San Fernando Valley Bar Association
founded in 1926

LACBA
LOS ANGELES COUNTY BAR ASSOCIATION

SAN FERNANDO VALLEY BAR ASSOCIATION AND LOS ANGELES COUNTY BAR ASSOCIATION TRUSTS & ESTATES SECTION

PROBATE SETTLEMENT OFFICER TRAINING PROGRAM

The Probate Settlement Program Committee invites experienced probate attorneys to attend a Settlement Officer Training Program. A panel of distinguished judicial officers and attorneys will discuss the highly successful LASC Probate Settlement Conference Program and the mediation process in probate.

MONDAY, MAY 8, 2017

Stanley Mosk Courthouse, Room 222

12:30 PM Registration
1:00 PM—4:00 PM Program
4:00 PM—5:00 PM Recognition Ceremony and Bench-Bar Mixer

Introductions
Judge Lesley Green

Probate Settlement Conference Program Overview
Kira Masteller and Elizabeth Post

When Is a §664 Court-Order Needed?
Judge Maria E. Stratton

Tips on Handing Settlement Conferences with Accounting Issues
Judge Reva Goetz, Ret.

Mock Settlement Conference with Pro Pers
Commissioner Brenda Penny, LeAnne Maillian and Marc Sallus

Achieving Settlement—Without Violating the Geneva Convention!
Judge James A. Steele, Ret.

Recognition of Current Probate Settlement Officers
Presiding Judge Daniel J. Buckley

Probate Bench-Bar Mixer

Download the application to become a volunteer probate settlement officer at **sfvba.org/public-service/probate-settlement-program.**

The San Fernando Valley Bar Association is a State Bar of California MCLE approved provider.
By attending this seminar, attorneys earn 2.75 Hours of MCLE (2.25 Hours General, 0.5 Hours Ethics).

PROBATE SETTLEMENT OFFICER INFORMATION SHEET

Thank you for volunteering as a Probate Settlement Officer. Please note the following which should not only ensure the success of your settlement conference, but make the experience more rewarding for you as well.

1. Please be sure to arrive in Department 5 on the selected date no later than by 8:30 a.m. At the check-in counter you will find a Probate Settlement Conference Reservation Book which lists the case and parties' and counsels' names for each matter by date. You should inquire of the courtroom if parties and counsel are present and ready for the matter identified.

2. Settlement briefs are not lodged, there are no court files available for your use and the courtroom clerk cannot provide or print out copies of pleadings or other scanned documents. However, at the time the parties signed up to participate in the program, they were advised to bring briefs and/or operative pleadings to the conference with them.

3. Settlement Conferences are held in conference rooms A, B and C at the back of the cafeteria on the 9th floor.

4. Travel with the parties over to the conference rooms or other designated location.

5. If the matter is resolved in whole or in part, you should use the Settlement Agreement form. The Settlement Agreement form should be emailed to you with these instructions, or if not, you may obtain the latest version of the form from the San Fernando Valley Bar Association's website at www.sfvba.org/public-service/probate-settlement-program.

6. Remember, if you are unable to volunteer on the date you have been designated to serve, you must make your own arrangements to have another volunteer from the panel approved by the Probate Settlement Committee do so on your behalf. Please do not contact the court staff in this regard.

Thanks Again!

NOTE ABOUT PARKING:

You should have been separately advised to park at Lot 26 or Lot 17, both located at 1st and Olive. Lot 17 (enter off Olive) requires a prepayment which is to be reimbursed at presentation of the validation sticker. Lot 26 (enter off 1st street) does not require prepayment. At the conclusion of your service, please visit Room 203 for your validation.

ACKNOWLEDGMENT/AGREEMENT RE CONFIDENTIALITY FOR SETTLEMENT CONFERENCE; RELEASE AND WAIVER

Case Name: _____ Case No.: _____

Date of Conference: _____

The undersigned hereby stipulate and agree to participate in the Bar Sponsored Probate Settlement Conference ("Conference") on the following terms and conditions:

1. The Conference shall be conducted by an unpaid volunteer Settlement Officer who has agreed to participate in the program sponsored by the participating Bar Associations for a given day, at the courthouse, for a period of not more than 3 hours. If the parties do not resolve the matter in the allotted time the parties may separately agree to retain the Settlement Officer as a settlement facilitator for one or more sessions, off of court premises, for a fee on terms mutually agreed upon in writing. Any such arrangement shall be solely between the parties and the Settlement Officer who is neither under the control of the sponsoring Bar Associations or the court.

2. Consistent with California Evidence Code §§ 1115 through 1128, the participants in this Conference agree that: except as otherwise provided herein, no written or oral communication made by any party, attorney, Settlement Officer, or other participant in or in connection with the Conference in this case may be used for any purpose in any pending or future proceeding unless all parties, including the Settlement Officer, so agree.

3. Disclosure of information that otherwise is privileged shall not alter its privileged character.

4. The Settlement Officer shall not be subpoenaed nor called to testify about any conduct or communication made during the Settlement Conference.

5. The parties agree, pursuant to Evidence Code section 1123, that any written settlement agreement signed by the parties in the course of the Settlement Conference is subject to disclosure, and will be binding, enforceable and admissible to prove the existence of, and to enforce, the agreement.

6. Each party hereby releases, waives and relinquishes any and all claims for liability and/or damages of any kind against the Settlement Officer, the sponsoring Bar Associations and the LA Superior Court arising out of the Conference, any failure to reach a settlement, or any Settlement Agreement including one which any party or parties may later determine was not in that party or parties' best interests and/or for failure of any party to comply with any settlement terms. The parties also acknowledge that the Settlement Officer is not responsible for enforcing compliance with any Settlement Agreement or terms.

Acknowledged and Agreed as of the date above indicated.

_____	_____
Party Signature & Printed Name	Party Signature & Printed Name
_____	_____
Party Signature & Printed Name	Party Signature & Printed Name
_____	_____
Party Signature & Printed Name	Party Signature & Printed Name
_____	_____
Attorney Signature & Printed Name	Attorney Signature & Printed Name
Attorney for: _____	Attorney for: _____

NOTE: Please do not ask court staff to make copies of or to lodge/file this document. The original and/or copies of this document may be retained by one or more of the parties and/or the Settlement Officer.

PROBATE SETTLEMENT CONFERENCE PROGRAM
POST CONFERENCE SURVEY

Thank you for serving as a Probate Settlement Officer. We would very much appreciate your feedback as well as your suggestions so we might ensure the program's continued effectiveness.

Settlement Officer: _____ Date Served: _____
Email address: _____

Number of cases assigned to you according to schedule: 1 ☐ 2 ☐ 3 ☐ 4☐

Number of cases you heard where all parties/counsel appeared: 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4☐

Type of case(s) handled: Decedent's Estate ☐ Guardianship ☐ Conservatorship ☐ Trust ☐

(Case 1) Amount in controversy/value of estate: $ _____ UNK ☐ N/A ☐

(Case 2) Amount in controversy/value of estate: $ _____ UNK ☐ N/A ☐

(Case 3) Amount in controversy/value of estate: $ _____ UNK ☐ N/A ☐

(Case 4) Amount in controversy/value of estate: $ _____ UNK ☐ N/A ☐

Number cases heard which were resolved in whole or in part: 0 ☐ 1 ☐ 2 ☐ 3 ☐ 4☐

If no settlement, was progress made towards possible future settlement? Yes ☐ No ☐

If settled, did the parties utilize the Settlement Agreement form? Yes ☐ No ☐

Please rate the following on a scale from 1—5 (1=poor; 5=excellent):

	1	2	3	4	5
Facilities	☐	☐	☐	☐	☐
Sufficient time available	☐	☐	☐	☐	☐
Sufficient number of settlement officers scheduled	☐	☐	☐	☐	☐
Appearance by all parties/counsel	☐	☐	☐	☐	☐
Parties' willingness to participate in the process	☐	☐	☐	☐	☐
Parties' preparedness (briefs or operative pleadings)	☐	☐	☐	☐	☐

Comments/Suggestions: _____

_____

_____

_____

_____

_____

Please email completed survey to epost@sfvba.org.

SETTLEMENT OFFICER INFORMATION:

_____

_____

_____

Telephone: _____

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

_____	Case No:
	RELEASE AND SETTLEMENT AGREEMENT
	Date:
	Time: 8:30 a.m.
	Case Assigned to Dept.:

This Release and Settlement Agreement is entered into by the parties signing below as of the date above, who, for good and valuable consideration which is hereby acknowledged, agree as follows:

1. Recitals and Representations **[strike out the one that does not apply]**.

a. There are no recitals or representations; or

b. The recitals and representations of the parties, if any, are set forth on attachment "A" to this Agreement.

2. Terms of Agreement.

The terms of this Settlement Agreement are as set forth below (and/or are set forth on or continued on Attachment "A" hereto):

_____

_____

_____

_____

_____

3. Costs **[strike out the one that does not apply]**.

a. [Each party shall bear its own costs and attorney's fees]; or

b. [The provisions for the payment of costs and attorney's fees is set forth herein and/or on Attachment "A" to this Agreement].

4. Mutual Release; Waiver of All Known and Unknown Claims.

Except for those rights specifically created by this Agreement and except as may be herein specifically reserved in writing, with respect to the subject of all matters pertaining to, in any way relating to and/or arising out of the within litigation, petitions and/or proceedings or the facts, circumstances or events alleged therein, the parties and each of them, on their behalf and on behalf of all of their successors and assigns and all those now or later acting on his, her or their behalf, hereby mutually release and forever discharge the other parties to this Agreement (including their agents, servants, successors, heirs, executors, administrators and all other such persons, firms, corporations, associations or partnerships associated with them) from and against any and all claims, demands, causes of action, obligations as well as any and all damages, liabilities, losses, costs and/or expenses, including attorney's fees, of any kind or nature whatsoever, past or present, ascertained or unascertained, whether or not known, suspected, or now claimed. Each party hereto therefore expressly waives any such rights or

benefits available under §1542 of the Civil Code of the State of California which provides as follows:

> "**A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor**."

The parties further covenant and agree that except as may be necessary to enforce this Agreement, they shall not institute against the other any further petitions, claims, demands, actions, litigation or proceedings relating to or arising out of the subject matter hereof. The parties understand and acknowledge the significance and consequence of the specific waiver of §1542 described above and hereby assume full responsibility for any injury, loss, damage, or liability that may hereafter be incurred by reason of, or related to, the matters released herein.

5. No Assignment.

Each party represents, warrants, and agrees that he/she/it has not heretofore assigned or transferred, to any person or entity any claim, demand, or cause of action based on, arising out of, or in connection with the transactions and events which are the subject of this Agreement.

6. No Inducement/Entire Agreement.

Each party, individually and collectively, declares and represents that no promises, inducements, or other agreements not expressly referred to herein have been made, that this document (including any attachments hereto, each of which are to be initialed by the parties) contains the entire agreement between them, and that the terms of this Agreement are contractual and not recitals only. Each party understands that the other parties are relying on the truthfulness and validity of the representations, if any, made by the others that are set forth in the recitals, if any, and enter into this Agreement based upon those representations.

7. Binding Effect.

Except as may be herein specifically provided otherwise, this Agreement is binding on the parties and their successors, heirs, representatives, assigns, agents, officers, employees, and personal representatives without the necessity of any further court approval or order. This

Agreement is enforceable by and shall inure to the benefit of all successors, heirs, representatives, assigns, agents, officers, employees, and personal representatives of each party.

8. Admissibility/Disclosure.

This Agreement and each of its terms are admissible and subject to disclosure and, to the extent necessary to enforce the Agreement, to the extent Evidence Code §1119(b) is deemed applicable, the parties waive same.

9. Attorney's Fees **[strike out any inapplicable language]**.

In the event any action or proceeding to enforce, set aside, or modify the terms of this Agreement, including an arbitration or reference pursuant to §638 of the Code of Civil Procedure is brought by either party against the other under this Agreement, the prevailing party shall be entitled to recover all costs and expenses, including the actual fees of its attorneys incurred for prosecution, defense, consultation, or advice in such action or proceeding.

10. Further Documents and Mutual Cooperation.

Each party hereby agrees in good faith to fully cooperate with the other(s) including prompt execution and delivery of such additional documents as may be required to effectuate the purpose and terms of this Agreement and, should it become necessary to obtain court approval, the parties shall each promptly execute such consents, agreements, and acknowledgments as are necessary to obtain approval of this Agreement and the modification/termination of the instrument(s) in dispute, if any.

11. No Modification.

This document sets forth the entire agreement between the parties and may not be altered, amended, or modified in any respect, except by a writing duly executed by the parties to be charged. All earlier understandings, oral agreements, and writings, unless referred to herein, are expressly superseded hereby and are of no further force or effect.

12. No Admission of Liability.

The parties, by entering into this Agreement, do not abrogate or concede their positions, and no admission of liability can be presumed or inferred by the execution of this Agreement.

13. Effectiveness/Counterparts.

This Agreement shall not be effective or binding on any party until fully executed by all parties. The parties may execute this Agreement in any number of counterparts, each of which shall be deemed to be an original instrument, but all of which together shall constitute one agreement.

14. Entry of Judgment/Jurisdiction.

The parties adopt the provisions of CCP §664.6 and by doing so authorize the Court, upon motion, to enter judgment pursuant to the terms of the settlement and further request that the Court retain jurisdiction over the parties to enforce this Agreement until performance in full of the terms of settlement.

15. Court Approval **[strike out the one that does not apply]**.

a. [This Agreement is not subject to court approval].

b. [This Agreement is subject to court approval].

16. Acknowledgment; Waiver; Indemnity of Settlement Officer.

The Settlement Officer, screened and selected solely by the Bar without any Court supervision or involvement, has provided his/her services as an unpaid volunteer and merely acts as a facilitator in assisting the parties in communicating with one another regarding possible settlement and does not represent one side or the other. If any party hereto seeks to compel the Settlement Officer to testify in any action regarding this Agreement, such party shall pay for same at the Settlement Officer's usual and customary rate and holds such Settlement Officer harmless for giving any such testimony. Except as elsewhere specifically provided herein, the settlement process is covered by the provisions of Evidence Code §1115 et seq. as well as by Evidence Code §1152. Each party specifically now and forever waives and relinquishes any and all claims for liability and/or damages of any kind or nature, whether arising in contract or tort, against the involved Bar Associations, including the participating volunteer attorneys, and the Court. This waiver and relinquishment of claims includes, but is not limited to, those arising out of any settlement, any failure to achieve any settlement and/or, if applicable, the satisfaction or failure of any party or parties to satisfy any settlement term or provision. Each party also specifically acknowledges and agrees that he/she has read the information regarding the

Settlement Program available on the court's website (www.lasuperiorcourt.org), including but not limited to the "NOTICE: WAIVER OF LIABILITY CLAIMS" , and which materials are also available in the courtroom, and specifically acknowledges that he/she is bound to all of those terms, conditions and provisions.

AGREED AS OF THE DATE ABOVE WRITTEN:

_____	_____
Sign and print name	Sign and print name
_____	_____
Sign and print name	Sign and print name
_____	_____
Sign and print name	Sign and print name

APPROVED AS TO FORM AND CONTENT:

By:_____
Date
Attorney for: _____

By:_____
Date
Attorney for: _____

By:_____
Date
Attorney for: _____

By:_____
Date
Attorney for: _____

Attachment “A” to Settlement Agreement in the Matter of:

_____

Initials: ____ ____

____ ____

Initials: ____ ____

____ ____

.004

Tips on Handling Settlement Conferences with Accounting Issues
Judge Reva G. Goetz, Ret.
May 8, 2017

1. Types of issues:
    a. Transparency/History of Accounting
    b. Expenses
    c. Use of property
        1) Income producing
        2) Not income producing
    d. Investments
    e. Distributions
        1) Unequal
        2) Not made
    f. Trustee Fees

2. What is really the issue?
    a. True malfeasance
    b. Ignorance
    c. Family History

3. Questions to Consider
    a. Materiality
    b. Motive of Trustee
    c. Motives of Challenging party

4. How to address and Resolve these issues?

NINE THINGS WE LIKE (TO SEE) ABOUT SETTLEMENTS

Preliminarily, keep two principles in mind:

(1) Probate is an in rem proceedings and the jurisdiction of the court is based on the decedent's domicile in California or property that was left by the decedent in California. PC section 8005(b); *Estate of Bonanno* (2008) 165 Cal.App.4th 7, 17.

(2) To exercise jurisdiction, publication and personal notice to heirs, beneficiaries and creditors is required.

Here's a checklist of the top nine judicial concerns

1. **Do the parties want the court to have the authority to enforce the agreement?**

   CCP section 664.6 allows the court to enforce the agreement even after the underlying petition(s) have been dismissed. This eliminates the need to file a separate and new breach of contract complaint if there is an alleged breach.

   Consent of the parties must be set out in writing or stated on the record in open court. Signature of counsel is not sufficient; parties themselves must sign the agreement if they do not consent orally on the record in court.

   Here's some language: "Pursuant to CCP section 664.6 the parties agree that the court may retain jurisdiction to enforce this agreement until all its terms have been performed in full and may enter an order or judgment as appropriate, upon noticed petition."

2. **Does the settlement ask the court to make orders beyond its jurisdiction?**

   The most common example is a settlement agreement in an estate matter that asks the court to make orders with respect to a related trust. If there is no trust action pending, the court cannot make the order. Ask yourself: are you agreeing to some relief

that you can't get through the pending petitions? If so, don't ask the court to approve it.

3. **Does your agreement set out what is supposed to happen to the underlying petition(s)?**

   You have figured out who gets what and when. Have you agreed upon what the court is supposed to do with the pending petition(s)? Is a particular party going to file a request for dismissal? Is a party supposed to make a motion to dismiss the litigation? Is the court supposed to grant one petition and deny another? Is the relief with or without prejudice? What happens to the objections that were filed? Is a new and different party being appointed on someone else's petition? Remember, the court needs to dispose of the case – it can't just pend forever.

4. **Does your settlement require the court to sign additional orders?**

   If so, have them ready to go. Examples are visitation orders; orders with respect to real property that will ultimately be recorded.

5. **Does your agreement tell the court who participated in the settlement and who did not participate**?

   Notice is always critical. The court needs to know who did not participate and why, so it can determine whether the settlement affects the non-participant's inheritance or creditor's claim and decide whether notice is an issue.

6. **Has everyone entitled to notice been given notice of the settlement?**

   Unless the personal representative has full IAEA, PC section 10518 requires notice of proposed action to "allow, compromise or settle" claims to property. If only some of those entitled to notice have signed the agreement, consider filing consents or

waivers or notices of proposed action. Or consider filing and noticing a petition to approve settlement.

7. **Is court approval of your settlement required by statute?**

Unless the personal rep has full IAEA, court approval is required for:

1. Settlement before expiration of the filing period for creditor's claims. PC section 9831.
2. Settlement of a claim involving title to, interest in or option to purchase real property. PC section 9832(a)(1)-(3).
3. Settlement requiring transfer or encumbrance of estate property or creation of an unsecured liability exceeding $25,000. PC section 9833.
4. Settlement of a claim by the estate against the personal representative or his/her counsel, whether or not the claim arises out of the administration of the estate. PC section 9834.
5. Settlement of a wrongful death of decedent or injury of decedent action. PC section 9835.
6. Settlement involving the estate accepting a deed in lieu of foreclosure. PC section 9850.
7. Settlement requiring the estate to give a partial satisfaction or partial reconveyance of a mortgage unless the reconveyance is pursuant to the terms of the mortgage or deed of trust. PC section 9851.

Regardless of the statutory requirements, filing a petition to approve the settlement is advisable when 1) not all parties have signed the agreement; the personal representative wants protection from liability for entering into the settlement (*Goldberg v. Frye* (1990) 217 Cal.App.3rd 1258 1264-65); objections are anticipated; you want to be sure everyone has notice of what is going on; additional orders are necessary to effectuate the settlement; the parties feel better with a court-approved settlement. The correct pleading is a petition to approve settlement; not a petition for instructions.

8. **Does the agreement set out why settlement is in everyone's best interests?**

9. **Does the agreement address how fees are going to be handled?**

   If not, you will be asked about it by the court because we want this to be over with.

May 8, 2017

SFVB and LACBA Probate Settlement Officer Training
May 8, 2017

Mock Settlement Conference

Commissioner Brenda Penny — Marc Sallus
LeAnne Maillian — Kenneth Wolf

SUGGESTIONS FOR HANDLING SETTLEMENT DISCUSSIONS INVOLVING SELF REPRESENTED LITIGANTS

ISSUES IN SETTLEMENT DISCUSSIONS:

- The facts at issue in the litigation are often tied to decades of family issues which are now "coming to a head" due to one or both parents' death or disability

- Although there may be finances involved, the amount in issue is often merely a tool that the litigants are using to address personal issues amongst themselves

- Self represented litigants are frequently focused on those issues and facts *not* the law

- The purpose of settlement negotiations is to find a resolution using the law

- The role of settlement officer when one or more of the litigants is self-represented is to find a way of helping the litigants resolve their case and that often means hearing those issues, listening to the facts and then encouraging the litigants to resolve their differences

- The easiest way to approach this is to remember The Six "C's"

SIX "C"s

1. Chit Chat
2. Confidentiality
3. Communication
4. Confirm Expectations
5. Compromise
6. Control

1. CHIT CHAT -

- Talk informally with the litigants before the settlement conference actually begins
- This can bring down the litigant's anxiety level
- It can instill confidence in the settlement conference process
- Casual conversation will also help the settlement officer ascertain who is "the leader of the pack" when there are several litigants/family members involved

2. CONFIDENTIALITY -

• Litigants don't understand the settlement conference process or the litigation process and therefore don't trust it
• Explain the process to the litigants - especially the fact that what they say in the settlement conference cannot be repeated unless they expressly authorize it
• Breakout sessions - allows the litigants to privately express their feelings, which can be cathartic
• Emphasize that you are neutral and have no interest in the case except to try and assist in settling the matter

3. COMMUNICATION -

• Listen to what the litigant says and carefully observe their body language, both as they are talking and as they listen to you and others. This can reveal a tremendous amount of the "true" facts and beliefs of each litigant and will help in structuring any proposals

- Make it an open discussion
  - Find out what they think would be best result if they win at trial
  - Ask what they think would be worst result if they lost at trial
  - Encourage them to understand that the *actual* result at trial will probably be to one extreme or the other and that they will have minimal control over that result

- The communication needs to be a two way street -

  a. Each litigant needs to tell their story and to have that story "heard" by the settlement officer. There is limited time so to make the best of that time:
     - Avoid sidetracking into irrelevant issues
     - If something is not clear, repeat what you heard to get a clarifying response
     - Steer litigant away from historical "facts" and issues
     - Prevent fixation on any one issue
     - Separate emotional issues from legal issues
     - Ask leading questions to get basic information

  b. The settlement officer has a responsibility to make sure the litigant understands:
     - That various settlement options are available - and what those are
     - What will happen procedurally if there is no settlement
     - That settlement can be partial
     - That this can be the first step in a series of "steps" to reach settlement

4. CONFIRM EXPECTATIONS -

• Encourage the litigant to tell you want they want to achieve by the litigation as a "best case" scenario so you can quantify their expectations

• Ultimately the settlement officer my evaluate the information provided by the litigants and indicate, based on that information and the settlement officers experience, what they believe would be the most likely outcome at trial

• Explain that there is a real difference between *knowing* something and *proving* it That at trial it will be necessary to *prove* everything they *know* to someone who is hearing the facts for the first time and who knows nothing about the "true" family history

• Explain the limitations of the legal system and stress the opportunity a settlement officer provides to find a broader resolution than would ever be obtained at trial

5. COMPROMISE -

- The litigants are participating in settlement negotiations because they want a resolution
- Listen - find out what is most important to the litigant
- Prioritize their concerns as you see them and allow room for adjustment based on their response
- Try to craft a resolution that addresses whatever is most important to each litigant
    - May not solve the entire problem
    - If a litigant feels they have been heard, then they may be willing to accept partial resolution
    - Approach resolution in "bite size" pieces if a global resolution seems impossible

6. CONTROL -

- What a settlement officer CANNOT do -
    - Cannot give legal advice
    - Cannot tell them their rights
    - Cannot tell them what they should or should not do
    - Cannot tell them what legal options are available or suggest which to choose
    - Cannot put any pressure on a litigant to settle
    - Cannot put any pressure on a litigant to agree to any terms in the settlement agreement

- Always suggest that they consult legal counsel if they have any questions about their rights but do not give them any information yourself regarding those rights

- What we CAN do - we can control the settlement process from start to finish to give the litigant as fair a chance as possible to find a resolution in the settlement negotiations.

PROBATE SETTLEMENT OFFICER TRAINING PROGRAM
MOCK SETTLEMENT CONFERENCE

FACTUAL BACKGROUND

Marc Jackson and Ken Jackson are brothers. Their parents are both dead. Dad died several years ago and mom just died. Mom left a Will that she signed approximately one year ago.

Marc has been living at home with mom taking care of her "because that is what good sons do" for many, many years. Marc is not married and does not have any children.

Ken, on the other hand, got married and has two children. He has been "living large" in Orange County. Up until recently, Ken has been sending Marc money to help with mom's care but that stopped. Ken owned a number of Block Buster franchises which was the source of his funds and those have, of course, dried up. Unbeknownst to Marc, when Ken lost his money, his wife left him, so Ken is now divorced.

After Ken quit sending money, Marc started using all of mom's money to pay for her support (and his to some extent) and now, the only assets remaining in the estate are:

- Mom's house;
- Dad's watch;
- Mom's engagement and wedding rings;
- A baseball card collection; and
- The family photos

After Ken quit sending money, Marc kept sending him emails asking for help. Those emails consistently talk about mom's "getting worse" and detailing how much help he needs both financially and in caring for mom. Ken always replied "no" but because of his pride he never revealed anything about his financial and marital catastrophes.

Now that Marc has filed the Petition for Probate of mom's Will, Ken is irrate and plans on filing a Will contest, claiming that mom lacked capacity and was subject to Marc's undue influence when she signed the Will. Needless to say, Marc disputes that. The settlement panel has been offered by the bench officer as an alternative and that is why they are here today.

SFVB and LACBA Probate Settlement Officer Training
May 8, 2017

Mock Settlement Conference Panelists

Ken Wolf has practiced probate and trust law for more than 45 years. He is a founder of and chairs the USC Probate and Trust Conference. He is a sole practitioner and Of Counsel to Freeman, Freeman & Smiley. He is also a member of the Probate and Trust panel of mediators at ARC and has presided over 120 mediations with better than a 95% settlement rate.

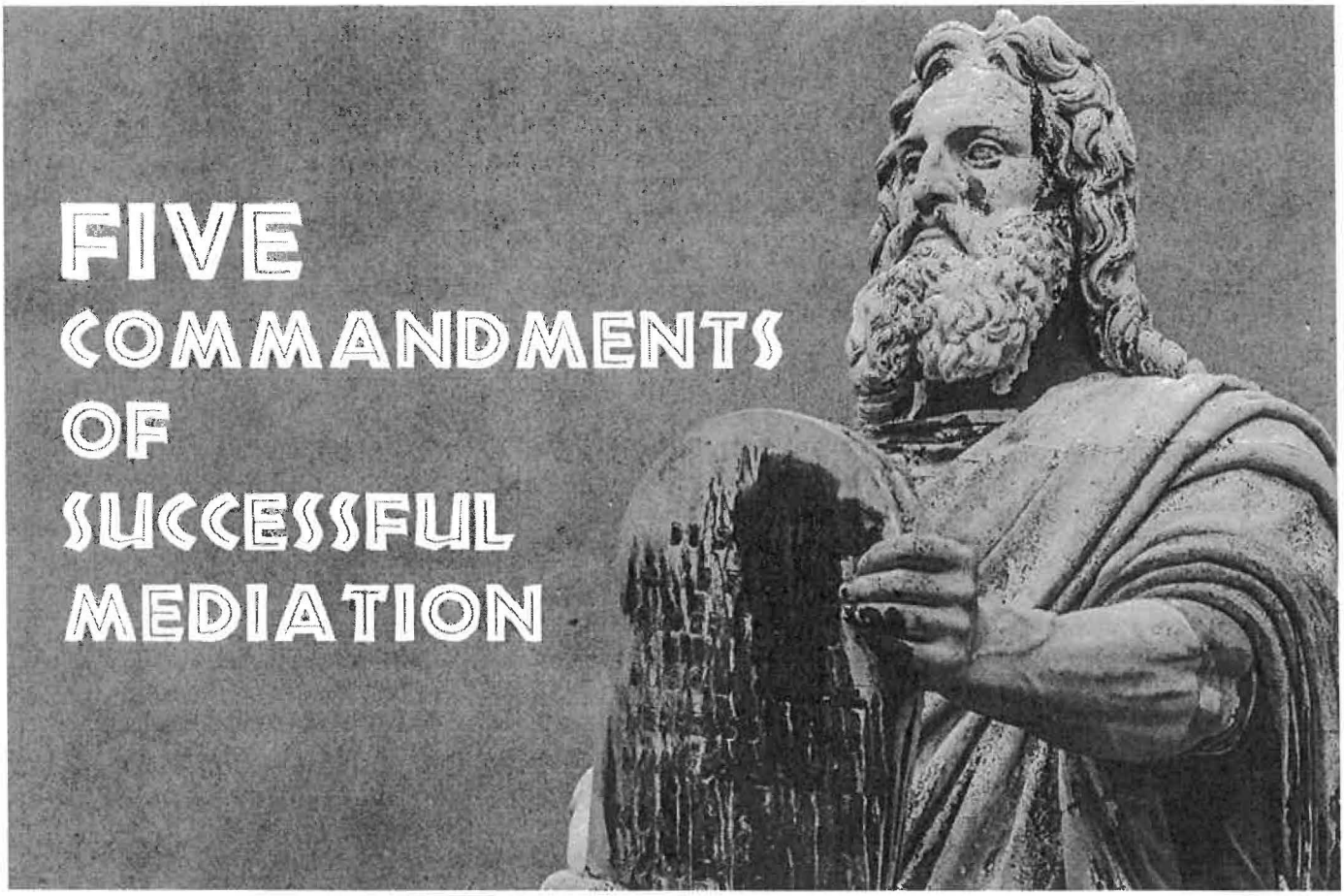
Marc Sallus is a graduate of UC Hastings. He is the past Chair of the BHBA of the Trust and Estate section and past President of the BHBA. He is presently a Trustee of the LACBA and Chair-Elect of the LACBA Trust and Estate section.

Commissioner Brenda Penny joined the Court as a Probate Attorney in 1997 after 15 years in private practice with an emphasis in Probate. From 2001 to 2014 she served the Court as its Assistant Supervising Probate Attorney. In 2014 she was elected as a Commissioner for the Los Angeles Superior Court where she sits in Probate in Dept 99.

LeAnne Maillian has been serving as a mediator on the settlement panel since its inception with the SFVBA at Van Nuys. She is a former Chair of the LACBA Client Relations Committee and is presently on the Board of SCCELA. She is also a member of the Probate and Trust sections of SFVBA and LACBA.

Journal of Consumer Attorneys Association for Southern California
ADVOCATE
September 2016 Issue

Hon. James A. Steele (Ret.)



Five rather simple suggestions for your consideration in all negotiated settlements

Some years ago, comedian George Carlin did an irreverent routine about the Ten Commandments. He said that although 10 was a great number (indeed, the basis for the decimal system), many were duplicative and appeared to evidence Commandment "padding." He determined two or three would suffice to cover all of the things one should never do. No doubt many of those who appreciated Carlin's acerbic wit were praying that when his time came, He (and I don't mean Carlin) had a sense of humor.

As a neutral, I thought I'd share some settlement Commandments. ("Suggestions," really since I haven't been able to order anybody to do anything since leaving the bench.) Like Carlin, 10 seemed a bit too many, so my 5 settlement "Suggestions" follow.

1. Thou shalt be fully prepared

Be sure all the decision makers will be present preferably in corporeal, not spiritual, form. While having a higher authority available only by telephone may be unavoidable, the odds of settlement increase if everyone is on the same hallowed mediation ground at the same time. Distill the facts and law in your briefs down to five or so pages (plus any essential exhibits). If you can't do that by the mediation date, you may have a problem should the case go to trial.

Figure out what is driving the other side to litigate rather than settle. Even the most aggressively litigated cases aren't always about money. One unfair competition case early in my career was certainly defensible. Before much money had been spent on defense, I suggested to my client's principals they consider settling by offering the other side a multi-million dollar judgment. Based on the facts, the plaintiff, a large corporation, merely sought to humiliate my client, an upstart competitor, by making and publicizing its

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damaging accusations. So what better way to satisfy the plaintiff, and avoid any further expenditure on my client's part, than to give the plaintiff what it could never achieve at trial? Pursuant to our strategy, the settlement would provide that, while the plaintiff could advertise its settlement victory (without any admission of liability), it could never record or execute on its judgment.

To my clients' surprise, the plaintiff accepted. The plaintiff thereafter issued numerous, pre-agreed upon, press releases touting its "victory." These of course stated that, despite these horrible claims being made against it, my clients' company had settled without any admission of liability. The parties also agreed that the plaintiff's inability to ever execute on the judgment would remain confidential.

What the plaintiff had not considered was that my client might also want to tout the settlement. The market initially perceived my client as an insufficiently capitalized David, to be crushed by the Goliath of the industry. That perception changed when my client issued press releases suggesting it had entered into a settlement for "millions of dollars" to avoid the nuisance of litigation so it could focus on satisfying its customers' needs. Suddenly, distributors lined up to buy my client's products, now confident in the company's financial status and its future as a reliable supplier.

Aside from divining the other side's motivations, it is important to learn about the opposing lawyers, their successes and failures in similar cases, the length and nature of the relationship between the opposing lawyers and their client, the strengths and weaknesses of your own case as well as the other's, the court in which your case is likely to be tried, and the results obtained at trial by this and other lawyers in similar cases. In short, the better prepared you are for mediation, the more likely a settlement favorable to your client will be achieved.

2. Thou shalt not hold thine cards too close to thine vest

Not to burst anyone's bubble, but there are few secrets, if any, in litigation. When you are trying to settle a case, it's better to put at least a few, if not most, of those tidbits to good use. At the least, these should be shared with your mediator, who can help you divine if and when to use them. As long as you picked well, you should be able to fully trust your neutral since the neutral cannot disclose something of this nature without your consent. No doubt there's a special place in hell for errant mediators should they be led astray in this regard.

3. Thou shalt not worry about what thine other side is getting

The only thing that matters is what your client is getting out of the settlement. That the no-good scoundrel on the other side is going to receive a big pile of money in settlement is no more relevant than how many mediators might be able to dance on the head of a pen. It's also not about who "wins," since both sides typically lose if they fail to settle. For ye of little faith, read Randall Kiser et al., "*Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*," 5 J. of Empirical Legal Stud. 55191 (2008), regarding California Section 998 offers to compromise and New York's comparable procedure. Kiser demonstrated that parties who rejected settlements were usually wrong with a collective error rate as high as 86 percent. Even more interesting was that plaintiffs were wrong by about $40,000 on average compared to defendants being wrong by over $1 million on average.

4. Thou shalt not draw lines in the desert ... er, sand

Parties sometimes fail to appreciate the importance of credibility in the settlement process. For this reason, the practice of making ridiculous demands or offers at the outset should be shunned. Similarly, making "take it or leave it" demands or offers too early can be apocalyptic. Rather, if the parties have exhausted the limits of their respective authority by the apparent end of the negotiating process, requesting a mediator's proposal would be a far better alternative to consider.

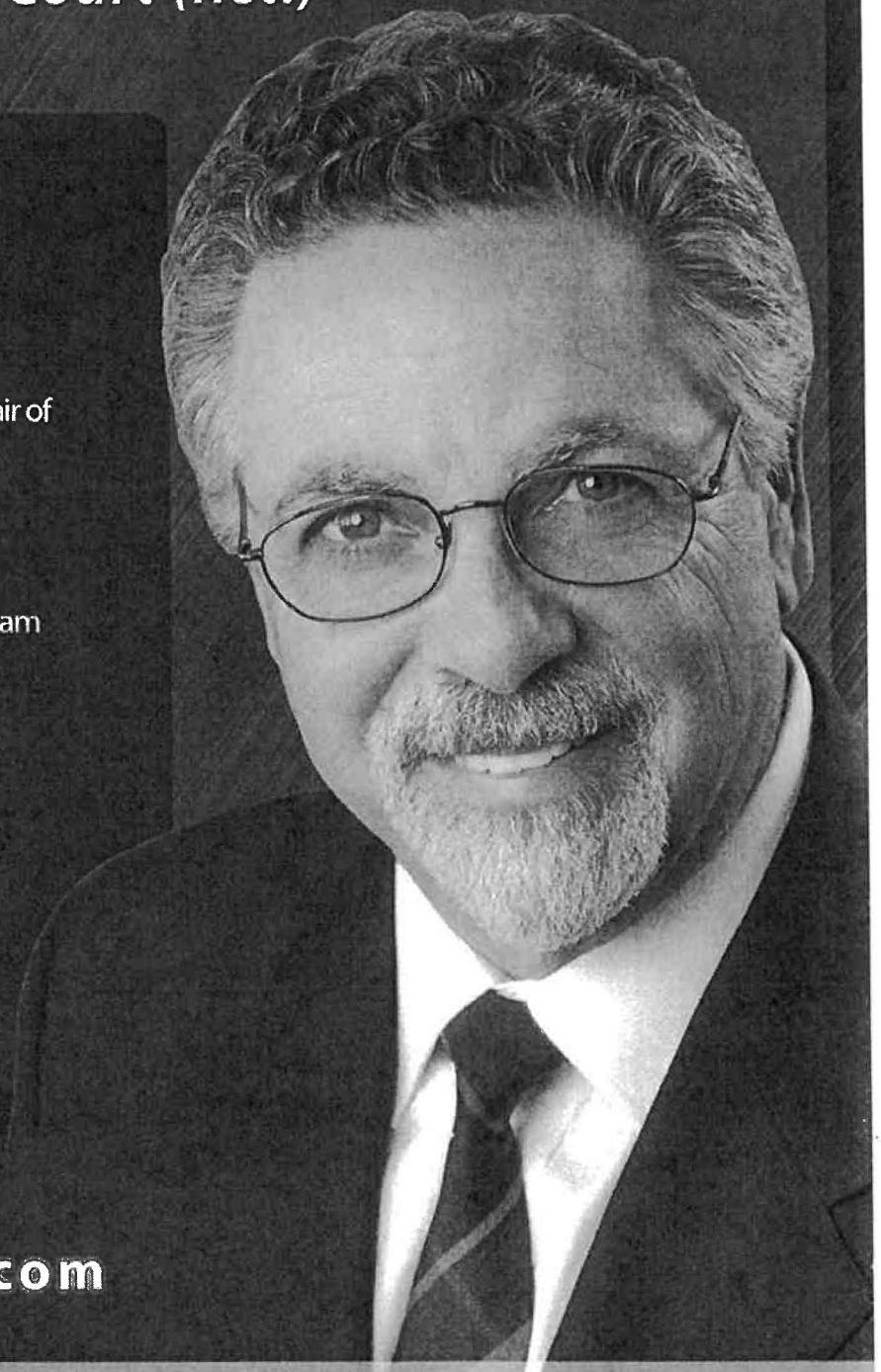
5. Thou shalt not depart until thine work is done

Once the parties have come to the realization that partaking of settlement is not to be avoided, they must promptly consummate, or at least document, their agreement. Experience tells us that it is far better to do so before everyone goes home even if this involves considerable additional time. If the parties determine some further documentation will be necessary, the details must be as fully and as clearly provided for in the signed settlement document executed before the parties leave the mediation (see, e.g., *The Facebook Inc. et al. v. Pacific Northwest Software*, 640 F. 2d. 1034 (9th Cir. 2011)).

Judge James A. Steele retired from the Los Angeles Superior Court and is now a full-time neutral working with ADR Services, Inc. *He re-assumed mortal form when he retired from the bench in late 2014 where he had held assignments in both unlimited (general) civil as well as probate. He emphasizes trusts & estates, business, real estate, construction, and legal malpractice mediations, among others, and also acts as an Arbitrator, as well as both discovery and trial Referee in a variety of fields. In 2014 he was selected by the Rutter Group to develop its new Construction Law Program. He has also recently spoken on Elder Abuse at CAALA Las Vegas. In addition to his law degree, he has an undergraduate degree in Economics, an MBA and has completed a post-graduate program in tax law. You can reach him through his case manager, Chelsea Rhodes, at (310) 201-0010 or by email to: Chelsea@ADRServices.org.*

Hon. JAMES A. STEELE

Judge of the Superior Court (Ret.)



- 35 years of legal experience
  - civil trial lawyer
  - in-house counsel for both public and private corporations
  - judge of the Los Angeles Superior Court
- Probate Court trial judge and Committee Chair of Probate Settlement Program
- Presided over a combined calendar of Unlimited Civil (80%) and Probate (20%)
- Created the Rutter Group Construction Program for Thomson Reuters Publishing

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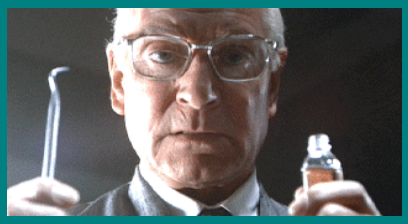
THE 2017 PRO BONO PROBATE SETTLEMENT CONFERENCE PROGRAM

Hon. James A. Steele (Ret.)

How to Extract A Settlement



Without Employing "Enhanced Settlement Techniques"

ENHANCED SETTLEMENT TECHNIQUE #1

THE WRONG OPENING

"Hello – I'm your friendly probate settlement officer"

And I'm here to tell you:
1) I know better than you; and
2) YOUR CASE REALLY SUCKS!

THE HARD OPENING (cont'd)

The judge will hate your arguments;

You'll have no credibility at trial;

You'll spend every last nickel you have before you get to trial, if ever; and

Even if your case might have some merit, the system really sucks!

But, hey... Good Luck!

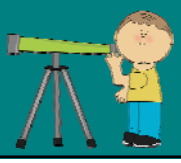
THE "GENEVA CONVENTION COMPLIANT" OPENING

THE SOFT OPENING

Thank the parties for participating;
Explain the process;
Establish your competence;
Show your interest and empathy;
Set the parameters for the discussion; and

Define the goal

TIME CAN BE YOUR ENEMY – DON'T LET IT GET AWAY FROM YOU



QUESTION

Is a joint session ever a good idea?

ENHANCED SETTLEMENT TECHNIQUE #2

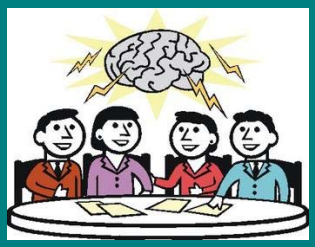
CONDUCTING THE SETTLEMENT CONFERENCE LIKE THE SPANISH INQUISITION

THE HARD APPROACH TO CONDUCTING THE SESSION

- Exclude support persons;
- Assume the facts;
- Lecture the parties; and/or
- Dictate the "correct" settlement

AVOID BECOMING THE SETTLEMENT DICTATOR!

THE "GENEVA CONVENTION COMPLIANT" SESSION



THINGS TO DO TO ENHANCE SETTLEMENT POSSIBILITIES

Include support persons;
Listen… then ask;
Invite questions;
Invite solutions;
Make use of available "technical tools"
Help develop settlement terms

MAKE USE OF "TECHNICAL TOOLS" WHEN POSSIBLE

e.g., Attorney's Fees

The "American Rule";
Contract;
Statutory Bases:
- Bad Faith Pros./Def – Accounts
- Unreas Pros./Def – Cred. Claims
- Certain Trustee Removal Actions
- Improper Donative Transfers
- Probate Code § 859
- Elder Abuse – One Way!!!

The Trustee/Bene Dynamic:
- Kasperbauer/Doolittle Rules

ANOTHER TECHNICAL TOOL: THE BURDEN OF PROOF

ENHANCED SETTLEMENT TECHNIQUE #3

CONCLUDING THE SESSION WITH A BIT OF VIOLENCE

THE RIGHT WAY TO CONCLUDE THE SUCCESSFUL SESSION

Reiterate the advantages of settlement;
Recap the agreed upon terms;
Make sure it is reduced to writing;
Thank all of the participants

And get the heck out of there!!!

THE RIGHT WAY TO CONCLUDE THE UNSUCCESSFUL SESSION

Review the progress made;

Reiterate the advantages of settlement;

Invite the parties, and if possible get a commitment, to continue the discussions, on their own if need be;

Thank all of the participants

And get the heck out of there!!!

WHAT DO YOU SAY IF ALL ELSE FAILS?

The judge will hate your arguments;

You'll have no credibility at trial;

You'll spend every last nickel you have before you get to trial, if ever; and

Even if your case might have some merit, the system really sucks!

But, hey…
Good Luck!

Thank You!

Hon. James A. Steele (Ret.)
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