

American Board of Trial Advocates™



Washington Chapter Newsletter September 2022

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PRESIDENT'S MESSAGE



An invite was sent recently for the upcoming ABOTA member event on September 20th at the Thompson Hotel to welcome and congratulate our new members and to visit and share stories amongst our established members. We look forward to seeing you there for free drinks and appetizers so please RSVP. If we are lucky, the event will be on the outdoor deck to enjoy the last of our good weather.

Sincerely,
Ketia

FREE CLE

The ABOTA Foundation is holding a free virtual CLE on September 14th, 2022 from 12:00 P.M. - 1:30 P.M. Central

Closing Statements

Learn from some of the best in the business. Presenters will talk about strategy and provide concrete skills and tips you can use at your next trial.

Presenters:

Charla G. Aldous, Dallas Chapter

Steven W. Quattlebaum, Arkansas Chapter

Moderator:

Peter Riley, Minnesota Chapter

Register at

https://us06web.zoom.us/webinar/register/WN_WVnctPp7ReeYcLIgbdrQyA

CIVIL TRIAL TIP OF THE MONTH



ABOTA Washington is partnering with King County Superior Court to provide a “Civil Trial Tip of the Month” by a designated superior court judge. This will help us improve our practices and also get to know the judges a little better.

This month’s tip is from King County Superior Court **Judge Matthew J. Segal.**

Matt Segal was appointed to the King County Superior Court in 2021. Before taking the bench, Matt was a founding partner of Pacifica Law Group. His practice focused on constitutional, appeals, and complex public policy litigation, counseling and dispute resolution for public and private clients. Prior to the founding of Pacifica, Matt was a partner at K&L Gates, and an associate at its predecessor firm Preston Gates & Ellis. Before entering private practice, Matt served as a judicial clerk for Justice Charles W. Johnson of the Washington State Supreme Court. Matt began his legal career as a law clerk for Rush, Hannula, Harkins & Kyler in Tacoma. Matt earned his J.D. from Seattle University School of Law, in 1999, graduating summa cum laude. He earned his B.A. in history from the University of California, Berkeley. Before he became a lawyer, Matt worked as a print and broadcast journalist, including filings and submissions for the Associated Press, A.P. Network News, ABC News, the Alaska Public Radio Network and Pacific Islands Monthly in Fiji. Matt and his wife moved to West Seattle 25 years ago and live there today with their daughter. When he is not in the courtroom, Matt enjoys spending time with his family, reading and collecting graphic novels, and exploring the outdoors including fishing, kayaking and hiking.

Tip: Offers of Judgement - CR 68

Offers of judgment can be an extremely helpful device in resolving a case. They are also often misunderstood and can yield unintended consequences if not properly implemented.

Offers of judgment are a special type of settlement offer governed entirely by court rule, CR 68 to be precise. “A CR 68 offer of judgment, however, is not a private settlement agreement; rather, in order to encourage settlement, the rule confers upon offerors certain ‘tactical advantages’ and, unlike a private settlement agreement, has implications for the offeree whether accepted or rejected...” *Washington Greensview Apartment Assocs. v. Travelers Prop. Cas. Co. of Am.*, 173 Wn. App. 663, 672, 295 P.3d 284 (2013). Because the terms of the rule control how an offer of judgment is made and accepted, and the ramifications of the offer and acceptance, CR 68 offers differ markedly in practice from informal offers of settlement. For example, with an informal offer of settlement, the offering party decides how and when the offer may be withdrawn. Commonly, the offering party will list a particular length of the time the offer will remain open (the famous “until close of business Friday” letter). Offers of judgment, however, must by the terms of the rule remain open for a fixed period of time, ten days. Following is a discussion of some of the key considerations and issues related to offers of judgment.

Who can offer? Any party “defending against a claim”. Usually this is the defendant, but it also includes the plaintiff with respect to any counter claim against them, or a third-party defendant.

When should an offer be made? By rule, the latest an offer may be extended is ten days before trial commences. Offers tend to be more valuable, however, when made earlier in the case. This is because “[i]f the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred *after the making of the offer.*” CR 68 (emphasis added). Moreover, if an offer is made “exclusive” of fees and costs, opening the possibility that the offeree can file a motion to recover fees and costs if the offer is accepted (see elaboration on this issue below), the amount of fees and costs will be less earlier in the case. Later in the case, filing an “exclusive” offer without knowledge of fees and costs incurred by the other side runs a substantial risk. Remember, you are also not limited to one offer – if you make an early offer that is not accepted, you can always make a new offer later.

Be precise as to all terms. The offeror is the master of the offer, but must also clearly state the terms of the offer. The Court will generally strictly construe the terms of the offer as written and not consider extrinsic evidence about the meaning of the offer. Are all parties included? Are all material terms stated precisely (this can complicate the apples to apples comparison). Are any key terms or caveats omitted when they could be stated expressly? And the big one...

Be sure you think through what costs and fees are included in your offer.

This, in the author’s opinion, is the biggest landmine in CR 68. The issue is whether your offer is “inclusive” of attorney’s fees and costs, or “exclusive”.

If an offer is accepted, “by virtue of the [resulting] entry of judgment, the offeree becomes the prevailing party as to all claims pending at the time of the offer. A prevailing party may be entitled to an award of attorney fees where such an award is authorized by statute, contract, or a recognized ground of equity. In the context of a CR 68 offer of judgment, whether the offeree, as the prevailing party, may be entitled to such an award—or, conversely, whether the offer of judgment precludes such an award—depends upon the language set forth in the offer of judgment itself.

Washington Greensview Apartment Assocs. v. Travelers Prop. Cas. Co. of Am., 173 Wn. App. 663, 671, 295 P.3d 284 (2013) (citations omitted)

When the offer of judgment reads that the offered amount includes all reasonable attorney fees and costs, the plaintiff may not recover reasonable attorney fees and costs, beyond the offered amount, even if a statute affords recovery for fees and costs.

Critchlow v. Dex Media W., Inc., 192 Wn. App. 710, 719, 368 P.3d 246 (2016). This is an “inclusive” offer.

In contrast, an “exclusive” offer either expressly omits fees and costs or fails to address them. In that case, the offeree can file the offer and seek fees and costs on top of the offered amount. Whether they get attorney’s fees as well as just statutory costs depends upon a fairly technical and arcane point. If the basis for recovery at issue (statute, contract, case law) defines attorney’s fees as a type of “cost”, then an offer including all “costs” would include attorney’s fees. If not, then an offer including all “costs”, if accepted, would not preclude a subsequent motion for fees. By way of example:

“Because attorney fees authorized by *Olympic Steamship [v. Centennial Insurance Company]*, 117 Wn.2d 37, 811 P.2d 673 (1991)] are not defined as costs, a CR 68 offeree seeking an award of attorney fees on that basis is entitled to such an award unless the offer of judgment unambiguously includes attorney fees. Here, Travelers' offer of judgment did not unambiguously include such fees. Accordingly, Greensview was entitled to an award of attorney fees in addition to the judgment amount set forth in the offer of judgment.”

Washington Greensview Apartment Assocs. v. Travelers Prop. Cas. Co. of Am., 173 Wn. App. 663, 682, 295 P.3d 284 (2013).

The key word in this case is “unambiguously”. Don’t leave any doubt about what you intend to include or exclude.

Not sure about fees incurred and considering an offer? Ask. The other side doesn’t have to tell you, but there is no harm in inquiring if you plan to make an offer, especially one that is “exclusive” and may therefore result in a fee claim post judgment if accepted. And if they won’t tell you, that alone tells you something....

When does an offer get “unveiled” to the Court? If an offer is made and accepted, the offeree files the offer and the Court enters it. The Court’s role is essentially ministerial here unless there is some issue, for example, with the timing or service of the offer. Otherwise “the rule imposes an obligation on the trial court to enter a judgment for the amount offered.” *Critchlow v. Dex Media W., Inc.*, 192 Wn. App. 710, 718, 368 P.3d 246, 250 (2016). If the offer is not accepted, it may never see the light of day. An unaccepted offer is not shown, and should not be shown, to the Court until after the case is resolved on the merits (e.g., by jury verdict or ruling of the Court); then the offer may be shown to the Court to determine who is the prevailing party entitled to fees and costs.

Properly advise your client.

Offers of judgment are a powerful and often underutilized tool. They help mitigate litigation risk and encourage settlement. But, be certain your client understands how an

offer works before one is made. For example, offers of judgment, if accepted, become public. The offeree files the judgment and it becomes an official court record showing the offeror as the judgment debtor. Some clients don't want this to happen, and are surprised to find what they thought was a confidential settlement offer has become a judgment against them. When it comes to settling a case, nobody wants to be surprised.

UPCOMING EVENTS

September 20th - Member Reception

Thompson Hotel | 110 Stewart St, Seattle

5PM - 8PM

FREE to attend

Appetizers and beverages provided

RSVP to Nicole at ABOTAWashington@gmail.com by September 16

November 10th - MIT

Washington Athletic Club

More details to follow

November 10th - Annual Meeting Dinner and Awards

Washington Athletic Club

More details to follow

MEMBERSHIP STATUS CHANGE DEADLINE

If you are planning to apply for Senior, Inactive, or Emeritus status for the 2023 dues cycle, **please submit your request to the Chapter no later than October 1, 2022.** Although we announced an earlier deadline by email, we still have time to process additional requests as long as they are received by Oct 1.

ABOTA requires your membership dues to be paid in full for the current year before considering your request. If your change of status application for 2023 is not received by October 1, 2022, it cannot be processed before the 2023 dues statements are run.

Please note that ABOTA membership classifications may not be the same as your state bar license classifications. For example, the ABOTA classification of "Senior" requires you to cease the practice of law, including mediation to qualify.

If you have any questions, or to submit your completed application, please email Nicole Battles at abotawashington@gmail.com by October 1, 2022.

[Senior/Inactive Application](#)

[Emeritus Application](#)

ABOTA - CIVIC LEARNING COUNCIL

CLC-ABOTA Scholarships

The Civic Learning Council-ABOTA Scholarship Grant program got up an running during the last month or so of the past school year. We awarded four scholarships in that limited period, and look forward to several more this fall. Grants were awarded for

- A teacher's attendance at the Constitutional Conversations and Civil Dialogue Summer Teacher Institute at the National Constitution Center in Philadelphia,
- The State We're In textbooks and supporting resources in an underserved school district in Western Washington,
- A student's attendance at the Youth and Government Conference on National Affairs held at the Blue Ridge Assembly in Black Mountain, North Carolina,
- An award to a teacher to help fund her students conferences with the school board and a field trip to city hall to discuss climate and curricula policies.

In addition, we have approved, but not yet funded, attendance of a small group of Mount Vernon teachers for Government Office of Indian Affairs training regarding relationships with the Swinomish Tribe. We are just waiting on the final logistical information regarding the training sessions to fund the grant.

With in-person classes getting started again, we anticipate a continuing need for financial assistance for encouraging civic education in Washington schools.