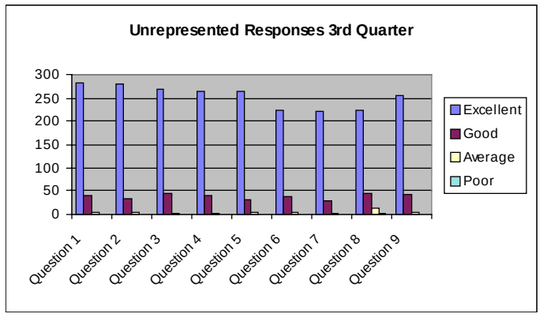
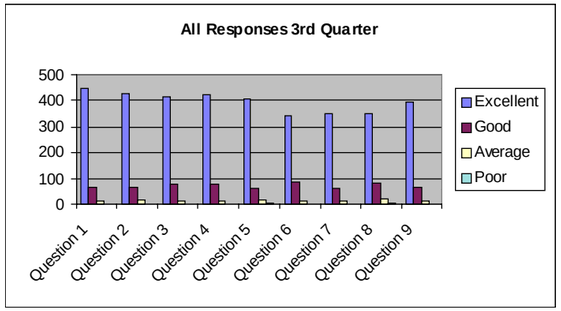
Evaluations of OAH Services





Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Note: The four major groups of respondents are: Represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The respondents fill out the evaluations immediately after the hearing and the evaluations are not disclosed to the ALJ involved.

Office of Administrative Hearings
1400 West Washington, Suite 101
Phoenix, Arizona 85007

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The OAH

Jane Dee Hull
Governor

Cliff J. Vanell
Director

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SETTLEMENT AGREEMENTS –TAKING THE PEN OUT OF THE JUDGE'S HAND

Robert I. Worth, Administrative Law Judge

A Settlement is a type of contract or agreement. Most often, the concluding of such an agreement between individuals or entities will resolve a prior dispute or controversy.

There are three primary benefits of entering into a settlement agreement. Two of the more obvious desirable results are the "Saving of Time," and the "Saving of Expense." These first two categories become shared benefits, especially in matters where extensive research, preparation, interviews, depositions and presentations may be necessary, as well as a perhaps realistic potential of further appeals. Depending on the status of the case at the time any settlement is finalized, it is probable that much overall wear and tear on the parties-in-interest, as well as on their wallets, would be avoided or at least minimized.

The third and perhaps most important benefit of any settlement will normally be the "Certainty of Result." Although many ultimate decisions by judges or juries are split in varying percentages, it is usual for one party to win and the other to lose. The certain result achieved by a mutual agreement serves to eliminate the worry of possibly not being the prevailing party, and most often the settlement will be coupled with a stipulation that each party shall bear its own counsel fees, thereby also eliminating another potential exposure of the parties, corporate or individual. This aspect of achieving a known-in-advance end result is subject to at least one recognized exception: when the parties mutually agree to submit their dispute to binding arbitration. Another obvious exception would have to be the consideration that one or perhaps both parties may not perform under the terms of the agreement as anticipated.

When taking part in any settlement negotiation, the parties should be constantly aware of the reality that neither the parties, their respective lawyers or the tribunal, whether judicial or quasi-judicial, are able to change history. Since the clock can never be turned back, all focus must remain on the choices presently available to the negotiating parties, which frequently is a business decision or one of expedience and not a legal determination. Frequently, the ending terms are products of give and take, and a compromise is reached.

There is no requirement for a settlement agreement to be in writing and verbal settlements are just as binding and enforceable as are those reduced to writing. However, the terms or even the very existence of a verbal settlement may be far more difficult or even impossible to establish at a later date. When one or more parties are represented by counsel, it is normally anticipated that either or both advocates will seek and finalize a written memorialization of all critical settlement terms. If any difficulty is encountered in securing an adversary's signature to a proposed writing, a useful and frequently effective alternative, whether or not attorneys are involved, is to compose an informal, perhaps self-serving letter confirming the major provisions of the oral settlement agreement. This letter should be transmitted to the other party, expressly advising that if no reply is promptly communicated then the stated terms shall be deemed to be accurate.

The terms of any settlement should not be so complex and intricate that there will be a high probability of future litigation

"Settlements"
continued page 2

***Director's note**: OAH is committed to fairness and making hearings accessible to all. This article is the fourth in what we at OAH plan to be a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.*

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies began in 1961 with California. The current states having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Illinois (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), North Carolina (1986), North Dakota (1991), Oregon (1999), South Carolina (1994), South Dakota (1994), Tennessee (1975), Texas (1991), Washington (1981), Wisconsin (1978) and Wyoming (1987).

Mission Statement:
We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.

3rd Quarter Statistics At A Glance

Acceptance Rate:
ALJ findings of fact and conclusions of law were accepted in **97.58%** of all recommended decisions acted upon by the agencies.* ALJ decisions, including recommended orders, were accepted without modification in **95.1%** of all recommended decisions acted upon by the agencies. **78.43%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:
The appeal rate was **1.77%** defined as appeals taken (22) over hearings concluded (1241**).

Rehearings:
The rehearing rate was **.56**%, defined as rehearings scheduled (7) over hearings concluded (1241**).

Completion Rate:
The completion rate was **111.86**%, defined as cases completed (1835) over new cases filed (1694).

Continuance:
The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 3rd quarter) was **46 days**. The frequency of continuance, defined as the number of continuances granted (159) over the total number of cases first scheduled (1698), expressed as a percent, was **9.36%**. The ratio of first settings (1811) to continued settings on the calendar (157) was **1 to 0.08.**

Dispositions:
Hearings conducted: **67.6%**; vacated prior to hearing: **29.6%**; hearings withdrawn by agency: **2.8%**.

Contrary Recommendations and Agency Response:
21.97% of recommendations were contrary to the original agency action where agency took a position. Agency acceptance of contrary recommendations was **83%**.

*** 1% of ALJ recommended decisions were certified as final by the OAH due to agency inaction.**
**** Cases which were vacated are not included**

"Settlements"

continued from page 1

with respect to compliance with or alleged breaches of the agreement. "Simplicity is a virtue." The more complicated the terms of any settlement, the more likely that there will be future issues with respect to possible or claimed breaches. As with any contractual format, the settlement terms must be formulated and finalized in clear, concise and readily understandable language.

Settlement agreements may fall into two different categories. Perhaps the most frequently encountered type of settlement is one that is frequently referred to as an "Accord and Satisfaction." The "accord" is the actual mutual agreement, consisting of the exchange of promises for some substituted performance, and the "satisfaction" is the actual performance or the giving of the agreed consideration.

There is another distinct type of settlement arrangement that, depending upon the parties' demonstrated specific intent, must and will be treated as a "Substituted Agreement." This type of settlement envisions the accepting of the settlement contract itself as a substitute for an existing claim which is extinguished.

Administrative Law Judges may not be of the same belief or give the same treatment whenever a breach of a previously concluded settlement is asserted. The accord and satisfaction analysis may well be more defensible, especially in administrative disciplinary actions. For example, assume that the original respective positions of both parties were substantially apart on a claimed entitlement to a dollar amount, and both retreat from their original positions to reach a negotiated compromise amount. If one party commits a breach of a payment obligation, the non-breaching party should have choice to select between the benefits arising from the resulting settlement terms or from the original demands or positions.

The parties and their legal counsel, if any, should be aware of the fact that any tribunal, civil or administrative, should not be presented with an illusory settlement, whether prior to or at the hearing. If it appears that there is merely an agreement to "hopefully, perhaps, possibly" resolve all differences in the future, or that the prospect of finalizing a settlement is "almost, nearly" successful or complete, then no present resolution has been concluded. If not, then no valid basis would exist for continuing or postponing any scheduled hearing, irrespective of how close the parties are to finalizing the terms. Whenever there are too many loose ends or tentative conditions precedent for an agreement to be fully and mutually confirmed, there is no binding settlement as of that point in time.

With certain cautions or limitations, the assigned Administrative Law Judge ("ALJ") need not always be excluded from all portions of discussions or conferences dealing with settlement negotiations. Nor is there any automatic disqualification for the same judge to resume hearing the matter if settlements talks break down.

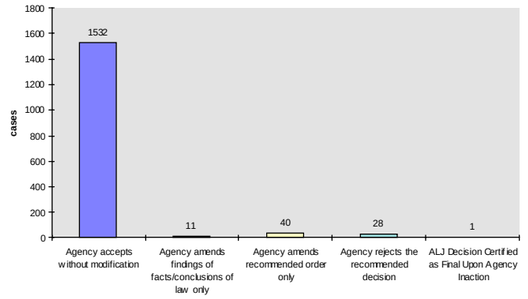
The ALJ's participation should ideally be confined to clarifying any complex terms of an agreement, additionally confirming that the settlement is genuine and not illusory. This limited inquiry should enable an informed determination of whether the proposed terms are fair and reasonable under all the circumstances, also enabling a verification that the parties' entry into the settlement was knowledgeable and voluntary. In the event any statements are made during this limited inquiry that would otherwise be inadmissible as being part of unsuccessful settlement negotiations, the ALJ may and should strike such statements and not consider them if the hearing on the merits is resumed. Both the parties and their counsel are generally willing to expressly waive any objections based upon a potential disqualification of an ALJ who is willing to participate in the limited inquiries.

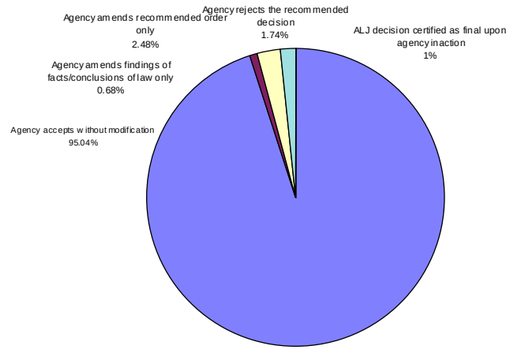
The confidentiality of all settlement talks should be stressed. As a general rule, customarily followed by all tribunals, statements and admissions made during the conducting of settlement negotiations will be inadmissible in the event an agreement is not reached. This extends to any purpose at a hearing or trial on the merits, even to the impeachment of a witness. If the rule were otherwise, there would certainly be great hesitation to even begin to propose or discuss compromise solutions.

Remember that the terms of the settlement agreement are to serve as a road map to guide the future actions of the parties-in-interest, and the ultimate goal for the professional drafter or for the parties themselves is to attempt to sufficiently clarify and simplify the operative language so that the matter will not be returned to the tribunal or become the subject of a subsequent separate action involving issues of whether the respective parties have complied with the settlement terms.

It is certainly not uncommon for cases to be settled at the beginning or during the conduct of the hearing. In most all forums, both civil judges and administrative law judges welcome the opportunity to allow the parties to effectively take the pen out of their hands and to let them decide their own respective destinies by mutual understandings embodied in an agreement. The successful negotiation and conclusion of a settlement agreement, frequently compromising disputed or unliquidated claims, is usually a "Win-Win" situation.

Agency Response to Recommended Decisions January 1 - March 31, 2001





Substantive Policy Statements adopted

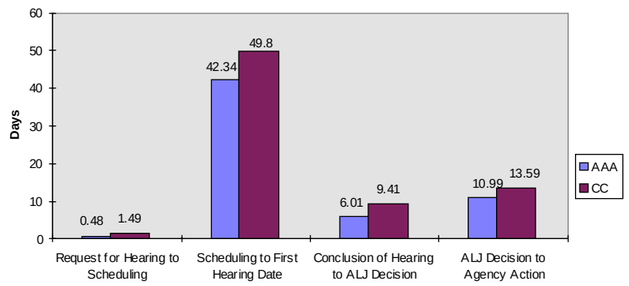
http://www.azoah.com/Rules.htm contains two links to substantive policy statements adopted by the OAH interpreting two terms found in A.A.C. R2-19-108. The full text is as follows:

PS 1.0 Interpretation of the terms, "signature" and "express mail" for the purposes of A.A.C. R2-19-108 Filing Documents.

"Signature" includes any affirmative mark. For example, the placing of a mark in an electronic document which states that by doing so one affirms that the document has been read, that there is a good basis for the submission of the document and that it is not filed for the purpose of delay or harassment, meets the requirements of A.A.C. R2-19-108(D).

"Express mail" includes e-mail, overnight mail or any other type of expedited delivery. Therefore, the filing of a document with the Office or the service of a document upon other parties by such means satisfies the requirements of A.A.C. R2-19-108(E).

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, January 1 - March 31, 2001



*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

1,694 Cases Filed January 1, 2001 - March 31, 2001

	3rd Q	FY 2001
Accountancy	14	41
Acupuncture Board	1	8
ADA	0	0
Administration	2	21
Admin. Parking	108	310
Agriculture	0	0
Ag. Emply. Rel. Bd.	0	0
AHCCCS	755	3187
Alternative Fuel	7	7
Appraisal	0	4
AZ Commission on the Arts	0	0
Attorney General	0	0
Arizona Works	0	1
Banking	10	23
Behavioral Health Ex.	0	4
Building/Fire Safety	59	131
Charter Schools	0	0
Chiropractic	0	4
Clean Elections	0	2
Community Colleges	0	0
Cosmetology	5	11
Dental	4	7
Economic Security	0	0
Economic Security-CPS	34	146
Education	0	1
Environ. Quality	54	107
Funeral	0	0
Gaming	4	9
Health Services	49	143
Insurance	31	87
Land	3	7
Liquor	28	78
Lottery	0	3
Maricopa Cty. Housing	0	0
Medical Examiners	2	8
Naturopathic	0	0
Nursing	4	12
Osteopathic	0	0
Parks	0	0
Peace Ofc. Standards	4	9
Pest Control	22	22
Physical Therapy	0	0
Podiatry	1	1
Psychologist Examiners	0	3
Public Safety - CW	4	5
Public Safety - Trans	2	7
Public Safety - Adult CC	0	3
Pvt. Post. Ed.	0	0
Racing	5	10
Radiation Regulatory	0	0
Registrar of Contr.	413	1170
Real Estate	19	47
Revenue	36	83
School - Deaf & Blind	1	1
Secretary of State	0	1
Technical Registration	0	5
Water Qual. App. Bd.	0	0
Water Resources	2	11
Weights and Measures	11	24