

Section 998 Update

What every lawyer should know about the latest interpretations of California's cost-shifting settlement statute

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Given the fact that the vast majority of litigated cases eventually settle, it makes sense to posture your client to be in the best position to cause that result to materialize, and to be in a good position if it doesn't.

A powerful tool in this regard is a key statute that allows a defendant to shift costs (including expert witness fees and, in some instances, attorney's fees as well) to the other side. The statute is section 998 of the California Code of Civil Procedure. The statute has been invoked thousands of times in cases governed by California law. It has also been amended several times by the Legislature, and those changes impact the present application of many older court opinions construing the section.

Needless to say, counsel are well advised to stay current with the continually evolving application of this important law. Indeed, knowing the mechanics of current section 998 procedure is imperative for every civil litigator in the Golden State.

MAKING THE OTHER SIDE BLINK

If you are litigating a contract case, the contractual terms at issue may have been set years ago and, in many instances, committed to a formal (and binding) document. Although they cannot be modified by you at this time, you can invoke section 998 to seriously alter the case dynamics.

In personal injury cases, where interest normally is not awarded, section 998 also can be a potent weapon because the first offer made pursuant to the statute triggers the recovery of prejudgment interest at 10 percent per year—and the interest accrues until the judgment is satisfied. (See Cal. Civil Code § 3291.)

But before we get into technical points, it helps to focus on the major import of a settle-

"If a 998 offer is not accepted and the other side does not do better at trial, cost-shifting may occur and even a prevailing party may be forced to pay the other side's costs. For that reason alone, when a reasonable 998 offer is made, an opponent is obliged to sit up and take notice."

ment offer made pursuant to section 998: if it is not accepted and the other side does not do better at trial (or arbitration), the cost shifting mechanism embedded in section 998 comes into play. For that reason alone, when a reasonable 998 offer is made, the other side is obliged to sit up and take notice. Under section 998, a reasonable offer merits serious consideration.

LINGERING QUESTIONS

Although statutory amendment have been designed to plug holes, resolve uncertainty, and provide stability there are still a few questions unanswered by the language of section 998.

The core principle underlying section 998 is one of public policy: to encourage settlement. Thus, the best arguments on how to construe open issues about the scope and application of section 998 are ones couched in terms of why a given action will promote settlement.

So for example, allowing a 998 offer to be revoked before acceptance will make it more likely that parties will be willing to make an offer since they know that they are not bound if they discover new information—post-offer—that makes them re-evaluate the litigation. See *T. M. Cobb Co. v. Superior Court*, 36 Cal.3d 273, 281 (1984) ("the policy of encouraging settlements is best promoted by making section 998 offers revocable. A party is more likely to make an offer pursuant to section 998 if that party knows that the offer may be revised if circumstances change or new evidence develops. Conversely, a party who knows that he or she is strictly bound to the terms of the first offer made may be reluctant to make such an offer for fear of being locked into a position which becomes unfavorable upon the discovery of additional information")

CONTRACTUAL ANALYSIS?

Because a 998 involves offers and acceptance, it is tempting to use the law of contracts or the commercial code to help fill any statutory voids. Such an approach caused one court to conclude that a prior settlement offer is extinguished by a subsequent settle-

ment offer to the same party. *Wilson v. Wal-Mart Stores, Inc.*, 72 Cal.App.4th 382, 389-391 (1999); *Distefano v. Hall*, 263 Cal.App.2d 380, 385 (1968).

So how would a court construe the first 998 offer that was followed in a few years by another one? Not the way one would expect under normal contract law. In one case, a party made two 998 offers over several years and incurred \$188,536.86 in expert fees in the time between the two offers. When the case was tried she met the terms of both offers and requested her expert fees for the period between the two offers. This would work only if the first offer was not extinguished by the second offer—as would be the result if one applied the general contract law principal that a subsequent offer entirely extinguishes a prior offer.

However, the California Supreme Court considered this situation placed settlement enhancement ahead of contract law in its unanimous opinion:

“In cases such as this, section 998’s policy of encouraging settlements is better served by not applying the general contract principle that a subsequent offer entirely extinguishes a prior offer. ... Not only do the chances of settlement increase with multiple offers ... but to be consistent with section 998’s financial incentives and disincentives, parties should not be penalized for making more than one reasonable settlement offer. Nor should parties be rewarded for rejecting multiple offers where each proves more favorable than the result obtained at trial. Accordingly, we hold that where, as here, a plaintiff serves two unaccepted and unrevoked statutory offers, and the defendant fails to obtain a judgment more favorable than either offer, the trial court retains discretion to order payment of expert witness costs incurred from the date of the first offer.

Martinez v. Brownco Construction Co., 56 Cal.4th 1014, 1026 (2013).

PRE-PRINTED FORMS

The California Judicial Council has published an optional form (CIV-090) that can be utilized to make a 998 offer. It can be found at <http://www.courts.ca.gov/documents/civ090.pdf>. The form is designed for use by a single plaintiff and a single defendant.

If multiple parties make a 998 offer, the results for all must all be considered. As one court noted:

“Accordingly, because in the present case no judgment has yet been entered with regard to six of the 20 defendants on whose behalf the section 998 offer was made, the trial court erred in awarding expert witness fees to the 14 dismissed defendants.”

Kahn v. The Dewey Group, 240 Cal.App.4th 227, 230 (2015).

MULTIPLE PARTIES

If there are several parties to the litigation, an offer to compromise must be sufficiently specific to permit an objective analysis of who has prevailed. If the defendants are alleged to be joint tortfeasors, then a single offer by both of the defendants may be acceptable. *Brown v. Nolan*, 98 Cal. App. 3d 445 (1979). The same is true if the sides are not true joint tortfeasors but are nevertheless unified in their interests. *Winston Square Homeowners Ass’n v. Centex West, Inc.*, 213 Cal. App. 3d 282, 294 (1989). However, a lump sum offer by the plaintiff to multiple defendants who have proportional liability for damages is not enforceable under section 998. *Taing v. Johnson Scaffolding Co.*, 9 Cal. App. 4th 579, 584 (1992).

CORE RULINGS

Although there is mandatory language in section 998 and there is a form for a 998 settlement offer, there are two basic pillars contained in key appellate decisions:

- No “magic language” or specific format is required for either an offer or acceptance under section 998. *Toste v. Cal-Portland Construction*, 245 Cal.App.4th 362, 374 (2016); and
- The offer and the acceptance must be in writing: (*Rouland v. Pacific Specialty Ins. Co.*, 220 Cal.App.4th 280, 285 (2013).)

CONSTANT AMENDMENTS

As noted above, Section 998 has been amended many times. The most recent change, contained in Assembly Bill No. 1141 (2015–2016 Reg. Sess.), which became effective January 1, 2016, equalizes the scope of costs for plaintiffs and defendants in section 998 settlement situations. The Legislative Counsel’s Digest comment to the legislation states: “This bill would clarify that this provision requires a plaintiff to cover only expert witness costs that arose post-offer.” This has been held to apply to cases on appeal. *Toste*, supra, 245 Cal.App.4th at 376.

The fact that section 998 is regularly amended requires attention to how the older opinions apply to a new proceeding. For example one court considering a breach of lease case where the lease had an attorney’s fee provision wrote: “[W]e find, under the circumstances here, attorney’s fees are not costs, [but are damages under the contract] and therefore the cost-shifting aspects of section 998, subdivision (c), did not become operative.” *Encinitas Plaza Real v. Knight*, 209 Cal.App.3d 996, 998 (1989).

In *Encinitas Plaza*, the tenant’s offer was for \$21,291.13. After it was made, and allowing for an offset, the court awarded a net of \$5,748.90. Unless the \$38,793.46

in incurred attorney’s fees was added to the damages awarded, the owner did not meet the required amount.

The Legislature was not happy with this result and amended the section in 1994 (which caused more confusion) and then again in 1997, to read:

“(A) In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the post-offer costs.

(B) It is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in *Encinitas Plaza Real v. Knight* [(1989)] 209 Cal. App. 3d 996, that attorney’s fees awarded to the prevailing party were not costs for purposes of this section but were part of the judgment.”

See Cal. Code Civ. Proc. §998(c)(2).

The language of the 1994 amendment was removed and replaced with language providing that post-offer costs are to be excluded in determining whether the plaintiff obtains a more favorable judgment. Further, the amendment expressly indicated that attorney’s fees were to be considered as costs. See *Heritage Eng’g Constr. v. City of Indus.*, 65 Cal.App.4th 1435, 1441 (1998).

CASE LAW PROVIDES GUIDANCE

Nearly a thousand opinions on section 998 offers have been filed in the past few years, and some of them are surprising. For example, it has long been the rule that one party can shift expert witness fees to the other side, but who knew the courts would also allow recovery of fees paid to the *opponent’s* expert at deposition? Yet this was the holding in *Chaaban v. Wet Seal, Inc.*, 203 Cal. App. 4th 49, 55 (2012).

As case law teaches, there are also a few things outside of the statutory language for litigants (and their counsel) to consider. For instance, while the statute does not expressly contain a “good faith” requirement, it is settled law that only a good faith offer qualifies for the benefits of section 998. Courts have ruled that the statute mandates good faith in that the offer must carry with it some reasonable prospect of acceptance, and the other side must have reason to know the offer is reasonable. See *Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal. App. 3d 692, 698–699 (1987).

A party having no expectation that his or her offer will be accepted will not be allowed to benefit from a no-risk offer made for the sole purpose of later recovering large expert witness fees. *Jones v. Dumrichob*, 63 Cal. App. 4th 1258, 1262-3 (1998).

In a case that stemmed from a high-speed accident involving a motorcycle and a van, counsel for the plaintiff (the injured motorcyclist) served a \$50,000 offer to compromise along with the complaint. See *Najera v.*

Huerta, 191 Cal. App. 4th 872 (2011). Plaintiff's counsel then refused to extend the 30-day deadline for responsive pleading, which was (and is) a common courtesy among litigators. After a verdict for the plaintiff in the amount of \$728,704, plaintiff's counsel sought to recover all of his expert costs plus prejudgment interest, based on the 998 offer that was not accepted by the defense.

The defense moved to tax the expert costs and the prejudgment interest, arguing that the plaintiff's section 998 offer was not made in good faith because it was served with the summons and complaint and expired before the defendant had adequate time to conduct a reasonable investigation and discover facts necessary to properly evaluate the offer. The court of appeal commented that "[a]n important factor in deciding whether a section 998 offer is unreasonable or in bad faith is whether the offeree was given a fair opportunity to intelligently evaluate the offer." *Najera*, *supra*, 191 Cal.App.4th at 878. The court noted that in this case, there was no such opportunity; in the court's eye, plaintiff's counsel was trying to "game the system" by not extending the deadline or providing requested information that was needed to fairly evaluate the offer.

Contrast that situation with *Adams v. Ford Motor Company*, 199 Cal. App. 4th 1475 (2011), where the defendant made an offer of \$2,500 on the courthouse steps just before trial in a mesothelioma death case. At first blush, a defense offer of \$2,500 with a waiver of costs made only a few days before trial might not seem realistic or reasonable. But in the *Adams* case, causation was still largely in dispute at that stage, and this uncertainty—which shifted \$185,742 in costs—was enough to make the offer reasonable.

STATUTORY LANGUAGE

It should be noted that under an amendment to section 998(d) that became effective in 2016, if a defense offer is rejected and the plaintiff doesn't do better at trial, only the post-offer costs for experts can be recovered. (Prior to this amendment, the rules were more permissive for defendants because under section 998(c)(1), a defendant might recover *both* pre-offer and post-offer costs for experts, as occurred in the *Adams* case cited above.)

Since a 2006 amendment, section 998(b) has contained a requirement that the settlement offer contain a provision that lets the accepting party indicate acceptance by signing a written statement to that effect. This requirement is crucial, for an offer that does not contain the appropriate language is invalid and will not trigger cost-shifting. (*Puerta v. Torres*, 195 Cal. App. 4th 1267, 1269 (2011).)

Litigators should use care when making

or responding to an offer that contains the words "each side to bear their own costs" yet makes no mention of attorney's fees. A 998 offer that excludes costs also excludes attorney's fees, even though it does not use those words, at least according to one appellate court. *Martinez v. Los Angeles Cnty Metro. Transp. Auth.*, 195 Cal. App. 4th 1038, 1041 (2011). This is because of the rapport between various "cost" statutes, including Code of Civil Procedure sections 998, 1032, and 1033.5.

On the other hand, if a 998 offer is *silent* about fees and costs, then a party who prevails under the ensuing judgment may be entitled to recover *both* costs and contractual or statutory attorney's fees. *Engle v. Copenbarger & Copenbarger, LLP*, 157 Cal. App. 4th 165, 169 (2007).

It is also well settled that an offeree can haggle away while an offer is pending and then still accept the original offer before it expires. *Guzman v. Visalia Community Bank*, 71 Cal. App. 4th 1370, 1377 (1999).

BE REASONABLE

A 998 offer that overreaches may be invalid. In one instance, two plaintiffs separately sued one defendant for damages arising out of a municipal bus accident. The defendant made a single 998 offer to both plaintiffs for an aggregate sum. The offer expressly provided that neither plaintiff could accept unless the other also accepted. The court held that the offer was an invalid "conditional settlement offer." The opinion explains that it is in the public interest that *each party* be given the right to accept and consummate an offer made to him or her. *Hutchins v. Waters*, 51 Cal. App. 3d 69, 73 (1975).

In addition, when the plaintiffs are married to each other, a single offer by the defense may not qualify under section 998. The key issue is whether the couple has a single "indivisible" injury. In a case that involved a husband-and-wife claim against a third party over damage to a community asset, the court held that it was a unified claim and a joint offer was valid. See *Vick v. DaCorsi*, 110 Cal. App. 4th 206 (2003); *Farag v. ArfvinMeritor, Inc.*, 205 Cal. App. 4th 372 (2012). But when the case involves particular injury to each spouse, separate offers must be made. *Weinberg v. Safeco Ins. Co. of America*, 114 Cal. App. 4th 1075 (2004).

ARBITRATION, YES – FAMILY LAW, NO

As amended, section 998 now applies to cases that are arbitrated as well as tried in a court of law. Judges and arbitrators have the same powers under this statute. *Maaso v. Signer*, 203 Cal. App. 4th 362, 379 (2012).

But not every case will qualify for section 998 cost-shifting benefits. A classic example

is a family law dispute. Given the broad discretion that family law statutes vest in the trial court to consider the conduct or misconduct of a party or counsel in awarding attorney's fees and costs, appellate tribunals have held that "the Legislature could not have meant to limit this discretion" by having the provisions of section 998 apply. *In Re Marriage of Green*, 213 Cal. App. 3d 14, 24 (1989).

In less expansive statutory schemes such as the state's consumer warranty law, commonly known as the Song-Beverly Act, the usual section 998 rules will hold. Because the cost-shifting provisions of the Song-Beverly Act (Cal. Civ. Code §§ 1790–1795.8) do not expressly disable a prevailing defendant from recovering section 998 costs and fees in general, or expert witness fees in particular, a trial court can exercise its discretion to award expert witness fees. *Murillo v. Fleetwood Enterprises, Inc.*, 17 Cal. 4th 985, 1000 (1998).

PROVING UP THE 998 OFFER

It's important in the course of submitting a section 998 offer to present admissible evidence to prove up the offer and the existence of the costs claimed under it. In a recent case, the court of appeal noted that a party "failed to support her memorandum of costs with a written offer to compromise. Accordingly, the award of expert witness fees must be reversed." *Behr v. Redmond*, 193 Cal. App. 4th 517, 538 (2011). Also, a party should not serve a 998 offer on an insurance carrier alone, because a demand served only on a (nonparty) insurer is not a valid 998 offer. *Arno v. Helinet Corp.*, 130 Cal. App. 4th 1019, 1025 (2005).

In most cases section 998 focuses on cost-shifting that is related to charges for witnesses, but in some circumstances the statute allows for the recovery of legal fees as well—particularly if a contract closely related to the dispute has a provision that authorizes such a recovery. When there is an attorney's fees clause, those fees become recoverable costs by virtue of section 1033.5 of the Code of Civil Procedure, and that, in turn, triggers cost shifting of the fees under section 998. *Scott Co. v. Blount, Inc.*, 20 Cal. 4th 1103, 1113 (1999).

CONCLUSION

Offers under section 998 demand a good deal of thought and attorneys who make them must be sure they comply with the oft-amended statutory prerequisites. Requesting costs and fees at the conclusion of a case is often a move made against a defeated opponent, who will likely exploit any procedural irregularity in an effort to win the final skirmish. So get it right from the outset. Doing so will make a 998 offer effective as well as enforceable.

TRUE/FALSE TEST & ANSWER KEY

1. Q: Normal contract rules and law always govern the interpretation of settlement offers made pursuant to section 998 of the California Code of Civil Procedure.
A: False. Public policy considerations favoring settlement are paramount. See *Martinez v. Brownco Construction Co.*, 56 Cal.4th 1014, 1026 (2103).
2. Q: The waiver of costs is irrelevant to a settlement offer made pursuant to section 998.
A: False. It can be the determining factor. See *Adams v. Ford Motor Co.*, 199 Cal.App.4th 1475 (2011).
3. Q: An offer that states "each side to bear their own costs" excludes attorney's fees.
A: True. That is the holding of *Martinez v. Los Angeles County Metro. Transp. Auth.*, 195 Cal.App.4th 1038 (2011).
4. Q: Section 998 has not been amended since the date it was enacted.
A: False. It has been amended many times.
5. If challenged, a party must be able to prove that the settlement offer made pursuant to section 998 was served.
A: True. See *Behr v. Redmond*, 193 Cal.App.517 (2011).
6. Q: If a party negotiates or issues a counter-offer, it immediately terminates a settlement offer pursuant to section 998.
A: False. It's okay to haggle and then accept the offer. See *Guzman v. Visalia Comm. Bank*, 71 Cal.App.4th 1370 (1999).
7. Q: Service on a party's insurance carrier of a settlement offer made pursuant to section 998 is effective.
A: False. See *Arno v. Helinet Corp.*, 130 Cal.App.4th 1019 (2005).
8. Q: Courts have determined that there is a good faith requirement when making a settlement offer pursuant to section 998.
A: True. See *Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal.App.3d 692 (1987) and *Jones v. Dumrichob*, 63 Cal.App.4th 1258 (1998).
9. Q: Once made, a settlement offer pursuant to section 998 cannot be revoked before acceptance.
A: False. See *Palmer v. Schindler Elevator Corp.*, 108 Cal.App.4th 14 (2003).
10. Q: Once a settlement offer pursuant to section a 998 is served, there is no requirement to provide any information to the other side.
A: False. They need to be given enough information to evaluate the offer. See *Najera v. Huerta*, 191 Cal.App.4th 872 (2011) *Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal.App.3d 692 (1987); and *Jones v. Dumrichob*, 63 Cal.App.4th 1258 (1998)
11. Q: Even if the matter is arbitrated, the application for experts' fees under section 998 must be made to a civil court, not to an arbitration panel.
A: False. See *Maaso v. Signer*, 203 Cal.App.4th 362 (2012).
12. Q: A settlement offer pursuant to section 998 offer applies in the same way to both plaintiffs and defendants.
A: True. As amended in 2016, a defendant and a plaintiff may recover only post-offer costs..
13. Q: The exact words and procedures of stated in section 998 must be used.
A: False. There are no "magic words" that must be used. See *Toste v. CalPortland Construction*, 245 Cal.App.4th 362, 374 (2016).
14. A settlement offer pursuant to section 998 offer must indicate how it can be accepted.
A: True. See *Puerta v. Torres*, 195 Cal.App.4th 1267 (2011).
15. Q: Serving a 998 offer with the summons and complaint is not allowed.
A: False. It can be done but there are some risks to doing this, including the likelihood that the court will consider the offer as unreasonable because the defendant did not have the time to conduct discovery before the statutory time limit expired.. See *Najera v. Huerta*, 191 Cal.App.4th 872 (2011).
16. A: Under section 998, a party may even be able to recover fees paid to an opponent's expert at a pretrial deposition.
A: True. See *Chaaban v. Wet Seal, Inc.*, 203 Cal.App.4th 49 (2012), regarding fees paid at a deposition for the other side's expert.
17. Q: A 998 offer that is silent as to attorney's fees and costs cannot shift those fees and costs.
A: False. Silence does operate to shift fees and costs. See *Engle v. Copenbarger & Copenbarger, LLP*, 157 Cal.App.4th 165 (2007).
18. Q: A successful 998 offer in a personal injury matter triggers prejudgment interest at 10 percent.
A: True. See Civil Code section 3291.
19. Q. A party can recover costs, but not attorney's fees, via a 998 offer.
A: False. Attorneys' fees can be awarded if there is a contract authorizing fees. See *Scott v. Blount*, 20 Cal.4th 1103 (1999).
20. Q: There is no approved Judicial Council form for settlement offers made pursuant to section 998.
A: False. See CA Judicial Council form CIV-090 for single plaintiff and single defendant cases.