

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Civil and Small Claims Advisory Committee
Hon. Lee Smalley Edmon, Chair
Case Management Subcommittee
Hon. Robert B. Freedman, Chair
Patrick O'Donnell, Committee Counsel, 415-865-7665,
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DATE: October 9, 2007

SUBJECT: *Offer to Compromise and Acceptance Under Code of Civil Procedure
Section 998 (approve form CIV-090) (Action Required)*

Issue Statement

Code of Civil Procedure section 998 concerns offers to allow judgment to be taken or an award to be entered in pending actions. This statute was amended effective January 1, 2006, to require that the acceptance of a judgment or award be in writing. There is presently no Judicial Council form available either for making or accepting such an offer.

Recommendation

The Civil and Small Claims Advisory Committee recommends that the Judicial Council approve, effective January 1, 2008, a new optional form, *Offer to Compromise and Acceptance Under Code of Civil Procedure Section 998* (form CIV-090), for litigants to use in making and accepting offers to compromise under Code of Civil Procedure section 998 in simple two-party civil cases involving only money judgments.

A copy of the form is attached at page 4.

Rationale for Recommendation

After the legislation was enacted in 2005 requiring acceptances of offers under Code of Civil Procedure section 998 to be in writing, the Civil and Small Claims Advisory Committee developed a proposed Judicial Council form for offers and acceptances. The initial version of the form was designed to be used in a variety

of situations, including cases involving multiple parties and arbitration awards as well as money judgments. The offer and acceptance form was circulated in spring 2006.

Most of the commentators in 2006 supported the approval of the proposed form. However, some commentators suggested specific changes; others expressed concern that the form did not sufficiently clarify the issues and consequences of section 998 offers. The Judicial Council's Rules and Projects Committee also was concerned that users of the form needed to have more information; it thought that a set of instructions was needed. So the committee attempted last year to develop instructions on section 998 offers and acceptances to accompany the form. But given the numerous possible issues and consequences that may result from section 998 offers and acceptances under various circumstances, this proved to be an exceedingly difficult task. The committee was unable to reach an agreement on a clear, simple set of instructions.

In 2007, the committee revised the offer and acceptance form based on the 2006 comments. The revised form was circulated in spring 2007. This version was also designed to be used in cases involving multiple parties. However, the invitation to comment raised the question whether the form should be further revised to cover the situation where an offer is for judgment in favor of multiple parties, but the acceptance or acceptances received are for fewer than the total number of parties. Alternatively, instead of revising the form to address this multiparty issue, the invitation inquired whether the entire form should be revised so that its use would be limited to cases involving only two parties (that is, one plaintiff and one defendant).

In response to the invitation to comment, several commentators supported revising the form so that it could be used only in simple two-party cases. The committee agreed with this recommendation. This would eliminate many of the complications in making and accepting section 998 offers that would have required a set of elaborate instructions. To further simplify the form, the committee concluded that the form should be revised so that it may be used only in cases involving offers and acceptances of money judgments.

In sum, the committee recommends that the Judicial Council approve as an optional form the attached revised offer and acceptance form, which is designed for use in simpler civil cases involving only money judgments and two parties. This form should be helpful to litigants in these simpler cases.

Alternative Actions Considered

The committee considered the three alternatives: (1) recommending approval of the form as circulated to be used in all types of cases, including multiparty cases; (2) not recommending that any form be approved; or (3) recommending approval of a revised form to be used only in simple two-party cases. As indicated above, the committee recommends the third alternative and believes that the form will be beneficial to the public.

Comments From Interested Parties

The most recent version of proposed form CIV-090 was circulated for public comment in spring 2007. Ten comments were received on the form. The commentators included judges, court administrators, the Superior Court of Los Angeles County, a local bar association, and the State Bar's Committee on Administration of Justice. A chart summarizing the public comments and the committee's responses is attached at pages 5–9.

As discussed above, based on its review of the comments and discussion of the issues, the committee recommends that the form be designed to be used only in simpler civil cases. The committee has revised the form so that it may be used only in cases involving two parties (a single plaintiff and a single defendant), where the offer and acceptance involve a money judgment.

Implementation Requirements and Costs

Some minor costs will be incurred in making the form available to the public. The form should make it easier for litigants and the courts to use the procedures in Code of Civil Procedure section 998 in simple two-party civil cases.

Attachments

ATTORNEY OR PARTY WITHOUT ATTORNEY <i>(Name, State Bar number, and address):</i> TELEPHONE NO.: _____ FAX NO. <i>(Optional):</i> _____ E-MAIL ADDRESS <i>(Optional):</i> _____ ATTORNEY FOR <i>(Name):</i> _____	FOR COURT USE ONLY
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF: DEFENDANT:	
<input type="checkbox"/> OFFER TO COMPROMISE AND <input type="checkbox"/> ACCEPTANCE UNDER CODE OF CIVIL PROCEDURE SECTION 998	CASE NUMBER: _____
Note: This form is designed to be used only in civil actions involving a single plaintiff and a single defendant, where the offer and acceptance involves a money judgment. The court will file this offer to compromise and the acceptance only if accompanied by a judgment prepared for the court's signature and entry of judgment.	

OFFER TO COMPROMISE

1. Plaintiff *(name):* _____ offers to have judgment entered under Code of Civil Procedure section 998 in favor of the plaintiff and against *(name of the defendant):* _____

2. The judgment is to be *(check and complete a or b)*
 - a. in the amount of \$ _____
 - (1) Each party shall bear its own costs and fees.
 - (2) Including costs under Code of Civil Procedure section 1032 and attorney's fees.
 - (3) Plus costs under Code of Civil Procedure section 1032.
 - (4) Plus costs under Code of Civil Procedure section 1032 and attorney's fees in the amount of \$ _____.
 - (5) Plus costs under Code of Civil Procedure section 1032 and attorney's fees allowed by law as determined by the court.
 - b. as follows *(describe the terms and conditions of the judgment):*

 Continued in attachment 2b.

Date: _____

_____ (NAME OF PARTY OR ATTORNEY FOR PARTY MAKING OFFER) _____ (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY MAKING OFFER)

ACCEPTANCE OF OFFER

3. Defendant *(name):* _____ hereby accepts the offer for the judgment stated in items 1 and 2 above.

Date: _____

_____ (NAME OF PARTY OR ATTORNEY FOR PARTY ACCEPTING OFFER) _____ (SIGNATURE OF PARTY OR ATTORNEY FOR PARTY ACCEPTING OFFER)

SPR07-17

Offer to Compromise and Acceptance Under Code of Civil Procedure Section 998 (adopt form CIV-090)

	Commentator	Position	Comment on behalf of group?	Comment	Committee’s Response
1.	Saul Bercovitch, Staff Attorney On behalf of: Committee on Administration of Justice State Bar of California San Francisco, CA	N	Y	<p>The Committee on Administration of Justice (CAJ) opposes adoption of the proposed new form.</p> <p>In response to the specific request for comments, CAJ began its discussion by concluding that the form should be modified to apply only in cases involving one plaintiff and one defendant. CAJ ultimately concluded, however, that efforts to simplify a complex procedural issue are laudable, but the various issues surrounding offers and acceptances under Code of Civil Procedure section 998 are simply not amenable to a form.</p> <p>Even in the simplest cases, the proposed form would be problematic. Most significantly, item 1 has two boxes, one to offer to have a “judgment” entered and the second to offer to have an “award” entered. The “award” box is designed for arbitrations. The “judgment” box raises an important issue because cases interpreting section 998 have concluded that “a statutory offer of compromise need not contain any ‘magic language,’ so long as it is clear the offer, which must be written, is made under section 998 and, if accepted, will result in the entry of judgment <i>or an alternative final disposition of the action legally equivalent to a judgment.</i>” (<i>Berg v. Darden</i> (2004) 120 Cal.App.4th 721, 731–732 [emphasis added]); see also <i>American Airlines, Inc. v.</i></p>	<p>The committee reached a different ultimate conclusion—namely, that the form could and should be modified to work in simple cases involving one plaintiff and one defendant, where the offer and acceptance involves a money judgment. An optional form designed for such limited purposes is workable and would be useful for litigants in simple civil cases.</p> <p>The problems relating to awards, settlements, and other final dispositions have been eliminated by specifically limiting the scope and applicability of the optional form to two-party civil actions involving money judgments.</p>

SPR07-17

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				<p><i>Sheppard, Mullin, Richter & Hampton</i> (2002) 96 Cal.App.4th 1017, 1054–1055 [offer to settle valid under section 998 where it did not provide for entry of judgment but instead required filing of a request for dismissal with prejudice]; <i>Goodstein v. Bank of San Pedro</i> (1994) 27 Cal.App.4th 899, 906 [same].)</p> <p>By including a box for a “judgment” only, the proposed form is inconsistent with and narrower than the cases interpreting that term as used in section 998. Oversimplification of the issues surrounding section 998 would be unfair to those who rely on the proposed new form. Where, as here, the various nuances created by the cases need to be read in conjunction with the statute in order to fully appreciate the potential complexities of a section 998 offer or acceptance, a “check the box” form does not seem workable at all.</p>	<p>The new optional form is not intended to be used in the full range of cases where section 998 applies. The note at the beginning explains the limited scope of the form to all users. The committee thinks that for the purposes specified, the form is workable and helpful.</p>
2.	Joseph Chairez President Orange County Bar Association Irvine, CA	AM	Y	<p>This creates a proposed Judicial Council form for Code Civ. Proc., § 998 for offers of judgment (to settle cases) in civil actions. Until now, the parties had to create their own forms, which has led to problems because of the variables and details that may or may not be included. The form is intended to formalize and standardize the offers. The forms are not suitable for complex cases, but we would approve its use where a single plaintiff is suing a single defendant.</p>	<p>The committee agreed that the form, with modifications, should be approved for use in simple two-party cases.</p>

SPR07-17

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3.	Julie A. Goren Attorney/Author-Publisher Sherman Oaks, CA	AM	N	<p>1. I suggest deleting the check boxes in the title of the form, so that the title is simply <i>Offer to Compromise and Acceptance</i>. . . This would alleviate the need to figure out who is supposed to check the acceptance box. The form would only constitute an acceptance if it is signed and returned, just like the <i>Notice and Acknowledgment of Receipt</i> form.</p> <p>2. The “Note” below the title is confusing. First, it appears to conflict with Code Civ. Proc., § 998(b)(1). Second, assuming it doesn’t conflict, shouldn’t it say “notice of entry of judgment” as opposed to “entry of judgment”?</p> <p>3. I believe use of the form should be restricted to 2-party cases.</p> <p>4. Given that part of the stated purpose of the form is to help self-represented individuals, I suggest providing them with a warning on (a) the consequences of not accepting, and (b) the time limits in which to do so (in line with the language proposed for the <i>Requests for Admissions</i> form).</p>	<p>1. The committee disagreed. The format makes it clearer how the form is to be used. The plaintiff would check the offer box and complete the top half of the form. The defendant, if the offer is accepted, would check the acceptance box and complete the bottom.</p> <p>2. The committee disagreed. For the clerk or judge to enter judgment, the court needs a judgment prepared for the court’s signature. Under Code Civ. Proc., §999(b)(1), a judgment—not a notice of entry of judgment—is to be entered.</p> <p>3. The committee agreed. The committee has modified the form for use only in two-party cases.</p> <p>4. The committee has worked on a set of instructions that includes warnings, but has not yet reached agreement on the instructions. It believes that the proposed simple two-party form is usable without such a set of instructions. The alternative, under which not even a simple form is available, is less desirable.</p>
4.	Superior Court of California	A	N	No specific comments.	No response required.

SPR07-17

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	County of Los Angeles, Los Angeles, CA				
5.	Wanda Mackey Court Services Supervisor Superior Court of California, County of Shasta Redding, CA	AM	N	I would suggest that if the form is for use by multiple pleadings or definitions, that it have multiple signature lines (e.g., husband and wife), or an instruction to provide the additional signatures on an attachment page.	The committee has revised the form to be used only in two-party cases.
6.	Pam Moraida Program Manager Superior Court of California, County of Solano Fairfield, CA	A	N	No specific comments.	No response required.
7.	Andrea Nelson Director of Operations Superior Court of California, County of Butte Oroville, CA	A	N	No specific comments.	No response required.
8.	Michael M. Roddy Court Executive Officer Superior Court of California, County of San Diego San Diego, CA	A	Y	No specific comments.	No response required.
9.	Gloria M. Sanchez Small Claims/Civil Advisor Superior Court of California, County of Contra Costa Martinez, CA	A	N	No specific comments.	No response required.
10.	David C. Velasquez Supervising Judge Superior Court of California, County of Orange Santa Ana, CA	AM or N	N	As currently proposed, the form, designed to assist self-represented litigants, potentially sets a trap even an experienced and attentive attorney may fall into. Therefore, I suggest the form be revised to pertain only to single-party settlements (one litigant on each side) if the form is to be accepted at all.	The committee agreed that the form should be revised to be used only in two-party cases.

SPR07-17

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				<p>Because form CIV-090 is phrased using the plural form rather than the singular, I believe it may unintentionally cause a party using it to violate the general rule that an offer of settlement made to multiple parties is valid only if it is expressly apportioned among them and not conditioned on acceptance by all of them. "A single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid." (<i>Weinberg v. Safeco Ins. Co. of America</i> (2004) 114 Cal.App.4th 1075.)</p> <p>The making of an offer to settle under the provisions of Code Civ. Proc., § 998 is fraught with danger to the uninitiated and its improper use could backfire causing costly unintended consequences in either having to pay the other side's costs, or in losing the right to the benefits that section 998 was designed to provide, including a plaintiff's right to prejudgment interest, which could be substantial.</p> <p>It is also the rule that offers of compromise under Code Civ. Proc., § 998 are strictly construed in favor of the parties to whom the offers were made. (<i>Berg v. Darden</i> (2004) 120 Cal.App.4th 721.) Therefore, I suggest that before CIV-090 is adopted, its language should be recast to avoid any ambiguity in terms and conditions of the settlement offers conveyed by it.</p>	<p>The form has been revised to be clear that it should only be used in two-party cases, where the offers and acceptances are involving money judgments.</p>