

MEDIATION AND SETTLEMENT PROCEDURES

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Discussion Roadmap



Overview of Pre-Trial Resolution in CA Litigation



Mediation

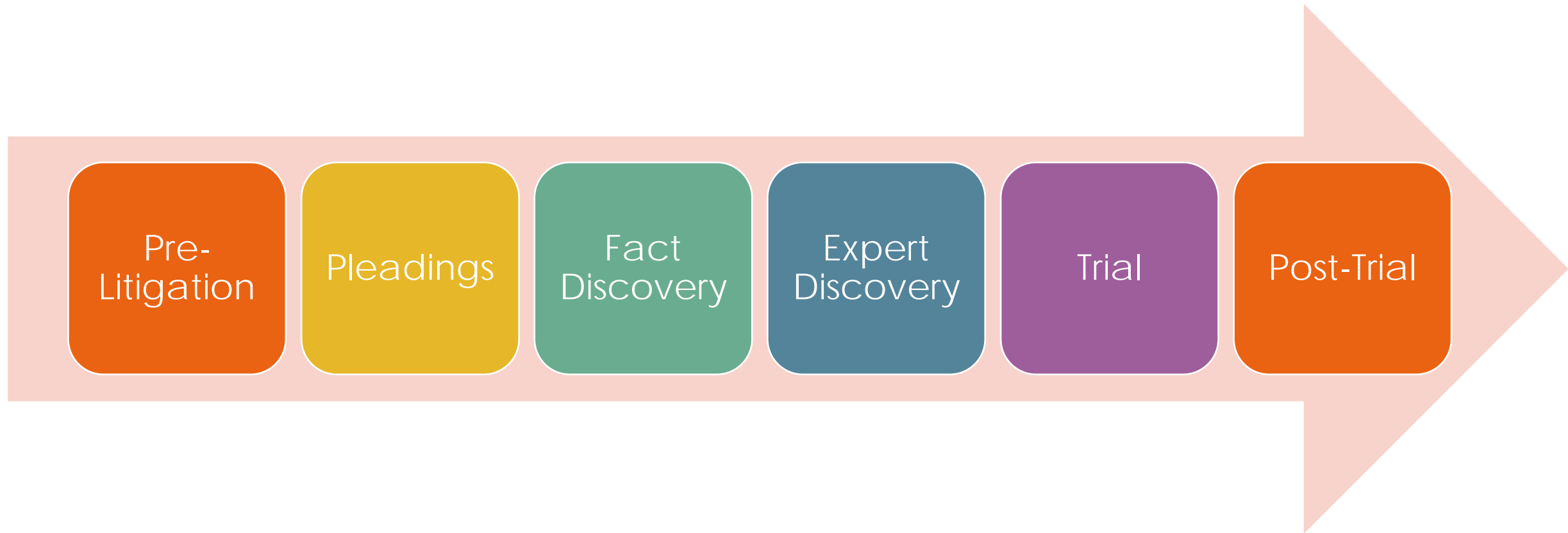


Statutory Offers to Compromise (C.C.P. § 998)



Settlement Agreements

Stages of a Civil Case





Wanna get away
(from trial)?

Vehicles for pre-trial resolution in CA litigation:

Involuntary Dismissal (Law and Motion)

- Demurrer
- Motion to Dismiss
- Motion for Judgment on the Pleadings
- Motion for Summary Judgment
- Motion for Terminating Sanctions

Voluntary Dismissal and Settlement

- Informal Negotiations
- Alternative Dispute Resolution (ADR) Process
 - Private Mediation
 - (Mandatory) Settlement Conference
 - Neutral Evaluation
 - Nonbinding Judicial Arbitration
 - Binding Private Arbitration
- Statutory Offer to Compromise (C.C.P. § 998)



MEDIATION

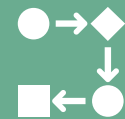
The Basics of Mediation



When / Why



Who



How / Where

WHEN to mediate depends on
WHY to mediate

Early in
litigation

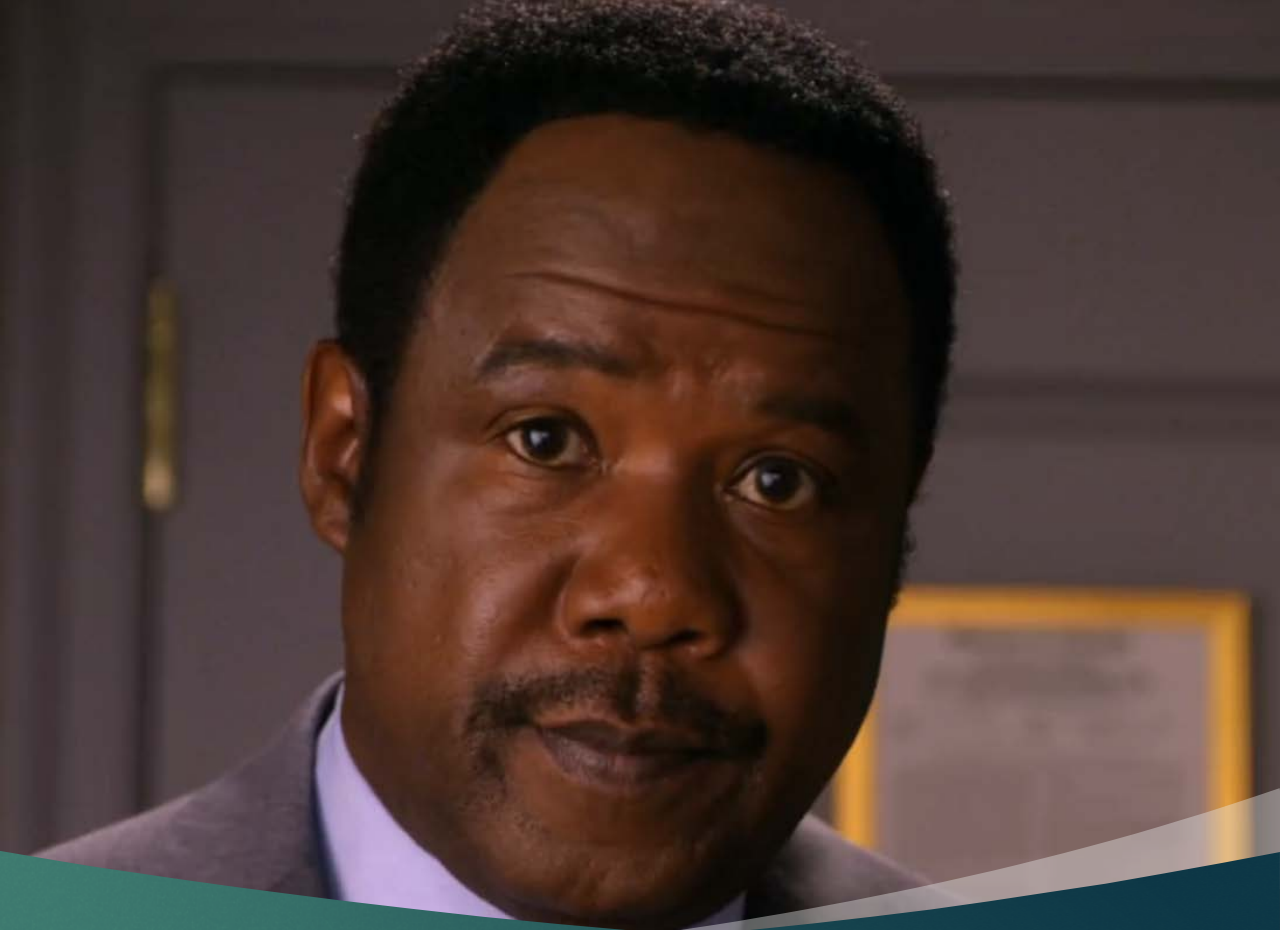
Middle of
litigation

Late in
litigation

WHO participates in a mediation?

- ▶ Mediator
- ▶ Each party OR a party representative with the authority to make a deal
- ▶ Each party's attorney





HOW the mediation process works
and WHERE it takes place

To Zoom or not to Zoom



CONFIDENTIALITY is CRITICAL

California's Evidence Code (§§ 703.5, 1119, and 1121)

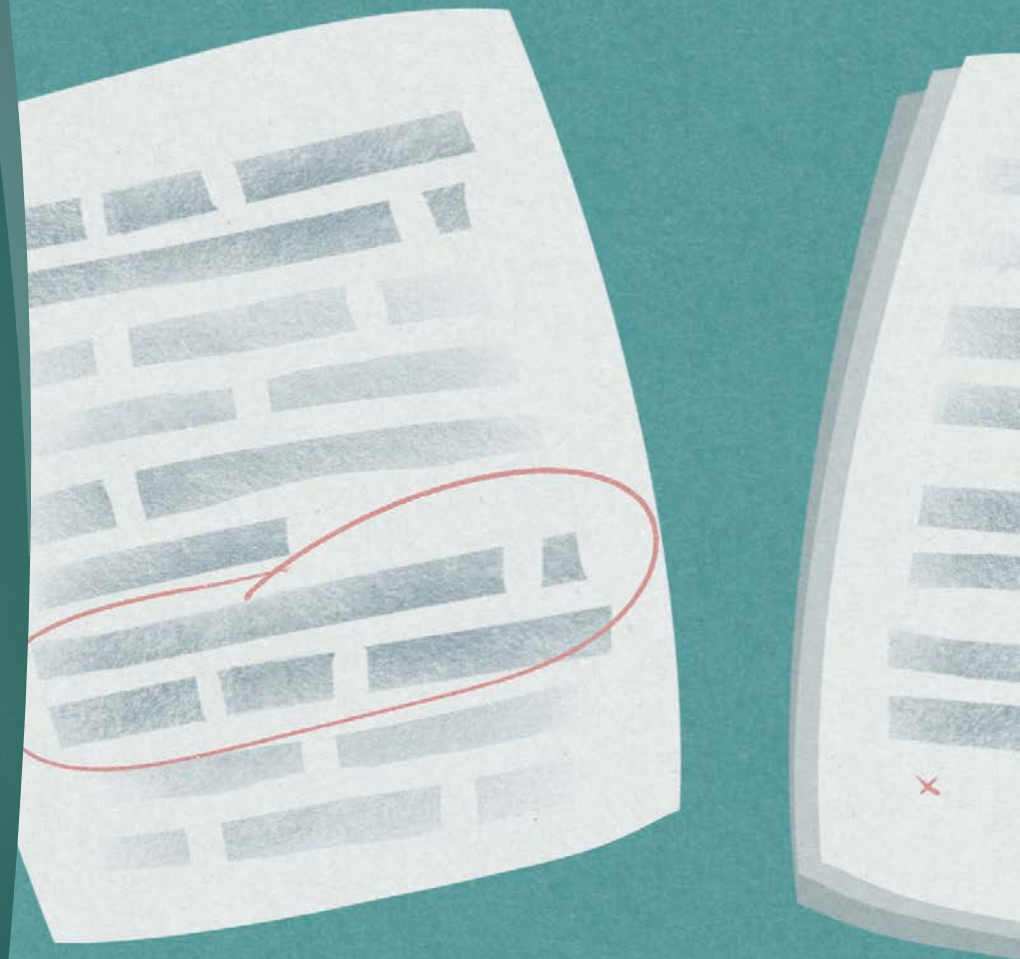
“**unqualifiedly** bars disclosure of communications made during **mediation** absent an **express** statutory exception.”


Mediator findings and reports = inadmissible

A court **may not** consider any “report, assessment, evaluation, recommendation, or finding of any kind by the mediator concerning [the] mediation” **unless**


1. A report is required by court rule or law stating whether an agreement was reached
2. The parties expressly agree otherwise

(Evid. Code, § 1121)



A stack of papers and folders is shown on the left side of the slide. A white, rounded rectangular text box is overlaid on the stack, containing the text "Party / attorney statements = inadmissible".

Party / attorney
statements =
inadmissible

A solid red vertical bar is located in the top right corner of the slide.

Things said – including admissions made – for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation are **NOT** admissible at trial and are **NOT** subject to discovery

This includes “writings” and all communications, negotiations, or settlement discussions by and between participants

(Evid. Code, § 1119)

Examples of protected "writings"



Exceptions (when “writings” are admissible / discoverable)

- ▶ **Consent to disclosure:** When all participants in the mediation, including the mediator, consent to disclosure.
- ▶ **Evidence otherwise admissible:** When the writing would have been prepared and exchanged even if there was no mediation.
- ▶ **Equitable estoppel:** When all of the elements for an equitable estoppel finding are present.
- ▶ **Raw physical evidence:** When it is a piece of raw physical evidence, like a physical sample (but the *recorded analyses* of the physical samples are protected).

Closing Time...

For purposes of confidentiality, when is mediation **over** – so that later writings may be admissible?

Settlement: The parties sign a written settlement or reach an oral settlement that either fully or partially resolves the dispute

Notice from mediator: The mediator notifies the parties in writing that the mediation is terminated (or words to that effect)

Notice from party: A party notifies the mediator and other parties in writing that the mediation is terminated (or words to that effect) - remaining parties may continue the mediation

10-day lapse in communications: There is no communication between the parties and the mediator relating to the dispute for a period of 10 calendar days (or another agreed-upon period)

Admissibility of Settlement Agreements

Written Settlement Agreements

Can be disclosed if **any** of the following conditions apply:

- the agreement provides that it is “admissible” or “subject to disclosure,” or words to that effect; or
- the agreement provides that it is “enforceable” or “binding,” or words to that effect; or
- all parties *expressly consent* to its disclosure; or
- the agreement is used to show *fraud, duress or illegality* that is relevant to an issue in dispute

Oral Settlement Agreements

Can be disclosed if **all** of the following conditions apply:

- the oral agreement is *recorded* by a court reporter, tape recorder or other “reliable means of audio recording”;
- the terms of the agreement are *recited on the record* in the presence of the parties *and the mediator*, and the parties expressly state on the record that they *agree to the terms* recited;
- the parties expressly state on the record that the agreement is “binding” or “enforceable,” or words to that effect; *and*
- the recording was *reduced to writing* and the writing was *signed within 72 hours* after it was recorded



STATUTORY
OFFERS TO
COMPROMISE

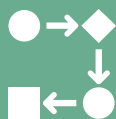
The Basics of C.C.P. § 998 Offers



What



When / Why



How

WHAT is it?

A written offer to allow judgment to be taken or an award entered in accordance with the terms and conditions stated at that time – which, if done right, **can shift costs** to the other party in certain circumstances

Contains:

- (1) a statement of the offer with specific terms and conditions, and
- (2) a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted

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10 Attorneys for Defendant,
11 COSMO KRAMER

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF KERN**

14 GEORGE COSTANZA,) No. 20CV-0185
15 Plaintiff,) [Assigned to Honorable Rita C. Federman]
16 vs.) OFFER TO COMPROMISE TO PLAINTIFF
17 COSMO KRAMER,) GEORGE COSTANZA BY DEFENDANT
18 Defendant.) COSMO KRAMER
19) [C.C.P. SECTION 998]

20 TO PLAINTIFF AND HIS COUNSEL OF RECORD:

21 Pursuant to California Code of Civil Procedure section 998, Defendant COSMO KRAMER
22 hereby offers to compromise and to settle the above-captioned action and all claims against him as
23 follows:

24 Defendant offers to pay to Plaintiff GEORGE COSTANZA a total sum of Thirty Thousand
25 Dollars and No Cents (\$30,000.00), in exchange for dismissal of Plaintiff's action with prejudice,
26 with each party to bear their own attorneys' fees, costs, and/or interest that may exist in relation to
27 this action, and with Plaintiff to be solely responsible for any and all liens related to this action.

28 If Plaintiff accepts this Offer, please sign and date the "Acceptance of Offer to Compromise"
set forth herein on page 3 of the Offer, and serve the written acceptance to the attorneys of record for
Defendant within thirty (30) days of the date of mailing of this Offer. This Offer is deemed withdrawn
if written acceptance is not received by Defendant's counsel of record within thirty (30) days from
the date of mailing of this Offer or the commencement of trial, as defined in Code of Civil Procedure,

1 section 998, subdivision (b)(3).

2 Please note that if Plaintiff does not accept this Offer in writing within the earlier of thirty (30)
3 days from the date hereof or the commencement of trial, as defined in Code of Civil Procedure,
4 section 998, subdivision (b)(3), and if Plaintiff fails to recover a more favorable judgment or award,
5 Defendant will seek recovery from Plaintiff for its post-Offer costs of suit and expert witness fees,
6 as provided in Code of Civil Procedure, section 998.

7 Dated: November 8, 2024

HALL HIEATT CONNELLY & BOWEN LLP

8 By: _____
9 STEPHANIE A. BOWEN
10 CATHERINE H. DEVLIN
11 Attorneys for Defendant,
12 COSMO KRAMER


13 **ACCEPTANCE OF OFFER TO COMPROMISE**

14 Plaintiff GEORGE COSTANZA accepts the Offer to Compromise made by Defendant
15 COSMO KRAMER pursuant to California Code of Civil Procedure section 998 on the terms and
16 conditions as set forth above.

17 Dated: _____, 2024

DEWEY CHEATEM & HOWE

18 By: _____
19 BOB LOBLAW
20 Attorneys for Plaintiff,
21 GEORGE COSTANZA



WHEN to make it (mostly) depends on WHY to make it

- ▶ CANNOT be made less than 10 days prior to commencement of trial or arbitration
- ▶ Otherwise,
 - ▶ Should NOT be made too early (e.g., with service of complaint), or it runs the risk of being deemed in bad faith
 - ▶ SHOULD be made at a time that maximizes or minimizes cost-shifting

WHAT are “costs”

- ▶ Incurred (whether or not already paid)
- ▶ Reasonably necessary to the conduct of the litigation (rather than merely convenient or beneficial to preparation)
- ▶ Reasonable in amount
- ▶ 16 items + discretionary catch-all
 - ▶ Filing, motion, and jury fees
 - ▶ Deposition costs
 - ▶ Models, enlargements and photocopies of exhibits, electronic presentation of exhibits
 - ▶ Attorneys' fees when fee award would be authorized by contract, statute, or law



Plaintiff George doesn't accept Defendant Kramer's Offer, they go to trial,* and Plaintiff George fails to get a better judgment – what happens?

▶ **Mandatory penalties:**

- ▶ Plaintiff George cannot recover his own court costs incurred *after* the § 998 offer was made (but *pre-offer* costs are still recoverable if Plaintiff George is the prevailing party)
- ▶ Plaintiff George must pay Defendant Kramer's *post-offer* court costs (and *pre-offer* costs if Defendant Kramer is the prevailing party) – if these exceed Plaintiff George's verdict, a judgment will be entered against Plaintiff George for the balance

▶ **Discretionary penalty:**

- ▶ The court *may* order Plaintiff George to pay a reasonable sum to cover Defendant Kramer's *post-offer* expert witness fees both for preparation and during trial or arbitration of the case

Defendant Kramer doesn't accept Plaintiff George's Offer, they go to trial, and Defendant Kramer fails to get a better judgment – what happens?

▶ **Mandatory penalties:**

- ▶ Defendant Kramer must pay Plaintiff George's costs
- ▶ In personal injury actions, Defendant Kramer must also pay 10% interest on the judgment from the date of the Offer (this does **not** apply to public entities or employees for acts in the course of their public employment)

▶ **Discretionary penalty:**

- ▶ The court *may* order Defendant Kramer to pay a reasonable sum to cover Plaintiff George's *post-offer* expert witness fees both for preparation and during trial or arbitration of the case

When does a party fail to obtain a “better” (more favorable) judgment?

Plaintiff George did not accept Offer and:

The verdict/award is in favor of Defendant Kramer **OR**

The verdict/award is in favor of Plaintiff George but it is **less** than the amount of Defendant Kramer’s Offer

Defendant Kramer did not accept Offer and:

The verdict/award is in favor of Plaintiff George and it is **greater** than the amount of Plaintiff George’s Offer

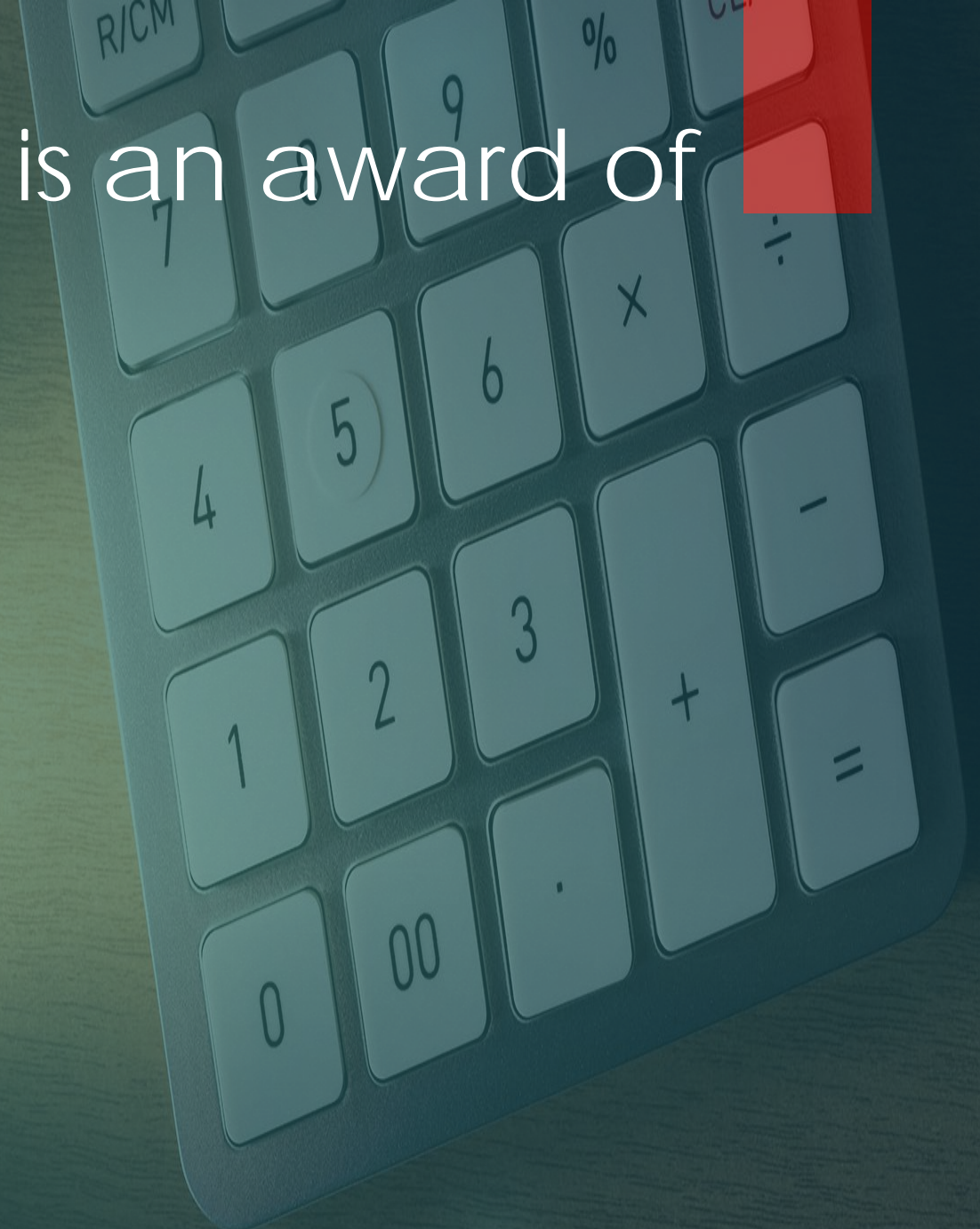
Calculating the amount of the verdict/award in favor of Plaintiff George:

- Howell / Government Code § 985 reduction
- Liens are NOT considered
- Settlements with other defendants
- Costs

What happens if there is an award of periodic payments?

The present value of such a judgment must be determined – which means that the jury must be instructed to ascertain “the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering” (e.g., the cost of an annuity that could be purchased to provide the periodic payments over plaintiff's lifetime)

Salgado v. County of Los Angeles (1998) 19 Cal.4th 629, 643



What happens if a party makes another C.C.P. § 998 Offer?

If Defendant makes another Offer

The last Offer is the **only** operative Offer for the cost-shifting provisions

(a subsequent offer *not* under § 998 may extinguish an earlier § 998 Offer)

If Plaintiff makes another Offer

If Defendant fails to obtain a judgment better than **either** Offer, the trial court retains discretion to order payment of expert witness costs incurred from the date of the first Offer

HOW to make a valid Offer

State terms and conditions that are **sufficiently certain** to be **capable of valuation**

(otherwise, the offeree will escape the offer's cost-shifting consequences)

- May contain non-monetary terms that can be valued in monetary terms
- Cannot be conditional
- Cannot seek to dispose of claims beyond those at issue in pending lawsuit

Offers found to be invalid

Offer required confidentiality. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793)

Offer to repurchase car so long as it was in "undamaged condition, save normal wear and tear." (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036)

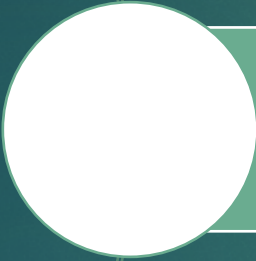
Offer required offeree to release "all claims" where claimant had at least one claim not part of present lawsuit. (*Chen v. Interinsurance Exch. of the Auto. Club* (2008) 164 Cal.App.4th 117)

Offer required execution of settlement and release agreement but did not attach written agreement or describe terms in any meaningful detail. (*K.M. v. Grossmont Union High School Dist.* (2022) 84 Cal.App.5th 717)

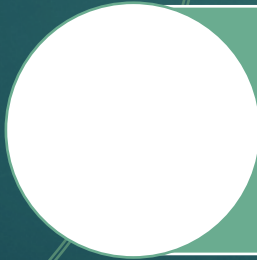
Offers found to be **valid**



Offer to waive costs in exchange for dismissal with prejudice. (*Hartline v. Kaiser Found. Hosps.* (2005) 132 Cal.App.4th 458)



Offer to pay "statutory costs including attorney's fees, incurred to the date of this offer *in the amount determined by the Court, according to proof,*" was enforceable upon acceptance. (*Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550)



Offer for settlement that provided: "1. This is an offer to settle, not an offer to have judgment taken. 2. This offer is subject to a good faith determination order. 3. [Plaintiff] must dismiss her complaint for damages against [Defendant], in its entirety, with prejudice. 4. [Plaintiff] must execute a release of all claims in favor of [Defendant]. 5. The parties will bear their own costs. 6. [Plaintiff] will be liable for all medical bills, liens or other financial obligations resulting from the accident." (*Menges v. Department of Transportation* (2020) 59 Cal.App.5th 13)

The more, NOT always the merrier

To several plaintiffs

Must be allocated to each plaintiff (unless there is a "unity of interest")

Invalid if requires acceptance by all of them

By several plaintiffs

Should be allocated to each plaintiff

(if not allocated, can still be valid if *absolutely clear* that verdict was greater than Offer)

To several defendants

Must be allocated to each defendant when defendants are not jointly liable for full amount of damages

Invalid if requires acceptance by all of them

By several defendants

Valid
(but different approaches for determining whether plaintiff beats the Offer)

Concept of **Good Faith** can invalidate nominal or token offers

Offers found to be **invalid**

- A \$15,001 offer in a case in which damages were ultimately determined to be in excess of \$1,000,000 (*Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692)
- A \$2,500 offer in a wrongful death case properly denied even though liability was tenuous (*Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53)

Offers found to be **valid**

- An offer to waive costs had significant monetary value even though no net sum established (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258)
- An offer of \$100 and waiver of costs and attorney fees was made in good faith in light of circumstances at time offer made, evaluated from defendants' perspective (*Carver v. Chevron USA, Inc.* (2002) 97 Cal.App.4th 132)
- A \$30,000 offer was reasonable even though plaintiff's potential damages over \$500,000 based on determination that defendant had no liability (*Najah v. Scottsdale Ins. Co.* (2014) 230 Cal.App.4th 125)

Two Major Traps for the Unwary

- ▶ The term “costs” does not need to be mentioned in the Offer
 - ▶ If the Offer is rejected and the offeror beats the Offer, offeror still entitled to receive costs
 - ▶ But if the Offer is accepted, acceptance may entitle the offeree to costs as prevailing party
- ▶ The statutory default is to allow entry of judgment
 - ▶ If the Offer fails to specify whether acceptance would result in judgment or dismissal, judgment will be entered

Options for **Responding** to an Offer

Acceptance

must be an unequivocal written statement (on Offer document or separate document), signed by counsel for accepting party, **and** communicated to the offeror within 30 days of service or before start of trial

Objection

written objection to set the stage for later argument that it was not a valid Offer

Expiration

if not accepted within 30 days of service or by start of trial, Offer expires and is deemed withdrawn

Rejection

must be an unequivocal statement of rejection (a criticism of the Offer, a request for better terms, or a counter-offer do **not** cut off the offeree's power to accept)



Is there a way out of an Offer or judgment?

- ▶ Revoking or Withdrawing Offer
 - ▶ May be revoked/withdrawn (in writing) prior to notice of acceptance
 - ▶ Automatically revoked upon death of offeror or offeree
 - ▶ No § 998 penalties for failure to accept revoked Offer
- ▶ Vacating Judgment
 - ▶ The trial court can vacate a judgment pursuant to C.C.P. § 473(b) for "mistake, inadvertence, surprise or *excusable* neglect"
 - ▶ But an attorney's intrinsic *mistake as to the terms* of a § 998 offer is *not* ground for relief because it is not the kind of mistake ordinarily made by a reasonably prudent attorney



SETTLEMENT AGREEMENTS

Basic Components

Recitals

Release

Payment

Special Terms

General Terms

Date / Signature

(Attorney Approval)



Some Special Terms

(to consider in every civil case)

- **Civil Code 1542 Waiver:** waives Civil Code 1542, which states that a general release does not extend to claims that the releasing party does not know or suspect to exist in their favor at time of executing the release and that, if known, would have materially affected their settlement
- **C.C.P. § 664.6 Enforcement:** allows Court to retain jurisdiction to enforce settlement without having to file a new lawsuit
- **Liens:** representation of no liens OR address responsibility for any and all liens
- **Confidentiality/Non-Disparagement Clause:** however, 1) cannot be included in cases involving public entities, and (2) cannot prevent employee complainant from disclosing factual information related to discrimination, harassment, assault, or retaliation (but can prohibit disclosure of amount paid, and complainant can protect their identity)

Some Special Terms

(to consider depending on parties/claims in civil case)

- If Plaintiff is a **beneficiary of Medicare** (or other government-funded plan): include specific language to protect plan's interest in reimbursement
- If Plaintiff is a **minor or incapacitated**: include contingency on Court's approval of compromise (otherwise, until approved, agreement is voidable by minor but not by defendant)
- If there is **more than one** defendant / tortfeasor: include contingency on Court's approval / finding of good faith
- If Plaintiff in **employment** lawsuit is **over 40 years old**: include (1) waiver of right to bring federal and state age claim (regardless of whether there is an age claim in the lawsuit) and (2) 21-day consideration and 7-day revocation periods (or, in certain circumstances, "reasonable amount of time" to consider effect of release)
- If Plaintiff was Defendant's **employee**: cannot restrict Plaintiff's return to work ("no rehire" clause) unless employee engaged in sexual harassment or sexual assault or there is a legitimate, non-discriminatory reason for not rehiring employee

Key Takeaway Points

- ▶ Mediation and C.C.P. § 998 Offers are two common ways (but not the only ways) to achieve pre-trial resolution in civil cases
- ▶ Mediation:
 - ▶ When/why, who, and where should be considered in the context of each case
 - ▶ Confidentiality is critical
- ▶ C.C.P. § 998 Offers:
 - ▶ If done right, they can have huge financial implications for the case
 - ▶ To do it right, the drafter must be very careful to craft clear terms
- ▶ Settlement Agreements: must pay special attention to
 - ▶ (1) who is the plaintiff and
 - ▶ (2) what is the case about



Questions?



THANK YOU!

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