Strategies for Effective Use of Offers of Judgment

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Two years after the COVID-19 pandemic ground courts to a halt, courts are still managing the extraordinary backload of cases set for trial. But even before COVID, the judiciary recognized the need to incentivize settlements and proactively keep trial calendars moving. NRCP 68, which permits offers of judgment, embodies that spirit. By penalizing parties who refuse a more favorable offer than the result obtained at trial, NRCP 68 forces litigants to realistically assess the strengths and weaknesses of their cases.

Unlike other states, or federal court, NRCP 68's provisions equip plaintiffs with powerful tools to expediently resolve cases, or, if the offer is not taken, maximize recovery after a successful trial. Recent opinions from the Nevada Supreme Court holding that the award of the full amount of a contingency-fee agreement as an NRCP 68 penalty solidify the need for plaintiffs' counsel to consider and implement an effective offer of judgment strategy.

A critical part of that strategy is when the offer is served and what information an opponent has available when considering it. The prevailing offeror must satisfy the *Beattie* factors, which help guide the trial court's analysis as to whether awarding attorney fees is reasonable and justified under the circumstances. This article explores some effective techniques to implement to ensure the district court has everything it needs to find each of the *Beattie* factors in favor of your client.

Recent Case Law Clarifies the Strength of Offers of Judgment In 2018, the Court of Appeals of Nevada held attorneys representing clients under a contingency fee agreement need not submit hourly billing records in order to obtain an award of attorney fees based on contingency fee agreement after the attorney "beats" the offer of judgment by obtaining a verdict larger than the amount specified in the offer. *O'Connell v. Wynn*, 134 Nev. 550, 558 (Ct. App. 2018). However, the *O'Connell* court limited the recovery to "those fees earned post-offer." *Id.* at 562. Last November, in *Capriati Construction Corp., Inc. v. Yahyavi*, the Nevada Supreme Court clarified the "district court may award the ***entire contingency fee*** as post-offer attorney fees under NRCP 68 because the contingency fee does not vest until the client prevails." *Capriati Constr. Corp., Inc. v. Yahyavi*, 137 Nev. Adv. Op. 69 (2021) (emphasis added). Though nothing prohibited district courts from awarding contingent attorney's fees pursuant to Rule 68 prior to *O'Connell* and *Capriati*, the opinions confirm the potential benefit to personal injury clients is immense. When the other side foots the bill for your attorney fees, your client will recover substantially more funds to help pay medical bills, future medical care and whatever other comforts help bring their lives closer to normal.

Begin Satisfying the *Beattie* Factors Long Before Trial

The district court must consider the *Beattie* factors prior to awarding your client their full contingency fee under NRCP 68. They are: (1) whether the [offeree's] claim [or defense] was brought in good faith; (2) whether the [offeror's] offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the [offeree's] decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. *Beattie v.*


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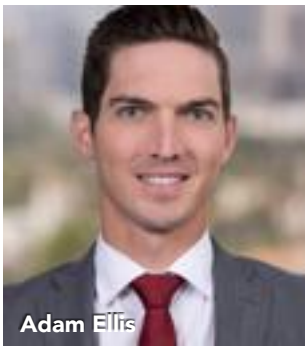
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Thomas, 99 Nev. 579, 588-89 (1983). "[T]he first three factors all relate to the parties' motives in making or rejecting the offer and continuing the litigation." *Frazier v. Drake*, 131 Nev. 632, 642 (2015). The fourth factor simply assesses the total amount of fees requested which, per *Capriati*, may be the entire amount specified in the contingency fee agreement.

The *Beattie* factors should not be viewed as imposing additional burdens on the party moving for attorney fees. Instead, consider them as a checklist for what steps you can take *early in your client's case* to lay a strong foundation for a successful post-trial motion for attorney fees and costs.

Consider the first *Beattie* factor: "whether the offeree's claim or defense was brought in good faith." If your first thought is that this factor is entirely out of your control because it relates to the substance of the other party's case, think again. Throughout litigation you can take various steps to allow the defendant to double-down on defenses they maintain without good faith, and ultimately use these instances as evidence in your post-trial motion for attorney fees. The timeline of *when* the defense re-asserts defenses in less than good faith, juxtaposed with the evidence in the case at that time, paints a bright picture as to the lack of good faith on the defendant's part. Useful points of comparison include: whether the defendants denied liability in their answer only to later concede fault; failure to admit what should be undisputed material facts in requests for admissions, forcing your client to retain experts to opine on issues the defendant later does not contest and whether the defense ultimately stipulates to or concedes issues it previously disputed. Comparing facts like these to the defendant's low settlement offers at each of these

stages tends to show they did not litigate their defenses in good faith, but instead needlessly complicated the litigation and increased the expense and effort required from the parties and the court.

Rather than just argue these facts in your post-trial motion for attorney fees, give the defendant multiple opportunities to do the right thing. Consider serving requests for admissions on the issue of liability when the facts support it. *See* NRCP 36(a)(1)(A) (allowing requests to admit regarding "the application of law to fact"). Contention interrogatories targeted to specific denials in a defendant's answer should also cause the defendant's counsel to re-assess their defenses, especially considering their client will have to verify their assertion of those defenses under oath. At various intervals, send correspondence spelling out the facts supporting your request to show the defendant the positions they are maintaining are unreasonable. And of course, this can also be accomplished in the text of the offer of judgment itself or in a demand letter served alongside the offer. Assuming the defendant does not accept the offer, each of these things will serve as a compelling exhibit to your post-trial motion for fees, demonstrating the defendant insisted on maintaining its defenses in bad faith.

For example, in a recent case we took to trial, the defendant served our client a glass of odorless, colorless cleaning solution mixed with beer. Our client suffered severe injuries from ingesting the solution. There was no legitimate basis to blame our client for his injuries: he had no control over what was served to him, no reason to suspect the liquid he was served as "beer" was anything but, and the defendant disciplined the responsible employee. Yet the defendant denied liability in multiple answers, and even blamed our client for his harms. In depositions of the defendant's employees, we established the defendant knew how serious the situation was from the minute our client drank the cleaning solution and that the incident was no fault of our client. With this testimony, we asked the defendant multiple times in writing to stipulate to liability. The defendant refused to do so until *four days before trial*. Then at trial, the defense attempted to take responsibility by arguing to the jury—and later to the

judge while opposing our motion for fees—that it was "obvious" the incident was its own fault. In other words, the defendant knew all along the incident was its fault but took the opposite position throughout litigation.

As the verdict exceeded both offers of judgment our client served years before trial, we moved for an award of attorney fees and costs. We described the timeline of events, the defendant's refusal to reconsider its defenses at various points despite the overwhelming evidence against it, and pointed out the defendant forced our client to hire a liability expert despite the defendant failing to even contest our expert's opinions. In finding this first *Beattie* factor in our client's favor, the district court considered our repeated, unanswered correspondence along with the circumstances of the incident, deposition testimony, and the (late) stipulation to liability as evidence the defendant did not defend the case in good faith.

The second *Beattie* factor asks "whether the [offeror's] offer of judgment was reasonable and in good faith in both its timing and amount." As the timing in which you serve an offer of judgment and the amount you specify in the offer are completely within your control, there are multiple strategies you can employ to ensure this factor weighs in your client's favor. You should serve your offer of judgment at a time when the defendant has had the opportunity to obtain sufficient information to reasonably assess your client's claims. If you are unsure whether the defendant has sufficient information, or if they claim not to, consider serving a 'safe-harbor' letter alongside your offer of judgment requiring the defendant to identify within a specified time the information they will need in order to reasonably assess your offer of judgment. If they fail to respond, they presumably have all the necessary information and tacitly concede the timing of the offer of judgment is reasonable. If they respond and request additional, *reasonable* information from your client, re-serve your offer of judgment *after* providing that information. But don't be fooled by illegitimate requests for information. Remember, information concerning liability is almost always exclusively within the defendant's control, or at least equally accessible by both parties. If important information is in possession of third parties, the defendant's failure to timely pursue the information is a product of their own inaction.

Ensuring the defendant has ample information can also help satisfy the second half of this factor—the reasonableness of the amount of the offer. If the defendant has access to your client's medical bills and is aware of your client's non-economic damages when you serve the offer of judgment (including if you provided this information to the defendant's insurance carrier prior to filing suit), the defendant can easily

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assess the amount of the offer of judgment. In any case, you should carefully consider the amount of your offer to ensure it is within a reasonable range of likely results considering your client's injuries, past and future medical specials, other economic damages, and the extent of past and future pain, suffering, and loss of enjoyment of life.

The third *Beattie* factor assesses "whether the [offeree's] decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith." When assessing this factor, the district court can consider a multitude of facts and circumstances centered on the defendant's motive in rejecting the offer and continuing litigating. Courts will often compare the amount of the (rejected) offer to the damages sought by the offeror. For example, the rejection of an offer in an amount similar to, or far less than the damages the offeror could reasonably be anticipated to recover may indicate the rejection was grossly unreasonable. This is especially true if the rejection occurs after key issues are established by summary judgment (e.g., a determined amount of past and future medical bills) or if the offeror received favorable rulings on motions *in limine* before serving the offer of judgment.

Along the same lines, a decision to reject the offer will be assessed in light of the information available to the offeree at the time. For example, rejection of an offer might be viewed to be more reasonable if the *offeror* withholds or unreasonably refuses to provide key evidence to the offeree. *See Trustees of Carpenters for S. Nevada Health & Welfare Tr. v. Better Bldg. Co.*, 101 Nev. 742, 746 (1985). This can be eliminated by serving the 'safe harbor' letter discussed previously. Doing so effectively shifts the burden to the defendant to show—long before responding to your post-trial motion for fees—that specific discovery was outstanding when they considered the offer of judgment.

Do not be afraid to flip the defendant's litigation strategy against them. For example, a party filing a motion for summary judgment is tacitly representing there are no additional material facts necessary to resolve the case. And failing to list outstanding discovery in a stipulation to extend deadlines (as required by EDCR 2.35(b)(2)) may indicate the information was never truly necessary. Judicial estoppel may preclude a defendant from later claiming they needed additional information to adequately assess the offer of judgment when they made contrary representations to the court. And a strong finding in your client's favor on this *Beattie* factor—especially if the court finds the offeree is acting in bad faith—can help

influence the court's analysis as to the other factors.

The fourth *Beattie* factor addresses whether the fees sought are reasonable and justified in amount. *Capriati* and *O'Connell* are extremely helpful when arguing in favor of this factor. Moreover, the entire analysis tends to implicate the analysis required under *Brunzell*, which assesses whether the fee sought is reasonable. *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345 (1969). Strategies to satisfy the *Brunzell* factors are best reserved for a discussion in another article, but are important as the district court must conduct a *Brunzell* analysis any time it awards attorney's fees.[1] Nevertheless, do not be shy when arguing the *Brunzell* factors—if you've made it that far, you are certainly worthy of the attorney's fees you are requesting!

Remember—start early. The strategies discussed in this article should be employed long before you request an award of contingent attorney's fees after trial. An award of attorney's fees after beating a Rule 68 offer of judgment can be significant; make sure you put your client in the best possible position to recover it.

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1 The *Brunzell* factors are (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived. *Brunzell*, 85 Nev. at 349