

**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**

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Chair**

**Hon. Helen M. Meyer
Liaison Justice**

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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

33 ~~trial, neither does it prohibit such offers. An offer made within ten days before~~
34 ~~trial does not shift the responsibility for taxable costs.~~
35 ~~Minn.Stat. § 549.09, subd. 1 (1982), as amended by Minn.Laws 1983, ch.~~
36 ~~399 (effective July 1, 1984), provides for recovery of prejudgment interest.~~
37 ~~Rule 68 does not affect the operation of that statute.~~

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39 *[Reporter’s note: balance of rule is entirely new; underscoring is omitted*
40 *in interest of readability]*

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42 **Rule 68.01. Offer.**

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

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

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

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

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

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

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

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

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

74 (1) If the offer is a total-obligation offer as provided in Rule
75 68.01(d), judgment shall be for the amount of the offer.

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

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

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

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

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

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

92 **Rule 68.03. Effect of Unaccepted Offer.**

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

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

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

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

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

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

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

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

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

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

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

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

135 **Advisory Committee Comment—2007 Amendment**

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

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

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

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