



# Preparing for and defeating bogus 998 objections

Plaintiff should consider an early 998 offer both for heightened pressure to negotiate a settlement and financial reward if the offer is beaten at trial

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Code of Civil Procedure (“CCP”) section 998 offers (“998 offer”) can be a crucial tool in a plaintiff’s attorney’s arsenal, allowing them to put pressure on defendants early in the case to promote settlement discussions. The potential penalties of 998 offers can progress settlement discussions, make the defense think seriously about negotiations and re-evaluate their position. Section 998 establishes a cost-shifting mechanism that, if properly done, could allow a plaintiff to save substantial fees and costs in their case to the detriment of the defendant.

Following the service of an early 998 offer however, defense attorneys often object in an effort to avoid the consequences of formally rejecting said offer. Should there be support for these objections, an unprepared plaintiff’s counsel can inadvertently forfeit the benefits of a 998 offer and potentially expose their client to other penalties. Thus, every plaintiff’s attorney should be well-versed in the strategies and considerations surrounding 998 offers, and be able to successfully refute these predictable defense objections.

Case law has established that 998 offers must be reasonable and made in good faith. Often, the objections issued against early 998 offers assert that the offer has been made too early, cannot be evaluated for reasonableness and therefore is not in good faith. Plaintiffs’ attorneys can mitigate these concerns through familiarity with controlling case law and adequate preparation and practice in advance of these predictable objections.

## Benefits of 998 offers

The Code of Civil Procedure has provided for the use of 998 offers in order to encourage case settlement prior to trial. (*Barba v. Perez* (2008) 166 Cal.App.4th 444, 451.) Due to the principles established in the statute, a properly presented 998 offer can create significant motivation for settlement, often sparking serious negotiations and potential settlement agreements prior to parties incurring significant fees and entrenching further in their positions. (*Ibid.*)

The consequences of a rejected 998 offer arise from the statutory teeth provided by the terms of CCP section 998.



Generally, when a plaintiff provides a 998 offer that is rejected by a defendant, and then receives a higher judgment amount than the 998 offer, significant consequences are triggered. In this outcome, a successful personal injury plaintiff would be entitled to 10% prejudgment interest from the date of the first 998 offer exceeded by the judgment and the potential for cost-shifting of expert witness expenses at the discretion of the court. (Code Civ. Proc., § 998, subd. (d); Code Civ. Proc., § 3291.) Thus, the rejection of a 998 offer can create significant monetary penalties, above, and in addition to, a civil judgment against the defendant.

## Make an early offer, and perhaps several more

A 998 offer can be made multiple times. For instance, should a plaintiff wish to revise an initial 998 offer and provide an



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updated offer, the cost-shifting eligibility and 10% prejudgment interest begins from the 998 offer that was lower than the eventual judgment. Should the judgment exceed both 998 offers, an initial 998 offer that was rejected remains active as the starting point for cost-shifting and prejudgment interest even after an amended 998 offer is presented. Said differently, the most recent 998 offer does not destroy the controlling effect of a prior offer. Due to this, plaintiffs should feel empowered to make a 998 offer early in the litigation process with the knowledge that, should it be necessary, further offers can be made later with minimal risk.

### Requirements of a valid and enforceable 998 offer

A valid 998 offer requires compliance with certain procedural requirements. First, a 998 offer must be presented in writing, contain a statement of the offer with the terms and conditions of the judgment or award and include a provision for the offeree to accept via signature. The offer terms must be unconditional, clear and specific. Last, and often most significant, the offer must be reasonable and made in good faith.

The benefits of a 998 offer are triggered after the rejection of the offer. A 998 offer is either formally rejected or rejected due to the expiration of time available for response. Generally, the amount of time to respond to 998 offers is 30 days from the date of service and/or the date of commencement of trial. Should the offeree fail to respond within this time frame, the offer is automatically deemed rejected. If applicable, the offeror can grant an extension to the deadline for response.

Under the statute, a 998 offer can be presented at almost any time during the litigation, up to 10 days prior to plaintiff's opening statement at trial or arbitration. (Code Civ. Proc., § 998; Code Civ. Proc., § 1281, Code Civ. Proc., § 1295.) Based on its terms, CCP section

998 allows for 998 offers to be served throughout the litigation process. While an offer served along with a complaint does not automatically make the offer unreasonable or a matter of bad faith, the offer may be later held to be unenforceable against the rejecting party unless certain requirements are present. (*Barba v. Perez, supra*, 166 Cal.App.4th at p. 450-452.) Therefore, a plaintiff's attorney should be aware of the factors that may influence the timing and presentation of a 998 offer in practice.

As discussed, early service of a 998 offer can inspire serious negotiations and settlement prior to incurring significant costs. Due to the strategic benefits of an enforceable 998 offer, a plaintiff's attorney should include early service of a 998 offer into their regular practice. But, as defendants often issue objections to these initial 998 offers, it is crucial for a plaintiff's attorney to plan for and respond properly to these common objections.

In order to be enforceable, 998 offers must include multiple procedural components including reasonableness and in good faith. Because compliance with the other procedural elements is relatively straightforward, defense objections to these early 998 offers often assert a lack of the good faith and/or unreasonableness of the offer. Based on the information available, if the reasonableness of an offer cannot be evaluated, the 998 offer will likely be considered unenforceable later. Therefore, exploring how to set a proper foundation to defeat these common objections is necessary to successfully enforce a 998 offer later.

### Evaluating 998 offers throughout the case

The defense's objection to early 998 offers asserting a lack of information to assess the reasonableness of the offer is predictable. Relevant case law provides an application of the theory and real-world examples of how plaintiffs' attorneys can lay a foundation and respond appropriately in order to defeat these objections.

As stated, in order to be enforceable, a 998 offer must be reasonable. Generally, case law has held that the reasonableness of a 998 offer can be inferred if the offeror receives a judgment in excess of the 998 offer. (*Elrod v. Oregon Cummins Diesel, Inc.*, 195 Cal.App.3d 692, 700.) However, this prima facie showing can be challenged and refuted by the rejecting party.

The 998 offer must be issued at a time where there is a reasonable prospect of acceptance, not before. (*Licudine v. Cedars-Sinai Medical Center* (2019) 30 Cal.App.5th 918, 924.) Whether there is a reasonable opportunity for acceptance hinges on whether the offeree has adequate information at the time of the offer to evaluate its reasonableness. (*Elrod v. Oregon Cummins Diesel, Inc., supra*, Cal.App.3d 692 at p. 699.) A 998 offer made so early in the matter that it cannot be adequately assessed is considered unreasonable and may be representative of gaming the system in bad faith. (*Westamerica Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 129.) There is no benefit of hindsight when assessing the reasonableness of a 998 offer; the court examines only the circumstances and information available to the deciding party when the offer was made to determine whether sufficient information was present.

Whether the offeree is in possession of sufficient information to evaluate the reasonableness of a 998 offer requires a case-by-case analysis. Although dealing with a defendant's 998 offer, the circumstances in *Elrond v. Oregon Cummings Diesel, Inc.* establish the foundation for evaluating the reasonableness of a 998 offer.

In this case, the plaintiff was severely injured in a motor vehicle accident while he was driving a logging truck. He filed suit against the company that had repaired the truck's braking system, as well as other defendants. Early in the case, the defendant company presented a 998 offer for \$15,001.00, which expired



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without plaintiff's answer. At trial, the jury verdict against the defendant company was later reduced below the 998 offer amount due to a pre-trial settlement between plaintiff and another defendant. Defendant company then attempted to enforce the cost-shifting principles of its 998 offer.

Although defendant had achieved a result at trial below its 998 offer, the court held that the offer was unreasonable and therefore unenforceable. Although a judgment above the 998 offer is prima facie showing that the offer was reasonable, when the offer was made the defendant knew plaintiff's damages exceeded \$1,000,000.00. Therefore, although, defendant's share of damages later fell below its 998 offer due to joint and several liability and pre-trial settlement of other parties, at the time of the 998 offer the defendant knew only of plaintiff's serious damages and the 998 offer was far below that figure. (*Elrod v. Oregon Cummins Diesel, Inc.*, supra, 195 Cal.App.3d at p. 692.)

Whether an offeree possessed sufficient information to evaluate the reasonableness of an offer is further analyzed in *Licudine v. Cedars-Sinai Medical Center*. In this case, a plaintiff underwent a surgical procedure where substantial internal bleeding occurred as well as a chronic condition. The plaintiff brought suit, and provided a 998 offer approximately one month after serving the defendant with the complaint. The defendant objected to the 998 offer, asserting that they were unable to fully investigate the plaintiff's claims at the time of the offer. Following the expiration of the 998 offer and an excess jury verdict, plaintiff moved to enforce the offer.

In assessing the ability of the defendant to evaluate the reasonableness of the 998 offer, the court determined that an offeree must possess sufficient information bearing on: (1) the issue of liability and (2) the amount of damages at the time of receiving the offer. (*Licudine v. Cedars-Sinai Medical Center* (2019)

30 Cal.App.5th 918, 925.) Although the court acknowledged that there was no minimum time period that must elapse following commencement of suit to issue a valid 998 offer, it was less likely early in the litigation process for sufficient information to be present. (*Ibid.*)

In *Licudine*, the plaintiff contended that the defendant possessed sufficient information because defendant had access to plaintiff's medical chart. According to plaintiff, this chart demonstrated plaintiff's claims and defendant's liability as asserted in the complaint. In its holding, the court presented numerous factors that it considered in evaluating the enforceability of the 998 offer. These factors included: how far into litigation the 998 offer was made, what information was available to the offeree prior to the offer and, if the offeree had alerted the offeror that they lacked sufficient information for the offer, how the offeror responded. The court explained that an offeror's good faith in the 998 offer can be inferred through the offeror's response to the offeree's request for additional information to evaluate.

The court explained that if an offeror subsequently refuses to provide further information or additional time for a response, "such obstinacy" is "potent evidence that [the] offer was neither reasonable nor made in good faith." (*Licudine v. Cedars-Sinai Medical Center*, supra, 30 Cal.App.5th at p. 926 [citing *Barba v. Perez*, supra, 166 Cal.App.4th at p. 451].) Thus, it is imperative for plaintiff's counsel to be mindful to demonstrate their willingness to provide additional information to assess if necessary.

After a review of the record at the time the offer was made, the court found that the 998 offer had been served in the initial stages of the litigation process and that although the defendant had access to plaintiff's medical records prior to the 998 offer, this record failed to detail plaintiff's other claims, including plaintiff's loss of earnings. Due to this,

the court found that defendant did not possess adequate information to assess the reasonableness of the offer and held the offer unenforceable.

Although the court in *Licudine v. Cedars-Sinai Medical Center* held that the 998 offer was made too early to be enforced against the offeree, the determination turned on the specific information available to the defendant and the actions of plaintiff's counsel. In *Barba v. Perez*, the court found that an early 998 offer was enforceable due to the information exchanged in pre-litigation.

In *Barba v. Perez*, the plaintiff was injured while assisting a family friend. Prior to the filing of the lawsuit, the plaintiff had sent the defendant a letter detailing his medical bills. In his complaint, he sought damages related to his medical expenses and lost wages. He served the complaint and summons on the defendant, and provided a 998 offer as well. The defendant did not respond to the offer and plaintiff later received a judgment above the initial 998 offer. (*Barba v. Perez*, supra, 166 Cal.App.4th at p. 444.)

Defendant subsequently argued that the 998 offer was unenforceable because they did not possess adequate information at the time of the offer to assess its reasonableness. Although it was served at the earliest point in litigation, the court held that the 998 offer was enforceable due to the pre-litigation relationship of the parties. The court pointed to the parties "close, semifamilial relationship" and "free flow of information between them" including the plaintiff's letter written before filing suit that detailed his medical bills and his complaint asserting medical expenses and lost wages. (*Barba v. Perez*, supra, 166 Cal.App.4th at p. 450-451.) Thus, the court held that this was not a situation in which plaintiff was playing "hide the ball," had acted in good faith, and enforced the early 998 offer against the defendant. (*Ibid.*)

Although not directly at issue in *Barba v. Perez*, the court again underscored



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the importance of the good faith of the offeree. The court explained that should a 998 offer be made and the offeree request further information and/or an extension of time, a refusal of this request would suggest the offer was neither reasonable nor made in good faith. (*Barba v. Perez, supra*, 166 Cal.App.4th at p. 451.) Due to this, plaintiff's counsel should be aware of the importance of demonstrating its good faith through the flow of information prior to and subsequent to a 998 offer.

As demonstrated in the above cases, whether an offer is made in good faith and is reasonable is often the critical analysis in the enforcement of 998 offers. A plaintiff can mitigate the defense's ability to make these objections to early 998 offers by complying with the procedural requirements, engaging in the exchange of information regarding damages and liability and responding courteously to a defendant's request for more information and/or additional time to review. The application of these principles to a plaintiff's attorney's practice will be explored below.

### Practice pointers

Adequate preparation and thoughtful responses to defendant will defeat objections asserting a lack of information to assess an early 998 offer. First, far ahead of the complaint filing, plaintiff's counsel should engage in extensive pre-litigation discussions with the defendant, including the service of a pre-litigation demand containing detailed discussions of plaintiff's damages and defendant's liability, as well as supporting records.

Following the filing of a complaint, plaintiff's counsel can move to present an early 998 offer with the complaint and summons. Although the defendant has already been supplied a pre-litigation demand, it is a good tactic to serve the 998 offer with an accompanying letter that again describes defendant's liability and plaintiff's damages. However, should

plaintiff's counsel anticipate that significant further information concerning plaintiff's damages or defendant's liability be uncovered through litigation, plaintiff may elect to delay service of the 998 offer to ensure all pertinent information has been presented.

After early service of a 998 offer, plaintiff can anticipate an objection asserting defendant's lack of sufficient information to evaluate the offer. Be ready to meet and confer and insist that the objecting party define *exactly* what additional information they need. Should the information be relevant and gatherable, weigh the difficulties of accessing the information with the benefits.

Generally, it is best practice to allow a limited extension of time to respond to the 998 offer corresponding with the amount of time it will take to gain the requested information. For instance, should the defendant want to take plaintiff's deposition prior to providing a response, plaintiff's counsel can agree to a 21-day extension as long as the deposition be noticed to occur within that time frame. Should the defendant request the opportunity to gather additional records, either obtain the records yourself or provide an extension of 35-40 days to allow time to issue a subpoena. Should the defense wish to perform a defense medical exam, provide available dates within a short window of time for them to perform this exam. Following this, an objection for lack of information will be clearly unreasonable in the face of all the available information.

Should a plaintiff want to further defeat defendant's ability to validly assert their objection, plaintiff may choose to delay issuing the 998 offer until initial discovery has been propounded and exchanged. After this, absent unusual circumstances, the bulk of the information regarding damages and liability should be in defendant's possession. Using these methods, a defendant should be foreclosed from validly objecting to a 998 offer and, if an excess verdict is

reached, will be exposed to the significant consequences of their rejection of the 998 offer.

### Conclusion

The benefits of a 998 offer can be significant, in particular when served early in the litigation process. The early service of a 998 offer can encourage early settlement or achieve maximum benefits following an excess verdict. However, although the statutory requirements of a 998 offer allow for service of the offer at almost any point in litigation, a plaintiff's attorney who is unaware of influential considerations may inadvertently destroy the enforceability of the offer.

Therefore, a 998 offer can be a powerful tool for plaintiffs or a detriment if not made properly. In particular, early service of a 998 offer presents serious potential pitfalls. These pitfalls can be avoided by a plaintiff's attorney who has a firm grasp of relevant case law and who thoughtfully prepares, positions and executes their case accordingly.

A defendant will often attempt to avoid the consequences of a 998 offer by asserting a lack of information to properly evaluate the reasonableness of the offer. This objection is particular common to early 998 offers. Defeating these objections requires strategic planning. However, the benefits to be gained from the service of an early 998 offer are significant. When a proper foundation has been laid to refute these predictable objections, plaintiff's counsel should seriously consider making a 998 offer early. Through pre-litigation exchange of information relevant to damages and liability, corresponding information again presented with the service of the 998 offer, and considerate responses to requests for further information and/or additional time, defense's canned objections will be easily overcome. Therefore, plaintiff's attorneys should feel empowered to make early 998 offers with the knowledge that they can ensure these offers create heightened pressure



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for settlement negotiations and are enforceable should an excess judgment be subsequently achieved.

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