

Using an Offer of Judgment to Your Advantage at a Divorce Trial

By Jason P. Stoffel, Esq. and the Honorable Bill Henderson

The astute practitioner should be aware of rules and procedure that can simplify the divorce process and achieve client goals, and be mindful that settlement should be encouraged at all stages of the litigation. This article will focus on the effective use of an offer of judgment (“OOJ”) at a divorce trial.

After the initial filings and the early case conference and case management conference, one should know the “value” of the case and the “walk-away” number to resolve the litigation. In other words, why spend dollars to chase dimes?

An OOJ is helpful in family law cases to encourage settlement after some basic discovery is done on a case. The rules on an OOJ is found in Rule 68 of the Nevada Rules of Civil Procedure and NRS 125.141.

Basically, the idea is to put in writing at least ten days before the divorce trial (21 days for general civil litigation) what you believe the divorce settlement should be. This is served onto opposing counsel/opposing party (not filed with the court).

If the result obtained at trial is less favorable to the party that rejected the offer, then the court can consider the OOJ. Most courts do not want to see the actual OOJ that was made but it is a good idea to ask the court for permission to file the OOJ after the trial date and then submit it with the memo of fees/costs to maximize your client’s recovery and hopefully get an award of attorney’s fees.

NRS 125.141(5)(e) is on point here as a factor con-
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sidered by the court when taking the appropriate action. In summary, the family court encourages settlement during litigation and the conduct of the parties and counsel can be viewed with scrutiny to see who caused the case not to settle and incur more litigation fees.

However, the rules do indicate in NRS 125.141(6) that this litigation tool to encourage settlement does not apply in a custody case or a child support/spousal support case. Most importantly, if an offer includes a support or custody proposal, the entire offer is deemed void in its entirety. While this law has been on the books since 1999, all too often an attorney should “know better” and fail to read the entire statute addressing this.

An OOJ, although rarely used because so many cases involve custody litigation and the financial support of another, should be strongly considered to encourage settlement and minimize legal fees.

At trial, use the time you have wisely. Sometimes a lengthy opening statement is not the best use of time. Know your audience. Know your client goals. Make evidentiary objections as needed.

Your closing statement summarizes your case and what the evidence supports. Remind the judge that there was an OOJ made as well and that it is your belief that the offer should have been accepted to avoid a costly and lengthy trial.

Hopefully an OOJ was made. If it was not accepted, the court will want to see billing statements of counsel and the filed version of the OOJ. The court can make an award of attorney’s fees in all appropriate situations.

The final takeaway from this article is to stress the importance of being prepared, walking the court through the theory of the case, and expecting an outcome that has been briefed and that the evidence supports at the time of trial. Use an OOJ as needed to be an effective advocate.

Observations from Judge Henderson

A few more observations on the use of OOJs in family law cases might be helpful. One obvious question that springs to mind is why is an OOJ still a relatively rare occurrence even though they have now been authorized by statute for several years? The most obvious explanation for this is that an OOJ is not appropriate in cases that address matters such as custody, child support, and alimony.

Therefore, if a case includes custodial issues and child support issues (and the majority of cases do), and/or also includes an alimony issue (which a large percentage of cases do), and since an OOJ is precluded in those areas, practitioners likely believe there is simply no reason to bother with an OOJ. This raises the issue of “globularity” and the dynamic that an OOJ is pointless unless it can embrace all issues and encompass a proposed global resolution. No global resolution can be proposed if some of the main issues in a case, such as child custody, child support, and alimony, are not appropriate to include in an OOJ.

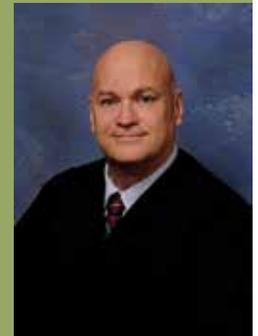
But in family law cases, even if a party submits an OOJ on some financial issue where it is permissible, the OOJ will have no effect once it becomes apparent that critical issues, such as custody, child support, and alimony, were not included in the OOJ because they could not be included. This is where globularity comes into play. In family law cases, a party cannot effectively cherry pick out certain issues on which to submit an OOJ, if globularity cannot possibly be established, as the critical issues mentioned were not included because it is not permissible to include them.

As a result, the tool of an OOJ is seldom used in these cases. By taking this across-the-board view, attorneys are missing a potential golden opportunity, albeit an opportunity which is only available in a relatively small and narrow niche of cases. An example is helpful. Let’s say the parties actually have a case where



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there are no children and no alimony issues.

Let's also say that the few remaining financial issues are very limited and are appropriate for the OOJ procedure. With an OOJ on these remaining issues, if the OOJ is accepted, globularity can be established, as the whole case is resolved once those two issues are resolved. If a practitioner has a case that is that clean and direct, and there is only one, or only a few major assets, and each lends themselves appropriately to an OOJ procedure, then an OOJ can effectively be used.

Let's say the case revolves around two major assets, both of which are free and clear with no encumbrances. If an award of those two assets establishes globularity and resolves the entire case, it can be appropriate to submit an OOJ indicating that if your client is awarded both assets that he or she will pay the opposing side \$80,000 for Asset A and \$125,000 for Asset B.

But we seldom see this, even in cases that are that direct and can be completely resolved with the rulings as to a remaining asset or two. In such instances, attorneys should give serious thought to this OOJ procedure. **G**



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