

**You Can Lead a Horse's Head to Water,
But You Can't Make Him Accept Your
Settlement Offer**



**Settlements in Trust and Estate
Matters**

Disclaimer

- I am happy to take questions during and after the program, time permitting.
- I am a quasi judicial court employee bound not only by the Rules of Professional Conduct, but by the Canons of Judicial Ethics.
- I cannot answer questions about cases that are pending in the Contra Costa County Superior Court.
- I cannot answer questions about how particular judges would rule on any issue. Nothing in this seminar should be construed as any indication of how a judge would rule.
- All fact patterns, examples and sample forms are fiction.

Glossary

- **Cee:** Conservatee
- **Cor:** Conservator
- **GAL:** Guardian Ad Litem
- **IAEA:** Independent Administration of Estates Act
- **NOPA:** Notice of Proposed Action
- **PR:** Personal Representative
- **TTEE:** Trustee

SETTLEMENTS: WHAT WILL WE BE DISCUSSING?

- **PRACTICAL TIPS IN NEGOTIATING PROBATE-CODE-RELATED SETTLEMENT AGREEMENTS**
 - **What is an enforceable agreement?**
 - **Rules governing particular Probate Code settlements**
 - **Confidentiality & Privilege issues**
 - **Court approval**
- **STATUTORY OFFERS TO COMPROMISE (CCP § 998)**
- **SETTLEMENT PERFORMANCE & ENFORCEMENT**

The year is 1949, New York City. Mafia bosses rule the underworld. The “Five Families” of New York compete with each other for control of gambling, prostitution, drugs, police and politics. Don Vito Corleone (known as The Godfather), head of the Corelone crime family, has died of a heart attack while playing with his grandson Anthony in the family tomato garden.

We all know that Don Corelone chose his youngest son, Michael, to take over “The Family Business” after his death. We also know that the Don’s oldest surviving son, Fredo, wasn’t too happy about that decision (he tried to have Michael killed in his Lake Tahoe house, after all), but before Fredo gave mob boss Hyman Roth the means to put a hit out on Michael, Fredo actually sued Michael in the Contra Costa County Superior Court for fraud, financial elder abuse, and to invalidate the Corelone Family Trust, among other causes of action.

During the course of the litigation, Fredo and Michael attended mediation and reached a written settlement agreement. The Settlement Agreement required, among other things, that Michael pay Fredo \$1 million (almost \$13 million today) and to appoint a private professional fiduciary to administer the Corleone Trust. In exchange, Fredo promised to not put a hit out on Michael (that part didn't turn out so well). The Settlement Agreement included a provision that it was enforceable pursuant to Code of Civil Procedure section 664.6 and that all disputes concerning its enforcement are to be resolved in the Contra Costa County Superior Court.

Assume venue is proper, there are no jurisdictional issues, and California law applies as it exists in 2024.

PRACTICAL SETTLEMENT TIPS

- **Why are settlements so important? Most cases result in a settlement agreement prior to trial.**
- **What is an enforceable settlement agreement?**
 - **Ordinary contract principles (i.e., a “meeting of the minds” or “offer, acceptance, consideration”)**
 - **Requires *definite* terms**
 - **Terry v. Conlan (2005) 131 Cal. App. 4th 1445.**
 - **Can be written (either as an ordinary contract or pursuant to CCP 998), recited “orally before the court” (CCP § 664.6), or any other way that an ordinary contract can be created (including orally).**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Individuals have the power/authority to compromise any claim under any terms that are agreeable, so long as the agreement is otherwise enforceable.**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Probate Estates**
 - **Prob. Code §§ 9830 *et seq.***
 - **Generally, and except where otherwise required by statute or limited by the will or court order, PRs have the power to compromise claims by or against the estate *without court approval*. Prob. Code § 9830(a).**
 - **Practically speaking, court approval is almost *always* required.**
 - **Settlements without court approval can always be challenged after the fact by interested persons on the PR's account and report. PR has the burden to prove that the settlement is "fair and honest" and in the best interests of the estate. See Trehame v. Loftin (1984) 153 Cal. App. 3d 878, 886. Until approved, the PR remains exposed to personal liability and surcharge for breach of fiduciary duty.**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Probate Estates**
 - **The following settlements *require* court approval:**
 - **Compromises on claims before the expiration of the claim filing period. Prob. Code § 9831;**
 - **Settlement, compromise, extension, renewal or modification affecting *real property*. Prob. Code § 9832(a);**
 - **EXCEPTION: leases < \$5,000.00/mo. AND < 1 year;**
 - **EXCEPTION: month-to-month leases in any amount;**
 - **Settlement valued > \$25,000.00. Prob. Code § 9833;**
 - **Settlement of claims by or against PR or PR's counsel. Prob. Code § 9834;**
 - **Settlement of wrongful death actions. Prob. Code § 9835**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Probate Estates**
 - **Acceptance of a deed in lieu of foreclosure or TTEE's sale. Prob. Code § 9850;**
 - **Partial satisfaction of mortgage or partial reconveyance under trust deed. Prob. Code § 9851.**
 - **IAEA Representatives do not require court approval or a NOPA for most settlements. HOWEVER, NOPA is required where terms of settlement otherwise require a NOPA**
 - **E.G., performance of terms not performed in < 2 years. Prob. Code § 10532.**
 - **E.G., compromise of Prob. Code § 850 claims. Prob. Code § 10518.**
 - **NOTE: Court approval is always required for compromise of "conflict of interest" claims. NOPA is not sufficient. Prob. Code § 10501(a)(9), (10)).**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Trusts**
 - **TTEEs have authority to settle claims by or against the Trust so long as that authority is not limited by the terms of the Trust instrument and is consistent with the TTEE's standard of care. Prob. Code § 16242; see generally Prob. Code §§ 16200 (general powers of TTEEs), 16040 (standard of care), 16047 (prudent investment).**
 - **Unless limited by the trust instrument, court order or terms of agreement, TTEEs do not need court approval to settle (though, as discussed later, it may be advisable).**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Conservators**
 - **C'ors of the Estate may generally settle claims without court approval. Prob. Code §2500(a).**
 - **HOWEVER, court approval is required for settlements involving (1) title to real property; (2) an interest in real property or a lien or encumbrance on real property; (3) an option to purchase real property. Prob. Code § 2501(a);**
 - **HOWEVER, court approval is required for settlement when the transaction requires the transfer or encumbrance of property of the estate or the creation of an unsecured liability of the estate >\$25k. Prob. Code § 2502;**
 - **HOWEVER, court approval is required for conflict-of-interest claims. Prob. Code § 2503;**

PRACTICAL SETTLEMENT TIPS

- **Rules governing particular Probate Code proceedings**
 - **Conservators**
 - **C'ors of the Estate may generally settle claims without court approval. Prob. Code §2500(a).**
 - **HOWEVER, court approval is required for settlements for support, maintenance or education of the C'ee, wrongful death or personal injury to the C'ee. Prob. Code § 2504;**
 - **HOWEVER, court approval is required where the claim is the subject of a pending action or proceeding. Prob. Code § 2505.**
 - **Independent authority to settle is available pursuant to Prob. Code § 2591(p) for most claims *except* conflict-of-interest claims.**

PRACTICAL SETTLEMENT TIPS

- **Privilege Issues**

- **Evid. Code § 1152**

- Not really a privilege *per se*, but a rule of inadmissibility based on extrinsic policies. Excludes offers to compromise for the purpose of proving liability.
 - This means that evidence of an offer to compromise may be admissible for any purpose other than to prove liability. See, e.g., Volkswagen of Am., Inc. v Superior Court (2006) 139 Cal. App. 4th 1481, 1491.
 - **TIP: When making a written settlement offer, designate the letter as a confidential settlement offer, e.g., “CONFIDENTIAL SETTLEMENT OFFER – EVIDENCE CODE § 1152”**

- **Evid. Code § 1119**

- Mediation privilege.
 - Nothing said at mediation or mediation consultation is admissible or subject to discovery for any purpose.
 - Very likely that anything remotely touching a settlement communication will be excluded from any proceeding. See Cassel v. Superior Court (2011) 51 Cal.4th 113.
 - Does NOT apply to MSC per R. of Ct. 3.1380 or Settlement Mentor Conference per L.R. 3.203.

PRACTICAL SETTLEMENT TIPS

- **Important “Boilerplate” Terms**

- **Civil Code § 1542 Waiver/General Release.**
 - **“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”**
- **Enforceability pursuant to CCP § 664.6.**
 - **Allows the court to enter judgment on motion to enforce the agreement rather than requiring new lawsuit or amendment of petition and MSJ. Also allows the court to monitor performance of the agreement.**
- **Dismissal of action.**
 - **Unless it is a CCP § 998 settlement, should include clear conditions by which the underlying action is finally dismissed.**
 - **NEVER, EVER, EVER DISMISS THE CASE UNTIL SETTLEMENT IS FULLY PERFORMED!!!! ONCE THE CASE IS DISMISSED, THE COURT LACKS SUBJECT MATTER J/X TO DO ANYTHING! Viejo Bancorp, Inc. v. Wood (1989) 217 Cal. App. 3d 200, 206.**

PRACTICAL SETTLEMENT TIPS

- **Important “Boilerplate” Terms**

- **Attorney’s Fees**

- **Generally says that prevailing party in any action to enforce agreement is entitled to attorney’s fees.**
 - **Civil Code § 1717 provides that an attorney’s fee provision is reciprocal, not limited to any one of the parties, even if specified in the contract.**
 - **TIP: Unless there is an extremely valid reason for not having it, an attorney’s fee provision should be in each and every written settlement agreement.**

- **Contingent on Court Approval**

- **Obviously needed if court approval is required by statute.**
 - **Also recommended if less than all fiduciaries and beneficiaries do not participate directly in the settlement (as in sign the agreement).**

PRACTICAL SETTLEMENT TIPS

- **Court Approval**

- **What is it?**

- **Strictly speaking, without more, court approval is the court's "blessing" of the exercise of a fiduciary's powers. Really has no effect on the performance of the agreement *per se*.**
 - **Prevents a later claim that entering into the settlement was a breach of fiduciary duty (*res judicata* effect)**
 - **HOWEVER, in petition for approval, consider requesting an order directing (or even ordering) all of the parties to perform its terms or even adopting the agreement itself as an order of the court.**

- **Why get it?**

- **Required by statute or by the terms of the agreement.**
 - **Flesh out objections from non-participating parties.**
 - **Enforcement mechanism.**

PRACTICAL SETTLEMENT TIPS

- **Court Approval**

- **How Does Court Approval Operate as an Enforcement Mechanism?**

- **Because bare court approval only serves to bless a fiduciary's exercise of his or her powers, the order does not necessarily obligate anyone else to do anything.**
 - **However, if the order directs the party to perform or specifically adopts its terms as the order of the court, then parties may use the EJI to enforce the order as a judgment. Prob. Code § 1049.**
 - **Gives enforcing party two options:**
 - **EJI mechanisms may be faster and may not require court intervention (e.g., judgment lien);**
 - **Other mechanisms (e.g., CCP 664.6 motion or complaint/petition) may entitle prevailing party to fees if there is a fee provision in the agreement.**

STATUTORY OFFERS TO COMPROMISE

- **Code of Civil Procedure § 998**
- **Settlement offer governed by statute that results in potentially significant shifting in costs from one side to another in the event that the offer is not accepted.**

STATUTORY OFFERS TO COMPROMISE

- **When do you use a 998 offer?**
 - **ALWAYS CONSIDER** when you anticipate the hiring of expert witnesses in support of your case.
 - **Most significant consequence of a rejected 998 offer is the shifting of expert witness fees to the non-accepting party.**

STATUTORY OFFERS TO COMPROMISE

• Procedure

- Offer must be in writing (preferably on pleading paper) with terms (a JC Form is available for optional use – CIV-090).
- Terms need not be monetary.
- Offer must be an offer of complete settlement as to the parties to the offer.
 - Doesn't necessarily mean that all parties must settle, just as to the offeror and offeree.
 - Must include dismissal of petition *with prejudice* or complete release. Menges v. Dept. of Transp. (2020) 59 Cal. App. 5th 13, 26.
- Must recite that the offer is pursuant to CCP § 998.
- Must include a way to accept (either as part of the offer or as a separate document).

STATUTORY OFFERS TO COMPROMISE

- **Procedure**

- **Must be served on party or their counsel, with proof of service.**
 - **Party served must be subject to court's j/x.**
- **Must NOT be filed.**
 - **Until the offer is accepted, it is still privileged as an offer to compromise (Evid. Code § 1152).**
- **Must be made individually to each party, not jointly.**
 - **Likewise, offers to multiple parties conditioned on acceptance by all parties is not valid as a 998 offer.**
- **Form of acceptance of the offer must be unequivocal (Bias v. Wright (2002) 103 Cal. App. 4th 811, 820) and unconditional (Siri v. Sutter Home Winery, Inc. (2022) 82 Cal. App. 5th 685, 691).**

STATUTORY OFFERS TO COMPROMISE

- **Procedure**

- **Timing**

- **Must be made not later than 10 days before trial starts (extended per CCP §§ 1013 and 1010.6 for service by mail/electronic means). CCP § 998(b).**
 - **Beginning of trial is opening statements. CCP § 998(b)(3).**
 - **Offer expires *by operation of law* 30 days after service (extended per CCP §§ 1013 and 1010.6 for service by mail/electronic means). CCP § 998(b)(2).**
 - **Offer is deemed withdrawn if trial commences. CCP § 998(b)(2).**

STATUTORY OFFERS TO COMPROMISE

- **Procedure**

- **Acceptance**

- **Must be communicated before expiration of the offer. Drouin v. Fleetwood Enterprises (1985) 163 Cal. App. 3d 486, 491-492.**
 - **An “original proof of acceptance” must be filed with the court along with a judgment for the court to enter. CRC 3.250(a)(23)**

STATUTORY OFFERS TO COMPROMISE

- **Procedure**

- **Rejections and Other Similar Things**

- Rejection of the offer must be unequivocal in order to terminate the offer. Criticisms or anything of the like does not prevent the offeree from accepting. Guzman v. Visalia Comm. Bank (1999) 71 Cal. App. 4th 1370, 1378.
- Communicating a *counteroffer* (pursuant to CCP § 998 or not) does not terminate the offer (the rule is different under ordinary contract principles). Poster v. Southern Calif. Rapid Transit Dist. (1990) 52 Cal.3d 266, 270.

STATUTORY OFFERS TO COMPROMISE

- **Cost Penalties on Rejected/Terminated 998 Offers**

- **General rules:**

- **If Petitioner fails to accept a 998 offer and fails to obtain a judgment “more favorable” than the offer, then**
 - **Petitioner cannot recover post-offer costs if Petitioner is prevailing party AND**
 - **Petitioner must pay Respondent’s post-offer costs.**
 - **Respondent may be awarded post-offer expert witness fees both for preparation and during trial. CCP § 998(c). This cost is *discretionary*.**
- **If Respondent fails to accept a 998 offer and fails to obtain a judgment “more favorable” than the offer, then**
 - **Petitioner is entitled to recover statutory costs under CCP 1032 as prevailing party AND**
 - **Petitioner may be awarded post-offer expert witness fees both for preparation and during trial. CCP § 998(d). This cost is *discretionary*.**

STATUTORY OFFERS TO COMPROMISE

- **Cost Penalties on Rejected/Terminated 998 Offers**

- **Determining “more favorable than”**

- **Generally, it comes down to dollars and cents.**

- **What if the offer is partly non-monetary? So long as the terms are definite and certain so that the court can determine whether the final result was “more favorable” than the offer, then costs could still be awarded. If the terms are not so certain, the offer will not qualify as a 998 offer.**

STATUTORY OFFERS TO COMPROMISE

• **Claiming Costs**

- **Submit Memorandum of Costs (Forms MC 10 and MC-11) after judgment pursuant to CCP §§ 1032, 1033.5 and R. of Ct. 3.1700-3.1702.**
 - **NOTE: 998 Offer need not be attached to the Memorandum, but you will need it if the Memo is challenged on a Motion to Strike or Tax.**
- **If no Motion to Tax is timely filed, then the Memorandum is presumed true and the costs become part of the judgment.**

STATUTORY OFFERS TO COMPROMISE

- **Challenging Cost Penalties**

- **File Motion to Strike or Tax (R. of Ct. 3.1700(b)).**

- **Grounds to Challenge 998 Cost Penalties:**

- **Entitlement (i.e., no 998 offer made at all, was untimely, or otherwise not Code-compliant);**

- **Unreasonable costs amount (via Motion to Tax); or**

STATUTORY OFFERS TO COMPROMISE

- **Challenging Cost Penalties**

- **Grounds to Challenge 998 Cost Penalties:**

- Offer was not in good faith.

- Offer must have a reasonable chance of being accepted. Nominal or token offers with little chance of acceptance will not qualify as a valid 998 offer. Santantonio v. Westinghouse Broadcasting Co., Inc. (1994) 25 Cal. App. 4th 102, 116.
- “Normally, a token or nominal offer will not satisfy this good faith requirement...unless it is absolutely clear that *no reasonable possibility* exists that the defendant will be held liable.” Wear v. Calderon (1981) 121 Cal. App. 3d 818, 821.
- UNPUBLISHED PROBATE EXAMPLE: Estate of Ellis Weldell Fuller 2011 Cal. App. Unpub. LEXIS 3555.
- Court has discretion to determine that the offer was made in good faith. Arno v. Helinet Corp. (2005) 130 Cal. App. 4th 1019, 1024.

SETTLEMENT PERFORMANCE AND ENFORCEMENT

- **Settlement Performance**

- **May always request that the court retain jurisdiction over the performance of a settlement pursuant to CCP § 664.6.**
- **Drafting is often the key component. Terms should be clearly stated so that the court knows whether there are any breaches.**

MOTION TO ENFORCE SETTLEMENT

- **CCP § 664.6**
- **Authorizes court to enter judgment pursuant to the terms of a settlement agreement.**
- **Settlement must either be in writing or orally *in court and on the record*.**
- **Written settlement must be signed by the party, not by counsel on behalf of a party.**
CCP § 664.6(b), (c).

MOTION TO ENFORCE SETTLEMENT

- **Need not allege breach to obtain judgment. Hines v. Lukes (2008) 167 Cal. App. 4th 1174, 1184-1185.**
- **Also authorizes the court to retain jurisdiction over the settlement until performance is complete.**

MOTION TO ENFORCE SETTLEMENT

- **Litigation must be *pending*. Kirby v. Southern California Edison Co. (2000) 78 Cal. App. 4th 840, 845.**
- **“Signed writing”**: signed by all parties to the agreement.
- **Must be an enforceable contract under ordinary contract principles. See Terry v. Conlan (2005) 131 Cal. App. 4th 1445.**

MOTION TO ENFORCE SETTLEMENT

- **Signed by counsel not allowed in Probate proceedings, but may still be enforceable as an ordinary contract outside of CCP § 664.6. Levy v. Superior Court (1995) 10 Cal.4th 578, 586.**
- **Court may adjudicate terms of settlement (i.e., what the terms are). Malouf Bros. v. Dixon (1991) 230 Cal. App. 3d 280.**
 - **BUT, may not modify the terms of the agreement!**

MOTION TO ENFORCE SETTLEMENT

- “Oral settlement before the court”: Verbal acceptance, not absence of objection to terms. Fiege v. Cooke (2004) 125 Cal. App. 4th 1350, 1353-1355.
- By the *parties*, not counsel. Johnson v. Dept. of Corrections (1995) 38 Cal. App. 4th 1700, 1707-1708.

MOTION TO ENFORCE SETTLEMENT

- **“Before the court” means in a *judicially supervised proceeding*. Marriage of Assemi (1994) 7 Cal.4th 896, 909.**
 - **General reference under CCP § 638(a) OK. Not special reference under CCP § 638(b). Murphy v. Padilla (1996) 42 Cal. App. 4th 707, 713.**
 - **Not at deposition. Datatronic Systems Corp. v. Speron, Inc. (1986) 176 Cal. App. 3d 1168, 1174.**

OTHER WAYS TO ENFORCE SETTLEMENT

- **Under the Enforcement of Judgments Law?**

- **Only if the court approves the settlement and adopts it as an order of the court or if the order directs or orders compliance with the terms of the agreement.**
 - **Prob. Code § 1049 (Probate Code orders are enforced under the EJM).**
 - **Most useful if the agreement requires payment of money. Can possibly use judgment lien for enforcement.**

OTHER WAYS TO ENFORCE SETTLEMENT

- **Amendment of underlying petition to include claim for breach of settlement agreement.**
 - **Almost certainly requires leave of court per CCP § 473(a).**
 - **Once amended, petition would usually lead to either an MSJ or trial on the breach of contract claim.**

OTHER WAYS TO ENFORCE SETTLEMENT

- **File a new breach of contract complaint**
 - **Probably in civil department**
 - **New case**
 - **This is the way settlement agreements were enforced before CCP § 664.6**

OTHER WAYS TO ENFORCE SETTLEMENT

- **Probate Code § 850 Petition?**
 - **Only if a fiduciary party is involved in the breach of the settlement obligation (850 requires a claim that an probate estate, conservatorship estate or trust is in possession of or entitled to possession of disputed property).**

QUESTIONS?



Thank You



Arrivederci

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

In re the) Case no. P51-00578
)
CORLEONE FAMILY TRUST) **SETTLEMENT OFFER PURSUANT TO**
) **CODE OF CIVIL PROCEDURE SECTION**
_____) **998**

Petitioner Fredo Corelone (“Petitioner”) hereby makes the following settlement offer to Respondent Michael Corleone (“Respondent”) for entry of judgment pursuant to the provisions of Code of Civil Procedure section 998:

1. Respondent shall resign as trustee of the Corleone Family Trust (the “Trust”) in favor of a private professional fiduciary to be selected by mutual agreement of Petitioner and Respondent not later than 30 days after this Offer is accepted and filed with the Court.
2. Respondent shall pay to Petitioner the sum of \$1 million from personal, not Trust, assets, to be paid not later than 60 days after this Offer is accepted and filed with the Court.
3. Petitioner shall not take sides against the Family on any matter of Family Business. This includes, but is not limited to providing information to any rival *capo* or any other person that is reasonably likely to result in a risk of personal injury or death of Respondent.
4. The filing of the Acceptance of this Offer shall immediately result in a judgment that incorporates the terms of this Offer and a judgment of dismissal of Petitioner’s Petition with prejudice.

Date:

Fredo Corelone

ACCEPTANCE

By signing below, I hereby accept the terms of the above-referenced Offer.

Date:

Michael Corleone