

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

Friday, February 17, 2006

**Session Two:
“Utilization and Alternatives to
Rule 68”**

PROFESSOR EATON: We are going to continue with our discussion here of reasons why Rule 68¹ may not be used more than we think it could be used. And just to kind of keep the orientation fresh, this afternoon we will talk about what changes might be done in light of the problems that we identify today.

I wanted to go back to an observation that Mr. Alfred made earlier in explaining why employment discrimination defendants do not make greater use of Rule 68. As I remember the point, and correct me if I have it wrong, it is that they have elaborate in-house case evaluation procedures already in place and Rule 68 is just not part of the culture.

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

MR. ALFRED: Those are two related issues compounded by the judgment/settlement issue.

PROFESSOR EATON: Now, there is a chicken and egg quality to that that occurs to me. Why is it that Rule 68 is not built into the evaluation process, and if it does have some value, why would it not be brought in at some point? It seems an inadequate explanation to say, "Well, they just don't think about it" when the relevant question is why don't they think about it? Why could they not think about it, especially if their counsel thought that it had some value?

MR. ALFRED: Well, those are two different questions. They could but they often do not, or, in my experience, usually do not. And to be clear, the internal investigation process, in my experience, is usually aimed in good faith to assess whether or not the company did something wrong. I believe most companies want to do right, and if there has been a mistake, they want to correct it.

There may be different reasons as to why they want to correct it. It may be purely economic. They do not want to go through a process of litigation that they ultimately believe has a substantial likelihood of liability. So they are going to do an investigation up front, and if they conclude in that investigation that the company made a mistake, they will try to correct it. If, on the other hand, the investigation leads to the conclusion that the company has not done anything wrong, then there are incentives for them to want to defend against unwarranted claims and to prevail. Those incentives relate to discouraging future litigation, what you called copycat litigation or to send a message to employees and their counsel that the company is not afraid to defend cases where it did nothing wrong. I tried a case once for a client that had been receiving a number of single-plaintiff wrongful termination claims, none of which had merit. As a strategy to reduce the number of meritless claims, they decided not to go forward with the case I was handling to trial. Fortunately, we obtained a directed verdict dismissing the case. Within an hour of that decision, everybody in the plant knew that the plaintiff had lost. The company did not have another employment claim for more than one year.

In that particular case, the company had done a very careful internal investigation initially. If I had come in at the beginning of that case and said, "Let's talk about a Rule 68 offer of judgment," the client would have believed that I was not with the program. Such an approach to the case would have been contrary to the company's goals. This conclusion is compounded by the fact that Rule 68 is a foreign concept to most inside counsel.

PROFESSOR EATON: And the reason that it would not be brought up by the prospective outside counsel, in part, is that it might be viewed as a concession of weakness?

MR. ALFRED: It is very important at the beginning of any engagement to talk to the client about its objectives and to understand those objectives. If the client expresses the objective of getting out of the case as quickly and as inexpensively as possible, without the need to prevail in the litigation, then I may have an opportunity to raise Rule 68 without concern that doing so will be misconstrued by the client. And when I have that opportunity, I use it. In my experience, the company usually rejects Rule 68 as a vehicle to settlement if only because of the offer of judgment issue. The judgment issue is usually a non-starter despite possible work-arounds. If in-house counsel reads *Marek v. Chesny*,² it is difficult to understand its impact. Reading other cases does not help. They may be concerned that this is just going to lead to further litigation. It is not an easy process. It is not one that they are familiar with or have used before. And they do not want a judgment against their company. They do not want to have to report or explain it to the Board, in the case of SEC filings. Does that answer the question?

PROFESSOR EATON: Yes, that does. Now, I would like to continue on that with Muriel. How did you get the City of New York thinking in terms of Rule 68? Is it a public/private dynamic that might explain why the City of New York was less resistant to routine consideration of making Rule 68 offers?

MS. GOODE-TRUFANT: I do not think there was ever any question that it would not be considered, because settlement is something that is always considered. We look at a cost/benefit analysis and it is simply that cases are cheaper if they are settled earlier. We did not have those types of problems at all.

PROFESSOR EATON: I also wanted to follow up on a comment that Brian Spears made when he referred to the phrase, “a culture of self-righteousness” that explains why there might be few offers of judgment in the Eleventh Circuit. Does a culture of self-righteousness not exist in New York?

2. 473 U.S. 1 (1985).

MS. GOODE-TRUFANT: Of course not. We do make far more offers, as you have observed, in New York. We do have categories of cases in which we do not make offers, and some of them are cases that might be, in our estimation, worth a hundred dollars. You are obviously not going to make an offer for a hundred dollars if the attorney fees are going to be so great that the offer is really meaningless. Additionally, there are cases that have, or bring with them great policy concerns, so even though we might be able to quantify what the damages are, the policy issues are greater and they reach much farther than that individual case.

I wanted to follow up on something that was observed. I think the difference in the employment discrimination and the civil rights cases is that the damages are much more quantifiable in civil rights cases. In employment discrimination cases, if an employer believes that the plaintiff should not have been promoted, that they were never discriminated against, that they are a poor employee, it is hard to convince that employer that they should be paying money to that plaintiff. Conversely, in a civil rights context, if you have someone who is arrested and they have a physical injury, that is something that you can quantify and place a dollar value on.

PROFESSOR LEWIS: Muriel, following up on that in another Northeastern city, a civil rights defense lawyer explained the willingness of that city to use Rule 68 routinely as a question of the role of the lawyer. Those lawyers saw themselves as not there simply to resolve matters efficiently and cheaply, but also, in the instances where they saw liability, to, in effect, be a voice for public justice. That is, their client was a government entity and that on occasion they had to recognize error.

MS. GOODE-TRUFANT: I do not know whether we would say we recognize error. We would use a different term. But certainly we have had cases where we have issued significant offers. I mentioned to you an offer we made of seven hundred and fifty thousand dollars, which is far different than the thirty thousand dollar case that I mentioned earlier. So there are those considerations.

PROFESSOR EATON: Yes, Jack.

MR. KENNEDY: The other observation I would make is in the employment arena because I work in that area as well, and I agree with the observation that there is a more sensitive reaction in the employment arena to utilizing offers of judgment for a couple of reasons that

strike me. Not only the idea of rectitude of the employer's position in making a termination decision or non-promotion decision, but also the other element that operates for an offer of judgment—I guess we are going to talk about this in terms of amendments—is that it often does not work very well. Even if you recognize the damage exposure, you may have a reinstatement claim, or an equitable injunctive relief type of claim, partnered with the damage claim. And you might have a client who is interested in resolving the case, but the last thing they want to do is take that employee back. Therefore, you are going to have a difficult job in formulating an offer of judgment that is necessarily going to be effective when you have that mixture of claims. It can be difficult.

MR. BUCKLEY: Could I —

PROFESSOR EATON: Go ahead.

MR. BUCKLEY: I was just going to comment on that. I am in a case right now. The principal relief my client wants is to get her job back. A substantial offer of judgment has been made. A substantial counter-proposal has been made which says, "If you are not going to give me my job back, then I want X beyond what you are offering." And we have negotiated throughout the litigation and twenty-four depositions on how, whether, there is any way to get this person's job back, and the employer's position has consistently been, "No." So the offer of judgment just does not work in that sort of context.

I would like to also address some comments made about early offers of settlement. Our practice is to write detailed demand letters before filing suit, make an early offer, break down the damages, and say, "Here is back pay, here is compensatory damages, here is attorney fees," which is usually a low number, a few thousand dollars at that point in time.

And sometimes attorney fees, you talk about plaintiffs front loading attorney fees, but under Rule 11,³ before we file suit we are required to investigate and make sure that what we put in a lawsuit and in a complaint is factually verified, but also that it states a good faith claim under the law. This does take time. You go, you interview witnesses, and you review documents. That is the way a lawsuit should be prepared and filed. I do not know, but I am sure there are plaintiff's lawyers out there that shoot from the hip. That is not our practice. You ave got to lay the groundwork and do the investigation just as the defendant's attorneys have to do it as well. So it is not a matter of front

3. FED. R. CIV. P. 11.

loading, it is a matter of doing our job and making sure that we fulfill our obligations with the court under Rule 11.

MR. ALFRED: And when I get that letter, I send it to my client and discuss it with in-house counsel (speaking just about single plaintiff cases, perhaps we will discuss Rule 23⁴ class actions this afternoon). We often view the demand as grossly inflated. Perhaps this is because plaintiff's counsel sometimes over-promise when they compete for a case, just as some defense counsel may over-promise when they compete for a case. So the initial demand letter is often inflated.

In response to the point that Muriel made about cases being cheaper if settled early, that may be so in the civil rights context. In employment litigation, my experience is that cases are often less expensive to settle after the plaintiff's deposition. If there could be an early deposition mechanism, even if an abbreviated deposition at the administrative agency stage of a discrimination case, as there once was in Massachusetts, I think that would be helpful.

PROFESSOR EATON: Yes, Jack.

MR. KENNEDY: A comment and then perhaps a clarification. Within this notion of lawyer preparation of the case before filing are two very distinct points. The due diligence Rule 11 issue is very critical and very necessary. When I use the term front loading, I am not referring to that work. I am referring to, in our jurisdiction, a very conscious—and I am not critical of it, I sort of tip my hat—a very conscious tactic by plaintiff's lawyers mindful of the use of offers of judgment that will cut off fees incurred after the making; what skilled plaintiff's lawyers are doing is before they ever file the suit is they are doing much of the work they would have done post-filing, by interviews, by legal research, et cetera. And when you get into the case they have already incurred much of the fees that you would otherwise have cut off when you can make your offer. You cannot make the offer until the suit is filed. But in our jurisdiction, lawyers, particularly in the public entity setting, are getting enormous access to records that they will use appropriately to prepare and, I say, front load their case well beyond Rule 11. They are preparing their substantive case and then some. So it is really a powerful way of getting around the impact of offer of judgment. It is something we may see more of if more people use offers of judgment.

4. FED. R. CIV. P. 23.

PROFESSOR EATON: Professor Cooper?

PROFESSOR COOPER: Without going into the details of proposed rules changes, would that dynamic change if an offer were required to be held open for ninety days so the post-offer fees would run only after you had that ninety-day interval to do the investigation and the preparation, the depositions that may be critical to framing an offer?

MR. BUCKLEY: So make the offer and then continue with discovery or whatever needs to be done during that ninety-day period with no penalty against —

PROFESSOR COOPER: The cut-off would run after the —

MR. BUCKLEY: At ninety days.

PROFESSOR LEWIS: That has actually been suggested by one of our lawyer respondents.

MS. MCCLAIN: It would seem to me that that would destroy the efficacy from the defendant's point of view, because there would be potentially an enormous amount of fees generated in that time frame.

MR. ROSEMAN: But it would give the plaintiff the opportunity to do some discovery, because even if the discovery were front loaded from the defense point of view, where the defendant takes the plaintiff's deposition and then makes an offer of judgment, in many cases our clients would not feel they have sufficient information, have not done sufficient discovery as far as fiscal information or taking the depositions of key managers or interviewing other plaintiffs to be able to intelligently decide whether or not that offer is reasonable. So I think the ninety-day proposal would be much better from the plaintiff's perspective; it would be much more balanced than the current, very pro-defendant Rule 68.

PROFESSOR LEWIS: Maureen, are you suggesting that if it were extended that the plaintiff's counsel would not be required to focus on it with the same immediacy as under the current ten-day period and that it would not grab the attention of a lot of plaintiff's lawyers?

MS. MCCLAIN: Ten days, it seems to me, is short. California has a thirty-day provision in its analog to Rule 68 which seems to me to be

about right.⁵ I am suggesting that the defendant would be faced potentially with extensive discovery which would, of course, increase its costs as well, setting aside the question of the shifting of costs and fees, that might be more extensive than otherwise would happen.

PROFESSOR LEWIS: Why would the defendant have to accelerate its normal pace of discovery if there were a ninety-day acceptance period?

MS. MCCLAIN: The defendant would not have to, but it would have to show up at the plaintiff's discovery.

MR. BUCKLEY: Ninety percent of the information that is discovered in employment discrimination cases in any event is in the possession of the employer. The plaintiff will have this much information. The defendant employer has proprietary information, all kinds of documentation. So sometimes, in order to assess an offer of judgment, it is true that the plaintiff needs to do discovery. The plaintiff will need to do discovery anyway to put their case together. But I do not think that Rule 68 is a good idea generally. But if it has got to be there, a longer period of time where people could assess the offer of judgment makes some sense. You really cannot assess them in ten days. You really do not have time to do anything other than say here it is, are we going to accept it or not, and talk to your client.

PROFESSOR EATON: I have heard from both sides now questions concerning uncertainty. Defendants have said, "Well, it is hard to know what to offer because we do not know what the plaintiff's fees are." Plaintiffs are saying, "We do not know how to evaluate a Rule 68 offer if we have not done enough discovery." And that leads into a question that a member of the audience asked that we throw out to the defense lawyers here, how do you package your Rule 68 offer? Do you make the offer inclusive of attorney fees or do you make the offer a set amount of damages and talk about attorney fees later?

MR. ALFRED: Inclusive.

MS. GOODE-TRUFANT: All of our offers are exclusive of attorney fees and costs, and it is derived from the practice, not simply with the

5. CALIF. CODE CIVIL PROC. § 998.

city, but that is prevalent in the Southern and Eastern Districts of New York.

PROFESSOR EATON: Jack?

MR. KENNEDY: Well, it depends sometimes on the sensitivity of the client, and it may depend on what we know about the lawyer on the other side. Lots of factors. But the preferred way that we like to make offers of judgment is a sum certain plus reasonable attorney fees and costs incurred to date to be determined by the court. It gives you the best certainty of outcome.

Now, what you do not know, and this is why I sort of chafe at the idea that we do not have a firm handle on what the fees are, even when claimed. Sometimes we are told; sometimes we are not. So you do not know what you are buying necessarily. But that same arbiter, namely the judge, is going to determine the fees. If you have a good judge and you think he or she is going to be reasonable in that determination, it is the best way, it seems to me, to have the best predictor at trial because that is packaged and all you have to put your science on is the dollar sum, the damage sum, to measure against the trial result. The reasonable attorney fees and costs is the subject of the court's later determination. You are not trying to guess at what those fees are.

PROFESSOR LEWIS: Which type of packaging, exclusive of fees or inclusive, do the defense lawyers think is more likely to be accepted by the plaintiffs? One defense lawyer told us he makes these offers in the hope that they will be rejected by the plaintiff. He offers a reasonably high amount for the merits, specifies nothing on fees, says we will work that out later, or if we cannot, the judge will decide what the fees up to that point would be. But he packages it that way in the belief that the offer will be rejected or not accepted within ten days; and, thus automatically rejected, and that then he will have a negotiating point with plaintiff's counsel and can say to that person you are working for free from now on because you have not done it. Where I gather, Jack, when you put one of these together with the client, you are trying to craft it so it will be attractive?

MR. KENNEDY: Yes.

PROFESSOR EATON: Let's hear from our employment discrimination defense lawyers, when you make offers, do you make them inclusive or exclusive of attorney fees?

MR. ALFRED: Inclusive. I would find it a much harder sell to my clients to tell them that the amount being offered is exclusive of attorney fees and that we were going to go to the judge and the court and have a hearing on the attorney fees. I think that is too much of a wild card, and I have never done it.

MS. MCCLAIN: I do all of the above. And if I do not want the offer to be accepted; that is, it is a tactical maneuver only, largely because I think the plaintiff has over-valued the case, then I would do it inclusively. And if I really wanted it to be accepted and I trusted the judge, which I think is very important “if,” and I knew the judge—in California you do not necessarily know what judge is going to be handling the case—I would do it Jack’s way.

PROFESSOR EATON: What about from the plaintiff’s side? Would a Rule 68 offer be more or less attractive if it was inclusive of fees or exclusive of fees? Is there a feeling? I know that some of you just have not received very many of them, so it is more of a hypothetical than it is based on hard experience.

MR. BUCKLEY: It depends on whether or not it is a realistic assessment of fees. On the rare occasions I have received them, they have typically been low ball numbers, where not only is the plaintiff’s recovery a very small quantity, but the amount attributable to fees may have, let us say you have fifty thousand dollars of time in the case and you are getting five thousand dollars attributed to fees, it is not really an offer. So it depends. If they make a realistic assessment, it could be more attractive.

PROFESSOR EATON: And if they ask you first on the telephone, “What you’ve got in the case,” before they submit that low ball fee component?

MR. BUCKLEY: You know, I honestly do not, but there have been situations where, because of the substantial amount of work that has been done in the case, they know I have got more than five thousand dollars in the case.

PROFESSOR EATON: Barry?

MR. ROSEMAN: My preference would be for an exclusive offer. I think it creates less potential for conflict of interest between my client and myself, to the extent that I can tell my client, “This is the amount

that you would receive and the attorney fees will be handled separately,” as opposed to having the fight over the attorney fees and —

PROFESSOR LEWIS: Doesn’t that depend on —

MR. ROSEMAN: — for an insurance law firm.

PROFESSOR LEWIS: Would that not depend on the nature of your fee agreement with your client as to whether you could really tell your client you keep the merits and I will keep the fees?

MR. ROSEMAN: Sure. Of course. But at least in that case I know that there would be a future hearing in front of a judge and presumably we would be entitled to fees on fees for the time that we spent litigating the fee issue itself, not that I would not bill that out. But if it did become a major issue, I would know that I would not be working for free on that in connection with that dispute.

PROFESSOR LEWIS: What Mr. Roseman is referring to, for those who may not be familiar, is that under these prevailing party attorney fee statutes, courts will award fees at a reasonable hourly rate for the time expended litigating about how much the fees should be during the previous litigation on the merits. That is fees on fees.

PROFESSOR EATON: Now, Bob, you practice in an area where there is an increasing frequency of use of Rule 68 offers. Do you have any sense of whether an offer that is inclusive or exclusive of fees is more attractive than the other?

MR. BENNETT: I have seen two kinds. I have never accepted one in a civil rights case, but I have seen two kinds of offers that were inclusive, one that was a universal number so we were left to define what number was for attorney fees, and another one in a case recently where there was a specific number for the plaintiff and a specific, and even a higher number for attorney fees that they were willing to come up with. Now, we ended up trying the case and the jury was hung, so we ended up settling it.

The ratio between those numbers ended up being the springboard for settling the case ultimately. It is a little easier to analyze and a little easier discussion to have with your client if it is a separate number. I think it is easier from my point of view, in terms of analyzing the case, at least making my rejection more certain if it is inclusive, and I know

what my fees are and you basically get back into a damage award. And what they are really offering is X for the plaintiff.

But in small cases I think it would be better to be inclusive so at least there is some cap on it. I do provide, for the benefit of counsel, the last offer, or the last fee petition approved with the rates so they can sort of extrapolate what the fees might be at the Rule 26(f)⁶ session.

PROFESSOR EATON: Jack.

MR. KENNEDY: Just a brief aside. In trying to explain to a client the prudence of an offer of judgment, if you take Hal's observation that under Section 1988 or other fee entitlement statutes, if you lose and you are defending the case, your client is going to end up paying the plaintiff's fees in addition to our fees for defending and the fees for litigating the petition for fees. Then they begin to get the picture of the potential power and reasonableness of trying to make an offer of judgment to cut off that exposure maybe. You know, if you sit in front of city councilmen, and they start hearing, "You mean I am paying you and them and then them." At some point it is pretty powerful.

MS. MCCLAIN: But if you make an offer of judgment that says fees and costs incurred to date, you would not be responsible for any post-fee litigation.

MR. ALFRED: That is right. That is why you do it.

MR. KENNEDY: But I am saying in the context of why to make it. If you do not do this, this is where you are going to go. That is your exposure.

PROFESSOR EATON: We are going to make a little bit of transition here. We have been focusing on some of the factors that might explain why Rule 68 offers are not used more than they are, and now Professor Lewis will report what lawyers told us about their reaction to various reform proposals.

PROFESSOR LEWIS: We asked about ten categories of proposed changes, some of which our panelists this morning have already injected, and here is what they told us.

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

The first was simply a terminology change. Instead of an offer of judgment, it would become an offer of settlement or agreement or compromise, which is the terminology used in many of the rules in several states. And along with that we asked how would it be if the rule expressly authorized the defendant to include in the offer a nonadmission of liability clause, because many lawyers just think it is inconsistent with the terminology judgment to say we are not liable. We are confessing judgment, but we are not liable, even though that practice occurs throughout the country, and we are not aware of any reported decision that prevents a defendant that voids the offer of judgment merely because there is a nonadmission of liability clause in it.

Plaintiffs and defense lawyers were moderately to strongly supportive of the terminology change. One civil rights plaintiff's lawyer was strongly opposed, I think on the theory that then the Rule might be used against his clients more often and he viewed the Rule as an evil in its current form because it is a tool that can only be initiated by defendants rather than being a two-way rule, which is a proposal we will get into shortly.

The second proposal was mentioned this morning. Should the plaintiff be required to disclose the accrued attorney fees at the point the defendant is considering making an offer so that the defendant can calculate, add that amount, if he or she trusts the certification, add that amount to the estimate on liability and damages for a total offer. This would address the defendant's concerns that one reason they cannot make an offer is they do not know how much the plaintiff's lawyers have in fees in the case at that point.

Our total group was actually moderately supportive of this change. However, a reasonable number of plaintiff's lawyers were strongly opposed for some of the tactical reasons mentioned earlier. Many plaintiff's lawyers thought, if I have to disclose to the defendant's lawyers during the litigation what my fees are, then the defendant can guess how many hours I have put into the case so far and might know if I am under-prepared and that would be a tactical advantage to the defendant. And there were some who responded, as I believe Brian Spears did this morning, that if we have to disclose our fees to you, you disclose your fees to us. Was that you, Brian?

MR. SPEARS: (Shakes head negatively).

PROFESSOR LEWIS: It was Ed. Of course, the defendant would need to know what the plaintiff's fees are because under these fee recovery statutes defendants are going to have to pay those fees if the plaintiffs prevail. But why, legally, does the plaintiff need to know what

the defendant is billing per hour. The one reason we all know plaintiff's lawyers would like to know that is if there is a fee petition later and the defendant says the plaintiff is not worth three hundred dollars an hour, the plaintiff can put in the defendant's, an indication that the defendant is billing three hundred and fifty dollars an hour. And that kind of takes the steam out of that argument before the judge.

But this is not unprecedented, this notion of requiring plaintiffs in fee litigation to disclose their hours, and we have actually discovered a number of other district court rules around the country that require plaintiff's lawyers periodically in fee recovery litigation to disclose in a writing, or at least disclose to the opposing counsel but not to the court, what the dollar amount of the fees are at that point. Many defendant's lawyers, unsurprisingly, were strongly supportive of that proposal presumably because it would cost them nothing and would give them some potential information.

The third proposal is an attempt to deal with the Supreme Court's decision in *Delta Air Lines, Inc. v. August*⁷ that robs the defendant of any incentive to make a Rule 68 offer in a case where the defendant is strongly convinced that it will win eventually. As a number of folks mentioned earlier, Rule 68 gives the defendant relief from having to pay future plaintiff's fees but only if the plaintiff wins and wins at a lower level than the offer. So we have an ironic situation here. If the defendant loses but loses small, Rule 68 gives it relief from fees. If the defendant wins, if it does better than losing small, it gets nothing special out of Rule 68. Instead, the ordinary rules of procedure would kick in under Federal Rule 54(d). The defendant as a prevailing party with a no liability judgment would be entitled to full costs, pre-offer costs and post-offer costs, from the plaintiff. And the plaintiff, of course, would have to bear its own costs.

Most defense counsel were moderately to strongly supportive of overturning *Delta Air Lines*, that is, of giving them an incentive to make an offer in a case that they think they are going to eventually win, and especially the employment discrimination defense counsel. Most plaintiff's counsel, and especially employment discrimination counsel, were moderately opposed to strongly opposed. But a number of plaintiff's counsel tried to bargain on this one, and they said we might be agreeable to giving the defendant something in the event that you turn down the offer and then there is no liability judgment. But since we are already paying full costs under Rule 54, we do not like this sanction of double or triple costs because that could be economically

7. 450 U.S. 346 (1981).

ruinous to an employed person who is working at a small salary grade. And if those sanctions of perhaps doubling or tripling the costs were made discretionary with the judge, or if they were limited in amount, then we might consider that, but only if the Federal Rules process also amends the Rule to make it two-way so that the plaintiffs could use Rule 68 as well. So we got into some bargaining in our responses in questioning lawyers about their willingness to consider certain changes.

The fourth proposal. What about instead of viewing Rule 68 as an aggressive sledge hammer tactic over here, and mediation or a neutral evaluation as a softer resolution over there, what about melding the two? What about making sure that Rule 68 is on the checklist of magistrate judges and mediators before whom the parties might come?

This was not part of our original set of hypotheses. This came to us from lawyers while we were on the road. Fortunately, it came very early and we then systematically asked all the other lawyers that we talked to about this idea. What they were thinking is that Rule 26(f), the initial discovery conferencing plan, might specifically require the counsel to discuss Rule 68 as an aspect of settlement, not just mention settlement. I think Mr. Alfred said that would give him a little bit of a lever or reason to discuss that with clients. At the Rule 16(b) scheduling conference that the federal judge or magistrate conducts shortly after the Rule 26(f) conference between the parties, added to the Rule 16(b) list of subjects to be considered by the judge would be Rule 68 offers, at least in a case where Rule 68 would involve more than costs; namely, federal fee recovery cases rather than ordinary diversity cases.

And another idea that came up on the road was that when a case is sent to a mediator, especially by the judge, that local court rules, as part of the mediator's checklist or that mediator's own organizational program, include in the materials that educate mediators a little education about the potential power of Rule 68 in the fee recovery situation. The major reason lawyers told us they were interested in this was to cut through the perceived economic conflicts of interest between defendants and defense counsel in making offers and between plaintiffs and plaintiff's counsel in receiving offers.

If a defense lawyer who is interested in billing by the hour for another year or two was economically reluctant to recommend making this offer to a client and reluctant for that reason, in the caucus where a mediator meets with both the defendant and defense counsel together and asks, "Have you considered what a Rule 68 offer might look like here, what it might do for you," then there is nowhere for the defense lawyer to hide. The defendant is sitting right there and they are both hearing about it together from the mediator. By the same token, if the defendant decides during mediation to extend an offer to the plaintiff that would be

conveyed by the mediator to plaintiff and plaintiff's counsel together, that would prevent plaintiff's lawyers from failing to transmit offers of judgment to their clients, which we were a bit appalled to find out had happened, according to defense counsel, in a number of situations. In an apparent violation of the rules of professional responsibility, a plaintiff's lawyer was receiving a formal written offer of judgment and not transmitting that to the plaintiff as defendant's lawyers later learned about when they took the deposition of the plaintiff. At least the plaintiffs were testifying under oath that they had never received that offer. Mediation would cut through that as well.

How did the lawyers respond to incorporating Rule 68 into these formal court processes or to mediation? As a whole the group was moderately supportive to strongly supportive, even among defense counsel. However, some plaintiff's counsel were agreeable only if the Rule were made two-way. You can see that some of them had a real thing about a two-way rule. They would like to be able to use it. And some on both sides thought the mediator should not be required to raise the issue, that that would interfere with the mediator's judgement and flexibility on a case by case basis to decide what types of tools were likely to bring the parties together.

One of the ironies of Rule 68 is that a lawyer just reading the rule would not see its major consequence because the rule has never been amended to state what *Marek v. Chesny*⁸ holds, what the Supreme Court held, that is in a federal fee recovery case when the rule is triggered the plaintiff forfeits not only post-offer costs but also post-offer fees.

We asked the lawyers if it would be helpful or if it would increase utilization of the Rule if that consequence was spelled out, if defendants could see that they would gain more than just relief from costs but also relief from fees. On average, the lawyers were moderately supportive, except some plaintiff's lawyers were opposed, again because this is currently a one-way rule that can only be initiated by defendants, and they thought it would not help them. They would be facing more offers of judgment if more defense lawyers could just read the Rule and see that this is a potentially valuable tool.

The sixth proposal would require defense lawyers to certify, and this again is driven by the suspicion in some cases about economic conflict, require defense lawyers to certify that they had discussed Rule 68 with their clients and considered its use. On average the plaintiff's and defense lawyers were neutral to moderately supportive, but some

8. 473 U.S. 1 (1985).

plaintiff's lawyers were strongly opposed. They thought it was demeaning for their counterparts to have to certify to that. And, of course, even more defense lawyers were strongly opposed to making that certification.

The seventh of our ten proposals involved tweaking the current one-way rule to have it triggered more often. Under the current rule, the plaintiff's recovery must exceed the defendant's offer by only a penny in theory if you could calculate it that finely. This proposal would have required the plaintiff, in order to preserve the right to post-offer costs and fees, to beat the defendant's offer by fifteen percent more than the amount of the offer, so it would put more risk in the plaintiff's mind in rejecting an offer of a certain dollar value. Most plaintiff's lawyers were strongly opposed to this proposal. There is nothing in it for them. It would still remain a one-way rule. Most defense lawyers were moderately supportive to strongly supportive, although a few said they thought plaintiffs have a tough enough time in these cases as it is and we do not really need to pile on.

The eighth proposal asked the lawyers about their general attitude, without getting into the details, about making the rule two-way. Allowing plaintiffs to submit an offer of judgment, which we would typically think of as a demand but in the form of an offer of judgment or settlement to the defendant, that would put the defendant at risk beyond what it already must face in damages if they turned down that offer and guessed wrong. Plaintiff's counsel were overwhelmingly strongly supportive.

Here is what they said. If this rule were made two-way, we would really use it early and routinely as a way of dynamiting earlier offers out of reluctant defendants, and particularly defendants who were covered by insurance in the particular litigation. And then they said if we issued a demand to them, it seems very likely that the defendants would respond with their own offer of judgment also fairly early, that defense clients would demand that of defense lawyers. And these lawyers felt that the combination of the two offers, the offer and the demand, would establish a somewhat more reasonable range for settlement at an earlier time in the litigation than happens through the ordinary settlement process. That was the basis of support on the part of most plaintiff's counsel and the support was very strong.

Many defense counsel were strongly opposed, but a significant number of defense counsel were either moderately supportive or strongly supportive. I do not want to under-estimate how intensely the defense lawyers were opposed who were opposed. They were very, very strongly opposed to giving the plaintiff the opportunity to place an early demand

on the defendant with legally compelled consequences if the defendant rejected the offer (the demand) and guessed wrong.

And our final two proposals were getting into the details of this two-way approach. The first was a pressure model that we did not see any precedent for in the laws of the states, just something that we dreamed up. Under this model, which is symmetrical, each side would, in effect, have to improve its position over the offer or demand it rejected by ten or fifteen percent. That is to say that the plaintiff, to avoid fee forfeiture under *Marek* would have to recover a hundred and fifteen percent or more of the defense offer that it had rejected, and the defendant would be subjected to additional sanctions beyond the full recovery of fees that is currently provided if the plaintiff recovered only eighty-five percent or more of the demand that the defendant had rejected.

So instead of having to beat an offer by a penny, as under current law, a plaintiff would have to beat it by fifteen percent to avoid losing fees. And a defendant, when faced with a plaintiff's demand, would face a multiplier on fees which is not available to plaintiffs under the current law, but would face some kind of a percentage multiplier on the post-offer fees if the plaintiff recovered even eighty-five or ninety percent or more of the amount of the demand the defendant had rejected. So this is putting heavy pressure on both sides. In a sense, it is mutual deterrence through nuclear armament on both sides.

Here is how the lawyers reacted. Many plaintiff's lawyers were strongly supportive of it, but it should be pointed out that one reason they may have been strongly supportive is that when we asked this question, the proposal did not subject plaintiffs to any additional sanctions if the offer were triggered against them; that is, they would forfeit all their post-offer fees and costs just as under the current law. But they would forfeit them more frequently; namely, when they did not exceed the defendant's offer by fifteen percent. So I guess the plaintiffs were thinking, "We may forfeit fees slightly more often under this rule but we're not going to have to dig into our pockets for anything beyond what we have to pay now." In fact, if we prevailed, we would not pay any costs at all.

Whereas the defendants are facing a new form of liability, a multiplier on fees that is currently generally unavailable under these fee recovery statutes because of an environmental law case called *City of Burlington v. Dague*.⁹ Most defense lawyers were moderately opposed to strongly opposed to this two-way pressure model, even though *Marek* might be triggered against plaintiffs more frequently. They really did not like the

9. 505 U.S. 557 (1992).

idea of paying extra fees if the rule were triggered against them. However, a significant number of defense lawyers were moderately supportive to strongly supportive.

The last proposal was a kinder, gentler version of a two-way rule that involves a percentage cushion; so instead of a pressure rule, it gives each side leeway to guess a little bit wrong but still not face sanctions. And this cushion approach does appear in some of the state rules, Florida's for example, so that if a defendant issues an offer for a hundred, and the plaintiff recovers ninety, the plaintiff wouldn't face sanctions, would not face forfeiture of fees, post-offer fees, under *Marek* because, although they had guessed wrong, they had not guessed too wrong. They had come fairly close. So that is how it works in the states.

But what we proposed was a modification of that. We felt that there are so few offers now from defendants when plaintiffs already have to beat the defendant's offer by a penny that it would be leading to even less utilization of the Rule by defendants if we gave plaintiffs a cushion. So what we proposed was a one-way cushion for defendants only. No cushion for plaintiffs. The defendant would face a possible fee multiplier, but only if the plaintiff exceeded the plaintiff's rejected demand by fifteen percent. So if the plaintiff really improved its position beyond its initial demand that the defendant had rejected, and in hindsight mistakenly, the plaintiff would be able to get a possible multiplier. But the defendant would enjoy the ordinary *Marek* consequence of relief from post-offer fees under the current trigger requiring the plaintiff to beat defendant's offer by one penny.

Plaintiff's lawyers strongly supported the pressure model; their support was considerably less for this two-way cushion model. And some plaintiff's lawyers were strongly opposed because, under this model, they would face extra cost sanctions. We felt it was perhaps, in some crude equitable sense, balancing sense, a little fairer to hit plaintiffs with some extra costs when they not only guessed wrong by a penny but when they guessed wrong by ten to fifteen percent. So because of those extra cost sanctions some plaintiff's lawyers were strongly opposed to this two-way cushion model. Most defense counsel, who were moderately opposed to strongly opposed to the pressure model, were less opposed to this model which gave them a cushion and did not give the plaintiffs a cushion, but they still strongly objected to the fee multiplier possibility defendants would face if the rule were triggered despite this cushion. So we could describe them as moderately opposed to this cushion model.

That is perhaps a great place for us to go to lunch because right after we return in our last segment this afternoon we will be turning to the panelists. They have an opportunity now to consider what their colleagues around the country thought about these proposals, and in our

last segment after lunch we will be hearing from them on that. And we look forward to seeing you in about five minutes across the way at the Woodruff House. Thank you.

(SECOND SESSION CONCLUDED)