

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

Friday, February 17, 2006

**Session Three:
“Changes to Rule 68”**

PROFESSOR LEWIS: We are very fortunate to have Professor Albert Yoon with us because his research on New Jersey’s two-way rule relates directly to a couple of the proposals that were mentioned at the end of the session, that our panelists this afternoon will give us their reactions to as well. Professor Yoon, could you give us an idea of the nature of your New Jersey research, your conclusions in the Vanderbilt Law Review article¹ that will be summarizing it, and how you think that might relate to what you have heard for these proposals in the Federal fee shifting area.

PROFESSOR YOON: Sure. Thank you very much. There have been a lot of interesting comments this morning, and some which I will try to

1. 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).

incorporate. When I thought about this problem, I thought about it very structurally, and to hear about some of the hurdles from a practical standpoint is extremely helpful. And I will have to confess I will have to try to think about how that fits into future models.

For those of you who have not seen my study, which could very well be all of you, let me just quickly go over what it is. Most states adopt some variation on the Federal rule, which is to say you only allow a defendant to make an offer. A lot of states just pretty much take the whole Federal rule and put it into the state statute. New Jersey is one of the few states that is not like that and they have actually had a different rule going all the way back to the 1970s.

Their rule, since its inception, has been bilateral, which is to say, either side can make an offer and the fee shifting mechanism is not simply just court costs but also attorney fees. Now there was one caveat to this. This law was passed in the early 1970s and they capped the attorney fees at seven hundred and fifty dollars, which back in the 1970s was about three thousand dollars, which is not trivial but it is probably not all that much. But they never indexed it for inflation so every year it is just seven hundred and fifty dollars. Now it is still worth seven hundred and fifty dollars. So, that was one of the key limitations.

When I talked to attorneys in New Jersey, they just said, I think similar to the Federal rule experience, this rule is kind of toothless, not because it is bilateral, but because there really is not any fee shifting mechanism that really matters. You know, seven hundred and fifty dollars, like court costs, is awfully de minimis. And, so, in the mid-1990s, they reformed the law and the only thing that they changed was they did not cap the attorney fees. Now it could be anything that was reasonable attorney fees.

Now, the way the rule is structured it actually incorporates a lot of the suggestions that were suggested by the attorneys themselves. It is a bilateral rule. It allows for a buffer so that the fee shifting does not get invoked simply if you beat it by a penny either way. You have to beat it by twenty percent. So it is not too different from some of the proposals here. And it also includes any type of victory on the merits from the defense perspective.

So, here are the main findings. I looked at three dimensions. One was whether it changed the average payout. The second was did it change the duration of litigation. And the third was did it change the attorney fees. What I found was that it did not have any statistically significant effect on how much plaintiffs or defendants got. They got roughly the same. I mean the coefficient was negative but it was not statistically significant. The duration of litigation took about two and a half months less time, so about seven percent. And the amount of

money that the insurance companies saved was about twenty percent, which is not trivial.

And, so, some of you may be asking, "If this is a symmetric rule, how do you get the results that you get?" Well, I think Judge Schwarzer alluded to this during lunch. Most cases settle over ninety percent. In the case of insurance, I was looking at automobile insurance cases. This is a ninety-eight percent settlement rate. When you try to think about affecting a rule when the baseline settlement rate is so high, it seems somewhat silly to talk about kind of the marginal effect on such a high settlement rate to begin with.

But the real effect here is that it caused cases to end sooner. And, so, what I am trying to think about in future research is what is causing this mechanism. Therefore, I would be very interested to hear what our fellow panelists have to say on this.

One thing that struck me as odd, after I wrote the paper I started talking to some more attorneys. I said, here are my results and asked them, "What do you think is driving this?" I got a lot of responses. Gee, that is really interesting. I never use the Rule which makes me wonder what the mechanism here is. But one thing that is really big in law is this idea of the shadow of the law, right, so the idea that you do not even need the rule to be formally filed to have an effect. It could be something that shapes the way the parties negotiate. And I talked to a couple of attorneys that say, well, we never really file the rule, but it certainly is something that we both know is going on. And it is something that because this rule is bilateral and now it has some teeth, it actually jump starts the negotiations.

And, so, I think Hal made some reference to mutually assured destruction. I talked about this briefly in my comments to the symposium, that what we think is going on here is it gets both parties to kind of start talking turkey faster. They sit down, they start bargaining about hard terms sooner, and they reach a settlement sooner.

But let me conclude with just a couple more points. There are a lot of potential implications of the study as well as for this conference, and one is, are offer of judgments a good thing? Is Rule 68² a good thing to have? And this is really part of the bigger question of what is the social optimality of suit. I think that any time you have a rule, whether it is any type tort reform measure like damage caps or something procedural like this, it has an effect, not simply on the substantive terms of the outcome, but on who brings suit in the first place. And you can imagine a rule, that if not designed properly, will have an effect, not just on the

2. FED. R. CIV. P. 68.

outcome which may be good or bad, but it may have an effect on who brings suit in the first instance, and that is potentially problematic.

What is elegant about the New Jersey rule is that in theory, it is completely symmetric. You would think that it would be a completely fair rule. Whatever benefits or privileges one side gets, the other side gets as well. But one thing that is important to think about, and this is highlighted, I think, particularly in the employment and civil rights context, is whatever symmetries you have in the rule could still lead to asymmetric outcomes because the parties are not symmetrically situated. You may very often have a case where one party, in the case of civil rights maybe, the plaintiffs do not have the same bargaining strength or resources as the defense. In other contexts it might be the other way around. And, so, when you devise a rule that is symmetric, it could still exacerbate whatever existing inequalities there are.

And, so, with that, I would love to hear the comments from some of our practicing attorneys. Thank you.

PROFESSOR LEWIS: Professor Yoon's research is so significant because I believe it is the first study that yields statistically significant conclusions that suggest that rules like Rule 68, but with two-way teeth, really do hasten the resolution of cases and lead to early settlement.

Albert, I am curious, in New Jersey, are there any kind of caps or protections on the plaintiff's side of the kind that Judge Schwarzer's proposal for diversity cases included; that is, some limit on the fees that plaintiffs would have to pay defense counsel or any discretion for the court to moderate or waive that fee?

PROFESSOR YOON: The statute just says reasonable fees, so that is something that the court would obviously determine. But there are not any types of additional measures that the judge alluded to during that talk.

PROFESSOR LEWIS: I see. Would any of our panelists care to weigh in on, now we sort of have a little model on how a two-way rule might work except that it is a model that would require plaintiffs to pay fees as well, which I think most of us agree is not possible under litigation governed by Section 1988 because a federal rule that countered the private attorney general policies of *Christiansburg Garment*³ would probably be an invalid federal rule? First, are we all agreed on that,

3. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

that a Rule's amendment could not validly require the plaintiff to pay the defendant's fees?

(***Reporter's Note:* Several responding affirmatively at once.**)

PROFESSOR LEWIS: With that sharp difference in mind, what are your thoughts about a two-way rule? More practically, what sanctions are feasible that would be meaningful to plaintiffs both in terms of their relatively modest resources in many of these cases and as influenced by their fee agreement with their counsel?

Everybody objected strongly to the notion of any sort of Rule 68 sanctions being imposed directly against counsel mainly because of the fairness reason that the decision to accept or reject an offer is ultimately the client's and not the lawyer's. Yet there is this unitary economic interest that the plaintiff and plaintiff's counsel have in the fee award that is formally received by the plaintiff. Are there any practical penalties that plaintiffs could pay and should pay to have guessed wrong in rejecting an offer, particularly if there were a cushion? If they guessed wrong by fifteen percent or by twenty percent, as in New Jersey, how would a two-way rule work then?

MR. BUCKLEY: You know, the problem with this is that you are talking about somebody who has less financial means versus a defendant that has more financial means, so my answer is there is not one. There is not one. Paying costs is something that is daunting enough. If there is twenty-five thousand dollars in costs in a case for an individual that makes fifty or sixty thousand dollars a year, that can send them to bankruptcy. So I do not think that there is a penalty that is appropriate or would work for a plaintiff other than a penalty that would effectively close the door to the courthouse.

That is why—the idea of a plaintiff paying attorney fees—I have said to defendants before when they got costs against one of my plaintiffs, “Well, good luck collecting.”

PROFESSOR LEWIS: Are there any defense counsel who have been involved in collecting a costs award?

MS. MCCLAIN: I sent the sheriff down to the place where the employee was working and he took the paycheck. So if there are any assets, if there is any pay whatsoever, they are enforceable.

PROFESSOR LEWIS: Was that garnishment for as many months or years as it took?

MS. MCCLAIN: It was not wage garnishment actually because this person had a little flower shop. So the sheriff actually went down and collected the proceeds. It sounds harsh, but in fact the case was frivolous and was pursued inappropriately, and it seems to me that is what should happen in such circumstances.

PROFESSOR LEWIS: Muriel, what are New York City's collection experiences?

MS. GOODE-TRUFANT: Well, we ask politely first and then we engage collection agencies who collect the money for us.

PROFESSOR LEWIS: With success?

MS. GOODE-TRUFANT: Yes. In many instances, yes.

PROFESSOR LEWIS: Do you make decisions as to when it would be feasible by making guesses about the plaintiff's means or assets?

MS. GOODE-TRUFANT: No. We collect. We intend to collect all costs.

MR. BUCKLEY: You know, the problem that I have with this is the across-the-board application. I think that there are cases that are frivolous and Rule 11⁴ is there to protect defendants against cases that are frivolous. But there are cases that are tried to verdict that are not frivolous because they have gotten past a motion for summary judgment. A case is not frivolous if it has gotten past summary judgment. There are issues of fact for a jury to decide. Why should a plaintiff be penalized for trying a case to a jury and winning but just not winning enough? That is the concern that I have.

We get into a lottery mentality. We are not trusting the American jury system if we only engage in case management. If all we are worried about is the collective whole of cases and not the individual rights that our Constitution and that our statutory scheme has been set up to protect, I think we are missing the boat and the dock. That is the concern I have. We are looking at this forest but the trees are important, too. Individual rights have to be vindicated. We cannot just start betting is it going to be higher or is it going to be lower.

4. FED. R. CIV. P. 11.

PROFESSOR LEWIS: A logical extension to your position, I guess, is that the best outcome is complete abolition of the Rule for costs as well as fees?

MR. BUCKLEY: That would be, well, if you lose, you are going to pay costs.

PROFESSOR LEWIS: But not under Rule 68.

MR. BUCKLEY: Not under Rule 68. You are going to pay defendant's costs anyway, statutory costs.

PROFESSOR LEWIS: Under Rule 54.⁵

MR. BUCKLEY: Right.

PROFESSOR LEWIS: But that leaves no independent role for Rule 68 in that situation.

MR. BUCKLEY: That is true. So you are absolutely right that my ideal outcome would be abolition.

PROFESSOR EATON: Would you prefer that to a two-way rule?

MR. BUCKLEY: You are asking me?

PROFESSOR EATON: Yes. You would prefer abolition to amending Rule 68 to allow you to try to put some pressure on the defendant?

MR. BUCKLEY: Yes, because under a two-way rule, as Hal just pointed out, there is not a penalty that really would work for the plaintiff. There is not a way. There is not a mechanism. As you just said, even when you have a symmetrical rule, if the parties are disparate in their positions and in their abilities to litigate, it can actually accentuate that disparity rather than leveling the playing field. That is a fair characterization I think?

PROFESSOR YOON: Yes.

MR. BUCKLEY: So to me that is not really a solution either.

5. FED. R. CIV. P. 54.

PROFESSOR EATON: What if the sanction against the defendant, who refused the plaintiff's offer by however much we decide ought to be the amount, would be to allow plaintiff to recover a contingency multiplier as many of the cases allowed before the Supreme Court decided *Dague*?⁶

MR. BUCKLEY: A terrific outcome, I think, and a fair and just one, but if it is a two-way rule, as you say, what would be the sanction against the plaintiff beyond the payment of costs that your normal walking around plaintiff could afford, someone that has not won the lottery and that is not a millionaire?

PROFESSOR LEWIS: You know, with costs we are typically talking ten thousand dollars or so in an employment discrimination case. Some have suggested double costs of roughly in the area of twenty thousand. And that is where I think Judge Schwarzer's limiting factors, caps, would become important. Some kind of a cap or judicial safety valve not to impose that sanction beyond ordinary costs if it looked reasonable in hindsight for the plaintiff to have rejected the offer.

MR. BUCKLEY: Well, I do not want to monopolize, but costs in cases I bring are typically higher. If you limit your costs out of fear that they might be doubled at the end, or if you pull back in discovery and you do not take as many depositions, there is a danger that you are not going to uncover the evidence that might make the difference between winning and losing. So I am concerned about a penalty that would be doubling costs for the plaintiff which would be daunting and having the plaintiff say, well, do not take those depositions because I might get sanctioned at the end and it might be doubled. So that is a procedural concern to me.

PROFESSOR EATON: On the defense side, how do you respond to a proposal that adds some extra financial pain to your client who rejects a plaintiff's offer and fails to improve on it by whatever amount we agree is reasonable, whether it is a penny or whether it is fifteen or twenty percent?

MR. KENNEDY: Well, I do not react very well to that. My reaction to this, and I do not mean to beg the question, but my reaction on either side of the aisle, that is to say either trying to impose a greater penalty

6. *City of Burlington v. Dague*, 505 U.S. 557 (1992).

on the plaintiff or a greater penalty on the defendant, is that I would rather see greater efficacy, greater enhancement of using Rule 68, some of these other things we have talked about, than adding yet another dimension of penalty. Here I am saying this from a defense perspective where I have clients that do not think Rule 68, to use their phrase, has any teeth currently. And perhaps they might be interested in this proposal to have a greater penalty to the plaintiff, but if it is a two-way street they have the greater penalty. I think that skews the process. I am sensitive to, is it Ed?

MR. BUCKLEY: Yes.

MR. KENNEDY: I am sensitive to Ed's point of view in that you do not want to do something on the front end, and the other, Professor Yoon's point of view, you do not want to do something on the front end that illegitimizes the prospect that meritorious cases are going to be brought, that you chilled that process. I think we all have an interest in the dignity of the judicial system, and I am troubled that either end of this spectrum is going to be really problematic. I would rather see some of the ideas that would allow us to use what is already a powerful tool more effectively. Early disclosure of fees and putting in part of the Rule 26⁷ process, linkage perhaps to the mediation process where Rule 68 is timed, as we already do, but it is more formed for that process. But I am concerned about this. I certainly see that it would add a new dimension to it, but I am concerned that it would really impact overall the rights litigants, and that troubles me.

PROFESSOR LEWIS: Does it follow from that view that you would not favor a two-way system in federal fee shifting litigation because there would be no incentive to the plaintiff to make a demand if there were no extra penalties on the defendant beyond what they currently get now?

MR. KENNEDY: Correct. Yes. I just think that is misplaced on either side.

PROFESSOR LEWIS: The two-way rule?

MR. KENNEDY: Right, the two-way rule.

7. FED. R. CIV. P. 26.

PROFESSOR LEWIS: How would you and others react to what plaintiff's lawyers have speculated about on the road; and that is if they could make the demand and get some extra fees out of it and it would work, they would do so early and routinely, that would result in defendant's countering with their own demands. The magnitude of the demands on both sides, or the demand and the offer, would be somewhat more reasonable than the ordinary negotiation of demands and offers, the ordinary size of offers and demands under private negotiation because of the way the Rule was structured, that there would be more realism built into the demands and offers because of the Rule, and that as a result, once the plaintiff makes the demand and the defendant makes a counter offer, each side would be somewhat at risk, but they would be negotiating within a more realistic range somewhat earlier in the process, maybe months earlier, than if they just started out with pie in the sky demands?

MR. KENNEDY: Well, I think that is interesting. I just think it is just too much jeopardy in that process. The goal is laudable. The goal there is early resolution, more realistic evaluation on both sides. That is laudable. But I think the down side is there is too big a penalty if you guess wrong for the defendant and too big a penalty if you guess wrong for the plaintiff. If the proposal is you end up affirmatively paying the other side's fees, that is a whole different process than limiting affirmatively fees from the defendant's standpoint. It is just a whole different process indeed.

PROFESSOR EATON: Maureen.

MS. MCCLAIN: It seems to me that part of the goal that we ought to be talking about, and I think we are talking about, is having litigants and their counsel more fairly and at an earlier time in the litigation evaluate the postures of their case. And if that is true, then a two-way street, as the one we have in California⁸ that I have some experience with under the state analog, makes sense because if there is more than one person analyzing the value of the case and what one can do to end the litigation, then I think that is good. I would advocate a two-way rule. And I am not so sure it is so bad to think about whether you need all those depositions on either side. So it seems to me, if one can structure a rule that is fair and that avoids some of the pitfalls, that is useful—I think it is very important to have a rule that addresses

8. CALIF. CODE CIVIL PROC. § 998.

frivolous cases, not just cases with a small value, or cases at least that the defendant values as frivolous. But it seems to me within a fair structure that is cognizant of the plaintiff's rights to litigate that there can be an ultimate benefit to a two-way rule.

PROFESSOR LEWIS: A California lawyer told us, however, that the two-way rule is not used too frequently.

MS. MCCLAIN: No, it is underutilized in California as well.

MR. ALFRED: And why is that?

PROFESSOR LEWIS: Is that because on the plaintiff's side it is underutilized because the rule does not really give them anything that they are not otherwise getting, or maybe just gives them expert's fees?

MS. MCCLAIN: As Hal points out, it is not an attorney fee shifting rule. It shifts only costs and expert fees. The expert fees can be fairly substantial in these cases. And I think it is a matter of education. In the last two or three years I have seen many more plaintiff's offers and more defendant offers. So I really think it is a matter of the bar understanding what these provisions are.

PROFESSOR LEWIS: Several of our lawyers have said that. Does that argue in favor of boring amendments that simply spell out a rule better textually on the face of the rule, or perhaps in notes some of the features that are already really part of the law but that a lot of lawyers are not aware of?

MS. MCCLAIN: I think in part. As long as it is a fair disclosure to both elements of the equation, I think that is right.

MR. ROSEMAN: Generally I agree with my good friend, Ed. I would prefer, rather than trying to revive Rule 68, to euthanize it for a lot of reasons you mentioned and others have mentioned. It is a complex rule as it is and it is very difficult for me to explain to my clients. It is sort of like the Internal Revenue Code—the way we are trying to improve it is really making it more complex; and, therefore, making it more difficult for ordinary folks to understand or for in-house counsel or managers of corporations or public entities to understand. It is also punitive. It may and oftentimes does, certainly to the extent that we talk about enhancing the penalties on plaintiffs, discourage meritorious litigation.

And having said that, I still think there are some merits we are going to have to consider, if Rule 68 survives, of having some way for it to become bilateral because I know, for example, Richard's point, which is that it is difficult to get plaintiffs to make reasonable settlement offers early on in the case, and that he gets very high offers. And part of that is because of the gamesmanship that happens in settlement negotiations.

Now, I do not want to make a relatively low offer because as my attorney fees go up, I am not going to be able to effectively go to you and say, "Well, now I was willing to offer fifty thousand, now it is two hundred fifty thousand, and that is because my fees are higher." And the response I am going to get is, "You're being unreasonable. You're moving in the wrong direction, etc." So if I could make an offer of settlement to the defendant at least that way it could focus my client's attention on that and get my client to think about the advantages of settling early and making that kind of offer. It also would not be in the same context of settlement negotiations, of positional bargaining. It would be a specific offer made under a rule as opposed to that kind of back and forth. So I think it might get those offers out there. And the same thing may happen on the other side.

But I do not see how we can do it effectively without running into the kind of problems I have talked about, which is why I eventually come to the same position Ed does. I think that we need to focus on some other mechanism for getting the parties together early rather than using this kind of punitive measure that is in the rules, using things such as enhancing Rule 26(f) or just enhancing the whole magistrate judge system.

MR. ALFRED: One of the things I found interesting is the degree to which the plaintiff's bar in employment discrimination cases opposes the concept of a bilateral rule and the degree to which the plaintiff's bar was, as I understand it, the obstacle to the '83 and '84 efforts to amend the Rule. I think the opposition was triggered largely by the plaintiff's bar. Maybe Ed [Cooper] could talk a little bit about that.

I think I come down closer to where Maureen is on this. I would not have an objection to a bilateral rule that could be enforced bilaterally. My skepticism is that the defendant more often has a deep pocket and can pay, if there were a true bilateral rule as Ed describes it, and the plaintiff would not be able to. So I would not favor the kind of rule that you described, Ed, where the cost is affirmatively placed on the defendant.

I think one area that could be looked at that we have not talked about is to change the definition of costs not necessarily to include attorney

fees but to include other aspects of costs, such as deposition transcripts and expert fees, which are not typically included in statutory costs.

PROFESSOR LEWIS: And for the employment discrimination plaintiffs who can already recover expert's fees but civil rights plaintiffs cannot —

MR. ALFRED: And that would be another area —

PROFESSOR LEWIS: — I assume civil rights plaintiffs, many of whom have no resources to satisfy a judgment would not mind paying extra costs provided that when they win they could recover expert's fees as part of the costs.

MR. ALFRED: Well, that is the problem. But if costs were expanded to include additional items that are not part of statutory costs now, the stakes would go up. If the cost of the transcripts of all those depositions that Ed [Buckley] is going to take was includable, that would start to get expensive. Would you have an objection to including those in the definition of costs?

MR. BUCKLEY: Again, it is going to depend on what the sanctions are, what the defendant would pay, then I would want to do that. And if they are the same, again, whether that levels the playing field or not, my ultimate concern is, if I need to have every conversation with a client who has a meritorious claim needs to be, if you lose you could go bankrupt, and the threshold for your average Joe or Jane to go bankrupt is a lot lower than a corporation's. That is what I would have to be concerned about. And if I were pulling back on taking depositions that I feel would otherwise be necessary out of concern my client might be paying your transcript fees, for example, I do not want to pull my punches out of concern that down the trail I am going to bankrupt my client.

MR. ALFRED: Well, in fact, what you are saying is already happening. I mean it is a fact of life today that depositions are expensive to take.

MR. BUCKLEY: Court reporters drive nicer cars than any of us.

MR. ALFRED: Well, I am not going to be critical of court reporters.

COURT REPORTER: Good for you.

MR. ALFRED: I am watching out for you. But Maureen raises a good question. Why is it not appropriate for you to have a conversation with your client, not that you are going to go bankrupt if I take this deposition, but that there is a potential that you are going to have to pay possibly several thousands of dollars in transcript fees if the result at trial triggers the Rule 68 consequences? Why is that not fair?

MR. BUCKLEY: Believe me, if the rule were changed to include that, then I would have that conversation. I would have to.

MR. ALFRED: I am sure you would.

MR. BUCKLEY: I would have to have that conversation.

MR. ALFRED: Well, why is that not a fair thing, and why would that not be a compromise in what we are talking about because then costs could become, instead of a nominal amount, perhaps tens of thousands of dollars?

MR. BUCKLEY: Here is why it is not fair. Because what we are really talking about here is case management and not ultimately achieving a fair outcome in front of a jury or in a bench trial. We are concerned about cost apportionment. With an individual, that can be enough to bar the courthouse door. For a time there was, you know, early in the case they started to say that certain arbitration clauses were legal, which now it seems all of them are, not quite all of them, but the ones that would split the costs between an employee and an employer. Well, the cost of arbitration by itself will bar the courthouse doors. Well, the courts recognized that that was not acceptable, that you cannot do that and expect an employee to pick up ten thousand dollars of arbitration fees.

So the same thing applies here. If the fees, the potential downside fees, get too high, a plaintiff who might otherwise have a meritorious case ends up pulling their punches and do not take that important critical deposition, say, of the CEO or the human resources director or somebody like that and they lose their case and then they have to pay the costs anyway.

MR. ALFRED: No, but those are not the marginal depositions, Ed. Those are the depositions that you are going to take first.

MR. BUCKLEY: Well, it is hard to say in a given case, I am not a cookie cutter lawyer. In a given case, what might be a marginal

deposition in one may be the key one in another. And you might not know until you are in the middle of it and that witness says, "Yes, he told me that he did not want any blacks in management." You just might not know. So that is the problem that we have. If we could prognosticate what is going to happen in a deposition before it ever happened, we would not need to take it and we could have early settlement because I would tell you I know what he is going to say. You would say, of course he is, and then we would settle the case.

PROFESSOR EATON: All right. I am glad that we have achieved consensus about what range of sanctions would be agreeable to both the plaintiff and defense bar. I would like to probe the depth of the plaintiff's bar expressed desire to euthanize Rule 68. How do you feel about reform proposals that deal with terminology like changing it from judgment to settlement? Would you be opposed to that on the grounds that, "Well, that is likely to trigger more offers and I just do not want anymore," or would that be an acceptable proposal because it would trigger more offers and you might get an earlier disposition of your case.

PROFESSOR LEWIS: And let me press Tom's point in a more adversary way. You guys say you can do a pretty good job of evaluating a case. If the defendant makes you a low ball offer, if more offers come after a terminology change that is not a threat to you because you recognize it as a low ball offer and you have great confidence that if your client prevails he will prevail at a higher level than the offer. So how threatening is it if defendants were to make more such offers under the same basic terms as we have now? How badly would that hurt your client's position, or would it perhaps give you in more cases better offers earlier?

MR. SPEARS: I think it would probably be a good thing to have the terminology changes. I think that there is a lot of confusion, particularly for lawyers, defense lawyers probably as well as plaintiff's lawyers, but confusion about what it means to give this offer. I will give an example of the kind of confusion that exists. One defense attorney has told me that the reason that they could not make a Rule 68 offer was because, depending on the facts of the case, and in this particular one it would have had this effect, if a judgment exists against a defendant that is, in fact, a judgment that is recorded with the court, depending on what the underlying facts were, they may find themselves collaterally estopped with respect to other cases in the future that may share a common factual base. So some defendants do not realize that they are really able to structure a Rule 68 offer in a way to get around that because the ones

that have ever worked that I have been involved in they have said, it cannot be filed with the court. So there is confusion about it and the terminology change might help, and I think overall it would be better if there were more and more offers being made. I mean, I am not afraid of them. I do not think we should be, so that would be fine.

PROFESSOR EATON: Bob, how do you feel about it?

MR. BENNETT: Well, I think that the, maybe on a broader plane I think Rule 68 as it stands right now provides an impediment, more minor perhaps in big cases, but an impediment nonetheless to the plaintiff actually getting to a jury trial, as does forced ADR, as does Rule 56.⁹ It is like a hundred and ten high hurdles and the end line is the jury trial. If all you had to worry about was what a jury of your peers would award you and the costs of litigation that you basically foist on yourself or is foisted on you, maybe that is a purer market for deciding how to settle a case. I mean, good lawyers can settle cases based on that easier than having these impediments that distract rather than whether they call it a judgment.

If you are going to offer a judgment, you offer a judgment. That is what it is. And something I can go enforce if you did not pay. If they do not send you a check, I ought to have a judgment and with all of the things attendant to it. I like the rule as it stands right now, but now it is a mild impediment for defendants because they have to piddle around with the language to make it fit what the city manager wants or the chief of police or the officer. But I frankly think we need more jury trials and less depositions and we need to just lock and load and see what our peers say. But that is me.

PROFESSOR EATON: Richard and Maureen, do you think that your clients would make offers earlier if the terminology was changed?

MR. ALFRED: Yes, I do. I think I signaled that this morning. There are work-arounds currently if opposing counsel has the inclination or courtesy to call me before accepting an offer by signing the judgment and filing it with the court. I can, for example, ask him or her if his client would accept a settlement rather than a judgment, maybe sweeten the proposal a little bit, in order to get a dismissal as part of a settlement. But from the perspective of talking to my clients at an early stage and overcoming some of the issues that I described this morning, it would be

9. FED. R. CIV. P. 56.

a big help in employment discrimination cases to be able to talk in terms of settlement rather than judgment. Judgment has consequences and is interpreted in a way that defendants want to avoid.

MS. MCCLAIN: I absolutely agree. I think it would make a major difference in style if not in substance.

PROFESSOR EATON: Barry and Ed, how about from the plaintiff's side of employment discrimination? The indication is that you might get more offers.

MR. ROSEMAN: I mean anything that would get more offers and offers early on I favor. I do have one policy problem with it which is that the reason I do not like confidential settlements, although I know why defendants prefer them, is because they are confidential and because that does not enable other people, including the public, to find out what is going on in these cases. I take a position against confidentiality in settlement agreements for exactly that reason.

The one concern that I have about all of this is that we are only looking at one relatively narrow set of incentives and disincentives that affect settlement of these cases. One huge change in the law that has affected the ability of both plaintiffs and defendants in settling employment discrimination cases came ten years ago when Congress changed the Tax Code to provide that emotional distress damages that were recovered in a discrimination case were no longer excludable from adjusted gross income. And so, that has made it much more difficult to settle cases, and I think it has had much more of an impact than anything we have talked about here today. If Congress were to change that, I think that we would have many more settlements and have them earlier because the client would be able to reveal the structure of the settlement so that much more of the money would be tax free.

PROFESSOR LEWIS: They may be on the road to doing that.

MR. ROSEMAN: Good.

PROFESSOR LEWIS: They certainly got rid of the double taxation.

MR. ROSEMAN: Right. We are working on that. I know that is not anything that the Civil Rules Committee can deal with. But it is a factor, and I think that when you just look at this one set of variables it does not really look at what is really driving the movement of cases into litigation.

PROFESSOR LEWIS: There is a slightly related question. You are a very refined subset of lawyers, and on the plaintiff's side you are vastly more successful, it is our impression, than what might be described as a typical plaintiff's employment discrimination lawyer or a typical plaintiff's civil rights lawyer based on your experience and your success. So while the impact may not be grinding on your plaintiffs about more offers resulting from a terminology change, one could predict that an increase in offers in the typical civil rights case, particularly that brought by a personal injury lawyer or a family lawyer or a criminal lawyer without very much experience in this technical area, the impact would be a lot more severe. And the question I want to put to you is, is that a good thing or a bad thing? Is it a good thing for the system of justice and indirectly for your clients if cases that might be called bad cases, at least under current law, are flushed out more readily by more low ball Rule 68 offers? Does that incline federal judges to look a little more favorably on the remaining cases, the "better" cases that are being brought, and I am putting better in quotes to refer to cases that meet current very stringent requirements under the Supreme Court authority of the last twenty years?

MR. BUCKLEY: What you are really raising here is a sociological issue, and I am torn between the individual client and the importance. There is a body of case law out there in this Circuit, indeed, that has been created by bad lawyers bringing bad cases. That body of case law impacts good cases that are brought forward. There is bad law that is made. And so, is it desirable that those cases get flushed from the system early so that good cases and meritorious cases can go forward?

Well, yes. Sure it is. Would changing one word, would changing the word judgment to settlement do that? I do not know. If the defense lawyers are saying they would be more likely to make these offers, maybe it would. And from a sociological perspective it might be a more desirable thing. But it is, in my view, an exultation of form over substance. The playing field is still tilted, and it may even tilt ever so slightly more by just changing that one word. I do not know that it creates the greater advantage for the individual plaintiff, but sociologically it does.

PROFESSOR LEWIS: The last major word this afternoon should probably come from Professor Cooper, who is in the best position to appraise how a variety of the types of proposals discussed here today might be received in the federal rules revision process. I wonder if we could turn to you, Ed, for some wisdom on that.

PROFESSOR COOPER: So much to choose from, so little time. First, of course, everything I say is individual and impressionistic. It is not in any way a reflection of what the Civil Rules Advisory Committee might think, let alone the many entities along the way up through the rules enabling act process. So this, as I say, is very broad and of necessity very quick.

The first proposition, without embellishing it, although it deserves embellishment, is that any proposal to amend a civil rule or any of the other rules encounters inertia, and that is quite properly so. The simplest proposition is that an awful lot of lawyers—and there must be some sympathy in the room for this—will tell you the rules get changed often enough, thank you, and rather too often; and the best thing you could do is just stop changing them for at least five years. Sometimes the committee thinks it is going to take the pledge, but they fall off the wagon awfully quick. There seems to be a lot that needs to be done. But there is that.

Underlying that is a very strong sense that by far the safest, most successful rules amendments are those that can draw from demonstrated experience with actual rules in state courts, local district court rules, lived with for some time, you have a pretty good idea of how they work. You are not just guessing. Short of that sort of foundation, it is very useful to have empirical studies, and the empirical study that Professors Lewis and Eaton have done is a very strong, very valuable contribution, as is Professor Yoon's, into an area in which it is exquisitely difficult to get the full range of empirical evidence that you would want to have to think of a reliable basis for striking out in dramatically new directions. But short of that, of course, there is always the thing that professors specialize in and that is theory. And the theoreticians, which clearly the economists say, if you do not recoil in horror, the game theory economists wind up all over the map with all kinds of strategies that they can imagine from one form of offer of judgment rule as compared to another offer of judgment rule wind up in very great difficulty. So, to follow that, this is an area in which it will be very difficult to feel secure about almost any sort of rule change.

A second part of the problem is that almost invariably when people suggest changes, as are often suggested, the rules committee gets mailbox suggestions and Rule 68 figures in the mailbox, suggestions from organized groups, individual judges, and others to put some teeth in Rule 68. And that very commonly turns out to let us do something about fee shifting. Again, this is a whole huge chapter. But the basic problem is the rules enabling act, which authorizes the adoption by the Supreme Court of general rules of practice and procedure that are not to abridge, enlarge or modify any substantive right. Well, any good

procedure rule abridges, enlarges or modifies a substantive right. You need think of nothing but the 1966 amendments of Rule 23¹⁰ on class actions that transformed many substantive rights.

So trying to flesh out in that atmosphere what is permitted and what is prohibited intrusion on a substantive right is, again, very difficult. But one easy starting point would be to ask, suppose the rules committee decided that we should go with the rest of the world. What we call the American rule on attorney fees is the American, Chinese, Japanese rule. What we tend to call the English rule is all the rest of the world.

So, why do we not just adopt a little rule that says the loser pays attorney fees? Is that something that abridges or modifies a substantive right? It sure as heck would have an enormous impact on the role civil litigation plays in our society and in our overall governmental structure. We need to be extremely cautious about doing such a thing.

How much different is it to use attorney fees in the guise of sanctions? We can do that when we are clear we have a sense of procedural duty. We have discovery rules, as Judge Schwarzer points out, in Rule 37 and Rule 26(g). They address sanctions for improper behavior in discovery. We have a procedural concept underlying that. So do Rule 11 sanctions.

Is there a comparable procedure, a procedural obligation to be reasonable in settlement negotiations? Surely we have to leave room for the litigant whose position is, "I will not settle." This is a matter of principle or this is a matter of absolute necessity for me. Eight hundred thousand dollars does not put me back in business. I need the whole million and that is what my policy gives me. We cannot make that party settle.

How far should we pressure them with Rule 68? There are huge issues in that dimension.

In very specific rules proposals, and this is going to be sort of hopscotch around, calling it settlement instead of judgment, an easy change to draft, and I am all in favor of that. There might be some collateral consequences beyond those we speak of. For instance, in federal courts absence of supplemental jurisdiction to enforce a settlement agreement if it is not made part of the judgment and you do not have an independent basis. You need to work through that sort of thing. But that sort of thing is easy.

We adjust the time the settlement offer should remain open. If you extend it very far, my guess is you would want to couple it with the authority to withdraw the offer before it is accepted. That is what the

10. FED. R. CIV. P. 23.

1992-1993 drafts did. But if you do that, you are complicating further the strategies and calculations that go on.

As for a proposal of writing the decision in *Marek v. Chesny*¹¹ into the rule, I think it would be malpractice in the rules process to carry forward the exact ruling of the *Marek* decision. To make the consequence turn upon whether this particular statute happens to have chosen to express the right to attorney fees as costs or not is bizarre. But that is the rule you have got. But you could not do that. You could write it in more general terms if you thought it a good idea. Justice Brennan's opinion offered compelling arguments that, speaking of the Enabling Act, to take away from what is especially favored by Congress, the statutory right to attorney fees, does abridge a substantive right to attorney fees that Congress has created as part of the remedy for those individual claims that lie under the statute. That argument lost in the Supreme Court's decision. That one having lost, I am not at all sure that having modified that statute you could not equally modify the statutory approach to limiting successful defendants' rights to statutory fees. But I suspect there would be very little appetite for that.

If, and this is the if that reflects the continuing uncertainty in the discussion this morning and this afternoon, but if you could find some acceptable sanction for plaintiffs' successful offers, then surely—successful in the sense of the offer is rejected and then the plaintiff beats the offer in judgment—surely the rule must be made bilateral. You can do that. And, surely, at the same time the *Delta Air Lines*¹² case ought to be overruled. Rulemaking in this area, if you are going to do it, seriously requires overriding at least two Supreme Court decisions. That may not stand in the way, but it is a deterrent.

You must deal with multiple offers. One of the questions at lunch this afternoon was how do you do that? Part of the question is can they cascade? Can a party make two or three offers and each of them carries forward its effect so that you make sure according to whichever one happens to beat the judgment. You can predict the most obvious sequences over time. And that is the real problem.

And another question was, of course, about class actions, and the draft rule we had exempted class actions specifically. Most courts exempt them now. But that raises a more general question that the instigators of all of this, Eaton and Lewis, put us up to, but the rules tend to be transsubstantive. You really want to have the same approach, even if you exempt class actions, to other forms of private attorney general, public interest litigation, you want to do it in ERISA, and most

11. 473 U.S. 1 (1985).

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

particularly how about cases involving specific relief? To draft a rule, we have got a draft that addresses comparing specific relief won to specific relief offered, but I would not want to stand on its being successful.

Do you do anything in the rule about multiple party actions, conditional offers, the consequences if some parties accept but the offer is conditioned on acceptance by all? Collectively they fail to better it in the end, who then is subject to Rule 68 sanctions? It is not easy.

The list goes on. Some of them are easy. Taking us to the end of the hour, some of them are easy but not if you get thoroughly into it. All of which is to say it is an important and extremely complex set of questions if you are going to be thorough about it. I would not hold my breath for immediate amendment.

PROFESSOR LEWIS: A specific question to Professor Cooper and then a general one to the panel. Ed, do you have any view about the validity of an amendment that would give the plaintiff a fee multiplier under certain circumstances after *City of Burlington v. Dague*¹³ generally frowns on them? I suppose you could distinguish the situations. The multiplier would be given for what might be called unreasonable litigation; whereas, in *Burlington* what was rejected was a multiplier based on the risk of loss or contingency. But is it unduly abridging a substantive right of the defendant to give the plaintiff a fee multiplier?

PROFESSOR COOPER: Well, the most modest form I can think of, and this is one of the problems, one of the things I would like to say is just because you are writing a rule does not mean you have to talk funny; but, still you sort of get an idea of what rules typically look like. And writing a rule that would say, and it strikes me as the least threatening of Enabling Act difficulties form would be a rule that says in calculating the reasonableness of fees the court can take into account the defendant's rejection of a settlement offer that the plaintiff beat at trial. And depending on how much looseness you have got whether a lode star or a contingent percentage of recovery approach to it, if you could find a way to say that in the rule my guess is that would face the lowest danger of Enabling Act problems.

But let me go beyond that and say if the court independently without knowing about the offer, calculates fees, and then you file the offer and you have a multiplier of 0.125 or whatever, it could be an effective

13. 505 U.S. 557 (1992).

incentive for plaintiffs to make offers. I would be wary about the Enabling Act question. I give no answer, but I would be wary.

PROFESSOR LEWIS: Thank you, Ed. A general question to the panel as a whole. We have had some generalizations about the amendments package already that we have looked at. I would like to get your reaction to the generalizations that in circuits where the defendant can be overwhelmingly confident of success, and we know who they are, is it fair to say that tinkering type amendments like terminology, express authorization, non-admission of liability clauses, tying it in with mediation, Rule 26, are really unlikely to spur additional defense offers, or at least halfway reasonable ones, at an early stage given the underlying economics of the defense situation and the attitudes of defense clients in those circuits who are looking around and seeing that every other defendant is winning at summary judgment, why can we not string it out at least that long, too; but that perhaps in the Districts or Circuits, that will, of course, change over time perhaps, where offers are already being made in certain areas, tinkering type amendments, the kind that Professor Cooper has suggested may be less troublesome to enact, but tinkering type amendments may make some difference in the utilization of offers by defendants and perhaps their acceptance by plaintiffs. A real broad generalization, but I would like to get your reaction to it.

Jack.

MR. KENNEDY: In our jurisdiction, which is one where offers of judgment are utilized, we are not a jurisdiction where defendants can predictably count on winning all the time, so in contrast to that, I think that tinkering with the language would be another plus to enhance the use. And I would like to see it linked to existing mechanisms like the advent of ADR, and perhaps to catch hold of a very rapidly moving train of alternative dispute resolution by suggesting that perhaps you could call this Rule 68 an offer of resolution, to get on that train and so invoke an alternative dispute resolution and build it into the rules with other things we talked about. It would help.

PROFESSOR LEWIS: Is there any reaction from counsel in some of those other Circuits where defendants can be overwhelmingly confident of victory; and, therefore, as long as the *Delta Air Lines* decision is intact and we cannot figure out a practical way to get around it because we cannot figure out what plaintiffs are able to pay beyond what they already have to pay when they lose? So let us assume just for the moment that *Delta* is there to stay if only because it cannot be practical-

ly changed. For counsel in those Circuits, would it be fair to say that even a collection of these tinkering amendments would be unlikely to spur the additional use of the rule by defense counsel? Brian.

MR. SPEARS: I think you are absolutely right. Again, there are so many elements that go into the process of defendants coming up with offers; nevertheless looming large is whether or not you are going to be able to count on winning; and if they can, then it is kind of a non-starter to envision in some Circuits. You would have to do more in some Circuits than simply modify the language.

PROFESSOR LEWIS: Professor Cooper referred to the objective of the rule to be transsubstantive. Your collective testimony today has reconfirmed for me that, in fact, this one operates differently in different fields, even closely related fields like employment discrimination and civil rights, and operates very differently in different geographical areas with different judicial and perhaps cultural climates. I suppose, in that respect, it is not unlike other Federal Rules of Civil Procedure. They are supposed to be transsubstantive, but they do not really operate the same way in different fields.

Tom, do you have some concluding comments?

PROFESSOR EATON: I would like to thank Dean Floyd and Hal and the members of the Mercer Law School community for putting on this program and doing it in a first class fashion. You have made us all feel very welcome and it has been a very pleasant experience for me. I would like to especially thank all of our panelists. Speaking as one who spends most of his time in the ivory tower, it is really refreshing and kind of a reality check to spend time with people who do what we think we are training our students to do and find out how close to reality we really are. Those of you who are billing your hours most of the time, it is a tremendous sacrifice for you to come here and spend the time here, and we thank you very, very much.

(END OF SESSION)