

**Revitalizing FRCP 68:
Can Offers of Judgment Provide
Adequate Incentives for
Fair, Early Settlement of Fee-
Recovery Cases?**

Friday, February 17, 2006

**Session One:
“Background and Federal Judicial
Interpretation of Rule 68”**

DEAN FLOYD: Good morning. I am Daisy Floyd, the Dean of the Law School, and it is my great privilege this morning to welcome you to Mercer and welcome you to the Law Review Symposium. We are looking forward to a day in which we will be collectively struggling with the provocative question of revitalizing Federal Rule of Civil Procedure 68:¹ Can offers of judgment provide adequate incentives for fair, early settlement of fee-recovery cases?

Many of us watched with great interest and delight as Professors Lewis and Eaton have shared their unfolding work with us, as they have traveled around the country to interview lawyers about their actual experiences with Rule 68. We are delighted to have panelists here who can share their experience and their wisdom and hope that you will be

1. FED. R. CIV. P. 68.

involved in this, ask questions, and help us as we struggle through this difficult but interesting question.

I want to say a word about Law Review before I turn it over to Elizabeth. Yonna Shaw and Cherie Jump, who I think are probably in the room, have done a wonderful job of assisting in preparing for this Symposium and bringing us to this day. The student members of the Law Review have also done fabulous work in preparing, planning, driving, and doing all kinds of tasks in order to bring us to this Symposium. So thank you to those of you from Law Review who have made this happen today.

So welcome to you. Please make yourselves at home. We are delighted that all of you are here. I am going to call now on our Law Review Editor in Chief, Elizabeth Baum. She is going to introduce the panelists.

ELIZABETH BAUM: Good morning. On behalf of the Mercer Law Review I would also like to welcome you to our annual Symposium. I am certain that today will be a day full of very insightful discussions for all of us. It is my great privilege to introduce our Symposium panel to you this morning. This is an extremely prestigious group of individuals who are all experts in this area.

Permit me to introduce to you the Honorable William Schwarzer, Senior United States District Judge for the Northern District of California; Richard Alfred, a partner in the firm of Seyfarth Shaw in Boston, Massachusetts; Robert Bennett, a managing partner in the firm of Flynn, Gaskins & Bennett, in Minneapolis, Minnesota; Edward Buckley, one of the founding partners of the firm Buckley and Klein in Atlanta, Georgia; John Kennedy, a managing partner in the firm of John Francis Kennedy in Gig Harbor, Washington; Maureen McClain, a senior partner in the firm of Kauff, McClain and McGuire in San Francisco, California; Barry Roseman, a shareholder in the firm of Roseman and Kazmierski in Denver, Colorado; Brian Spears, an attorney in a private civil litigation practice in Atlanta, Georgia specializing in federal litigation; Muriel Goode-Trufant, Chief of the Special Federal Litigation Division and an Equal Employment Opportunity Officer of the New York City Law Department; Professor Edward Cooper, the Thomas M. Cooley Professor of Law at the University of Michigan School of Law; Thomas Eaton, the J. Alton Hosch Professor of Law at the University of Georgia School of Law; Professor Harold Lewis, the Walter F. George Professor of Law at Mercer University School of Law; and Professor Albert Yoon, Professor of Law at Northwestern University School of Law.

I would like to thank each one of you for your willingness to be here and participate in our Symposium. I would also like to thank Rebecca

McKelvey, Mercer Law Review's Lead Articles Editor, and Professor Harold Lewis for all the work that has made this event possible.

Thank you.

PROFESSOR LEWIS: Thank you Dean Floyd and thank you Libby Baum. Thank you for being here. This is an extraordinary assemblage of talent from around the nation on an issue of great potential importance that looks awfully technical, can be awfully technical, but at bottom is fairly simple. There is a huge category of cases in the federal courts in which prevailing plaintiffs can recover fees. Roughly, ninety-six percent of those cases, we are told by recent research, never go to trial. They all settle. And, yet, they can take months or many many years to settle with enormous costs to the parties and to the public.

Rule 68 was designed, initially, in the original package of Federal Rules in 1938, to basically provide defendants a lever to encourage plaintiffs to think about early offers of settlement. In a sense it was long before Tony Soprano, but the idea was to make them an offer they could not refuse. And it turns out that, despite the Supreme Court's effort in 1985 to invigorate this Rule and to really give defendants some incentive to make it, defendants have not been making very many of these offers. At least that was the impression that my research partner, Tom Eaton, and I have gained. We set about to find out from lawyers around the country if that was true; if it is, why defendants were not making those offers; and then why, in the cases where they were making the offers, they apparently were so seldom accepted by plaintiffs.

I need to thank, initially, the people and institutions who have made this nationwide interview effort possible. There were some very good earlier studies of this issue. John Shapard from the Federal Judicial Center did an extensive written questionnaire survey of lawyers around the country. He concluded from the written responses that there was under-utilization. He indicated frequencies in the use of the Rule in various types of cases.

But as we looked at the results of the study, we found ourselves asking more questions: Why? We could not, and Mr. Shapard could not, get all that from a questionnaire. We decided that an interactive interview process might work a little better. And with the support of the Walter F. George Foundation, which generously supported the research and the travel, and its Chair, Griffin Bell, former Attorney General and Fifth Circuit Judge, and Mercer University President R. Kirby Godsey, also a member of the Walter F. George Foundation, and of our current and preceding deans, Dean Floyd who you met a few minutes ago and interim Dean Michael Sabbath who preceded her, all these people made it possible for Professor Tom Eaton from the University of Georgia and

me to meet these lawyers in interviews lasting anywhere from an hour and a half to two hours. Although the acquaintance might have gone on a couple hours later over lunch, and to have confidential, transcribed interviews supervised by the institutional review boards of our respective universities, the University of Georgia in Professor Eaton's case and Mercer in my case, these interviews were extremely candid. The lawyers knew that they would not be identified, nor would their firms or their clients or their government agencies, with any of the views that they expressed. And just a reminder to our wonderful guests who have come so far that those rules are not in effect today and our remarks are being recorded. I hope that does not mean less candor, but perhaps it is only fair to the participants because these remarks today from the panelists will appear as part of the Mercer Lead Articles Edition that Rebecca McKelvey is editing.

Tom Eaton is my research partner on this project. He is an eminent, nationally known civil rights scholar with several academic works on the subject. And he is also experienced in empirical research, especially in Georgia tort law. I did not have that experience, so Tom was an invaluable check on my own excesses in plunging headlong into dark waters. Tom is also tall enough that he can be seen over the computer screen; and therefore he makes an excellent partner in that respect as well.

The lawyers who you see in front of you are identified by the principal area of their practices, principally for your convenience, so you can appreciate, perhaps, why some of them are expressing the views that they are. I cannot say enough about them that goes beyond name, rank, serial number, and formal status and prestige. This group is unrepresentative of national employment discrimination and civil rights lawyers in two respects: Professor Eaton and I rapidly concluded that if we limited our group of lawyers to be interviewed to those who were representative in the field, we would be talking to many lawyers on the defense side who have never made an offer of judgment and to many on the plaintiff's side who would never have received one. And, so, the first decision in the research design was to focus on experienced lawyers in fields where fees are recoverable. Professor Eaton will be spelling that out in more detail.

So we took experienced lawyers and these, the sixty-four of them we interviewed around the country that Professor Eaton will tell you about, are far more experienced in employment discrimination and civil rights law than typical practitioners in the field. The eight who are with us today are the very best among the sixty-four whom we interviewed. They are just exceptional. They are not just excellent practitioners, but they are very, very concerned about resolving matters efficiently and

effectively on their clients' behalf. They also have real sensitivity to the fairness of the justice system as a whole, and even, on occasion, have concern for adversaries, which was expressed during the interviews, and certainly for the cost to the federal judicial system.

The professors sitting on the far end of the panel add a special dimension. Professor Albert Yoon has developed perhaps the richest data set for studying Rule 68 of any researcher who has tried it before. He has gotten hold of insurance company data covering thousands of cases, tort personal injury cases in the state of New Jersey, and he will be sharing that experience with us. And he has an article on his research that will be coming out very soon in the *Vanderbilt Law Review*.²

Professor Edward Cooper, sitting next to him, has a special role in the Symposium. He has witnessed previous failed attempts to amend Rule 68 in the Federal Rules amendment process. In fact, he served as Reporter to the Federal Civil Rules Advisory Committee the last time an attempt was made to amend Rule 68, and it failed spectacularly. It almost resulted in a committee recommendation to abolish the Rule altogether. And, so, if Professor Eaton were not a sufficient check on the enthusiasms of improving the rule, Professor Cooper will put the final nail in the coffin. But he is an eminent scholar, currently the chief author of the Wright Miller treatise on federal courts, and we are delighted to have him here as well.

Judge Schwarzer enjoys a special, and I think more balanced, role than perhaps any of the rest of us. He has a deep abiding interest in Rule 68 in particular. He is the proponent of a very thoughtful and innovative proposal to amend Rule 68 in the early 1990s that borrowed from the English rule that the loser of the lawsuit, whether plaintiff or defendant, pays the other side's fees. But his proposal had several important modifications of that English rule that perhaps he will have occasion to tell us about. One of the most significant is that he would not have his proposal apply at all in employment discrimination, civil rights, or other statutory fee shifting cases so as to require plaintiffs who were on the wrong side of a Rule 68 offer to pay the fees of defendants or forfeit their own post-offer fees.

The very simple basics of the Rule go like this, and Professor Eaton will describe what we have learned. He will mark out the research design and what we have learned from sixty-four lawyers who have spoken to us about the degree of their utilization of the Rule and why

2. Albert Yoon & Tom Baker, *Offer-Of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. (forthcoming 2006).

they do not use it more. The basics are pretty simple. Under the current Rule, only defendants can make these offers to plaintiffs. Plaintiffs, in rules under a number of state laws, can make these offers to defendants, and can thus use the pressure from the law to encourage defendants to consider early settlement.

The Rule is triggered only when the plaintiff, who has turned down the defendant's offer, fails to recover at trial a greater amount. The greater amount is calculated by adding the amount of fees that the judge thinks the plaintiff incurred before the offer was made to the total recovery, that is, the ordinary damages recovery on the merits. So the judge would add up the pre-offer fees, the pre-offer costs, and the plaintiff's damages, and see if the post-trial total that the plaintiff recovered exceeded what the defendant had offered usually months or years earlier. The Rule is designed to place a penalty on the offeree, which would usually be a plaintiff, except in a counterclaim situation, who guesses wrong in rejecting an offer and continues to litigate for months or years afterwards.

And what are those penalties? The text of the Rule simply says that if the plaintiff guesses wrong in rejecting the offer, then the plaintiff will forfeit the defined "costs" that the Federal Rules and the Judicial Code ordinarily award to a prevailing party. Costs in themselves would seldom be a sufficient deterrent to a plaintiff to keep litigating. Typically, they would involve court costs and costs of court transcriptions. So while the statutory costs might add up to thousands of dollars, they will seldom, in an ordinary civil rights or employment discrimination case, amount to many tens of thousands of dollars and would therefore seldom by themselves put enough pressure on the plaintiff to consider an offer that was not very attractive on its own terms.

The way the Supreme Court in 1985, a little over twenty years ago, tried to juice up the Rule was to say that in the majority of federal question cases, where plaintiffs who prevail are eligible to recover attorney fees from the defendant, the plaintiff would not only forfeit recovery of post-offer costs when they guessed wrong, but would also forfeit recovery of post-offer attorney fees. And as all of you who are paying tuition can devoutly hope, fees will be a significantly larger item than the costs. It is important to realize that in these cases, federal civil rights cases and employment discrimination cases in particular, damages are typically fairly small; and, so, the highest dollar component of recovery that the defendant would be faced with would be attorney fees payable to the plaintiff, and indirectly, in a fee agreement, to the plaintiff's lawyer.

And you can imagine, then, that if an offer of judgment is made by the defendant early to the plaintiff, that if the plaintiff's lawyer is anticipat-

ing months or years of depositions, other discovery, motions, and trial, that the plaintiff's lawyer, when receiving an early offer of judgment has to think, "If my client turns this offer down, will my client be deprived of the next six months or maybe six years of an award of attorney fees?" As some defense lawyers like to put it to plaintiffs' lawyers when they transmit an offer of judgment, "If you turn this down you might be working for free for the next several years."

There is a good deal of confusion in the practice, we are learning, about whose money this is. Who gets the attorney fees recovery? The Supreme Court, as a formal matter, has told us at least twice that when a defendant is ordered to pay attorney fees to a prevailing plaintiff, the award belongs to the plaintiff, and how much of that is retained by the plaintiff and how much of that is paid to the lawyer is strictly a matter of the parties' own contractual fee agreement as governed by state contract law and subject to ethical and professional responsibility considerations between the lawyer and the client. But the fee award itself is technically paid by the defendant to the plaintiff. And, so, there are all kinds of interesting professional responsibility issues that the lawyers have been telling us about involving how attorneys counsel their clients on the defense side about extending offers, and on the plaintiff's side about whether to accept them. And there is some concern among plaintiff's lawyers that this offer has a way of driving a wedge, in some cases, between the interests of the plaintiff and the interests of plaintiff's counsel.

Okay, so the offer is made only by the defendant and the Rule is triggered only when the plaintiff turns it down. The case goes to trial, which we know is only about four percent of the time in the federal system, then there is a trial and the plaintiff prevails, but prevails at a lower amount than the offer. The Supreme Court has said this Rule has no application whatsoever when the case goes to trial and the defendant wins. Why, then, would a defendant have a strong incentive to make an offer of judgment in a case that the defendant thinks that it may win months or years down the road? The Rule gives it no special benefit.

Last, what are the sanctions on the plaintiff in the unlikely event that the Rule is triggered because the defendant makes an offer; the plaintiff turns it down; the case is not resolved on summary judgment; it goes to trial; and the plaintiff wins at trial but fails to recover an amount exceeding the amount of the offer? If all those things happen, the Rule is triggered. What are the adverse consequences to the plaintiff for having litigated an additional six months or six years after guessing wrong about how much they might recover?

Three consequences: First, the plaintiff in this situation is the prevailing party. They just have not prevailed at a level high enough to

exceed the offer. As a result, under normal litigation rules, the plaintiff would recover, under Rule 54(d), costs for the entire action from the defendant. But if Rule 68 is triggered against the plaintiff, the plaintiff will forfeit all Rule 54 costs incurred after the offer was made.

Second, and more important, we have the Supreme Court's 1985 decision in *Marek v. Chesny*.³ If the particular statute that authorizes fees uses language that awards those fees as part of the "costs," then the Supreme Court says Rule 68 forfeits not just the plaintiff's post-offer costs but also post-offer attorney fees. And that is why this is the category of the case where Rule 68 is potentially very, very significant as a settlement lever for a defendant, or if we look at it more deeply, a way in which plaintiffs who have good cases might potentially receive reasonably valued offers at a relatively early moment in the lawsuit. And if even a small percentage of this huge number of federal cases could settle significantly earlier, there would be an enormous savings of transaction costs for the parties and for the judicial system.

The third, and often overlooked, consequence that the plaintiff suffers in the rare event that the Rule is triggered, is that not only does he forfeit, as the prevailing party, a recovery of his own post-offer costs and fees, but, contrary to the ordinary Federal Rules of Civil Procedure approach, even though he has prevailed he must pay the *defendant's* post-offer costs.

I said earlier that costs are relatively insignificant in amount; that is to say plaintiffs would not settle a case very often for fear of not receiving an award of costs. But consider the lack of means of many of the plaintiffs in these large categories of federal cases: employment discrimination plaintiffs who may no longer be employed when the litigation commences and civil rights plaintiffs—who we are learning are overwhelmingly plaintiffs with doubtful, questionable economic means, often victims of, or alleged victims of police misconduct, arrest, search, excessive force—although a little different mix of civil rights plaintiffs perhaps in New York City, as Ms. Goode-Trufant will tell us, many more First Amendment civil rights actions in that district. If you imagine plaintiffs with scant means, while they may not be threatened by the failure to recover their own post-offer costs, it might be rather damaging to some of them to have to reach into their pocket and pay the defendant's post-offer costs. And perhaps that is more of a problem to those plaintiffs who are actually employed or have assets or other sources of income, and perhaps of less importance to typical civil rights plaintiffs. That is something we will hear about from the lawyers.

3. 473 U.S. 1 (1985).

So our investigation here is really concerned about promoting earlier, yet still fair, settlement. The vast majority of these cases settle eventually. But we can promote earlier settlements by arming defendants with a settlement lever supplied by the Rules that might induce defendants, if the incentives are great enough, to make plaintiffs early offers. It is only if a Rule 68 offer comes early in the lawsuit that the plaintiff and the plaintiff's lawyer have to fear the loss of significant future fees.

With that introduction, let me turn it over to my excellent research partner, Professor Thomas Eaton, who will tell you a little bit more about our research design. We have now completed our first run-through of transcripts from these sixty-four interviews. He will tell you what the lawyers around the country have told us about under-utilization of the Rule and the reasons for that. Thank you.

PROFESSOR EATON: It seemed when *Marek v. Chesny* was decided that defendants were given a significant leverage in inducing settlement. There was an outcry by the plaintiff's bar and by many academics that this leverage was unfair and was going to lead to a lot of coerced settlements. But then anecdotes suggested that few lawyers actually made or received Rule 68 offers.

I approached this research project from a little bit different standpoint than Hal. I approached it more as an anthropologist. I was more interested in finding out if the rumors that Rule 68 was not being used were true; and, if so, why would that be? I came to this project with less of a commitment to reform than a simple curiosity to find out what lawyers were doing.

We decided early on that the best way to find out how Rule 68 is used in practice would be to talk to the people who would make or receive such offers. So we set out to interview attorneys. We decided to interview four attorneys in sixteen cities. The set of four attorneys would include practitioners in the fields of plaintiff employment discrimination, defense employment discrimination, plaintiff civil rights, and defense civil rights—sixty-four lawyers in all. Why sixteen cities? We wanted to have at least one city in each of the twelve federal circuits, and we wanted to have more than one city in the federal circuits that accounted for the greatest number of civil rights and employment discrimination cases: the ninth, the fifth, and the eleventh.

We identified attorneys primarily through referrals from professional associations, bar committees, individual attorneys, and sometimes even law professors. And what we ended up with was a group of sixty-four very experienced lawyers, the people who would most likely be in the best position to tell us about how Rule 68 actually works in the trenches.

You will be glad to know, ladies and gentlemen, that collectively the sixty-four lawyers we interviewed have more than one thousand six hundred years of practice experience. The least experienced attorney we interviewed had been practicing in the area for ten years, the most senior over forty years, and the average was more than twenty-five years. Our sixty-four lawyers collectively have worked on more than thirteen thousand employment discrimination or civil rights cases in the last five years. So if there is a group of people in a position to know something about how Rule 68 works in fee shifting cases, we are confident that it is this group.

Most of the employment discrimination lawyers, both plaintiff and defendant, were in private practice. For some of them, employment discrimination was part of a broader labor law practice. One of our employment discrimination defense lawyers was an in-house counsel for a Fortune 500 corporation. All these attorneys handled sex, race, age, and disability discrimination cases. A couple of the employment discrimination plaintiff's attorneys also did defense work on behalf of unions. Most of their work involved representing individuals with disputes against private corporations, but sometimes they defended unions against claims brought by union members.

Our civil rights plaintiff's attorneys were mostly in private practice, although some had an institutional affiliation in the past or present with the ACLU. Most of their cases involved police misconduct, such as false arrest, search and seizure, and excessive force. Some attorneys had a significant amount of experience in litigation involving jail and prison conditions, suicides, physical attacks on inmates, or medical care in confinement. A few also handled First Amendment employment cases, for example, whistleblowers who claimed they were retaliated against because they exercised First Amendment rights. More commonly that type of claim was handled by employment discrimination lawyers, but sometimes it was handled by an attorney who also litigated police misconduct cases.

Our civil rights defense lawyers were mostly salaried government attorneys representing cities, counties, and, in one case, a state; but several were in private practice who were either engaged directly by a government unit or as a part of a risk pool group. That is a way for smaller groups of governments to band together and share in the costs of providing defense.

As Hal said, each of the interviews lasted one or two hours. The first research question I had was whether the anecdotes were true: Is Rule 68 largely ignored? Our interviews confirmed that the general practice across the United States is that Rule 68 offers of judgment are rarely used in either employment discrimination or civil rights cases.

There was a New York employment discrimination plaintiff's attorney who had been in practice for thirty-three years who reported that he had received three offers in his practice experience—one every eleven years. An employment discrimination defense lawyer in New Orleans said that he had made ten or fifteen offers in thirty years of practice. That works out to one offer every two or three years. A Chicago employment defense lawyer said he had not made any Rule 68 offers in the past five years. In-house corporate counsel for our Fortune 500 company who supervises employment discrimination cases said that his company had not made an offer of judgment in the past ten years.

On the civil rights side, one defense lawyer claims to have made no more than ten offers over a thirty-year career in which he and his firm have processed ten thousand cases on behalf of the City of New Orleans and various sheriff's departments around the state. Civil rights defense attorneys in Memphis and Houston, who between them had more than forty years of experience, had never made a Rule 68 offer. So these stories tend to confirm what others had told us was the norm.

Several employment discrimination and civil rights plaintiff's lawyers expressed both surprise and relief that this was the case. They were glad that Rule 68 is largely ignored and expressed the hope that our project would not change that. One plaintiff's counsel said that he was just "flat mystified." He could not explain why defendants did not use Rule 68 more often because he felt it would put significant pressure on him.

While the general rule is one of non-use or very infrequent use, there were some notable exceptions. Civil rights defense lawyers in New York, Minneapolis, Philadelphia, Oakland, and the greater Seattle area report that they now consider whether to make a Rule 68 offer as a routine part of initial case evaluations. So as soon as a case comes in, among the things that they are thinking about is whether it is a good case in which to make a Rule 68 offer. Probably the high water mark in terms of frequency of use comes from one of our panelists who reported that he has made Rule 68 offers in seventy percent of his cases. There was no other person that we interviewed who came close to that mark.

One thing I found to be interesting is that all of the reports of systematic use of Rule 68 came from civil rights defense, not employment discrimination defense. The lawyers reporting the greatest use of Rule 68 all were representing public—not private—defendants. Even in the same geographic area we did not find any reports among the plaintiff's or defense's employment discrimination bar of a systematic use of Rule 68. One of the questions I have for our panelists is: what might explain why public entities in certain areas might be more willing to make Rule 68 offers than private defendants?

Our interviews also explored the question of why Rule 68 is not used more frequently. We do not have a single answer to that question. We cannot wrap it up. But I can describe consistent themes that occurred. Some are more disputed than others, but the first three are the ones that we heard most frequently.

Probably the most common explanation provided concerned problems associated with the word "judgment." Privately negotiated settlements typically include non-admissions of liability clauses: "Yes, we're paying you money, but our client denies having done anything wrong. We're paying you to make this go away." Private settlements also commonly include confidentiality provisions: "You're not allowed to talk about the amount that we're paying you." Judgments on the other hand are considered by many to be a more formal public declaration of wrongdoing. Many defense lawyers reported that their clients, whether public or private, wanted to avoid making this formal declaration of wrongdoing.

Among the reasons why a defendant would not want to make a public declaration of wrongdoing is that it might encourage others to sue. We refer to this as copycat litigation: "If we make an offer of judgment in this case we may end up with five more cases." Some lawyers reported that their clients were concerned about adverse publicity. You can imagine that offering to have a judgment entered for the plaintiff in a police brutality case might yield some adverse publicity to the defendant city. Or a corporation admitting that there is sexual harassment in the workplace might not be the best advertising for the company.

Some lawyers expressed concern about more specific adverse consequences. For example, we were told by several lawyers that if a police officer had a judgment against him individually, it might make it more difficult for that officer to secure a mortgage or it could impair his career advancement. A judgment that an officer used excess force might make it more difficult for that officer to qualify for assignment to a S.W.A.T. team later in his career.

Lawyers for public defendants, and to a lesser extent private defendants, expressed a need to back up their team: "We're not going to make offers of judgment because it makes it sound like we're not backing our police officers," or "we need to support the police," or "We need to support the supervisors in our company, especially when we do not think that they did anything wrong."

Since I identified a few cities where Rule 68 offers are made with greater frequency, the foregoing objections are not universally considered to be insurmountable. Somehow the cities of New York, Philadelphia, and Minneapolis have found ways to make Rule 68 more palatable despite these concerns.

The second theme as to why Rule 68 is not used more frequently involved a point Professor Lewis alluded to previously. Many of the defendants and defense counsel emphasized they were going to win anyway. "We're not interested in making a Rule 68 offer in a case that we think we're going to win, especially if we think we're likely to win it on summary judgment." As Professor Lewis pointed out, Rule 68 provides no specific tangible economic reward for having made an offer and then winning the case outright on the merits. Some defense attorneys described Rule 68 as providing, at most, a kind of insurance policy against paying further fees if they guessed wrong about winning on the merits.

Another point that I thought was interesting was that employment defense lawyers who do not make Rule 68 offers in federal court might very well make them under corresponding state rules where the state rules allow for recovery of attorney fees. So there appears to be something to the notion that if you give the defendant a tangible economic benefit they might make more offers. A related point that I heard from municipal attorneys is that there are certain transaction costs associated with making an offer. Specifically, lawyers who represent public defendants may have to secure some bureaucratic approval before making a Rule 68 offer that is above a specified dollar amount. These lawyers said the bureaucratic approval process is a pain in the rear end. They do not want to navigate the political waters, especially if "We're going to win anyway."

All of this may be part of a broader litigation philosophy of not wanting to show weakness in a particular case. Several defense lawyers commented that their clients would rather pay thousands for defense and not a penny for tribute. One civil rights defense lawyer expressed it in terms of morality, saying that he thought it was just "wrong" to spend a dollar of taxpayer money to pay a non-legally deserving plaintiff. That, in his view, is just a misuse of public funds.

The third common theme is what Hal and I have referred to as the economic conflict theory. Most defense lawyers are paid on an hourly fee, and a widespread suspicion among plaintiff's lawyers is that defense lawyers feel a need to run up their fees before discussing settlement. The pressures to accumulate billable hours is especially acute for associates who are expected to bill eighteen hundred to two thousand hours a year.

This is a widespread but not a universal suspicion among plaintiff's lawyers. Other plaintiff's lawyers discount this hypothesis. Of course, no defense lawyers admitted that they run up their own fees, but some acknowledged that there might be others who do. Other defense lawyers expressed strong disagreement, even outrage, at this suggestion. They

pointed out that market forces push them towards efficient resolution of disputes. Competition among the defense bar for clients is such that if you pad your hours, your client is going to find another attorney. And even in single engagement cases, where it is just going to be a one-time representation, there is often an insurance company that is paying the cost of defense and they provide oversight of the amount of time an attorney spends on the case. This oversight (or, depending on your point of view, micro-managing) helps keep attorney fees in check.

The economic conflict theory is also called into question by the fact that many government attorneys who do not have any economic interest in running up the bill also do not make Rule 68 offers. On the other hand, the only lawyers that we found that do make Rule 68 offers with any frequency were those representing public defendants.

A fourth argument focuses on plaintiff's counsel. Some defense lawyers suggested that maybe it is the plaintiff's lawyers who dampen the use of Rule 68. Many civil rights cases are likely to yield small damages, thus yielding a small fee under a typical contingent fee arrangement. So a plaintiff's lawyer who thinks his client has a good case on the merits but one that is not going to produce a big damage award may want to get more hours into the case to increase the amount of statutory fees. The obvious limitation with this theory is that it does not explain why so few Rule 68 offers are made in the first place.

A fifth point that was made by some defense lawyers is that they cannot accurately evaluate a case sufficiently early to make Rule 68 an attractive tactic. One defense lawyer claimed that he needed a year and a half of discovery before he could ethically determine what a case was worth. This problem is compounded by uncertainty regarding the amount of plaintiff's pre-offer attorney fees. Some defense lawyers said that they cannot calculate a reasonable Rule 68 offer without knowing the amount of the plaintiff's pre-offer attorney fees.

A majority, but not all, of our interviewees rejected this hypothesis. Plaintiff and defense lawyers in both civil rights and employment discrimination practices tend to agree that a defense lawyer can value a case in terms of liability and damages fairly early on in the litigation. At most, one or two depositions would be all that would be needed. Most defense lawyers thought that they could either estimate pre-offer fees by considering what they have done in the case and looking at how well they think the plaintiff is prepared at that point, or could get that information simply by asking: "Hey, Bill, how much do you have in this case?" And more often than not Bill would provide a figure.

Sixth, some lawyers commented that there are other methods of dispute resolution that are more effective than Rule 68 at achieving an early disposition, such as court ordered early mediation or early neutral

evaluation. A lawyer in Houston commented that he thought that Rule 68 had an adversarial tone to it, that it smacked of a tactic, of a trick, and that might get the lawyers, if not the clients, to dig in a little bit more and be more adversarial. In his view, really effective dispute resolution required an ongoing process, and this process was more like mediation or early neutral evaluation.

Some other explanations that we heard and explored included the assertion that some lawyers just do not know about Rule 68, and those that do are not aware of *Marek v. Chesny*. These lawyers do not use Rule 68 because they do not know about it. Others commented that the Rule is very hard to apply in multi-party cases where there is more than one plaintiff or more than one defendant. Defendants are primarily interested in securing finality as to all of their financial exposure, and a Rule 68 offer that gets rid of only one party to the case is much less attractive than a Rule 68 offer that would get rid of the claims of all parties. Some of the employment discrimination and civil rights cases involve significant claims for equitable relief. In a particular case, equitable relief may be a bigger issue than money damages. It is hard to figure out whether a Rule 68 offer beats or does not beat the outcome if the outcome is primarily equitable.

In summary, with some notable exceptions, it appears that Rule 68 is not used very much in the very type of cases in which it might be expected to have the greatest impact. The three reasons most frequently given by attorneys for the underutilization of Rule 68 are the problems associated with the "formal judgment," the high likelihood of defendants prevailing on the merits, and, perhaps, though this is much more disputed, economic incentives for defense attorneys to avoid an early disposition of the case.

PROFESSOR LEWIS: Thanks so much, Tom. I would like to start with asking the panel about something Tom put his finger on, a real irony. He points out that in civil rights cases with public defendants, we have controversies where you might expect it to be difficult for a counsel to recommend and get acceptance from a public client to make an offer. After all, police misconduct disputes are perhaps more often in the newspapers than employment discrimination disputes involving private corporations. But, in addition, the lawyers' problem of getting authority from the client to settle is, as we have learned, a good deal more complicated in certain municipalities and counties than it would be in most private corporations. And, yet, despite the seeming difficulty of getting offers of judgment from public entities, as Tom reports, this is the one area where we find any significant utilization of the rule. And we are tempted to think of this hypothesis, the hypothesis Tom

mentioned, that perhaps government attorneys are more willing to recommend these offers because they are not paid by the hour; they are paid a fixed salary. Yet we have quite a few government lawyers around the country who use Rule 68 despite the fact that they work for private firms who are engaged either directly by the government or by risk pools on behalf of the government and are paid by the hour. Indeed, there might be someone like that on this very panel.

We will have to ask our panelists who are, after all, representing both fields, any thoughts on what accounts for the observation in the summary that Tom gave that the only significant use that we are finding now is in the civil rights area, section 1983 cases,⁴ as opposed to employment discrimination? This is Ms. McClain who is an employment discrimination defense lawyer from San Francisco.

MS. MCCLAIN: Muriel Goode-Trufant may be able to correct me on this, but my sense is that public corporations have institutionalized procedures for handling cases so that you have a history, perhaps, of utilizing Rule 68 and you have discussed it before with the client. An analogy to that might be with regards to corporations who have continuing litigation and who have in-house counsel who institutionalize approaches to handling litigation. But if you have a single defendant client, it is fairly difficult, I think, to explain the parameters of Rule 68, to explain it at an early stage in the litigation, and to make all the determinations relative to it on a case by case basis.

PROFESSOR LEWIS: This is Jack Kennedy from Gig Harbor, Washington, a civil rights defense lawyer.

MR. KENNEDY: I think one of the reasons why public entities are willing to use offers of judgment is because they have seen firsthand the exposure, that is to say, the risk of litigating these cases to verdict. It is certainly my experience in dealing with public entities as a privately retained lawyer that what you need to do, and we do do, is educate in the very first meeting you have with the client. We do not wait to talk about offers of judgment as some kind of procedural surprise later on. It is just part of the territory that is advised and discussed in the original meeting with the officer or the chief of police or the city council or county commissioners. And you get their attention because you demonstrate the advantage of it to limit exposure and, in many jurisdictions, they are very acutely aware of high level verdict results

4. 42 U.S.C. § 1983 (2005).

that they have been stung with. So there is an education process, and I think there is a willingness.

That is not to say that it is not a delicate piece of rapport building and being sensitive to the political dynamics in a public entity, a police force, or some other kind of case. If you are not sensitive to that, and I have had some interesting discussions with some of our panelists while we have been here, if you are not sensitive to those political dynamics, it is a dead on arrival proposition. It just will not start. And that is when you have got to do it at the beginning and you have to know who your clients are.

PROFESSOR LEWIS: The panelists think it is completely accidental that our first two responders on this question, Ms. McClain and Mr. Kennedy, are working in the Ninth Circuit, where, from all reports, the prospects of liability from the defendant's standpoint are often real. I was listening to Tom Eaton's summary earlier, and the Houston, Memphis, and New Orleans lawyers were saying they never use the offer on the defense side. Then he referred to a Fortune 500 counsel whose company had not used the Rule in ten years. That was also in the Southeast, and all of these cities are in the Fifth, Eleventh, and Fourth Circuits, Memphis being in the Sixth but having its own dynamics. I wonder if you are struck offhand about the *Delta Air Lines*⁵ point that if a defendant can be enormously confident of a victory, it becomes harder to sell a Rule 68 offer to a client even if, as Tom said, it amounts to a largely cost free insurance policy in case they are wrong, in case it turns out three or four years later that there is a surprise judgment for the plaintiff. Any thoughts on that?

MR. BUCKLEY: I am Ed Buckley, and I am in the Eleventh Circuit. For those of you who do not know, the Eleventh Circuit is a tough circuit to bring a plaintiff's employment claim in. We have to be very selective in what we bring. I can count on one hand or maybe one and a half in twenty-three years the numbers of offers of judgment that I have received. And I will freely admit that when I was interviewed for this, when asked why I had so few, I said that because the amount of square footage of commercial real estate in the Atlanta market would shrink dramatically if these large defense firms made offers of judgment straight out of the gate in employment discrimination cases.

I think that there is a lot to that. I had a lawyer once during a trial in a hotly disputed case in which we had taken numerous depositions

5. See *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981).

and in which I had repeatedly said, "Why don't you make me an offer; why don't you make me an offer," who told me he lit a candle to me every night to thank me for the fees that he was incurring in the case. So I do have some cynicism, at least with respect to the private bar, and that is not a condemnation of the private defense bar at all. There are many excellent fair-minded lawyers out there who discuss early dispute resolution with their clients and come up with creative ways to try to resolve cases early. But it is a fact that in the private bar there is a great deal of incentive where people have billable hour goals. Associates in firms have billable hour goals. Partners have to report to their other partners what they are generating in terms of fees, and if you make early offers of judgments that are accepted then, well, a hundred thousand or two hundred thousand dollars or three hundred thousand dollars of fees may vanish.

PROFESSOR LEWIS: We have Muriel Goode-Trufant, a civil rights defense lawyer, and then Mr. Alfred, an employment discrimination defense lawyer. Ms. Goode-Trufant.

MS. GOODE-TRUFANT: I practice in the Second Circuit and we have some of the same considerations that you identified coming into play in my circuit. A plaintiff who accepts an early offer from us means that we will pay much less in attorney fees. However, if a case goes to trial and the plaintiff prevails, the award to the attorney will be many multiples the award to the plaintiff, and that is a very serious consideration for us.

PROFESSOR LEWIS: Does the fact that the biggest stake you face is often attorney fees; is that a major factor that leads you to seriously consider Rule 68 offers?

MS. GOODE-TRUFANT: It is a major factor. The average settlement in our cases is about thirty thousand dollars. We have many cases that are worth more, but realistically cases do not settle for a lot of money and many of them are not worth a lot of money. But an attorney can bill hundreds of thousands of dollars on a thirty thousand dollar case over a couple of years, so the incentive to settle that case early is quite high.

PROFESSOR LEWIS: For those in the audience we should point out that there is no required proportionality between the amount the plaintiff recovers and the amount of fees that the defendant may be ordered to pay the plaintiff. And so, as Ms. Goode-Trufant says, an award to the plaintiff might be thirty thousand dollars and to plaintiff's

counsel it could be four hundred or even six hundred thousand dollars to recover that thirty thousand. Once again, though, how that gets divided up between the plaintiff and the plaintiff's counsel is a matter of their own personal relationship and fee agreement that is modified by some external legal and professional responsibility considerations. Mr. Alfred.

MR. ALFRED: Yes. I practice in the First Circuit in Boston. The initial question that began this discussion related to the comparison between public entities, not public corporations, but public entities, such as municipal and state agencies. I would like to respond to a couple remarks.

First, a remark by Mr. Buckley to my left. I have no doubt that he has good friends against whom he practices who are, perhaps, beholden to him for bringing claims. The successful employment defense counsel, whom I know, and I know quite a few, are successful because they have a reputation of practicing and, in fact, actually practice in a way that maximizes efficiencies and gets good results for clients. No client is pleased, I think we would agree, with a case valued at thirty thousand dollars that costs two or three hundred thousand dollars in fees to defend, unless it is an unusual case and there are unique or unusual factors that justify such expense.

What I find and the problems that I face with Rule 68 are the following: Many public companies—and Maureen touched on this—have internal procedures that are complex and bureaucratic in and of themselves and because of the overall rarity of use of Rule 68 those clients are not themselves familiar with the procedures. Many, if not most, of those companies view their internal human resources procedures as effective in investigating cases. They believe that when a claim is initially made, either internally or as an administrative charge as a prerequisite to a lawsuit, they have done an excellent job investigating that claim so they know whether or not it should be resolved internally before going to outside counsel and, if so, what its value is. If they go to outside counsel because they have made an internal decision not to settle, they do so because they believe that the claim is one that should be defended, maybe because they believe they will prevail at trial or maybe because the plaintiff has been unrealistic in his or her demands. But if I, as outside counsel, start the discussion with my client by talking about a Rule 68 offer of judgment in the typical case, the message I send may be inconsistent with my client's price analysis. If I do not have confidence that my raising the issue of Rule 68 will be received in the right way, it may send a message that may not be helpful to the defense of the case and to my relationship with the client.

Now, the exception is where the client is very motivated to settle, and it wants to settle notwithstanding the fact that it will not be able—for whatever reason—to settle before litigation. Those are the cases where I am most apt to raise a Rule 68 offer at the outset.

One other issue that is changing the landscape involves the sophistication of insurers in employment cases. Experienced employment practices may, themselves, advocate raising the issue of Rule 68 early.

PROFESSOR LEWIS: Interesting point. One lawyer in our project indicated that insurance companies, insurance company representatives, were looking carefully at each case that had been assigned to that lawyer's office and that part of the checklist to make sure that the lawyer was handling the matter in the way the company hoped, and whether a Rule 68 offer had been considered. Yet quite a few other lawyers told us that even though they did insurance defense work no insurance representative had ever asked them about Rule 68; and, thus, unless the lawyer him or herself was familiar with Rule 68 and willing to consider recommending it, the issue probably would just fall between the cracks.

Yes. Brian Spears, civil rights plaintiff's lawyer from Atlanta.

MR. SPEARS: I want to talk about the question of why defense attorneys, at least in my area of practice, do not make more offers of judgment. And I am not satisfied with the notion that the explanation lies in the economics of being a defense side attorney, not that I also do not hold the view that that is a part of why those offers are not made. What I would like to throw out as an idea is that there is, in my experience, a culture of self-righteousness on the part of government officials who find themselves being accused of wrongdoing in the area of civil rights. Most of the people I represent are people who, by definition, are powerless. They are people who the people in power tend not to think very much of, whether they are law enforcement officers or government officials. And I am just trying to kind of level with that sort of remark about this field. What I find is that, and some lawyers tell me who represent a defendant, some of them have the approach that they just do not pay money to bad people.

Now I find myself representing people who oftentimes are in custody, who are being taken into custody, who are in prison. Those are not people for whom government officials who think they by and large are running a tight ship, a good ship, a moral ship, et cetera, want to give any money to at all. So I think that the reasons for lack of offers of judgment under Rule 68 actually are wound up as well in what I refer to as a culture of self-righteousness. And that culture is reinforced in

Circuits such as the Eleventh Circuit where the standards by which cases of the type that I bring are savagely stern can hardly ever see the light of a courtroom and a trial.

Let me give you an example. The Eleventh Circuit found, in an *en banc* opinion, that to shackle a man to a, sort of like a cross over in Alabama—you may have heard of the case, the *Hope*⁶ case—that despite the fact that there had been a Fifth Circuit decision that specifically said that tying a person to a fixed object and making them stay there for quite some considerable period of time over the course of the day was cruel and unusual punishment, the Eleventh Circuit, nonetheless, in an *en banc* opinion decided that really was not so clear. The Eleventh Circuit decided that even though that person had been out in the sun all day, and even though he had urinated on himself over the course of time, that the officers who made those decisions did not have, in the court's lingo, "fair warning" that that might constitute cruel and unusual punishment.

The Supreme Court of the United States told the Eleventh Circuit that their reading of qualified immunity in section 1983 cases was too strict, it looked too hard in this area, and frankly was making the prospect of a plaintiff's winning much too hard even when the court had earlier spoken on similar topics.

What I am suggesting to you is that in Circuits like this, in the Eleventh Circuit, where, ironically, when the Eleventh Circuit got that case back from the Supreme Court, you know what they said, "Well, you know we have been applying what the Supreme Court told us to do all along, and I guess the Supreme Court did not get it right." It was mind boggling because the Eleventh Circuit had said they were using the true approach for defined qualified immunity all along.

I probably stretched out my remarks too long, but I think that when we look at the question of why offers of settlement and offers of judgment are not made, there is the economic component to it, but there genuinely is a culture of self-righteousness that I think drives government decisions.

And I want to make one other observation. Simply stated it is this: It is also my experience, and particularly for defense lawyers in the civil rights area who have not done it for very long, the way these lawyers get their new clients is by convincing that government entity that they are going to be the toughest defense lawyers on the block. And it is difficult to imagine that with that kind of sales job, if you will, that they do, or need to do in order to get the business that they can, then turn around

6. *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001).

and be very effective at counseling those same government defendants to settle or to issue offers of settlement. I find myself currently in a case where I have very experienced defense counsel, and defense counsel has just recently come into the field of representing government defendants. I have been able to talk candidly to a defense attorney who I have known for a long time, and I know that a part of why there will not be an offer made in the case is that the two defense firms have to agree before they can go to their client to get any authorization, and he does not think that is going to happen. So I think there are a lot of dynamics that are in play.

PROFESSOR LEWIS: Another voice from the Eleventh Circuit reminding us of Professor Eaton's report earlier that, from our observations, the rule is being used by public defendants in Philadelphia, New York, Minneapolis, and Washington, all in very different Circuits than in the Circuits like Atlanta. Mr. Roseman.

MR. ROSEMAN: I practice in Denver in the Tenth Circuit, which is somewhere ideologically between the more liberal ones and the more conservative. I think the issue is not so much whether we get, or why we do not get early offers of judgment, but rather why we do not get early offers of settlement of any kind. And my experience in employment discrimination cases is that defense counsel usually are not interested in and do not make settlement offers that are in a range my client might be willing to consider until after there has been a ruling on the summary judgment motion. I think that is the real obstacle here; it is not Rule 68 but Rule 56. I think, in my jurisdiction, defense lawyers generally view it as being almost malpractice not to file a motion for summary judgment in an employment discrimination case unless the liability is outrageously clear. But our judges do view those very seriously and a lot of cases do get knocked out on summary judgment. And because of that, we never get to the point of having those discussions. And it is usually only after there has been an offer of settlement, an informal offer of settlement, that I may get occasionally, very rarely, a Rule 68 offer, and I may need to convince my client to settle the case.

So why do we not get those early settlement offers? I think there are many reasons for that. I think one thing we have not talked about is the emotional component for employment discrimination cases. It is emotional not only from the plaintiff's point of view, but often there are very strong emotions, sometimes, of self-righteousness, sometimes just from the perspective of the manager who has been involved in making an employment decision, concerned about career advancement if the case is settled early, so there are emotional factors on both sides that tend to

get in the way of trying to resolve these cases. People do not view these cases simply as economic transactions; they view them through that lens. And unless you can get through that, you are not going to get those offers. So I think a much more effective way of trying to resolve these cases would be to provide more resources to the magistrate judges who provide free services in many federal judicial districts in settlement conferences to give them the amount of time and the amount of training that they need to bring the parties together early on, before they have spent a huge amount of time and attorney fees to try to resolve the cases instead of waiting until after there has been a ruling on summary judgment.

PROFESSOR EATON: Are you referring to some sort of mandatory mediation or early neutral evaluation?

MR. ROSEMAN: Yes. That has been our practice in our district. Even as early as the scheduling conference, some of our magistrate judges require the parties to come in with not only the lawyers but also to have the client or a representative of the client to talk about settlement. I have had that happen and my general experience has been that the defense lawyer is not interested in making an early offer because they want to: (a) do the discovery and (b) file a motion for summary judgment and see how that ends up. Of course, as you pointed out, if they win the summary judgment motion, they do not pay anything and they have scored points with their clients.

PROFESSOR EATON: Professor Cooper and then Professor Yoon.

PROFESSOR COOPER: I do not want to intrude much on the scheduled break time, but the question about using magistrate judges for settlement conferences, mediation, whatever, provokes a sort of wistful question of you. Rule 26(f)⁷ was totally revised in 1993. Part of the conference of the parties initially at the very beginning was supposed to include the prospects of settlement, and the question is, does that happen at all in your practice?

MR. BUCKLEY: Not really. Not effectively. It is a pro forma perfunctory thing that happens and generally there is not real hard settlement discussion.

7. FED. R. CIV. P. 26(f).

MR. ALFRED: Well, if I may, our practice is to ask plaintiffs for a demand if one has not been made. What we often see are huge numbers coming back that have the effect of ending further discussion until the plaintiff's expectations become more realistic.

MS. MCCLAIN: I think Rule 26 is fabulous. The hold on the discovery means that you have a period of time where you can analyze the case, and you can have these discussions. If you have a case you want to settle early, by whatever mechanism, an offer of judgment, discussion with the opposing counsel, something lawyers seem to have less ability to do directly these days than in the past, there is time to analyze and have those discussions. I think it is a very helpful procedure for early settlement.

PROFESSOR EATON: Professor Yoon, did you want to add anything?

PROFESSOR YOON: The question I wanted to ask the practicing lawyers is this: As you know, with Rule 68 or any offer of judgment rule you can still have settlement negotiations. You do not actually need to file the Rule. One thing I am curious is, do you think there would be any effect, either in the civil rights context or the employment context, if you would allow the plaintiff to make an offer? I mean, not just informally but to actually submit a formal offer in a true bilateral structure, not the way that Rule 68 is but the way that some states have expanded it with truly bilateral offers. Do you think that would have effect? It sounds like it would have less of an effect on the civil rights context but maybe more of an effect potentially on the employment area. I would be very interested in your thoughts.

MR. ROSEMAN: I would say only if there was some enhancement to fees that were offered by the plaintiff, because if we recover in a case where we have a statutory fee award we are going to get our attorney fees anyway. So there is really no incentive or disincentive for the defendant to reject an offer if they know they are going to have to pay the same amount, even if they lose and we recover more than what they have offered.

MR. BUCKLEY: I have yet to see a statute that is a plaintiff's side version, or have a balanced plaintiff's side version of Rule 68. I think that the only such statute, which is not practical, would be one which would require the defendants or the defendant's counsel to disgorge their attorney fees, and I do not think that is going to happen.

PROFESSOR EATON: Mr. Kennedy.

MR. KENNEDY: I wanted to comment on Maureen's observation about Rule 26(f). This, of course, is the process by which parties are obliged to identify people with relevant knowledge and to engage, in part, in some discussion of settlement before discovery can go forward, at least in our part of the world as well. One of the thoughts I had, and let me make this aside. I do not think that at that early stage it usually prompts very fruitful discussions in terms of settlement. But I had this thought as an observation because I am always looking for synergy, how to use these devices together and strategically. I mean by that how to use Rule 68, how to use Rule 56 and Rule 26(f). I have this thought. One of the paradoxes for defendants in trying to formulate offers of judgment is not knowing what the fees are of the plaintiff, and increasingly what we see by very bright, able plaintiff's lawyers is they frontload their preparation in their cases even before they file the suit. And so, much of the harm is done before we even get to posturing an offer. My point is this: early on as part of the Rule 26(f) process there was a disclosure requirement to oblige attorneys to disclose what fees they have incurred in developing the case, processing the case, and even pre-litigation. Therefore, early on you would know what the landscape is as a defending party to take to your client that exposure to say here is where we are at the beginning as far as fees incurred by the plaintiff, and I can tell you what it is going to look like hereafter. It would make that whole process far more productive, and it would be really not a very big fix to require that kind of disclosure as part of the iterated elements of Rule 26(f).

PROFESSOR EATON: Mr. Bennett.

MR. BENNETT: Better you should guess and guess high. Send over your bills and we will send over ours.

PROFESSOR EATON: Do I hear in that a fear that if there is a kind of mandatory disclosure for plaintiffs to disclose fee information that that might be used for other strategic purposes other than formulating a reasonable early offer?

MR. BENNETT: Yes.

PROFESSOR EATON: How do you think that information could be misused?

MR. BENNETT: Well, the defense might use it to make their fees look reasonable when the plaintiffs are doing the laboring most of the time. I think it depends. There are two kinds of civil rights cases in my judgment at least. One is the alleged or even demonstrable constitutional wrong with minimal damages, the thirty thousand dollar cases if you will, the average case. And then there are these larger cases where there is an alleged or demonstrable constitutional wrong and huge damages where there has been a shooting or some very serious injuries. I think offers of judgment are treated very differently in those kinds of cases. I sense that you will never see—even in Minneapolis where we make some offers on the smaller cases—you will never see them in big cases. I think there needs to be a distinction, and employment cases are not as problematic. But if there is an institutional or organizational impediment by the agency, they obviously do not want to address serious ones or they can push the thirty thousand dollar cases under the rug. That is fine, but with a three million dollar case, they have less willingness to accept the financial consequences. And frankly the attorney fees do not make much difference in those cases where the damages drive the case. But my political bodies do not like to accept financial consequences, especially if there is an upcoming election. I have had to postpone settlement conferences; then, eventually, an offer is made because we could not do this until November is over and we have been re-elected. We cannot go to the populace, having given away money, and expect to be re-elected to the county board or the city council. So I think those are different kinds of cases or are analyzed differently. I just thought I would add that.

MR. ALFRED: I would like to make a couple of points. Analogously to what you just mentioned, public companies also do not like to disclose settlements in their quarterly or annual SEC filings. I think that may have some impact.

But getting back to the Rule 26(f) issue, I think that is a very important issue. I had been thinking prior to this morning of the possibility of amending Rule 26(f) to include an express requirement that the parties discuss Rule 68 as an option for settlement. That would be helpful from my perspective as defense counsel because then I have an obligation to raise that subject with my client at the outset of the case.

We are going to be discussing later in the day the issue of amendments to Rule 68. We have not yet focused on it, although I think Tom mentioned it in his remarks, but the issue of entering judgment as opposed to settlement is important from the defendant's perspective. I think that the entry of judgment, as the Rule is now written, is a huge impediment to the use of Rule 68. I understand that there are work-

arounds, but they are cumbersome and risky. I wanted to mention this issue for further discussion.

PROFESSOR LEWIS: That is a great place to stop at our break because we will take about a ten-minute break. In the last hour this morning, we will spend about half of it pursuing these questions of why the rule is under utilized. Then we will report what we have learned from the lawyers about the proposal for change including specifically requiring plaintiffs to disclose, various methods by which plaintiffs might be required to disclose their fees at the point the defendant is considering making an offer, looking at Rules 26, 16, and mediation to incorporate Rule 68 into all three.

(FIRST SESSION CONCLUDED)