#K-410

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

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 **October 31, 1997.**

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
650-494-1335 FAX: 650-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

The California Law Revision Commission recommends reform of evidentiary provisions governing the admissibility of negotiations to settle a civil case (Evidence Code Sections 1152 and 1154). The proposal seeks to foster productive settlement negotiations by making offers of compromise and other settlement overtures generally inadmissible against the person seeking to compromise. It would also add an explicit statutory standard providing protection against discovery of such evidence in specified circumstances.

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

PROTECTING SETTLEMENT NEGOTIATIONS

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

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

EXISTING LAW

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

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

For evidentiary protection of plea bargaining, see Sections 1153 (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 Gov't Code § 11415.60.

2. Section 1152.5 is the principal statute governing mediation confidentiality. See also Sections 703.5 (mediator competency to testify), 1152.6 (declarations or findings by a mediator). A pending bill drafted by the Law Revision Commission would relocate and revise these provisions. See Assembly Bill 939 (Ortiz, Ackerman). See also *Mediation Confidentiality*, 26 Cal. L. Revision Comm'n Reports 407 (1996).

The protection for settlement negotiations recommended in this proposal is not as strong as the protection for mediation communications in either existing law or the pending bill. 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.

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

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

The second provision, Section 1154, prohibits disproof of a claim through an offer to discount 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.

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

Neither Section 1152 nor Section 1154 expressly addresses the discoverability of a settlement discussion.[7] Case authority on whether existing law restricts

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

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

> (b) In the event that evidence of an offer to compromise is admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.03 of the Insurance Code, then at the request of the party against whom the evidence is admitted, or at the request of the party who made the offer to compromise that was admitted, evidence relating to any other offer or counteroffer to compromise the same or substantially the same claimed loss or damage shall also be admissible for the same purpose as the initial evidence regarding settlement. Other than as may be admitted in an action for breach of the covenant of good faith and fair dealing or violation of subdivision (h) of Section 790.3 of the Insurance Code, evidence of settlement offers shall not be admitted in a motion for a new trial, in any proceeding involving additur or remittitur, or on appeal.
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> (c) This section does not affect the admissibility of evidence of any of the following:
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> (1) Partial satisfaction of an asserted claim or demand without questioning its validity when such evidence is offered to prove the validity of the claim.
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> (2) A debtor's payment or promise to pay all or a part of his or her preexisting debt when such evidence is offered to prove the creation of a new duty on his or her part or a revival of his or her preexisting duty.

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

[6]. *See, e.g.*, California Physicians' Service v. Superior Court, 9 Cal. App. 4th 1321, 1327, 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 (mediation confidentiality) expressly addresses both the admissibility and the discoverability of mediation communications.

discovery of offers to compromise, offers to discount a claim, and associated conduct and statements (hereinafter, "evidence of settlement negotiations") is sparse and ambiguous.[8]

ARGUMENTS FOR PROTECTING SETTLEMENT NEGOTIATIONS

Arguments for evidentiary protection of settlement negotiations include the public policy of promoting settlements, fairness, and relevancy.[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 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]

Fairness

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

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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 L.J. 955, 1002 (1988).

9. Another rationale, known as the contract theory, holds that a settlement offer is inadmissible because it is a promise without consideration. This theory has never gained acceptance in the United States and "has little merit." D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.3.1, at 3:26-27 (1996).

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 ("this general rationale has for many years been widely supported by the commentators as the primary justification for the exclusionary rule and the cases following that view are legion").

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

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

13. Leonard, *supra* note 9, § 3.3.4, at 3:35-36. 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).

Relevancy

The relevancy theory holds that courts should exclude evidence of settlement negotiations because such evidence 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. The argument does not support exclusion of statements made in settlement negotiations.[16] Thus, the relevancy theory is not independently sufficient to justify provisions such as Sections 1152 and 1154.[17] To some extent, however, it supplements the other rationales for excluding evidence of settlement negotiations.

PROBLEMS WITH EXISTING LAW

The fairness rationale and public policy of promoting settlements justify protection of settlement discussions, but provisions like Sections 1152 and 1154 do not fully achieve that goal.

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

Candor is often crucial in a settlement discussion and assurance of confidentiality is usually essential to candor.[21] Under Sections 1152 and 1154,

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14. J. Wigmore, Evidence in Trials at Common Law § 1061(c), at 36 (J. Chadbourn ed. 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. Louisell & Mueller, Federal Evidence § 171, at 454 (1985).

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

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

18. *See, e.g.*, Neary v. Regents of University of California, 3 Cal. 4th 275, 278, 834 P.2d 119, 10 Cal. Rptr. 2d 859 (1992); Leonard, *supra* note 9, § 3.1, at 3:2-3 & 3:2 n.2.

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

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

21. *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.

such assurance is limited, because evidence of settlement negotiations is admissible for any purpose except proving or disproving liability.[22]

Misconceptions about the extent of 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.[23] The consequences can be severe. A party's admission in settlement negotiations, made on the assumption that it would be inadmissible, may become critical evidence against the party at trial and may later be the basis of a malpractice claim.

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. Frequently, this is the motive for introducing such evidence.[24] Regardless of whether a party offers evidence of settlement negotiations disingenuously, admitting such evidence can result in distortion of the litigation process and injustice.

RECOMMENDATIONS

Balancing the competing considerations in protecting evidence of settlement negotiations is a delicate endeavor. The detriments of excluding potentially relevant evidence must be weighed against the benefits of fairness and promoting settlement.[25] To effectively achieve these benefits, the Commission recommends the following reforms:

Purposes for Introducing Evidence of Settlement Negotiations

As a general rule, evidence of settlement negotiations should be inadmissible against the person seeking to compromise. This will encourage openness and

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[22]. *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 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.

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

[24]. 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).

[25]. *See generally* Leonard, *supra* note 9, § 3.4, at 3:44.

enhance rationality in settlement negotiations, and be fairer than existing law, because a person could not be penalized for offering to settle.

This general rule should be subject to a number of exceptions. In each of the following situations, if a court admits evidence of settlement negotiations, it should recognize and attempt to minimize the potential negative impact on achievement of settlements and perceptions of fairness.

Partial satisfaction of undisputed claim or acknowledgment of preexisting debt. Evidence of partially satisfying a claim without questioning its validity may be admissible if that evidence is offered to prove the validity of the claim.[26] Similarly, a debtor's payment or promise to pay all or part of a preexisting debt may be admissible when a party offers that evidence to prove the creation of a new duty or revival of the debtor's preexisting duty.[27] 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.

Misconduct. Evidence of settlement negotiations should be admissible to show, or to rebut a contention of, misconduct or irregularity in the negotiations. The public policy favoring settlement has limited force as to settlements and settlement overtures that involve illegality or other misconduct or irregularity.[28]

Obtaining benefits of settlement. Evidence of a settlement should be admissible to bar reassertion of a claim or enforce the settlement. This exception is essential if parties are to enjoy the benefits of settling a dispute.[29] Conversely, evidence of settlement negotiations should be admissible to rebut an attempt to enforce a settlement, as by showing that there was no settlement.

Good faith. Evidence of settlement negotiations should be admissible to prove or disprove the good faith of a settlement. This exception follows from the rule that a good faith settlement between a plaintiff and a joint tortfeasor or co-obligor bars "any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault."[30]

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[26]. Section 1152(c)(1).

[27]. Section 1152(c)(2).

[28]. *See generally* Leonard, *supra* note 9, § 3.7.4, 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.").

[29]. *See generally id.*, § 3.8.1, at 3:120-22 ("[T]he law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").

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

Sliding scale recovery. A sliding scale recovery agreement is 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.[31] If the first defendant testifies at trial, the testimony may affect how much that defendant has to pay. The potential effect may consciously or subconsciously influence the defendant's testimony. Because of the danger of bias, evidence of a sliding scale recovery agreement should be admissible, but only if a defendant party to the agreement testifies and the evidence is introduced to show bias of that defendant.[32]

Discoverability of Settlement Discussions

Because Sections 1152 and 1154 only bar use of compromise evidence on the issue of liability, counsel can readily argue for discovery of such evidence on the ground that it may be admissible for some other purpose.[33] But any potential intrusion on confidentiality, whether in trial or in discovery, may inhibit settlement discussions.

To effectively serve the goal of promoting settlement, the proposed law would establish a standard for obtaining discovery of settlement negotiations. Under the new standard, such evidence would be subject to discovery only if all of the following conditions are satisfied:

> (1) The party requesting disclosure makes a specific showing of a substantial likelihood that the disclosure will lead to the discovery of admissible evidence.
>
> (2) The request for disclosure is not unreasonably cumulative or duplicative.
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> (3) The requested information is not obtainable from another source that is more convenient, less burdensome, less expensive, or less intrusive on settlement negotiations.
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> (4) The likely benefit of the proposed discovery outweighs its burden and expense, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.
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> (5) Discovery is otherwise authorized by law.

These requirements will provide significant protection from discovery, especially in light of the rule making evidence of settlement negotiations generally inadmissible.

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31. Code Civ. Proc. § 877.5(b).

32. 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.
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> The jury disclosure herein required shall be no more than necessary to inform the jury of the possibility that the agreement may bias the testimony of the witness.

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

Settlement agreements, as opposed to settlement offers and associated negotiations, present special considerations. For example, suppose a manufacturing plant allegedly emits a hazardous chemical and a nearby resident sues for resultant injuries. If the manufacturer and the victim enter into a purportedly confidential settlement agreement, it may be important to resolve whether other persons, particularly other victims or potential victims, are entitled to disclosure of the agreement. Such issues are controversial[34] and this proposal does not address them. The new standard for discovery of settlement negotiations would not apply to discovery of settlement agreements.

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

Application to Criminal Cases

Sections 1152 and 1154 do not expressly state whether evidence of efforts to compromise a civil case is inadmissible only for purposes of proving civil liability, or also for purposes of a criminal prosecution. This is a very different question from whether to provide evidentiary protection for efforts to compromise a criminal case (i.e., plea bargaining). The latter issue is explicitly covered to some extent by other provisions[35] and is not encompassed in this proposal.[36]

Case law on invoking Section 1152 or 1154 to exclude evidence in a criminal case suggests that the provisions do not apply in a criminal case.[37] The statutory references to proving "liability for the loss or damage" (Section 1152) and "invalidity of the claim" (Section 1154) tend to support that interpretation, because such nomenclature is usually used in the civil and not the criminal context.[38]

Where the same conduct is subject to both civil and criminal prosecution, however, the defendant will be reluctant to engage in efforts to compromise the

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34. *See, e.g.*, Senate Bill 701, introduced by Senator Lockyer in 1991. The Legislature passed the bill but the Governor vetoed it.

35. See Sections 1153, 1153.5.

36. See proposed Section 1130 (application of chapter), *infra*.

37. See People v. Muniz, 213 Cal. App. 3d 1508, 1515, 262 Cal. Rptr. 743 (1989), in which 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 use read into the statute the word "criminal" as an alternative modifier for liability yet offers no reason for use 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. See also Manko v. United States, 87 F.3d 50 (2d Cir. 1996) (Federal Rule 408 "does not exclude relevant evidence in a criminal prosecution even where that evidence relates to the settlement of a civil claim"); United States v. Prewitt, 34 F.3d 436 (7th Cir. 1994) (Federal Rule 408 "should not be applied to criminal cases").

38. *See, e.g.*, D. Leonard, *supra* note 9, § 3.7.3, at 3:94-95 & 3:95 nn. 114-15; 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure: Evidence § 5306, at 217 (1980).

civil case, if evidence of those efforts will be admissible in the criminal case. As a result, resolution of the victim's suit for restitution or other relief may be delayed until after the defendant's assets are depleted by defending against the criminal charges. The victim's quest for relief becomes a fruitless expenditure of personal and judicial resources.

The proposed legislation would address this problem by making the new restrictions on admissibility and discoverability of efforts to compromise a civil case applicable in criminal actions, as well as in noncriminal proceedings. The restrictions would not apply, however, to settlement negotiations amounting to an obstruction of justice (e.g., an offer to pay civil damages to a rape victim in exchange for false testimony in the criminal case).[39]

The Commission recognizes that extending the new rules to the criminal context calls for consideration of 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."[40] This requirement is not absolute.[41] In particular, the Legislature may establish exceptions by a two-thirds vote.[42] The Legislature should exercise that authority here, because the proposed rules on admissibility and discoverability of settlement negotiations are consistent with, and would promote, a fundamental purpose of the Victims' Bill of Rights: protecting the restitutionary interests of crime victims.[43]

Humanitarian Conduct

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

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39. There is scholarly support for this approach. *See* D. Leonard, *supra* note 9, § 3.7.3, at 3:88-97 & 3:96 nn. 120, 122. *See also* C. Mueller & L. Kirkpatrick, Federal Evidence § 135, at 91, § 138 at 104-07 & 105 n. 17 (2d ed. 1994); 2 J. Weinstein & M. Berger, Weinstein's Evidence 408[01], at 408-17; 23 Wright & Graham, *supra* note 38, § 5306, at 217. Federal Rule of Evidence 408 expressly states that exclusion of compromise evidence is not required when the evidence is offered to prove "an effort to obstruct a criminal investigation or prosecution." Cases construing that rule may provide guidance in interpreting the proposed legislation.

40. Cal. Const. art. I, § 28(d).

41. The Truth-in-Evidence provision 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." Cal. Const. art. I, § 28(d).

42. *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. The requirement may apply to the proposed provision on the extent to which settlement negotiations are discoverable in a criminal case.

43. *See* Cal. Const. art. I, § 28 (a)-(b); *see also* Cal. Ballot Pamphlet 34 (June 8, 1982).

covering such conduct in a separate provision, as in the Federal Rules of Evidence.[44]

The proposed provision would make evidence of "furnishing or offering or promising to pay medical, hospital, or other expenses occasioned by an injury" inadmissible to prove liability for the injury.[45] The rule would not extend to associated conduct or statements, because they are likely to be incidental, not in furtherance of the offer.[46]

Overall Approach

The proposed law would add a new Section 1152 on humanitarian conduct. The provisions on settlement negotiations would be a new chapter of the Evidence Code.[47] These reforms would help eliminate court congestion, promote peaceable resolution of disputes, and make the legal system more fair and just.

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[44]. See Fed. R. Evid. 409.

[45]. This is similar to the language in Rule 409 of the Federal Rules of Evidence.

[46]. 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.

[47]. This recommendation does not attempt to define the scope of statutorily protected settlement negotiations more clearly than under existing law. There are issues such as how much of a controversy is necessary to trigger the statutory protection. *See generally* Brazil, *supra* note 8, at 960-66; Leonard, *supra* note 9, § 3.7.2, at 3:74-87. Issues like this may be the subject of future study.

PROPOSED LEGISLATION

Evid. Code §§ 1130-1140 (added). Settlement negotiations

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

CHAPTER 2. SETTLEMENT NEGOTIATIONS

§ 1130. Application of chapter

1130. (a) This chapter governs the admissibility and discoverability of "settlement negotiations," which are negotiations to settle a pending or prospective civil case. As used in this chapter, "settlement negotiations" means any of the following:

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

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

(3) Conduct or statements made for the purpose of, or in the course of, or pursuant to negotiation of an action described in paragraph (1) or (2), regardless of whether a settlement is reached or an action included in paragraph (1) or (2) occurs.

(b) This chapter does not apply to plea bargaining. This chapter does not affect the admissibility or discoverability of evidence of an effort to obstruct a criminal investigation or prosecution, regardless of whether that effort may also be "settlement negotiations" within the meaning of subdivision (a).

Comment. Section 1130 states the scope of this chapter. The chapter encompasses, but is not limited to, judicially-supervised settlement negotiations in a civil case, such as a settlement conference pursuant to California Rule of Court 222.

Subdivision (a)(1) of Section 1130, coupled with subdivision (a)(3), is comparable to former Section 1152. Subdivision (a)(2), coupled with subdivision (a)(3), is comparable to former Section 1154. For protection of settlement negotiations, see Sections 1131 (admissibility and discoverability in noncriminal proceeding), 1132 (admissibility and discoverability in criminal action).

As subdivision (b) recognizes, evidentiary protection of plea bargaining, is covered by other provisions. See Sections 1153 (offer to plead guilty or withdrawn guilty plea), 1153.5 (offer for civil resolution of crimes against property). Where a civil case is related to a criminal prosecution, negotiations to settle the civil case are within the scope of this chapter, but the chapter does not apply to 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). This limitation is drawn from Rule 408 of the Federal Rules of Evidence. For background, see D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.7.3, at 3:91-97 (1996).

For settlement of an administrative adjudication, see Gov't Code § 11415.60. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152.

§ 1131. Admissibility and discoverability in noncriminal proceeding

1131. Except as otherwise provided by statute, in a civil case, administrative adjudication, arbitration, or other noncriminal proceeding, the following rules apply:

(a) Evidence of settlement negotiations is not admissible against the person attempting to compromise.

(b) Evidence of settlement negotiations is not subject to discovery, and disclosure of the evidence may not be compelled, unless all of the following conditions are satisfied:

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

(2) The request for disclosure is not unreasonably cumulative or duplicative.

(3) The requested information is not obtainable from another source that is more convenient, less burdensome, less expensive, or less intrusive on settlement negotiations.

(4) The likely benefit of the proposed discovery outweighs its burden and expense, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(5) Discovery is otherwise authorized by law.

Comment. Section 1131 supersedes former Sections 1152(a) and 1154, which made evidence of a settlement negotiation inadmissible for the purpose of proving invalidity of the claim, but not for other purposes. To preclude abuse and foster greater candor in settlement negotiations, Section 1131 eliminates that distinction in civil cases. See also Section 1132 (admissibility and discoverability in criminal action).

Under subdivision (a) of this section, evidence of settlement negotiations in a pending or prospective civil case is inadmissible in a subsequent noncriminal proceeding, but only if the evidence is offered against the party who attempted to compromise. For exceptions, see Sections 1133 (evidence otherwise admissible or subject to discovery), 1135 (partial satisfaction of undisputed claim or acknowledgment of preexisting debt), 1136 (misconduct or irregularity), 1137 (obtaining benefits of settlement), 1138 (good faith), 1139 (sliding scale recovery agreement). Evidence satisfying one or more of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, including the balancing test of Section 352. See also Section 1140 (extent of evidence admitted).

Subdivision (b) is drawn in part from Rule 26(b)(2) of the Federal Rules of Civil Procedure. Consistent with the underlying rationale of promoting out-of-court settlement, subdivision (b) establishes a heightened threshold for civil discovery of settlement negotiations. Subdivision (b) does not protect evidence of attempting to compromise a criminal case. See Section 1130 (application of chapter). For exceptions to Section 1131(b), see Sections 1133 (evidence otherwise admissible or subject to disclosure) and 1134 (discovery of settlement agreement).

For guidance on whether settlement negotiations in a civil case are admissible or discoverable in a subsequent criminal action, see Section 1132. 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 Gov't Code § 11415.60. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152 (payment of medical or other expenses).

§ 1132. Admissibility and discoverability in criminal action

1132. Except as otherwise provided by statute, in a criminal action the following rules apply:

(a) Evidence of settlement negotiations is not admissible against the person attempting to compromise.

(b) Evidence of settlement negotiations is not subject to discovery, and disclosure of the evidence may not be compelled, unless all of the following conditions are satisfied:

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

(2) The request for disclosure is not unreasonably cumulative or duplicative.

(3) The requested information is not obtainable from another source that is more convenient, less burdensome, less expensive, or less intrusive on settlement negotiations.

(4) The likely benefit of the proposed discovery outweighs its burden and expense, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

(5) Discovery is otherwise authorized by law.

Comment. Under subdivision (a) of Section 1132, evidence of settlement negotiations in a pending or prospective civil case is inadmissible in a subsequent criminal action, but only if the evidence is offered against the party who attempted to compromise. For exceptions to Section 1132(a), see Sections 1134 (evidence otherwise admissible or subject to discovery), 1135 (partial satisfaction of undisputed claim or acknowledgment of preexisting debt), 1136 (misconduct or irregularity), 1137 (obtaining benefits of settlement), 1138 (good faith), 1139 (sliding scale recovery agreement). Evidence satisfying one (or more) of these exceptions is not necessarily admissible. It may still be subject to exclusion under other rules, including the balancing test of Section 352. See also Section 1140 (extent of evidence admitted).

Subdivision (b) is drawn in part from Rule 26(b)(2) of the Federal Rules of Evidence. Consistent with the underlying rationale of promoting out-of-court settlement, subdivision (b) establishes a heightened threshold for criminal discovery of settlement negotiations. Section 1132(b) does not protect evidence of attempting to compromise a criminal case. See Section 1130 (application of chapter). For exceptions to Section 1132(b), see Sections 1133 (evidence otherwise admissible or subject to disclosure) and 1134 (discovery of settlement agreement).

See Sections 130 ("criminal action" includes criminal proceedings), 1130 (application of chapter). For guidance on whether settlement negotiations in a civil case are admissible or discoverable in a subsequent noncriminal proceeding, see Section 1131 (admissibility and discoverability in noncriminal proceeding). 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 Gov't Code § 11415.60. For a provision on paying medical expenses or offering or promising to pay such expenses, see Section 1152 (payment of medical or other expenses).

§ 1133. Evidence otherwise admissible or subject to discovery

1133. Evidence otherwise admissible or subject to discovery independent of a settlement negotiation is not inadmissible or protected from disclosure under Section 1131 or 1132 solely by reason of its introduction or use in the negotiation.

Comment. Section 1133 is drawn from Section 1152.5(a)(6) and Federal Rule of Evidence 408. See Section 1130 (application of chapter).

§ 1134. Discovery of settlement agreement

1134. Sections 1131 and 1132 do not affect the right, if any, to discovery of a settlement agreement.

Comment. Section 1134 makes clear that although Sections 1131 and 1132 restrict discovery of settlement negotiations, those provisions do not apply to discovery of a settlement agreement and thus do not affect whether and to what extent the existence and terms of such an agreement may be kept confidential.

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

1135. Sections 1131 and 1132 do not affect the admissibility of either of the following:

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

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

Comment. Subdivision (a) of Section 1135 continues former Section 1152(c)(1) without substantive change. Subdivision (b) continues former Section 1152(c)(2) without substantive change.

§ 1136. Misconduct or irregularity

1136. Evidence of settlement negotiations is not inadmissible under Section 1131 or 1132 where the evidence is introduced to show, or to rebut a contention of, fraud, duress, illegality, mistake, malpractice, libel, breach of the covenant of good faith and fair dealing, or other misconduct or irregularity in the negotiations.

Comment. Section 1136 recognizes that the public policy favoring settlement agreements has limited force with regard to settlement agreements and offers that derive from or involve illegality or other misconduct or irregularity. See D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.7.4, at 3:97 (1996) ("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.").

See Section 1130 (application of chapter). See also Section 1140 (extent of evidence admitted).

§ 1137. Obtaining benefits of settlement

1137. Evidence of settlement negotiations is not inadmissible under Section 1131 or 1132 where either of the following conditions is satisfied:

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

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

Comment. Section 1137 seeks to ensure that parties enjoy the benefits of settling a dispute. For background, see generally D. Leonard, The New Wigmore: A Treatise on Evidence, *Selected Rules of Limited Admissibility* § 3.8.1, at 3:120-22 (1996) ("the law would hardly encourage compromise by adopting an evidentiary rule essentially making proof of the compromise agreement impossible.").

See Section 1130 (application of chapter). See also Section 1140 (extent of evidence admitted).

§ 1138. Good faith

1138. Evidence of settlement negotiations is not inadmissible under Section 1131 or 1132 where the evidence is introduced pursuant to Section 877.6 of the Code of Civil Procedure or a comparable provision of another jurisdiction to show, or to rebut an attempt to show, lack of good faith of a settlement of the loss, damage, or claim that is the subject of the settlement negotiations.

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

See Section 1130 (application of chapter). See also Section 1140 (extent of evidence admitted).

§ 1139. Sliding scale recovery agreement

1139. Evidence of a sliding scale recovery agreement, as defined in Code of Civil Procedure Section 877.5, is not inadmissible under Section 1131 or 1132 where a defendant party to the agreement testifies and the evidence is introduced to show bias of that defendant.

Comment. Section 1139 provides an exception to Sections 1131 (admissibility and discoverability in noncriminal proceeding) and 1132 (admissibility and discoverability in criminal action), in recognition of the danger of bias inherent in a sliding scale recovery agreement. Code of Civil Procedure Section 877.5(a)(2) provides additional safeguards for use of a sliding scale recovery agreement.

§ 1140. Extent of evidence admitted

1140. A court may not admit evidence pursuant to Section 1136, 1137, 1138, or 1139, where the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confusing the issues, or misleading the jury.

Comment. Section 1140 is drawn from Section 352. Exclusion pursuant to Section 1140 is mandatory, not discretionary. To prevent unnecessary chilling of settlement negotiations, Section 1140 requires a court to minimize the scope of settlement negotiation evidence admitted. For example, if the evidence is offered to rebut a defense of laches, it may only be necessary to admit evidence that ongoing potentially productive settlement negotiations occurred, without getting into the details of those negotiations. *See* D. Leonard, The New Wigmore: A Treatise on Evidence *Selected Rules of Limited Admissibility* § 3.8.3, at 3:145-46 (1996).

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

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

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

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

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

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

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

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

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

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

Comment. Former Section 1152 is superseded by Sections 1130-1140 (settlement negotiations), 1152 (payment of medical or other expenses).

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

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

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

Comment. Section 1152 is drawn from Federal Rule of Evidence 409. As to humanitarian conduct, it supersedes former Section 1152. For protection of settlement negotiations, see Sections 1131 (admissibility and discoverability in noncriminal proceeding), 1132 (admissibility and discoverability in criminal action). See also Section 1130 (application of chapter). 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 Gov't Code § 11415.60.

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

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

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

Comment. Former Section 1154 is superseded by Sections 1130-1140 (settlement negotiations).

CONFORMING REVISIONS

Civ. Code. § 1782 (amended). Prerequisites

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

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

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

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

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

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

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

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

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

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

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

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

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

Comment. Subdivision (e) of Section 1782 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new Evidence Code provisions protecting settlement negotiations. See Evid. Code §§ 1130-1140 (settlement negotiations).

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

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

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

Comment. Section 1775.10 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1140 (settlement negotiations).

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

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

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

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

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

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

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

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

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

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

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

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

Evid. Code § 1152.5 (amended). Mediation confidentiality

SEC. ____. Section 1152.5 of the Evidence Code is amended to read:

1152.5. (a) When a person consults a mediator or mediation service for the purpose of retaining the mediator or mediation service, or when persons agree to

conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute in whole or in part:

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

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

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

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

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

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

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

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

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

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

Comment. Subdivision (c) of Section 1152.5 is amended to reflect the repeal of former Section 1152 and the enactment of new provisions protecting settlement negotiations. See Sections 1130-1140 (settlement negotiations).

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

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

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

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

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

Comment. Section 11415.60 is amended to reflect the repeal of former Evidence Code Section 1152 and the enactment of new provisions protecting settlement negotiations. See Evid. Code §§ 1130-1140 (settlement negotiations).

Uncodified (added). Operative date

SEC. ____. (a) This act becomes operative on January 1, 1999.

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

(c) Nothing in this act invalidates an evidentiary determination made before January 1, 1999, overruling an objection based on Section 1152 of the Evidence Code. However, if an action, proceeding, or administrative adjudication is pending on January 1, 1999, the objecting party may, on or after January 1, 1999, 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.