Avoiding the Pitfalls of CCP 998 Offers

By Laurie Quigley Saldaña

In the 1% of civil cases that actually go to trial and result in a verdict, pre-trial offers to compromise pursuant to Code of Civil Procedure section 998 may have serious consequences in terms of cost and fee shifting. As such, during mediations, parties often rely upon the (perceived) strength of their CCP 998 offers in negotiating with the other side. However, if the validity of your CCP 998 offer is suspect, dynamics in mediation may shift and the leverage you thought existed can evaporate. Here are some real life examples (*of what not to do*...) and the 2011 case law about which you must know:

1. **Omitting the "acceptance" signature line**. In a recent mediation, Defendant spoke frequently of the 998 offer it served on Plaintiff, and which had since lapsed. The post-offer costs in the case were high and the amount of the 998 offer was not unreasonable. Therefore, Defendant felt comfortable holding firm to the amount set forth in the expired 998 offer, "knowing" that if the Plaintiff failed to beat the offer at trial, the Defendant would be entitled to recover on a very large cost bill. The problem? Defendant's 998 offer did not include a signature line whereby Plaintiff could sign and accept the offer, rendering the 998 offer invalid. Therefore, Plaintiff disregarded Defendant's post-offer cost bill in evaluating her settlement position. The lesson? Serving an invalid offer leaves your client in a much weaker position than anticipated. CCP section 998 was amended in 2006 to state: "The written offer shall include . . . a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." Without this, the offer is not valid. *Puerta v. Torres,* 195 Cal.App.4th 1267 (2011).

2. **Ignorance of the law regarding "costs".** In another case, disputants were parties to a contract with an attorneys fees provision favoring the prevailing party. Mediation was held during the thirty day window that the Defendant's 998 offer to the Plaintiff was still open. The offer included a very low monetary component and the statement: "Each party to bear their own costs." The offer was silent as to "fees." At mediation, Plaintiff considered terminating mediation and, instead, accepting the 998 offer, reasoning that as "prevailing party", he could then pursue the Defendant for the six-figure attorneys fees Plaintiff had incurred during litigation. The problem? Plaintiff wrongly assumed that he could still pursue the Defendant for his *attorneys fees* (as distinct from "costs"); this assumption threatened to change the dynamic of the negotiation. The lesson? A party who accepts a monetary offer of compromise under section 998 is the "prevailing party" for purposes of a cost award under section 1032. (Allowable costs under section 1032 are specified in section 1033.5. Section 1033.5, subdivision (a)(10) provides that attorney fees are allowable costs under section 1032 when authorized by contract, statute, or law.) "Because attorney fees are costs under section 1033.5 it follows that when a section 998 offer provides that each party will bear its own costs the word "costs" refers to all the costs described in section 1033.5, **including attorney fees**. (emphasis added)" *Martinez v. Los Angeles County Metropolitan Transportation Authority*, Case No. B221234 (2d Dist., Div. 1, May 23, 2011).

3. **Dismissing a 998 offer as made in "bad faith".** Parties in mediation often act dismissively toward the pre-trial section 998 offers that their clients rejected pre-mediation, claiming that the offers were so low as to be "in bad faith" and, therefore, "could not possibly" trigger the cost/fee shifting penalties of section 998. While it is true that courts look skeptically at "nominal" or "token" offers when evaluating the validity of section 998 offers, just because an offer is low does not mean it is in bad faith. In Adams v. Ford Motor Co., Case No. B225791 (2d Dist., Div. 1, Sept. 29, 2011), Ford made a $10,000 offer under section 998 ($2,500 to each of four plaintiffs) in an asbestos exposure case with very questionable causation. Plaintiffs rejected the offer and lost at trial. The lower court awarded Ford costs of $185,741.82. The main issue on appeal was whether the offer was reasonable and made in good faith. The Court of Appeal found it was reasonable and affirmed the award.

For me, the California Supreme Court Case of Scott Co. v. Blount, Inc., 20 Cal. 4th 1103 (1999) serves as the most cautionary tale regarding the power of section 998 offers and why parties and their counsel must carefully analyze such offers prior to deciding whether to accept or reject. This was a construction dispute with a contractual attorney's fees provision. Blount made a CCP 998 offer for $900,000 which was rejected by Plaintiff. At trial, Plaintiff was awarded $442,054, plus $226,812 in pre-offer attorneys fees and costs. Therefore, Plaintiff's total recovery was $668,886. Since Plaintiff failed "to beat" the prior $900,000 CCP 998 offer, Defendant was entitled to recover its post-offer fees and costs of $633,984 and expert costs of $247,652, for a total award of $881,635. So rather than owing Plaintiff $668,866, Defendant was entitled to recover $212,769, the difference between the two awards.

What is the overall lesson for 998 offers in mediation? Section 998 provides a powerful tool for litigants and serves to encourage realistic valuation of cases. However, the benefits of this statutory tool may be lost if the parties fail to fully understand the requirements of a valid 998 offer. Evaluate the validity of pre-mediation 998 offers as thoroughly as the facts and law of your case. This is especially true if your client's negotiation position is predicated upon the risk of the cost and fee shifting impact of the 998 offer. It is also important to recognize the risk of invalidity of the offer. Otherwise, negotiation strategies built around the CCP 998 offer may fall apart in the middle of mediation, leaving the parties and counsel scrambling to develop new positions and settlement authority.

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