

RESOLUTION 11-06-05

DIGEST

Offers of Compromise: Relief for Drafting Errors

Amends Code of Civil Procedure section 998 so that no pre-judgment costs or attorney's fees shall be included in the judgment unless specifically requested.

RESOLUTIONS COMMITTEE RECOMMENDATION:

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 998 so that no pre-judgment costs or attorney's fees shall be included in the judgment unless specifically requested. This resolution should be disapproved because modification of the statute is not warranted.

Lawyers occasionally omit the reference to attorney's fees and then must defend an attorney's fees motion. The present statute requires that a proponent of a statutory offer make it clear whether or not attorney's fees are included in an offer. Code of Civil Procedure section 473, however, provides relief for drafting errors. By applying the discretionary relief provision of section 473 to judgments entered pursuant to section 998, subdivision (b)(1), courts have consistently promoted a policy of having matters resolved on the merits as opposed to technical "errors." (*Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256.)

While the statutory offer to compromise promotes early settlements and requires a realistic evaluation of a party's position, automatically excluding attorney's fees will dilute the statute's effectiveness. A stipulated judgment is a contract. A section 998 offer to compromise is "an offer . . . to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time." (Code Civ. Proc. § 998(b).) This resolution rewards ambiguous drafting of statutory offers. If an attorney intends in his or her offer to encompass attorney's fees, he or she can readily state that each side shall bear its own attorney's fees. (*Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986, 991.)

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend section 998 of the Code of Civil Procedure to read as follows:

- 1 § 998
- 2 (a) The costs allowed under Sections 1031 and 1032 shall be withheld or augmented as
- 3 provided in this section.
- 4 (b) Not less than 10 days prior to commencement of trial or arbitration (as provided in
- 5 Section 1281 or 1295) of a dispute to be resolved by arbitration, any party may serve an offer in
- 6 writing upon any other party to the action to allow judgment to be taken or an award to be entered in
- 7 accordance with the terms and conditions stated at that time.
- 8 (1) If the offer is accepted, the offer with proof of acceptance shall be filed and the clerk or
- 9 the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of
- 10 acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award
- 11 accordingly.
- 12 (2) If the offer is not accepted prior to trial or arbitration, within 30 days after it is made,
- 13 whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial
- 14 or arbitration.
- 15 (3) For purposes of this subdivision, a trial or arbitration shall be deemed to be actually
- 16 commenced at the beginning of the opening statement of the plaintiff or counsel, and if there is no

17 opening statement, then at the time of the administering of the oath or affirmation to the first witness,
18 or the introduction of any evidence.

19 (4) Unless set forth in the express terms of the offer, no pre-judgment costs or attorney fees
20 or other sums shall be included in the judgment; but post-judgment costs and fees may be awarded
21 as provided by law.

22 (5) A judgment entered under this section may be corrected or vacated pursuant to Section
23 473.

24 (c) (1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain
25 a more favorable judgment or award, the plaintiff shall not recover his or her post offer costs and
26 shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding
27 other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff
28 to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular
29 employees of any party, actually incurred and reasonably necessary in either, or both, preparation
30 for trial or arbitration, or during trial or arbitration, of the case by the defendant.

31 (2) (A) In determining whether the plaintiff obtains a more favorable judgment, the court or
32 arbitrator shall exclude the post offer costs.

33 (B) it is the intent of the Legislature in enacting subparagraph (A) to supersede the holding in
34 *Encinitas Plaza Real v. Knight*, 209 Cal. App. 3d 996, that attorney's fees awarded to the prevailing
35 party were not costs for purposes of this section but were part of the judgment.

36 (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more
37 favorable judgment or award in any action or proceeding other than an eminent domain action, the
38 court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover
39 costs of the services of expert witnesses, who are not regular employees of any party, actually
40 incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial
41 or arbitration, of the case by the plaintiff, in addition to plaintiffs costs.

42 (e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more
43 favorable judgment or award, the costs under this section, from the time of the offer, shall be
44 deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section
45 exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the
46 defendant and judgment or award shall be entered accordingly.

47 (f) Police officers shall be deemed to be expert witnesses for the purposes of this section;
48 plaintiff includes a cross-complainant and defendant includes a cross-defendant. Any judgment or
49 award entered pursuant to this section shall be deemed to be a compromise settlement.

50 (g) This chapter does not apply to either of the following:

51 (1) An offer that is made by a plaintiff in an eminent domain action.

52 (2) Any enforcement action brought in the name of the people of the State of
53 California by the Attorney General, a district attorney, or a city attorney, acting as a public
54 prosecutor.

55 (h) The costs for services of expert witnesses for trial under subdivisions (c) and (d) shall not
56 exceed those specified in Section 68092.5 of the Government Code.

57 (i) This section shall not apply to labor arbitrations filed pursuant to memoranda of
58 understanding under the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of
59 Division 4 of Title 1 of the Government Code).

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Santa Clara County Bar Association

STATEMENT OF REASONS

Existing law: Offers of Judgment contains traps for the unwary which reduce the effectiveness of this procedure in promoting early settlement of litigation.

This Resolution: Makes costs or attorney fees recoverable only to the extent expressly set forth in the offer of judgment. This overturns the rule of cases such as *Lanyi v. Goldblum*, 177 Cal. App. 3d 181

(1979). The formal language of "each party shall bear its own costs and attorney fees" will no longer be required to limit the offer to the amount stated.

Allows errors to be corrected to the same extent as errors in other judgments. This codifies the decision of *Zamora v. Clayborn Contracting Group, Inc.*, 28 Cal. 4th 249 (2002).

The Problem: Settlements are good. Early settlements are even better. The purpose of Section 998 to promote settlements is curtailed when this procedure yields uncertain and unpredictable effects. Under current interpretations of Section 998, an offeror must explicitly exclude costs and attorney fees from the offer. Inadvertent omission of this language makes the offeror liable for more than the express terms of the offer of judgment. This hidden "gotcha" reduces the utility of the section; and unfairly penalizes litigants, particularly those in pro per, who are unlikely to understand it.

Similarly, a drafting error in an offer of judgment should be correctable if it results from mistake, surprise, inadvertence or excusable neglect, just like any other defective judgment. Under the *Zamora* decision, it is. This Resolution adopts and codifies that decision.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule.

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COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The law is clear as it exists. Counsel should be deemed to know that if they intend to exclude costs and fees from a 998 offer, they must expressly so state. This has been the known and practiced law for years. In addition, expressly providing that a 998 judgment may be corrected or vacated pursuant to section 473 is a bad idea, tending to contravene the finality of a 998 settlement, and encouraging settler's remorse.