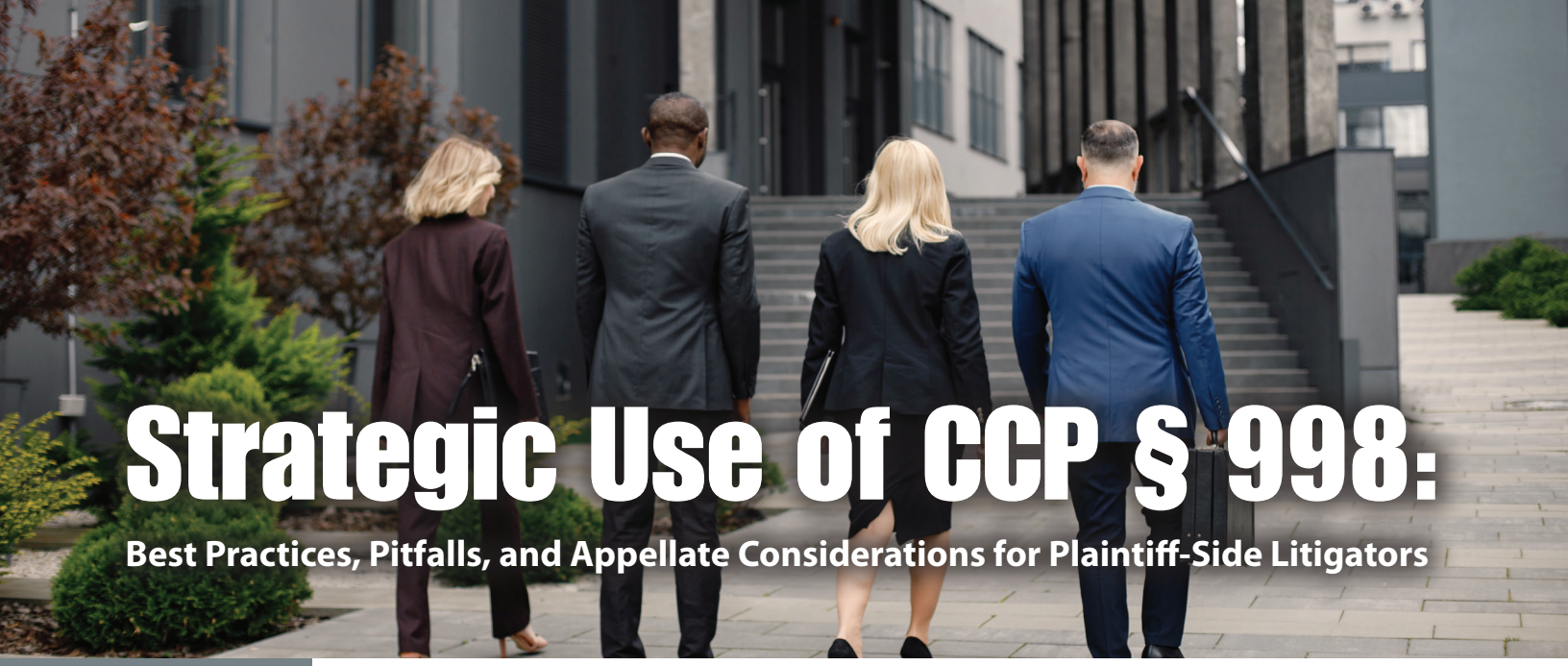

Strategic Use of CCP § 998:

Best Practices, Pitfalls, and Appellate Considerations for Plaintiff-Side Litigators

California Code of Civil Procedure section 998 is often thought of as a tool for defense counsel to penalize plaintiffs who reject pretrial settlement offers. But in the hands of a skilled plaintiff-side trial lawyer, it can become a powerful strategic device—one that pressures defendants to settle reasonably, creates leverage during negotiations, and shifts costs to the other side after trial. To unlock the full potential of section 998, trial counsel must understand how to use it correctly, how to identify invalid offers, and how appellate courts have interpreted its boundaries.

This article outlines best practices for drafting and evaluating 998 offers, identifies common traps, and explores how decisions made at the trial level affect appellate outcomes. It also incorporates lessons from recent California cases and emphasizes the importance of preserving the record when appellate review is likely.

Understanding Section 998's Framework and Purpose

In a civil action, Section 998 allows either party to make a written offer to settle the case. If the offer is not accepted and the offeree fails to obtain a more favorable judgment or award, cost-shifting consequences may follow. For plaintiffs, beating their own 998 offer can entitle them to prejudgment interest and expert witness fees. (§ 998, subd. (d); see also Civ. Code § 3291.) For defendants, prevailing against a plaintiff who rejected their offer can result in denial of post-offer costs and imposition of defense costs on the plaintiff. (§ 998, subd. (e).)

The clear policy behind Section 998 is to encourage the settlement of lawsuits before trial. (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019.) In *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804, the Court reasoned Section 998 is able to accomplish this goal "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 that party could have achieved by accepting his or her opponent's settlement offer. (This is the stick. The carrot is that by awarding costs to the putative settler the statute provides a financial incentive to make ***reasonable*** settlement offers.)" (emphasis added.) It is one thing, however, to implore litigants to make reasonable offers, and to review the offers in retrospect to determine reasonableness, and a whole other thing to evaluate reasonableness of an offer in real time.

To be valid, the 998 offer must be timely, unconditional, clearly state all material terms, and be open for at least 30 days or until the commencement of trial (or arbitration)—whichever occurs first. (Code Civ. Proc., § 998, subd. (b).) Acceptance must be in writing and signed by counsel for the accepting party, or by the accepting party if proceeding in pro per. Offers are deemed withdrawn by operation of law if not timely accepted. (§ 998, subd. (b)(2).) Procedural compliance is critical; courts have routinely invalidated offers containing vague language, containing conditions that create ambiguity, or for failing to follow the statute's strict timelines. Additionally, despite containing explicit language to the effect, Section 998 also requires that, for an offer to be valid under the statute, it must be made in "good faith." (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698.)

By its terms, Section 998 does not apply to all cases, and even where it applies, it merely provides the default rule, imposing cost-shifting whenever its terms are met. However, the parties remain free to agree to their own allocation of costs and fees as part of the settlement agreement. (Code Civ. Proc., § 1032, subd. (c).)

Assessing a Settlement Offer's Reasonableness

But how do courts determine whether a settlement offer has been made in "good faith" and is "reasonable" under Section 998? Courts assess the offer in its context, looking at the circumstances under which the offer was made. (*Elrod, supra,* 195 Cal.App.3d at 699.)

The starting point is the offer itself. Courts determine whether the offer satisfies the statutory requirements. For instance, courts evaluate whether the offer is conditioned upon other events or conditions. Courts also evaluate whether the offer is sufficiently certain, specific, or definite in its terms and conditions. This means that the offer should clearly outline the terms and conditions under which the judgment or award will be entered. (*Gorobets v. Jaguar Land Rover North America* (2024) 105 Cal.App.5th 913, 925-926, rev. granted 1/15/25, S287946.) To satisfy the statute's sufficient certainty requirement, the offer's terms and conditions must be such that: (1) at the time of the offer, the *offeree* can "evaluate the worth of the offer and make a reasoned decision" whether to accept it; and (2) at the time the case is resolved, the *trial court* can determine whether the judgment "is more favorable than the offer." (*Gorobets, supra,* 105 Cal.App.5th at 926; *Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764.)

For an offer to be made in "good faith," the offer must be "realistically reasonable" under the circumstances because (1) the offer was within the range of reasonable possible results at trial, considering all of the information the offeror knew or reasonably should have known; and (2) the offeror knew that the offeree had sufficient information to assess whether the offer was a reasonable one. (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924-925; *Gorobets, supra,* 105 Cal.App.5th at 926.)

Practices to Embrace and Pitfalls to Avoid in Making and Evaluating 998 Offers

In light of the requirements, there are some helpful considerations when drafting and evaluating 998 offers.

Strategic timing is critical. Offers made before taking sufficient discovery can appear speculative, while those made too late risk being seen as tactical rather than genuine. For example, to frame a credible offer, a plaintiff in a medical malpractice case should generally wait until after depositions of key experts have been taken. Early offers are most effective in straightforward liability cases, such as rear-end auto collisions, where factual disputes are minimal.

Clarity and specificity are essential. The offer should specify: The amount offered; Whether costs and fees are included or additional; Whether judgment or dismissal will follow acceptance; and conditions (if any) attached to performance. The Judicial Council form (CIV-090) provides a template, but its use is not mandatory and is intended for single plaintiff/single defendant cases.

When crafting 998 offers, to avoid ambiguity that could invalidate the offer, always be sure to attach any referenced settlement agreements or releases. If the offer references a release or other document, attach it **to the offer itself**. For example: "A draft General Release is attached hereto as Exhibit A. Acceptance of this offer requires execution of the attached Release." Avoid vague references like "a mutually agreeable release" without providing the actual document.

Set clear deadlines. While section 998 specifies a 30-day window unless trial begins sooner, it can be helpful to restate it.

Carefully and strategically calculate the settlement offer amount. The amount offered should reflect a reasonable forecast of likely outcomes, or risk backfiring. Inflated or "nuisance" offers can undermine credibility and result in findings of bad faith. Plaintiffs must carefully assess the strengths and weaknesses of liability, damages, and available insurance coverage when framing their offers. When providing the amount of the settlement offer, be sure to address costs and fees directly. Especially in statutory fee-shifting cases (e.g., FEHA, wage/hour), specify whether the offer includes or excludes attorney fees and costs.

Take another shot. If substantial new evidence emerges after an initial 998 offer is rejected, counsel should consider serving a renewed or modified offer. Doing so preserves the plaintiff's strategic advantage and reflects evolving circumstances. This is especially important where the defendant makes a renewed offer after discovery. If plaintiff's counsel has not been diligent in both *seeking* and *reviewing* discovery, counsel may not recognize the potential flaws in the case that would have become apparent from such discovery, and in assessing the validity of the defendant's offer, courts will look at what the plaintiff should have known, and not only what it had learned, at the time of the renewed offer. Discovery diligence is not merely a good practice; its failure could potentially become costly problem for the client.

Memorialize your 998 offers. Always confirm the date and manner of service in a declaration. Contemporaneously sending a "courtesy copy" email summarizing the offer terms (without negotiation) can help later establish the defense had actual notice of the offer's contents and deadlines.

Avoid ambiguous terms. One of the most common reasons courts find section 998 offers unenforceable is ambiguity. Any requirement for future agreement—such as requiring the signing of a "mutually acceptable" release—can

doom the offer. For example, in *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121, 1129, the court invalidated a 998 offer because it conditioned acceptance on executing an unspecified "settlement agreement." Always *attach referenced documents* and clearly define key terms. Remember, especially when challenging the validity of the opposing party's 998 offer, court interpret against the offeror any ambiguity in the offer. (*Chen v. Interinsurance Exchange of Auto. Club* (2008) 164 Cal.App.4th 117, 122.)

Make sure to state the offer clearly, and include language to eliminate ambiguity about what follows acceptance, including judgment versus dismissal. For instance, "Upon acceptance of this offer, judgment shall be entered in favor of Plaintiff and against Defendant in the amount of $[amount]" or, if appropriate, "Upon acceptance of this offer, Plaintiff will file a request for dismissal with prejudice of all claims against Defendant."

Avoid contingencies. Avoid making the offer contingent on extraneous conditions, such as payment within a certain number of days after signing, unless that term is part of the offer, itself. Courts have invalidated offers where conditions are added after acceptance or made acceptance contingent on later or even unknown actions. In *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 706, the court invalidated a 998 offer conditioned upon release of all known and unknown claims and release of claims that had not yet accrued. Similarly, a court invalidated a 998 offer due to a condition that the offeree waive claims not encompassed within the current lawsuit. (*Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 697-8.)

Avoid State Bar discipline. When crafting a 998 offer, always keep in mind the protection of lienholders. If attorneys "settle around" known liens, attorneys may risk personal liability and State Bar discipline (including disbarment). (*Kaiser Foundation Health Plan, Inc. v. Aguiluz* (1996) 47 Cal.App.4th 302, 305, disapproved on other grounds in *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 775; *Matter of Respondent P.* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 622 [1993 WL 542462]; *Kennedy v. State Bar* (1989) 48 Cal.3d 610, 617-618.)

Beware of nominal offers. Token or nominal offers can be challenged for lack of good faith. In *Wear v. Calderon* (1981) 121 Cal.App.3d 818, 821, the court explained that nominal offers ($1, for example) will not shift costs unless there is a strong showing that the offeree had no legitimate expectation of victory. (Of course, and especially for plaintiffs, a finding of a lack of legitimate expectation of victory could prove problematic for other reasons, such as sanctions for proceeding with a frivolous case, award of statutory-based attorney fees to the defense, violation of professional rules of responsibility, etc.). Plaintiffs should craft offers that, while strategic, are grounded in, and reflect a fair evaluation of the case's merits. In reviewing the validity of a 998 offer, consider the proportion between the settlement amount offered and the plaintiff's demand. In *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal. App.3d 53, 62-63, the defendant's settlement offer of $2,500 was deemed to have been unreasonable in its disproportion to the plaintiff's settlement demand of $10 million.

Make a record. All Section 998 offers should be accompanied by a filed proof of service. If an offer is rejected, counsel should *also document the rejection* by noting it in correspondence or on the record. Without clear proof of service and rejection, plaintiffs may lose the ability to enforce cost-shifting provisions.

Stay Informed on Recent California Supreme Court Decisions

Pretrial settlements. A recent turning point in interpreting Section 998 came in *Madrigal v. Hyundai Motor America* (2025) 17 Cal.5th 592. *Madrigal* emphasized that cost-shifting under section 998 is not limited to judgments but applies when comparing the 998 offer to the eventual recovery. The California Supreme Court clarified that section 998's cost-shifting provisions apply even when a case resolves through a *pretrial settlement*, not just after a judgment following trial. The Court held that a party who fails to accept a 998 offer and subsequently settles for less than that offer may still face cost consequences, reaffirming the statute's purpose of encouraging early settlement and discouraging gamesmanship. This interpretation broadened the strategic value of section 998 for plaintiffs and underscored the importance of clear documentation and timing.

Practically, *Madrigal* impacts even informal settlements or mediator proposals, if they resolve a case or if the parties subsequently settle pre-trial. They can trigger consequences if the plaintiff previously extended a valid offer that exceeded the final resolution. *Madrigal* serves as a wake-up call to all litigants: rejecting a reasonable offer has financial consequences, even if the case never reaches a verdict.

Madrigal also reminds litigants of the California Supreme Court's embrace of the Legislature's use of the section 998 to limit parties' flexibility. The Court explained, "section 998 is specifically designed to limit parties' flexibility and to encourage certain conduct: the making and acceptance of reasonable settlement offers with an eye toward reducing costs…Section 998 purposely places on the party who rejects a reasonable offer the risk that changed circumstances might lead to a worse result. [Citation.] This limitation on flexibility is a feature of the scheme, not a bug." (17 Cal.5th at p. 610.)

This expanded understanding of section 998 raises the stakes for trial lawyers and necessitates great intentionality in assessing and framing 998 offers to ensure they are enforceable, clearly documented in the record, and strategically positioned to withstand appellate scrutiny.

Choose-your-own-offer. At the time of writing this article, the California Supreme Court had granted review and ordered briefing in *Gorobets, supra,* 105 Cal.App.5th 913, rev. granted 1/15/25, S287946. According to the Court's docket, the Court plans to resolve the following issue: "Is a settlement offer under Code of Civil Procedure section 998 that contains two options inherently invalid, presumptively invalid, or invalid or partially or entirely valid depending on a separate and independent evaluation of each option?"

The Court of Appeal recognized that nothing in Section 998's wording precludes parties from making more than one offer to the same opposing party, and typically, the most recent offer is the operative offer that controls for purposes of evaluating whether the subsequent judgment is more or less favorable. (*Gorobets, supra,* 105 Cal.App.5th at 927.) It considered the extension of such a practice to determine whether Section 998 allows a party to make multiple offers to the same party at the same time. (*Ibid*.) In concluding that simultaneous offers are not valid under Section 998, the Court of Appeal reasoned such offers satisfy only one of Section 998's certainty requirements (i.e., the trial court's ability, at the time the case is resolved, to determine whether the judgment is more favorable than the offer). (*Id.* at p. 928.)

While waiting for the Supreme Court's resolution of the issue, parties should simply avoid any unnecessary risk that their 998 offers will be invalidated and refrain from issuing simultaneous offers to the same party.

Tips to "Make a Record"

Section 998 offers should never be treated as merely a trial tactic. Their design and execution must anticipate appellate review. In doing so, there are some useful guidelines in ensuring your record contains all of the documentation you may need.

Build a Clear, Admissible Record. For appellate courts, the record's clarity often controls the outcome. Trial counsel must file the 998 offer with the court (if appropriate, under seal if confidentiality is important), especially when the 998 offer is accepted. Maintain proof of service showing proper delivery under Code of Civil Procedure section 1013 (or electronic service under section 1010.6). Be sure to document rejection or lapse, preferably with defense correspondence or court acknowledgment. Without these building blocks, even the strongest offer may be useless on appeal.

Object! If a plaintiff receives a defense 998 offer with ambiguous, improper, or conditional terms, counsel should object in writing before expiration of the offer—and, if necessary, move to strike it. Although courts have held that silence can still permit later challenges, proactively objecting strengthens the argument that the offer was invalid. Timely objections may also offer opposing counsel to course-correct and prepare a compliant offer, which can save the parties substantial time, money, and headache.

If the defense later argues that the plaintiff's offer was not made in good faith, trial counsel should insist that the record reflects why the offer was reasonable based on discovery and expert analysis at the time it was made. Filing a supporting declaration contemporaneously with the offer—or in opposition to a defense motion—can become pivotal on appeal to demonstrate this. Build a clean record by documenting all service details, attaching referenced documents, and where appropriate, submitting declarations establishing the offer's contemporaneous good faith and clarity, in light of what has been gleaned from discovery at that time.

Link the Judgment to the Offer. When judgment is entered, plaintiffs must ensure that their motion to tax costs or motion for costs expressly links the requested amounts to the valid 998 offer. Appellate courts are reluctant to reconstruct a complicated trial and post-trial history without guidance from the lower court record.

Anticipate and Counter Defense Tactics

Defense counsel are increasingly sophisticated in neutralizing the cost-shifting power of section 998 offers. Plaintiff's counsel must anticipate these maneuvers and take proactive steps to preserve leverage. For instance, a defendant may respond to a plaintiff's 998 offer with their own ambiguous counter-offer, creating confusion over which offer governs. To avoid this, when receiving a counter-offer, immediately send a clear communication indicating whether you treat it as a rejection of your original offer and whether you withdraw or reissue your offer.

Sometimes defendants attempt to "accept" a 998 offer while introducing minor variations ("acceptance conditioned on mutual releases," "acceptance pending insurance approval"), undermining the offer's terms. Anticipate and avoid this, by including strong language in your offer that acceptance must be "unconditional and without modification," and reserve the right to reject any conditional acceptance.

Where there are multiple defendants, defense counsel may argue that your offer was joint and therefore unenforceable against individual defendants. When possible, issue separate 998 offers to each defendant or specify the offer is severable unless expressly conditioned otherwise.

Appellate Review

California appellate courts review the trial court's construction of section 998 under the de novo standard of review, but when reviewing the trial court's determination of the validity or reasonableness of a specific section 998 offer, they apply the abuse of discretion standard of review, which is highly deferential. (*Whatley-Miller v. Cooper* (2013) 212 Cal.App.4th 1103, 1113.) To invalidate the trial court's exercise of discretion, the appellant must demonstrate that the trial court exercised its broad discretion in a manner that is "arbitrary, capricious or patently absurd and which resulted in a manifest miscarriage of justice." (*Ibid*.) Not an easy task. However, the more your trial court record contains contemporaneous evidence of good faith, of notice, etc., the easier it will be to support your assertions with evidence, particularly because when considering the reasonableness of a section 998 offer, courts consider what information was available to the parties as of the date the offer was served. (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130.) And like trial courts, appellate courts must interpret section 998 "so as to effectuate its purpose of encouraging the settlement of lawsuits before trial." (*Elrod, supra,* 195 Cal.App.3d at 698-699.)

Conclusion

Strategic use of Code of Civil Procedure section 998 offers can dramatically alter the course—and the final cost consequences—of civil litigation. Plaintiffs' attorneys who understand both the technical requirements and the evolving case law are best positioned to leverage section 998 as both a sword and a shield.

But section 998 is not a passive tool. It demands active, thoughtful execution: carefully timed offers, precisely drafted terms, strong record-building, and anticipation of defense tactics designed to sow confusion or defeat cost recovery. Missteps in offer drafting or procedural compliance can erase otherwise valid entitlements to fees, costs, and leverage.

The stakes are often high. In substantial personal injury, employment, and consumer cases, a properly crafted 998 offer can mean hundreds of thousands of dollars—or more—in expert witness fees, prejudgment interest, and other litigation costs.

The benefits of section 998 are not limited to cases that proceed to judgment. Trial lawyers must approach section 998 offers as a critical litigation tactic from day one, building a record that will withstand post-judgment challenges and securing advantages that extend beyond the trial court. Challenge-proof 998 offers make the difference between recovering significant additional sums or walking away from hard-earned victories without the full benefit the law provides.

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