

PROBATE SETTLEMENT OFFICER TIPS

Judge Aviva K. Bobb (ret.), judgeabobb@gmail.com

Judge Arnold Gold (ret.), judgeagold@aol.com

I. Opening:

- A. Get down to business immediately. If one side is late, consider whether you can begin with the other side by asking that side for information.
- B. Provide snacks?
- C. Introduce yourself - describe your credentials in order to enhance credibility
- D. Are the necessary parties present (including contingent beneficiaries)?
If not, what to do:
 - a. Postpone?
 - b. Make agreement subject to Court approval? (Court approval won't solve every deficiency in parties.) If so, bind current signatories to support Court approval, and make that part of the agreement not conditional on Court approval
- E. Are too many people present? Exclude some?
- F. Explain confidentiality - of two sorts:
 - 1. Statements in course of settlement conference are not admissible at trial - Evidence Code Section 1119(c).
 - 2. Settlement Officer should promise not to repeat to other side what one side stated in settlement conference without first getting the permission of the side that stated it.
- G. Confirm agenda: "What dispute(s) are we trying to resolve today?"
- H. If one or more briefs are submitted, explore possibility of sharing briefs. (Can expedite understanding opposing arguments.)
- I. Ask about previous demands and offers.

II. Communication:

Meet with each side separately to build credibility and establish rapport - Ask each side what it is trying to accomplish - what its goal(s) is/are. Consider asking each party: "What would you like to tell me?"

Can shorten this step if attorneys communicate well with each other and have good client control. Then, you can begin by talking to both lawyers together without clients to get agreement on a proposed resolution.

III. Negotiation:

A. Evaluative Mediation

1. Develop options that have potential for mutual gain.
2. Help parties develop and then communicate first realistic offers.
3. Provide case valuation (strengths, weaknesses, likely decision, result range) to each party privately (takes sting out of unfavorable evaluation).
4. Facilitate the subsequent negotiation until reach resolution.

B. Alternative Immediate Evaluation Method

C. Settlement Officer's Tools During Negotiation

1. Discuss benefits of settling.
 - a. Save attorneys fees and costs:
 - b. Find out if attorney for either side is on a contingent fee basis
 - c. Find out affluence of parties, if possible: Bears on
 - (i) Staying power - ability to pay fees and costs
 - (ii) Risk-taking ability - ability to withstand blow of a complete loss
 - d. Estimate amount of future fees and costs
2. Explore chances of recovering attorneys fees and costs from the other side
Limited grounds for such recovery - statutory. But see accounting case (*Leader v. Cords* (2010) 182 Cal. App. 4th 1588), and *Rudnick v. Rudnick* (2009) 179 Cal. App. 4th 1328.
3. Explore risk (odds and amount) of having to pay the other side's fees or of other side's fees coming out of the estate or trust of which the first side is a beneficiary).

4. Explore best case scenario? Worst case scenario? Helps to deflate over-confidence.
5. Discuss lost time factor.
6. Discuss aggravation factor.
7. Explore how nice it would be if case went away today, closure, moving on with life.
8. Expand the settlement pie. Listen for other issues between parties that can also be included and encourage settlement. E.g., more time to make payment, distribution of personal property, conservatee visitation, substituted judgment stipulation, apology.
9. Use appropriate body language, active listening, validation. Watch parties' body language.
10. If appropriate, affirm desire for future relationship between parties.
11. Encourage parties to understand problem from opponent's perspective.
12. Manage negative reactions to extreme positions of opposing side (e.g. explain opposing parties' high demand as a need to ventilate).
13. Emphasize the need for concession and compromise.
14. Use visual aids (e.g. offers on paper scotch taped to wall).
15. Encourage parties to think about offers as a business decision rather than as satisfying emotional issues.
16. Be mindful of attorneys' needs – impress clients, help managing clients' expectations, impressing opposing side, learn more information about the case, financial gain.
17. Take time out to re-center yourself.
18. Encourage parties to rethink settlement strategy when at impasse
19. Don't be afraid to cease participating temporarily in negotiations if parties at impasse.
20. Meet with counsel alone if all else fails.

21. If no settlement, develop plan for future negotiations – e.g. may need additional information.
 22. Keep the settlement process going any way you can.
- D. Keep a running tally of what has been agreed upon, and consider giving that tally to the attorneys so that they can prepare the settlement agreement there from.

IV. **Closing the deal:**

- A. No one leaves until a written agreement, binding under CCP Section 664.6, is signed by everyone who is a party. Obtain signatures by fax or E-mail, if necessary.
- B. If only a “deal point” agreement is prepared (with a further, more detailed, agreement to be prepared in the future):
 1. Provide that deal point agreement is to be binding under CCP Section 664 even if no more detailed agreement is ever signed.
 2. Consider providing that disputes as to the content of the more formal agreement are to be decided by binding arbitration with you as the arbitrator - because you know the deal the parties intended. If so, provide who pays what fees of the arbitrator and what arbitration rules are to apply (ARC rules? AAA rules? Some other organization’s rules?).
- C. Use the Court’s pre-printed form if neither side brings a proposed agreement.