any other settlement offers and barred from evidence by
36 section 1152. Policy considerations compel the same result. Where evidence is generally
37 inadmissible based upon strong public policy, it is admissible pursuant to an exception to the
38 generality only if its probative value outweighs the policy considerations for its exclusion.
39 Offers of compromise and statements made in the course of settlement negotiations are
40 barred from evidence to promote the high public policy of encouraging settlement of
41 lawsuits including those in eminent domain. Conversely, the evidentiary effect of an offer to
42 purchase property made by a party to an eminent domain proceeding is so circumscribed as
43 to give it little probative value.

44 We thus conclude that the trial court erred in receiving evidence of condemner's offer in
45 compromise to purchase the subject property.

46 [*Id.* at 969 (citations omitted).]

1 The above amendment of Section 822(a)(2) would clarify the provision's interrelationship with
2 the exclusionary rule for settlement negotiations, and would essentially codify the result in *People*
3 *ex rel. Dep't of Public Works v. Southern Pac. Tran. Co.* The staff believes that this clarification
4 would be helpful. If anyone has different thoughts, please bring them to the Commission's
5 attention. The staff does not plan to raise this point.

6 **Evid. Code § 1152.5 (amended). Mediation confidentiality**

7 SEC. __. Section 1152.5 of the Evidence Code is amended, to read:

8 1152.5. (a) When a person consults a mediator or mediation service for the
9 purpose of retaining the mediator or mediation service, or when persons agree to
10 conduct and participate in a mediation for the purpose of compromising, settling,
11 or resolving a dispute in whole or in part:

12 (1) Except as otherwise provided in this section, evidence of anything said or of
13 any admission made in the course of a consultation for mediation services or in the
14 course of the mediation is not admissible in evidence or subject to discovery, and
15 disclosure of this evidence shall not be compelled, in any civil action or
16 proceeding in which, pursuant to law, testimony can be compelled to be given.

17 (2) Except as otherwise provided in this section, unless the document otherwise
18 provides, no document prepared for the purpose of, or in the course of, or pursuant
19 to, the mediation, or copy thereof, is admissible in evidence or subject to
20 discovery, and disclosure of such a document shall not be compelled, in any civil
21 action or proceeding in which, pursuant to law, testimony can be compelled to be
22 given.

23 (3) When a person consults a mediator or mediation service for the purpose of
24 retaining the mediator or mediation service, or when persons agree to conduct or
25 participate in mediation for the sole purpose of compromising, settling, or
26 resolving a dispute, in whole or in part, all communications, negotiations, or
27 settlement discussions by and between participants or mediators in the course of a
28 consultation for mediation services or in the mediation shall remain confidential.

29 (4) All or part of a communication or document which may be otherwise
30 privileged or confidential may be disclosed if all parties who conduct or otherwise
31 participate in a mediation so consent.

32 (5) A written settlement agreement, or part thereof, is admissible to show fraud,
33 duress, or illegality if relevant to an issue in dispute.

34 (6) Evidence otherwise admissible or subject to discovery outside of mediation
35 shall not be or become inadmissible or protected from disclosure solely by reason
36 of its introduction or use in a mediation.

37 (b) This section does not apply where the admissibility of the evidence is
38 governed by Section 1818 or 3177 of the Family Code.

39 (c) ~~Nothing in this section makes admissible evidence that is inadmissible under~~
40 ~~Section 1152 or any other statutory provision, including, but not limited to, the~~
41 ~~sections listed in subdivision (d) Chapter 2 (commencing with Section 1130) of~~
42 Division 9 or any other statutory provision. Nothing in this section limits the
43 confidentiality provided pursuant to Section 65 of the Labor Code.

1 (d) If the testimony of a mediator is sought to be compelled in any action or
2 proceeding as to anything said or any admission made in the course of a
3 consultation for mediation services or in the course of the mediation that is
4 inadmissible and not subject to disclosure under this section, the court shall award
5 reasonable attorney's fees and costs to the mediator against the person or persons
6 seeking that testimony.

7 (e) Paragraph (2) of subdivision (a) does not limit the effect of an agreement not
8 to take a default in a pending civil action.

9 **Comment.** Subdivision (c) of Section 1152.5 is amended to reflect the repeal of former Section
10 1152 and the addition of new provisions protecting settlement negotiations. See Sections 1130-
11 1139 (settlement negotiations).

12 ☞ **Staff Note.** This amendment does not reflect any of the Commission's proposed reforms
13 relating to mediation confidentiality. As this project and the Commission's interrelated work on
14 mediation confidentiality progress, they will need to be coordinated. See the discussion in
15 Memorandum 96-59.

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

17 SEC. __. Section 11415.60 of the Government Code is amended, to read:

18 11415.60. (a) An agency may formulate and issue a decision by settlement,
19 pursuant to an agreement of the parties, without conducting an adjudicative
20 proceeding. Subject to subdivision (c), the settlement may be on any terms the
21 parties determine are appropriate. Notwithstanding any other provision of law, no
22 evidence of an offer of compromise or settlement made in settlement negotiations
23 is admissible in an adjudicative proceeding or civil action, whether as affirmative
24 evidence, by way of impeachment, or for any other purpose, and no evidence of
25 conduct or statements made in settlement negotiations is admissible to prove
26 liability for any loss or damage except to the extent provided in ~~Section 1152~~
27 Chapter 2 (commencing with Section 1130) of Division 9 of the Evidence Code.
28 Nothing in this subdivision makes inadmissible any public document created by a
29 public agency.

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

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

39 **Comment.** Section 11415.60 is amended to reflect the repeal of former Evidence Code Section
40 1152 and the addition of new provisions protecting settlement negotiations. See Evid. Code §§
41 1130-1139 (settlement negotiations).

1 **Uncodified (added). Operative date**

2 SEC. __. (a) This act is operative on January 1, 1999.

3 (b) This act applies in an action or proceeding commenced before, on, or after
4 January 1, 1999.

5 (c) Nothing in this act invalidates an evidentiary determination made before
6 January 1, 1999, overruling an objection based on Section 1152 of the Evidence
7 Code. However, if an action or proceeding is pending on January 1, 1999, the
8 objecting party may, on or after January 1, 1999, and before entry of judgment in
9 the action or proceeding, make a new request for exclusion of the evidence on the
10 basis of this act.
