

## CCP § 998 as a Settlement Tool

Litigants usually settle their disputes when they conclude the risks of trial outweigh the concessions necessary for resolution. In mediation, the attorney who effectively identifies the risks facing the other side usually strengthens his or her position during negotiations. One tool attorneys often overlook when preparing for mediation is the effect a settlement offer made pursuant to *California Code of Civil Procedure section 998* can have on the other side. Under this provision, the costs of litigation, including expert fees and attorney fees, can, under certain conditions, be shifted to the party that rejects such an offer. The possibility of such cost-shifting can improve the prospects for settling a case. As a result, parties preparing for mediation should consider the value of serving a "998 offer" prior to mediation.

Pursuant to *CCP § 998* a party may serve a written offer to compromise prior to trial, and if the offer is rejected and the opponent does not receive an award at trial greater than the offer, then the unsuccessful party may be ordered to pay the offeror's costs. The purpose of this provision is to encourage settlement by providing a strong financial disincentive to a party-whether it be a plaintiff or a defendant-who fails to achieve a better result than the party could have achieved by accepting the settlement offer. It also provides a financial incentive to make reasonable settlement offers.

Some litigants do not even consider the possibility of paying the other side's costs when considering the settlement value of their case, or they make the mistake of only evaluating general litigation costs such as filings fees, the cost of deposition transcripts, and service of process fees awardable under *CCP § 1033.5*. While these costs can be substantial, there is even a greater danger in rejecting a "998 offer" when the other party's expert fees and attorney fees are considered.

Under *CCP § 998*, the trial court has the discretion to order the party who rejects an offer to pay the other side's expert witness fees for the time spent preparing for and participating in trial. The trial court also has the discretion to award expert fees incurred before and after the offer to compromise is served. *Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. App. 4<sup>th</sup> 985, 1000*. In addition, a party who rejects a "998 offer" and does not achieve a better result at trial than could have been achieved by accepting the offer may be ordered to pay attorney fees as an item of cost when they are authorized by contract, statute or law. *Scott Co. of California (1999) 20 Cal. 4<sup>th</sup> 1103, 1112*.

How does all of this apply in the context of a mediation? Ordinarily, counsel will calculate the settlement value of a case by analyzing the likelihood of success at trial both as to liability and damages. The damage estimate will then be discounted by some percentage to reflect the possibility that the trial will not proceed according to plan. If, however, counsel must also consider whether the damage award will exceed the amount of a "998 offer," then the analysis becomes more complicated and the stakes at mediation increase. For example, suppose plaintiff's counsel believes a case is worth \$ 1,000,000 in damages, but for purposes of settlement discussions considers \$800,000 as the reasonable settlement value of the case. Without a "998 offer," plaintiff's counsel need only worry about the other side's costs if no money is awarded at trial. Being extremely confident, counsel considers the likelihood of a jury awarding nothing to

be zero. Therefore, counsel concludes \$800,000 is the minimum amount that should be accepted at mediation. But let's say the defendant serves a "998 offer" of \$500,000 prior to mediation. Now plaintiff's counsel must consider the likelihood of the damage award being less than \$500,000, knowing that if it is, plaintiff may have to pay defendant hundreds of thousands of dollars in costs, even if the award is \$499,999.99. Given this risk, plaintiff's counsel will be more willing to come off the \$800,000 target number during mediation. Of course, the risk analysis would be the same if the defendant received a "998 offer" of \$500,000. If the offer were rejected and plaintiff were awarded one-cent more than the amount of the rejected offer, then the defendant would be responsible for plaintiff's costs.

The possibility of paying the other side's costs, especially if they include attorney and expert fees, is a powerful incentive to mediate in the utmost good faith. As demonstrated above, the cost-shifting feature of *CCP* § 998 can be a carrot to entice reasonable settlement offers and can also be a big stick to discourage rejection of settlement offers. Use this tool to your advantage at mediation. You will increase your negotiating leverage while demonstrating that you are a wise steward of your client's litigation dollars.

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