998 offers: Pitfalls and opportunities in the statutory settlement offer

Identifying pitfalls that doom many litigants and the strategic opportunities that are often missed

By Valerie T. McGinty and Kirsten Fish

Section 998 provides a statutorily-protected method of making a settlement offer. But to be entitled to those protections, the terms of the statute must be strictly satisfied, creating a landmine for the unwary attorney. Moreover, as San Mateo Superior Court Judge Stephen Dylina observed at a recent seminar, "the plaintiff's bar often does not utilize 998 offers to their fullest advantage."

This article addresses both of these challenges, identifying the pitfalls that doom many litigants and the strategic opportunities that are often missed by other plaintiff's attorneys.

Avoiding the pitfalls

To avoid pitfalls when making an offer, you must do three things.

First, in all cases with a single plaintiff and defendant, use the Judicial Council form (CIV-090) or be absolutely certain that your standard 998 offer has *all* of the elements required for a valid offer. Using the Judicial Council form guarantees freedom from problems that ensnared others, such as failing to make the 998 offer unconditional, failing to include all the terms of the offer, and failing to include a method of acceptance for the offer.

Second, be sure not to issue the offer too early or too late. If you make a 998 offer too early (such as serving it along with the complaint), it may be deemed invalid because defense counsel will not have sufficient information to evaluate the case (see *Najera v. Huerta* (2011) 191 Cal.App.4th 872). On the other hand, you will violate the statute by serving the offer less than 10 days before trial or arbitration (and no less than 15 days if service is by mail within California). (Cal. Code Civ. Proc., § 998.)

Third, in cases with multiple parties, specify an allocation and issue multiple offers. When making offers to multiple defendants, offers should be apportioned so each defendant may accept or reject the offer individually (unless defendants are jointly and severally liable for the full amount of plaintiff's damages, in which case the offer need not be apportioned). And when making a joint offer from several plaintiffs, include an allocation to each plaintiff so the court can determine whether each plaintiff's recovery at trial exceeded their 998 offer.

To avoid pitfalls when evaluating defense offers, you must do four things.

First, check the form of offer to confirm that it: (1) provides a method of acceptance (*Puerta v. Torres* (2011) 195 Cal.App.4th 872; *Rouland v. Pacific Specialty Ins. Co.* (2013) 220 Cal.App.4th 280); and (2) states all terms and conditions of the settlement that are capable of valuation.

Second, give the defense the benefit of any doubts you have on the offer's validity. For example, don't assume a minimal offer can be disregarded as invalid for lack of good faith. Unfortunately, courts have deemed minimal offers (even zero offers!) as being in good faith, so you should assume the court will deem the offer in good faith and advise your client of the assumed risk of additional costs. Also, analyze each term carefully. For example, if the offer says each party will "bear their own costs," then acceptance of that offer will preclude the later recovery of statutory attorney fees. (*Martinez v. Los Angeles County Metropolitan Transportation Authority* (2011) 195 Cal.App.4th 1038.)

Third, if there is only one offer for multiple plaintiffs, analyze whether that offer might still be valid. In general, separate offers should be served that allow each plaintiff to accept individually. But if plaintiffs have a unity of interest, separate offers may not be required, such as: (a) where married plaintiffs are suing on a community property claim (*Farag v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 372); (b) where the "plaintiffs" are actually one individual suing in different capacities (*Peterson v. John Crane, Inc.* (2007) 154 Cal.App.4th 498); (c) wrongful death actions (courts are split on this but to be conservative, you should assume a single offer in a wrongful death case will be deemed a valid 998 offer, see *McDaniel v. Asuncion* (2013) 214 Cal.App.4th 1201).

Fourth, in evaluating offers from multiple defendants who are sued on a theory of joint and several liability, analyze the wording to determine the value of the offer – and the risks involved with rejecting it. For example, a joint offer against co-defendants who are jointly and severally liable reads as an offer by each of them and so allows recovery of 998 costs if the judgment against either defendant is less than the full amount of the pretrial offer. (*Steinfeld v. Foote-Goldman Proctologic Med. Group* (1996) 50 Cal.App.4th 1542; *Santantonio v. Westinghouse Broadcasting Co., Inc.* (1994) 25 Cal.App.4th 102, 114.) But if the joint offer is apportioned, defendants will not

be entitled to costs if the judgment is less than the sum of both offers – instead costs will be awarded only if the whole judgment is less than that defendant's apportioned 998 offer. (*Persson v. Smart Inventions, Inc.* (2005) 125 Cal.App.4th 1141.)

Maximizing your strategic advantage with 998 offers

To maximize your strategic advantage, you must do three things.

First, be sure to issue a 998 offer. As Judge Dylina confirmed, the problem is that many plaintiff's attorneys do not issue a 998 offer at all. Accordingly, opportunities are missed – either an opportunity to reap the cost-shifting benefits of the statute (if the offer is rejected and you prevail at trial) or the opportunity to resolve the case.

Why is this? For some attorneys issuing a 998 simply does not occur to them. Others are focused on going to trial so they can "stick it to the defense attorney." Still others have failed to moderate their clients' expectations, making it very difficult to get the clients' approval to ever issue a reasonable offer. There are a few cases (where the outcome is truly unpredictable), when a 998 may not be appropriate.

But, as a general rule, plaintiffs should issue 998 offers as early as practicable so they will be best positioned to reap the biggest benefits from the statute's cost-shifting provisions (or to reach settlement, if the offer is accepted).

Second, before issuing an offer, you must first evaluate your case. This means deriving a predicted range of jury verdicts. This range should be derived from several key factors including your past experience, the plaintiff's likeability, and the law, facts, and venue of your case. Because so many factors affect a case's value, you should ask other attorneys what their valuation of the case is. A collaborative process will generally help you produce the most accurate valuation possible.

Third, once you have your valuation range, you should take the lowest number in the range and subtract the costs involved in getting from wherever you are in the litigation process all the way to the end of trial. One rule of thumb says to take another 10 percent off of that to arrive at your final number. As goes the saying about all settlements, your 998 offer will undoubtedly be less than you want to accept and more than the defense wants to pay.

Now you are ready to issue your offer. Though the 998 offer should be issued as early as practicable, it can be done up to 10 days before trial. Accordingly, Judge Dylina recommends bringing a blank 998 offer to any pre-trial settlement conference. So long as it is hand-served no less than 10 days before trial, it will comply with the statute.

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