



## MICHAEL R. DILIBERTO, ESQ.



### L.A. Confidential

To encourage settlement before trial, you submit a reasonable settlement offer to the other party pursuant to CCP section 998 to invoke the cost-shifting procedure. However, your 998 offer also requires that the settlement terms remain confidential.

**Question:** Is your offer valid? According to *Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, a section 998 offer conditioned on its terms remaining confidential is not a valid offer.

Plaintiff Barella, a real estate developer, sued defendant bank for defamation, based on an email stating that plaintiff was a “slime-ball” and the mastermind of a land deal with another developer who had been charged with criminal fraud. The bank made a CCP section 998 offer to settle for \$25,000 and an “Agreement to strictly maintain the confidentiality of the settlement and the settlement amount.” Plaintiff did not accept the offer, and it expired. A jury awarded plaintiff \$10,000. The trial court declined to shift plaintiff’s costs under section 998, finding (1) that the bank’s offer was invalid because the condition of confidentiality was impossible to evaluate or, alternatively (2) that the public verdict of \$10,000 was more favorable to plaintiff than the bank’s offer of a \$25,000 settlement that could not be made public. The court of appeal affirmed.

The court held that a confidentiality condition attached to a settlement offer in a defamation action is incapable of valuation and renders the offer invalid for purposes of the cost-shifting provisions of section 998. Confidentiality was not a form of relief that defendant bank could have obtained from a court, the court noted. By including the confidentiality term in its offer of compromise, the bank injected an “extra judicial component” that a trial court cannot evaluate.

The court concluded that “the value to a particular plaintiff of public vindication (or, conversely, the negative value of confidentiality) is so highly subjective and elusive that no court can determine its monetary worth.” (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698) (terms and conditions of an offer may render it difficult to accurately value the monetary term of the offer so that the court cannot fairly determine whether the damage award is more favorable or less favorable than the section 998 offer).

#### The takeaway:

1. A confidentiality clause in a 998 offer can invalidate the offer for cost-shifting purposes.
2. *Barella* may have broad implications, as the elusive task of determining the monetary value of public vindication to a plaintiff extends beyond defamation actions.
3. Although not discussed in *Barella*, if a 998 offer is accepted, the offer must be filed with the court, with judgment entered accordingly. (CCP § 998, subd. (b)(1).) Here, the bank’s 998 offer could not be filed with the court because the terms were to remain confidential as a condition of acceptance. Because plaintiff could not comply with the requirements of section 998, subd. (b)(1) if he were to accept the offer, the bank’s offer may also be invalid on that basis.