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PERSPECTIVE

998 offers to compromise breed confusion

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As a mediator of employment disputes, I have found that no process breeds more confusion among parties and their counsel than offers to compromise under Code of Civil Procedure Section 998. If not handled correctly, there are very few processes that have such significant consequences. Unfortunately, I have also found that the threat of serving a 998 offer has become a frequent weapon to be unleashed at the first sign of impasse during mediations, even when parties and their counsel don't quite understand the mechanics of making such offers.

For a law intended to facilitate settlement of disputes, Section 998 has fostered more than its share of perplexity among practitioners, as well as sharp disagreements among the judges and arbitrators tasked with its interpretation. For savvy employment attorneys who have mastered the use of this incredibly useful litigation tool, however, 998 offers to compromise possess a significant advantage that can tip the scales in their clients' favor.

Section 998 offers

What is the 998 process, and why should parties and counsel care about it? Code of Civil Procedure Section 998 was adopted more than five decades ago for the sole purpose of facilitating settlement of claims outside the courtroom. The California Legislature then amended Section 998 in 1997 to apply to arbitration proceedings as well. Under the law, any party can, at any time not less than ten days prior to the commencement of a trial (or arbitration), make a written offer to any other party to try to resolve their dispute.

Compromise offers under Section 998 must include all terms and conditions of the proposed judgment, and they can only be accepted in writing by the other party. If or when that happens, judgment in the agreed upon amount can then be entered by the court or, for matters scheduled for arbitration, the agreed upon award is made by the arbitrator.

How the 998 offer is written can be critical to the ultimate resolution of a dispute, even if the offer is rejected. When an offer to compromise is not accepted, the matter might end up going to trial, where judgment is issued by the court at the conclusion. Alternatively, the parties might decide to negotiate a settlement outside of court. In either case, the earlier rejected 998 offer to compromise could play an unexpected role in the outcome.

Section 998(c)(1) encourages parties to seriously consider settling their claims early by providing a mechanism that shifts costs between them if a compromise offer "is not accepted and the plaintiff fails to obtain a more favorable judgment or award." In such cases, "the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of

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the offer." In addition, "the court or arbitrator, in its discretion, may require the plaintiff to pay a *reasonable* sum to cover postoffer costs of the services of expert witnesses" incurred in preparation for trial.

Section 998(e) states that if an offer is not accepted and the final award ends up being less favorable, "the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff." If those costs exceed the amount of damages awarded to the plaintiff "the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly."

Fees and costs

These costs, which include attorney's fees (in cases where attorney's fees are recoverable by statute or contract), can be significant. But if appropriately addressed within the 998 offer, they can be mitigated, moderated or shifted so that they are less onerous for the non-prevailing party. Too many attorneys, however, appear to mistakenly believe that a 998 offer to compromise, on its own, automatically excludes attorney's fees from judgments or awards that are lower than the amount of the 998 offer.

I've lost track of the number of times I've watched defendants in employment disputes threaten to tender compromise offers if a settlement agreement isn't reached at mediation, thinking of them as potential weapons that will prevent plaintiffs from recovering their attorney's fees at trial. Because they assumed that the offer itself would protect them from paying fees and costs, too many defendants find themselves paying amounts they could have - and should have - anticipated and avoided.

The bottom line is that unless a 998 offer expressly includes or otherwise addresses attorney's fees and costs, the losing party could be saddled with those costs, even if the damages award is less than the amount of the rejected 998 offer. It is well settled that when a 998 offer is silent as to recovery of attorney's fees and costs, those fees and costs may be recovered in a later motion. Therefore, the 998 offer should not only state the amount of proposed damages, it should also spell out how costs and fees will be handled at the conclusion of the proceeding.

This requires both forethought and strategy. If the offer "includes" costs and attorney's fees, the amount offered will cap attorney's fees as part of the total amount offered. Even if judgment at trial is lower than the amount of the 998 offer, attorney's fees could easily push the total above the offer amount, resulting in a large bill payable by the defendant. Defendants might instead consider drafting their 998 offers to include a set amount "plus reasonable attorney's fees," or "plus an amount of attorney's fees determined by the trial court upon motion." If the plaintiff rejects such an offer, he or she would then have to win a monetary judgment greater than the 998 offer, exclusive of attorney's fees. This scenario should prevent a plaintiff from bulking up attorney's fees in an effort to exceed the 998 offer amount.

Recent case

Parties who ignore how attorney's fees and costs are addressed in the 998 offer could pay the price later. In a recent case of first impression, a divided three-judge panel of the California Court of Appeals for the Third Appellate District ruled that the provisions of Section 998 also apply when a case ends in settlement prior to trial.

In *Madrigal v. Hyundai Motors America* (2023) 90 Cal.App.5th 385 (review granted Aug. 30, 2023, S280598), the court found that when Oscar and Audrey Madrigal agreed before trial to settle their claims against Hyundai Motors America (Hyundai) for far less than what they would have received under either of the defendant's two Section 998 offers to compromise, they became liable for Section 998 costs and fees. Both Section 998 offers also included attorney's fees of $5,000, or "an amount of fees determined by the trial court upon motion." After plaintiffs filed their motion for attorney's fees and costs, Hyundai opposed the motion, arguing that plaintiffs could not recover any costs or fees after the date of the second Section 998 offer.

The court of appeal reversed the trial court's ruling that the parties' settlement agreement did not constitute a "judgment" for purposes of triggering Section 998's cost-shifting provision. Shifting post-offer costs and expert fees to the plaintiff, said the court, would further the law's purpose because "the statute is designed not to encourage pretrial settlements generally, but specifically to encourage the acceptance of offers to compromise within the parameters of the statute by using the stick of postoffer costs and fees against reluctant offerees."

Conclusion

When preparing to attend mediation in an employment dispute where attorney's fees are recoverable by the plaintiff, parties and their counsel should keep in mind that any Section 998 offer needs to address attorney's fees and costs specifically. While using the threat of serving an offer to compromise can be an effective tool, overreliance on such a threat might prove counterproductive unless a defendant is truly prepared to make such an offer. Parties and their attorneys should also consider the possibility that if a settlement isn't reached at mediation, and a Section 998 offer is served immediately thereafter, a diligent mediator can use this circumstance to continue to help the parties negotiate