ASSOCIATION OF BUSINESS TRIAL LAWYERS SAN DIEGO

abtl REPORT

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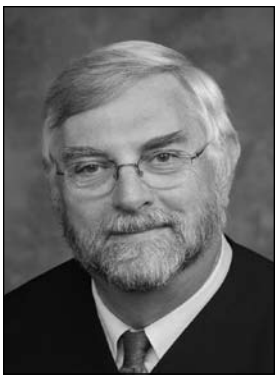
A Duty to Decide ... When Is Recusal Appropriate?

By the Hon. Peter M. Bowie and the Hon. J. Richard Haden

"A judge has a duty to decide any proceeding in which he or she is not disqualified . . .." California Code of Civil Procedure, § 170. Canon 3A(2) of the Code of Conduct for United States Judges imposes the same obligation on federal judges. The foregoing is a cornerstone premise to understanding the process for recusal of a judge.



Hon.Peter M. Bowie

Hon. J. Richard Haden

Many judges will disclose information about their familiarity with a party, with counsel, or the subject matter of litigation. The judge may have concluded that he or she is not disqualified, or the judge may not have reached a conclusion about disqualification. But then some of those judges will ask the attorneys and/or the parties if they have any concern about the judge continuing to hear the case. Therein lies the rub.

At first blush, it may seem reasonable for a judge to offer counsel or the parties an opportunity to ask a judge to recuse, even when the judge has determined recusal is not required. After all, the motivating concern is that the parties have confidence in the impartiality of the judicial process, and if there are multiple judges on the court, there should

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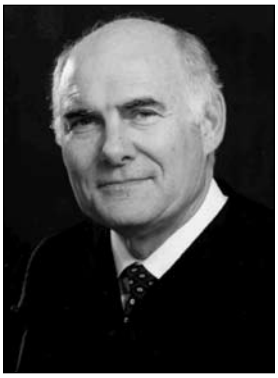
Judge Jeffrey T. Miller: A Lunchtime Conversation

By Charles Berwanger, Esq.of Gordon & Rees LLP

Imagine being a federal district court judge in charge of 500 civil and criminal cases. Thirty to forty percent of those cases are civil and they consume 80% of both your time and your clerks' time. The remaining cases are criminal. The variety, complexity and unimaginable issues are your daily fare.



Hon. Jeffrey T. Miller

One day, Judge Miller ruled on a motion to dismiss a false advertising consumer protection class action against KFC. A class action was brought against KFC charging that its advertisements portraying KFC's fast food as part of a sensible balanced diet were false. The complaint alleged that the consumption of trans fat is not a part of a healthy lifestyle. Judge Miller granted the motion to dismiss based upon federal preemption. Another day, Judge Miller's calendar included an action to enjoin dissemination of defendant's

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Inside

President's Letter

By the Hon. Jan M. Adler, President ABTL

As I write this letter, I can hardly believe that the holiday season is upon us and that my term as President of the San Diego chapter of ABTL is rapidly drawing to a close. We have had, if I may say so, a terrific year, with a series of outstanding dinner and brown bag lunch programs, as well as a cutting-edge Annual Program on information security and privacy in the Napa Valley that broke all previous attendance records. Our last dinner program of the year, in which Professor Erwin Chemerinsky (the recently appointed Dean of UC Irvine's new Bren School of Law) and Dr. John Eastman (Dean of Chapman University School of Law) engaged in a highly informative and wide-ranging discussion about the decisions and direction of the Roberts Court, was yet another exceptional program and was a huge hit with our audience of nearly 300 attendees.

Hon. Jan M. Adler

Looking ahead to 2008, which will mark our chapter's 15th anniversary, we will continue to present a series of top-notch programs. We are delighted to announce that on February 4, Mark Geragos will speak on "Media and the High Profile Case." Mr. Geragos is one of the most accomplished and acclaimed trial lawyers in California. He has been honored as the "California Lawyer of the Year in Civil Litigation," as well as the "Trial Lawyer of the Year" by the Los Angeles Criminal Courts Bar Association. Mr. Geragos has represented a diverse group of clients in high profile cases, including former Congressman Gary Condit, former "First Brother" Roger Clinton, Winona Ryder, Michael Jackson, Scott Peterson, Greg Anderson (the former personal trainer for Barry Bonds) and, in a trial recently concluded in San Diego federal court arising out of the Duke Cunningham affair, Brent Wilkes. In June, we will present a panel of federal judges, which is always one of our most informative and stimulating programs. Our Co-Program Chairs, Tom Egler and Anna Roppo, have other outstanding dinner programs in the works and we will announce the details of those programs when they are finalized.

Our brown bag lunch program, headed by Past President Charles Berwanger, will continue next year as well, starting with a program on electronic discovery featuring Magistrate Judge Anthony Battaglia on January 24. We will also present our semi-annual "Mini Seminar" next year. This event, the inspiration of The Honorable J. Richard Haden, another of our chapter's Past Presidents who continues to be actively involved in the organization, is an excellent opportunity for young lawyers to learn trial skills from an array of San Diego's finest judges and lawyers. Finally, please mark your calendars for September 24-28, when ABTL will present its Annual Program on the island of Kauai.

It is also my pleasure to recognize our new officers and board members for 2008. Our officers will be Robin Wofford (President), Ed Gergosian (Vice-President), Mark Zebrowski (Treasurer) and the Honorable M. Margaret McKeown of the Ninth Circuit Court of Appeals (Secretary). Our new board members will be the Honorable William Hayes of the United States District Court, the Honorable Kenneth So, Presiding Judge of the Superior Court, the Honorable Joan Lewis of the Superior Court and attorneys Ed Chapin, Michael Holmes, Jack Leer, Alan Mansfield, Valerie Torres and Brian Foster. We thank our outgoing Board members, the Honorable Dana Sabraw, the Honorable William McCurine and attorneys Brian Behmer, Craig McClellan, Monty McIntyre, Jeffrey Patterson, Dennis Stewart and Kristine Wilkes, for their service.

Next year will also mark the initial year for our chapter's Leadership Development Committee ("LDC"). The purpose of the LDC will be to encourage greater young lawyer participation in ABTL and its programs. The members of the LDC will serve for a three-year term and will help develop "nuts and bolts" events for young lawyers, interview members of the local judiciary to prepare profiles, and assist with the planning of the Annual Program and the Mini-Seminar. The members of our first LDC are Gary Brucker,

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Jury Reform: Improving Juror Comprehension, Satisfaction and Utilization in California State and the Ninth Circuit Courts

By Charles Berwanger, Esq.of Gordon & Rees LLP

The Scene: An empanelled jury in a courtroom bustling with human activity. There has been a parade of witnesses and a multitude of documents introduced into evidence. The jurors in their imposed passive role are to listen carefully to the witnesses; understand the written evidence; and suspend judgment until the case is submitted to them. In the meantime, the passive jury, according to the Legal Model, is not to take notes; may not ask questions of witnesses; is not given a legal road map to the case by preliminary instructions from the court on the law; is not allowed to discuss the evidence with other jurors during recesses; and is to pretend that it consists of human vessels into which the evidence is poured, suspending belief until the starting gun fires.

The Legal Model of juror decision-making has generated juror apathy, dissatisfaction with jury duty and an utter lack of comprehension, especially in complicated trials. In some jurisdictions, juror dissatisfaction with the justice system is so marked that no more than 20% of summoned jurors appear for duty.

Juror dissatisfaction with the jury system, artificial limits on juror comprehension and poor utilization of jurors have not gone unnoticed by lawyer groups, states and the various federal circuits. At least 30 states have developed jury innovations to improve juror comprehension, satisfaction and utilization. The American Bar Association has promulgated aspirational standards for better juror satisfaction, comprehension and utilization. Arizona has taken the lead in adopting jury reforms founded on various studies including the Arizona Filming Project where a multitude of jury trials and juror deliberations were filmed and the effectiveness of innovations were studied.

As of January 1, 2007, reforms were adopted by the California Judicial Council and promulgated by the Ninth Circuit Court of Appeals. This article is about some of the more important reforms; their background; and related concepts including accompanying jury instructions.

Overview of Reforms

On October 28, 2006, the Judicial Council of California Administrative Office of the Courts recommended jury rule changes leading to the adoption of new California Rules of Court 2.1032, 2.1033, 2.1034, 2.1035 and 2.1036. The Judicial Council and California courts had been engaged in jury reform efforts for over 10 years, building upon the efforts of the Blue Ribbon Commission on Jury System Improvement created in 1995 and a Task Force on Jury System Improvements. The Judicial Council report proposed the adoption of the new Rules of Court, which for the most part were proposed discretionary rules to clarify judicial authority and provide guidance about innovative jury trial practices. The report emphasizes that, save for Rule 2.1032 (which requires that jurors be allowed to take notes), the rules are intended to clarify and provide support for the actions that judges have discretion to employ in circumstances described in the rules to include juror comprehension and participation.

Charles Berwanger

The Ninth Circuit Jury Trial Improvement Committee by its Second Interim Report: Recommended and Suggested Best Practices dated October 26, 2006 makes 18 recommendations to improve juror satisfaction, comprehension and utilization. The recommendations and suggested best practices are intended to improve courtroom procedures to provide better jury trials and improved experiences for jurors. The recommendations are just that – recommendations – and trial courts may disregard them.

This article will discuss three of the new Cali-

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Use of Offers to Compromise in Contractual Arbitration

By John H. L'Estrange, Jr. and Joseph T. Ergastolo, Wright & L'Estrange LLP

In arbitration, as in judicial proceedings, a prudent client wants to know in advance the likely financial exposure. How much will it cost and who pays for what if I lose? Will I recover my costs and attorneys' fees if I win? Because of the discretion afforded to arbitrators, it is difficult to predict cost allocation unless it is provided expressly in the contract or by reference to the rules of the ADR provider. However, there is a way to provide some insulation against assessment of costs and foster a possible settlement at the same time.

Offers to compromise pursuant to Code of Civil Procedure section 998 (hereinafter "§ 998") apply in California contractual arbitrations.[1] This tool has long been used to encourage parties to make and accept reasonable settlement offers in judicial proceedings. *Pilimai v. Farmers Ins. Exchange Co.*, 39 Cal.4th 133, 139 (2006) ("*Pilimai*"); *Marcey v. Romero*, 148 Cal.App.4th 1211, 1214-1215 (2007).

§ 998 procedures are well established in litigation, but there are still uncertainties surrounding their use in contractual arbitration. Can the fees of the arbitrator be the subject of a § 998 offer? Can the court enforce the § 998 penalties if the arbitrator issues an award and loses jurisdiction? How and when do the parties advise the arbitrator that a § 998 offer was rejected? How does the § 998 procedure work if the case originates in a U.S. District Court in California and is then stayed and compelled into arbitration?

A. § 998 And Civil Code § 3291

§ 998 authorizes an arbitrator to require a claimant or respondent who rejects a § 998 offer to pay the offering party certain penalties including post-offer costs, and possibly expert fees, if the offeree fails to obtain a more favorable result at arbitration. § 998 (c)-(d). The "costs" are those enumerated in C.C.P. § 1033.5.

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be no real impediment to transfer of the case to another judge with whom the parties are more comfortable.

However, there are multiple arguments for why such an approach is inappropriate, including the cornerstone premise that a judge has a duty to decide all matters assigned unless disqualified. In 1971, the Judicial Conference of the United States, which is the governing body for federal judges, adopted Resolution G. It provides:

> In all cases involving actual, potential, probable or possible conflicts of interest, a federal judge should reach his own determination as to whether he should recuse himself from a particular case, without calling upon counsel to express their views as to the desirability of his remaining in the case. The too frequent practice of advising counsel of a possible conflict and asking counsel to indicate their approval of a judge's remaining in a particular case is fraught with potential coercive elements which make this practice undesirable.

See *U.S. v. Kelly*, 888 F.2d 732 (11th Cir. 1989).

Consider the position such a practice creates for the attorneys. The judge has just advised of some relationship, but has not declared his or her own disqualification. Instead, the judge has asked counsel for their views, and perhaps whether either side wants the judge to recuse. How is the attorney supposed to respond? If the attorney has been made uncomfortable by the disclosure, should the attorney say so, realizing that the judge may reasonably construe the attorney's unease as a distrust of the integrity or impartiality of the judge? Such a practice becomes particularly coercive when there is some likelihood the attorney will draw the judge on other cases in the future. That is part of the rationale for why a judge should not shift to the attorneys or parties the burden of addressing disqualification without having first declared whether the judge has concluded recusal is warranted.

There are additional facets to the issue. Keeping in mind the judge's duty to decide all matters assigned unless disqualified, the Sixth Circuit Court of Appeals, in *Barksdale v. Emerick*, 853 F.2d 1359 (1988), wrote:

> No judge, of course, has a duty to sit where his impartiality might be reasonably questioned. However, the new test should not be used by judges to avoid sitting on difficult or controversial cases.
>
> At the same time, in assessing the reasonableness of a challenge to his impartiality, each judge must be alert to avoid the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision. Disqualification for lack of impartiality must have a reasonable basis. Nothing in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial. Litigants ought not have to face a judge where there is a reasonable question of impartiality, but they are not entitled to judges of their own choice.

See also, *In re Bernard*, 31 F.3d 842, 846, n.6 (9th Cir. 1994).

The Judicial Conference Committee on the Codes of Conduct, in its published Advisory Opinion No. 52, wrote:

> [T]he Committee is of the view that unwarranted recusal may bring public disfavor to the bench and to the judge himself. Where the provisions of the Canons point to recusal, the recusal must follow, but where the only factor present

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Recusal

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> is supersensitivity on the part of the judge, or his distaste for the litigation, or his annoyance at a party's suggestion that he recuse himself--and nothing more--the dignity of the bench, the judge's respect for the fulfillment of his judicial duties, and a proper concern for his judicial colleagues, all require that the judge not recuse himself.

Which brings us back to the cornerstone premise--a judge has a duty to decide assigned matters unless disqualified. And the relevant legislatures have provided formal mechanisms for determining whether a judge is disqualified. If a judge concludes that the judge is not disqualified, but then allows counsel or the parties to nevertheless request recusal by other than the formal mechanisms the legislatures have provided, the judge is doing violence to those mechanisms by giving each side an additional peremptory challenge to which they are not entitled. (Of course, there is no peremptory challenge of a federal judge, at least at present, so agreeing to recuse when not disqualified is granting such a challenge even though the Congress has not yet authorized one). If the context were challenges of jurors, and the court concluded there was no sufficient basis for a challenge for cause, the court would not excuse the juror unless the party used one of its allotted peremptories. There is no reason why an extra peremptory challenge of a judge should be allowed and, as discussed above, there are a number of reasons why it should not be allowed.

The law applicable to California state judges is essentially the same as the foregoing. That is, a judge has a duty to decide all matters assigned unless disqualified. And the judge should make the decision without making inquiry of counsel or the parties, for the reasons set out above. However, the state Canons impose an additional duty of disclosure. Canon 3E(2) of the California Code of Judicial Ethics requires:

> In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.

Hence, a state judge must recuse where appropriate and may obtain a waiver of that disqualification in many instances. Beyond that, a state judge must disclose information the jurist does not believe requires recusal, but which the

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parties or counsel may find relevant in deciding whether or not to challenge the judge (California Judges' Association Ethics Opinion No. 45 describes the process in detail).

In an effort at scrupulous fairness, some judges have construed the requirement of disclosure to authorize making the disclosure, then sending the counsel and parties out to discuss it, and allowing them to interrogate the judge or to argue for or request recusal, even when the judge does not believe the circumstance is disqualifying, and without requiring the parties to resort to the statutory procedures set out in C.C.P. § 170.3, and § 170.6. That gives each side an extra challenge the legislature did not intend them to have, and it does violence to the judge's duty under C.C.P. § 170.

The strength of the foregoing proposition is demonstrated by examining the process that has been set up for waiver or remittal of disqualification. On the state side, that is provided for in C.C.P. § 170.3(b). In pertinent part, that subsection provides: "(1) A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification . . .." It is clear that waiver only becomes a possibility after the judge has declared that he or she is disqualified. Hence, it would be improper to use a *de facto* waiver process without first having declared the disqualification, although it appears to happen too often.

Only if the judge is disqualified does waiver or remittal become a possible option, and then only if the nature of the disqualification is one that may be waived. Certain disqualifications on both the state and federal sides may not be waived. No state waiver is permitted when the judge has a personal bias concerning a party, when the judge will be a material witness, or when the judge served as an attorney in the mat-

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ter. Other state grounds for recusal are waivable. There are fewer waivable grounds of disqualification on the federal side. See C.C.P. § 170.3(b), 28 U.S.C. § 455, and Canon 3D of the Code for United States Judges. The state procedure expressly provides that the "judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification." "A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record."

On the federal side, Canon 3D provides in pertinent part:

> A judge disqualified . . . may, instead of withdrawing from the proceeding, disclose on the record the basis of disqualification. If the parties and their lawyers after such disclosure and an opportunity to confer outside of the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

To review for a moment. A judge has a duty to decide assigned cases unless disqualified. The judge should make the decision about disqualification without consultation with the parties or counsel. Despite the obligation on the state side to disclose information that may not be disqualifying, a judge may not use that disclosure to ask the parties or counsel whether they think the judge should recuse. The judge must make that decision without resort to input from the parties. If the judge decides that disqualification is not warranted, and the judge has made any required disclosure, that ends the judge's role. If one of the parties disagrees, their redress is by use of the C.C.P. § 170.3 or § 170.6 process on the state side, and the 28 U.S.C. § 455 process on the federal side.

However, if the judge decides disqualification is required, the judge should so declare. If the nature of the disqualification is one that is waivable, the judge may so advise counsel and the parties. They should be given the opportunity to discuss the matter outside the presence of the judge and staff, and with the clients. All sides must agree to the waiver, and it must be reduced to writing. On the federal side, the waiver may alternatively be put on the record. In either situation, the expressed waiver should include that the disclosure was made and that all sides have agreed to waive the disqualification.

The next point is that if less than all sides agree to waive the court should learn only that there is no agreement. The court should not learn, and the process should be conducted in a way to prevent the court from learning, who was opposed to waiver. If there is no unanimously agreed-upon waiver, then the judge remains disqualified. Recognizing that a determination of disqualification is a predicate for invoking the waiver process, a judge may not later retract the declaration of disqualification upon learning that not everyone has agreed to waive. Once the judge starts down the path, the judge is committed, and the parties are entitled to rely on the judge's original determination of disqualification. That proposition is further evidence of why it is inappropriate for a judge to make a disclosure and seek input from counsel and the parties without first deciding whether the judge is disqualified.

Finally, how does all this impact on the trial lawyer as he or she watches the judge grapple with these rules? First, the lawyers and the parties should understand that the judge is engaged in a conscientious effort to apply two ethical notions that may be in tension – the duty to sit and the duty to recuse when appropriate. Second, the lawyers should recognize that if they disagree with a judge's decision not to recuse, the next step is to file a formal challenge under the statute, rather than argue with the court about its decision. Lastly, if the judge determines he or she is disqualified, but the ground for disqualification is a waivable ground, consider initiating the request for waiver. The judge may not automatically do so.

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Conclusion

The applicable statutes and Canons provide a process for determining whether a judge is disqualified from sitting in any particular case, and for waiver of the disqualification in certain circumstances. In addition, California judges have a duty to disclose some information even though it is not disqualifying, but that duty to disclose does not change the judge's duty to decide disqualification without consultation with the attorneys or parties. Consultation with the attorneys or parties without having first decided disqualification tends to put the attorneys and parties in an untenable position. If the processes set out in the statutes and Canons are followed, judges will honor their obligation to decide all matters in which they are not disqualified, while also disqualifying when they should do so, and the integrity of the judicial process will be enhanced. ▲

Judge Bowie is a member of the ABTL Board of Governors and the Chief Bankruptcy Judge for the Southern District of California. He was a member of the Codes of Conduct Committee of the Judicial Conference of the United States from 1995-2003, and from 2003-2007 was a liaison from the Judicial Conference to the ABA Commission that rewrote the Model Code of Judicial Conduct adopted by the ABA's House of Delegates in 2007.

Judge Haden, after a long and distinguished career on the state court bench, works now at JAMS as a mediator handling complex business arbitrations and mediations.

Editor: Alan M. Mansfield
(858) 348-1005

Editorial Board:
Erik Bliss, John T. Brooks,
Richard Gluck, Robert Gralewski,
and Shannon Petersen.

Hon. Jeffrey T. Miller

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claim to have developed a FDA approved cancer treatment. Needless to say, the FDA had not approved the treatment and Judge Miller imposed appropriate relief. Those are but two examples of the variety of cases that find their way into Judge Miller's courtroom.

On August 29, 2007, Judge Miller met with 30 attorneys to, in his words, throw back the curtain that attorneys perceive enshroud the judicial process. This article recounts Judge Miller's dialogue with the attendees at this ABTL Brown Bag lunch highlighting his role, his clerk's responsibilities, and the expected professionalism of attorneys appearing in his courtroom.

Cases and Case Loads

Before the addition of five new judges to the Southern District several years ago, each judge had about 1,000 cases on his or her docket. This extraordinary number of cases was nearly unmanageable. With the addition of the new judges, the caseload per judge has been reduced to between 450 and 500. This caseload is the norm throughout the United States.

Cases among the district court judges and the magistrate judges are assigned randomly, with one exception. The clerk's office performs a weighing process of all filings based upon the apparent complexity of new cases and tries to assign cases so that all judges have equally weighted case loads. No judge is given a specific type of case.

Most cases reach trial about 18 to 24 months after the filing of the complaint or indictment. Complex civil cases may take more time to reach trial and a standard civil case may be initially set for trial earlier than 18 months. As is true in state court, so too it is true in federal court--about 98% of all civil and criminal filings are settled before trial. The result is that Judge Miller tries two to five civil cases per year and ten to twenty criminal cases per year.

Motions

A great deal of effort is spent in preparing the court's analysis of law and motion matters. Judge Miller has the assistance of two law clerks, one being a career clerk and the second being an annual appointee. Law clerks are exceptionally talented; typically have law degrees from prominent law schools; have been on their school's law review; and are extremely sensitive to well-written papers. Judge Miller's secretary/judicial assistant is also a valuable member of the chamber's team.

Judge Miller reads all motions and writes his own orders, in collaboration with his clerks. His three law clerks perform the vital function of accurately summarizing the key issues presented in motions. Judge Miller works closely with the law clerks to discuss issues; to analyze arguments; and to arrive at a tentative conclusion.

Oral Argument

Before oral argument Judge Miller will have read the operative pleading, the motion papers and the more important cases cited by counsel and will typically have a list of questions that he needs answered in order to decide a motion. Judge Miller will typically have a bench memorandum prepared by a law clerk that summarizes the issues and possibly a draft order in front of him at oral argument. Historically, Judge Miller has not shared such memoranda and drafts with counsel, but rather he uses them to create a dialogue to address areas of concern.

Judge Miller encourages attorneys to request oral argument, particularly where the motion is outcome dispositive. Judge Miller believes that attorneys and clients have a greater trust in the integrity of the judicial system when they can participate in or view oral argument where the judge exhibits an understanding of the issues and counsels' opposing views are aired. Judge Miller is sympathetic to such factors and is often available for oral argument on reasoned request, even if the outcome is not case dispositive.

Not too surprisingly counsel do not fare well if they incorrectly state what a case stands for; have not read the cases they cite; or misstate the facts. Attorneys who mislead the court not only hurt their own credibility but hurt the client's case and will not be in good stead with the court in the future.

Finally, how many of us have witnessed attorneys who do not respond to the judge's question or who cut-off the judge in mid-sentence? Counsel should thank the judge for the opportunity to address any issue of concern and respond directly. Counsel should show also the court the

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courtesy of not interrupting. Unresponsiveness is not good advocacy.

Unpublished Opinions

Thomson-West Publishing Co. and the other purveyors of judicial opinions often make available trial court judges' orders and decisions. A LEXIS search of Judge Miller's opinions yields at least 50 orders and decisions in the last two years. Although not binding, published orders and decisions by another district court judge may be informative and even persuasive. Judge Miller views such orders and decisions, if relevant, as not precedent but possibly worth reviewing.

Judge Miller is the consummate professional judicial officer and any attorney appearing before him should ensure that their written and oral presentations meet that standard. Judge Miller's written orders and decisions are polished and well researched and counsel should replicate that standard in written communications to the court. Such is a prerequisite to effective advocacy in Judge Miller's courtroom. ▲

BIOGRAPHY

PREVIOUS JUDICIAL APPOINTMENTS

Court:	San Diego County Superior Court
Title:	Judge
Dates:	1987-1997
Appointed by:	Gov. Deukmejian
Date:	January 30, 1987

EDUCATION

Law School:	UCLA School of Law
Date:	1967
Degree:	J.D.
Coll./Univ.	UCLA
Date:	1964

PRACTICE HISTORY

California State Department of Justice – Deputy Attorney General

Location:	San Diego, CA
From:	1973-1987

Deputy Attorney General

Location:	Los Angeles, CA
From:	1968-1973

BARS AND RELATED PROFESSIONAL ACTIVITIES

2000-present:	ABTL–Emeritus Board Member
1995-2000:	Association of Business Trial Lawyers, Member of Board of Directors
1987:	California Judges Association
1974-1986:	San Diego County Bar Association
1968-1986:	Association of Deputy Attorneys General American Bar Association Bar of the United States Supreme Court American Inns of Court, Wm. B. Enright Chapter (Master) American Judicature Society

PUBLICATIONS

1992:	"Liability Under The Federal Civil Rights Act," Chapter 5, California Government Tort Liability Practice, Third Edition (Cal CEB)
1992:	Chief Consultant: California Government Tort Liability Practice, 3rd Edition (Cal CEB)
1987-1991:	Supplements, California Trial Objections, 2nd Edition (Cal CEB)
1986-1995:	Supplements, California Government Tort Liability Practice, (Cal CEB)
1990:	Consultant, Effective Introduction of Evidence in California, Cal CEB

President's Letter

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Samantha Everett, Brooke Hodge, Jeff Hood, Matthew Kleiner, Douglas W. Lytle, Morgan J. Miller, William V. O'Connor, Shannon Peterson, Julie Corbo Ridley, Christian Scott, Jessica Shinnefield, Colleen Smith, Kristin Strojan, Sarah Weber and Aaron Winn. We thank Ed Gergosian for his efforts in bringing the LDC from concept to reality.

As I conclude my term as President, I wish to make a couple of observations about why ABTL is such a special and worthwhile organization. While ABTL is rightfully acclaimed for the high quality of its programs, I believe its greatest contribution to our legal community is its enhancement of the atmosphere in which all of us work as lawyers and judges. I believe that's the reason our Board members and officers continue to be involved in ABTL long after their terms have ended, and to an extent I've never seen in any other legal organization. It has been an honor and a privilege for me to serve as President of ABTL and I, like my predecessors, look forward to continued involvement in the organization.

Please accept my best wishes to you and your families for a wonderful holiday season and a very happy new year. ▲

Jury Reform

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fornia rules and the corresponding Ninth Circuit recommendations. In order of impact, this article will discuss (1) juror questions to witnesses; (2) pre-instruction and mini-opening statements to the jury; and (3) jury notebooks. This article will also discuss some of the perceived benefits of and arguments against the rules and recommendations.

I. Juror Questions

A. California

California Rule 2.1033 provides that "a trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury." The Judicial Council Report explains that it chose not to use the word "shall" instead of "should" because the use of "should" more accurately reflects the intent of the Task Force and Steering Committee. The original draft of the rule mandated that judges allow jurors to submit written questions and provided that the court may determine not to allow such questions upon a determination of good cause. The original text of the rule garnered substantial opposition from a multitude of judges, judicial groups and lawyers.

B. Ninth Circuit

The Ninth Circuit recommends that the trial court "should permit written questions from jurors during civil trials." The Ninth Circuit reasons that questions can improve the jury's level of attentiveness to the trial and may improve their comprehension. Jurors should always be permitted to submit questions to the court in civil cases, although the judge retains the right to limit or prohibit the submission of questions if the jurors' questions are inappropriate.

The Ninth Circuit explains this recommendation is to be accompanied with an instruction by the trial judge that written questions will be permitted to be submitted to the judge. This means that the process for handling such questions is that they should be submitted to counsel out-

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side the presence of the jury. After hearing from counsel, if the judge rules that a juror's question may be asked, then a number of options can be considered. The court may ask the question as submitted or rephrase it if the question needs to be modified before asking. The court may also permit the lawyers to decide whether or not they will ask the question. The parties may agree that the judge may give a stipulated answer in response to a juror's question. Further, the court in a preliminary instruction should explain that some questions may not be asked and why that will be.

C. Studies and Literature

The arguments against allowing juror questions are many. One major concern is that allowing jurors to question witnesses significantly alters the roles of attorneys and the judges. Specifically, allowing juries to participate in the trial threatens the advocates' control of their case and the judge's control of the trial. Another major criticism is that jurors' questions will help prosecutors and plaintiffs meet their required burden of proof by bringing out evidence that will strengthen one party's argument. For example, a juror may ask a question that indicates that there is a deficiency in the prosecutor's or the plaintiff's story giving either one a second chance to prove the case, which is viewed as an unfair advantage. Some objectors believe that questioning can be disruptive and unduly delay a trial. Further, if questions are allowed, jurors are implicitly encouraged to have preconceptions that once they are verbalized are unlikely to be changed. Stated a little differently, some attorneys fear that jurors will abuse the opportunity by becoming competitive against attorneys or other jurors or the jurors may simply ask questions because they can.

Juxtaposed to the foregoing are the results of numerous studies on the impact of allowing juror questions during trial. The principal objection to precluding juror questions is that it is nonsense that jurors are neutral fact finders and will do nothing more than view and retain the facts as the trial proceeds and to withhold judgment until the end of trial and the start of jury deliberations. The psychological theory of decision making called the "Story Model" (as contrasted with the "Legal Model" that portrays jurors as blank slates) assumes that jurors rarely wait until the end of trial to come to conclusions. Instead, they are cognitively active throughout the trial. Such research suggests that jurors should be allowed to ask questions in order to facilitate their natural decision-making tendencies.

The Story Model is premised on the view that jurors organize trial evidence into a narrative story based on intentions and causation of events. It suggests that jurors construct mental accounts of the trial to comprehend evidence. Stories allow juries to better understand evidence and reach a verdict. For example, a Massachusetts jury pool study utilizing a videotaped trial and post-judgment interviews concluded that participants did not organize evidence as a list, but instead organized evidence by arranging evidence into causes and effects, which facilitated the creation of a credible and sensible story that explains the evidence. Jurors surmise missing pieces because they cannot ask questions, disregarding information that do not fit their stories. Allowing juror questions helps fill that gap. The Story Model, thus, contrasted with the Legal Model or the pure adversary model which contemplates the juror as being a mere empty vessel into which facts and evidence are poured, and out comes a judgment based upon only the evidence and the law.

The studies indicate that juror questions enhance juror satisfaction with the jury experience and jurors' confidence that they have enough information to decide the case. Further, the data indicate that allowing juror questions will not be unduly disruptive; will not prolong a trial; and will not unduly burden the court or the lawyers. Surveys of judges indicate substantial support for juror questions. For example, in Massachusetts a pilot program allowing juror questions resulted in 96% of the judges concluding that the procedure was helpful and worthwhile. Three quarters of surveyed jurors concluded that allowing questions helped them remain attentive and 63% said that the answers to their questions aided their decision making.

What is likely to spawn a juror question? Studies indicate that questions are most often asked to clarify testimony by both lay and expert

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witnesses and to inquire about technical issues or unfamiliar concepts. The empirical evidence indicates that questions are responsible and enhance the quality of decision making.

II. Statements to the Jury

A. California

California Rule 2.1034 provides that "Prior to the examination of prospective jurors, the trial judge may, in his or her discretion, permit brief opening statements by counsel to the panel."

The Judicial Counsel Report explains that "this statement is not a substitute for closing argument statements. Its purpose is to place voir dire questions in context and to generate interest in the case so that prospective jurors will be less inclined to claim marginal hardships."

Several defense associations disagreed with the proposal, stating that opening statements tend to be overly argumentative already and the judicial process would not be enhanced by having two argumentative opening statements. They continued that there is no good reason why the trial court cannot provide for the jurors the summary statement explaining the nature of the case.

B. Ninth Circuit

The Ninth Circuit's Recommendation VII recommends that the trial court "provide more and better information of the trial and the judicial process to the potential jurors at the beginning of the *voir dire*." The Ninth Circuit Judicial Council explains that if potential jurors are given as much information about the case as possible, they will better understand the case, and therefore will be better able to respond during the *voir dire* process. With more information they will be better able to identify personal biases. Finally, pre-instructions provide the jury with a road map to the law and assist the jury in better organizing the evidence.

C. The Studies and Literature

One study based on mock jury trials demonstrates that pre-instructed jurors score significantly better on recall and comprehension measures. Pre-instructions provide jurors with a framework that enables them to organize the evidence according to legal principles. Judges who participated in pilot studies almost unanimously support early instructions. Attorneys, too, were virtually unanimous that they consider preliminary instructions to be helpful. Finally, jurors found the procedure valuable and improved their jury experience.

The opponents of pre-instruction argue that to pre-instruct a jury at the time when the evidence is not in may result in the court failing to identify all of the applicable legal principles, thereby leading to some confusion. The opponents also argue that neither the court nor the attorneys may be prepared at the inception of a trial to give such preliminary instructions.

III. Jury Notebooks

A. California

Rule 2.1032 provides that "A trial judge should encourage counsel in complex civil cases to include key documents, exhibits, and other appropriate materials and notebooks for use by jurors during trial to assist them in performing their duties."

The proposed rule calls for judges to encourage counsel to prepare juror notebooks, the contents and scope of which can be developed and agreed to during pre-trial conferences. It is contemplated that the court and counsel will agree upon including key documents and exhibits in the notebook. Such a notebook may also include a schematic of the courtroom identifying the location of the various trial participants; pictures of the witnesses with pertinent witness information; a chronology; a glossary of uncommon terms; and such other documents that may assist juror comprehension.

B. The Ninth Circuit

The Ninth Circuit's Recommendation X recommends that the court "permit juror note-taking, and provide individual juror trial books in appropriate cases."

The Ninth Circuit recommends that jurors be allowed to take notes. The Southern District judiciary typically permits such note taking. Recommendation X also calls for the provision of juror trial books to assist juror note-taking and enhance jurors' memories. Trial books should include the preliminary jury instructions. It should also include copies of key exhibits and,

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Civil Code § 3291 provides for the award of pre-judgment interest to a successful personal injury claimant from the date of the rejected offer. § 3291 does not specifically state that it is applicable in arbitrations, but courts have held that prejudgment interest back to the date of the § 998 offer may be added by a court to a judgment confirming an arbitration award pursuant to C.C.P. § 1287.4. *Caro v. Smith*, 59 Cal.App.4th 725, 736 (1997).

B. A § 998 Offer Can Create An Entitlement To Costs

In a judicial proceeding, the prevailing party is entitled to an award of costs regardless of whether there is any contract provision that allows cost shifting. C.C.P. § 1032(b); *Pilimai*, 39 Cal.4th at 145. The same is not true in arbitration. Unless the arbitration agreement provides otherwise, each party to the arbitration shall pay its *pro rata* share of the expenses and fees of the neutral arbitrator and all other fees and expenses of the arbitration. C.C.P. § 1284.2.

But a party to an arbitration may create an entitlement to costs and expert witness fees if he makes a valid § 998 offer that is refused and then obtains a more favorable award. *Pilimai*, 39 Cal.4th at 150-151.

The *Pilimai* case arose out of a contractual uninsured motorist arbitration. The arbitration provision in the insurance contract provided:

> "The expense of the arbitrator and all other expenses of arbitration will be shared equally. Attorneys' fees and fees paid for the witnesses are not expenses of arbitration and will be paid by the party incurring them." *Pilimai v. Farmers Insurance Exchange Co.*, 2005 Cal.App. LEXIS 463 at *12 (2005).

Prior to the arbitration hearing, Pilimai served a § 998 settlement demand for $85,000. The arbitrator later found that Pilimai was entitled to recover damages of $556,972. The arbitrator's award was silent on the issue of costs and prejudgment interest. *Pilimai*, 39 Cal.4th at 137. Farmers moved to confirm the award in the amount of $235,000 (the policy limit, less a credit for $15,000). Pilimai did not oppose the amount of the judgment requested by Farmers, but asked the court to add costs and prejudgment interest based on the § 998 offer rejected by Farmers. The trial court ruled that the policy limited recovery to $235,000 and rejected the request for costs and prejudgment interest. Id. at 138. The

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where there are technical or complicated concepts, a glossary in the notebook to enhance juror recall of testimony, increase comprehension, and reduce confusion during deliberations. Trial courts should also permit electronic note-taking, the devices to be provided by the court.

C. Studies and Literature

Research indicates that notebooks containing a glossary of technical terms, a list of witnesses, copies of expert slides and blank paper for note-taking as well as the important documents enhance juror comprehension and satisfaction. In one study, 92% of the jurors supplied notebooks reported that they used them to review the contents; and 90% found them somewhat or extremely helpful. When asked why they helped, 79% of jurors reported that the notebooks' contents enhanced their understanding and recall of the evidence. Jurors who were provided with notebooks had significantly higher comprehension of the evidence than those not supplied with notebooks.

IV. Conclusion

The observation by Thomas Jefferson that "serving on a jury is more important than voting" is most apt. Equally important is ensuring that jurors comprehend the evidence, are satisfied with the process and that their time is properly utilized. Although this article selected only three jury reforms, there are others that are equally significant in accomplishing the foregoing purposes, and which both federal and state courts continue to implement and refine. The Ninth Circuit has followed the lead of the Arizona courts, a pioneer in jury reform, and it is expected that both the Ninth Circuit and California will ultimately follow the lead of the Arizona courts in allowing jurors to engage in pre-deliberation discussion of the evidence when trial is in recess. ▲

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Court of Appeal reversed and held that the insurance contract was subject to the cost-shifting provisions of § 998 and Civil Code § 3291. 2005 Cal.App. LEXIS 463 at *17. The Court of Appeal also held that, even though the arbitrator had not ruled on the issue of costs or prejudgment interest, the court that was asked to confirm the award had the power to award costs in the first instance. Id. at *23-24.

The Supreme Court reversed the Court of Appeal decision to the extent it allowed prejudgment interest (on the ground the UIM arbitration was not a personal injury claim), but affirmed the award of costs by the Court of Appeal. Even though the arbitration provision in the insurance contract provided that "the expenses of the arbitrator and all other expenses will be shared equally," the Supreme Court held:

> "That language [of § 998(d)], as explained above, puts the arbitration plaintiff on the same footing as the plaintiff to a civil action vis-à-vis costs when the plaintiff has made an offer that the defendant has refused and obtains a judgment more favorable than the offer." *Pilimai*, 39 Cal.4th at 150-151.

The Court found that the claimant in *Pilimai* was entitled to an award of post offer C.C.P. § 1033.5 costs as a result of the defendant rejecting a § 998 offer that was less than the award. Pilimai, 39 Cal.4th at 151. In effect, § 998 trumps the contract on allocation of costs and expenses.

C. Can A § 998 Offer Be Used To Shift The Fees And Costs Of The Arbitrator?

In most contractual arbitrations, the single biggest expense is the arbitrator's fee. Even for a one-day arbitration, that expense can exceed $4,000 if there is a need for study time and a request for a reasoned award. Multi-day arbitrations can exceed $25,000 in fees. The arbitrator's fee is not one of the cost items specifically called out in C.C.P. § 1033.5, and there is nothing in § 998 stating that the arbitrator or the court may assess the arbitrator's fee as part of a penalty for failing to accept a § 998 offer. However the court, and by implication the arbitrator, has discretion to award costs that are not listed in § 1033.5.

C.C.P. § 1033.5 (c)(4) provides:

> "(c) Any award of costs shall be subject to the following: …
> (4) Items not mentioned in this section and items assessed upon application may be allowed or denied in the court's discretion."

One court interpreted this section to mean that it had discretion to award the arbitrator's fee as a "cost" in a confirmation proceeding. *Cobler v. Stanley, Barber, Southard, Brown & Associates*, 217 Cal.App.3d 518, 533 (1990). However, the matter is not free from doubt. In *Pilimai*, the Court acknowledged there was an issue whether arbitrator compensation is a cost under § 1033.5, but did not express an opinion. *Pilimai*, 39 Cal.4th at 148 n. 3.

D. The ADR Provider Rules May Affect Cost Allocation

None of the major ADR providers in California has specific rules that govern the use of an offer to compromise generally or a § 998 offer specifically. However, some of the ADR providers have other rules that may have an impact on the shifting of costs to a party who rejects a § 998 offer. Under the AAA's Employment Rules, arbitrator compensation and administrative fees are not subject to re-allocation by the arbitrator in certain types of claims except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous. AAA Employment Arbitration Rules and Mediation Procedures (eff. July 1, 2006) at p. 46.

AAA Commercial Rule R-43(c) gives the arbitrator complete discretion to "apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate." AAA Rule R-43(d) gives the arbitrator the power to include pre-award interest and an award of attorneys' fees if all parties request such an award or if it is authorized by law or contract. JAMS Rule 24(f) allows the arbitrator to allocate arbitrator fees and arbitrator compensation unless prohibited by the parties' agreement; and JAMS Rule 24(g) allows the arbitrator to allocate attorneys' fees, expenses and interest if provided in the parties' agreement or allowed by applicable law.

E. When A § 998 Offer Can Be Used

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If a claimant initiates a commercial arbitration in California, either party may serve a § 998 offer. It does not matter whether the arbitration is administered by the parties or by a private ADR provider such as the AAA or JAMS. If a plaintiff files a complaint in Superior Court and the matter is later stayed and compelled into arbitration, either side may serve a § 998 offer while the case is pending in court or after the matter is compelled into arbitration. If it is served before the matter is compelled into arbitration, it need not be renewed unless the scope of the arbitration is more narrow than the judicial proceeding.

It is uncertain how a § 998 offer would be treated in a case initiated in federal court and then stayed and compelled into arbitration. Before the case is compelled into arbitration, the defendant could serve a Fed. R. Civ. P. 68 Offer of Judgment, but since Rule 68 does not provide for use in arbitration it would be prudent to renew that offer under § 998 after the case is in arbitration.[2] After the case is submitted to arbitration, either party can serve a § 998 offer; and the arbitrator has the power, subject to the contract, the ADR Provider Rules and the governing law, to assess costs and expert witness fees as penalties for failing to accept a § 998 offer.

If the case is pending in federal court and compelled into arbitration pursuant to the Federal Arbitration Act ("FAA"), § 998 should still apply as long as there is a California choice of law clause in the contract. *See Volt Information Sciences v. Bd. of Trustees of Stanford University*, 489 U.S. 468, 477 (1989) (holding that, in a California state court case concerning contractual arbitration with a California choice of law provision, the FAA did not preempt C.C.P. § 1281.2(c), which allows a state court to stay arbitration pending resolution of related litigation).

In diversity cases, federal courts recognize state law offer to compromise statutes as a matter of substantive law. *Healy Co. v. Milwaukee Metropolitan Sewerage District*, 60 F.3d 305, 312 (7th Cir. 1995). Courts sitting in diversity jurisdiction or exercising supplemental jurisdiction over state law claims will apply the state law offer to compromise statute unless it conflicts with a valid federal statute or procedural rule. *MRO Communications, Inc. v. American Tel. & Tel. Co.*, 197 F.3d 1276, 1282 (9th Cir. 1999). Because of the potential conflict with Rule 68, there is a distinction in federal court if the offer of judgment is made by the plaintiff or the defendant. *See Walsh v. Kelly*, 203 F.R.D. 597, 600-601 (D. Nev. 2001), *rev'd on other grounds*, 28 Fed.App. 707 (9th Cir. 2002) (refusing a request for penalties under state law against a plaintiff who rejected a defense offer of judgment because of the conflict with Rule 68). However, there are no reported decisions that provide guidance as to how a federal court would rule if it was asked to confirm an arbitration award and also assess § 998 penalties against either a plaintiff or a defendant. If the arbitration arises out of a federal court case, it is better practice to have the arbitrator, rather than the court, assess the penalties for a rejected § 998 offer.

F. Preparing The § 998 Offer

A § 998 offer may be made at any time from the date of service of the complaint/claim on the defendant/respondent, up to 10 days prior to commencement of the arbitration. See § 998(b). The arbitration is deemed to have commenced at the beginning of the opening statement of the claimant or if there is no opening statement, when the first witness is sworn. § 998 (b)(3). The offer must be in writing (§ 998(b)) and should include the following points:

a. an offer to allow the award to be entered according to § 998;
b. the amount of the offer;
c. a statement whether the offer includes costs/attorneys' fees (and arbitrator fees) or each party is to bear its own costs and attorneys' fees (and a proportionate share of the arbitrator's fees);
d. the signature of counsel for the offering party; and
e. a proposed form of acceptance that can be signed by the party accepting the offer.

The offer should *not* be disclosed to the arbitrator or the case administrator. § 998(b)(2) (the rejected offer "cannot be given in evidence upon the trial or arbitration"); *cf.* C.R.C. 3.250(a)(23) (not to be filed with the court unless accepted).

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G. Accepting The § 998 Offer

The acceptance, whether made in the document served with the offer, or on a separate document, must be signed by counsel for the accepting party or if not represented by counsel, by the accepting party. § 998(b).

Often an accepted § 998 offer results in a written settlement that eliminates any further involvement of the arbitrator or the ADR provider. The case administrator should be notified and asked to close the file.

If the § 998 offer is accepted but there is no settlement, the case administrator should be notified that the case is resolved and the parties require the entry of a consent order. The arbitrator is then required to enter an award accordingly. § 998(b)(1)). Consent awards are permitted by the AAA (Rule R-44) and JAMS (Rule 28).

H. Rejecting The § 998 Offer

The § 998 offer is "rejected" by letting it expire. Nothing more is required. In judicial proceedings, the consequences of a rejected § 998 offer can be sorted out by the court after entry of the verdict or statement of decision, but there is a complication in arbitration. The arbitrator loses jurisdiction after the final award is entered. *See* C.C.P. §§ 1284 and 1286.6 (giving limited power to arbitrator to correct the final award for clerical, computational or typographical errors within 30 days of entry). For that reason, the parties must notify the arbitrator that there is a rejected § 998 offer *before* the final award is issued. The initial notification should not advise the arbitrator of the details of the § 998 offer, or even who served it. All that should be disclosed is that there was an offer and it was rejected.

If the parties fail to notify the arbitrator of the § 998 offer and the final award issues, the party who served the unaccepted offer can request the court to award the § 998 penalties. With regard to expert witnesses, § 998 states that the "court or arbitrator" may require the non-accepting party to pay. *See also Weinberg v. Safeco Ins. Co. of America*, 114 Cal.App.4th 1075, 1085 (2004). In *Pilimai*, C.C.P. § 1033.5 costs were awarded by the appellate court in a case where they were not requested until a post award confirmation proceeding. 39 Cal.4th at 137-138. The better and safer practice is to have the arbitrator assess the § 998 penalties; if for no other reason the award, including all the costs, will accumulate post award prejudgment interest. *Pierotti v. Torian*, 81 Cal.App.4th 17, 27 (2000).

I. Comparing The Interim Award To The Rejected § 998 Offer

Once the arbitrator knows there is a rejected § 998 offer, she can issue an interim award rather than a final award. It is important that the parties specifically request the arbitrator to reserve the issue of costs and attorneys' fees and that the interim award be labeled "interim" or contain language stating that it is not a final award.[3] This preserves jurisdiction and allows time to compare the interim award to the rejected offer and, if appropriate, calculate the costs to be shifted. Only after the arbitrator issues the interim award should the parties advise the arbitrator of the details of the § 998 offer.

If the claimant receives an award less than his rejected § 998 offer, the offer is a nullity.

If the claimant receives an award greater than his § 998 offer rejected by the respondent, the only issue is the discretionary award of expert witness fees (by the arbitrator) (§ 998 (d)); and possibly pre-award interest (by the court confirming the award) if it is a personal injury matter (Civil Code § 3291). When making the "more favorable" determination, the unaccepted claimant's offer is compared to the award plus the claimant's pre and post offer costs. *Wilson v. Wal-Mart Stores, Inc.*, 72 Cal.App.4th 382, 392 (1999).

If the claimant receives an award more than the rejected § 998 offer from the respondent, then that offer is a nullity.

If the claimant receives an award less than the amount of a rejected § 998 offer from the respondent, then the respondent's costs from the time of the offer are deducted from the award. The claimant himself does not receive any post-offer costs. In determining whether the claimant receives a more favorable award, the post-offer costs are not considered (§ 998(c)(2)), but pre-offer costs are. *Heritage Eng. Const., Inc. v. City of Industry*, 65 Cal.App.4th 1435, 1441 (1998). Because of this distinction between pre- and post-offer costs, it is important for counsel to maintain detailed accounting records.

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Authorized attorneys' fees provided by the contract or statute incurred before the date of the offer are recoverable as a cost and therefore are included in determining whether the claimant received a "more favorable" award than the rejected § 998 offer. *Id*. at 1441-1442; *Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.*, 73 Cal. App.4th 324, 330 (1999). Detailed time records are necessary to distinguish between pre- and post-offer fees.

Pre-award interest can be an element of compensatory damages if the amount of the damages is liquidated. Civil Code § 3287. Therefore, if the claimant is entitled to pre-award interest accruing before the expiration of the rejected § 998 offer, that interest, under Civil Code § 3287, is included in determining whether the award is more favorable. *Bodell Constr. Co. v. Trustees of Cal. State University*, 62 Cal.App.4th 1508, 1526 (1998).

The arbitrator, like the court, also has discretion to award post-offer expert costs both for preparation and presentation at the hearing. § 998 (c),(d); *Pilimai* 39 Cal.4th at 149.

After the arbitrator evaluates the rejected § 998 offer, she then values the penalties for costs, expert witness fees and pre-award interest (if applicable) and enters a final award. That award can then be confirmed into a judgment. C.C.P. § 1287.4. ▲

1. Prior to the 1997 amendment, § 998 offers to compromise were not effective in contractual arbitrations. *Woodard v. Southern California Permanente Medical Group*, 171 Cal. App.3d 656, 666 (1985). However, they were allowed in judicial arbitration proceedings. *Wagy v. Brown*, 24 Cal.App.4th 1, 9 (1994).

2. The federal counterpart in Fed. R. Civ. P. 68 "has no application to offers made by the plaintiff," *Delta Airlines, Inc. v. August*, 450 U.S. 346, 350 (1981), and by its terms only applies to judicial proceedings.

3. Interim awards are specifically allowed by the rules of the major ADR providers. See AAA Rules R-30(b), R-34, R-43(b) and JAMS Rule 24(d). Nothing in the California Arbitration Act prohibits interim awards.

ASSOCIATION OF BUSINESS TRIAL LAWYERS
SAN DIEGO
abtl

P.O. Box 16946
San Diego, CA 92176-6946

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