



## *The Offer to Compromise---Tactic of Champions!#*

**Woodland Hills Personal injury attorney Barry P. Goldberg has been a proponent of using the California Code of Civil Procedure § 998 Offer to Compromise as a tool in every case which is in litigation. The truth is that experienced trial lawyers and civil litigators only have a limited number of tools to force or encourage a prompt and equitable settlement. Because section 998 of the Code of Civil Procedure was enacted to encourage the settlement of lawsuits prior to trial, Mr. Goldberg uses it in nearly every case. However, it is critical to use the Offer to Compromise process wisely to reap the maximum benefit and effectiveness.**

Before discussing the 998, it is important to acknowledge that as trial lawyers and civil litigators there are three situations than can force or encourage a favorable settlement. This is what we look for and our experience, training and know-how can separate us from other lawyers in our field. First, we look for the theoretical great case. I say “theoretical” because it seems that there is no such thing as a perfect case. A great case (for the personal injury attorney) has significant injuries like broken bones, surgeries, and permanent scarring. A great case has no question about liability and no comparative fault on the part of our client. The really great case also has a significant liability insurance policy which will result in actual payment to our clients. It is rare that all of these factors align at the same time---big injuries, small policy; big policy, liability issues; and so on.

The second situation that can force or encourage a settlement is a liability policy limit that is close or slightly below the objective value of a case. An effective “policy limits” demand wherein the plaintiff agrees to accept the extent of the defendant’s liability insurance policy limits, in return for a release of all claims, does more to settle cases than just about anything else. In this situation, the



liability insurer is under substantial pressure to settle a case or risk the excess personal exposure of its insured. Further, failure to accept a reasonable policy limits when given an opportunity could expose the insurer to a direct action, further damages and sometimes punitive damages. In fact, a 998 offer to compromise can be used in conjunction with a policy limits demand.

So, what about the majority of cases in litigation that are neither “perfect” nor have policy limits issues? I submit that the California Code of Civil Procedure § 998 Offer to Compromise should be used as a tool in every case. In essence, the statute encourages settlement by providing for augmentation and withholding of costs recoverable at trial when a party fails to achieve a result better than it could have obtained by accepting an offer to compromise. Among other things, section 998 provides that a defendant may be ordered to pay a reasonable sum to cover plaintiff’s post offer costs of expert witness services when the judgment is not more favorable than the plaintiff’s settlement offer. (§ 998 (d))

Many lawyers either miss-time or never make “an effective” offer to compromise. This may create a lost opportunity to settle a case or, if settlement is not possible, an opportunity for a client to receive an award of considerable costs. My conclusion is that the 998 procedure should be used in every case! As an expert in Uninsured and Underinsured Motorist Arbitrations, I further recommend that the 998 procedure be used in every arbitration case!

The primary reason I have seen for the failure to “effectively” use the 998 procedure is that attorneys are “locked in” to the “high-low” negotiating strategy. They feel that if they set a reasonable offer to settle amount that will be used by his or her opponent as a ceiling and may actually devalue the settlement possibilities. Those attorneys are not willing to “buy in” to the purpose of the statute---to encourage settlement of lawsuits prior to trial. An overly high offer to compromise really accomplishes nothing. There is only a small possibility of beating the offer at trial. There is no chance that the defendant will simply pay your high demand.



As a rule, I only serve 998 offers to compromise in amounts that I honestly believe that I can and will beat at trial with a high likelihood. This puts tremendous pressure on a defense attorney to report to his insurer that he will beat my offer more often than not and that his insurer will not be put in a position to my client's costs and expert witness fees. Remember, a 998 offer is in writing and an attorney is duty bound to report written settlement offers to his client or risk discipline. Many insurers have strict rule about reporting and case analysis upon receipt of 998 offers to compromise.

It is not only important that the offer be for an amount that will be surpassed at trial. It must be an amount that your client is willing to accept---right now--- to settle the case. I highly recommend that a client actually “sign off” giving the attorney authority before any 998 offer to compromise is served. This achieves several valuable goals. It starts a realistic settlement dialogue with the client and explains the risks and benefits of trial.

Often settlement of a case is impossible. In those cases, the 998 offer to compromise is even more critical. Perhaps a defendant has made a “low ball” “take-it-or-leave-it” offer or has professed that the case must go to trial. A savvy trial attorney will then make a 998 offer as low as humanely possible knowing that it will never be accepted. This will guarantee the award of costs at the end of a trial. Again, be careful to get a client's authority. If a defendant “wakes up” after the expiration of the 998 offer and closer to trial, politely inform the defense counsel that the settlement number is much higher now and that the expired 998 is now a plaintiff's asset.

Often after mediation, one or both of the parties will 998 a last offer---I think this is a great idea! It often leads to a re-evaluation and a settlement---or a compromise.



Recently, at a very contentious high stakes mediation, a question arose as to the effect of a party's multiple 998 offers to compromise. As a rule, it was thought that a second offer could undo the beneficial effects of an earlier offer. The terms of section 998 do not prohibit a party from making more than one settlement offer. However, under the rules of contract law, it was thought that a later offer may extinguish a previous offer for purposes of section 998's cost-shifting provisions.

Coincidentally, the day after that mediation, the California Supreme Court issued an opinion clarifying the confusion on the issue in *Martinez v. Brownco Const. Co., Inc.* (June 10, 2013) 56 Cal.4<sup>th</sup> 1014. The Court in *Martinez* concluded that where a plaintiff makes two successive statutory offers, and the defendant fails to obtain a judgment more favorable than either offer, allowing recovery of expert fees incurred from the date of the first offer is consistent with section 998's language and best promotes the statutory purpose to encourage settlements.

The lesson that is learned from *Martinez* is that it is never really too late to serve a 998 Offer to Compromise. More importantly, it reaffirms my opinion that there is really no reason not to serve a 998 Offer to Compromise in every case. It will either encourage a settlement or will have the beneficial effect of section 998's cost-shifting provisions.

**For more information about blog author and attorney Barry Goldberg's civil litigation expertise, please visit his web page, [Woodland Hills Civil Litigation Attorney. <http://www.barrypgoldberg.com/Practice-Areas/Civil-Litigation.aspx>](http://www.barrypgoldberg.com/Practice-Areas/Civil-Litigation.aspx) For more information about the article author and attorney Barry Goldberg's Personal Injury Expertise, please visit his web site: [Woodland Hills Civil Litigation Attorney; <http://www.BarryPGoldberg.com>](http://www.BarryPGoldberg.com)**

**Call Mr. Goldberg today for a free consultation. (818) 222-6994**

#