Settlement Strategies for the FEHA Plaintiff

By Christina Coleman

I. Introduction: Q. Why Settle When You Can Take the Case to Trial?

My father was a trial attorney, and for as long as I can remember, I wanted to be just like him: a trial attorney. Once I knew I had passed the bar and was, in fact, an attorney, I began having fantasies about the press coverage of my many trial victories. I even had my outfit picked out for when I made the cover of *California Lawyer* as the most fearsome woman trial attorney in the state.

Now, ten years later, I have yet to try a jury case solo, and have only had a handful of solo bench trials and second chair jury cases. How did this happen?

Apparently, my tenacity and aggressive litigation style has paid off in a way that did not harmonize with my childhood fantasies and has, in fact, kept me out of the courtroom because I keep settling all of my stinkin' cases. And I'm not giving them away. No, these cases are settling for fair, even very generous amounts, and my clients are tearfully grateful and satisfied.

While my lack of actual jury trial experience renders me frustrated, and chomping at the bit to no end, *California Lawyer* will have to wait, because there's no shame in being good at the art of settling.

II. Hit 'em Hard, Hit 'em Early

A. Have Discovery Ready to Go Before You Serve

There is a ten (10) day hold on written discovery after service of the lawsuit on any particular party.[1] Everybody knows that you don't hear from an attorney for defendants until the eve of their answer due date and, even then, usually just to request an extension of time to respond.

A diligent plaintiff can have their first round of discovery ready to go for service directly on the probably-unrepresented defendant on that tenth day following service, even if it is just a first set of form interrogatories and employment form interrogatories, and maybe a request for production of documents.

Also having a "standardized" set of requests for admission, accompanied by Form Interrogatory No. 15.1, can be of huge benefit. For the FEHA plaintiff, this might include things like:

1. At the time of Plaintiff's termination, Plaintiff was disabled.
2. At the time of Plaintiff's termination, you perceived Plaintiff to be disabled.
3. Prior to Plaintiff's termination, you did not engage in the interactive process with Plaintiff.
4. You did not offer Plaintiff an accommodation for Plaintiff's disability as you perceived it.
5. Offering Plaintiff an accommodation for Plaintiff's disability as you perceived it would not have caused you undue hardship.
6. You refused to provide to Plaintiff the accommodations requested by Plaintiff for Plaintiff's disability.
7. You discriminated against Plaintiff based on Plaintiff's disability (sex, race, etc.).
8. At the time of Plaintiff's termination, Plaintiff was performing Plaintiff's job duties satisfactorily.

Not only do you hit defendants fast and hard, but you actually give them an incentive to settle: early and heavy generation of attorney's fees! Defendants' counsel don't like to settle early because they want to earn their fees while the gettin's good. Forcing them to respond to a mountain of discovery at the inception of this case accomplishes that goal.

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Additionally, sometimes a stubborn defendant needs to see (and pay) a few high attorney's bills before it will consider settlement, because the cost of defending the action through trial is far too abstract a notion early on. This is not the case when the cost of defense is apparent from the beginning.

B. Depositions, Early or Later?

Defendants will almost never make an offer to settle the case until they have deposed your client … so let them! In fact, the earlier the better. Aggressive defense counsel will notice the plaintiff's deposition right away, sometimes concurrently with the defendant's first appearance in the case, so give up the plaintiff right away. Don't argue, object, or withhold plaintiff while you wait for defendant to respond to your discovery. Chances are, the earlier the plaintiff is deposed, the less prepared defendants' counsel will be to take that deposition, and they only get one shot.[2] Moreover, if plaintiff's time to respond to defendant's first request for production of documents is not yet even due by the time plaintiff's deposition is taken, then plaintiff has a good argument that defense counsel's standard "I reserve the right to further depose the plaintiff after I have received production of documents" cannot be used to circumvent the "one deposition rule" because defendant set the timeline for the discovery and the documents are not even due yet by defense counsel's own design.

Further, if your client is going to be a good witness, you want defendants to know this *immediately*, because this will also encourage a settlement offer.

But what about deposing the defendants? Frequently, plaintiff's counsel will wait until after a summary judgment motion is filed before deposing defendants, in order to raise a triable issue of fact. This approach makes sense for a number of reasons, but how does it affect settlement?

On the one hand, many defendants also will not settle until they have made (and hopefully lost) a summary judgment motion, in which case there's no reason to depose defendants early. But if you get the sense that defendants are very interested in settling, deposing one or two key players early will help the process. (1) If the defendant does not want to be deposed, this could be a motivator because they would rather settle than submit to a deposition. (2) If you can really shake up the decision-maker during their own deposition, the case will settle.

C. Fun with Depositions

Once you do depose defendants' key players, make it *count*! This is especially true if your mediation is approaching and you need to give defendants an added incentive to settle.

Oftentimes lawyers torment themselves over how to approach the deposition and whether or not to cross-examine the witness. On the one hand, cross-examining the witness hard and making them (and their story) look ridiculous, is great for purposes of settling cases. On the other hand, attorneys often fear that this cross-examination (1) shows their cards before trial, and (2) gives the witness an opportunity to come up with a better explanation or to "fix" their testimony at the time of trial, or give a different answer (risking impeachment, but sometimes better than the alternative).

What lawyers often forget, however, is that there is *no* reason to even *give* the witness an opportunity to give better testimony at trial. The deposition (videotaped works best) of *any* witness who, at the time of their deposition, was a party, or was an officer, director, managing agent, agent, designee, or even just a mere *employee* of a party, may be used at trial *in lieu of* offering live testimony, even if the deponent is available to testify or will later testify.[3] So if you can get some good testimony of defendants that is harmful to their case at their deposition, why not do it? You can play the harmful portions during your case in chief, and defendants will not even have the opportunity to address that harmful testimony until they put on their own case. By that time, the damage may be irreparable.

Some key depositions to take prior to a mediation might include: the human resources director, the decision-maker behind the termination or retaliatory conduct, the plaintiff's supervisor (if different than the decision-maker), and the alleged harasser/retaliator (if different than the plaintiff's supervisor or decision-maker). These are the same witnesses the defendants will rely upon to defend themselves, so showcasing all the reasons why defendants do not want to rely upon these witnesses at trial can go far towards encouraging a settlement.

III. Mediations

A. Don't Skimp on That Brief!

You want the mediator on your side, so the mediator must be persuaded. Don't just set forth the facts that support your case. Set forth defendants' alleged facts and, if possible, explain in your brief why defendants' story makes no sense or is not worthy of belief. Be *specific!* Cite to deposition testimony if you can, or discovery responses. Attach documents. The mediation brief can be confidential, so you will not be showing your cards to opposing counsel by doing this, but you are educating the mediator who is the only person who will be in that room with defendants and their counsel who can persuade them why they need to pony up some real cash.

Include the relevant law. You probably already have it handy because you have opposed defendants' summary judgment and had to educate the judge because defendants did not set forth the correct legal standard (such as using the ADA definition of "disability" instead of the far broader FEHA definition of "disability") and you had to do it yourself. Not all mediators are familiar with and/or understand the current state of the law in employment cases in California, or even of FEHA itself. Give the mediator the law, and apply your facts to it; don't just assume your mediator will be able to do this for you.

Set forth your damages with particularity. If you want credibility with your mediator, show them where your numbers are coming from so you can justify your sky-high opening demand that defendants will balk at. For your FEHA plaintiff, don't forget to include your attorney's fees and costs to date, because your prevailing FEHA plaintiff *will get them!*[4]

Your mediation brief should show the mediator (1) that plaintiff will win at trial, and (2) that you are already ready for trial! Even if the case does not settle, none of the above will have been a waste of time. A well-drafted mediation brief, with a full exposition of the facts and law, can be converted into your trial brief with minimal effort later.

B. Walk Away and Do it Again

Maybe because you suggested mediation, or maybe because you simply agreed to it, defendants may believe your participation in mediation means you are desperate to settle because you are afraid/unwilling to take your case to trial. Or maybe defendants are still in denial that they face significant liability and think the settlement value of your case is even lower than their underestimated potential risk. Whatever the reason, you are at mediation and defendants refuse to offer an amount that even covers the attorney's fees and/or costs to date. What do you do?

Leave! You don't have to stay any longer than is productive, even if you are there because you were ordered to mediation by your judge. There is no minimum time limit you need to spend to demonstrate that you actually participated in good faith. If defendants' settlement movement is not, in your opinion, in good faith, then give notice of your intention to leave unless you see a gesture of good faith that justifies your continued participation. If in response you don't get that gesture, perhaps in a calling of your supposed bluff, then take your client and get out.

It's not over until it's over, and you can mediate a second time, even a third time or as many times as it takes. But sometimes sending the message that you are *far* from desperate to settle goes a long way towards settling. Inevitably, the second mediation will be far more productive.

IV. 998's in FEHA Cases

A. To Serve or Not to Serve, That Is the Question

Most FEHA plaintiff attorneys regard a 998 offer as a defendants' tool, not a plaintiff's tool. While this is most typically the case, there is no reason the 998 offer cannot be a plaintiff's tool also. True, a FEHA plaintiff does not need to rely upon a defendants' unreasonable rejection of a 998 offer to get expert fees,[5] like most non-FEHA plaintiffs. In FEHA cases, expert witness fees have express statutory authority.[6] So is there still a reason to do it? Sure, if you want to settle the case.

The reality is, it can be exceedingly difficult for a defendant in a FEHA case to beat a plaintiff's reasonable 998 offer if *any* liability is found for the simple fact that FEHA provides for statutory attorney's fees recoverable as costs *and* expert fees. Thus, if a FEHA plaintiff is awarded even nominal damages, say $1,000, but ends up being entitled to attorney's fees and costs of $100,000, the number to beat is $101,000, not $1,000. Further, there is a significant difference between a plaintiff's 998 offer, and a defendant's 998 offer. With respect to a defendant's 998 offer, when determining whether or not the plaintiff obtained a more favorable judgment, only *pre*-offer attorney's fees and costs are included.[7]

In stark contrast, in determining whether a defendant has obtained a more favorable judgment than a plaintiff's offer, *both* pre-*and* post-offer attorney's fees and costs are included.[8] This is true even if the 998 offer itself contains an express waiver of costs or is silent thereto.[9] This means a FEHA plaintiff's 998 offer can significantly exceed the amount of actual damages, and even the actual amount of attorney's fees incurred to date, even if made early on in the case.

B. Responding to a Defendant's 998 Offer, If At All

As stated above, a defendant's 998 offer, and what it takes to beat it, is different than a plaintiff's 998 offer. A defendant's 998 offer, to be reasonable, must necessarily take into account not just the FEHA plaintiff's damages, but also the plaintiff's attorney's fees and costs as of the making of the offer, because these pre-offer fees and costs are added to the ultimate judgment when determining whether or not a plaintiff has beaten a defendant's 998 offer.[10] Despite this, defendant's frequently send low-ball 998 offers that reflect only their own self-serving underestimation of the plaintiff's damages, with *nothing* included for attorney's fees and costs.

A 988 offer not made in good faith is not valid.[11] "Whether a section 998 offer is reasonable must be determined by looking at circumstances when the offer was made. [Citations.] To be in good faith, there must be some reasonable prospect of acceptance."[12] But how can a defendant making a 998 offer fully consider the existing circumstances to determine whether their offer is or is not in good faith? Tell defendant yourself!

When you receive a 998 offer, the first thing the plaintiff's attorney should do is generate a bill for fees and costs as of that date. These are the amounts (give or take some amounts of costs on your bill that are not statutorily-authorized) that will be added to your ultimate jury verdict for purposes of determining whether you beat the 998 offer. If your fees and/or costs exceed the amount of defendant's offer, all you need is to obtain prevailing party status (an award of $1.00) to beat the 998 offer. Why keep this news to yourself? I recently was in such a position and sent a letter to defendants' counsel stating:

> We received Defendants' Offer to Compromise pursuant to Code of Civil Procedure section 998. While we appreciate the interest in settling this case, we consider the offer to be in bad faith for several reasons.
>
> *First*, the purpose of Section 998 is to encourage settlement by providing a strong financial disincentive to a party who fails to accept a reasonable offer. *Bank of San Pedro v. Superior Court* (1992) 3 Cal.4th 797, 804; *Hurlbut v. Sonora Community Hospital* (1989) 207 Cal.App.3d 388, 408

[the statute's purpose is to "punish[] a party who fails to accept a reasonable offer from the other party"]. Fundamentally, then, the "financial incentive" afforded by Section 998 requires the offeror to "make [a] *reasonable* settlement offer." *Bank of San Pedro, supra,* 3 Cal.4th at 804.

In a case like this, where attorney's fees are recoverable pursuant to statute, they must be taken into account when determining whether or not an offer was or was not reasonable because pre-offer fees and cost are added to the jury award or judgment for purposes of determining whether or not the plaintiff has obtained a "more favorable judgment." Code Civ. Proc. § 998(c); *Wilson v. Safeway Stores, Inc.* (1997) 52 Cal.App.4th 267, 270, 273-274 [*affirmed* pre-offer fees and costs are added to verdict when determining whether there has been "a more favorable judgment" for plaintiff than the defendant's 998 offer].

Second, Plaintiff's pre-offer attorney's fees are just over $124,000.00, and his pre-offer costs are just over $19,700.00.

Third, this means Plaintiff need only obtain $1.00 as a nominal judgment to obtain prevailing party status and beat Defendants' $40,000.00 998 offer. Indeed, the only thing that could cause Plaintiff to *not* beat the 998 Offer is if there was a complete defense verdict, which Plaintiff is confident is highly unlikely.

We strongly recommend that Defendants make, and Plaintiff would consider in good faith, a reasonable 998 Offer (or other settlement offer) that realistically evaluates and provides for the full liability defendants face at trial, and which does not ignore realistic components of Plaintiff's potential recovery, such as costs and statutory attorney's fees.

Ultimately, whether not a 998 offer is deemed to have been made in "good faith" is at the discretion of the trial court,[13] although attaching your letter containing the above disclosure of the current state of affairs to your motion challenging whether the offer was made in "good faith" can only help your cause.

And while there are cases that say that where the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable,[14] this is not always the case. Indeed, the requisite "good faith" element may be found lacking when the defendant's offer is so disproportionate to the plaintiff's demand, that there is no "realistic" chance it would be accepted.[15]

If the 998 offer, whether made in good faith or not, is simply unacceptable, it need not be rejected, but can simply be ignored since it expires after 30 days, or at the latest, on the first day of trial.[16]

If the 998 offer appears to be in good faith, and plaintiff wishes to accept, be sure to properly accept, e.g., accept in writing and do not include any additional terms such that the "acceptance" is actually a counter-offer.[17]

C. Where Offer Is Silent as to Fees and Costs

When determining whether to accept a defendant's 998 offer, obviously fees and costs are a consideration. So what happens when the defendant's 998 offer is silent as to fees and/or costs? They are *excluded* from the offer, and a plaintiff who accepts the 998 offer silent to fees and/or costs may pursue them post-acceptance.

The undisputed rule is that a party who accepts an offer of compromise under Section 998 may recover costs after judgment where the compromise offer is silent on costs.[18] This same thing applies where the compromise offer is silent on fees,[19] and applies even if the offeror *intended* such costs and fees to be included.[20] And, under current law, it is *still* true even though the 998 offer calls for a dismissal with prejudice, rather than entry of judgment against defendant (thus, conferring prevailing party status on the plaintiff).[21]

Thus, if a FEHA plaintiff receives a 998 offer that is silent as to fees or costs, the plaintiff can accept the 998 offer, and then file a memorandum of costs and a motion for attorney's fees for their recovery. Expect a fight (no doubt because at least one court has called such an obvious omission of such simple language as "each side to bear its own attorney fees and costs" from a 998 offer as "malpractice"[22]), but there is quite literally *zero* case law supporting the position that a 998 offer silent as to fees or costs prohibits their recovery.

So what about the plaintiff drafting a 998 offer – should the offer include or exclude attorney's fees and/or costs? As with a defendant's 998 offer, a plaintiff's 998 offer that is silent as to fees and/or costs does not prohibit the plaintiff from, after defendant accepts, moving to recover its attorney's fees and costs.[23] A careless defendant might not notice the omission, accept the offer, and then be liable for attorney's fees and costs well beyond the amount the defendant believed it was agreeing to pay by accepting the 998 offer.

On the other hand, an offer that includes attorney's fees and costs, or agrees to waive them as part of the offer (which does not alter the proper inclusion of these elements for purposes of determining whether a defendant obtained a more favorable judgment[24]), is more likely to be accepted, because the typical defense attorney would notice the omission and understand its consequences. Rather than try to pull a "fast one" and hope you are dealing with a negligent attorney, a plaintiff's 998 offer could expressly point out that attorney's fees and costs are *not* included, with the offer expressly including language that these amounts are to be determined by the judge pursuant to the ordinary memorandum of costs and motion for attorney's fees procedures. For the defendant who would like to limit their exposure and who is willing to roll the dice on attorney's fees and costs, this is an appealing option.

V. Conclusion: Because It's Not About You

So, back to the original question: Why settle when you can take the case to trial? Think of the money! Think of the glory! Think of your client!

At the end of the day, we all know that if a defendant is actually willing to pursue reasonable settlement negotiations, it is better for the client to accept a reasonable settlement. This is especially true for the FEHA plaintiff who has been riding the emotional rollercoaster since long before you were even retained.

Nearly every time I settle a case, I feel a twinge of resentment that yet another client has prevented me from realizing my destiny of being the world's greatest trial attorney by again depriving me of my day

in court. Then, my client sends me the little scales of justice clock as a thank you gift which I keep on my desk, accompanied by a thank you card telling me how good it feels to be able to move on with her life and how she could not be more grateful or happier with her result, and I remind myself: it's not about me. And once I do that, my twinge of resentment is replaced by an overwhelming sense of satisfaction that I have done a good thing for my client.

… But *California Lawyer* hasn't heard the last of me yet! ■

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[1] Code Civ. Proc. §§ 2030.020(b), 2031.020(b), 2033.020(b). Careful! The day service is deemed complete depends on the manner of service. See, Code Civ. Proc. § 415.10, et seq.

[2] Code Civ. Proc. § 2025.610(a).

[3] Code Civ. Proc. § 2025.620(b).

[4] California Gov. Code section 12965(b) provides that, in actions brought pursuant to the FEHA, "the court, in its discretion may award to the prevailing party reasonable attorney fees and costs ...." Although Section 12965(b) is phrased in terms of the court's "discretion" to award fees, the case law interpreting the statute has made clear that, "a prevailing Plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'" (*Stephens v. Coldwell Banker Commercial* (1988) 199 Cal.App.3d 1394, 1405.)

[5] Code Civ. Proc. § 998(d).

[6] In *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, the Supreme Court struck expert fees from a prevailing FEHA plaintiff's cost bill, primarily based on the fact that Government code section 12965(b) did not specifically authorize recovery of expert fees. (*Id.* at 440.) In what appears to be a direct response to *Davis v. KGO-T.V., Inc.*, in the Civil Rights Amendments of 1999, the Legislature made its intentions clear and amended Section 12965(b) to expressly authorize the recovery of expert fees. (See, 1999 Cal. Legis. Serv. Ch. 591 (A.B. 1670) (West), Stats. 1999, c. 591 (A.B.1670) (at pp. 3 and 33).) Now, Section 12965(b) states: "the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, *including expert witness fees*, …" (emphasis added). (See also *Bouman v. Block* (9th Cir. 1991) 940 F.2d 1211, *cert. denied*, 112 S.Ct. 640, 502 U.S. 1005 [expert witness fees could not be awarded as costs to Title VII plaintiff under § 1988, but could be supported under California FEHA].)

[7] Code Civ. Proc. § 998(c). See, *Stallman v. Bell* (1991) 235 Cal.App.3d 740, 747-748 [to determine whether the plaintiff obtained a judgment more favorable than defendant's offer, preoffer costs are added to the award of damages, and post-offer costs are excluded].

[8] *Stallman v. Bell, supra*, 235 Cal.App.3d at 748 ["both pre- and post-offer costs should be added to the verdict to determine the amount of the judgment" because "[i]n this case it is the defendant who has impeded the statutory purpose by rejecting the offer, thus allowing the plaintiff to incur post-offer costs"]; Code Civ. Proc. § 998(d).

[9] *Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 68-69; *Stallman v. Bell, supra*, 235 Cal.App.3d at 747-750.

[10] Code Civ. Proc. § 998(c); see, *Stallman v. Bell, supra*, 235 Cal.App.3d at 747-748.

[11] *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1263.

[12] *Hartline v. Kaiser Foundation Hospitals* (2005) 132 Cal.App.4th 458, 471 (internal citations and quotations omitted); *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 698.

[13] *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692, 700.

[14] See, *Hartline v. Kaiser Foundation Hospitals, supra*, 132 Cal.App.4th at 471; *Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 117.

[15] *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53, 62-63 ["good faith" element was found to be lacking even after the defendant obtained a defense verdict, when its 998 offer of $2,500 was so disproportionate to plaintiff's demand of $10,000,000 that it was unreasonable to expect that it would be accepted].

[16] Code Civ. Proc. § 998(b)(2).

[17] Code Civ. Proc. § 998(b) [acceptance must be in writing and signed by counsel for the accepting party]. See, e.g., *Bias v. Wright* (2002) 103 Cal.App.4th 811, 820 [the purported acceptance of a 998 offer silent on costs simply adding the language "each party to bear their own respective costs" was determined to be a counter-offer, not a valid acceptance].

[18] *Folsom v. Butte County Assn. of Governments* (1982) 32 Cal.3d 668, 676 [specifically denied the defendant's motion to strike costs, holding that the unqualified acceptance by plaintiffs of the defendant's 998 offer for settlement stating the sums offered were in "full compromise settlement" of plaintiffs' claims but made no specific mention of costs, did not preclude plaintiffs from recovering for their costs], relying upon *Rappenecker v. Sea-Land Service, Inc.* (1979) 93 Cal.App.3d 256 [*held*, the unqualified acceptance by plaintiffs of the defendant's 998 offer for compromise settlement, which stated that the sums offered were in "full compromise settlement" of plaintiffs' claims, did not preclude plaintiffs from recovering for their costs, denying defendant's motion to strike costs].

[19] *Ritzenthaler v. Fireside Thrift Co.* (2001) 93 Cal.App.4th 986, 991 [*held*, that plaintiffs, by accepting defendant's 998 offer to compromise "in final settlement of all damages and injunctive claims" plaintiffs were asserting in the action, though offer specifically encompassed all damages and injunctive claims asserted by plaintiffs, it omitted any mention of any claim for attorney fees plaintiffs might have and, thus, attorney fees were not within the scope of the proposed compromise agreement].

[20] *Pazderka v. Caballeros Dimas Alang, Inc.* (1998) 62 Cal.App.4th 658, 670 ["an agreement silent as to costs and fees does not create a bar to either a cost bill or a motion for attorneys' fees" (internal quotes and citation omitted)].

[21] *On-Line Power, Inc. v. Mazur* (2007) 149 Cal.App.4th 1079, 1084-1085 [acceptance of offer "to settle and compromise" cross-complaint for a total payment of $25,000 "as full and complete resolution of all of the claims raised by the Cross-Complaint to be dismissed with prejudice" could not reasonably be interpreted to exclude recovery of attorney's fees and costs, and the prevailing party was entitled to seek them], applying the principles of *Rappenecker* and *Ritzenthaler* to 998 offers calling for dismissal, rather than entry of judgment. *Note:* the issue of "prevailing party" status for purposes of awarding attorney's fees was ordered to be determined upon remand because "both parties achieved a status that Code of Civil Procedure section 1032 defines as a prevailing party" (one got a net monetary recovery and the other got a dismissal with prejudice). (*Id.* at 1087.) Expect to see this issue rear its ugly head within the next few years.

[22] *Pazderka v. Caballeros Dimas Alang, Inc., supra*, 62 Cal.App.4th at 672 [denied relief under Code of Civil Procedure section 473, characterizing the attorney's failure to specifically mention attorney's fees and costs in the 998 offer as malpractice confirming relief under Section 437 "was not intended to permit attorneys to escape the consequences of their professional shortcomings or to insulate them from malpractice claims"].

[23] See, *Hoch v. Allied-Signal, Inc., supra*, 24 Cal.App.4th at 69 [impliedly agreeing with the defendant's argument that its acceptance of the plaintiff's 998 offer without an express cost waiver would not have precluded the plaintiff from seeking statutory costs under Code of Civil Procedure section 1032, citing to *Rappenecker v. Sea-Land Service, Inc., supra*].

[24] *Hoch v. Allied-Signal, Inc., supra*, 24 Cal.App.4th at 68-69; *Stallman v. Bell, supra*, 235 Cal.App.3d at 747-750.