

REFERENCE GUIDE TO LAW

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Our Reference Guide covers many areas of Arizona law, highlighting the most common issues associated with civil litigation. This resource is intended to provide a general overview of the subject matter, and is a supplement to the personal service we provide to our clients. It should not be relied upon as the sole source of information, and should not be substituted for competent professional legal advice for a particular situation. Should you have any questions, we encourage you to contact the authors listed at the end of each chapter or any JSH attorney.

CHAPTER 6: OFFERS OF JUDGMENT

REQUIREMENTS

Arizona has a rather extensive “offer of judgment” procedure and practice, set forth in Rule 68 of the Arizona Rules of Civil Procedure. For reasons discussed below, it is important to remember that the offer is an offer of judgment, not merely an offer of settlement. Literally, it means that the offeror is allowing a judgment to be entered in the action, and certain sections of the Rule provide for that very thing – the entering, signing and filing of a judgment against the defendant.

At any time more than 30 days before trial begins, any party may serve upon any other party an offer to allow judgment to be entered in the action. An offer must remain open for 30 days after it is served unless it is rejected before that time; but an offer made within 45 days of trial shall remain effective only for 15 days after service. If the case is assigned to arbitration under the Arizona Rules of Civil Procedure, then the offer of judgment must be made more than 25 days before the arbitration hearing date, and it expires at 5:00 PM on the 5th day before the hearing. Where the plaintiff serves an offer of judgment on a defendant within 60 days of filing the complaint, the offer remains open for 60 days.

The offer must be made in writing, must state a specific sum of money, and shall be inclusive of all damages, taxable court costs, interest, and attorney’s fees sought in the case. Alternatively, the offer can exclude an amount for attorney’s fees but the offer must specifically state that attorney’s fees are being excluded from the offer. The offer does not have to be “reasonable” relative to the lawsuit’s probable damages. *Stafford v. Burns*, 241 Ariz. 474, 389 P.3d 76 (Ct. App. 2017). The offer also does not have to be apportioned by claim or causes of action. That is, if a plaintiff is asserting several different claims against a defendant, the defendant can still make an offer of a lump sum of money to the plaintiff without designating a certain amount for each claim.

Multiple parties may make a joint, unapportioned offer of judgment to a single offeree. For example, multiple wrongful death claimants or a husband and wife may make a joint unapportioned offer of judgment to a single defendant. But unapportioned offers may not be made to multiple offerees. In other words, a defendant cannot make a joint unapportioned offer to multiple plaintiffs. A separate offer must be made to each plaintiff because when the jury returns a verdict, there will be separate awards for each plaintiff. The defendant can make the offers to multiple plaintiffs conditioned upon acceptance by all of the plaintiffs. Each offeree may serve a separate written notice of acceptance of the offer.

Additionally, a defendant can make an offer to a plaintiff contingent on the plaintiff using the proceeds to satisfy all liens that attach by operation of law to the proceeds and for which defendant could be held liable. See *Cuellar v. Vettorel*, 235 Ariz. 399, 332 P.3d 625 (Ct. App 2014).

If an offeree believes the offer is defective or objectionable, the offeree must serve written notice of the objection within 10 days of the date of the offer. Failure to timely object waives all objections to the offer's validity. See Rule 68(d), Ariz.R.Civ.P.

An offer not accepted within the specified time is deemed to be rejected. An acceptance of an offer must be in writing. Upon acceptance of an offer, either party may then file in the court the offer, proof of acceptance, and a proposed judgment complying with Rule 58(b).

Acceptance of an offer of judgment ends the entire litigation by or against the offering party (unless otherwise specified in the language of the offer) and extinguishes the accepting party's right to appeal any of the court's prior decisions concerning the offering party. **Lee v. ING Inv. Mgmt., LLC**, 240 Ariz. 158, 377 P.3d 355 (Ct. App. 2016). For example, if the plaintiff sued the defendant alleging five theories of recovery, but defendant defeats three of those on summary judgment, and thereafter defendant makes and plaintiff accepts an offer of judgment on the two remaining claims, plaintiff cannot appeal the dismissal of the first three claims. Rule 68 is intended to encourage settlement and avoid protracted litigation. By accepting the defendant's offer, plaintiff agrees to end the litigation on all claims encompassed by his complaint against the offering defendant.

Note: The usual practice in Arizona is for the parties to treat the acceptance of an offer of judgment as a settlement, and simply exchange a check for a settlement agreement and release; however, that practice is not what Rule 68 mandates. Under Rule 68, a plaintiff can insist on having a judgment entered against the defendant, which can then be filed as a public record. In such a case, the defendant should insist that the plaintiff file a satisfaction of judgment to show that the defendant paid the judgment.

ATTORNEY'S FEES

If an offer is accepted in a case where either party is seeking recovery of attorney's fees, but the attorney's fees are specifically excluded from the offer, the offeree can apply to the court for attorney's fees after accepting the offer. That is, the collection/award of attorney's fees can be above and beyond the amount of the offer of judgment itself. See **Lee v. Ing**. This means that where the complaint seeks attorney's fees and the law allows it, counsel should be aware that such fees can be awarded after the offeree accepts an offer that specifically excludes attorney's fees. Likewise, in cases involving claims for attorney's fees, an offering defendant might want to specifically state that any offer made to the plaintiff includes attorney's fees.

SANCTIONS

If an offeree rejects an offer, or fails to accept it within the allowable time period, and then does not obtain a more favorable judgment at trial, the offeree must pay, as a sanction, twenty percent of the difference between the amount of the offer and the amount of the final judgment.

Practice Tip: More than one offer can be made during the course of litigation, so a defendant can start with a lower offer in the early stages of litigation and, if necessary, increase the offer (or lower it) as more information is learned in the discovery process. Offers of judgment are a useful tool in cases where defendant's liability is admitted or very likely. Beware, however, that if a plaintiff makes multiple rejected offers and the defendant fails to "beat the offer" with respect to any of them, sanctions will be calculated from the date of the first rejected offer. **Orosco v. Maricopa County Special Health Care Dist.**, 241 Ariz. 529, 390 P.3d 375 (Ct. App. 2017).

What constitutes a "more favorable" judgment? The offer is not simply compared to the jury's verdict, but is compared to the judgment entered by the court. This includes taxable court costs and attorney's fees incurred as of the offer date, per Rule 68(g)(2). See, e.g., **Bradshaw v. Jasso-Barajas**, 231 Ariz. 197, 291 P.3d 991 (Ct. App. 2013); **Hall v. Read Dev., Inc.**, 229 Ariz. 277, 274 P.3d 1211 (Ct. App. 2012); **Berry v. 352 E. Virginia, L.L.C.**, 228 Ariz. 9, 261 P.3d 784 (Ct. App. 2011). For example, assume a defendant offers \$50,000 to plaintiff. At trial, the jury returns a verdict for plaintiff for \$45,000. As the prevailing party, plaintiff is entitled to recover his taxable court costs pursuant to A.R.S. § 12-332, which the court determines are \$15,000. If the case also involves attorney's fees, the court would determine the plaintiff's reasonable attorney's fees and, if appropriate, add those into the final judgment. The offer is then compared to the combined amount of the jury verdict, plus those taxable costs and attorney's fees reasonably incurred as of the date the offer was made. If those combined amounts exceed the offer, then plaintiff has obtained a judgment more favorable than defendant's offer, and no Rule 68 sanctions are triggered.

Conversely, if the plaintiff makes an offer of judgment to defendant for \$60,000 and the jury returns a verdict for \$45,000, it does not necessarily mean that defendant "beat" plaintiff's offer. Since plaintiff is deemed to be the prevailing party, plaintiff is entitled to collect his taxable costs and, in some types of cases, his attorney's fees. If the combined value of the verdict, taxable costs and attorney's fees equals or exceeds \$60,000, then defendant has not obtained a more favorable judgment than plaintiff's offer. Defendant will be responsible for paying Rule 68 sanctions.

When comparing the offer to the judgment, courts will not consider "non-monetary terms" of the offer where no monetary value is ascribed to those terms. **Williams v. King**, 248 Ariz. 311, ¶¶ 34-35, 460 P.3d 303, 310 (Ct. App. 2020) (affirming trial court's refusal to consider offer to make real property improvements when comparing offer to the judgment where no dollar value was assigned to the additional terms).

In **Reyes v. Frank's Service and Trucking, LLC**, 235 Ariz. 605, 334 P.3d 1264 (Ct. App. 2014), the court held that "taxable costs" includes such things as the cost of taking depositions. Such costs include counsel's reasonable travel expenses getting to and from the deposition (regardless of whether the deposition is in-state or out-of-state), court reporter fees, translator fees, and transcript fees. They will also include the fees a party must pay the opposing expert for his deposition.

Practice Tip: What good does it do a defendant to make an offer of judgment if the plaintiff does not have the assets or money to pay Rule 68 sanctions? Rule 68 sanctions can be deducted from the judgment entered in plaintiff's favor (assuming the jury has awarded plaintiff something at trial). For this reason, an offer of judgment is a good tool to use in cases where Plaintiff will likely be awarded damages. Where defendant obtains a complete defense verdict, the Rule 68 sanctions can be incorporated into the court's final judgment, which the defendant can then record as a lien against plaintiff's property.

If you have questions regarding the information in this chapter, please contact the author.

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