STATE OF MINNESOTA

IN SUPREME COURT

ADM04-8001

OFFICE OF
APPELLATE COURTS

FEB 29 2008

FILED

**ORDER PROMULGATING AMENDMENTS
TO RULES OF CIVIL PROCEDURE**

The Supreme Court Advisory Committee on the Rules of Civil Procedure has recommended amendments to Rule 68 of the Rules of Civil Procedure. Pursuant to our order filed October 16, 2007, we received written comments and held a hearing on December 19, 2007, on the proposed amendments. In addition, we have become aware of the need for a cross-reference correction in Rule 30.04.

The court has reviewed the proposals and is advised in the premises.

IT IS HEREBY ORDERED THAT:

1. The attached corrective amendment to Rule 30.04 of the Rules of Civil Procedure be, and the same is, prescribed and promulgated to be effective on the filing of this order.

2. The attached amendments to Rule 68 of the Rules of Civil Procedure be, and the same are, prescribed and promulgated to be effective on July 1, 2008.

3. These amendments shall apply to all actions or proceedings pending on or commenced on or after the effective date, provided that the amendments to Rule 68 shall not apply to any offers made under that rule before July 1, 2008, and the effect and

consequences of such offers shall be governed by the provisions of the pre-amendment Rule 68.

4. The inclusion of advisory committee comments is made for convenience and does not reflect court approval of the statements made therein.

Dated: February 29, 2008

BY THE COURT:

Russell A. Anderson
Chief Justice

AMENDMENTS TO RULES OF CIVIL PROCEDURE

[Note: new material is indicated by underscoring, except committee comments, which are all new; deleted material is indicated by strikethrough.]

Rule 30. Depositions Upon Oral Examination

* * *

30.04 Schedule and Duration; Motion to Terminate or Limit Examination

(a) Objections. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (~~e~~d).

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 *Everson 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.~~

[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).

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

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

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

76 **Rule 68.02. *Acceptance or Rejection of Offer.***

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

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

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

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

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

91 (1) the filing of a stipulation of dismissal stating that the terms of the offer,
92 including payment of applicable prejudgment interest, costs and disbursements,

93 and applicable attorney fees, all accrued to the date of the offer, have been
94 satisfied or
95 (2) order of the court implementing the terms of the agreement.
96 **(d) Offer Deemed Withdrawn.** If the offer is not accepted within the 10-day
97 period, it shall be deemed withdrawn.
98 **(e) Subsequent Offers.** The fact that an offer is made but not accepted does not
99 preclude a subsequent offer. Any subsequent offer by the same party under this rule
100 supersedes all prior offers by that party.
101 **Rule 68.03. Effect of Unaccepted Offer.**
102 **(a) Unaccepted Offer Not Admissible.** Evidence of an unaccepted offer is not
103 admissible, except in a proceeding to determine costs and disbursements.
104 **(b) Effect of Offer on Recovery of Costs.** An unaccepted offer affects the
105 parties' obligations and entitlements regarding costs and disbursements as follows:
106 (1) If the offeror is a defendant, and the defendant-offeror prevails or the
107 relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-
108 offeree must pay the defendant-offeror's costs and disbursements incurred in the
109 defense of the action after service of the offer, and the plaintiff-offeree shall not
110 recover its costs and disbursements incurred after service of the offer, provided
111 that applicable attorney fees available to the plaintiff-offeree shall not be affected
112 by this provision.
113 (2) If the offeror is a plaintiff, and the relief awarded is less favorable to
114 the defendant-offeree than the offer, the defendant-offeree must pay, in addition to
115 the costs and disbursements to which the plaintiff-offeror is entitled under Rule
116 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred
117 after service of the offer. Applicable attorney fees available to the plaintiff-offeror
118 shall not be affected by this provision.
119 (3) If the court determines that the obligations imposed under this rule
120 as a result of a party's failure to accept an offer would impose undue hardship or

121 otherwise be inequitable, the court may reduce the amount of the obligations to
122 eliminate the undue hardship or inequity.

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

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

127 (2) a total-obligation offer is compared with the amount of damages
128 awarded to the plaintiff, plus applicable prejudgment interest, the offeree's taxable
129 costs and disbursements, and applicable attorney fees, all as accrued to the date of
130 the offer.

131 **Rule 68.04. Applicable Attorney Fees and Prejudgment Interest.**

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

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

142
143 **Advisory Committee Comment—2008 Amendment**

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

153 Rule 68 uses the term "offer" to include offers to settle made by any party. Thus,
154 *both an offer by a defendant to pay a sum in return for a dismissal of a claim and an offer*
155 by a claimant to accept a sum in return for dismissal—often termed a "demand" and not
156 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 as the federal rule (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

219 governs prejudgment interest in most cases, contains a mechanism analogous to this rule
220 that adjusts calculation of prejudgment interest based on the relationship between the
221 parties' offers of settlement and the ultimate judgment or award in the case.