

Top 10 Dos and Don'ts for CCP 998 Offers

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The benefits of prevailing on a California Code of Civil Procedure section 998 (CCP 998) offer are widely known. If the defendant makes an offer and the plaintiff fails to obtain a more favorable judgement or award, the plaintiff is not entitled to recover its post-offer costs and must pay the defendant's costs from the time of the offer. These costs may, in the discretion of the court or arbitrator, include the defendant's post-offer costs for expert witnesses. Similarly, if an offer made by the plaintiff is not accepted and the defendant fails to obtain a more favorable judgement or award, the plaintiff is entitled to recover all of its costs, and the court or arbitrator, in its discretion, may award the plaintiff its post-offer expert witness fees. Finally, if the defendant prevails on its offer, its costs from the time of the offer will be deducted from the plaintiff's verdict or

award. If those costs exceed the plaintiff's damages, the net amount will be awarded to the defendant.

Nothing can be more frustrating, however, than to file a CCP 998 offer; receive a favorable verdict or award after an arduous trial; and prepare a memo of costs and disbursements, expecting to receive the cost-shifting benefits of CCP 998, only to have the offer invalidated by the trial court or arbitrator.

To avoid this unfortunate scenario, and to reap the rewards of the CCP 998 offer, here are 10 tips to keep in mind:

DOS

- Include an acceptance provision for signature within the offer. If you do not, the offer will be deemed invalid and any judgement resulting from it will be invalid.
- If there are co-defendants or multiple plaintiffs, make a separate offer to each party



or to only one party if that is the intention. A joint offer will require acceptance by all parties and will be invalid if one of the parties is dismissed before trial.

- Make explicit reference to CCP 998 in the offer; otherwise, it may be rejected for not putting the offeree on sufficient notice of the cost-shifting penalties of CCP 998, even if the party is represented by counsel.
- Include a provision for costs and attorneys' fees, if applicable. If there is no provision, the offeree may accept

the offer and, after a judgment is entered, recover its pre-offer costs and attorneys' fees if provided by contract or statute. Conversely, if the offer is not accepted, the offeree may add the costs and applicable attorneys' fees to the verdict, and that combined sum may exceed the offer even if the verdict or award on its own does not. Also, remember that the term "costs" in CCP 998 offers includes attorneys' fees, so if you wish to exclude recoverable attorneys' fees from costs, you must specify that in the offer.

- Extend CCP 998 offers when cross-complaints are filed. The complaint and cross-complaint are treated as separate actions for CCP 998 purposes, notwithstanding the one final judgment rule. A CCP 998 offer does not have to dispose of both the complaint and cross-complaint to be valid.

DON'TS

- Make a joint offer to multiple parties unless it is apportioned among them. A joint offer to multiple plaintiffs that is not apportioned will be invalid unless there is a clear unity of

interest and a single injury. Similarly, a non-apportioned joint offer to co-defendants will be invalid unless there is joint and several liability.

- Include a confidentiality clause. This will invalidate the offer because the value of the clause cannot be evaluated. Remember, if the offer is accepted, the clerk must enter a judgment. If your client does not wish to have a judgment entered against it or does not want the public to know about it, a CCP 998 offer may not be for you.

- Include a hold harmless clause with respect to a lien or anything else. This would make the offer conditional and render it invalid.

- Include general release language, such as a release of any and all claims, known or unknown. This could include claims outside those contained in the complaint, which cannot be evaluated and would thus invalidate the offer.

- Make a token, no-risk offer. To be valid, the CCP 998 offer must be made in good faith; i.e., it must carry with it some

prospect of acceptance, and/or it must be realistic and reasonable in terms of the particular circumstances of the case.

If you're in doubt about including a particular term in a CCP 998 offer, you're probably better off leaving it out. For best results, keep it simple and follow the statute.

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