

NEW CALIFORNIA ESTATE-TRUST CASE:  
RECOVERY OF ATTORNEYS' FEES AFTER SETTLEMENT OFFER  
MARTINEZ V. LA METRO TRANSPORTATION

David Tate, Esq. (San Francisco), <http://davidtate.us>  
California Estate & Trust Litigation, <http://californiaestatetrust.wordpress.com>  
Tate's Blog: Law – Governance – Risk - Business, <http://davidtate.wordpress.com>  
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*Martinez v. Los Angeles County Metropolitan Transportation Authority* (California Court of Appeal, Second Appellate District, B221234, May 23, 2011)

I don't see statutory Cal. Code Civ. Proc. §998 settlement offers very often in trust, estate and probate court proceedings, but they are very common in civil litigation and should be considered more often in trust, estate and probate court proceedings. A 998 offer is a binding limited offer to settle the case on the terms provided in the offer. If the offer is not accepted within the time allowed, the offer can operate to shift the recovery or payment of costs, including attorneys' fees. I have copied and pasted below the primary relevant wording from section 998 regarding the shifting of costs.

Care needs to be exercised in wording the section 998 offer, considering all aspects of settlement if the offer is accepted, and cost shifting in terms of likely trial results if the offer is not accepted. In *Martinez v. Los Angeles County Metropolitan Transportation Authority* ("MTA") a monetary 998 offer was made by Defendant MTA which in relevant part stated that each side was to "bear their own costs." Plaintiff accepted the offer settling the case. Claiming it was the prevailing party based on the settlement terms, Plaintiff then filed a motion for recovery of attorneys' fees under the federal and California disabilities statutes. The Appellate Court affirmed the trial court's ruling that where a §998 offer is silent as to both costs and attorney fees, the prevailing party was entitled to both, but as in this case, where the offer specifically excludes costs but does not mention attorney fees, unless the offer expressly states otherwise, an offer of a monetary compromise under §998 that excludes "costs" also excludes attorney fees.

The primary relevant wording from Cal. Code Civ. Proc. §998 relating to the shifting of costs:

(c)(1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.

(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action,

the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

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