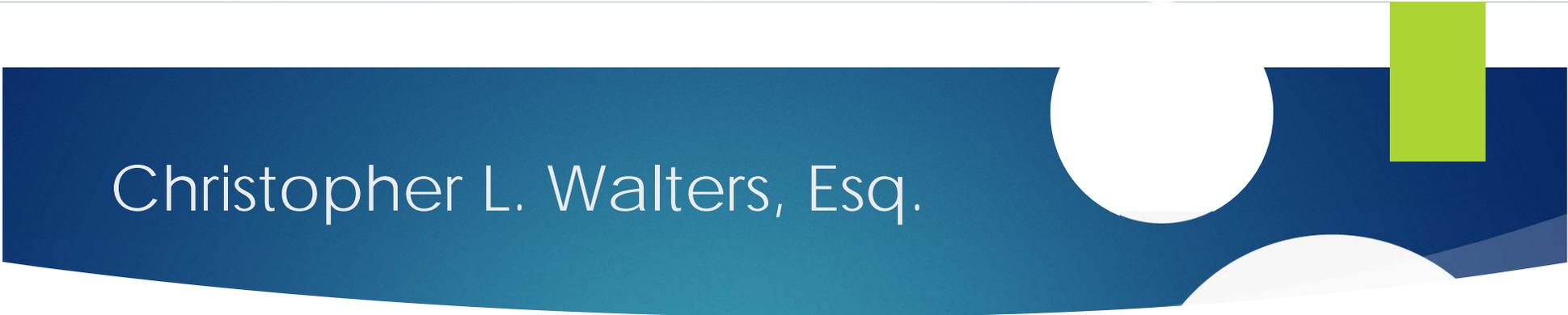




California Code of Civil
Procedure Section 998:
Offers by a Party to
Compromise



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Most Cases Settle

Cases settle for a few primary reasons:

- ▶ Fear/uncertainty over exposure at trial
- ▶ Mounting legal fees/costs
- ▶ Emotional stress/distraction from business

How can a 998 Offer be used to:

- ▶ Get the case settled?
- ▶ Increase exposure/liability to improve the terms of the settlement (either for the plaintiff or the defendant)?

California Code of Civil Procedure 998

"(b) ***Not less than 10 days prior to commencement of trial or arbitration ... , any party*** may serve an offer ***in writing*** upon any other party to the action ***to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time.*** The written offer shall include a statement of the offer, containing the terms and conditions of the judgment or award, and a ***provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted.*** Any acceptance of the offer, whether made on the document containing the offer or on a separate document of acceptance, shall be in writing and shall be signed by counsel for the accepting party or, if not represented by counsel, by the accepting party.

(1) ***If the offer is accepted, the offer with proof of acceptance shall be filed*** and the clerk or the judge shall enter judgment accordingly. In the case of an arbitration, the offer with proof of acceptance shall be filed with the arbitrator or arbitrators who shall promptly render an award accordingly.

(2) ***If the offer is not accepted prior to trial or arbitration or within 30 days after it is made, whichever occurs first, it shall be deemed withdrawn, and cannot be given in evidence upon the trial or arbitration.***"

California Code of Civil Procedure 998

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

(2) (A) In determining whether the plaintiff obtains a more favorable judgment, the court or arbitrator shall exclude the postoffer costs."

California Code of Civil Procedure 998

"(d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, ... in addition to plaintiff's costs."

California Code of Civil Procedure 998

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

Purpose of CCP 998

The purpose of Section 998 is to encourage settlements by effectively “upping the ante” for the other side. It encourages parties to make reasonable settlement offers and encourages parties to accept reasonable offers made by the other side.

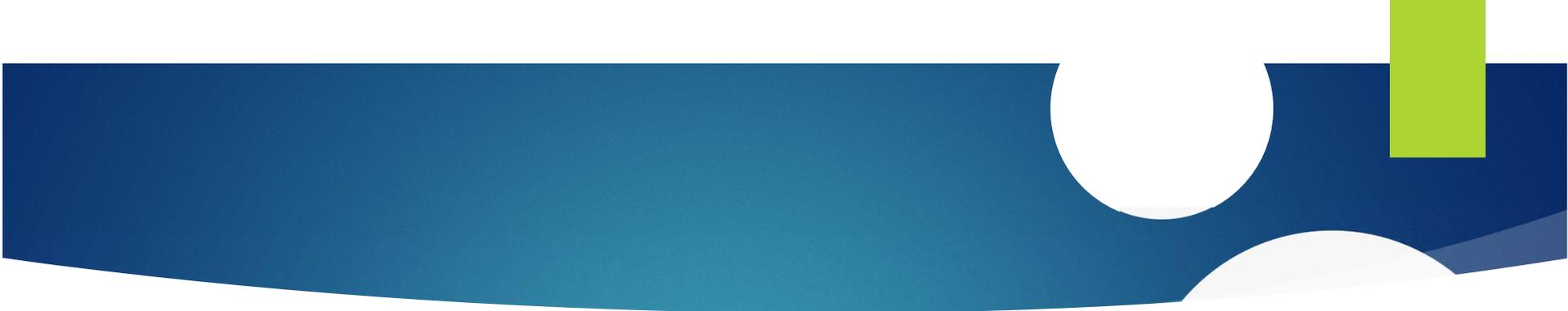
- ▶ 998 has statutory penalties that may come into play if the offer is rejected. So by making a 998 offer you are hoping that the other side will be incentivized to take the settlement now and avoiding, not only an adverse judgment, but also additional penalties. The amount at risk is more than merely the difference between the final judgment and the 998 offer.

998 offers are common in personal injury cases. But they may be an effective strategy in business litigation and practically any other case where damages are sought. The consequences of rejecting such offers put increasing pressure to settle on the opposing side as expert witness fees and other litigation costs rise.

Purpose of CCP 998

The use of 998 offers also be particularly effective in those cases where the fees/costs involved dwarf the actual damages at issue.

Attorneys' fees allowed by contract/statute are treated as costs for purposes of CCP 998. (See CCP 1032, 1033.5)

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- ▶ Remember: there must be a verdict/judgment in order to invoke the cost-shifting effect of a 998 offer. If there is a settlement, the 998 statute and offers have no effect.
 - ▶ These 998 penalties could affect the parties' willingness to settle during the course of the trial.

Purpose of CCP 998

- ▶ At its heart, 998 allows one party to make a reasonable settlement offer at any pre-trial stage of the litigation. The other party must then undertake the analysis if they will be able to secure a “more favorable” result at trial. If this analysis is incorrect, there is cost-shifting which penalizes the party who rejected the offer.
- ▶ This public policy of encouraging settlement is accomplished through the carrot & the stick:
 - ▶ A party who rejects the 998 offer may be forced to pay certain costs of the other party.
 - ▶ A party who makes a 998 offer may be entitled to recover costs that it otherwise would not be able to.
- ▶ So, ***parties are encouraged to make reasonable settlement offers and parties are encouraged to accept such offers.*** The stakes are raised if one party decides to roll the dice and proceed to trial.

Purpose of CCP 998

As you will see in the discussion and case studies later, the courts consider this purpose in making their decisions regarding who is entitled to costs/fee shifting

The Mechanics -- Procedure for Extending and Accepting 998 Offers

- ▶ Section 998(b) sets forth the requirements for the form of an offer to compromise: *"The written offer shall include a statement of the offer, containing the terms and conditions of judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. "*

The Mechanics --Procedure for Extending and Accepting 998 Offers

998 Offer Must Be in Writing

- ▶ Telephone discussion insufficient
- ▶ Offer on the record at deposition is also insufficient

The Mechanics -- Procedure for Extending and Accepting 998 Offers

Offer Should Identify Itself as a 998 Offer

- ▶ If ambiguous, put pressure on other side to take position on whether it is a 998 offer or not
- ▶ Remember: *998 offer is not an offer to enter into a settlement agreement, it is an offer for a filed judgment*

The Mechanics --Procedure for Extending and Accepting 998 Offers

Must be clear regarding the terms and conditions: what is the compensation at issue.

- ▶ Terms must be capable of valuation to utilize in later “more favorable” analysis

Must be a concrete offer: other side must have the ability to either accept or reject. This is not the time for back & forth negotiations.

Opposing party must be served with 998 offer, but not filed

The Mechanics -- Procedure for Extending and Accepting 998 Offers

Timing

- ▶ May be issued any time up to 10 days before trial (15 days if by mail)
- ▶ Offer automatically expires 30 days after issued (or first day of trial)
 - ▶ But, issuing party does have ability to revoke sooner

The Mechanics -- Procedure for Extending and Accepting 998 Offers

Offer must be in “good faith”

- ▶ Court will not grant benefits of 998 if it finds that offer was not issued in good faith. Token or nominal amount is insufficient: Defendant can't offer to settle for \$1 and then get benefit of attorneys' fees if Plaintiff gets \$0. Court has discretion making this determination and may consider several factors:
 - ▶ Likelihood of defendant's apparent liability
 - ▶ Nature, amount of Plaintiff's damages
 - ▶ Information known to Plaintiff at time of receipt of offer
 - ▶ Jury reports: results in similar cases

The Mechanics -- Accepting a 998 Offer

- ▶ Statutory requirements:
 - ▶ (a) must be in writing;
 - ▶ (b) signed by counsel
- ▶ Acceptance must be made before 998 offer expires or is revoked. Only have 30 days to consider.
- ▶ Must be unconditional, unequivocal acceptance. Can NOT change terms, e.g. 2002 decision found no acceptance where offeree added "each party to bear his own costs" to the offer

After acceptance, 998 Offer & Acceptance is filed with court and Judgment is then entered

How Does Section 998 Incentivize Settlement of a Case? Penalties for Rejecting Party

- ▶ Section 998 has different subsections to address the rejection of offers made by Defendants and rejection of offers made by Plaintiffs. Although there are similarities, *it is important to understand what side of the "v" you are on* in analyzing the 998 offer.

Plaintiff Rejects Defendant's Offer and Does Not Obtain More Favorable Result

Mandatory Penalties

Plaintiff Cannot Recover Postoffer Costs

- ▶ May not recover postoffer costs otherwise entitled to
 - ▶ Includes statutory/contract attorneys' fees
- ▶ Plaintiff may still recover preoffer costs where he is the "prevailing party" and he would otherwise be so entitled. The "prevailing party" is the party with net monetary recovery or the party so designated by the court. Code Civ. Proc. § 1032.

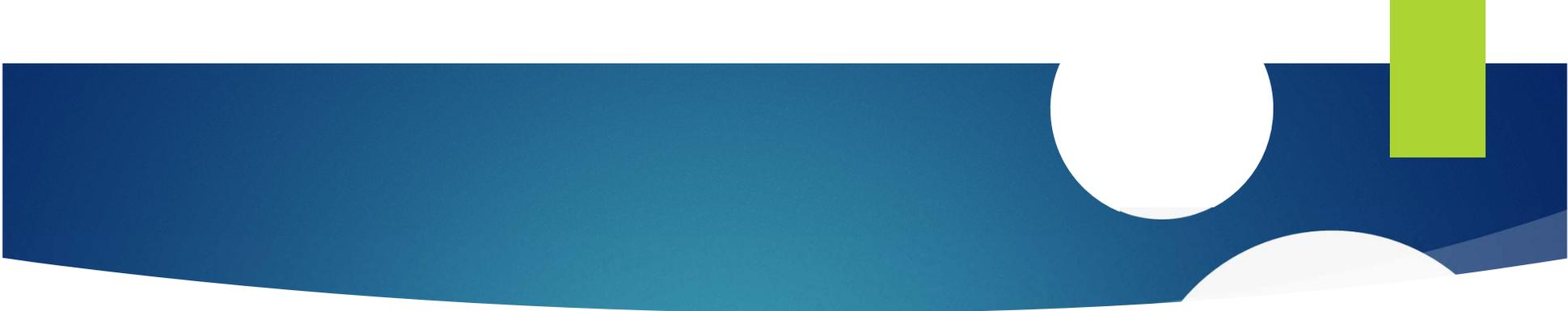
Plaintiff Liable for Defendant's Postoffer Costs

- ▶ Plaintiff liable for Defendant's Postoffer costs, including attorneys' fees where authorized by statute/contract

Plaintiff Rejects Defendant's Offer and Does Not Obtain More Favorable Result

Discretionary Penalties: Expert Witness Fees

- ▶ Court has discretion to award defendant expert witness fees.
 - These include all fees incurred in preparation for trial and used at trial. *May include pre-offer expert witness costs.*
- ▶ This is within the court's discretion.



What are the greatest costs associated with preparing and trying a case?

- ▶ Attorneys' fees and expert witness costs are at the top.
- ▶ These costs both may be shifted from the Defendant to the Plaintiff.
 - ▶ *And Defendant is not required to get a \$0 verdict, just have Plaintiff receive a judgment less than Defendant's 998 offer.*

How to Determine if Plaintiff's Award is "More Favorable"

What data/figures goes into court's calculation if Plaintiff's award is more favorable?

- ▶ Damage Award at Trial
- ▶ Consider what would the Plaintiff be entitled to at the time of the offer:
 - ▶ Costs
 - ▶ Attorneys' Fees
 - ▶ Interest
- ▶ Value nonmonetary terms of settlement
 - ▶ Disregard if too vague, ambiguous
 - ▶ But do consider release of claims, cross-complaint causes of action if value can be placed upon them
- ▶ Do NOT consider Postoffer Fees & Costs

How to Determine if Plaintiff's Award is "More Favorable"

Take a snapshot in time of when the 998 offer was made: what costs, fees, pre-judgment interest would Plaintiff have been entitled to up until that date. This determines "more favorable" decision.

Defendant Rejects Plaintiff's Offer

- ▶ If Plaintiff receives judgment more favorable than 998 Offer it issued and Defendant rejected, Plaintiff is entitled to:
 - ▶ All fees and costs otherwise entitled to
 - ▶ May receive *post-offer* expert witness costs, at court's discretion
- ▶ In Personal Injury actions, also entitled to 10% interest from time offer was made through satisfaction of judgment

Defendant Rejects Plaintiff's Offer

→IMPORTANT DISTINCTION: Under 998(c)(1): Defendant may be awarded expert witness costs "actually incurred and reasonable necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration." Is not critical whether fees incurred pre or post offer. BUT, Plaintiff may only be awarded "postoffer costs of the services of expert witnesses." 998(d)

Determining Whether Defendant's Award is "More Favorable"

In analyzing whether Defendant achieved a "more favorable" result than Plaintiff's offer, consider entire judgment:

- ▶ Compensatory damages
- ▶ Punitive damages
- ▶ Statutory costs (including preoffer and postoffer)
- ▶ Nonmonetary amounts of judgment that can be valued
- ▶ NOT prejudgment interest

Multiple Parties

Can quickly become complicated when you have:

- ▶ Offer issued to multiple parties on one side
- ▶ OR Offer issued by multiple parties on one side

- ▶ When offer is issued to multiple parties, the settlement offer must show how it would be allocated. This is necessary for the “more favorable” analysis
- ▶ Cannot make 998 offer to multiple parties contingent upon acceptance by all parties. This removes freedom of choice by individual plaintiffs.
- ▶ Can be complicated in cases of joint & several liability

Costs & Attorneys' Fees – A Crucial Consideration

Attorneys' fees and expert costs are often the most expensive part of litigating a matter. Shifting these costs can change the whole economic outcome of litigation.

- ▶ In the Scott case, the Plaintiff made a \$1.1M decision regarding the 998 offer
 - ▶ Defendant issued a 998 for \$900K; plaintiff rejected
 - ▶ Plaintiff received verdict for \$442K in damages
 - ▶ Plaintiff had \$226K in preoffer attorneys' fees and costs
 - ▶ So, result as a snapshot at time the offer was made, the award was \$668K
 - ▶ Plaintiff failed to receive a judgment "more favorable" than 998 offer
 - ▶ Defendant's postoffer fees & costs were total of \$882K (attorneys' fees & costs were \$634K, expert costs \$248K)
- Plaintiff entitled to \$669K (judgment, preoffer fees & costs), Defendant entitled to \$882K === ***after offset, Plaintiff had to pay Defendant \$213K***

Federal Rule of Civil Procedure 68

- ▶ Similar rule under the Federal Rules of Civil Procedure
- ▶ Can only be issued by defendant
- ▶ Different timeline for acceptance: only 14 days to accept
- ▶ Offer must include “costs accrued”, which will include attorneys’ fees where allowed by underlying statute

Federal Rule of Civil Procedure 68

- ▶ Rule 68. Offer of Judgment
- ▶ (a) MAKING AN OFFER; JUDGMENT ON AN ACCEPTED OFFER. *At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.* If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- ▶ (b) UNACCEPTED OFFER. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. *Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.*
- ▶ (c) OFFER AFTER LIABILITY IS DETERMINED. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
- ▶ (d) PAYING COSTS AFTER AN UNACCEPTED OFFER. *If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.*

Special Contexts - Eminent Domain and Arbitration Proceedings

- ▶ 998 applies in arbitration just like trial court
- ▶ In eminent domain, there is a similar procedure but a different timeline. Also, each side must submit offer to compromise before eminent domain trial.

Making and Responding to 998 Offers

- Strategic Considerations

Considerations:

- ▶ Accepted 998 Offer is not confidential, it is a judgment entered by the Court. It is NOT a settlement agreement.
- ▶ May be emboldened if you know the other side will reject a “reasonable” offer

Strategy

Timing – when to issue the 998 offer?

- ▶ Make offer early to maximize costs/fees that are “post-offer”
- ▶ Make offer later when have a better understanding of liability & damages
- ▶ Timing will effect:
 - ▶ **Amount of preoffer, postoffer costs at issue**
 - ▶ **Preoffer costs which affect whether final judgment is “more favorable”**

Two Examples, Same Facts but Only Difference is When 998 Offer Issues

(A) Defendant issues 998 for \$50,000 on January 1, 2010 (immediately after complaint filed). Plaintiff rejects.

- ▶ 24 months of litigation: \$1,000/month burn rate.
- ▶ Verdict issued on January 1, 2012 for \$45,000. Defendant entitled to \$24,000 in post-offer costs resulting in cutting the verdict in ½.

Two Examples, Same Facts but Only Difference is When 998 Offer Issues

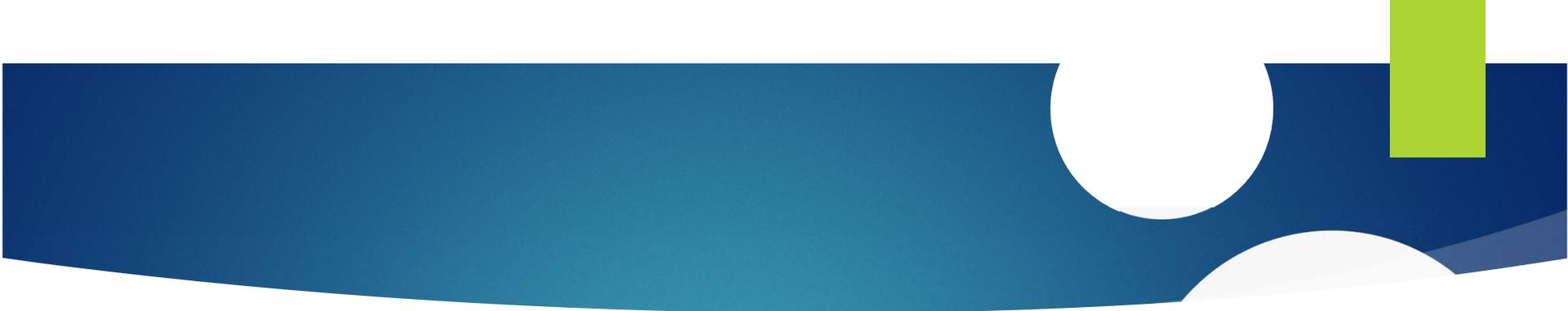
(B) Defendant issues 998 for \$50,000 on December 1, 2011, one month before trial. Plaintiff rejects.

- ▶ 24 months of litigation: \$1,000/month burn rate.
- ▶ Verdict issued on January 1, 2012 for \$45,000. Defendant entitled to \$1,000 in post-offer costs resulting in no significant effect on judgment.

Another Important Aspect of Timing

Determining what is the ultimate award Plaintiff received & is it “more favorable”

- ▶ Same example: Defendant issues 998 offer for \$50,000 on January 1, 2010; verdict issued on January 1, 2012 for \$45,000.
 - ▶ As of February 1, 2010, pre-offer costs are only \$1,000 so amount to consider is \$46,000.
 - ▶ As of December 2, 2011, pre-offer costs are \$24,000 so amount to consider is \$69,000.

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- ▶ In more extreme version where parties are so far apart on valuation of case, the award of post-offer costs/expert witness fees could result in a Plaintiff winning at trial but the judgment being offset & actually in favor of Defendant, like the Scott case discussed earlier.
 - ▶ Plaintiff's pre-offer costs are utilized in the "more favorable" result analysis, but neither parties' pre-offer costs (with exception of expert witness fees for defendants) are shifted as a result of 998.

Case Study: *Martinez v. Brownco*, 203 Cal.App.4th 507 (2012)

- ▶ Martinez injured in electrical explosion. He (Raymond) and his wife (Gloria) sue construction company.
- ▶ On August 30, 2007, Raymond serves 998 for \$4.75M, Gloria offers to compromise for \$250K. Brownco ignores offers, neither accepts or rejects. Offers automatically withdrawn after 30 day statutory period.
- ▶ On February 8, 2010, Raymond offers to compromise for \$1.5M, Gloria for \$100K. Brownco ignores offer and withdrawn by statute when trial began on February 18.
- ▶ After trial, Raymond awarded \$1.6M, Gloria \$250K.
- ▶ Gloria sought costs from September 2007, Brownco argued only liable for costs from February 2010 when second offer issued.

Case Study: *Martinez v. Brownco*, 203 Cal.App.4th 507 (2012)

- ▶ What is the effect of Gloria's second 998 offer?
- ▶ From what starting period is Gloria entitled to collect costs: date of initial offer or date of second offer?

Case Study: *Martinez v. Brownco*, 203 Cal.App.4th 507 (2012)

Court Ruling:

- ▶ Where a party makes two *section 998* offers to compromise more than 30 days apart, the purpose of *section 998* is adequately served by the statute's existing language, which **entitles an offeror to cost shifting from the date of the earliest reasonable offer**. This rule encourages early settlement, respects the Legislature's preference for early discovery and evaluation of the merits of lawsuits, and presents a certain, bright-line rule by which settlement negotiations may be guided. If any mischief or confusion results from later offers, or any gamesmanship arises, the court can address such concerns when it awards costs.
- ▶ Here, it is undisputed that if Gloria had not made her second *section 998* offer she would have been entitled (in the court's discretion) to an award of expert fees incurred after the first offer. No principle requires a different result simply because she made the second offer. **The trial court thus abused its discretion when, albeit following *Wilson*, it found that Gloria's second offer to settle extinguished her first.** The matter will be remanded to afford the court an opportunity to reexamine Gloria's entitlement to expert fees.

Case Study: Haskell Corp. v. ConocoPhillips Co., Case No. A124446 (1st Dist., Div. 4 Mar. 14, 2012)

Construction dispute. Parties had cross-claims against one another.

- ▶ Conoco Phillips issued \$2.9M 998 offer to resolve all claims parties had against one another. Haskell rejected.
- ▶ At trial, Haskell awarded \$3.6M, ConocoPhillips (through its surety) awarded \$1.3M resulting in offset award of \$2.3M.

Did Haskell obtain "more favorable" judgment/award than \$2.9M offer?

Case Study: Haskell Corp. v. ConocoPhillips Co., Case No. A124446 (1st Dist., Div. 4 Mar. 14, 2012)

- ▶ Trial court found, as a matter of law, Haskell did not obtain a more favorable judgment than the pretrial offer. ConocoPhillips therefore entitled to post-offer costs (including \$200K in expert witness fees). These costs were then deducted from Haskell's net award resulting in a further offset of total amount owed by ConocoPhillips to Haskell.
- ▶ Critical in this matter was how the offer was phrased. ConocoPhillips was agreeing to dismiss its own action as part of the pretrial offer. Conoco's claim was for \$1.1M (claim for sums it had to pay Haskell's subcontractors due to their misconduct). So, court said \$2.9M offer was really \$4.0M (\$2.9M + \$1.1M).

How to Support Litigator in Making 998 Offer

Understand the mechanics/requirement of the statute:

- ▶ Timing
 - In writing
- ▶ Contents of writing
- ▶ How to accept

Be able to provide up to date costs information to consider in making offer/considering offer made