STATE OF MINNESOTA

IN SUPREME COURT

C6-84-2134

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE

IT IS HEREBY ORDERED that a hearing be held before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 17, 1999 at 1:30 p.m., to consider the recommendations of the Supreme Court Advisory Committee on the Rules of Civil Procedure to amend the rules. A copy of the committee's report containing the proposed changes is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 10, 1999, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the Clerk of the Appellate Courts together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before November 10, 1999.

Dated: September 24, 1999

BY THE COURT:

Kathleen A. Blatz
Chief Justice

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NICOLE R. MEIXNER

Also offices in Owatonna

November 4, 1999

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Hearing to Consider Proposed Amendments to the Rules of Civil Procedure

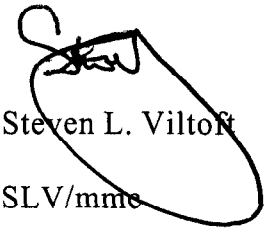
Dear Mr. Grittner:

Pursuant to the Order of Chief Justice Kathleen Blatz of September 24, 1999, I am hereby requesting permission to make an oral presentation at the hearing to consider Amendments to the Rules of Civil Procedure scheduled for November 17, 1999, commencing at 1:30 p.m.

I am attaching hereto a Proposed Amendment to Rule 68 of the Minnesota Rules of Civil Procedure. I am also attaching supportive letters from four attorneys who are heavily engaged in civil mediation in this jurisdiction: Gene Bradt, Jim Dunn, William D. Foster and Helen Preddy. All four of these attorneys have granted me permission to submit these supportive documents to the Court.

Thank you very much for your attention to the foregoing.

Respectfully submitted,



Steven L. Viltoft

SLV/mme

Enclosure

PROPOSED AMENDMENT TO MRCP RULE 68

"At any time prior to 10 days before the trial begins, any party may serve upon an adverse party an offer to allow judgment to be entered to the effect specified in the offer or to pay or accept a specified sum of money, with costs and disbursements then accrued, either as to the claim or the offering party against the adverse party or as to the claim of the adverse party against the offering party. Acceptance of this offer shall be made by service of written notice of acceptance within 10 days after service of the offer. If the offer is not accepted with the 10-day period, it is deemed withdrawn. During the 10-day period the offer is irrevocable. If the offer is accepted, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and thereupon the court administrator shall enter judgment. An offer not accepted is not admissible, except in a proceeding to determine costs and disbursements. If the judgment finally entered is not more favorable to the offeree than the offer, the offeree must pay the offeror's costs and disbursements and is not the prevailing party and may not tax the offeree's costs and disbursements. The fact that an offer is made but not accepted does not preclude a subsequent offer."

HANSEN, DORDELL, BRADT, ODLAUG & BRADT

PROFESSIONAL LIMITED LIABILITY PARTNERSHIP

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DAVID J. ODLAUG
WILLIAM M. BRADT
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October 28, 1999

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Ave
St Paul MN 55155

Re: Written Statements Concerning Proposed Amendments to Rules of Civil Procedure

Dear Mr. Grittner:

I am writing with respect to the Advisory Committee's recommendations concerning the Rules of Civil Procedure. I am specifically referencing the Offer of Judgment under Rule 68.

I have been in practice since 1963, concentrating my practice in the area of civil litigation, representing both plaintiffs and defendants.

In the early 90s, I began offering my services as a mediator and/or arbitrator and am currently engaged in that area of practice 100% of my time.

Both in the trial practice and ADR, I always felt that Rule 68, as most lawyers interpreted it, was a very useful tool. While it was most often utilized by defendants, it was available to both sides.

It was particularly useful in ADR. Many plaintiffs, with very questionable cases but with attorneys who were willing to underwrite the expense of their litigation, were suddenly awakened to the fact that, if unsuccessful, they could be looking at a judgment for their opponents' costs, which their attorney was not willing to underwrite.

Under the current interpretation of Rule 68 (Borchert v. Maloney, 581 N.W.2d 833 (Minn. 1998), there is certainly less incentive for a party to make an Offer of Judgment and definitely less risk in rejecting the offer.

As you know, in some states (Wisconsin, for example) if a party does not exceed the offer, double costs can be awarded. While I do not advocate that, it does show that the courts consider the Offer of Judgment as playing an important role in the early resolution of litigation.

I would, therefore, endorse an amendment to the Rule which would make it clear that an offeree who does not obtain a judgment more favorable than the Offer of Judgment, is not the prevailing party and may not tax costs, but must pay the offeror's costs.

I believe that such an amendment would clarify what, in my opinion, has always been the intent of Rule 68.

Yours very truly,

Gene P. Bradt

GPB:gl

Gene P. Bradt

The Law Offices of

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October 6, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Written statement concerning proposed amendments to the Rules of Civil Procedure.

Dear Mr. Grittner:

I read, in the October 4, 1999 Appellate Courts edition of the Minnesota Lawyer, the summary of the advisory committee's recommendations concerning the Rules of Civil Procedure. I would like to make a specific comment with regard to the recommendation referring to the Offer of Judgment under Rule 68.

I have been practicing since 1974. I commenced my practice with the litigation firm of Robins Kaplan Miller & Ciresi and after I left the firm in 1976 continued as a trial lawyer practicing exclusively in the civil trial area. In the early 1990's I began to devote more and more of my practice, upon request of other lawyers, to serving as an ADR neutral. Finally in 1996 I made the transition to doing ADR probably 85%-90% of my time. I still do defense work for Minnesota Mining & Manufacturing, serve on the Jury Instruction Advisory Committee, appear as an expert witness in insurance matters and still do a smattering of plaintiff's work.

My comments concerning the recommendations on Rule 68 have to do with clarifying the rule in light of the Borchert decision (Borchert v. Maloney, 581 NW2d 833 (Minn. 1998).

In my practice as a defense lawyer and also as a plaintiff's lawyer, I had always understood the rule, as everyone else did, to mean that the offeree would absorb the offeree's own costs and also pay the offeror's costs in the event of a verdict which came in at less than the amount of the offer. Justice Paige's decision makes reference to the federal rule, which simply says that "if the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must

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Member of the Board of National Trial Advocacy
Also Admitted in Wisconsin
Approved ADR Neutral

pay the costs incurred after the making of the offer". This taken together with federal statutory law made it clear, in Justice Paige's opinion, that the offeree would bear its own costs and also pay the offeror's costs. Our rule is more vague and the teaching of Borchert, in my opinion, was to make sure that Rule 68 is clarified to conform with the federal rule.

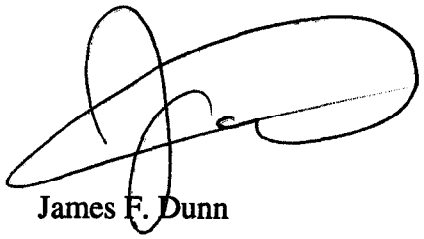
I would make a recommendation that our Rule 68 go even further in clarifying the conflict between the rule of civil procedure and the statute, ch. 549. I would suggest that the rule clarify that, if the judgment finally entered is not more favorable to the offeree, the offeree must pay the offeror's costs and disbursements and that the offeree not be allowed to tax costs against the offeror. There are several different ways of handling this so that there isn't a conflict between the Supreme Court's rule making authority and the legislature's authority to pass legislation on the issue. This could be done by way of stating that the offeree, under those circumstances, is not the "prevailing party" or that the offeree simply absorbs its/his/her own costs and pays the offeror's costs.

The Offer Settlement or Judgment under Rule 68 was a tremendously helpful tool for both sides in the resolution of cases in ADR. It is a risk and cost-shifting tool, which places a premium on the defendant making a reasonable offer as soon in the litigation as possible thereby shifting the burden to the plaintiff. If the goal is earlier settlements, even before ADR, this will be accomplished if the rule is clarified as I suggested.

I thought it would be helpful for you to hear from a lawyer who's practiced trial law for his entire career and is also served as an ADR neutral, at least in the last two or three years probably in excess of 200 times per year.

Thanks.

Sincerely,



James F. Dunn

JFD/bjm

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WM. D. FOSTER
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NOV 04 1999

November 3, 1999

Mr. Steven L. Viltoft, Esq.
LaBore, Giuliani, Cosgriff & Viltoft, Ltd.
P.O. Box 70
Hopkins, MN 55343-0070

Re: Rule 68

Dear Mr. Viltoft:

Thank you for your request to submit my comments regarding the current interpretation of Rule 68.

As you know, I work full-time as a mediator/arbitrator, conducting over 300 hearings per year. Since the Supreme Court's ruling in Borchert v. Maloney, 581N.W.2d 838 (Minn.1998), the opportunity for mediators to impress upon litigants, particularly plaintiffs, the financial risks associated with unsuccessful litigation, has been significantly frustrated. The current interpretation given to a joint reading of Minn. Stat. 549 and Rule 68, pursuant to Borchert, means that plaintiffs only face the risk of absorbing the court costs of their opponents in the face of a zero verdict. This has limited the motivation of litigants to focus on the potential effects of a negative outcome.

Plaintiffs, particularly in tort cases, are the least sophisticated participants in the litigation process. As a mediator, the loss of any tool that assists me in causing litigants to re-evaluate their often unreasonable expectations is a significant loss indeed.

Thank you for the opportunity to comment on this matter.

Very truly yours,

William D. Foster

WDF/lmb

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Helen Preddy, Esq.
PRESIDENT

NOV 05 1999

Thursday, November 4, 1999

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Written statement concerning proposed amendments to the Rules of Civil Procedure.

Dear Mr. Grittner,

I am writing to voice my opinion in an effort to assist the Advisory Committee in making recommendations concerning the Rules of Civil Procedure regarding the Offer of Judgment under Rule 68.

I have been involved in the area of ADR since 1988 as an administrator of a Conflict Resolution agency and as a mediator.

I have found Rule 68 to be most useful in my experience as a mediator. It is usually at the time of a mediation that most plaintiffs learn of the concept of an Offer of Judgment. Before Borchert they learned that if they should be unsuccessful in exceeding the Offer of Judgment, they could still "win" their case but be responsible for the defense costs, thereby lowering the actual amount which they could recover. Further, if they lost their case, they could face the prospect of having to pay the defense costs out of their own pockets. This fact enabled the parties to look at their cases with a new clarity and responsibility before they decided to reject the offer.

Under the Borchert v. Maloney interpretation of Rule 68, the parties involved have less incentive to take the offer seriously and have a lower risk in rejecting the offer.

I support an amendment to the Rule which would clarify that an offeree who does not obtain a judgment more favorable that the Offer of Judgment is not the prevailing party and should not be allowed to tax costs, but must pay the other party's costs.

Since the Offer of Judgment under Rule 68 was a most helpful method in assisting both plaintiffs and defendants in reaching a decision regarding the settlement of their cases, I would support a proposal which puts some "teeth" back into the Rule 68 Offer of Judgment and gives both sides something to consider before they reject the Offers of Settlement and Judgment which are presented to them. This would be helpful to me as a mediator and to the other mediators with whom I work.

Thank you for your consideration of this matter.

Sincerely,

Helen B. Preddy
President
USA&M of Minnesota, Inc.,

JOHN R. WYLDE

L A W Y E R

Calhoun Square, Suite 309B
3001 Hennepin Avenue South
Minneapolis, Minnesota 55408
Telephone (612) 822-8616
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of Counsel:
Tore Simonsen

October 7, 1999

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

RE: Order for Hearing to Consider Proposed Amendments to the Rules of Criminal Procedure

Dear Clerk Grittner:

I would like the opportunity to speak in opposition to the proposed rule change giving prosecuting attorneys the right (if not the necessity to deliver a final argument in criminal cases). I should like to make an oral presentation which would take approximately three to five minutes.

If written submissions are necessary, I would appreciate being advised and I shall do so.

Yours truly,

J.R. Wylde

John R. Wylde

JRW:wal

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October 21, 1999

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155-6102

Dear Mr. Grittner:

Enclosed are twelve copies of this letter, submitted pursuant to the September 24, 1999, Order of Chief Justice Kathleen A. Blatz, inviting comment of all persons on the proposed amendments to the Rules of Civil Procedure. I do not wish to make an oral presentation and submit this statement pursuant to Paragraph No. 1 of the Chief Justice's Order.

My only comments relate to the proposed amendments to Minn. R. Civ. P. 26.05 regarding supplementation of discovery responses. I am opposed to the changes being suggested for a number of reasons.

1. I do not believe the current version is in need of amendment. In my experience, the rule works well--attorneys in Northern Minnesota routinely present a request for supplementation of discovery responses near the end of the discovery period, as both sides are preparing for trial. The additional information is then provided, perhaps some additional discovery is done with regard to the supplementation, and the parties proceed to trial. It seems that practice would end with the elimination of subdivision (c).

2. I have always appreciated the fact that Rule 26.05(a) requires automatic supplementation concerning both fact witnesses and expert witnesses. Assuming the witnesses are identified when they become known, I have found that all necessary discovery can be done. Indeed, that provision, in my opinion, helps eliminate unwanted surprises when it comes to the time of trial. I believe deleting subdivision (a) without providing some sort of substitute will complicate matters for both lawyers and trial judges.

3. I would be against the amendment of former subdivision (b) to the extent that a duty to amend a prior response is not triggered unless "the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." This presents several problems:

    a. It makes the supplementation process more subjective, since it appears to be a matter within the judgment of the supplementing party whether or not the information has been "made known" in some way to their opponent. This seems likely to result in some exasperating arguments about what was made known to whom, and when.

b. I would prefer to keep the requirement of a formal supplementary response to, for example, an interrogatory answer because it is often useful to confront a party on cross-examination with his or her own signature on both the original and the supplementary response in cases where there seems to be a conflict between the two. That opportunity would be lost if parties can supplement by, for example, a phone call between attorneys, which seems to be allowed under the proposed amendment. Parties often deny that they know the reasons for what their attorneys have or have not done but cannot gainsay answers they themselves have signed.

c. I believe parties and courts would be better served by an objective standard that places a burden on parties to update or supplement their discovery responses whenever new or additional information becomes available that has some effect on the response previously provided.

d. The proposed amendments also narrow the scope of the duty to supplement to interrogatories, requests for production of documents, and requests for admission. Regardless of the rule chosen, I would advocate for a supplementation rule applicable to all discovery.

4. The reason provided in the Advisory Committee comments for this amendment is to conform the state standard with that which exists in the federal courts. While I typically would agree that uniformity with federal practice is a good thing, in this case, I do not. The reason is that the state and federal courts take a very different approach to the consequences of a failure to supplement. In state court, Supreme Court decisions such as *Dennie v. Metropolitan Medical Center*, 387 N.W.2d 401 (Minn. 1986), establish that exclusion of witnesses or evidence for failure to disclose information is difficult to obtain anytime the trial date could be continued. In the federal courts, however, it is my experience that discovery deadlines are strictly adhered to, and the courts routinely exclude tardy information under their inherent power to control the progress of a civil case and that power granted under Rule 16 of the Federal Rules of Civil Procedure. Because the federal approach is so different from that used by the state courts, I believe it would be a mistake to conform our rule to the federal rule.

Thank you for providing me with this opportunity to present my comments.

Sincerely yours,

Eric D. Hylden

EDH:k

OFFICE OF
APPELLATE COURTS

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FILED

To our Honorable Supreme Court Judges,

I am writing on behalf of our family. We are aware that you are considering changing the law which pertains to: "THE REBUTTAL DURING CLOSING ARGUMENTS IN OUR STATE'S COURT." We respectfully submit this "synopsis" of our own personal experience to you as you consider this matter, and we hope it will make a difference, because we feel very strongly that the law should be changed.

Amongst the many faces I'm sure you've seen in your years on the bench, I'm sure you can recall that special child or special family whose innocence was taken away through the tragic events of a crime.

Please read our story and remember our family. Our family is amongst those that have experienced the pain of crime. Remember our daughter; our brave & beautiful Eleven-year-old Brianna. You'll see that a guilty man was set free. However, with the option of rebuttal, we believe that the outcome of our case could have very easily been different.

THE FACTS OF OUR CASE:

* 7APR99 at approximately 12:45 AM, a stranger breaks into our house, took our daughter Brianna from her bed, attempted to take her out of our house. When Brianna resisted, he threatened to "shoot" her parents. He then took her to another upstairs room (the bathroom) where he began to fondle her. Brianna screamed. Brianna's screams awoke her [redacted] Dad and I who were downstairs. The man ran down the stairs, and my husband chased him out our door and through the streets of Northeast Minneapolis.

* Meanwhile I called 911. Brianna describes a "black man" with a black coat with patches on the front. "He smells like beer."

* I could recall the back of the jacket – it had a word with the letters "A," "V," and "X." He was an African-American male.

* Meanwhile, while chasing the intruder, my husband loses sight of him for 15-20 seconds – the time it took for him to walk around a house. The streets (in testimony) were deserted. When my husband regains sight, of who he [redacted] is "absolutely positive" was the intruder, he chose

FACTS OF OUR CASE (cont.)

resumes and my husband catches the intruder. The first words uttered between these two were by the intruder: "Let me go man! Let me go! I wasn't in your house!"

* They wrestled as my husband yelled for help. The intruder bites my husband on the back and breaks free as they both tumble to the ground. The intruder runs to the front of the complex nearby and into apartment #3. My husband called "911" from a neighbor's house.

* The police arrive quickly, find a man in apartment #3 who is "sweating, breathing heavily, smelling of alcohol." The police bring him out — my husband positively identifies him. The police bring the intruder to our home for identification.

* Our daughter says, "It's him." They present his jacket, and as they show it to Brianna, she cries, "That's it! That's it!" and nearly collapses. The back of the jacket has the word "AVIREX." On the front are patches.

* The intruder vomits in the squad car and is arrested.

The facts of our case (cont.)

These facts were presented in court:

* The bite mark on my husband's back is a MATCH to the mold of the intruder's teeth.
* The defendant's previous conviction of 1st degree burglary was disclosed to the jury.

These facts were NOT presented: (because the judge felt we had enough to prove our case.)

* One month earlier (3-8-99) the same incident occurred 2 blocks away with an eleven-year-old girl. Lifted from the scene at THAT crime were fresh shoe prints. (3 houses from his residence)

* The shoes worn by the intruder my husband caught 7APR99 and who the police arrested matched PERFECTLY the shoeprints from the incident on 3-8-99.

SOME OF THE DEFENSE ATTORNEY'S CLOSING STATEMENTS:

1) "How many kids do we have? Ten? Twelve?" (NO-seven)
2) "How many seconds did Mr. Corbett lose sight of him? Forty-five seconds? A minute? A minute-and-a-half?" (NO-testimony was 15-20sec)
3) ~~"Why [illegible] evidence? What is the State trying to cover up?~~

Some of the Defense Attorneys's Closing Statements (cont.)

3). "Those folks (us) are out to get my client because he's poor."

(Our 1998 income, when considering our family size, was considered "low income.")

4). He referred to us as "not being able to tell one black man from another."

(My dear eleven-year-old Brianna is proudly half African American!) (Also, several of our closest friends are African American).

Those untrue, unfactual, misleading and inflammatory statements were obviously enough to cause the jurors to consider that the intruder was innocent. But with the option of rebuttal, these statements could have and WOULD have been addressed.

SUMMARY

As I'm sure you'd agree, if the STATE would have had the option of rebuttal, the outcome of our case could VERY EASILY have been different. At any rate, the misleading, untrue, unfactual

Summary (cont.)

and inflammatory statements could have and WOULD have been corrected, therefore giving the jury true statements to help them make their decision a good one.

It has been painful to recount our story. All of our children were robbed that night, but especially our Brianna. Please, for all the families, all the children, and our society as a whole — please change this law so all people can receive a fair trial.

When we watched that intruder walk out of that courtroom knowing he would be set free immediately, it was like the crime happened all over again. It was almost as devastating as what happened the early morning hours of 7 APR 89 to our Brianna, and the rest of our family

Sincerely

Karin S. Corbett

Karin S. Corbett