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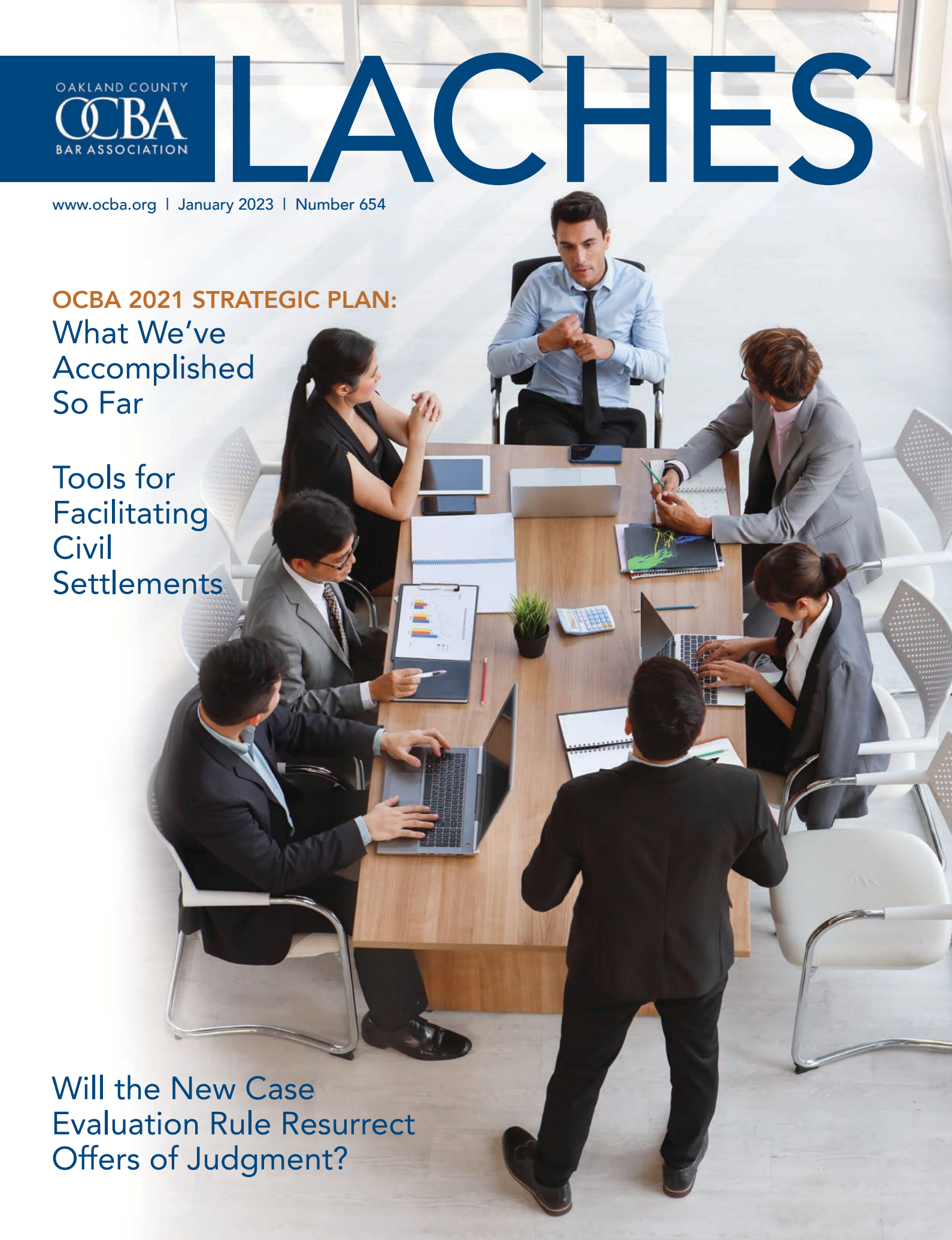

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Tools for Facilitating Civil Settlements

Will the New Case Evaluation Rule Resurrect Offers of Judgment?

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Will the New Case Evaluation Rule Resurrect Offers of Judgment?

By Elizabeth A. Favaro

Because Michigan follows the "American rule," where litigants pay their own way unless costs or attorney fees are authorized by statute or court rule,[1] case evaluation has historically been a key litigation tool that creates risk for the opposing party. As the Michigan Supreme Court once said, the "liability for costs" provision of the prior case evaluation rule[2] "exemplifies the American rule by expressly authorizing the recovery of attorney fees and costs as case evaluation sanctions."[3] Until recently, Michigan's offer of judgment rule, MCR 2.405, was not an option, as it generally did not allow courts to award costs or attorney fees in cases submitted to Michigan's case evaluation process.[4] But now that Michigan's case evaluation rule has changed[5] to eliminate the sanctions available under former MCR 2.403(O), and the prohibition on offers of judgment in cases submitted to case evaluation has been removed, it raises the question — will practitioners now use offers of judgment to force settlements and potentially obtain costs and attorney fees against opponents who take unreasonable settlement positions? Possibly. But before going down this road, practitioners should be mindful of the rule's picky requirements, the ways in which offer of judgment sanctions may be limited, and a couple of pitfalls into which an unwary practitioner should be careful not to fall.

OFFERS OF JUDGMENT: REQUIREMENTS

Michigan's offer of judgment rule has been around since 1985 — it was adopted at the same time as the case evaluation rule.[6] The federal offer of judgment rule is much older, having been adopted more than 85 years ago. The stated purpose of both the Michigan rule and its federal counterpart is to encourage settlement and deter protracted litigation.[7] The rules do this, in part, through the threat of an award of costs and attorney fees for litigants who take unreasonable settlement positions.

Michigan's rule provides for a written offer to an adverse party of a willingness to stipulate to entry of judgment in a sum certain, which is deemed to include all costs and interest then accrued.[8] To accept, the receiving party must do so in writing within 21 days of the offer, and file the offer, the notice of acceptance, and proof of service of the notice with the court.[9] Once all of that happens, the court "shall enter a judgment according to the terms of the stipulation."[10] If an offer is not responded to at all, or it is rejected in writing, then the case does not settle at that time.[11]

The rule is designed to create risk for the rejecting party. Costs are payable as follows:

> (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror's actual costs incurred in the prosecution or defense of the action.
>
> (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree's actual costs incurred in the prosecution or defense of the action.[12]

In this way, an offer of judgment is similar to the former case evaluation rule in that both rules allowed for the recovery of certain costs and attorney fees as a penalty for rejecting a value placed on the case. It is for this reason that the prior offer of judgment rule did not apply in cases submitted to case evaluation.[13]

THE 'INTEREST OF JUSTICE' EXCEPTION

The offer of judgment rule grants trial courts more discretion in making awards than the prior case evaluation award did, particularly when it comes to attorney fees. The difference between the rules in this regard is in their treatment of "actual costs." Both rules define "actual costs" to include certain costs and reasonable attorney fees.[14] Under the case evaluation rule, a rejecting party "must" pay actual costs — consisting of both costs and a reasonable attorney fee — unless the verdict is more favorable to the rejecting party than the case evaluation.[15] But the offer of judgment rule separates attorney fees from costs and gives the trial court the power to refuse to award attorney fees: "The court may, in the interest of justice, refuse to award an attorney fee under this rule."[16] This "interest of justice" exception applies when, for instance, the offer is "token or de minimis in the context of the case," the case involves "an issue of first impression or an issue of public interest," or any other reason the court deems to be in the interest of justice.[17]

Although the "interest of justice" exception appears to be rarely applied,[18] the most common application is where the court suspects a party made an offer of judgment for gamesmanship purposes, rather than as a sincere effort to negotiate, such as when a defendant "make[s] a de minim[i]s offer of judgment early in a case in the hopes of tacking attorney fees to costs if successful at trial."[19]

One way courts expose such gamesmanship is by comparing the offer of judgment to a prior case evaluation award. For instance, in *Nostrant v. Chez Ami Inc.*, the case evaluation award was $5,000, which the plaintiff accepted and the defendant rejected. Subsequently, the defendant made an offer of judgment in the amount of $1,500, which the plaintiff rejected. The jury rendered a no cause for action, and the trial court awarded only taxable costs, not attorney fees, finding that the plaintiff's rejection of the defendant's offer of judgment was reasonable because the offer was substantially less than the case evaluation award. The Court of Appeals agreed.[20] A similar circumstance existed in *Stitt v. Holland Abundant Life Fellowship*, in which the defendant rejected a $160,000 mediation evaluation and subsequently made an offer of judgment of only $25,000. The trial

court awarded offer of judgment sanctions, but the Court of Appeals reversed, explaining that the "gamesmanship that occurred is precisely the type that the amended offer of judgment rule was intended to remedy."[21]

The methodology approved by the Court of Appeals in *Nostrant* and used in *Stitt* — analyzing an offer of judgment against a prior case evaluation award — illustrates why, even without the "liability for costs" provision, there remains value in the case evaluation process: It provides "an apparently meaningful understanding of both the merits and potential value of [a] claim."[22]

PITFALLS

One confounding element of the federal offer of judgment rule is that costs may not be awarded to prevailing defendants.[23] This is not true of Michigan's offer of judgment rule; prevailing defendants may receive offer of judgment costs following a defense verdict.[24] And although at one time a defendant was precluded from obtaining costs when it was the prevailing party following a summary disposition motion,[25] defendants may now also recover costs following a successful summary disposition motion, since under MCR 2.405(A)(4), the term "verdict" is now defined to include "a judgment entered as a result of a ruling on a motion after rejection of the offer of judgment."[26]

So what are the pitfalls? One is dismissal orders that do not result in final judgments. As one defendant learned the hard way, a dismissal with prejudice does not count as a "verdict" for purposes of the offer of judgment rule if the case remains open.[27] Thus, in cases where — for instance — a conditional dismissal order is entered due to an unresolved issue despite the completion of a trial, offer of judgment sanctions will not be available.[28]

Another potential pitfall is timing, particularly if there is a counteroffer. MCR 2.405(C)(2) and (3) allow counteroffers as well as later offers following the rejection of a prior offer.[29] Thus, unlike the one-time event of case evaluation where the award is *the* number, the initial offer is subject to change if the receiving party wishes to make a counteroffer. To obtain costs, offers must be served 42 days before trial, unless there is a counteroffer — the counteroffer must be made 28 days or more before trial.[30] So, if an offer of judgment is made 42 or more days before trial, there is still time for a counteroffer to be made, and if one is made on day 28, the initial offeror does not have sufficient time to counter. The rule's timing requirements can put the initial offeror at risk of having to accept an unfavorable offer made by the initial offeree or paying the other side's costs. In short: Don't start a fight you're not willing to finish.

CONCLUSION

While there is some appeal to the offer of judgment rule, its use does not come without peril. Know the rule's requirements, make sure the rule is used in a serious effort to resolve the case, and watch for pitfalls like the ones identified above (there may be others, too!). If you are a cautious practitioner, perhaps it's best to wait for another "guinea pig" to offer a test case up to the appellate courts to address offers of judgment following the abolition of the sanctions previously available under the case evaluation rule.

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Footnotes:

1. Michigan codified the "American rule" in MCL 600.2405(6), which provides that among the items that may be taxed and awarded as costs are "[a]ny attorney fees authorized by statute or court rule." Of course, parties have the freedom to contract for fee-shifting provisions regardless of any statute or court rule. *ABCS Troy, LLC v. Loancraft, LLC*, 337 Mich. App. 125, 132 (2021) ("[T]he American rule is not an absolute one, and parties can contract around it").
2. See former MCR 2.403(O)(6).
3. *Haliw v. City of Sterling Heights*, 471 Mich. 700, 707 (2005).
4. There was an exception for nonunanimous case evaluation awards. See former MCR 2.405(E).
5. The Michigan Supreme Court announced the changes on December 2, 2021, and they took effect on January 1, 2022.
6. Case evaluation evolved out of the creation of the Mediation Tribunal Association (MTA). The MTA was created on November 16, 1979, to "act as an aid[e] to the … Court and the Federal Courts … to provide mediation panels to hear lawsuits for the purpose of settlement and thereby remove the cases from further litigation in the courts." In 1980, the Michigan Supreme Court adopted GCR 1963, 316, to provide for statewide mediation programs. According to the staff comment to the 1985 adoption of MCR 2.403, it "corresponds to GCR 1963, 316."
7. See *Simcor Construction Inc. v. Trupp*, 322 Mich. App. 508, 514-515 (2018); *Delta Air Lines Inc. v. August*, 450 U.S. 346, 352 (1981).
8. MCR 2.405(A)(1); MCR 2.405(B).
9. MCR 2.405(C)(1).
10. *Id.*
11. MCR 2.405(C)(2).
12. MCR 2.405(D).
13. See former MCR 2.405(E).
14. See former MCR 2.403(O)(6) (defining "actual costs" to include taxable costs in a civil action and a reasonable attorney fee); MCR 2.405(A)(6).
15. See former MCR 2.403(O)(1).
16. MCR 2.405(D)(3).
17. MCR 2.405(D)(3)(i)-(ii).
18. Michigan appellate courts have referred to the "interest of justice" exception as "exceptional," "unusual," and not to be applied so broadly as to swallow the rule. E.g., *Luidens v. 63rd District Court*, 219 Mich. App. 24, 35 (1996).
19. *Stitt v. Holland Abundant Life Fellowship*, 243 Mich. App. 461, 476 (2000).
20. *Nostrant*, 207 Mich. App. at 340.
21. 243 Mich. App. at 474.
22. *Parkhurst Homes Inc. v. McLaughlin*, 187 Mich. App. 357, 364-365 (1991).
23. *Danese v. City of Roseville*, 757 F Supp 827, 831 (ED Mich. 1991) ("The provisions of Rule 68 do not refer to judgments obtained by the defendant").
24. E.g., *Sanders v. Monical Mach. Co.*, 163 Mich. App. 689, 690 (1987).
25. *Freeman v. Consumers Power Co.*, 437 Mich. 514, 519 (1991).
26. See *Burks v. Indep. Bank*, Case No. 341008, 2019 WL 488792, at *3 (Mich. App. Feb. 7, 2019).
27. *Masias v. North*, Case No. 357294, 2022 WL 4587384, at *2-3 (Mich. App. Sept. 29, 2022) ("[W]e conclude that the April 5, 2021, order of voluntary dismissal did not meet the requirements of a 'verdict' under MCR 2.405(A)(4). Though the order did dismiss plaintiffs' adverse possession claim with prejudice, the trial court explicitly left the case open because the underlying property dispute remained unresolved. … [The] order [was] of conditional dismissal and was certainly *not* a 'final determination of the rights and obligations of the parties'") (emphasis in original, citation omitted).
28. *Id.*
29. MCR 2.405(C)(2) and (3).
30. MCR 2.405(B) and (D)(2).