



998s: They're out to get you. Better leave while you can . . .

Plaintiff attorney's fees drive employment litigation, yet the defense bar can "cut off" these fees using 998 offers

BY RACHEL PUSEY

A partner in my office called plaintiff's counsel on a new case to introduce himself and to ask for a discovery extension. Plaintiff's counsel was happy to provide the extension, on one condition – he asked that defense agree not to serve a Code of Civil Procedure section 998 Offer to Compromise. Why such a dramatic condition placed on an everyday courtesy? The answer is fees. Not just any fees, but statutory attorney's fees, which in any employment case that goes to trial are never less than six figures and for hard-fought cases can easily reach into the seven-figure range.

In most employment cases, it's the plaintiff's attorney's fees that drive the litigation, yet the power of the 998 rests with the defense bar's ability to "cut off" these fees using 998s. If and until that power differential is altered, there are many valid reasons for plaintiffs to give careful consideration to accepting reasonable 998 offers.

Attorney's fees

Statutory offers to compromise were developed with the goal of encouraging settlement in personal-injury and complex-litigation cases. The statute was not designed with civil rights cases in mind. In personal-injury cases, either party can issue a 998 in the amount they assess as a likely jury verdict. The other side has 30 days (plus five if mailed) to accept the offer; otherwise it extinguishes. If a party doesn't accept the offer and the case is tried, the declining party must "beat" the 998 (for either side this means obtaining a more

favorable judgment), otherwise it will be liable for the other side's costs.

Expert fees are considered a discretionary cost under Code of Civil Procedure section 1033.5 which may be ordered by the court. Here is where the 998 packs its punch, since each side is likely to have multiple experts and the fees quickly run into the hundreds of thousands of dollars. For personal-injury practitioners, this power is bilateral. Plaintiffs are just as likely to serve 998s and have just as good a chance of being awarded their expert fees as does the defense (often each side will issue competing 998s in the same case). Either receiving party needs to carefully take stock of the case and think long and hard about the realistic jury verdict she is likely to achieve. Counsel also has to have a frank discussion with the client about the offer and the risks of rejecting, as it is the client who will be responsible for paying the costs, not the attorney.

In employment cases, either side can issue a 998, but the plaintiff's offer lacks any sharp teeth (only the defendant can issue an offer under the federal counterpart Federal Rules of Civil Procedure Rule 68.). Unlike personal-injury cases, experts are not as common and many cases are tried without expert testimony. For the defense, the threat of being liable for a plaintiff's expert costs, while a genuine risk, does not carry the same weight associated with it as in a personal-injury case. In an employment case, however, the defense holds great sway in having the ability to cut off the plaintiff's attorney's fees. If an employment-plaintiff declines the 998 and does not achieve a

more favorable judgment at trial, counsel will be precluded from recovering her fees and costs from the date the 998 was served, forward.

Defendant's perfect 998 case

From the defense perspective, the cases ripe for issuing a 998 are cases where there is a high probability of liability but low enough exposure that a real, legitimate offer can be made (and stomachached by the client). They are also most effective when served early in litigation before substantial fees are incurred. Plaintiff's counsel has told "David," a defense attorney who has effectively used 998s in dozens of employment cases, she intends to "litigate the crap out of the case" and will "never" accept what David has offered. In one case against a prominent and aggressive plaintiff's counsel, David heard this message at mediation where he was prepared to offer real money to settle the case.

Plaintiff's counsel insisted his was a million-dollar case, but in David's assessment it was more like a \$200,000 case (there was unquestionable liability, but small damages and several viable defenses.) David told this to plaintiff's counsel and the mediator – along with the fact that he intended on serving a 998 if the case didn't settle. Plaintiff's counsel scoffed at the warning. The parties left mediation with no deal and David served a 998 the next day for \$200,000, plus reasonable attorney's fees. Twenty-nine days later, plaintiff accepted.

David did the same thing in a similar case, but plaintiff's counsel rejected the 998 and the case went to trial. It was no



surprise when the jury found in plaintiff's favor – but David was ecstatic when the verdict came in \$30,000 shy of the 998. This meant that plaintiff's counsel's fees – which were well over a million dollars by that time – were reduced to what she had incurred at the time the 998 was served. David filed a cost bill as the “prevailing party” and the court awarded \$90,000 in costs including \$60,000 in expert fees. The \$90,000 came off the top of the plaintiff's verdict.

Does the 998 include a “release”?

Before I “switched sides” and began representing management in employment disputes, I spent a number of years litigating on behalf of plaintiffs. I received fewer than ten 998s over the course of six years. Two of ten clients accepted the 998s. In one situation, an interesting twist arose. We represented Rosalie, who had suffered sexual harassment culminating in an assault and a retaliatory transfer. She remained employed – and had no intention of leaving. After pre-litigation attempts to mediate the case failed, we filed suit and were quickly served with a 998 for a substantial amount of money (even though plaintiff claimed zero special damages.)

Defense counsel was well-seasoned and cognizant that fees in the case would quickly become an impediment to settlement. And, at that point, fees were low. Rosalie reluctantly accepted even though she saw no “justice” in the offer, but she was astute enough to understand the consequences of not beating the 998. The offer was silent on the issue of a release. Thereafter, defense counsel sent over a standard settlement agreement and release with a strong confidentiality provision, but Rosalie balked. She was astounded that the agreement said that defendant did not accept liability (a standard provision in any settlement agreement) and she flatly refused to sign. And, she didn't have to. There was no mechanism for the defense to compel a release. We filed the 998 as a judgment, worked

out fees, and Rosalie received her settlement, without ever having to sign a release. If the defense desires a settlement agreement or confidentiality is important to the client, a different route to settlement should be pursued.

Has something been forgotten?

When you receive a 998, take a careful look and make sure it addresses attorney's fees and costs. In most cases the offer will read, “plus statutory costs including reasonable attorney's fees incurred to the date of this offer.” If you receive an offer that is silent on fees, you may accept, file the 998 as a judgment and file a fee motion as the “prevailing party.” This may surprise your opponent and give you leverage to settle the case before the court rules on your motion. In most cases, fees will be included as part of the 998 and the parties can negotiate attorney's fees. If not, you'll have to proceed with a fees motion and have the court determine reasonableness.

Sometimes defense counsel serves a 998 that only offers a waiver of costs. Rare is the case where this is palatable, especially if it comes early in the litigation. Offers must be reasonable at the time that they were made which means the receiving party must have had time to assess the claim. Offers also must be in good faith and token or nominal offers will usually not be found reasonable. In all likelihood, if you reject an offer for a waiver of costs or a nominal offer and lose at trial, you can successfully tax a motion for costs on the basis that the offer was not reasonable at the time it was made. Sometimes these offers are the result of your opponent having uncovered a damning fact. A frank chat with your client about the offer may also help you determine what the other side knows.

Showing your hand

“Eva” was pumped on her new FMLA case. Rarely do you see a clear liability case in employment law. But she had one. Her plaintiff, Mark, went out on FMLA leave for his serious health

condition. Mark had 15 days to provide his employer with his doctor's certification, but his employer terminated his employment on the 13th day. Eva was just as pleased to learn that “Peter,” a well-respected and fair defense attorney was on the other side. After serving the complaint, Eva called Peter to talk settlement. Plenty of plaintiffs' lawyers put a demand out there when they have a strong case with the proviso that the defense can either pay them now, or pay them the same amount or more down the road for the fees alone. Eva didn't like to pull that move, but in this case that was exactly what would happen if she didn't get her number.

Eva told Peter, “get me \$100,000 and we've got a deal. You can pay me now or pay me later for my fees.” Peter assured Eva he'd talk to his client and get back to her. Two days later Peter served Eva with a 998. Eva felt like an idiot. She'd shown her hand and Peter was smart. He knew he had to cut off her fees, but when she saw the number, she realized that Peter had made a great tactical move, but a critical error with the number. The offer was precisely the amount of Mark's special damages without any allowance for emotional distress. Eva knew that when she won the case at trial, the jury would undoubtedly award Mark some amount for general damages. Luckily with a couple of calls to Peter, Eva got just a couple of thousand dollars shy from her original demand. Peter knew the original number had not been enough, but his adjuster had tunnel vision at the time the offer went out.

When it's a really good offer, accept unequivocally

Although this scenario took place in a personal-injury case, all of us can learn from the experience. “Liza” was about to start taking expert depositions when she was pleasantly surprised to receive a 998 that was substantially more than she anticipated the defense would ever offer. She called opposing counsel, “Barbara,” and let her know her client wanted to



accept. They discussed which side would pay for the cancellation of the upcoming expert depositions and Barbara agreed to cover the costs. Liza quickly drafted a confirming letter – accepting the 998 and laying out the additional agreement with regard to the depositions.

Meanwhile, Barbara, being a little surprised with Liza's quick acceptance, took another look at the 998 she served and realized she had made a serious mistake – the offer was double what she'd had the authority to offer. Barbara called Liza to let her know of her mistake and to revoke the offer. (998s can be revoked at any time prior to acceptance.) Although she sympathized with Barbara's predicament (her husband worked at a defense firm so she knew about intricacies of the defense counsel and adjuster relationship), Liza stood firm – the offer had already been accepted since she'd mailed her letter. Barbara, who'd done her research before calling Liza, said, "I don't think so – what you sent was a counter-offer." Ultimately, the court agreed with Barbara. In the end they reached a deal and both attorneys walked away having learned from their missteps.

A tale of two siblings

My good friend "Brandon," a successful plaintiff's attorney, was reluctant

to share this story because he didn't want to clue defense lawyers into what he saw as a sharp move. Brandon represented two sisters who worked together at an accounting firm. The younger sister, Elizabeth, was meek, soft-spoken and risk adverse. As things would have it, she also had a far stronger case than her older sister, Camilla. Camilla was the opposite of her sister – articulate, forceful and ready to be in it for the long haul. After a failed mediation, Brandon soon received two 998s (each plaintiff must have the opportunity to accept individually.) Elizabeth's 998 was about four times as much as what the defense offered Camilla. Brandon had to admit that his opposing counsel's move was savvy – a classic divide and conquer strategy. The offers gave each sister what she needed – there was no way Elizabeth would reject her offer – and Camilla's payout was just enough that it gave her a way out. Brandon knew he could never go forward without Elizabeth – and Elizabeth could never survive the case without her sister's support.

Some cases should be settled

998 offers are a strong mechanism for getting the right cases settled, leaving you time to litigate and try your other cases. As it stands, for employment cases, 998s from plaintiffs don't pack the

requisite punch, but keep them in mind for the occasional case that only involves common law claims where they place you on equal footing, especially if you plan on using experts.

The defense should be mindful that its offers must be reasonable and commensurate with what the jury is likely to award plaintiff at the time of trial. If the plaintiff is going to prevail, general damages cannot be ignored when calculating the offer. For the plaintiff's attorney, given the risk of not recovering for your time and your client being liable for costs, the smartest response for both you and your client may be to accept truly reasonable 998s.

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