STATE OF MINNESOTA

IN SUPREME COURT

ADM04-8001

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 December 19, 2007 at 2:30 p.m., to consider the recommendations of the Supreme Court Advisory Committee on the Rules of Civil Procedure to amend Rule 68. A copy of the committee's report, including the proposed amendments, 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 Dr. Rev. Martin Luther King Jr. Boulevard, St. Paul, Minnesota 55155, on or before November 30, 2007, 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 30, 2007.

Dated: October 16th, 2007

BY THE COURT:

Russell A. Anderson
Chief Justice

ADM04-8001
STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee on Rules of Civil Procedure

Recommendations of Minnesota Supreme Court Advisory Committee on Rules of Civil Procedure

Final Report
October 15, 2007

Hon. Christopher J. Dietzen
Chair

Hon. Helen M. Meyer
Liaison Justice

Stephanie A. Ball, Duluth
Paul A. Banker, Minneapolis
Kenneth H. Bayliss, III, St. Cloud
Charles A. Bird, Rochester
Leo I. Brisbois, Minneapolis
James P. Carey, Minneapolis
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Hon. Bruce Peterson, Minneapolis
Hon. Susan M. Robiner, Minneapolis
Richard S. Slowes, Saint Paul
Michael W. Unger, Minneapolis
Mary R. Vasaly, Minneapolis

Michael B. Johnson, Saint Paul
Staff Attorney

David F. Herr, Minneapolis
Reporter

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Introduction

The Court's Advisory Committee on Rules of Civil Procedure recommends that the Court amend Rule 68, dealing with offers of judgment or settlement. The amendment proposed in this report deals with several shortcomings of the current rule, and the committee believes its adoption will further the underlying purpose of the Rule 68 procedure—encouraging settlement of civil disputes.

History

The committee has considered Rule 68 on several occasions over the past decade and has not discovered a clear path through the thicket of issues. The committee has therefore repeatedly concluded that further study was necessary. Over the course of time, the issues have come into sharper focus, and the committee now recommends that the rule be amended to accomplish three broad purposes: remove some traps for the unwary, make the rule generally more specific and "user-friendly," and to make it a more effective tool in accomplishing its purpose of encouraging the settlement of litigation where possible. These goals are not always consistent or easily accomplished by rule, but a majority of the committee favors the adoption of the entirely revamped Rule 68 submitted with this report.

As a preliminary matter, the committee did ask whether the rule continues to serve an important role in the litigation process. There is certainly ample commentary suggesting the federal counterpart to Rule 68, Fed. R. Civ. P. 68, is underused, *see, e.g.*, Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865 (2007). Anecdotal evidence in the form of committee member experience suggests the rule is occasionally used in Minnesota practice, and that some may use it more often than others. There is little reported

use of it by plaintiffs because, despite the intent of the 1985 amendment to the rule to make the rule available to all parties, the current rule offers little incentive to plaintiffs to encourage its use. *See* Minn. R. Civ. P. 68, Advis. Comm. Note—1985 Amends., *reprinted in* Minnesota Rules of Court: State 90 (2007) (amendment will make offer of judgment procedure "available to both plaintiffs and defendants in order to encourage settlement by all parties"). Under the court's interpretation of the current rule a plaintiff who prevails will be entitled to costs in any event, so there is little incentive under Rule 68 for plaintiffs to make, and defendants to accept, a Rule 68 demand.

Since Minnesota adopted Rule 68 in 1953, courts have made greater use of pretrial conferences under Rule 16 as settlement tools and all civil cases are subject to court-annexed ADR mechanisms. *See* Minn. Gen. R. Prac. 114. Parties to disputes have also resorted to ADR processes wholly outside the litigation process. It therefore seemed fair to ask whether Rule 68 continues to serve a useful purpose. On balance, the committee believes the rule is valuable in some cases, and should therefore be retained, with amendment to cure some of its present deficiencies.

General shortcomings of the current rule identified to or discussed by the committee include:

1) Surprises in the effect of an accepted offer under the rule

2) Surprises in the effect of an unaccepted offer under the rule

3) Surprises that the rule was even brought into play by an offer that doesn't mention the rule

4) Uncertain applicability of the rule to attorney fees recoverable by statute or agreement of the parties

5) Uncertain effect of the rule on calculation and recovery of prejudgment interest recoverable under common law or statute

6) Seeming inefficiency of, in some circumstances, requiring a party to pay an adversary's costs, but also allowing that party to recover its own costs from that adversary

7) General unfairness of having the rule create an incentive for a plaintiff to entertain a settlement offer, but no reciprocal incentive for a defendant to accept an demand made by a plaintiff

8) Uncertain effect in cases involving both claims and counterclaims.

Some of these issues have been confronted by the appellate courts, some only by trial courts, and some are known only from anecdotal reports from lawyers.

The committee believes that the proposed rule set forth below addresses most of these concerns. The committee felt constrained not to recommend more extensive changes that might fairly be viewed as "substantive" in effect, rather than procedural. Certainly, the rule could be made a more potent tool if it were given a significantly greater effect in shifting the burden of litigation costs, particularly attorneys' fees available to a prevailing party by statute. *See Marek v. Chesney*, 473 U.S. 1 (1986) (holding that attorneys' fees that statute makes available to a prevailing party as costs are cut off from date of offer if Rule 68 offer is not accepted and offeree does not recover more than the offer). The committee believes such a change would present policy questions and separation-of-power issues that this committee would not initiate.

This amended rule does incorporate some rulings of Minnesota appellate decisions construing the current rule. The Court should be aware that this recommended rule would potentially modify the effect of certain appellate decisions. The committee believes that codifying—and in some instances modifying—these decisions is a necessary and desirable effect of making this rule more coherent and workable, though it has not been a goal in its own right. Affected court decisions include:

- *Borchert v. Maloney*, 581 N.W.2d 838 (Minn. 1998). In *Borchert* this Court held that an offeree recovers its costs and disbursements

as prevailing party even if offer exceeds judgment and it is required to pay offeror's costs. The amended rule would not require this seemingly inconsistent result of both recovering and having to pay costs.

- *Bucko v. First Minnesota Savings Bank*, 471 N.W.2d 95 (Minn. 1991); and *Vandenheuvel v. Wagner*, 690 N.W.2d 757 (Minn. 2005). *Bucko* held that an offeror is allowed to recover only costs and disbursements "incurred from the date of its offer of judgment." Rule 68 had included language mandating that result until 1985 when the rule was amended. But in 2005, in *Vandenheuvel v. Wagner*, 690 N.W.2d 757 (Minn. 2005), this Court held that the costs shifted by operation of the rule are costs and disbursements from the beginning of the case, basing its ruling in part on the lack of any limiting language in the rule. The proposed amendment to Rule 68 consistently applies an express provision measuring costs paid as a consequence of not accepting an offer from the date of the offer, essentially codifying this Court's decision in *Bucko* and overruling *Vandenhuevel*.
- *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003). This Court held in *Collins* that where an applicable statute allows recovery of attorney fees and defines them as "costs," and a lump sum Rule 68 offer that does not expressly include attorney fees is accepted, attorney fees are recoverable as part of costs in addition to the offer amount. This holding is essentially now made clear in the rule, thus eliminating a significant source of surprise under the current rule. The same result applies for cases where the right to attorney fees is based on contract. This Court has interpreted a Rule 68 offer as encompassing all contractual claims. ruling in *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d

79 (Minn. 2004), that attorney fees were encompassed within a lump sum offer, and additional fees were not recoverable. Both results are covered under the new rule, without modification of the result. Where a right to attorney fees is created by statute.

The recommendations of the advisory committee reflect a strong consensus of the committee, but are by no means unanimously held. A significant minority of the committee would not make the recommended changes to Rule 68, favoring either retaining the existing rule or the complete abrogation of the existing rule. The most significant concern of those not voting to adopt recommendations of the majority center on the efforts to make the rule more even-handed by allowing a claimant to make use of the rule and recover additional costs if it makes an offer to settle that is more favorable to the opposing party than the result. The dissenters view this as allowing "double costs" to one side without justification and creating an opportunity for a claimant to "game" the process by making an early offer under the rule before the defendant has information to evaluate the case, and creating a right to a substantial costs and disbursements windfall.

The structure of this rule, creating two distinct types of offers—the "damages-only" and the "total-obligation" offer—flows from the recognition that the rule may operate with significantly different results, and sometimes wholly unexpected results, because of differences in how attorneys' fees are treated under the law. In most cases, the so-called "American rule" applies, and attorneys' fees simply don't come into play before the court regardless of whether a Rule 68 offer is made. In cases where attorneys' fees are recovered pursuant to a contractual right, the fees claim can be viewed as part of the claim and resolved with relative ease. Rule 68 results in a relatively modest shift of responsibility for costs in these instances. Where a fee-shifting statute creates a right of one party to recover fees from an adversary, the matter is more complex and the stakes can be much higher. The various legislative schemes creating a right to attorneys' fees use many

different formulations of how those fees are to be recovered, but a substantial number of them allow recovery of fees "as costs." *See, e.g.*, Minn. Stat. §§ 8.31, subd. 3a ("private attorney general" statute; allows recovery of "costs and disbursements, including costs of investigation and reasonable attorney's fees"); 181.65 (in certain employment actions, successful plaintiff has right to recover "reasonable attorneys" fees as the court shall fix, to be taxed as costs in any judgment recovered). When recoverable "as costs," fees may dramatically change the effect of an offer under Rule 68, and in some instances under the current rule may create ugly surprises for unwary parties or their counsel. *See, e.g.*, *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003)(party made Rule 68 offer to settle for $200,000 which was accepted; plaintiff then allowed to recover additional amount for attorneys' fees). The amended rule makes available the total-obligation offer to allow a party defending a claim to make an offer that will have a certain effect for both parties. (That party could instead make a damages-only offer, which would work just as it did in *Collins*, but with greater warning of the eventual result.)

Hearing and Effective Date

The committee believes this amendment should probably be the subject of a notice period and public hearing before the Court. This rule amendment should probably take effect at least 60 days after adoption, in order to permit the rule to be published and publicized.

The committee believes the amended rule should be made applicable to pending actions, but only as to offers made after the effective date of the rule. Offers made before the effective date would be construed under the current rule, although they would still be superseded by post-effective date offers by operation of proposed Rule 68.02(e).

Style of Report

The specific recommendation as to the existing rule is depicted in traditional legislative format, completely ~~struck-through~~ because it is replaced in its entirety by a new rule. For ease of reading, underscoring of the new rule text is omitted.

Respectfully submitted,

MINNESOTA SUPREME COURT
ADVISORY COMMITTEE ON RULES OF
CIVIL PROCEDURE

Recommendation: **The Court should amend Rule 68, replacing the current rule with an entirely new version.**

Rule 68. Offer of Judgment or Settlement

~~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 of the offering party against the adverse party or as to the claim of the adverse party against the offering party. Acceptance of the 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 within 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. The fact that an offer is made but not accepted does not preclude a subsequent offer.~~

~~ADVISORY COMMITTEE NOTE—1985~~

~~The changes to Rule 68 are intended to accomplish two things. First, the former offer of judgment procedure will be available to both plaintiffs and defendants in order to encourage settlement by all parties. Second, an offer of settlement is irrevocable during a ten-day period, but has no continued vitality if not accepted within that ten-day period. This change is made to answer the question raised by the Minnesota Supreme Court in *Iverson v. Kapperman*, 343 N.W.2d 19 (Minn.1984). The Minnesota practice will now conform to practice under Federal Rule 68, although the language of the rules is not identical.~~

~~The principal effect of making an offer of settlement under Rule 68 is to shift the burden of paying costs properly taxable under Minn.R.Civ.P. 54.04. Nothing in the rule limits the use of any other devices to encourage the settlement of actions or to reach agreement upon settlement. Thus, although Rule 68 does not apply to any offers of settlement made within ten days before~~

~~trial, neither does it prohibit such offers. An offer made within ten days before trial does not shift the responsibility for taxable costs.~~

~~Minn.Stat. § 549.09, subd. 1 (1982), *as amended by* Minn.Laws 1983, ch. 399 (effective July 1, 1984), provides for recovery of prejudgment interest. Rule 68 does not affect the operation of that statute.~~

[Reporter's note: balance of rule is entirely new; underscoring is omitted in interest of readability]

Rule 68.01. Offer.

(a) Time of Offer. At any time more than 10 days before the trial begins, any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.

(b) Applicability of Rule. An offer does not have the consequences provided in Rules 68.02 and 68.03 unless it expressly refers to Rule 68.

(c) Damages-only Offers. An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which shall be added to the amount stated as provided in Rules 68.02(b)(2) and (c).

(d) Total-obligation Offers. The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees.

(e) Offer Following Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days before the commencement of a hearing or trial to determine the amount or extent of liability.

(f) Filing. Notwithstanding the provisions of Rule 5.04, no offer under this rule need be filed with the court unless the offer is accepted.

Rule 68.02. Acceptance or Rejection of Offer.

(a) Time for Acceptance. Acceptance of the offer shall be made by service of written notice of acceptance within 10 days after service of the offer. During the 10-day period the offer is irrevocable.

(b) Effect of Acceptance of Offer of Judgment. If the offer accepted is an offer of judgment, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and the court shall order entry of judgment as follows:

(1) If the offer is a total-obligation offer as provided in Rule 68.01(d), judgment shall be for the amount of the offer.

(2) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment.

(c) Effect of Acceptance of Offer of Settlement. If the offer accepted is an offer of settlement, the settled claim(s) shall be dismissed upon

(1) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied or

(2) order of the court implementing the terms of the agreement.

(d) Offer Deemed Withdrawn. If the offer is not accepted within the 10-day period, it shall be deemed withdrawn.

(e) Subsequent Offers. The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

Rule 68.03. Effect of Unaccepted Offer.

(a) Unaccepted Offer Not Admissible. Evidence of an unaccepted offer is not admissible, except in a proceeding to determine costs and disbursements.

(b) Effect of Offer on Recovery of Costs. An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(1) If the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer, and the plaintiff-offeree shall not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the plaintiff-offeree shall not be affected by this provision.

(2) If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

(3) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

(c) Measuring Result Compared to Offer. To determine for purposes of this rule if the relief awarded is less favorable to the offeree than the offer:

(1) a damages-only offer is compared with the amount of damages awarded to the plaintiff; and

(2) a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the

offeree's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer.

Rule 68.04. Applicable Attorney Fees and Prejudgment Interest.

(a) "Applicable Attorney Fees" Defined. "Applicable attorney fees" for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to attorney fees not provided for under the applicable substantive law.

(b) "Applicable Prejudgment Interest" Defined. "Applicable prejudgment interest" for purposes of Rule 68 means any prejudgment interest to which a party is entitled by statute, rule, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to prejudgment interest not provided for under the applicable substantive law.

Advisory Committee Comment—2007 Amendment

Rule 68 is extensively revamped both to clarify its operation and to make it more effective in its purpose of encouraging the settlement of litigation. The overarching goal of this set of amendments is to add certainty to the operation of the rule and to remove surprises both to parties making offers and those receiving and deciding whether to accept them. Additionally, Rule 68.03 is revised to make the mechanism of Rule 68 better address the goal of providing incentives for both claimants and parties opposing claims. This rule is not as closely modeled on its federal counterpart, Fed. R. Civ. P. 68, as is the existing rule, so that rule and decisions construing it may not be persuasive guidance in construing this rule.

Rule 68 uses the term "offer" to include offers to settle made by any party. Thus, both an offer by a defendant to pay a sum in return for a dismissal of a claim and an offer by a claimant to accept a sum in return for dismissal—often termed a "demand" and not an "offer"—are offers for the purposes of the rule.

Rule 68.01(b) is a new provision that requires that in order to be given the cost-shifting effect of the rule an offer must include express reference to the rule. *See Matheiu v. Freeman*, 472 N.W.2d 187 (Minn. App. 1991). This provision is intended to make it unlikely that an offer would come within the scope of the rule without the offeror intending that and the offeree having notice that it is an offer with particular consequences as defined in the rule.

The revised rule carries forward the former rule's application both to offers of judgment and to offers of settlement. The effects of these two types of offer are different, and are clarified in Rule 68.02. Rules 68.01(c) and (d) create an additional dichotomy in the rule, creating new categories of "damages-only" and "total-obligation" offers. This dichotomy is important to the operation of the rule, and is intended to remove a significant "trap for the unwary" where an accepted offer may be given two substantially different interpretations by offeror and offeree. Under the former rule, if a statute

allowed the recovery of attorney fees as costs and a Rule 68 offer were made and did not expressly include reference to attorney fees, fees could be recovered in addition to the amount offered *See, e g , Collins v Minn Sch of Business, Inc* , 655 N W 2d 320 (Minn 2003) Fees recoverable by contract, rather than statute, would be subsumed within the offer, and not be recoverable in addition to the amount of the accepted offer *See, e g , Schwickert, Inc v Winnebago Seniors, Ltd* , 680 N W 2d 79 (Minn 2004) Similar uncertainty may exist as to whether prejudgment interest is included in or to be added to the amount of an offer *See, e g , Collins; Stinson v Clark Equip Co* , 743 N W 2d 333 (Minn App 1991) Discussion of other ambiguities under the federal counterpart to Rule 68, Fed R Civ P 68, is included in Danielle M Shelton, *Rewriting Rule 68 Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN L REV 865 (2007)

The "damages-only" or "total obligation" offer choice allows the party making the offer to control and understand the effect of the offer, if accepted; similarly, a party deciding how to respond to an offer should be able to determine the total cost of accepting an offer Rule 68 01(c) creates a presumption that an offer made under Rule 68 is a "damages-only" offer unless it expressly meets the criteria of Rule 68 01(d) by stating that it is a "total-obligation" offer The added precision allowed by distinguishing the types of offers permits the new rule to provide greater clarity and certainty as to the effect both of accepted offers and unaccepted offers

Rule 68 03(b)(1) changes the effect of Rule 68 on costs and disbursements when a defendant's offer is rejected and the judgment is less favorable to the plaintiff offeree Under the former rule, the offeree would nevertheless recover its costs and disbursements from the offeror *Borchert v Maloney*, 581 N W 2d 838 (Minn 1998) The revised rule provides that the offeree does not recover its costs and disbursements incurred after service of the offer But this change does not affect a prevailing plaintiff's right to attorney fees to which it is entitled under law or contract In this respect the revised rule, like the former rule, does not incorporate the cut-off of attorney fees that occurs under the federal Rule 68 as interpreted in *Marek v Chesney*, 473 U S 1 (1986) Additionally, under the former rule, the offeror was entitled to its costs and disbursements incurred from the beginning of the case *Vandenheuvel v Wagner*, 690 N W 2d 757 (Minn 2005) As to this issue, the revised rule now has the same effect (although with language that is not identical), requiring the offeree to pay the offeror's costs and disbursements incurred after service of the offer

Rule 68 03(b)(2) introduces a consequence for a defendant's rejection of a plaintiff's Rule 68 offer if the judgment is less favorable to the defendant offeree In that circumstance, this new provision requires the defendant to pay double the offeror's costs and disbursements incurred after service of the offer If the defendant is merely required to pay the offeror's costs, as under the current rule, there is no adverse consequence for a defendant who rejects a Rule 68 offer In contrast, under the revised rule, a plaintiff who rejects a Rule 68 offer suffers dual adverse consequences: loss of the right to recover his costs and required payment of the defendant's costs

Rule 68 04(a) expressly provides that the rule does not create a right to recover attorney fees This provision is intended only to avoid confusion The rule might affect the extent of fees recoverable by statute, common law, or by contract, but it does not create any right to recover fees that does not exist outside of Rule 68

Similarly, Rule 68 04(b) provides that the rule does not create a right to prejudgment interest, which right must rather be drawn from an applicable statute, rule, contract, or common law It is noteworthy that MINN STAT § 549 09, subd 1(b), which governs prejudgment interest in most cases, contains a mechanism analogous to this rule that adjusts calculation of prejudgment interest based on the relationship between the parties' offers of settlement and the ultimate judgment or award in the case

QUINLIVAN & HUGHES, P.A.
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November 30, 2007

Frederick K. Grittner
Minnesota Court of Appeals
305 Minnesota Judicial Ctr.
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155

RE: Proposed Amendments to Rules of Civil Procedure
Court File # ADM04-8001
Our File #10209.00044

Dear Mr. Grittner:

Enclosed please find one original and 12 copies of a brief providing commentary on the proposed amendments to Rule 68 and my request to participate in the oral presentation to the Court at the time of the December 19th hearing.

Sincerely,

Kenneth H. Bayliss
Attorney at Law
KHB/jbg
Enc.

ADM04-8001
STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Supreme Court Advisory Committee
on Rule of Civil Procedure

COMMENT ON PROPOSED AMENDMENTS TO RULE 68

QUINLIVAN & HUGHES, P.A.

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I. RULE 68 EXISTS TO REMEDY THE UNFAIRNESS CAUSED WHEN A PLAINTIFF IS ALLOWED COSTS EVEN AFTER REFUSING AN OFFER GREATER THAN THE RECOVERY.

The "plain purpose of Rule 68 is to encourage settlement and avoid litigation. . . . The Rule prompts both parties to a suit to evaluate the risks and costs of litigation and to balance them against the likelihood of success upon trial on the merits." Marek v. Chesney, 473 U.S. 1, 5 (1985). "Once a defendant allows a plaintiff to take a judgment against it for all the relief to which he or she may be entitled, there is nothing further to try, and the action becomes moot. At that point, there is no reason for the action to continue." Zeigenfuse v. Apex Asset Mgmt., 239 F.R.D. 400, 401 (E.D. Pa. 2006). Put another way, as the U.S. Supreme Court has observed:

> Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer. Because costs are usually assessed against the losing party, liability for costs is a normal incident of defeat.

Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981) (footnote omitted).

The basic purpose of Rule 68 is demonstrated by the following examples: Example 1: Plaintiff leaves employment with Defendant and demands payment for outstanding wages. Plaintiff claims Defendant owes $5,000 in wages.

Defendant concedes that wages are owed, but claims to have already made payment for half of the wages, $2,500, by direct deposit into Plaintiff's account. A lawsuit is filed and Defendant immediately offers the $2,500 it believes is owed. This is rejected by the Plaintiff. The case goes to trial and the jury rejects Plaintiff's claim for $5,000, finding that payment for $2,500 had already been made, but awards the $2,500 that Defendant admits to owing. Plaintiff recovers $2,500, the amount that Defendant was offering all along. Each side incurred costs of $3,000 in the litigation.

Example 2: Plaintiff claims a whiplash injury in an automobile accident and demands $20,000 for her injuries. Defendant concedes liability. Defendant offers $10,000. At trial the jury awards damages of $1,000.

The fundamental question presented by these two scenarios is why should a defendant be the one to pay "costs"—the miscellaneous but sometimes significant expenses of litigation—when the defendant agreed to pay as much as or perhaps much more than the plaintiff ultimately recovered?

Rule 68 operates to remedy the fundamental unfairness of making a defendant pay for the litigation process when the defendant offered everything that the plaintiff deserved, but not as much as the plaintiff unreasonably demanded. Without a mechanism to eliminate the unfairness of a defendant having to pay for a process that it sought to avoid by offering fair payment there would be serious unfairness in the process for allocating payment of costs. Because Rule 68 merely eliminates salient unfairness by shifting costs in certain

situations where it would be unfair to allow them to an unreasonable or under-recovering plaintiff, there is no need to counterbalance the creation of Rule 68's basic provision with a countervailing right for plaintiffs to make Rule 68 offers. Rule 68 is a remedy for an injustice inherent in the general rule that a prevailing party recovers costs. It is not itself a malady that needs to be remedied by counterbalancing.

II. ALLOWING DOUBLE COSTS WOULD CHANGE THE NATURAL BALANCE BETWEEN PLAINTIFFS AND DEFENDANTS AND SUGGEST TO THE PUBLIC THAT IT IS THE POLICY OF THE STATE OF MINNESOTA TO TILT JUSTICE IN FAVOR OF ONE GROUP OF LITIGANTS OVER ANOTHER.

The unfairness of the proposed rule change allowing the recovery of double costs[1] can be demonstrated by a simple hypothetical:

Example 3: Plaintiff and Defendant are in a car accident at an intersection. Both claim that they had a green light. The suit is for property damage and both parties agree damages total $8,000. There are no witnesses and the parties are of comparable credibility.

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[1] The Committee Report suggests that referring to the Plaintiff's two sets of recovered costs is not properly considered "double costs" by placing the phrase in quotations marks when characterizing the dissenters' stance. Advisory Committee Report, p. 5. The proposed rule provides:

> If the offeror is a plaintiff. . . the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer.

Proposed Rule 68.03 (b)(2). While the amount of costs may not be precisely double, because a late Plaintiff's offer could be made, the expenses attending trial will mean that they will usually be nearly so.

Analysis: Fact patterns resembling this case actually occur in practice. The reality is that damages are fixed, but it is difficult to determine who will prevail on liability. Under the current system one of the two parties will win and claim costs. It might seem unfair to accord either party costs when liability is so close, but it seems sensible and unavoidable to accept as a basic premise that a losing party should pay the costs in this circumstance. But this assumes that no Rule 68 offers are made.

What if the defendant makes a Rule 68 offer under the circumstances in this example? Under the current rule such an offer would have no significance. Plaintiff will either recover nothing, in case of a defense verdict, or the entire agreed upon amount. Defendant will gain nothing my making a Rule 68 offer until his offer is equal to or greater than the agreed damages of $8,000. Now it could be reasonably argued that the fair value of the case is $4,000, since liability is about 50/50 and the value of the claim is $8,000. Even so, under the current system this is not the type of case where a Rule 68 offer has any traction. Even if the defendant offered an amount over the $4,000 fair settlement value of the claim, the offer would have no effect. A $5,000 offer, $6,000 offer, or even a $7,000 offer would fail to shift the award of costs, because if plaintiff does recover he will recover more—$8,000.

What happens with this hypothetical under the dynamic created by the proposed rule? Under the proposed rule the defendant is still stymied. He can make no Rule 68 offer that will mean anything, since plaintiff will recover either

all or nothing and the amount of damages are not in dispute. Plaintiff on the other hand swoops down and picks up a measure of double costs at no risk. Here's how: when serving the Complaint,[2] or shortly thereafter, plaintiff makes a Rule 68 offer for a penny less than the full amount of damages, $7,999.99. Defendant, knowing that the value of the case is around $4,000, not $7,999.99—since liability is a 50/50 proposition—rejects it. Under the proposed rule, when the case goes to trial the defendant recovers one measure of costs if he wins. The plaintiff recovers two measures of costs if he wins. Not only this, plaintiff has done so without extending himself at all: he simply demanded a penny less than the maximum amount that he would ever recover, $8000.

This scenario unmasks one of the basic flaws of the proposed rule: while defendants' Rule 68 offers must actually approach the fair settlement value of the case in order to be meaningful, a plaintiff can easily acquire double costs without making a meaningful demand.

Beyond appearing unfair, the application of the new proposed rule has another undesirable effect: it changes the value of cases in favor of plaintiffs. In the above hypothetical, assume the taxable trial costs are $3,000, an amount easily reached even in a short trial. The existence of the new rule now makes the fair settlement value of the case not $4,000, but $5,500. This is because the plaintiff will surely make the free Rule 68 offer invited by the proposed rule so

[2] Ironically, the defendant would be required to respond to such a Rule 68 offer within 10 days even before answering the Complaint, which must be done in 20 days).

that the half of the time that he recovers he gets the value of the claim ($8,000) plus double costs ($3,000 + $3,000), for a total of $14,000. The defendant will recover no damages, because he was just defending, but will get one measure of costs ($3,000). The difference between the two recoveries is $17,000 and the midpoint of this difference no longer resides at $4,000, but at $5,500. No longer is the value of a win of equal value to the plaintiff and the defendant. As one would expect by granting a plaintiff an extra $3,000 dram of costs, the fair settlement of the case has increased by half of that amount. Thus does the new proposed rule put a finger on the scales of justice. It is easy to see why some members of the committee took grave offense to the proposed rule's double taxation of costs.

A quick tour of this Court's recent cases involving Rule 68 shows that costs can in fact be substantial even in cases involving comparatively small judgments. For instance in Vandenheuvel v. Wagner, taxable costs were over $8,000 in a case involving a net judgment of slightly over $12,000. 690 N.W.2d 753 (Minn. 2005). A single measure of costs thus accounted for about 2/3 the cost of the judgment. If, applying the new proposed rule's doubling feature, the defendant had made no Rule 68 offer and the plaintiff had at an amount lower than $12,000, the recoverable costs would be one and one-thirds times the judgment. In Borchert v. Maloney the taxable costs incurred by both the plaintiff and the defendant exceeded the amount of the damages. 581 N.W.2d 838 (Minn. 1998) See also Dillon v. Haskamp, No. C2-96-2461 (Minn. Ct. App. July 22, 1997)

(unpublished) (over $17,000 taxed in automobile accident case, an amount exceeding damages recovered). So even in what seem rather mundane cases, the reported cases discussing Rule 68 show that the costs are often substantial in proportion to the subject of the litigated matter.

But it is argued that such a policy might encourage settlements. It might, but judicial impartiality is more important than pressuring litigants to resolve their differences before trial. The public, sometimes plaintiffs, sometimes defendants, often view the judicial system with apprehension and skepticism. The new proposed rule, which effectively puts a finger on the scales of justice, would be viewed cynically by the public—and justifiably so.

III. THE CURRENT RULE HAS DIFFICULTIES THAT HAVE VEXED LITIGANTS, ATTORNEYS AND THE COURTS; THIS COURT SHOULD ADOPT CHANGES TO THE RULE THAT WILL ADDRESS THESE CONCERNS WHILE AT THE SAME TIME AVOIDING THE UNFAIRNESS AND ADVENTUROUSNESS OF THE PROPOSED RULE.

The proposed changes grow out of a consensus that Rule 68 has given rise to much strife in recent years and that it should be changed. The impetus for change springs from a number of specific concerns, including the following:

- Many members of the Defense bar were surprised by the result of Borchert v. Maloney, which allowed both parties to recover costs whenever a defendant's rule 68 offer applies.

- Many members of the Plaintiff bar were surprised by the result of Vandenheuvel v. Wagner, which held that when a Rule 68 offer is made the defendant recovers costs from the beginning of the case, not just from the time that the offer was made.

- Occasionally attorneys who are not practiced in the use of Rule 68 make expensive mistakes as to its application because the face of the rule

provides little guidance on the nuances of its use in cases involving statutory attorney fees—as was the case in Collins v. Minnesota School of Business, 655 N.W.2d 320 (Minn. 2003), where the defendant inadvertently failed to consider the effects of statutory fee statutes on its Rule 68 offer.

- Beyond the fact that the face of Rule 68 does not directly inform practitioners that attorney fees can sometimes be included in costs, there are a wealth of other complex issues that arise out of the interaction of Rule 68 and fee shifting statutes, some of which are discussed in Marek v. Chesney, 473 U.S. 1 (1986).

These concerns are legitimate concerns and should be considered by the Court in adopting any alternative to the present rule. Before formulating a solution, however, it is worth noting the origins of these problems.

Borchert v. Maloney, 581 N.W. 2d 838 (Minn. 1998), was a controversial case that wrestled with the interaction of Rule 68 and Minnesota statutes applicable to the taxation of costs. At issue in Borchert was the question of whether a plaintiff who recovered something, but less than the Rule 68 offer, should be able to tax costs. Before Borchert it was the view of the practicing bar and the Committee that if a plaintiff recovered less than the Rule 68 offer then the defendant recovered costs, but not the plaintiff. At the time Borchert was decided the Committee's comments stated that the "principal effect of making an offer of settlement under Rule 68 is to shift the burden of paying costs properly taxable under Minn. R. Civ. P. 54.04." Rule 68 Advisory Committee Note—1985. This widely held interpretation of the rule was rejected by the Court. The Court carefully focused on the exact language of the rule and the differences between Minnesota's Rule 68 and the corresponding federal rule:

> The district court's reading of the rule's plain language is correct. If the rule was intended to prevent an offeree who prevails on the lawsuit's merits from recovering her costs and disbursements even though the judgment entered was less than the Rule 68 offer, it would specifically say so, as does Fed. R. Civ. P. 68. Under the federal rule, the offeree is responsible for all costs incurred, including her own, after the making of the offer.

Borchert, 581 N.W.2d at 840 (footnote omitted). In other words, the result of Borchert was compelled by the precise language of the rule and its variance from the federal rule. The federal rule stated: "If the judgment finally obtained by the offeree is not more favorable to the offeree than the offer, the offeree must pay the costs incurred after the making of the offer." Fed. R. Civ. P. 68. By contrast, Minnesota's rule provides: "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." Minn. R. Civ. P. 68. This slight modification of the language in Minnesota's rule—the addition of the word "offeror's" before the word "costs" compels the result under the current language or our rule. The Court's analysis states that, notwithstanding the applicable statute governing costs and disbursements, Minn. Stat. § 549.04, if the rule had been in conformity with the language of the federal rule that the result of the case would have been different. In the context of deciding Borchert the Court was constrained by the language of the rule. In this proceeding the Court is deciding what would be the best form of the rule. So the Court can do here what it could not in Borchert: adopt a version

of this portion of the rule that is consonant with the language in the federal rule and thereby forego the unexpected result in Borchert.

Another recent Rule 68 flashpoint was the decision of Vandenheuvel v. Wagner, 690 N.W.2d 753 (Minn. 2005). The simple issue there was whether an offeror's costs are measured from the beginning of the action or only from the time of the offer. Plaintiffs argued that it is unfair to allow all the costs in an action to be awarded when a Rule 68 offer might not be made until just before trial. Defendants focused on the language of the rule, which did not specify, as did the federal rule, that the costs shifted by Rule 68 applied only to costs incurred after the making of the offer. In deciding the case, the Court again focused on the literal language of the rule, noting that it was at variance with the federal rule and this variance compelled the result:

> As an initial matter, we note that while the two rules are similar, they are not identical. For example, unlike the plain language of Federal Rule 68, Minnesota Rule 68 allows either party to make an offer of judgment. Compare Minn. R. Civ. P. 68 with Fed. R. Civ. P. 68. See also Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998) (recognizing that Minnesota allows the offeree to recover costs as a prevailing party under Minn. Stat. § 549.01-.04 (2004), despite having rejected a more favorable Rule 68 offer because, unlike the federal rule, Minnesota Rule 68 does not specifically state that the offeree is responsible for her own costs and disbursements).

Vandenheuvel, 690 N.W.2d at 756. Again, the Court expressed constraint in its interpretation of a rule at variance with its federal counterpart.

The Court's analysis in both Borchert and Vandenheuvel suggests a solution to our Rule 68 problems that will be discussed next: modify a handful of

words in the rule so that it is in conformity with the federal rule. After this discussion we will return to the other concerns expressed in support of the changes.

IV. MODIFYING THE RULE TO CONFORM TO THE FEDERAL RULE WOULD BE EASY AND WOULD SOLVE THE BORCHERT AND VANDENHEUVEL ISSUES.

In considering amendments to the rules, the Committee has always been guided by the principle that there are benefits to bringing Minnesota's civil rules into conformity with their federal counterparts. The Advisory Committee has noted the adoption of rules conforming to their federal counterparts in commentaries relating to rules 1, 4.04, 5.05, 6.01, 6.05, 11, 16.03, 23, 26.02, 26.05, 26.07, 29, 30.04, 30.06, 32.03, 35.04, 37, 41.01, 43.07, 44.04, 45, 50, 51, 53 and 65. Indeed, one of the Committee's chief activities of recent years has been to adopt rules that conform to or more closely align with the federal rules. The benefits of conformity with the federal rules are numerous:

- Practitioners who practice in both federal and state matters find it easier to practice.
- Litigants may better understand Minnesota practice if the practice conforms to the federal rules.
- In difficult case judges can find guidance in case law interpreting the federal rules or even rules from other states that conform to the federal rules.
- Academic and scholarly commentary on federal rules or rules from other states that conform to the federal rules can be referred to for guidance.
- Archaic practices unique to Minnesota practice can be replaced with more focused rules.

- Minnesota can benefit from the work of the federal rules committees.

Indeed, modifying Minnesota's rule to conform to the federal rules might be viewed as a staple of the Committee's diet in recent years. The Committee has cogently explained its goal of conforming Minnesota rules to the federal rules in its comment to Rule 11:

> On balance, the Committee believes that the amendment of the Rule to conform to its federal counterpart makes the most sense, given this Committee's long-standing preference for minimizing the differences between state and federal practice unless compelling local interests or long-entrenched reliance on the state procedure makes changing a rule inappropriate.

Rule 11, Advisory Committee Comments—2000 Amendments.

In fact, the example of Rule 11 is instructive. During the late 1980's, controversy swirled around the imposition of sanctions under Rule 11. This controversy for the most part concluded with the Court's decision in Uselman v. Uselman, 464 N.W.2d 130 (Minn. 1990), which set forth clearer guidelines for the imposition of sanctions under Rule 11. The Court later abandoned Minnesota's successful ad hoc approach for the federal rule:

> Rule 11 is amended to conform completely to the federal rule. While Rule 11 has worked fairly well in its current form under the Supreme Court's guidance in Uselman v. Uselman, 464 N.W.2d 130 (Minn. 1990), the federal rules have been amended and create both procedural and substantive differences between state and federal court practices.

Even though the Committee noted that the combination of Uselman's dictates and accompanying legislation had created calm seas, the Committee still

decided to abandon the special Minnesota practice for the federal one. In a situation where a storm of discontent surrounds the current incarnation of Rule 68 there is even greater reason to seek the sheltered harbor of the corresponding federal rule.[3]

V. MODIFICATION OF RULE 68 TO CONFORM TO THE FEDERAL RULE WOULD BE SIMPLE.

The difficulties created by Borchert and Vandenheuvel could be eliminated by simply changing this current language in the Minnesota rule:

> 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.

to the following language of the federal rule:

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[3] Turning to the federal rule now would also be somewhat ironic in that the 1937 Federal Advisory Committee that first recommended adoption of Rule 68 in the federal courts stated that is was basing its new rule on a Minnesota statute. See Delta Airlines, Inc. v. August, 450 U.S. 346, 357 (1981) (stating that the Minnesota cost statute was one of the models for the federal rule). In fact, the Minnesota statute that the 1937 federal committee relied upon appears to be the closest to the original federal rule of the three state statutes that were cited as models for the federal rule: "At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor." 2 Minn. Stat. § 9323 (Mason 1927), cited in Delta Airlines, 450 U.S. at 357.

> If the judgment finally obtained by the offeree is not more favorable to the offeree than the offer, the offeree must pay the costs incurred *after the making of the offer.*

This change would require very little rewriting. It would also solve both the Borchert issue, by inserting "offeror" back into the statute, and would solve the issue presented in Vandenheuvel, by making it clear that a Rule 68 offer only affects future costs, not costs dating back to the beginning of the litigation.

These simple changes would bring Minnesota rule into conformity with its federal counterpart.

VI. MODIFYING THE MINNESOTA RULE TO COMPLY WITH THE FEDERAL RULE WOULD ALSO HELP CLARIFY ISSUES RELATED TO COSTS IN STATUTORY FEE CASES BY ALLOWING PRACTITIONERS TO REFERENCE FEDERAL LAW INTERPRETING RULE 68.

While the above discussion addresses how modifying Rule 68 to comply with the federal rule would totally eliminate the Borchert and Vandenheuvel issues, the Committee expressed other concerns related to Rule 68 in its current form. In particular, the Committee expressed the concern that, as in Collins, practitioners do not always understand the nuances of Rule 68 practice in statutory fee cases. This is undoubtedly the case. In such cases the offeror confronts difficulties. By way of example, the following are some basic questions of Rule 68 practice that give practitioners pause:

- Does a Rule 68 offer need to expressly include costs and disbursements in that offer or can the offer by its terms not include costs and disbursements?
- In a statutory fee case, if offeror makes an offer for an amount that is less than the fees accrued at the time of the offer, does the offer have any effect?

- In a statutory fee case, how are the offeree's attorney fees computed for purpose of determining whether the offer is more favorable than the trial result?

- When a party recovers on some statutory fee claims, but not others, how is it determined whether the party has obtained relief that exceeds the value of the offer?

Many of these issues are routinely addressed by the federal courts. The federal courts see most federal civil rights claims and many if not most complicated employment cases involving fee-shifting statutes. The ample body of federal case law should be sufficient to provide practical guidance to a party contemplating making a Rule 68 offer. Thus, conforming the Minnesota rule to the federal rule would assist practitioners by assuring that there is a point of reference if a thorny legal issue arises. By contrast, the proposed rule's creation of two new categories of offers, "total-obligation" offers and "damages-only" offers, would make the Minnesota rule unique, so that it would be more difficult to rely on federal precedent or precedent from other states in addressing uncertainties facing practitioners.

VI. WHILE UNIQUE AND NOVEL, THE PORTION OF THE PROPOSED RULE THAT CREATES TWO TYPES OF OFFERS WILL MAKE MINNESOTA PRACTICE MORE COMPLEX AND LESS CERTAIN; IT WILL ALSO ASSURE THAT PRACTIONERS WILL NEED TO LITIGATE TO ADDRESS DIFFICULTIES POSED BY THE LANGUAGE OF THE NEW RULE.

The creation of a rule with two types of offers is a vehicle that is untested. It is impossible to deny the hard work of the drafters of this provision, but the proposal is full of difficulty. Borchert and Vandenheuvel have demonstrated that

even the slightest changes in the rule, or even the slightest variance from the federal rule, can give rise to a raft of disputes. The wholesale process of abandonment of the traditional form of Rule 68 for a new model will in effect jettison the applicability of existing Minnesota cases interpreting our rule. It will also leave Minnesota courts and practitioners without the benefit of federal case law discussing Rule 68. The marginal benefit of notifying some practitioners of the effect of a Rule 68 offer that does not address statutory attorney fees by including an explanation in the text of the rule is grossly outweighed by the trouble the experimental rule would create. This is particularly true where the Committee's published comments, which accompany both paper and electronic versions of the rule, could simply be modified to include reference to the Collins decision and thereby put the reasonable practitioner on notice of the special circumstance of statutory fee cases.

Adopting the "damages-only" and "total-obligation" scheme of the proposed rule is at odds with the touchstone of the Committee's recent work: *conformity* between the state and federal rules. Many have suggested—particularly after Borchert, Vandenheuvel and Collins—that the current Minnesota rule has problems. But none can show that these problems cannot be solved by simply harmonizing the rule with the federal rule. Adopting the federal rule or modifying the rule's central provisions as discussed above would render unnecessary the complicated, difficult and unusual offer categories in the proposed rule. Faced with the choice of adopting a creative but revolutionary

proposal or a venerable staple of federal practice, it would seem more prudent to choose the latter.

VIII. THE FEDERAL RULE ASSURES THAT COSTS ARE ALWAYS BORNE BY PARTIES WHO ARE UNREASONABLE OR WHO FAIL TO PROPERLY EVALUATE A CASE.

In the end, beyond the fact that the current rule does not require a counterbalancing enactment, because it exists merely to right a wrong—requiring a defendant to pay for the process when he offered more to the plaintiff to begin with—the fairness of the federal rule is manifested by simply examining all the situations under which costs are paid. Under the federal rule the party that is unreasonable or who fails to properly evaluate a case always pays costs. There are four basic permutations under the federal rule—where only the defendant is allowed to make a Rule 68 offer:

1. Every defendant who loses without making an offer pays costs;
2. Every defendant who loses and makes an insufficient offer pays costs;
3. Every plaintiff who loses pays costs;
4. Every plaintiff who recovers, but does not recover enough after a Rule 68 offer pays costs.

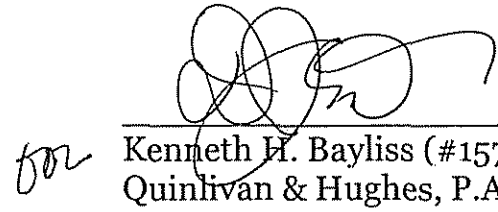
These are the basic permutations under the federal rule and the rule of the vast majority of states. Nothing about this order of affairs provided by the majority rule warrants allowing plaintiffs to make their own Rule 68 offer so as to entitle them to double costs.

Finally, some have suggested that Rule 68 could simply be abolished. The only effect of this would be to eliminate the salutary benefits of Rule 68 and reward unreasonable conduct by granting costs to parties that were offered more

than they ultimately recovered and needlessly put everyone through a difficult and expensive process.

REQUEST FOR ORAL PARTICIPATION IN RULES HEARING

Pursuant to the Court's order of October 16, 2007, Kenneth H. Bayliss respectfully requests an opportunity to make a fifteen minute oral presentation to the Court with respect to these matters.



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November 29, 2007

Frederick K. Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

Re: ADM04-8001 Proposed Amendments to the Rules of Civil Procedure

Dear Mr. Grittner:

Enclosed for filing please find 12 copies of the Response of the Minnesota Defense Lawyers Association to the Proposed Change to Rule 68 and Request to be Heard.

Very truly yours,

JACKSON LEWIS LLP

Thomas E. Marshall
Treasurer, MDLA
Co-Chair, MDLA Law Improvement Committee

TEM/amp
Enclosures

c: Paul A. Rajkowski, Esq., President, MDLA (w/enclosures)
Renee Anderson, Executive Director, MDLA (w/enclosures)

STATE OF MINNESOTA

IN SUPREME COURT

ADM04-8001

RESPONSE OF THE MINNESOTA DEFENSE LAWYERS ASSOCIATION TO THE PROPOSED CHANGE TO RULE 68 AND REQUEST TO BE HEARD

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Introduction

The Minnesota Defense Lawyers Association ("MDLA"), an organization of over 700 Minnesota attorneys, primarily engaged in the defense of civil litigation and who regularly appear in our Minnesota Courts, present the following comments on the recommendations of the Minnesota Supreme Court Advisory Committee to change Rule 68 of the Minnesota Rules of Civil Procedure. The MDLA believes that all Minnesota Court litigants should face a level playing field to ensure fair and impartial determination of their rights and obligations. The Rules of Civil Procedure have long presented parameters for governing dispute resolution which do not favor any one side or a particular result. That is, until now. The proposed change to Rule 68 upsets the fair balance in the Rules and should not be adopted. Frankly, it is hard to imagine a Rule more blatantly biased towards one party, especially in the attorney fee shifting situation. The MDLA therefore requests that the Supreme Court reject the proposed changes to Rule 68. The MDLA further requests the opportunity to speak at the hearing on December 19, 2007.

Minnesota's Present Rule 68

Rule 68 presents a definite mechanism for settlement. The rule basically mirrors federal Rule 68 with the exception that only defendants may make an offer under the federal rule while both parties may use the rule in Minnesota. Minn. R. Civ. Pro. 68; F. R. Civ. Pro. 68. The Rule provides that, at least 10 days before trial, either plaintiff or defendant may serve an irrevocable offer that judgment be

entered for specific relief or payment of money with costs and disbursements then accrued. Minn. R. Civ. Pro. 68. The judgment offered may take any form, whether it is damages, equitable relief, or declaratory relief depending on the matter. A party that accepts the offer within 10 days will obtain an enforceable judgment. If not accepted in 10 days, the offer is withdrawn and is not admissible, except to determine costs and disbursements. If the judgment finally entered is not as favorable to the offeree than the offeror, "the offeree must pay the offeror's costs and disbursements." *Id.* The rule is designed to shift some of the risk of trial when a party rejects a reasonable settlement offer. Its underlying purpose is simple: "to encourage settlement by all parties." M. R. Civ. Pro. 68, 1985 Advisory Committee Note.

The Proposed Rule 68

The proposed rule is intended to completely replace the former rule with new offer language and concepts. For several reasons, as outlined below, the proposed rule fails to meet the needs of Minnesota litigants and impacts parties unfairly in those actions in which it would apply.

The Proposed Rule Only Applies to Actions for Damages

The first change concerns the form of the offer. Where, under the existing rule, the offeror could offer judgment "to the extent specified in the offer or to pay a specified sum of money...," the proposed rule permits a "damages-only" or "total-obligation" offer. Minn. R. Civ. Pro. 68; Proposed Rule 68.01 (c), and (d). Every offer under the proposed rule would be considered a "damages-only" offer

unless a party expressly uses the term "total-obligation" in its offer. Proposed Rule 68.01(c). The proposed rule does not define the form of the offer other than to use the term "damages." The proposed rule obviously contemplates the offer to be a sum of money as the subsequent text considers the judgment in the form of an "amount." *See* Proposed Rule 68.02(b)(1), 68.03(c); Advisory Committee Comment-2007 Amendment(discussing "offer" in the sole context as payment of a "sum"). Therefore, the proposed rule, by its chosen text, applies only to actions for money damage, while the existing rule applies to all actions, whether or not money damages are sought.

The cases filling the dockets of Minnesota Courts contain more issues than the recovery of money damages. Some cases seek injunctive and declaratory relief, while others seek equitable relief like specific performance. Other cases may have both equitable and monetary components. In order to take advantage of the proposed rule, the relief in those cases will either have to be conformed to some "amount" or the proposed rule, more likely, will just go unused. The proposed rule, as written, does not apply to all Minnesota civil litigants.

The Proposed Rule Fails in its Purpose When Fee Shifting Exists

Nearly 300 different Minnesota statutes permit the recovery of attorney fees to successful litigants for various civil claims in tort, employment and many other areas. *See* Deborah McKnight, *Attorney Fee Awards in Minnesota Statutes*, February 2004, http://www.house.leg.state.mn.us/hrd/pubs/attyfee.pdf. Parties may also agree for fee awards by contract. Generally, under the "American"

Rule, each party accepts responsibility for its own attorney fees and cannot shift that cost to the losing party. *Marek v. Chesny*, 473 US 1, 8 (1985). Some statutes and contracts may specify an attorney fee as a "cost" which may fall under Rule 68. *Id.; see also Barr-Nelson v. Tonto's, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983); *Collins, et al., v. Minnesota School of Business, Inc.*, 655 N.W.2d 320, 325 (Minn. 2003).

Commentators noted that one criticism of the existing Rule was that it contained no provision for the shifting of the burden of attorney's fees. Herr & Haydock, *Minnesota Practice*, Fourth Edition, Vol. 2A, § 68.3. "If the rule permitted a party to avoid paying attorney fees, it would certainly see greater use." *Id.* In *Marek*, the plaintiffs rejected an offer that was more favorable to the defense in a civil rights matter. The United States Supreme Court, applying the federal Rule 68, held that Plaintiffs could not collect their statutory attorney fees incurred after the offer from the Defendants reasoning that Plaintiffs received no monetary benefit from the post offer services of their attorney. *Marek*, 473 US at 12. This result supported the goal of Rule 68 to encourage settlements. *Id.*, 473 US at 10.

The proposed rule turns *Marek* and the criticism of the existing rule on its head. Under the proposed rule, the recovery of attorney fees for the "plaintiff-offeree" rejecting a reasonable settlement offer "shall not be affected" by the rule. Proposed Rule 68.03(b)(1). The *Marek* Court suggested a reasonable offer would require a plaintiff to "'think very hard' about whether continued litigation is

worthwhile; that is precisely what Rule 68 contemplates." *Marek*, 473 US at 11.[1] Under the proposed rule, the plaintiff faces no risk of going forward with a fee-shifting case. The plaintiff's entire attorney fee will be sought from the defendant as long as some result is obtained and the proposed rule provides the defendant no relief. No incentive exists for a defendant to use the proposed rule where fee shifting exists as it has no real effect.

This situation also creates a serious conflict for a plaintiff's lawyer. His or her client may receive an offer that fully compensates the client yet the attorney could press for further litigation to increase the attorney's fee recovery. While proceeding in such a manner presents significant ethical violations, the incentive nonetheless exists. *See* Minnesota Rules of Professional Conduct 1.5(a)(An attorney may not charge an unreasonable fee for services); Minnesota Rules of Professional Conduct 1.8(i) (A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of a litigation except for a lien to secure fees or a reasonable contingent fee); Minn. Stat. § 481.071 (An attorney who delays a client's suit with a view to the attorney's own gain is guilty of a misdemeanor and could also be civilly liable for treble damages); *see also Evans v. Jeff D.*, 475 US 717, fn. 14 (1986) (Discussing ABA Model Rule of Professional Conduct 1.7(b) stating that a lawyer "must not allow his own interests, financial or otherwise, to influence his professional advice").

[1] The Court noted that the plaintiffs incurred nearly $140,000 in fees post offer to secure a judgment $8,000 less than the offer. It considered this a "good example" of why such fees should not be ordered against the defendants. *Id*

In fee shifting cases, the proposed rule actually presents no benefit to settlement and actually benefits the recalcitrance of party to reject a reasonable offer. Worse, the proposed rule provides an incentive to encourage unethical conduct. It should not be adopted.

The Proposed Rule Unfairly Benefits Plaintiffs Over Defendants

As indicated above, plaintiffs face no risk for rejecting reasonable offers when fee shifting applies. Moreover, in other circumstances, the proposed rule permits double costs to plaintiffs when a defendant rejects an offer. Proposed Rule 68.03 (b)(2). The proposed rule therefore exacts a fine rather than shift a risk of going forward.

The proposed rule will have the likely effect of encouraging litigation rather than resolving litigation. As noted by the Committee, the "double-costs" proposal permits a claimant to "game" the process with early offers. Advisory Committee Final Report p. 5. Plaintiffs would make inflated offers and defendants would unlikely respond or utilize the proposed rule. Double-costs would potentially be available in every case.

Just as the proposed rule encourages plaintiffs to reject offers in order to increase attorney fees, the proposed rule encourages plaintiffs to inflate their costs in order to obtain a potential double recovery. The proposed rule would appear to conflict with Minnesota Statute § 549.04, Subd. 1, which permits the taxation of "reasonable disbursements paid or incurred" to a prevailing party. *See* Minn. R. Civ. Pro. 54.04 (costs and disbursements shall be allowed as provided by statute).

The proposed rule rewards the party who commences litigation as only the "plaintiff-offeror" has the opportunity for double costs. The sole effective strategy to counter the effect of the proposed rule's double cost windfall is for a party facing a potential dispute to commence an action against the other. This encourages litigation and defeats the settlement purpose of Rule 68.

The proposed Rule only benefits the party who commences litigation and provides no genuine incentive for parties to resolve a dispute.

The Proposed Rule Defeats Its Purpose

The incentive for a Rule 68 offer of judgment is its provision shifting the burden of paying costs to the offeree if the trial outcome is not as favorable as the offer. Herr & Haydock, *Minnesota Practice*, Fourth Edition, Vol. 2A, § 68.3. The existing Rule 68 provides no discretion to a court to deny recovery of costs allowed by the Rule. *Id.*

The proposed rule provides that the offer of judgment process may be for naught should the court determine that a "party's failure to accept an offer would impose undue hardship or otherwise be inequitable." Proposed Rule 68.03(b)(3). This provision undermines the value of an offer of judgment. It promotes additional litigation to determine hardship. It provides additional incentive to reject a reasonable offer as a means exists to escape any accountability or consequence for the rejection.

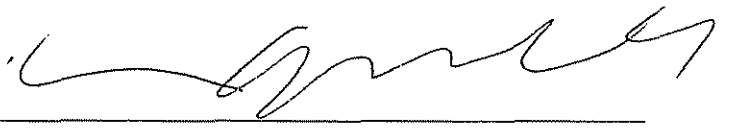
Conclusion

The proposed Rule 68 change presents a poor and unwarranted alteration to the Minnesota Rules of Civil Procedure. It provides an unfair advantage to plaintiffs and fails to meet its essential settlement purpose. Its effect appears intended to invite litigation as opposed to resolution.

The MDLA requests that the Supreme Court reject the proposed changes to Rule 68 and requests the opportunity to be heard at the December 19, 2007 hearing.

Dated: November ___, 2007

MINNESOTA DEFENSE LAWYERS ASSOCIATION



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