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Recommended Citation

Roy D. Simon Jr., *The Riddle of Rule 68*, 54 Geo. Wash. L. Rev. 1 (1985)

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The Riddle of Rule 68

Roy D. Simon, Jr.*

Introduction

Since the start of this decade, a debate has been steadily growing over rule 68 of the Federal Rules of Civil Procedure,¹ the only

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1. Rule 68 presently provides:

[1] At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. [2] If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. [3] An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. [4] If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. [5] The fact that an offer is made but not accepted does not preclude a subsequent offer. [6] When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68 (sentence numbers added and hereinafter cited for convenient reference).

procedural rule devoted exclusively to settlement.² The Supreme Court handed down controversial decisions about rule 68 in 1981 and 1985,³ and the Advisory Committee on Civil Rules circulated proposals to amend rule 68 in both 1983⁴ and 1984.⁵ Presently at

2. See *Delta Air Lines v. August*, 450 U.S. 346, 352 (1981) ("The purpose of Rule 68 is to encourage the settlement of litigation."). Until August 1, 1983, when amendments to FED. R. CIV. P. 16 took effect, see 97 F.R.D. 165, 168-71 (1983), the word "settlement" had never appeared in the rules. "Settlement" now appears twice — once in FED. R. CIV. P. 16(a)(5) (one purpose of pretrial conference is "facilitating the settlement of the case"), and once in FED. R. CIV. P. 16(c)(7) (participants at a pretrial conference may consider and take action regarding "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute"). Rule 16, however, has many purposes other than promoting settlements. See FED. R. CIV. P. 16(a). In contrast, rule 68 has no purpose apart from encouraging settlement.

3. *Marek v. Chesny*, 105 S. Ct. 3012 (1985), *rev'g* 720 F.2d 474 (7th Cir. 1983); *Delta Air Lines v. August*, 450 U.S. 346 (1981), *aff'g* 600 F.2d 699 (7th Cir. 1979).

4. Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts*, reprinted in 98 F.R.D. 337, 361-67 (1983) [hereinafter cited as *1983 Proposal*]. The 1983 proposal provided:

[1] At any time more than 30 days before the trial begins, any party may serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in his offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. [2] The offer shall remain open for 30 days unless a court authorizes earlier withdrawal. [3] An offer not accepted in writing within 30 days shall be deemed withdrawn. [4] Evidence of an offer is not admissible except in a proceeding to enforce a settlement or to determine costs and expenses.

[5] If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest from the date of the offer on any amount of money that a claimant offered to accept to the extent such interest is not otherwise included in the judgment. [6] The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. [7] In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration. [8] Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith.

[9] The fact that an offer is made but not accepted does not preclude a subsequent offer. [10] When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement under this rule, which shall be effective for such period of time, not more than 30 days, as is authorized by the court. [11] This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

98 F.R.D. at 361-63 (sentence numbers added and will be hereinafter cited for convenient reference).

5. Committee on Rules of Practice & Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts*, reprinted in 102 F.R.D. 407, 432-37 (1984) [hereinafter cited as *1984 Proposal*]. The 1984 proposal to amend rule 68 provided:

[1] At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall

least two bills to amend rule 68 have been introduced in both the

not file with the court a written offer, denominated as a [sic] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. [2] The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. [3] An offer that remains open may be accepted or rejected in writing by the offeree. [4] An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. [5] The fact that an offer is made but not accepted does not preclude a subsequent offer. [6] Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

[7] If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. [8] In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

[9] In determining the amount of any sanction to be imposed under this rule the court shall also take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

[10] This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

102 F.R.D. at 432-33 (sentence numbers added and will be hereinafter cited for convenient reference).

The process for approving a proposed amendment to the Federal Rules of Civil Procedure involves many stages and may take two years or more from the date an amendment is first proposed. The Advisory Committee on Civil Rules begins the process by circulating a proposed amendment to the bench and bar. This is followed by approximately six months of public comment, including public hearings before the Advisory Committee on Civil Rules.

After the period of public comment, the Advisory Committee decides whether to forward the proposal to the Standing Committee on Rules of Practice and Procedure or to revise the proposal. If the Advisory Committee revises the proposal, it circulates the new proposal for public comment. If the Advisory Committee forwards the proposal to the Standing Committee, the Standing Committee may accept the proposal as is, make minor technical and stylistic changes, or send the proposal back to the Advisory Committee to be redrafted and recirculated for public comment. If the Standing Committee accepts the proposal as is or makes only minor changes, it forwards the proposal to the Judicial Conference of the United States and recommends that the Judicial Conference pass the proposal on to the Supreme Court for its consideration.

If the Judicial Conference transmits a proposal to the Supreme Court, the Court normally forwards the proposal to Congress without change. The Court must forward the proposal to the Congress no later than May 1 of the year following its receipt by the Court. If Congress enacts no contrary legislation for 90 days after receiving the

Senate and the House.⁶

In essence, the debate over rule 68 is a debate over the extent to which court rules should encourage settlements by penalizing refusals to settle. Some favor strong penalties for those who spurn settlement offers.⁷ Others believe every litigant has a right to go to trial and that court rules should not penalize refusals to settle.⁸ Some even argue that stronger sanctions for rejecting settlement offers would be counterproductive and actually discourage settlements.⁹ Rule 68 has become the vehicle for debating these conflicting viewpoints.

This Article explores the direction Congress or the Advisory Committee on Civil Rules should take in amending rule 68.¹⁰ Part I explains the existing rule, the Supreme Court's interpretation of the rule, and recent efforts to amend the rule. Part II sets forth rule 68's basic goals and limitations and develops a framework for discussing the rule. Part III uses this framework to analyze a pending proposal to amend rule 68. Part IV develops an alternative proposal for amending rule 68. Part V explores the relationship between rule 68 and alternative dispute resolution. Finally, part VI sets forth this author's proposed rule in statutory form.

proposal, the proposal becomes part of the Federal Rules. See 28 U.S.C. § 2072 (1982). If Congress disapproves of the proposal, Congress may either redraft the proposal or veto it. *Id.*

For an excellent and concise explanation of the approval process, see Spaniol, *Making Federal Rules: The Inside Story*, 69 A.B.A. J. 1645 (1983).

6. S. 2038, 99th Cong., 2d Sess. (Feb. 3, 1986); H.R. 3998, 99th Cong., 1st Sess. (Dec. 19, 1985).

7. The most vocal proponent of stronger sanctions has been the Advisory Committee on Civil Rules itself, which promulgated the 1983 and 1984 proposals to amend rule 68. See 1984 *Proposal*, *supra* note 5, advisory committee note at 434 (stating that current rule 68 penalties "are too small a factor to motivate parties to use the rule"). Chief Justice Warren Burger has also worked hard for stronger rule 68 sanctions, both by lobbying the Advisory Committee and speaking publicly. See Letter from Charles Alan Wright to the author (Sept. 9, 1985) (perceiving "very great pressure from the Chief Justice for some drastic revision" of rule 68); *On the Merits*, 70 A.B.A. J., July 1984, at 28, 28 (report on Chief Justice's comments at ABA midyear meeting). The Chief Justice also reportedly appeared at the Advisory Committee's June, 1985 meeting to urge the Committee to continue its work to strengthen rule 68.

8. See, e.g., Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1670 (1985) (arguing that once litigants "have turned to the courts," it would be "absurd for the legal system to create incentives or pressures to force them to settle"); Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1077 (1984); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 441, 444 (1982).

9. See Oesterle, *Proposed Rule 68 on Offer of Settlement*, 10 CORNELL L.F., Feb. 1984, at 11, 11-12; Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 164 (1982).

10. The ideas expressed in this Article apply whether Congress or the Advisory Committee amends rule 68. There is recent precedent for Congress to reject a proposal from the Advisory Committee and amend a Federal Rule of Civil Procedure itself. In 1983, Congress amended FED. R. CIV. P. 4 because it was dissatisfied with the Supreme Court's proposed rule. Federal Rule of Civil Procedure Amendments of 1982, Pub. L. No. 97-462, § 2, 92 Stat. 2527, 2527-30 (codified at 28 U.S.C. § 2071 (1982)), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4437, 4438. There is no precedent, however, for Congress to take the initiative in amending a federal rule without waiting for the Supreme Court to forward a proposal, but a bill is now pending in the House of Representatives to amend rule 68. H.R. 3998, 99th Cong., 1st Sess. (Dec. 19, 1985) (bill introduced by Rep. John Conyers, Jr.).

I. The Existing Rule and Proposals to Amend Rule 68

A. Basic Operation of Rule 68

The basic operation of rule 68 is simple. Under the rule, a defendant (but not a plaintiff)¹¹ may offer, any time up to ten days before trial, to allow judgment to be taken against him on specified terms.¹² The plaintiff has ten days to accept or reject the offer.¹³ If the plaintiff accepts the offer, either party may file the offer with the court and the clerk will enter judgment accordingly.¹⁴ However, if the plaintiff rejects the offer and finally obtains a judgment that is less favorable than the rejected offer, the plaintiff "must pay the costs incurred after the making of the offer."¹⁵ Rule 68 thus alters the operation of rule 54(d), under which the prevailing party in litigation is ordinarily entitled to an award of his taxable costs.¹⁶ In short, rule 68 is designed to

11. FED. R. CIV. P. 68 (only a party "defending against a claim" may serve an offer) (sentence 1). Technically, therefore, plaintiffs who are defending against counterclaims can make offers. See 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3001, at 56 n.7 (1973). However, a plaintiff defending against a counterclaim may invoke rule 68 only to make an offer of judgment on the counterclaim, not to settle the plaintiff's own affirmative claim. See *Delta Air Lines v. August*, 450 U.S. 346, 350 & n.5 (1981). For the sake of clarity, this Article uses "defendant" as shorthand for either an original defendant or a plaintiff defending against a counterclaim.

12. The offer may be for money, property, or other terms specified in the offer, with costs accrued to the date of the offer. FED. R. CIV. P. 68 (sentence 1).

13. *Id.* (sentences 2 & 3). There is general agreement that an offer under rule 68 may not be revoked during the 10-day acceptance period. See, e.g., 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 3004, at 59-60 (1973); Udall, *May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?*, 19 F.R.D. 401, 403-06 (1957). Courts disagree over whether the 10-day acceptance period can be extended. Compare *Passeron v. Lockheed Aircraft Corp.*, No. 84-1412 (D.D.C. Sept. 11, 1984) (granting plaintiff's motion for extension of time to respond to offer of judgment under FED. R. CIV. P. 6(b)) and *Coleman v. McLaren*, 33 Fed. R. Serv. 2d 593, 595 (N.D. Ill. 1981) (Callaghan) (same) with *Staffend v. Lake Cent. Airlines*, 47 F.R.D. 218, 220 (N.D. Ohio 1969) (denying extension). The correct rule is that courts should permit extensions on good cause shown, see FED. R. CIV. P. 6(b), because rule 6(b) does not exempt rule 68 from extensions of time. However, because it would be unfair to compel the offeror to keep his offer open indefinitely, a court permitting an offeree more than 10 days to respond to a rule 68 offer should allow the offeror to withdraw the offer anytime after 10 days. See Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 922 n.140 (1984).

14. FED. R. CIV. P. 68 (sentence 2).

15. *Id.* (sentence 4).

16. Rule 54(d) provides:

Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

FED. R. CIV. P. 54(d) (emphasis added).

Under rule 54(d), courts employ a "heavy presumption favoring an award of costs to

encourage settlement and avoid protracted litigation¹⁷ by depriving a prevailing plaintiff of any costs that accrue after the plaintiff rejects a settlement offer more favorable than the plaintiff's judgment at trial.¹⁸

Many lawyers and judges believe that rule 68 has failed¹⁹ to

the prevailing party" tempered by a measure of discretion to order "otherwise." *Sun Ship, Inc. v. Lehman*, 655 F.2d 1311, 1314-15 (D.C. Cir. 1981). The term "costs" is not defined in the Federal Rules, so courts usually refer to the definition of taxable costs in 28 U.S.C. § 1920 (1982). See, e.g., *Copper Liquor, Inc. v. Adolf Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), modified on other grounds, 701 F.2d 542 (5th Cir. 1983); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143, 162 (D. Md. 1968), cert. denied, 397 U.S. 920 (1970). See generally *Peck, Taxation of Costs in United States District Courts*, 37 F.R.D. 481 (1965) (using section 1920 to interpret what taxable costs are available under rule 54(d)).

In rare instances, courts may award costs other than those specified by statute. See *Farmer v. Arabian Amer. Oil Co.*, 379 U.S. 227, 235 (1964).

17. 1984 Proposal, *supra* note 5, advisory committee note at 433.

18. Surprisingly, courts are still debating whether the phrase "must pay the costs incurred" in rule 68 requires the offeree merely to bear his own post-offer costs or actually to pay the offeror's post-offer costs. See *Marek v. Chesny*, 105 S. Ct. 3012, 3023-3024 (1985) (Brennan, J., dissenting). The correct reading of the rule is that rule 68, when it applies, should reverse the operation of rule 54(d), not just cancel it; the plaintiff should have to pay the defendant's post-offer costs in addition to absorbing his own costs. See, e.g., *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113 (N.D. Cal. 1979). But see, e.g., *Marek*, 105 S. Ct. at 3014 n.1 ("The District Court refused to shift to respondent any costs accrued by petitioners. Petitioners do not contest that ruling."); 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3001, at 56 (1973) (interpreting rule 68 not to impose liability upon plaintiff for defendant's costs).

The confusion stems from the ambiguity of the language of the present rule, which says the offeree must pay "the costs" but does not say whose costs. The original language specified that an offeree who failed to obtain a judgment more favorable than that offered "shall not recover costs in the district court from the time of the offer but shall pay costs from that time." See *FED. R. CIV. P. 68*, reprinted in 1 F.R.D. at CXXXIV (1941). This language suggests that failure to recover costs and payment of costs are two different things, and that rule 68 penalties include both.

The original language was replaced by the present language in 1946. The advisory committee note to the 1946 amendment says nothing about changing the practice provided by the original rule regarding costs, and suggests that the change was made for other reasons. *FED. R. CIV. P. 68* advisory committee note — 1946 amendments. Thus, as the drafters intended under the original rule, the existing language should be read both to deny post-offer costs to the plaintiff and to require the plaintiff to pay the post-offer costs incurred by the defendant. This is how other commentators generally read the rule. E.g., *Miller, An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 93 (1986).

19. The Advisory Committee on the Federal Rules of Civil Procedure has referred to "the rule's past failure" and stated that rule 68 "has been considered largely ineffective as a means of achieving its goals." 1984 Proposal, *supra* note 5, advisory committee note at 433. Although no empirical evidence exists regarding the effectiveness of rule 68, the Advisory Committee's view that the rule has failed is widely shared. Of the many people who testified about proposals to amend rule 68 at public hearings held in Washington, D.C., Los Angeles, and San Francisco in 1984 and 1985, not a single person suggested that the present form of rule 68 is effective. See *Hearings on the Proposed Amendments to the Federal Rules of Civil, Criminal and Appellate Procedure and the Proposed Amendments to the Rules Governing Proceedings Under 28 U.S.C. 2254 and 2255* (San Francisco Feb. 21, 1985) [hereinafter cited as *San Francisco Hearings on 1984 Proposal*]; *Hearings on the Proposed Amendments to the Federal Rules of Civil, Criminal, and Appellate Procedure and the Proposed Amendments to the Rules Governing Proceedings Under 28 U.S.C. 2254 and 2255* (Washington, D.C. Feb. 1, 1985) [hereinafter cited as *District of Columbia Hearings on 1984 Proposal*]; *Hearing on Proposed Amendments to the Federal Rules of Civil Procedure* (Los Angeles Feb. 3, 1984) [hereinafter cited as *Los Angeles Hearings on 1983 Proposal*]; *Hearings on Proposed Amendments to the Federal Rules of Civil Procedure* (Washington, D.C. Jan. 18, 1984) [hereinafter cited as *District of Columbia Hearings*

encourage settlement.²⁰ Two principal defects account for this apparent failure. First, rule 68 is a "one-way street" — only defendants can invoke the rule.²¹ Second, the sanction of post-offer "costs" is usually too small to motivate parties to settle (except when costs are held to include attorneys' fees).²² These short-

on 1983 Proposal] [transcripts of the hearings are available for public inspection at the Administrative Office of the United States Courts, 811 Vermont Street, Washington, D.C. 20005, and are on file with the author]. All of these hearings were held before panels that included various members of the Advisory Committee on Civil Rules.

This author has predicted that "numerous positive effects" will flow from the Supreme Court's construction of rule 68 in *Marek v. Chesny*, 105 S. Ct. 3012 (1985). See Simon, *supra* note 13, at 930 (arguing that *Marek's* reading of rule 68 will save defendants attorneys' fees, get money into the hands of plaintiffs sooner and in greater amounts, and rescue courts from managing and trying numerous complex cases). It is still too early to test these earlier predictions through empirical evidence. But even if the predictions prove correct, this author is far from satisfied with the existing version of rule 68.

20. The Honorable Walter Skinner, a member of the Advisory Committee on Civil Rules, has graphically expressed the problem caused by rule 68's failure:

Part of the problem is the case that may never go to trial, but hangs around for five years, building mountains of paper back and forth and taking up judge time on the preliminaries, which might well be disposed of at an early stage if the parties were forced to take a good, hard look at what they're doing.

That's as much our concern as the case that goes to trial.

District of Columbia Hearings on 1983 Proposal, *supra* note 19, at 30.

The Honorable Walter Mansfield, then a member of the Advisory Committee on Civil Rules, put the matter this way: "The big complaint of the public is that there is a lot of useless, vexatious and wasteful continuation of litigation that is now clogging our courts, preventing people from getting relief, except at an enormous cost of legal services and delay." *Id.* at 56.

Some scholars are skeptical that the country is experiencing a litigation explosion. See Daniels, *We're Not a Litigious Society*, 24 JUDGES' J., Spring 1985, at 18, 20 (concluding that there is no "litigation explosion" in Illinois state courts); Daniels, *Ladders and Bushes: The Problem of Caseloads and Studying Court Activities Over Time*, 1984 AM. B. FOUND. RESEARCH J., 751, 751-52; Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 26-28 (1983). One study has specifically questioned the proposition that federal courts are afflicted with drawn-out cases that clog the courts long after they could have been settled. Grossman, Kritizer, Bumiller & McDougal, *Measuring the pace of civil litigation in federal and state trial courts*, 65 JUDICATURE 86, 112 (1981). These studies do not affirmatively establish that the litigation explosion is fictional, or that cases are being disposed of quickly enough. Rather, they suggest that the empirical data underlying the supposed litigation explosion is "thin and spotty." Galanter, *supra*, at 71. Thus, these studies cannot tell us how many litigants settle because they cannot wait for the courts to mete out justice.

21. See FED. R. CIV. P. 68 (sentence 1); 1984 Proposal, *supra* note 5, advisory committee note at 434; *supra* note 11.

22. 1984 Proposal, *supra* note 5, advisory committee note at 433-34; see J. MOORE, MOORE'S FEDERAL PRACTICE 1985 RULES PAMPHLET pt. 1, ¶ 54.6, at 520 (1985) (because we do not follow the English rule in which costs include attorneys' fees, "the costs awarded a successful litigant are normally insignificant compared to his actual expenses").

However, the Supreme Court has recently decided that "costs" under rule 68 include the plaintiff's attorneys' fees when suit is brought under 42 U.S.C. § 1988 or some similar federal statute that defines the prevailing party's attorney's fees as part

comings have crippled the rule. Defendants seldom make rule 68 offers,²³ and offers that are made are seldom accepted because the potential sanction is so mild.²⁴

The existing rule is also unfair to plaintiffs because the timing and terms of rule 68 offers are totally controlled by defendants — the only party that can make rule 68 offers.²⁵ The defendant's advantage can be especially damaging early in the case because the rule gives plaintiffs only ten days to evaluate offers,²⁶ a period that allows plaintiffs little opportunity to take any discovery necessary to evaluate an offer.²⁷ The rule compounds this problem by denying courts discretion to reduce or eliminate the rule's sanction, even if the plaintiff's rejection was justified or the sanction would cause undue hardship. When a plaintiff's judgment is not more favorable than a rejected rule 68 offer, the plaintiff "must pay the costs incurred after the making of the offer."²⁸ Moreover, because the existing rule sanctions only plaintiffs, it gives leverage only to defendants.²⁹ Sophisticated economic analyses of rule 68 have

of the "costs." *Marek v. Chesny*, 105 S. Ct. 3012, 3017 (1985). Thus, whenever an applicable federal fee-shifting statute defines attorneys' fees as "part of the costs" (or uses some similar language, such as "costs, including reasonable attorneys' fees"), rule 68 prohibits plaintiffs from recovering *any* attorneys' fees for work done after the defendant made a rule 68 offer more favorable than the judgment obtained by the plaintiff. *Id.* at 3018. *Marek* will not affect the size of rule 68 costs when jurisdiction is founded solely on diversity of citizenship or when a fee-shifting statute does not define attorneys' fees as costs.

Even where plaintiffs have a strong incentive to settle, defendants may not. The time value of money may lead defendants to withhold a settlement offer. The Advisory Committee on Civil Rules explains:

[S]ome parties defending against claims for money are inclined to delay making otherwise acceptable offers until trial so that in the interim they may have the use at favorable interest rates of funds that otherwise would have been available to the offeree under an offer accepted at an earlier time.

1984 Proposal, *supra* note 5, advisory committee note at 434.

23. The Advisory Committee remarked that although the existing rule has been a part of the federal rules in essentially its present form since 1938, the rule "rarely has been invoked." 1984 Proposal, *supra* note 5, advisory committee note at 434. Unfortunately, apart from anecdotal evidence, there is no firm data to indicate how frequently rule 68 is used. The *Rutgers Law Review* recently attempted an empirical survey of rule 68 and its New Jersey counterpart, N.J. PRAC. R. 4:58, but the 68 responses were "insufficient in number to permit statistical analysis." Note, *Rule 68: An Offer You Can't Afford to Refuse*, 37 RUTGERS L. REV. 373, 374 & n.10 (1985).

24. 1984 Proposal, *supra* note 5, advisory committee note at 433-34.

25. Timing has been described as one of "the three crucial variables" in negotiation. See H. COHEN, YOU CAN NEGOTIATE ANYTHING 91-99 (1982).

26. FED. R. CIV. P. 68 (sentences 2 & 3).

27. If the defendant makes an offer of judgment before the plaintiff has taken enough discovery to evaluate the case, the plaintiff will want to take additional discovery before accepting or rejecting the offer. However, the plaintiff will seldom be able to complete additional discovery within 10 days because all written discovery devices allow the recipient 30 days in which to file answers or objections, unless the court orders a longer or shorter time. See, e.g., FED. R. CIV. P. 33(a) (interrogatories); *id.* 34(b) (document production and inspection of land); *id.* 36(a) (admissions). Even if a court ordered a defendant to respond to plaintiff's discovery requests in less than 10 days, the plaintiff would still need time to evaluate the case in light of the responses.

28. FED. R. CIV. P. 68 (sentence 4) (emphasis added); see also *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 113 (N.D. Cal. 1979) (holding that rule 68 supersedes the discretion available under rule 54(d)).

29. Because rule 68 offers can be made only by defendants, and because rule 68

demonstrated that the rule works not to encourage settlements but rather to redistribute wealth from plaintiffs to defendants, driving down the amounts at which plaintiffs settle their cases.³⁰

*B. The Supreme Court's First Look at Rule 68:
Delta Air Lines v. August*

All of rule 68's flaws were exacerbated by the Supreme Court's 1981 decision in *Delta Air Lines v. August*.³¹

Delta was an employment discrimination suit: a flight attendant alleged that Delta had discharged her solely because of her race.³² The defendant made a rule 68 offer to settle the case for \$450,

sanctions can be imposed only against parties who reject offers, it follows that only plaintiffs ever reject rule 68 offers and only plaintiffs can be penalized under rule 68. Stated another way, defendants do not incur any cost in making rule 68 offers — they have nothing to lose by making rule 68 offers. Rule 68 thus does not deter defendants from making offers that are unreasonably low or in bad faith.

Although rule 68 might be read to imply a requirement that offers be reasonable, the Supreme Court has declined a clear opportunity to read a reasonableness requirement into rule 68. In 1980 the Supreme Court granted certiorari to review a court of appeals' decision holding that a rule 68 offer is invalid unless it is "reasonable." See *Delta Air Lines v. August*, 600 F.2d 699, 702 (7th Cir. 1979), *cert. granted*, 446 U.S. 907 (1980). The Supreme Court instead held that rule 68 does not apply to a case in which the defendant rather than the plaintiff prevailed. The Court thus avoided deciding whether rule 68 has a "reasonableness" requirement, suggesting in dicta that the Court's interpretation of the rule obviates the need for such a requirement. *Delta Air Lines v. August*, 450 U.S. 346, 355-56 (1981); see also *id.* at 368 (criticizing the majority's failure to respond to the circuit court's incorporation of reasonableness into rule 68) (Rehnquist, J., dissenting). Perhaps to avoid *Delta's* implication that rule 68 offers are enforceable even if they were not reasonable when made, the 1983 proposal to amend rule 68 prohibited courts from imposing sanctions on an offeree if the court found that an offer had been made in bad faith. See *1983 Proposal*, *supra* note 4, at 363 (sentence 8). According to the Advisory Committee, the purpose of this prohibition was "to prevent a defending offeror from taking unfair advantage of a claimant-offeree by making a riskless offer, for example, offering to settle a non-frivolous claim for an amount so small in relation to the merits of the claim that the offeror should know that the offeree certainly will decline to accept it." *Id.*, advisory committee note at 366-67. The 1984 proposal did not contain any similar reference to bad faith offers, apparently because an offeree would always be acting reasonably (and thus could not be sanctioned) if he rejected an offer made in bad faith. See *1984 Proposal*, *supra* note 5, at 432-33 (sentence 7); *id.*, advisory committee note at 435 (standard of unreasonable rejection gives courts "sufficient authority to prevent the rule from being used by a party who makes an offer in bad faith").

30. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 94, 108-10 (1986); Priest, *Regulating the Content and Volume of Litigation: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 168-73, 179 (1982) (concluding that rule 68's principal effect is distributive: "plaintiffs become worse off"). Miller recognizes, however, that the uneven distributive effects of the current rule could be largely cured by making the rule a two-way street, allowing plaintiffs as well as defendants to make rule 68 offers. Miller, *supra*, at 123-24.

31. 450 U.S. 346 (1981), *affg* 600 F.2d 699 (7th Cir. 1979). *Delta* was the first case in which the Supreme Court construed rule 68.

32. The plaintiff alleged that Delta had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-5(k) (1982). 450 U.S. at 348.

including attorneys' fees accrued to the date of the offer.³³ The plaintiff rejected the offer,³⁴ and when the plaintiff ultimately lost the case, the defendant argued that rule 68 required the plaintiff to pay the defendant's post-offer costs.³⁵ This argument did not succeed. Both the district court and the court of appeals held that rule 68 applied only when offers were "reasonable,"³⁶ and neither court considered the \$450 offer reasonable.³⁷

The Supreme Court affirmed the lower courts' results, but based its decision on an issue that had not been presented for certiorari.³⁸ Looking to the plain language of rule 68, the Court reasoned that the rule is not triggered unless there has been a "judgment obtained by the offeree."³⁹ Reading this language literally, the Court held that rule 68 does not apply if the defendant, rather than the plaintiff, obtains judgment.⁴⁰ Because the defendant had ultimately prevailed in *Delta*, the Court held that rule 68 did not apply.⁴¹

Delta's highly technical construction of rule 68 caused an outcry from commentators, who pointed out that defendants making rule 68 offers might now be better off losing than winning.⁴² A losing defendant would automatically receive his post-offer costs pursuant to rule 68 as long as the plaintiff's judgment was not more favorable than the rejected offer, but a winning defendant would be at the mercy of the court's discretion under rule 54(d).⁴³ In light of this anomaly, as well as rule 68's other weaknesses, the rule appeared ripe for change.

C. The 1983 Proposal to Amend Rule 68

In August of 1983, the Advisory Committee on Civil Rules circu-

33. 450 U.S. at 348 & n.2.

34. *Id.* at 348-49.

35. *Id.* at 349.

36. See 600 F.2d at 700-02 & n.3 (substantially quoting district court's unpublished opinion).

37. *Id.*

38. See 450 U.S. at 366-67 (Rehnquist, J., dissenting).

39. *Id.* at 351 (quoting FED. R. CIV. P. 68 (sentence 4)) (emphasis added).

40. The Court stated: "In sum, if we limit our analysis to the text of the Rule itself, it is clear that it applies only to offers made by the defendant and only to judgments obtained by the plaintiff. It therefore is simply inapplicable to this case because it was the defendant that obtained the judgment." 450 U.S. at 352.

41. *Id.*

42. See, e.g., Barnicle, *Offers of Judgment Under Federal Rule 68: The Impact of Delta Airlines, Inc. v. August*, 1982 TRIAL LAW GUIDE 139, 156-61; Note, *Delta Air Lines, Inc. v. August: The Agony of Victory and the Thrill of Defeat*, 35 ARK. L. REV. 604, 633 (1982); Comment, *Civil Procedure — Federal Rules of Civil Procedure 68 — When It Comes Down to Costs, It's Not How You Play the Game, It's Whether You Win or Lose — Delta Air Lines, Inc. v. August*, 9 FLA. ST. U.L. REV. 671, 672 (1981).

43. This proposition assumes that rule 68 both deprives the plaintiff of his post-offer costs and requires the plaintiff to pay the defendant's post-offer costs, compare FED. R. CIV. P. 68 (sentence 4) (if the judgment obtained by the offeree is not more favorable than the rejected offer, the offeree "must" pay the costs incurred after the making of the offer) with FED. R. CIV. P. 54(d) (costs shall be allowed as of course to the prevailing party "unless the court otherwise directs"). While this is most likely a correct reading of the rule, the question is not yet settled. See *supra* note 18.

lated its first major proposal to overhaul rule 68.⁴⁴

1. Major Features of the 1983 Proposal

The 1983 proposal had a number of innovative features. Procedurally, the 1983 proposal made the rule into a two-way street, permitting plaintiffs as well as defendants to make rule 68 offers⁴⁵ and counteroffers.⁴⁶ Moreover, although the proposal kept the mathematical trigger of the existing rule by providing for sanctions whenever a judgment is at least as favorable as a rejected offer, the proposal avoided the anomaly of *Delta* by making rule 68 applicable even when the defendant prevails.⁴⁷

The proposal also substantially increased rule 68's sanctions.⁴⁸ Specifically, the proposal provided that an offeree who rejected an offer under rule 68 and failed to obtain a more favorable judgment at trial would ordinarily have to pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the offer.⁴⁹

Additionally, the proposal encouraged plaintiffs to make early offers (and encouraged defendants to accept them) by requiring a defendant who rejected an offer more favorable than the plaintiff's judgment at trial to pay prejudgment interest on the amount

44. Rule 68 had been amended twice before, once in 1946 and again in 1966, but these amendments were minor. See 7 J. MOORE, J. LUCAS & K. SINCLAIR, MOORE'S FEDERAL PRACTICE ¶ 68.01 (2d ed. 1985). No amendments to Rule 68 were proposed between 1966 and 1983.

45. 1983 Proposal, *supra* note 4, at 362 (sentence 2).

46. See *id.* The 1983 proposal did not expressly mention counteroffers, but because the proposal allowed any party to serve a rule 68 offer on any adverse party, it followed that any party could respond to an opposing rule 68 offer by serving a counteroffer.

47. The proposal sidestepped *Delta* by making the operation of the rule dependent on "the judgment finally entered," see 1983 Proposal, *supra* note 4, at 362 (sentence 5), rather than on the "judgment finally obtained by the offeree" as provided by the existing rule, see FED. R. CIV. P. 68 (sentence 4); 1983 Proposal, *supra* note 4, advisory committee note at 367 (stating that change in language "avoids the problem of construction that was involved in *Delta Air Lines, Inc. v. August*").

48. "Sanctions" is the term used by the advisory committee note. 1984 Proposal, *supra* note 5, advisory committee note at 432.

Critics have argued that the term "sanctions" is a facile attempt to disguise the abandonment of the American rule on attorneys' fees by using the language of other Federal Rules, such as rules 11, 16(f), & 26(g) (all using the word "sanction" to describe the penalty of shifting attorneys' fees). See Macklin, Testimony of the Alliance for Justice on the 1984 Proposal to Amend Rule 68 at 20 (Jan. 28, 1985) [hereinafter cited as Alliance for Justice Comments on 1984 Proposal] (inconsistency between 1984 proposal and federal fee-shifting laws "cannot be altered or obscured . . . by calling the monetary awards under the new rule 'sanctions' rather than 'attorney's fees'"); see also H.R. REP. NO. 422, 99th Cong., 1st Sess. 13 ("The Judiciary Committee does not agree . . . that calling a fee-shifting mechanism 'sanctions' and making it discretionary resolves all doubts as to its validity under the Enabling Act.").

49. 1983 Proposal, *supra* note 4, at 362 (sentence 5).

the plaintiff had offered to accept.⁵⁰

Further, the proposal gave offerees additional time to take discovery and evaluate offers by increasing from ten to thirty days the time limit for considering a rule 68 offer.⁵¹

The 1983 proposal alleviated the rule's rigidity by giving courts discretion to reduce the normative sanctions — post-offer costs, expenses, and fees — if they were excessive or unjustified under all of the circumstances.⁵² The proposal also protected offerees against token or sham offers by providing that a court could not sanction an offeree when an offer had been made in bad faith.⁵³

Finally, the 1983 proposal excluded class actions and derivative suits from the reach of rule 68.⁵⁴

2. Reaction to the 1983 Proposal

The 1983 proposal to amend rule 68 generated intense controversy. The main champions of the proposal were defense lawyers, who believed the proposal would force the settlement of weak and frivolous lawsuits much earlier than under the existing rule.⁵⁵

50. *Id.*

51. *Id.*

52. *Id.* (sentence 6). The Advisory Committee gave courts discretion to reduce sanctions to "avoid the Draconian impact of an 'all-or-nothing' rule that would impose a heavy award of expenses against an offeree under all circumstances." *Id.*, advisory committee note at 365. The Advisory Committee suggested the following situations under which the courts might properly exercise their discretion to reduce sanctions:

(1) when the offeree's refusal was reasonable at the time, (2) when the recovery was less favorable to the offeree than the offer by only a narrow margin, (3) when the offer is a sham and was made solely for the purpose of recovering attorney's fees if it should be refused (for example, a token \$1 type of offer), (4) when the offeror incurred excessive attorney's fees or other expenses after making the offer, (5) when the offeree has made a reasonable counteroffer, or (6) when the award would be unduly burdensome.

Id. However, the Committee chose to deny the judge unbridled discretion "since that might destroy the rule's potential for leading parties seriously to consider settlement at an early stage." *Id.* at 366.

53. 1983 Proposal, *supra* note 4, at 363 (sentence 8).

54. *Id.* (sentence 11).

55. See, e.g., Letter from Charles Thomason to Committee on Rules of Practice and Procedure (Oct. 24, 1983) ("The amendment is a disincentive to those who refuse reasonable offers or who protract litigation as a way of punishing adversaries."); Letter from Kenneth McGuiness, President, Equal Employment Advisory Council to Joseph Spaniol, Jr., Secretary, Committee on Rules of Practice and Procedure (Mar. 1, 1984) ("The amendments, on balance, will operate to encourage settlement and deter non-meritorious claims."); Letter from Loren Kieve to Committee on Rules of Practice and Procedure (Sept. 19, 1983) ("proposed amendments to Rule 68 are excellent and long overdue" but should go further in attacking "sham" lawsuits).

Not all defense lawyers supported the proposal. Some defense lawyers criticized the 1983 proposal on the grounds that it gave an unfair advantage to plaintiffs. Because the proposed rule allowed offers to be made "at any time" up to 30 days before trial, plaintiffs could ambush defendants by serving rule 68 offers with their complaints. A plaintiff who had been investigating the facts and evaluating the case over a period of months would thus gain an advantage over a defendant unfamiliar with the facts and the law. See, e.g., Letter from Gerald Morris to Committee on Rules of Practice and Procedure (Oct. 18, 1983) ("[M]any cases are not filed until the plaintiff has a good idea of what his case is about and what it is worth. On the other hand, the defendant may never have heard of the case prior to suit . . ."); Letter from James F. Graham to Committee on Rules of Practice and Procedure (Sept. 29, 1983) ("an

The plaintiffs' bar, on the other hand, overwhelmingly opposed the proposal. Some plaintiffs' lawyers argued that because the proposed version of rule 68 would be much stronger than most state offer-of-judgment rules,⁵⁶ diversity plaintiffs would be driven from federal courts.⁵⁷ Other plaintiffs' lawyers argued that the 1983 proposal would destroy the contingency fee system: if the 1983 proposal took effect, lawyers could no longer advise plaintiffs that there would be attorneys' fees only if the plaintiff won.⁵⁸ Instead, lawyers would have to warn plaintiffs that they might be required to pay defendant's attorneys' fees if the plaintiffs turned down a settlement offer and then lost at trial.⁵⁹ As a result, plaintiffs who could afford lawyers only on contingency might be denied effective access to federal courts.⁶⁰

early offer to settle could be used as a form of coercion") [all letters sent in response to the Advisory Committee's request for public comment on the 1983 and 1984 proposals are available for public inspection at the Administrative Office of the United States Courts, 811 Vermont Avenue, Washington, D.C. 20005, and are on file with the author].

56. Many states, though by no means all of them, have an analog to rule 68. None of these states' offer-of-judgment rules is as strong as the 1983 proposal. *See, e.g.*, WIS. STAT. § 807.01(4) (1983-1984) (entitling plaintiff-offeror to recover costs, excluding attorneys' fees, and interest on the amount received at trial if it equals or exceeds the rejected offer-of-settlement); MO. S. CT. R. 77.04 (essentially following FED. R. CIV. P. 68).

57. *See* Letter from Louis Kerlinsky to Committee on Rules of Practice and Procedure (Sept. 13, 1983).

58. The assessment of attorneys' fees against losing parties would amount to abdication of the American rule and adoption of the English rule with respect to post-offer fees. Under the American rule, winning litigants can recover their attorneys' fees from the losing party only to the extent prescribed by statute, absent certain narrow exceptions. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-60 (1975). *See generally* Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 9 (discussing the American rule in detail). Under the English rule, the loser ordinarily has to pay the winner's attorneys' fees. *See* Statute of Westminster, 1607, 4 Jac. 1, ch. 3; Statute of Gloucester, 1278, 6 Edw. 1, ch. 1; *see also* Goodhart, *Costs*, 38 YALE L.J. 849, 852-53 (1929) (describing the English courts' routine interpretation of costs to include attorneys' fees).

59. The ABA *Model Code of Professional Responsibility* exhorted a lawyer to "exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1969). The new ABA *Model Rules of Professional Conduct* have transformed this urging into a commandment. Model Rule 1.4(b) provides that a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (Final Draft 1983).

Undoubtedly, the risk of having to pay an opponent's attorneys' fees is a relevant consideration a lawyer would have to explain to his client in assessing the potential costs and benefits of the litigation.

60. *See* Letter from Steven Tucker to Committee on Rules of Practice and Procedure (Jan. 25, 1984) ("few clients would be in a position to undertake the risk of financial ruin in order to exercise their right to have their claim adjudicated in court"); *see also* Letter from Stephen Yagman to Joseph Spaniol (Oct. 13, 1983) (proposed change is "not in consonance with the principle that American courts shall be open to all litigants").

Mr. Yagman and another commentator also suggested that the proposed rule might

The most visible critics of the 1983 proposal were lawyers concerned about civil rights.⁶¹ These critics viewed the proposed sanction of attorneys' fees as "drastic."⁶² Although a prevailing civil rights plaintiff would normally receive attorneys' fees,⁶³ rule 68's sanctions could cause the fees of expensive defense attorneys to swallow up the plaintiff's entire fee award, and perhaps the judgment as well.⁶⁴ Moreover, civil rights plaintiffs who lost would nearly always have to pay the defendant's fees.⁶⁵ The 1983 proposal gave courts discretion to reduce an award if the sanctions were unreasonable or excessive,⁶⁶ but no lawyer could assure his client that the court would exercise that discretion.⁶⁷

Under the 1983 proposal, the vast majority of civil rights plaintiffs, unable to bear the risk of paying a defendant's post-offer attorneys' fees, might feel compelled to accept plainly inadequate offers.⁶⁸ This chilling effect would conflict with the policy of fee-shifting statutes⁶⁹ designed to encourage meritorious civil rights

abridge constitutional rights, including the fourteenth amendment right to due process and the first amendment right to freedom of speech as expressed by litigation. *Id.*; Mills & Nereim, *Report on Proposed Rule 68: Offer of Settlement*, in THE NEW AND PROPOSED FEDERAL RULES OF CIVIL PROCEDURE 501, 517-18 (PLI 1984).

61. For example, at the January 18, 1984 public hearing before the Advisory Committee on Civil Rules, the following organizations testified against the 1983 proposal: the National Bar Association, the American Civil Liberties Union, the Alliance for Justice, and the NAACP Legal Defense and Educational Fund, Inc. See *District of Columbia Hearing on 1983 Proposal*, *supra* note 19, at 17, 49, 71, 86.

62. *City Bar Panel's Report: Rule 68 "Drastic Remedy"*, N.Y.L.J., Apr. 2, 1984, at 1, col. 2, reprinted in CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE at 313, 313 (PLI 1984) [hereinafter cited as *N.Y. City Bar Report*].

63. *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam). In *Newman*, the Supreme Court held that a prevailing civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.*

64. Because defendants select their own attorneys, plaintiffs have no control over defendants' attorneys' hourly rates, and of course plaintiffs have no direct control over the number of hours defendants' attorneys spend on the case. See Mills & Nereim, *supra* note 60, at 509-10. Moreover, because wealthier defendants would as a rule employ more expensive attorneys, the proposed rule 68 would favor the wealthy by making sanctions more severe when defendants could afford high-priced lawyers.

If the rule 68 sanction exceeded the combined amount of the plaintiff's fee award and judgment, the plaintiff would have to pay part of the sanction out of his own pocket. Because civil rights plaintiffs are usually individuals with meager resources, the proposed rule might have caused these plaintiffs to lose their life savings or even their homes. See *District of Columbia Hearings on 1983 Proposal*, *supra* note 19, at 58 (remarks of Burt Neuborne, ACLU). Moreover, plaintiffs who sued under statutes not providing for an award of attorneys' fees would have to pay out of their own pockets whenever the judgment was less favorable than the amount of the rule 68 sanctions.

65. The Advisory Committee specifically stated that the proposed rule, unlike the existing one, would apply even if the plaintiff "wins nothing." *1983 Proposal*, *supra* note 4, advisory committee note at 367.

66. *1983 Proposal*, *supra* note 4, at 362 (sentence 6).

67. At the public hearings on the 1983 proposal Mr. Neuborne frankly summarized the practitioner's predicament: "After all, it's a new area of the law. I don't know what [the] judge is going to do with it." *District of Columbia Hearing on 1983 Proposal*, *supra* note 19, at 57.

68. See, e.g., *id.* at 60-61 (civil rights plaintiffs "would be forced — they would be forced — to accept defendants' settlements") (remarks of Burt Neuborne, ACLU).

69. See, e.g., 42 U.S.C. § 1988 (1982) (the court, in its discretion, may award the

litigation.⁷⁰

Critics also charged that the 1983 proposal's sanctions would violate the Rules Enabling Act⁷¹ by abridging or modifying the substantive⁷² right to attorneys' fees in civil rights cases.⁷³ Under *Christiansburg Garment Co. v. EEOC*,⁷⁴ a civil rights plaintiff cannot be required to pay a prevailing defendant's attorneys' fees unless the plaintiff's action was originally frivolous, groundless, or unreasonable, or unless the plaintiff continued to litigate after it clearly became so.⁷⁵ However, under the 1983 proposal, any civil rights plaintiff who turned down a rule 68 offer and lost at trial — even a plaintiff with a bona fide claim — could be forced to pay the defendant's post-offer attorneys' fees.⁷⁶ That result appears

prevailing party in a civil rights case reasonable attorneys' fees as part of the costs); *id.* § 2000e-5(k) (same).

70. See *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983); see also Letter from George M. Strickler, Jr. to Committee on Rules of Practice and Procedure (Feb. 29, 1984) (proposed amendment would "discourage [civil rights attorneys] from continuing to engage in this kind of work").

71. 28 U.S.C. § 2072 (1982). The Act provides, in pertinent part: "[The Federal Rules of Civil Procedure] shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

A recent report by the House Committee on the Judiciary showed considerable sympathy for criticisms based on the Rules Enabling Act. Commenting on the 1983 and 1984 proposals to amend rule 68, the Committee stated:

Whatever the rulemaking power with respect to sanctions for litigation conduct generally, that power does not extend to the alteration of a scheme of remedial rights fashioned by Congress as essential to the enforcement of substantive law. 42 U.S.C. 1988 contains one such scheme. Where a rulemaking proposal would alter "substantive . . . remedial rights," it is not for the Advisory Committee or the Court to speculate whether, if it had considered additional policies, Congress might have fashioned a different solution.

H.R. REP. NO. 422, 99th Cong., 1st Sess. 13 (footnotes omitted). The Judiciary Committee's criticisms of the 1984 proposal, including a letter from Representative Robert Kastenmeier to Judge Frank Johnson (newly appointed Chairman of the Advisory Committee on Civil Rules) stating that the 1984 proposal might violate the Rules Enabling Act, were apparently the major factor that led Judge Johnson to cancel the Advisory Committee's scheduled November 1985 meeting to consider the 1984 proposal. See *infra* note 142.

72. In *Marek v. Chesny*, 720 F.2d 474, 479 (7th Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 3012, 3015 (1985), the Seventh Circuit held that the right to attorneys' fees under 42 U.S.C. § 1988 was "substantive." The House Committee on the Judiciary has taken the same position. See H.R. REP. NO. 422, 99th Cong., 1st Sess. 13.

73. *District of Columbia Hearings on 1983 Proposal*, *supra* note 19, at 65-66 (remarks of Burt Neuborne, ACLU); *id.* at 80 (remarks of Laura Macklin, Alliance for Justice); see, e.g., Letter from Sen. Arlen Specter to Committee on Rules of Practice and Procedure (Feb. 28, 1984) (arguing that the 1983 proposal would violate the Rules Enabling Act in any case involving a fee-shifting statute).

74. 434 U.S. 412 (1978).

75. *Id.* at 422. The Court also stated that attorneys' fees could be assessed against a losing plaintiff even though his action was "not brought in subjective bad faith." *Id.* at 421.

76. See *District of Columbia Hearing on 1983 Proposal*, *supra* note 19, at 57-58, 59-60 (remarks of Burt Neuborne, ACLU). Of course, the 1983 proposal would have

patently contrary to *Christiansburg*.⁷⁷

If a civil rights plaintiff prevailed but won less than the amount of a rejected offer, the consequence would be even more severe than it would under the English rule.⁷⁸ Under the English rule, the loser pays the winner's attorneys' fees. Under the 1983 proposal to amend rule 68, the *winner* could be required to pay the *loser's* attorneys' fees,⁷⁹ without any showing that the plaintiff had acted unreasonably, vexatiously, or in bad faith.⁸⁰ This result also contradicted Supreme Court pronouncements on attorneys' fees.⁸¹

In the face of this onslaught of criticism, the Advisory Committee withdrew the 1983 proposal to amend rule 68 and went back to the drawing board.⁸²

D. The 1984 Proposal to Amend Rule 68

The Advisory Committee's second major effort to overhaul rule 68 came in the fall of 1984.

allowed the court to reduce the sanctions if the defendant's costs and expenses, including attorneys' fees, were excessive or unjustified under all the circumstances, and would have required the court to deny a motion for sanctions if the offer had been made in bad faith. See 1983 Proposal, *supra* note 4, at 362-63 (sentences 6 & 8).

77. The *Christiansburg* Court cautioned that attorneys' fees should not be assessed against civil rights plaintiffs "routinely," 434 U.S. at 421, or "simply because they do not finally prevail," *id.* at 422.

78. In recent years, many have called for adoption of the English rule in America. See, e.g., Mayer & Stix, *The Prevailing Party Should Recover Counsel Fees*, 8 AKRON L. REV. 426, 442 (1976) ("Logic, fairness and equity now clearly require discretion in our courts to permit the granting of a counsel fee to a prevailing party."); Middleton, *To the Victor, the Spoils: Proposal to Abandon the American Rule*, 41 J. MO. BAR, Mar. 1985, at 79, 83 (criticizing the American rule and suggesting that Missouri courts should adopt the English rule without awaiting legislation); Wills & Gold, *Attorneys' Fees in Litigation: Time to Discard the American Rule?*, 4 LITIGATION, Spring 1978, at 31, 31 (arguing that adoption of English rule would improve system of justice by deterring unwarranted litigation and compensating successful litigants). However, no one has suggested going beyond the English practice by requiring the winners to pay the loser's attorneys' fees. But see *Crossman v. Marcoccio*, 108 F.R.D. 433, 435-37 (D.R.I. 1985) (interpreting rule 68 to require a prevailing civil-rights plaintiff to pay losing defendant's post-offer attorneys' fees).

79. *N.Y. City Bar Report*, *supra* note 62, at 4, col. 2, reprinted in CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE at 314 (PLI 1984).

80. For an excellent elaboration of this argument, see *N.Y. City Bar Report*, *supra* note 62, at 1, col. 3, reprinted in CURRENT PROBLEMS IN FEDERAL CIVIL PRACTICE at 313-18 (PLI 1984).

81. In *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), the Supreme Court stated that a "specific finding" that a lawyer's conduct was tantamount to bad faith "would have to precede" any shifting of fees under inherent judicial powers. Federal Rules of Civil Procedure that shift attorneys' fees from winners to losers generally do not require a showing of bad faith before sanctions can be imposed against parties or lawyers, although they normally disallow sanctions for conduct that was in good faith or substantially justified. See, e.g., FED. R. CIV. P. 16(f) (imposing sanctions for failure to participate "in good faith" at pretrial conference); *id.* 37(a)(4) (imposing sanctions for unsuccessful opposition to discovery motions unless such opposition was "substantially justified"); *id.* 56(g) (imposing sanctions for affidavits presented "in bad faith or solely for the purpose of delay").

82. See *Fee Shifting Plan Sent Back to Drawing Board*, Legal Times of Washington, May 28, 1984, at 4, col. 1.

1. Major Features of the 1984 Proposal

The 1984 proposal to amend rule 68 responded to many criticisms of both the 1983 proposal and the existing rule.⁸³

To guard against premature offers, the 1984 proposal prohibited any party from making a rule 68 offer until sixty days after service of the summons and complaint.⁸⁴ Moreover, the 1984 proposal precluded offers on the eve of trial by requiring that parties make rule 68 offers no later than ninety days before trial.⁸⁵

Further, the 1984 proposal allowed an offeree sixty days in which to accept or reject an offer or counteroffer⁸⁶ — double the time specified in the 1983 proposal and six times as long as the current rule allows.

In a major departure from both the existing rule and the 1983 proposal, the 1984 proposal abandoned the mathematical comparison between the offer and the final judgment,⁸⁷ replacing that comparison with a flexible standard that asks whether an offer was "rejected unreasonably."⁸⁸

Finally, even if a court determined that an offer was rejected unreasonably, the 1984 proposal allowed the court wide-ranging discretion to devise "an appropriate sanction."⁸⁹ Thus, post-offer attorneys' fees would not automatically be shifted. However, the advisory committee note made plain that rule 68 sanctions could include the offeror's costs, expenses, and attorneys' fees in appropriate cases.⁹⁰ This gave little comfort to those who had opposed the fee-shifting aspect of the 1983 proposal.

2. Reaction to the 1984 Proposal

The 1984 proposal met with vigorous criticism. Lawyers concerned about civil rights repeated their criticisms of the 1983 pro-

83. 1984 Proposal, *supra* note 5, advisory committee note at 433-34.

84. *Id.* at 432-33 (sentence 1).

85. *Id.*

86. *Id.* at 433 (sentences 2-4).

87. Both the existing rule and the 1983 proposal would have imposed sanctions whenever the judgment obtained by the offeree was not more favorable than the amount of a rejected rule 68 offer. FED. R. CIV. P. 68 (sentence 4); 1983 Proposal, *supra* note 4, at 362 (sentence 5).

88. 1984 Proposal, *supra* note 5, at 433 (sentence 7).

89. *Id.*

90. According to the Advisory Committee, the 1984 proposal applied "the principle that a court may impose a reasonable sanction, including an award of attorneys' fees, as a means of facilitating the efficient operation of the litigative process" 1984 Proposal, *supra* note 5, advisory committee note at 436 (emphasis added). The House Committee on the Judiciary has taken a dim view of the Advisory Committee's semantic sleight-of-hand: "The [Judiciary] Committee does not agree . . . with the Advisory Committee's view that calling a fee-shifting mechanism 'sanctions' and making it discretionary resolves all doubts as to validity under the Enabling Act." See H.R. REP. NO. 422, 99th Cong., 1st Sess. 13.

posals;⁹¹ although the 1984 proposal did not shift attorneys' fees automatically, the potential for shifting fees might still chill the enforcement of civil rights by those unable to bear the downside risk of paying opponents' fees,⁹² and might still violate the Rules Enabling Act.⁹³ The plaintiff's bar repeated the argument that the possibility of heavy sanctions seriously threatened the viability of diversity suits and the contingency fee system.⁹⁴

Critics also raised the new argument that the 1984 proposal would lead to an intolerable amount of collateral litigation, over both the unreasonableness of rejections and the appropriateness of particular sanctions.⁹⁵ Factors such as the amount of relief that might reasonably have been expected if the claimant prevailed⁹⁶ and the burden of the sanction on the offeree⁹⁷ require difficult determinations that might well lead to a second round of litigation in each case.⁹⁸

Opponents also charged that the proposal would threaten the attorney-client privilege and the work-product doctrine,⁹⁹ because determining whether a rejection was unreasonable would often entail an inquiry into both the attorney's discussions with his cli-

91. See *supra* text accompanying notes 60-80.

92. See, e.g., Alliance for Justice Comments on 1984 Proposal, *supra* note 48, at 37-40; Association of the Bar of the City of N.Y., Committee on the Federal Courts, Comments on Proposed 1984 Amendment to Rule 68 (Offers of Settlement) of the Federal Rules of Civil Procedure 4 (Jan. 21, 1985) [hereinafter cited as N.Y.C. Bar Ass'n Comments on 1984 Proposal]; Goldstein, Comments Submitted by the NAACP Legal Defense and Educational Fund, Inc., Pursuant to the Notice Published September 1984 by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Regarding Proposed Amendments to Rule 68 of the Federal Rules of Civil Procedure 18 (Jan. 29, 1985) [hereinafter cited as NAACP Fund Comments on 1984 Proposal]; Larson & Neuborne, Comments of the American Civil Liberties Union on the 1984 Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Appellate Procedure, Federal Rules of Criminal Procedure, and Rules Governing § 2254 Cases and § 2255 Proceedings 7-8 (Feb. 1, 1985) [hereinafter cited as ACLU Comments on 1984 Proposal].

93. See, e.g., ACLU Comments on 1984 Proposal, *supra* note 92, at 18-21; N.Y.C. Bar Ass'n Comments on 1984 Proposal, *supra* note 92, at 13-15.

94. See, e.g., *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 36 (1984 proposal would be "cutting down on if not deep into the contingency system") (testimony of John Frank); NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 27 ("contingent-fees arrangement not only permits nonwealthy persons to obtain counsel but also limits the 'downside risk' for these persons").

95. See, e.g., N.Y.C. Bar Ass'n Comments on 1984 Proposal, *supra* note 92, at 11; *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 6-8 (testimony of Gilbert Serota, Federal Courts Committee of San Francisco Bar Association).

96. 1984 Proposal, *supra* note 5, at 433 (sentence 8).

97. *Id.* (sentence 9).

98. In *Blum v. Stenson*, 465 U.S. 886 (1984), Justice Powell expressed the desire that a "request for attorney's fees should not result in a second major litigation." *Id.* at 902 n.19 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The determination of reasonableness under the 1984 proposal is even more likely to lead to a second major round of litigation than is a fee request, because the proposal requires courts to consider many factors and figures in addition to attorneys' fees. See 1984 Proposal, *supra* note 5, at 433 (sentences 8 & 9) (in determining whether rejection was unreasonable and in determining an appropriate sanction, court "shall consider all relevant circumstances," including 10 factors expressly enumerated in the rule).

99. See, e.g., N.Y.C. Bar Ass'n Comments on 1984 Proposal, *supra* note 92, at 5-8; Alliance for Justice Comments on the 1984 Proposal, *supra* note 48, at 43; *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 5 (testimony of Gilbert Serota).

ent and the attorney's evaluation of the case.¹⁰⁰ Clients unwilling to risk revelation of their secrets might cease to be fully candid with their attorneys, thereby undercutting the fundamental rationale for the attorney-client privilege.¹⁰¹ Disclosures of protected information would also severely prejudice the disclosing party in the event of a retrial or related litigation.¹⁰²

Finally, critics charged that by giving the judge wide-ranging discretion to tailor a sanction and by permitting the crushing sanction of attorneys' fees, the proposed rule would give courts enormous new powers over litigants. Judges could coerce settlements before trial by threatening sanctions, or could punish unpopular litigants after trial by imposing sanctions. These sanctions would thus further chill the enforcement of rights and penalize zealous advocacy.¹⁰³

E. The Supreme Court Revisits Rule 68: Marek v. Chesny

Even though the existing rule is unfair to plaintiffs, most civil rights lawyers opposed the 1983 and 1984 proposals,¹⁰⁴ apparently believing that any change in rule 68 would be a change for the worse. But after the Supreme Court decided *Marek v. Chesny*,¹⁰⁵ civil rights lawyers also began searching for a solution to the problem of rule 68.

Marek arose when the father of a boy who had been shot and killed by the police sued the officers involved in the shooting, alleging a violation of 42 U.S.C. § 1983 and a number of state tort laws.¹⁰⁶ About five months before trial, the plaintiff rejected defendants' rule 68 offer to settle for \$100,000, including accrued

100. Clients obviously do not decide in a vacuum whether to accept or reject settlement offers. They rely heavily on the advice of counsel. NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 32 ("As a practical matter, the attorney's advice is a critical and often the determinative factor in a client's decision to accept or reject an offer."). The attorney's advice, in turn, is based primarily on his evaluation of the case. Thus, to determine whether a rejection was reasonable, a judge would want to ask: "What did the attorney advise?" and "What was the attorney's evaluation of the case at the time of the rejection?" These questions go to the heart of the attorney-client privilege and the work-product protection.

101. See, e.g., N.Y.C. Bar Ass'n Comments on 1984 Proposal, *supra* note 92, at 8.

102. See, e.g., *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 5-6 (testimony of Gilbert Serota); Alliance for Justice Comments on 1984 Proposal, *supra* note 48, at 43.

103. See, e.g., NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 22-23; N.Y.C. Bar Ass'n Comments on 1984 Proposal, *supra* note 92, at 9.

104. Among the organizations that testified against both the 1983 and 1984 proposals were the American Civil Liberties Union, the NAACP Legal Defense and Educational Fund, Inc., and the Alliance for Justice. See *supra* note 19.

105. 105 S. Ct. 3012 (1985).

106. *Marek v. Chesny*, 547 F. Supp. 542, 543 (N.D. Ill. 1982), *rev'd*, 720 F.2d 474 (7th Cir. 1983), *rev'd*, 105 S. Ct. 3012 (1985).

attorneys' fees.¹⁰⁷

The plaintiff prevailed at trial, but the jury awarded the plaintiff less than the defendants' rule 68 offer.¹⁰⁸ The district court therefore had to consider the interplay between rule 68 and the Civil Rights Attorneys' Fees Awards Act of 1976¹⁰⁹ (section 1988), which entitles the prevailing party in a civil rights action to reasonable attorneys' fees "as part of the costs."¹¹⁰ Because section 1988 defines attorneys' fees as costs,¹¹¹ and because rule 68 mandates that a plaintiff whose judgment fails to exceed a rule 68 offer at trial "must pay the costs incurred after the making of the offer,"¹¹² the district court reasoned that rule 68 barred the plaintiff from recovering post-offer attorneys' fees.¹¹³

The court of appeals, speaking through Judge Posner, reversed and remanded.¹¹⁴ The court gave three reasons for excluding civil rights attorneys' fees from rule 68 "costs."¹¹⁵ First, neither the history of rule 68 nor the history of section 1988 revealed any intent to include attorneys' fees in rule 68 "costs."¹¹⁶ Second, using rule 68 to deny attorneys' fees to prevailing plaintiffs conflicted with Congress's policy of encouraging meritorious civil rights actions.¹¹⁷ Third, allowing rule 68 to cut off attorneys' fees violated the Rules Enabling Act by abridging the plaintiff's substantive rights to attorneys' fees under section 1988.¹¹⁸ The Seventh Circuit's arguments thus roughly paralleled the arguments that civil

107. See *Marek*, 105 S. Ct. at 3014.

108. *Id.*

109. 42 U.S.C. § 1988 (1982).

110. Section 1988 provides, in pertinent part, that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.* (emphasis added).

111. *Id.*

112. FED. R. CIV. P. 68 (sentence 4).

113. *Marek*, 547 F. Supp. at 545.

114. *Chesny v. Marek*, 720 F.2d 474, 480 (7th Cir. 1983), *rev'd*, 105 S. Ct. 3012 (1985). The court of appeals affirmed the validity of the offer, 720 F.2d at 476-77, but reversed the denial of post-offer fees to the plaintiff and remanded to allow the district court "to determine reasonable attorney's fees for those services." *Id.* at 480.

115. *Id.* at 478-80.

116. *Id.* at 477, 479. The court reasoned that drafters of rule 68 "did not foresee the application of the rule in cases where the plaintiff might be entitled to an award of attorney's fees if he won," *id.* at 477, and drafters of section 1988 "would not have wanted its effectiveness blunted because of a little-known rule of court promulgated almost 40 years earlier," *id.* at 478.

117. *Id.* at 478-79. Specifically, the court stated:

The effectiveness of section 1988 would be reduced if the rejection of a Rule 68 offer that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting any award of legal fees that accrued after the date of the offer. That would mean in this case that the plaintiff's lawyers would have either to collect an additional fee from the plaintiff . . . or to swallow the time they put in on the trial. Either way, the next time they are faced with a similar offer they will have to think very hard before rejecting it even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake.

Placing civil rights plaintiffs and counsel in this predicament cuts against the grain of section 1988.

118. 720 F.2d at 479. The court specifically held that a statutory right to attorneys' fees is "substantive" when designed to achieve compliance with the law. *Id.*

rights attorneys had leveled against the 1983 and 1984 proposals to amend rule 68.¹¹⁹

The Supreme Court reversed the Seventh Circuit's decision.¹²⁰ In an opinion by Chief Justice Warren Burger, the Court held that a civil rights plaintiff who rejects a rule 68 offer and fails to obtain a more favorable judgment at trial cannot recover attorneys' fees under section 1988 for work done after the date of the rule 68 offer.¹²¹ The majority explained that the drafters of rule 68 were aware of numerous federal statutes defining attorneys' fees as part of the costs,¹²² and must have intended that rule 68 costs would encompass attorneys' fees whenever an applicable statute defined attorneys' fees as costs.¹²³ The Court also believed that the plain meaning of costs in rule 68 and section 1988 could be given full effect only by construing rule 68 costs to include attorneys' fees whenever a federal statute defined attorneys' fees as costs.¹²⁴

The Court rejected the argument that using rule 68 as a fee-shifting device would discourage civil rights litigation.¹²⁵ Many civil rights plaintiffs would receive greater compensation in settlement than they would have received at trial,¹²⁶ the Court noted, and would receive this compensation "at an earlier date without

119. See *supra* text accompanying notes 60-80 & 91-93.

120. *Marek v. Chesny*, 105 S. Ct. 3012, 3018 (1985).

121. *Id.* Technically, the Court's holding is limited to cases involving civil rights plaintiffs. However, as the dissent points out, more than 60 federal statutes refer to attorneys' fees as "costs," and all of them would appear to be affected by the Court's holding. *Id.* at 3019, 3024-25 (Brennan, J., dissenting). Moreover, the majority flatly stated: "Civil rights plaintiffs — along with other plaintiffs — who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected." *Id.* at 3018 (emphasis added). At least one-third of all federal court litigation may thus fall within the holding of *Marek*. See Simon, *supra*, note 13, at 892 & n.16 (collating official statistics).

122. *Marek*, 105 S. Ct. at 3017. Before addressing the interplay between rule 68 and the fee-shifting statutes, the Court validated the offer of judgment in *Marek*, which had lumped costs, attorneys' fees, and damages into the single gross amount of \$100,000. *Id.* at 3016.

123. *Id.* at 3017. After noting that 11 of 25 statutes in the original advisory committee note to FED. R. CIV. P. 54(d) allowed for attorneys' fees as part of the cost, the court stated:

[T]he most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees should be included as costs for purposes of Rule 68.

105 S. Ct. at 3017 (citations omitted) (emphasis added).

124. *Id.*

125. *Id.* at 3018.

126. The court also pointed out that some plaintiffs would receive compensation through rule 68 offers even though they might not have recovered anything at trial. *Id.*

the burdens, stress, and time of litigation.”¹²⁷

Although the Court never mentioned the Rules Enabling Act by name, the opinion implicitly rejected the Seventh Circuit’s conclusion that rule 68’s bar against plaintiffs’ recovery of post-offer attorney fees violates the Enabling Act.¹²⁸ The “most critical factor” in determining a reasonable attorney’s fee under section 1988, the Court explained, is “the degree of success obtained.”¹²⁹ Because the plaintiff in *Marek* had not achieved any success beyond the defendant’s offer, he had no right to post-offer attorneys’ fees under section 1988. Thus, rule 68 and section 1988 did not conflict.¹³⁰

The majority’s opinion provoked a biting dissent from Justice Brennan. He observed that the sanctions available under rule 68 would now differ almost randomly from statute to statute, sometimes because of minute differences in language.¹³¹ He also criticized the majority for compressing section 1988’s discretionary, multifactor analysis for determining reasonable attorneys’ fees¹³² into rule 68’s mechanical single-factor standard, which asks only whether the plaintiff’s judgment exceeded the amount of a rejected offer.¹³³ Justice Brennan further argued that the Court had transgressed the limits on fee-shifting set down in *Alyeska Pipeline Service Co. v. Wilderness Society*,¹³⁴ by cutting off fees without any showing that the plaintiffs had acted unreasonably or in bad faith.¹³⁵ Finally, Justice Brennan argued that the Court should have refrained from altering the meaning of rule 68 be-

127. *Id.* The Court did not mention the practical benefits its holding may have for the judicial system as a whole: *Marek* will undoubtedly encourage earlier settlements, thus relieving courts of burdensome pretrial activities and trials. See Simon, *supra* note 13, at 929. Also, by endorsing rule 68 offers that lump damages and costs, the Court’s opinion spares courts the difficult and complex task of determining reasonable pre-offer attorneys’ fees in many cases. See *id.*; see also *supra* note 122 (discussing Court’s endorsement).

128. *Marek*, 105 S. Ct. at 3018. The Court implicitly rejects the argument based upon the Rules Enabling Act by stating that the effect of rule 68 under *Marek* “is in no sense inconsistent with the congressional policies underlying § 1983 and § 1988.” *Id.*

129. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

130. The Court stated:

Rather than “cutting against the grain” of § 1988, as the Court of Appeals held, *we are convinced that applying Rule 68 in the context of a § 1983 action is consistent with the policies and objectives of § 1988*. Section 1988 encourages plaintiffs to bring meritorious civil rights suits; Rule 68 simply encourages settlements. There is nothing incompatible in these two objectives.

105 S. Ct. at 3018 (emphasis added).

131. *Id.* at 3020 (Brennan, J., dissenting).

132. *Id.* at 3027 & nn.39-42. Justice Brennan stated: “[T]he results under § 1988 and Rule 68 will *not* always be congruent, because § 1988 mandates the careful consideration of a broad range of other factors and accords appropriate leeway to the district court’s informed discretion.” *Id.* at 3028 (emphasis in original).

133. Justice Brennan believed the majority’s construction would inevitably lead to violations of the Rules Enabling Act because the decision “necessarily will require the disallowance of some fees that otherwise would have passed muster under § 1988’s reasonableness standard” *Id.* (footnote omitted).

134. 421 U.S. 240, 263 (1975).

135. *Marek*, 105 S. Ct. at 3032 (Brennan, J., dissenting).

cause "Congress and the Judicial Conference are far more institutionally competent . . . to resolve th[e] matter."¹³⁶

In deciding *Marek*, the Supreme Court suddenly transformed rule 68 into a powerful settlement weapon.¹³⁷ Rule 68's new power has several practical implications. First, civil rights lawyers, who bitterly opposed the result in *Marek*, may now join efforts to amend rule 68.¹³⁸ Moreover, because *Marek* made plain that rule 68 can cut off fees to plaintiffs not just in civil rights cases but in all cases involving statutes that define attorneys' fees as costs, the decision is likely to produce calls for reform from plaintiffs' lawyers in the fields of securities, antitrust, copyright, communications, and a host of other areas covered by federal fee-shifting statutes.¹³⁹ Finally, because rule 68 is now radically stronger in fee-shifting cases than it is in cases that do not involve fee shifting, either the Judicial Conference or Congress is more likely to amend rule 68 than they were before *Marek*.¹⁴⁰

F. The Next Step

As Justice Brennan stated in closing his dissent, the decision in *Marek* "renders even more imperative the need for Congress and the Judicial Conference to resolve this problem with dispatch."¹⁴¹ Since the existing rule is unacceptable for many reasons, the main

136. *Id.* at 3035. Justice Brennan specifically cited the ongoing debate based on the 1983 and 1984 proposals to amend rule 68, as well as several failed efforts in Congress to amend section 1988 to preclude the award of post-rejection fees. *Id.* at 3032-34 & n.60 (Brennan, J., dissenting).

137. See Simon, *supra* note 13, at 930.

138. The ACLU filed an amicus brief on behalf of the losing side in *Marek*. Several opponents of the 1984 proposal also scored the district judge in *Marek* for denying post-offer attorneys' fees to the plaintiff even though the judge himself had considered the proper settlement range to be well above the amount of the defendant's Rule 68 offer. See, e.g., Alliance for Justice Comments on 1984 Proposal, *supra* note 48, at 37-39; *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 119 (testimony of Professor Judith Resnik); *District of Columbia Hearings on 1984 Proposal*, *supra* note 19, at 118-21 (testimony of Laura Macklin). These groups may well now lobby Congress either to change rule 68 without waiting for the Advisory Committee and Judicial Conference to act, or to amend section 1988 and other fee-shifting statutes to make clear that attorneys' fees are not to be considered "costs" for purposes of rule 68. Representative John Conyers, Jr. has introduced a bill to amend rule 68 which would define rule 68 costs according to 28 U.S.C. § 1920. H.R. 3998, 99th Cong., 1st Sess. (Dec. 19, 1985).

139. See *supra* note 121; see also *Federal Statutes Authorizing the Award of Attorney's Fees*, 8 ATT'Y FEE AWARDS REP. 2-3 (June 1985) (listing fee-shifting statutes).

140. The holding in *Marek* will have no effect on cases that do not involve federal fee-shifting statutes that define attorneys' fees as costs. Thus, although plaintiffs' attorneys in most fee-shifting cases risk losing their post-offer fees under rule 68 offers, the rule will not affect attorneys' fees in other cases at all. In diversity cases, for example, the only sanction that can be imposed under rule 68 will be post-offer costs as defined by 28 U.S.C. § 1920 (1982), which does not include attorneys' fees. See *supra* note 16.

141. *Marek*, 105 S. Ct. at 3035 (Brennan, J., dissenting).

question is how rule 68 should be amended.¹⁴²

The 1984 proposal, which was criticized by lawyers from various segments of the bar, appears to be a dead letter. But much can be learned by studying the spirited debate over the 1983 and 1984 proposals. A thorough understanding of both the good and bad features of the 1984 proposal is essential to developing a better proposal. To lay the groundwork for analyzing the 1984 proposal and to establish a practical framework for developing an alternative proposal, this Article begins by distilling the lessons from the debate over rule 68.

II. Goals And Limitations of Rule 68

The debate over the 1983 and 1984 proposals and over the Supreme Court's recent decisions on rule 68 has significantly illuminated the goals and limitations of rule 68.

The fundamental goal of rule 68 is to encourage fair and early settlements.¹⁴³ But the means of meeting this goal are subject to several limitations: rule 68 must not be so powerful that it coerces

142. The corollary question is when an amended rule 68 would take effect. As this Article is being printed, the status of the 1984 proposal is up in the air. The Advisory Committee on Civil Rules was originally scheduled to vote on the 1984 proposal at a June 4, 1985 meeting. At that meeting, however, the Committee postponed further action concerning the 1984 proposal until its next scheduled meeting on November 20-21, 1985. According to informal sources, the Advisory Committee postponed action for several reasons: the Committee hoped that *Marek v. Chesny* might illuminate the scope of the Advisory Committee's power to shift fees under the Federal Rules; it wanted to consider the results of an almost-completed study concerning the impact of 1983 amendments to FED. R. CIV. P. 11; and it desired to review more carefully a variety of alternative ideas for amending rule 68.

Before the November meeting, however, three things happened: (1) the Honorable Frank M. Johnson, Jr. of the United States Court of Appeals for the 11th Circuit replaced Judge Walter Mansfield as Chairman of the Advisory Committee on Civil Rules; (2) *Marek v. Chesny* was decided on June 27, 1985, and it did not directly address the Rules Enabling Act question; and (3) most important, Representative Kastenmeier, head of the House Judiciary subcommittee that is working on a bill to revise the Rules Enabling Act, reportedly wrote a letter to Judge Johnson suggesting that the 1984 proposal would violate the Rules Enabling Act by shifting attorneys' fees. Representative Kastenmeier's letter also reportedly informed Judge Johnson that Congress itself would be holding hearings concerning rule 68. In late September 1985, apparently in reaction to Representative Kastenmeier's letter, Judge Johnson wrote members of the Advisory Committee cancelling the November meeting. However, Judge Johnson put rule 68 on the agenda for an April 1986 meeting of the Advisory Committee to assess the steps taken by Congress regarding rule 68. Some of these events are recounted generally in *Effort to Amend Settlement-Offer Rule Put on Hold*, Legal Times of Washington, Oct. 14, 1985, at 4, col. 1.

Congress has indeed taken some steps to amend rule 68. One bill now being considered is very mild compared to the Advisory Committee's 1983 and 1984 proposals. The bill, which has been referred to the House Committee on the Judiciary, would simply negate *Marek v. Chesny* by providing that rule 68 costs are to be defined by 28 U.S.C. § 1920 (1982), which does not include attorneys' fees. H.R. 3998, 99th Cong., 1st Sess. (Dec. 19, 1985). The other pending bill, which has been referred to the Senate Committee on the Judiciary, would essentially enact into law the Advisory Committee's 1984 proposal to amend rule 68 with a few new twists. See S. 2038, 99th Cong., 2d Sess. (Feb. 3, 1986).

143. The Advisory Committee expressed the purpose of the 1984 proposal: The increased risk faced by an offeree who has acted unreasonably, causing needless expense and delay, is expected to encourage more serious evaluation of a proposed settlement at an earlier stage than otherwise

litigants to settle on unfair terms, forces settlements when continued litigation would serve the public interest, imposes unjust sanctions on those who refuse to settle, or requires courts to spend too much time applying the rule.

To address these goals and limitations in an organized fashion, it is useful to divide rule 68 into its four main components: procedures, standards, sanctions, and exclusions.

A. Rule 68's Procedures

In designing rule 68's procedures, the drafters should consider four major procedural objectives.

First, the rule should treat all parties equally, allowing plaintiffs as well as defendants to make rule 68 offers.¹⁴⁴

Second, the rule should not force parties to respond to settlement offers before they have had time to investigate and evaluate their cases. The rule should therefore prohibit premature offers.

Third, the rule should provide sufficient time to evaluate offers, but should not unduly stretch out settlement negotiations. The time allowed for responding to offers should be long enough to permit reasoned evaluation but short enough to encourage offerors to keep their offers open throughout the response period, and to facilitate the exchange of offers and counteroffers within a relatively compact time frame.

Finally, the cut-off point for making and responding to rule 68 offers should occur far enough in advance of trial to give an incentive to settle before the most intensive preparation for trial has occurred.

might occur, which should lead to more dispositions of cases before the heaviest expenses have been incurred.

1984 Proposal, *supra* note 5, advisory committee note at 435. However, as one of the most astute observers of rule 68 has commented: "[T]he rule is premised on a notion that early settlements are always better than late settlements . . . but we don't know whether or not if you speed [settlement] up that's something good or bad." *San Francisco Hearings on 1984 Proposal, supra* note 19, at 124 (testimony of Professor Judith Resnik). In response to Professor Resnik's observation, Judge Mansfield — formerly Chairman of the Advisory Committee on Civil Rules, and now a member of the Standing Committee on Rules of Practice and Procedure — stated: "There are obviously always cases where it would be unreasonable to require somebody to settle early. There are also cases where rejection would be reasonable under the rule, because we didn't know the extent of the injuries yet . . ." *Id.* In other words, the goal of rule 68 should be to encourage litigants to settle as soon as a *fair* settlement can be reached in the context of the particular case.

144. Both the 1983 and 1984 proposals would have allowed both plaintiffs and defendants to make rule 68 offers. See 1983 Proposal, *supra* note 4, at 361-62 (sentence 1); 1984 Proposal, *supra* note 5, at 432-33 (sentence 1).

B. *Standards for Triggering Sanctions*

To forestall excessive collateral litigation and increase predictability, rule 68 must establish a clear trigger for imposing sanctions. In devising a standard for triggering sanctions, therefore, the principal goal should be maximum objectivity.

A flexible standard for triggering sanctions would be neither necessary nor desirable. Flexibility would complicate the rule without adding any benefits. If the drafters desire flexibility, they can build discretion into the sanctions, not the trigger for applying the rule. A flexible standard can only increase collateral litigation and reduce predictability.

C. *Sanctions*

Sanctions are the most difficult and critical problem in redrafting rule 68. In designing rule 68's sanctions, the drafters must address four distinct questions: how heavy should the normative sanction be; how much discretion should courts have to modify this sanction; who can be sanctioned; and who should be awarded monetary sanctions.

Normative sanctions are subject to conflicting pressures. On the one hand, the normative sanction must be heavy enough to provide litigants with a substantial incentive to make and accept reasonable offers. On the other hand, the sanction must not be so heavy that it coerces unfair settlements, forces settlements when trials would be in the public interest, fosters intense collateral litigation over sanctions, or encourages some offerors to go to trial in order to win sanctions.¹⁴⁵

Judicial discretion under rule 68 is also subject to conflicting pressures. The rule should give courts sufficient discretion to fashion fair sanctions in light of the damage to the offeror and the financial resources of the offeree, but this discretion must be narrow enough to avoid extensive collateral litigation and to dissuade offerees from routinely rejecting reasonable rule 68 offers in the hope that courts will reduce or eliminate sanctions.

The problem of deciding who can be sanctioned is somewhat easier. The rule should permit the court to sanction the rejecting party, the rejecting party's attorney, or both. If rule 68 permits sanctions against only the rejecting party, attorneys may have little incentive to encourage clients to accept reasonable settlement offers, and clients of limited means may feel compelled to accept inadequate offers even when their attorneys advise rejection. If courts can sanction only attorneys, converse problems may arise: attorneys may seek to immunize themselves from sanctions by ad-

145. If sanctions are too heavy, the potential sanction may exceed the offeror's expenses for a trial. In those cases, sanctions may encourage offerors to go to trial — exactly the opposite of the intended effect. The heavier the sanctions are under rule 68, and the less discretion courts have to reduce them, the more often sanctions will function as a magnet for offerors to go to trial. See Oesterle, *supra* note 9, at 11-12.

vising clients to accept unreasonable offers, and clients may have minimal incentives to follow their attorneys' advice to accept reasonable offers. If rule 68 permits sanctions against both attorneys and their clients, courts may have to probe more deeply to determine who should be sanctioned, but clients and attorneys will both have a stronger incentive to act reasonably and in good faith.

The question of who should receive the monetary sanctions is also relatively uncomplicated. The options are the offeror and the court. Frequently, the offering party deserves the award, because that party has been forced to expend additional time and money litigating.¹⁴⁶ However, the offeror will sometimes benefit by the opposing party's rejection; a plaintiff will receive a judgment greater than the rule 68 offer, or a defendant will pay a judgment less than the amount of his rule 68 offer. The court, however, is always harmed by delays in settlement. When the offeror has benefited substantially from the rejection, therefore, it may be fitting for sanctions to be paid in whole or in part into the court rather than to the offeror.¹⁴⁷

D. Exclusions and Exemptions from Rule 68

No matter how carefully the drafters compose rule 68, it will be inappropriate to apply the rule to all cases. To provide flexibility, the drafters should establish criteria for exempting certain types of suits from rule 68 sanctions on a case-by-case basis.¹⁴⁸

As a further refinement, the drafters should consider establishing criteria for exempting particular counts, as opposed to entire cases, from the operation of rule 68, much as rule 56 allows courts to grant partial summary judgment.¹⁴⁹ This refinement will prevent a party from unilaterally nullifying rule 68 by including in a pleading a colorable, but minor, count that fits within the exemptions.

146. The offeror's attorney will seldom be damaged by the rejection of a rule 68 offer: the attorney will be salaried or compensated on an hourly rate, or (when a plaintiff receives a judgment at trial higher than the amount of the offer the defendant rejected) will receive a higher fee based on a contingent fee arrangement.

147. See *infra* note 202.

148. Both the 1983 and 1984 proposals excluded class actions and derivative suits from the operation of rule 68. One commentator has suggested that the rule should also exclude civil rights cases and other fee-shifting cases. See Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719, 742 (1984). However, there is no need to exclude fully any class of cases as long as attorneys' fees are not a potential sanction for good faith rejections and as long as courts have appropriate discretion to exempt suits on a case-by-case basis. See *infra* text accompanying notes 326-28.

149. FED. R. CIV. P. 56.

III. Analyzing the 1984 Proposal

A. Procedures Under the 1984 Proposal

The Advisory Committee carefully constructed the 1984 proposal to amend rule 68's procedures. With certain modifications, the changes proposed in 1984 provide a solid foundation for the next proposal.

1. Time Limits

The 1984 proposal prohibited rule 68 offers for sixty days after service of the complaint, required parties to make rule 68 offers no later than ninety days before trial, and allowed sixty days for an offeree to decide whether to accept or reject an offer.¹⁵⁰ These periods solve most of the problems that arise under the existing rule: they prohibit litigants from ambushing each other with premature rule 68 offers, they prohibit rule 68 offers on the eve of trial, and they allow parties adequate time to evaluate offers. Nevertheless, the time-limit provisions can be improved.

a. The Initial Prohibition Period

In certain cases, the sixty-day prohibition on offers following service of the complaint may be too long¹⁵¹ or too short.¹⁵² Unfortunately, the proposal does not expressly allow courts discretion to adjust this limit.¹⁵³ The next proposal should explicitly em-

150. 1984 Proposal, *supra* note 5, at 432-33 (sentence 1). The proposal distinguished counteroffers, which could be made as late as 75 days before trial. *Id.*

151. The 60-day prohibition may be too long in an action seeking a preliminary injunction. Due to the urgency of preliminary injunction proceedings, the court may hold hearings on the injunction sooner than 60 days after service of the complaint: this would effectively bar a rule 68 offer before the hearing commenced. Moreover, because a court "may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application" for a preliminary injunction, FED. R. CIV. P. 65(a)(2), the hearing on the injunction may be the only trial in the case, and there may never be an opportunity for either side to make a rule 68 offer. This makes no sense: if the parties can prepare for a hearing on the preliminary injunction sooner than 60 days after the complaint is served, they should also be able to prepare and respond to rule 68 offers sooner than 60 days after the complaint is served.

Nevertheless, it would be unwise to remove the front-end restriction on offers; in most cases, the initial 60-day prohibition will prevent offers before they can be properly evaluated. This author suggests that the rule give courts the necessary flexibility to allow earlier offers if the front-end prohibition would thwart rule 68's purpose.

152. The initial 60-day prohibition may be too short if a motion to dismiss or a motion for summary judgment is pending, or if a motion to stay discovery has been granted. If a motion to dismiss or for summary judgment is pending, the decision on a rule 68 offer essentially forces parties to place a high-stakes bet on the court's ruling on a matter of law. Similarly, if discovery is stayed, it would usually be unfair to ask a party to evaluate a rule 68 offer. In either case, the court should extend the prohibition on rule 68 offers until the situation changes.

153. In contrast, many other rules that contain time limits give courts discretion to adjust them. *See, e.g.*, FED. R. CIV. P. 12(a) (setting times for filing an answer "unless a different time is fixed by order of the court"); *id.* 15(a) (10 days to respond to amended pleading "unless the court otherwise orders"); *id.* 30(a) (court may permit plaintiff to take deposition sooner than 30 days after serving complaint); *id.* 33(a), 34(b) (responses to interrogatories normally due 30 days after service, but court "may allow a shorter or longer time"); *id.* 36(a) (matters set forth in requests for admissions

power courts to adjust the sixty-day restriction upon good cause shown.¹⁵⁴

b. *The Response Period*

The ten-day response period under the current rule is certainly too short for discovery and evaluation, and possibly too short for a corporate or bureaucratic defendant to obtain appropriate authority to accept an offer.¹⁵⁵

The 1983 proposal increased the offeree's response time to thirty days, but critics still considered the period too short to permit adequate discovery.¹⁵⁶ The 1984 proposal, in turn, lengthened the response period to sixty days. For two reasons, a sixty-day response period is too long.

First, sixty days is such a long period that conditions are likely to change while offers are pending.¹⁵⁷ This will lead many offerors to withdraw their offers before the response period has expired.¹⁵⁸ Because withdrawn offers have no subsequent effect,¹⁵⁹

admitted unless response served within 30 days "or within such shorter or longer time as the court may allow").

154. The standard of "good cause shown" is borrowed from FED. R. CIV. P. 6(b)(1) (general provision allowing extension of time upon "cause shown").

155. The Advisory Committee commented:

The 10-day period was thought to be too short to enable many offerees to act upon offers made to them, particularly when authority from others (for example insurers or the government) had to be obtained before action could be taken on an offer or when the offeree needed additional information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer.

1984 Proposal, *supra* note 5, advisory committee note at 434-35.

156. See, e.g., Mills & Nereim, *supra* note 60, at 512-13.

157. In *Stafford v. Lake Cent. Airlines*, 47 F.R.D. 218 (N.D. Ohio 1969), the court refused to keep a rule 68 offer open pending a potentially controlling Ohio Supreme Court decision because "[n]o sensible defendant would make an Offer of Judgment under Rule 68 if he knew [that] the offer might be kept open for an indefinite period of time, even though the value of the litigation might change." *Id.* at 220. For the same reason, defendants might hesitate to make rule 68 offers if they knew that an offer would have to remain open for a long time in order to be effective.

158. Under the existing rule, offers are irrevocable during the ten-day period after service. 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3004, at 59-60 (1973); Udall, *May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?*, 19 F.R.D. 401, 406 (1957). The 1983 proposal provided that an offer "shall remain open for 30 days unless a court authorizes earlier withdrawal." 1983 Proposal, *supra* note 4, at 362 (sentence 2). The requirement for court approval was criticized as too cumbersome, so the 1984 proposal allowed an offeror to withdraw an offer without court approval "by a writing served on the offeree prior to acceptance by the offeree." 1984 Proposal, *supra* note 5, at 433 (sentence 3). Because sanctions are predicated upon a rejection, few offerees will reject offers until they must. Thus, the longer the response period, the more likely an offeror is to withdraw his offer before the acceptance period expires. One commentator has therefore suggested a 21-day response period for accepting or rejecting rule 68 offers. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U.L. REV. 813, 846 (1984).

159. The 1984 proposal provides: "An offer that is neither withdrawn nor accepted

they cannot encourage early settlement.

Second, a sixty-day response period will make the cycle of offers and counteroffers too long. Because offerees have no incentive to reject an offer sooner than necessary,¹⁶⁰ a cycle of one offer and one counteroffer will normally take at least 120 days.¹⁶¹ Because many cases will not settle until each side has made several offers and counteroffers, the goal of early settlement often will be frustrated.¹⁶²

The next proposal to amend rule 68 should permit a response period of thirty days.¹⁶³ The criticism of the thirty-day period in the 1983 proposal¹⁶⁴ was largely predicated on the 1983 proposal's lack of a front-end restriction on rule 68 offers: under the 1983 proposal, parties could make offers as soon as the complaint was served.¹⁶⁵ If rule 68 offers are prohibited until more than sixty days after the service of the summons and complaint, however, a thirty-day response period gives offerees at least ninety days after service of the complaint in which to investigate and evaluate the case. Offerees should be in a position to respond to rule 68 offers

within 60 days shall be deemed rejected." *1984 Proposal*, *supra* note 5, at 433 (sentence 4). An offer that was withdrawn clearly could not be rejected. And without a rejection, there can be no sanctions.

160. If an offer is very favorable, the offeree will have at least two incentives to accept it before the 60 days expire: to avoid litigation costs while the offer is pending, and to take advantage of the offer before it is withdrawn. An offeree who expects to reject an offer, however, has a strong incentive not to reject it before the 60 days expire. The offeror may withdraw the offer before rejection, thereby relieving the offeree of possible sanctions. *See supra* note 159. Additionally, the offeree can make a counteroffer without rejecting the pending offer; therefore, the offeree has no reason to reject an offer sooner than 60 days even if the offeree desires to make a counteroffer. *See 1984 Proposal*, *supra* note 5, advisory committee note at 435 ("[A] written counter-offer would not constitute a rejection unless it expressly so stated.").

161. If an initial offer is withdrawn or if time elapses between the expiration of an offer and the making of a counteroffer, the cycle of offer and counteroffer might be much longer than 120 days.

162. Every litigator knows that few cases can be settled with a single offer, because even if the first offer is reasonable the offeree seldom believes that the opening offer is the final offer. In fact, litigators are expressly advised to start with an inflated demand or a stingy offer in order to leave room for further bargaining. *See, e.g., X. FRASCOGNA, JR. & H. HETHERINGTON, NEGOTIATION STRATEGY FOR LAWYERS* 222 (1984) (advising plaintiff to "[o]pen high but be willing to readjust downward in a realistic manner" and advising defendants to "[o]pen low but be willing to adjust upward in a realistic manner"); Nolan, *Settlement Negotiations*, 11 LITIGATION, Summer 1985, at 17, 19 ("Demand more than you will accept. Offer less than you will pay.").

163. Thirty days is the time ordinarily allowed for responding to interrogatories and document requests. *See* FED. R. CIV. P. 33(a) & 34(b); *see also* Varon, *supra* note 158, at 846 (suggesting a response period of 21 days).

If the United States is considering a rule 68 offer, however, 30 days may be too short. *See* Letter from D. Lowell Jenson, Acting Deputy Attorney General, to the Hon. Edward T. Gignoux (Feb. 28, 1984). Mr. Jenson wrote:

In some cases, the personal approval of the Deputy Attorney General is required. 28 C.F.R. § 0.165. In others, the approval of an Assistant Attorney General is necessary. 28 C.F.R. § 1.168 and Appendix to 28 C.F.R. Part O, Subpart Y. Any time a settlement is outside the delegated authority of the immediate litigation unit, with the result that approval at a higher level or levels would be needed, final action would normally take substantially longer than 30 days.

164. *See supra* note 51 and accompanying text.

165. *See 1983 Proposal*, *supra* note 4, at 361-62 (sentences 1-2).

within thirty days.¹⁶⁶ Settlement negotiations should not be delayed by allowing sixty days to respond to rule 68 offers. Moreover, when special circumstances (such as a pending hearing or trial) make it desirable for rule 68 negotiations to proceed at a faster pace than normal, a court should have power, upon good cause shown, to order a response in less than thirty days.¹⁶⁷

c. *The Prohibition Period Before Trial*

The 1984 proposal prohibited rule 68 offers within ninety days of trial in hopes of encouraging settlements before the heaviest litigation expenses were incurred.¹⁶⁸ However, such a long prohibition period does not enable parties to respond to significant developments that may occur as a case approaches trial.¹⁶⁹ For example, an important witness may die, a key document may be located, or a controlling appellate decision may be handed down. Additionally, the parties may still be taking and evaluating discovery until shortly before trial. For these reasons, a prohibition on rule 68 offers for ninety days before trial is too long. The next proposal should allow rule 68 offers to be made routinely as late as forty-five days before trial. Moreover, to accommodate unusual circumstances, the rule should give courts discretion, upon good cause shown, to allow offers to be extended to less than forty-five days before trial.¹⁷⁰ A late settlement, after all, may still be better

166. If the 30-day response period is insufficient in a particular case, the offeree can protect himself by rejecting the offer and making a counteroffer after he has conducted enough discovery and investigation to evaluate his position. If the terms of the counteroffer are close to the terms of the rejected offer, the original offeror (now the counterofferee) is likely to accept the counteroffer unless conditions have changed dramatically since the initial rejection.

167. Judges presumably will consider all pertinent factors in determining whether to shorten the time for responding to a rule 68 offer. However, to guard against excessive judicial zeal to settle cases, this author suggests a minimum response time of seven days for all cases. See *infra* note 347 and accompanying text.

168. 1984 Proposal, *supra* note 5, at 432 (sentence 1). The 1984 proposal also allowed counteroffers as late as 75 days before trial. *Id.* The Advisory Committee hoped these time limits would encourage parties "to consider settlement seriously at a reasonably early stage in the litigation after enough discovery has been had to appraise the strengths and weaknesses of a claim or defense." *Id.*, advisory committee note at 434.

169. Often, completion of discovery may not occur until about three or four weeks before the scheduled trial date. See Urbom, *Calendar Control — Organizing the Flow of Cases* (1973), in SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 18, 19 (Fed. Jud. Center 1976) (recommending a final pretrial conference about 10 days before trial and a discovery cut-off date about two weeks before the conference).

170. Because the litigants and the court often benefit even if a case settles shortly before trial, it would be unwise to set a standard higher than good cause shown. See, e.g., FED. R. CIV. P. 16(e) (allowing a modification of pretrial orders to prevent "manifest injustice"). However, courts should not construe good cause so leniently that parties ignore the 90-day deadline and revert to the undesirable practice of waiting until the last minute to make offers. See *supra* notes 25-27 and accompanying text.

than no settlement.

2. *Allowing All Parties to Make Offers*

The proposal to allow all parties to make rule 68 offers is a critical component for a fair and effective rule and should remain in any future proposal.¹⁷¹

B. *The 1984 Proposal's Unsatisfactory Standard for Imposing Sanctions*

The existing rule employs a bright line, mathematical test for imposing sanctions: Is the judgment obtained by the offeree more favorable than the rejected offer?¹⁷² If not, sanctions are mandatory.¹⁷³

The 1984 proposal replaces the existing mathematical standard with a flexible, multifactored standard. Specifically, the 1984 proposal imposes rule 68 sanctions if "the court determines that an offer was *rejected unreasonably*, resulting in unnecessary delay and needless increase in the cost of the litigation"¹⁷⁴

Thus, in polar opposition to the existing rule, the 1984 proposal ignores both the amount of the final judgment and comparison of that judgment to the rejected offer. The standard for sanctions under the 1984 approach is simply whether an offer was rejected unreasonably.¹⁷⁵

To guide courts in determining whether an offeree rejected an offer unreasonably, the 1984 proposal instructs courts to "consider *all* of the relevant circumstances *at the time of the rejection*," including six factors specifically enumerated in the proposed rule.¹⁷⁶

171. For a review of the inequities in the current rule, nearly all of which favor defendants, see *supra* text accompanying notes 25-29.

172. See FED. R. CIV. P. 68 (sentence 4).

173. See *id.*

174. The phrase "unnecessary delay or needless increase in the cost of the litigation" is identical to language in rules 11 and 26(g), FED. R. CIV. P. 11, 26(g). The Advisory Committee apparently uses that phrase to express rule 68's purpose: it is a sanctions provision rather than a fee-shifting provision. In his letter of transmittal forwarding the 1984 Proposal draft of rule 68 to the Committee on Practice and Procedure of the Judicial Conference of the United States, former Advisory Committee Chairman Walter Mansfield asserted that the 1983 proposal had been criticized by some as violative of the Rules Enabling Act. See *1984 Proposal, supra* note 5, at 424. Judge Mansfield stated:

Our Committee, without taking any position regarding the validity of these objections, believes that they are met by the present proposal, which is clearly procedural and does not provide for attorney's fee shifting but authorizes imposition of a sanction based on the creation of unnecessary delay and needless increase in the cost of litigation.

Id. But see H.R. REP. NO. 422, 99th Cong., 1st Sess. 13.

175. *1984 Proposal, supra* note 5, at 433 (sentence 7) (emphasis added). The phrase "an appropriate sanction" tracks the language of rules 11 and 26(g). *Id.*, advisory committee note at 435. Unlike rules 11 and 26(g), however, sanctions under rule 68 would be discretionary. Rules 11 and 26(g) state that an appropriate sanction "shall" be imposed when the rules are violated. In contrast, the 1984 proposal provides that the court "may" impose an appropriate sanction if an offer has been unreasonably rejected. *Id.*

176. *Id.*, at 433 (sentence 8) (emphasis added). In determining the amount of any

Measured against the fundamental goals and objectives of rule 68, the 1984 proposal's standard is not satisfactory. Because the standard determines whether a rejection will result in sanctions, the overriding goal in devising a standard should be maximum objectivity. Objectivity is essential to avoid extensive collateral litigation.¹⁷⁷ Discretion and flexibility introduce subjectivity and generate collateral litigation: the more discretion courts have, the more lawyers tend to debate the exercise of that discretion.

A standard that triggers sanctions based upon an unreasonable rejection would make the problem of collateral litigation especially severe. The reasons for this are worth exploring in detail.

1. *The Undue Complexity of a Reasonableness Standard*

The unreasonable-rejection standard is extraordinarily complicated. To begin with, reasonableness is *subjective*, varying from judge to judge and case to case. Reasonableness also requires a complex inquiry. What is reasonable in each situation depends on all relevant circumstances, and cannot be boiled down to any pat formula.¹⁷⁸ Accordingly, the 1984 proposal mandated a *multi-factored* analysis of reasonableness: it required courts to consider at least six separate factors in each case.¹⁷⁹ Some of these factors, such as the closeness of the questions of fact and law or the relief the plaintiff could reasonably have expected to obtain if he prevailed, are themselves highly subjective, complex, and dependent on many subfactors.¹⁸⁰ Moreover, because the 1984 proposal

sanction to be imposed, the proposal directs the court "also" to consider the four factors listed in the third paragraph. The word "also" can refer only to the factors used to assess whether an offer was unreasonably rejected — namely, all of the relevant circumstances at the time of the rejection, including the six factors enumerated in the second paragraph of the proposal. *See id.* (sentences 8 & 9).

177. "Collateral litigation" might be defined as litigation about the conduct of the litigation, as opposed to litigation about the merits of the case. One cannot seriously argue that allowing courts discretion to adjust time limits, *see supra* text accompanying notes 151-54, 167 & 170, would cause extensive collateral litigation. Although all discretion causes some collateral litigation, any problem caused by motions to adjust time limits would be *de minimis*. The circumstances justifying a deviation from the normal time limits would be of record or readily apparent. Moreover, because sanctions would not directly follow from a ruling on a motion to alter time limits, parties would seldom fiercely litigate motions to adjust time limits.

178. NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 11-13.

179. 1984 Proposal, *supra* note 5, at 433 (sentence 8).

180. *Id.* (sentence 7). Determining the relief the plaintiff could reasonably have expected to obtain if he prevailed, for example, would require the court to predict — as of the time of the rejection — the most probable jury verdict at trial. Predicting jury verdicts is almost witchcraft. *See, e.g.,* H. MILLER, ART OF ADVOCACY — SETTLEMENT §§ 4.00-4.15 (1984) ("Both juries and courts are far less predictable than we would like to believe. Consequently, determining the value of a case is an art difficult even for the seasoned and prudent counsel."); Wallach, *Settlement in a Personal Injury Case: The Imperfect Art*, 5 LITIGATION, Fall 1978, at 35, 39 (asserting that the fear of uncertainty accompanying the prospect of trial may affect the decision to settle).

required courts to consider all relevant circumstances at the time of the rejection, the inquiry was open-ended. In most cases, a court would have needed to consider factors beyond the six articulated in the rule,¹⁸¹ and adequate consideration of each relevant factor might well exceed judicial capacity.¹⁸²

The 1984 proposal compounded the problem by requiring a *retrospective* determination of unreasonableness, based on the circumstances at the time of the rejection, not at the time of the motion for sanctions.¹⁸³ This retrospective standard would have required courts to reconstruct the state of the facts and the law at a past point in time, a task that is elusive and time consuming.

2. *Subjectivity Under a Reasonableness Standard*

The extreme subjectivity of a reasonableness standard would exacerbate the problems of complexity, because a reasonableness standard would allow motions for sanctions that could not be made under the existing rule. Under the purely mathematical test of the existing rule, a motion for rule 68 sanctions is permissible only if the judgment obtained by the offeree is not more favorable than the rejected offer.¹⁸⁴ However, under an unreasonable-rejection standard, an offeror could move for sanctions even if the offeree won a judgment at trial more favorable than the rejected offer.¹⁸⁵ Given the opportunity for winning heavy sanctions, many lawyers would move for rule 68 sanctions whenever they could argue in good faith that an offer had been rejected unreasonably.

3. *Secrecy and the Need for Substantial Discovery*

Because most motions for sanctions under the Federal Rules can be decided by examining factors that appear in the record, lit-

181. For example, in most cases a court generally would want to consider whether the rejection was made frivolously, in bad faith, or for any improper purpose; whether the offeree made a reasonable offer or counteroffer at any point in the litigation; whether the offeree caused additional delays in the litigation after rejecting the offer in question; the difference between the amount of the offer and the judgment finally entered; and whether the offeree seriously evaluated the offer when it was made, as opposed to waiting until after trial to make a post hoc, self-serving evaluation. The particular circumstances of various cases may present other factors to consider.

182. Because the imposition of heavy sanctions is usually accompanied by a statement of reasons, writing the opinions analyzing each relevant factor would occupy a substantial amount of judicial time. The danger is that courts may avoid this extraordinary demand on their time by (1) looking to some shortcut, such as a naked comparison between the offer and the judgment; (2) skipping over some of the more difficult factors; (3) analyzing all of the factors quickly or simplistically; or (4) refusing to impose sanctions except in egregious cases. The rule will not work well if any of these scenarios becomes commonplace, as they well might if the rule is too cumbersome.

183. *1984 Proposal*, *supra* note 5, at 433 (sentence 8).

184. FED. R. CIV. P. 68 (sentence 4).

185. See *infra* notes 175-76 and accompanying text. Indeed, a strong argument can be made that a lawyer's failure to move for sanctions under the 1984 proposal would constitute malpractice. Because the 1984 proposal is a de facto fee-shifting statute, any lawyer who failed to file a colorable motion for sanctions would be as derelict as a lawyer who failed to file a fee petition under 42 U.S.C. § 1988 (1982).

the additional discovery is ordinarily necessary or allowed.¹⁸⁶ In contrast, the reasonableness of a rejection under the 1984 proposal will turn on facts that are off the record and shrouded in secrecy.¹⁸⁷ Secrecy is a hallmark of the negotiation process: lawyers generally conceal the substance of their negotiations from the court and the jury¹⁸⁸ and closely shield their bottom-line evaluations of cases from each other.¹⁸⁹ Consequently, a meaningful hearing on the reasonableness of a rule 68 rejection would often require substantial post-trial discovery.¹⁹⁰ The additional discov-

186. For example, the advisory committee note to FED. R. CIV. P. 11 provides: In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, *the court must to the extent possible limit the scope of sanction proceedings to the record.* Thus, discovery should be conducted only by leave of the court, and then only in extraordinary circumstances.

FED. R. CIV. P. 11 advisory committee note (emphasis added).

187. Although not protected by any specific privilege, virtually every phase of the negotiation process is conducted off the record and concealed from the judge. Moreover, both the attorney's discussions with his clients concerning a rule 68 offer and the attorney's evaluation of the case are protected either by the attorney-client privilege or as a work product. See *supra* text accompanying notes 99-102. Although a judge may learn that settlement negotiations have taken place, the judge usually does not inquire into the precise substance of the negotiations.

Even if judges do participate in settlement negotiations, the judge typically conducts the negotiations in chambers and off the record. See generally Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982) (discussing the difficulty of proving abuse of judicial power to induce settlements).

188. Presumably, some express provision of the rule will conceal rule 68 negotiations from the court. The 1984 proposal, for example, expressly prohibited parties from filing rule 68 offers with the court. See *1984 Proposal, supra* note 5, 432-33 (sentence 1). The existing rule provides for filing offers with the court only after acceptance or after judgment has been entered, FED. R. CIV. P. 68 (sentence 2), and at least one court has stricken from the record (but not invalidated) a rule 68 offer that the offeror filed prematurely. See *Nabors v. Texas Co.*, 32 F. Supp. 91, 92 (W.D. La. 1940) (striking offer from the record but reserving to the offeror the right to make proof of the offer "at the proper time"). Because FED. R. EVID. 408 generally makes offers of compromise inadmissible as evidence, the negotiation process under rule 68 would also be kept secret from the jury.

189. If lawyers did not keep their bottom line evaluations from each other, there would be no point in negotiating. See H. EDWARDS & J.J. WHITE, *THE LAWYER AS A NEGOTIATOR* 112-13 (1977) (noting that negotiation consists of each party concealing his bottom line while trying to read the other's).

190. An offeror seeking sanctions would want to know everything about the offeree's reasons for rejecting the offer. Immediately upon filing a motion for sanctions, most offerors would serve interrogatories and document requests seeking all relevant information concerning communications between the lawyer and his client, as well as any relevant notes made by the offeree's attorney. In resisting the motion for sanctions, the offeree would serve document requests and interrogatories to determine how the offeror arrived at the terms of the rejected offer, and whether the offeror expected a more favorable outcome at trial.

These opposing sets of discovery requests would raise serious problems with both the attorney-client privilege and the work-product protection, and would thus compli-

ery might even be broader than the discovery allowed on the merits.¹⁹¹

4. *Factors Compounding the Problems with the 1984 Proposal*

The problems of complexity, subjectivity, and secrecy are inherent in the unreasonable-rejection standard. However, the 1984 proposal compounds these problems by making the rule available to plaintiffs as well as to defendants and by severely increasing the rule's potential sanctions.

Making rule 68 available to plaintiffs will dramatically increase the use of the rule. In many cases, both parties will make and reject rule 68 offers, thus allowing both parties to move for sanctions.¹⁹² Because the 1984 proposal required courts to judge the reasonableness of a rejection at the time it was made, courts could not mechanically wash out competing motions for sanctions, but would have to weigh the reasonableness of each rejection separately.¹⁹³ This dual determination would double the courts' work.

Additionally, the potential for extremely heavy sanctions under the 1984 proposal would encourage offerors to move for sanctions whenever the court appeared to have the slightest room for discretion. The heavy sanctions would also ensure that opponents

cate the collateral litigation over sanctions with motions for protective orders, *see* FED. R. CIV. P. 26(c), and motions to compel discovery, *see id.* 37(a). In many instances, the court could resolve the privilege and work-product disputes only by reviewing the relevant documents in camera, which would further add to the judicial burdens. *E.g.*, *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 720 (N.D. Ill. 1978).

191. *See* Alliance for Justice Comments on 1984 Proposal, *supra* note 48, at 411.

192. Consider, for example, a case in which the plaintiff has offered to settle for \$55,000 and the defendant has made a counteroffer to settle for \$45,000. If the jury returns a verdict of \$50,000, both the plaintiff and defendant may move for sanctions under rule 68. The plaintiff will argue that the defendant acted unreasonably in refusing to pay \$50,000 rather than continuing the litigation in order to achieve a net gain of only \$5,000 over the offer (\$55,000 - \$50,000 = \$5,000). The defendant will make the same argument in reverse, because the plaintiff gained only \$5,000 by rejecting the defendant's offer to settle for \$45,000.

In the context of the 1984 proposal, both the plaintiff and the defendant may be right. If the case was worth \$75,000 when the plaintiff offered to settle for \$55,000, the defendant's rejection was probably unreasonable at that time; but if the value of the case fell to \$30,000 by the time the plaintiff rejected the defendant's offer to pay \$45,000, then the plaintiff's rejection was probably also unreasonable.

A similar problem of dual motions for sanctions will occur whenever a verdict falls in between an offer and counteroffer.

193. Assessing the reasonableness of competing rejections is problematic not only because the parties rejected the offers at different times, but also because the plaintiff and defendant had different perspectives on the litigation. These considerations would force the court into a separate review of each party's motion for sanctions. For example, reasonableness depends, in part, on knowledge: the offeree's assessment of a factor such as "the relief that might reasonably have been expected if the claimant should prevail," 1984 Proposal, *supra* note 5, at 433 (sentence 8), necessarily depends on the offeree's knowledge of the facts and the law at the time of the rejection. This knowledge, in turn, depends partly on "whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer." *Id.* It may well be that the plaintiff shared all discoverable information with the defendant but the defendant did not share all discoverable information with the plaintiff. Moreover, a rejection may have been based on a good faith misunderstanding of a complex point of law, a decision not to take certain discovery, or a decision to believe a certain witness who later turned out to lack credibility.

would hotly contest these motions.¹⁹⁴

C. *The Normative Sanction*

The most controversial aspect of the 1984 proposal was the elimination of a specific sanction in favor of an undefined "appropriate sanction." To determine the amount of an appropriate sanction, the proposal required courts to consider four specific factors: the extent of the delay, the parties' costs and expenses, the interest that could have been earned, and the burden on the offeree.¹⁹⁵ Each of these factors is problematic.

1. *The Extent of the Delay*

In determining the amount of an appropriate sanction, the 1984 proposal required the court to consider the extent of the delay.¹⁹⁶ Although "delay" was not defined or explained either in the rule itself or in the advisory committee note, the term presumably referred to the length of time the offeree could reasonably have expected the litigation to take from the rejection of an offer to the entry of final judgment.¹⁹⁷

Delay is superficially an attractive factor because a party who

194. If the final judgment is low, the stakes on the motion for sanctions might exceed the amount of the judgment. Indeed, it is not hard to find examples of cases in which post-offer attorneys' fees and other expenses claimed by the plaintiff greatly exceed the amount of the plaintiff's judgment at trial. *See, e.g.,* *Marek v. Chesny*, 105 S. Ct. 3012, 3014 (1985) (judgment of \$60,000; respondent claimed post-offer costs and fees of \$139,692); *Bitsouni v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 894, 899, 903 (D. Conn. Aug. 2, 1983) (judgment of \$171.10; defendant claimed post-offer costs and fees of approximately \$4,700); *Firm Wins \$2,500 for Client, Awarded \$55,000 Counsel Fee*, N.Y.L.J., June 27, 1985, at 1, col. 1 (civil rights case). Justice Rehnquist, expressing concern over the magnitude of attorneys' fees in relation to judgments at the oral argument in *Marek v. Chesny*, asked: "Well, how can a court award \$173,000 attorney's fees where all the plaintiff recovered was \$60,000? Don't the attorney's fees have to bear some proportion to the value of what was recovered?" *Chesny v. Marek*, oral argument at 7 (Dec. 5, 1984). The Supreme Court apparently intends to address the relationship between damages and fees during its 1985 Term, because it has granted review in a case where a \$33,000 damage award led to a \$243,343 fee award. *See City of Riverside v. Rivera*, 679 F.2d 745, 796 (9th Cir. 1982), *vacated*, 461 U.S. 952 (1983), *later proceeding*, 763 F.2d 1580 (9th Cir.), *cert. granted*, 106 S. Ct. 244 (1985).

195. 1984 Proposal, *supra* note 5, at 433 (sentence 9).

196. *Id.* (sentence 9 (1)).

197. The advisory committee note mentions delay several times but neither defines it nor gives any guidance for determining the extent of the delay. However, the proposal itself refers to "the amount of the additional delay . . . the offeror reasonably would be expected to incur if the litigation should be prolonged" as a factor to be considered in deciding whether an offer was rejected unreasonably. *Id.* (sentence 8). The proposal also refers to "unnecessary delay." *Id.* (sentence 7). Thus, the delay to be considered in calculating sanctions under rule 68 might include only part of the time between the rejection of the offer and the entry of judgment unless all delay following an unreasonable rejection would always be "unnecessary." Deciding what time to eliminate from the period between rejection and judgment would be tricky.

unreasonably rejects a settlement offer is in a sense responsible for all additional time expended on the case. Yet, despite the old bromide that justice delayed is justice denied, the extent of the delay should not be considered in determining an appropriate sanction. Delay alone does not damage an offeror.¹⁹⁸ Indeed, delay may benefit offerors who are defendants, because delay allows defendants to earn interest on their money for a longer time.¹⁹⁹ Only the court would be automatically damaged by delay;²⁰⁰ however, rule 68 should not require the offeree to pay the offeror for damage suffered by the court. Moreover, including a factor of delay increases complexity by requiring courts to determine the part of the delay caused by the rejection, rather than by the offeror's own conduct or by the court.²⁰¹ Delay may also be quite unpredictable at the time of a rejection, thus making it an unfair factor to consider.

Finally, delay by itself is not quantifiable in monetary terms and thus provides little or no guidance for determining an appropriate sanction. Even if a court could determine the precise amount of delay caused by the rejection rather than by other factors, the court could not readily translate this delay into a dollar amount. Accordingly, the factor of delay should not be an independent factor in future drafts of rule 68. If the failure to settle damages the court, however, a fine payable directly to the court might be appropriate.²⁰²

198. Obviously, delay causes the parties to spend additional money and may cause the plaintiff to lose interest. But these costs and expenses are considered separately in another factor. See *id.* (sentence 9 (2)-(3)); *infra* text accompanying notes 203-05. However, delay alone is not inherently damaging to the parties, and therefore cannot logically be justified as an independent factor for determining sanctions.

199. For example, suppose a defendant made a rule 68 offer to settle for \$100,000, which was rejected, and the defendant went on to lose \$99,000 two years later at trial. The defendant may actually be better off, in strictly financial terms, than he would have been if the case had gone to trial only two months after the plaintiff rejected the offer. (This assumes that the defendant is not required to pay prejudgment interest, or that prejudgment interest is assessed at a lower rate than the defendant has earned on his money. It also disregards the costs, expenses, and attorneys' fees of continued litigation and trial, because those costs would be considered by the court in the second factor of the 1984 proposal). Why should courts sanction the plaintiff for causing a delay if the delay benefited the defendant? The defendant would in effect recover twice — once in extra interest, and again in the form of a rule 68 sanction.

200. A delay in settlement requires a court to continue an active role in the litigation. For example, a court will generally hold additional pretrial conferences, hear additional pretrial motions, and review various papers filed in the case. If the suit does not settle, the court will also have to conduct a trial and hear post-trial motions. All of these proceedings are expensive. See *Burger says lawyers need new way to wage "legal warfare,"* Chi. Daily L. Bull., May 14, 1985, at 2, col. 1 (cost of operating federal district court during trial is about \$565 per hour).

201. For a discussion of the problems of determining the cause of delay in the context of awarding prejudgment interest, see *infra* note 235.

202. If the drafters intend the factor of delay to encompass costs incurred directly by the court, those costs could properly be reflected in an appropriate sanction — a fine payable directly to the court. Although nothing in the 1984 proposal or its advisory committee note expressly authorizes a sanction in favor of the court, a fine payable to the court would certainly fit into the elastic rubric of "an appropriate sanction." See 1984 Proposal, *supra* note 5, at 433 (sentence 8).

There is sound authority for requiring a party to pay a fine into the court as punish-

ment for unreasonable conduct in settlement negotiations. An excellent recent example is *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3d Cir. 1985) (en banc). In *Eash*, the court considered "an issue important to judicial administration, namely, whether a district court may order an attorney to pay to the government the cost of impaneling a jury for one day as a sanction for the attorney's abuse of the judicial process." *Id.* at 559. The defendant's attorney abused the judicial process by failing to settle until the day of trial, even though the plaintiff had repeatedly tried to contact the defendant regarding settlement possibilities during the week preceding the trial. *Id.* The district court considered settlement on the eve of trial "unjustified," and ordered the attorney to pay \$390 to the Clerk of the Court to cover the cost of summoning jurors on the day of trial. *Id.* at 571-72 (presenting text of district court's order). The Third Circuit approved the sanction in principle as a valid exercise of the district court's inherent power to manage its affairs "so as to achieve the orderly and expeditious disposition of cases." *Id.* at 564 (quoting *Link v. Wabash R.R.*, 370 U.S. 626, 630-31 (1962)). In approving the sanction, the Court overruled *Gamble v. Pope & Talbot, Inc.*, 307 F.2d 729 (3d Cir.) (en banc), cert. denied, 371 U.S. 888 (1962). *Eash*, 757 F.2d at 568. The Third Circuit explained:

In *Gamble* this Court essentially was concerned with the imposition of a fine unrelated to any actual consequence of counsel's conduct and that knew no bounds other than each individual judge's notion of an appropriate penalty warranted by a counsel's misdeeds. The present case is significantly different in that *the district court tied its sanction to specific costs that bore a direct relationship to the alleged misconduct* and thus offered a nexus and a limit.

Eash, 757 F.2d at 565 (emphasis added). However, the Third Circuit also conditioned the sanction upon appropriate procedural protections, holding that the district court's imposition of a sanction without providing the sanctioned attorney notice and an opportunity to be heard violated due process. The court therefore remanded for an appropriate hearing. *Id.* at 570-71.

The Ninth Circuit reached a similar result outside the settlement context. See *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516 (9th Cir. 1983). In *Southern Pacific*, the district court found pretrial documents submitted by both attorneys to be "totally unsatisfactory" and violative of the local rules governing pretrial submissions. *Id.* at 518. The court therefore fined the attorneys \$250 each pursuant to another local rule that required district courts to penalize rules violations by subjecting "the offending party and his attorney, at the discretion of the court, to appropriate discipline including the imposition of costs and such attorney's fees to opposing counsel as the court may deem proper under the circumstances." *Id.* at 518, 520 n.7 (quoting local rule) (emphasis by the court). The court of appeals upheld the local rule, stating: "We see no reason to preclude the use of reasonable monetary sanctions against attorneys for violations of local rules when they are the offending parties. This may well be more appropriate on many occasions than penalizing the parties for the failures of their counsel." *Id.* at 521. As in *Eash*, however, the court remanded to give the sanctioned attorneys notice and an opportunity to be heard. *Id.* at 523.

At least three other cases also illustrate judicial power to levy a reasonable fine payable directly into the court for conduct that hampers the administration of justice. See *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453-54 (11th Cir. 1985) (remanding \$10,000 fine for an accounting, but leaving open the possibility that the fine could be payable directly to the court); *Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992, 993-94 (10th Cir. 1979) (affirming an order requiring the plaintiff and her counsel to cover the costs of summoning jurors because a late settlement violated a local rule); *In re Sutter*, 543 F.2d 1030, 1032-36 (2d Cir. 1976) (affirming a fine against an attorney to cover part of the jury costs when attorney withdrew from the case on the day of trial).

These decisions demonstrate courts' power to sanction abusive settlement practices by requiring the offending attorneys or their clients or both to pay a fine directly into the court, provided that (1) the fine bears a reasonable relationship to the costs actually incurred by the court, and (2) the offending parties had notice and an opportunity to be heard. Rule 68 could satisfy this standard by providing that appropriate sanc-

2. *Parties' Costs and Expenses, Including Any Reasonable Attorneys' Fees Incurred by the Offeror as a Result of the Offeree's Rejection*

In response to the blunt criticisms of the 1983 proposal,²⁰³ the amount of the offeror's post-rejection attorneys' fees was only one of several factors in determining sanctions, and not an automatic sanction.²⁰⁴ Nevertheless, including attorneys' fees even as a factor for determining sanctions sparked vigorous arguments against the 1984 proposal.²⁰⁵

a. *Problems Resulting from the Threat of Fees*

One set of arguments focused on ill effects stemming from the mere threat that a court might order an offeree to pay his opponent's attorneys' fees. This threat would sometimes chill meritorious litigation by forcing settlements on plaintiffs who could not afford the downside risk of paying defendants' attorneys' fees. The burden would fall especially hard on civil rights plaintiffs and contingency-fee plaintiffs, many of whom could not pay even their own attorneys. In civil rights cases, therefore, the threat of attorneys' fees would contradict the policy of fee-award statutes designed to encourage meritorious civil rights litigation. In contingency-fee cases, similarly, the threat of attorneys' fees would undermine the fundamental premise of the contingency-fee system: anyone with a meritorious suit should be able to hire a lawyer even if the plaintiff cannot afford to pay fees unless he wins.

The threat of attorneys' fees would also chill zealous advocacy. No lawyer would want to anger a judge who could later order his client to pay the opponent's fees. Similarly, the power to award attorneys' fees under rule 68 would give judges enormous leverage to coerce settlements.

Finally, the threat of attorneys' fees would increase the frequency and intensity of motions for sanctions because the stakes would be enormous.

b. *Problems Resulting from the Actual Imposition of Fees*

A second set of arguments against attorneys' fees focuses on the legal and practical problems arising when courts actually impose the sanction of attorneys' fees. In civil rights cases, opponents

tions for violating rule 68 may include fines payable to the court to cover costs incurred directly by the court as a result of the rejection. The costs could include jury costs (unless paid by one of the parties), as well as the reasonable value of the directly related trial and pretrial activities of the judge, the court reporter, the bailiff, and other court personnel.

For a further discussion of the notice requirements for imposing fines payable to the court, see *infra* note 220.

203. See *supra* text accompanying notes 61-80.

204. See 1984 Proposal, *supra* note 5, at 433 (sentence 9).

205. Although this Article has briefly reviewed the arguments against attorneys' fees as a potential rule 68 sanction, see *supra* text accompanying notes 91-94, this section amplifies the arguments because of their immense importance.

argued, requiring the plaintiff to pay the defendant's fees would violate the Rules Enabling Act unless the plaintiff's decision to continue litigating was frivolous, vexatious, or unreasonable.²⁰⁶ The same opponents argued that the sanction of fees was totally one-sided: because a prevailing civil rights plaintiff is already

206. Although the Supreme Court could have resolved the Rules Enabling Act issue in *Marek v. Chesny*, 105 S. Ct. 3012 (1985), the Court sidestepped the issue by holding that there was no conflict between rule 68 and section 1988. Indeed, the majority refers to rule 68 as a fee-shifting device only once: "The District Court refused to shift to respondent any costs accrued by petitioners. Petitioners do not contest that ruling." *Id.* at 3014 n.1.

It is important to note that earlier decisions such as *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978), and *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983), do not answer the Rules Enabling Act question if the sanctioned offeree is the prevailing plaintiff. *Christiansburg* and *Hensley* addressed only the circumstances under which section 1988 fees could be awarded to a *prevailing defendant* (where plaintiff's suit was vexatious, frivolous or brought to harass or embarrass defendant); they did not establish standards for awarding fees to a *losing defendant*. Moreover, section 1988 itself — like most other fee-shifting statutes — authorizes an award of fees only to a *prevailing party*, 42 U.S.C. § 1988 (1982), and the Supreme Court has implied that a losing party is never entitled to statutory attorneys' fees, even in exceptional circumstances, see *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 692 (1983). Thus, unless the phrase "prevailing party" is twisted so that a plaintiff who wins his suit after unreasonably rejecting a settlement offer is considered the prevailing party only for pre-offer work and the defendant is considered the prevailing party for all post-offer work — an interpretation Justice Brennan suggests might result from the majority's opinion in *Marek*, see 105 S. Ct. at 3024 n.16 (Brennan, J., dissenting) — section 1988 would apparently never allow a losing defendant to receive attorneys' fees from a prevailing plaintiff, unless the plaintiff had conducted the litigation in bad faith. See *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980). But see *Crossman v. Marcoccio*, 108 F.R.D. 433, 435-37 (D.R.I. 1985) (assessing defendants' attorneys' fees against prevailing plaintiffs who "whimsical[ly]" rejected defendants' rule 68 offer).

In light of *Hensley* and *Christiansburg*, therefore, it would appear that an amended rule 68 could require a prevailing plaintiff to pay a losing defendant's attorneys' fees only if (1) the right to attorneys' fees under federal fee-shifting statutes is considered "procedural," so that rule 68 would not be infringing on any "substantive" right, or (2) shifting attorneys' fees from a prevailing plaintiff to a losing defendant can be justified by some other doctrine, such as inherent judicial powers. For a discussion of courts' inherent powers, see *infra* text accompanying notes 220-25.

The Advisory Committee debated the Rules Enabling Act question in two nonpublic memoranda. See Mansfield & Miller, Proposed Amendment of Rule 68 — Background Memorandum 7-8 (Apr. 15, 1984) (asserting that resolution between the Committee's powers and the Rules Enabling Act is unlikely) [hereinafter cited as Background Memorandum]; Mansfield, Memorandum Re: Whether the Proposed "Attorneys' Fee" Amendment of Rule 68 Complies with the Rules Enabling Act, 28 U.S.C. § 2072 at 4 (June 14, 1983) (concluding that because of the proposal's regulatory purpose, the Supreme Court's preference for classifying civil rules as procedural, and the enactment procedure in general, the proposed 1983 amendment of rule 68 complied with the terms of the Rules Enabling Act) (copy on file with the author). The Advisory Committee's present official position is that the 1984 proposal is "clearly procedural" because it "does not provide for attorney's fee shifting but authorizes imposition of a sanction based on the creation of unnecessary delay and needless increase in the cost of litigation." Letter from Hon. Walter Mansfield (then Chairman of the Advisory Committee on Civil Rules) to Hon. Edward Gignoux (Sept. 15, 1984), reprinted in 102 F.R.D. 407, 424 (1984). But see H.R. REP. NO. 422, 99th Cong., 1st Sess. 13.

entitled to an award of fees,²⁰⁷ ordering a defendant to pay the plaintiff's post-offer fees after unreasonably rejecting a rule 68 offer would give the plaintiff nothing new.²⁰⁸

Opponents further argued that using a rule of procedure to shift fees would violate the constitutional limits on judicial power, unless the sanctioned party had acted in bad faith or oppressively.²⁰⁹

The critics also raised several practical problems. The formidable task of calculating attorneys' fees would substantially increase the burden on the courts.²¹⁰ In addition, the sanction of attorneys' fees would in many cases greatly outweigh the sin of unreasonable rejection, especially if the offeree had rejected the offer in good faith and on the advice of counsel.²¹¹ Indeed, if counsel had

207. A prevailing civil rights plaintiff is ordinarily entitled to an award of attorneys' fees "unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968).

208. Opponents emphatically attacked the 1984 proposal on this ground. See Alliance for Justice Comments on 1984 Proposal, *supra* note 48, at 17-18; ACLU Comments on 1984 Proposal, *supra* note 92, at 6 n.4.

To respond to the argument that the 1984 proposal's approach gives plaintiffs nothing, the drafters could make plain that prevailing plaintiffs could recover double their post-offer attorneys' fees under rule 68 in addition to any fee award under 42 U.S.C. § 1988 whenever a defendant unreasonably rejected a rule 68 offer of settlement. The separate fee award under rule 68 would be justified as a deterrent to unreasonable rejections of rule 68 offers in the future. Cf. Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 HARV. L. REV. 1033, 1049-54 (1978) (positing the extension of FED. R. CIV. P. 37 sanctions to unintentional discovery abuses and discussing its deterrence implications). Moreover, the "double" recovery of post-offer sanctions would be awarded to the parties who suffered the anxiety of continued litigation, not to the attorneys.

209. In *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59 (1975), the Supreme Court reaffirmed the general rule that, absent an applicable fee-shifting statute or an enforceable contract, litigants must pay their own attorneys' fees. However, the Court recognized several well-established exceptions stemming from the inherent power of the courts, including the power to award fees "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .'" *Id.* at 258-59 (citations omitted).

Conduct that is merely unreasonable, such as the unreasonable rejection of a settlement offer, ordinarily would not rise to the level of bad faith or vexatious, wanton, or oppressive conduct. See Mansfield & Miller, Background Memorandum, *supra* note 206, at 7-8. In his dissent in *Marek*, however, Justice Brennan stated: "[T]he assessment of fees against parties whose unreasonable conduct has violated the rules of litigation falls comfortably into the courts' authority to administer 'remedy and redress for disregard or infraction' of those rules. . . ." *Marek*, 105 S. Ct. at 3032 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)) (Brennan, J., dissenting) (emphasis in original).

210. See generally M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES ¶ 15.03 (1984) (providing a general idea of the complexity of calculating attorneys' fees). The problems of calculating statutory attorneys' fees are so great that the Supreme Court has been forced to address the issue in five recent opinions. See *Marek v. Chesny*, 105 S. Ct. 3012, 3017-18 (1985); *Webb v. County Bd. of Educ.*, 105 S. Ct. 1923, 1928-29 (1985); *Smith v. Robinson*, 104 S. Ct. 3457, 3471-72 (1984); *Blum v. Stenson*, 465 U.S. 886, 892-96 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433-34 (1983). These decisions address the appropriate amount of an award of attorneys' fees in civil rights cases, in which courts now must calculate fees. However, the 1984 proposal would require courts to calculate fees whenever offers were unreasonably rejected, even in cases not involving statutory attorneys' fees. See 1984 Proposal, *supra* note 5, at 433 (sentence 9). This rule would increase courts already burdensome involvement with fee awards.

211. Because few laymen can evaluate cases and settlement offers, most parties rely largely or exclusively on their lawyers' advice in deciding whether to accept or

recommended the rejection, the heavy sanction of attorneys' fees might lead the offeree to sue his lawyer for malpractice.²¹²

The Advisory Committee responded to critics by insisting that the 1984 proposal was not a fee-shifting rule;²¹³ rather, attorneys' fees would be only one of many factors courts would consider in devising sanctions.²¹⁴ The Committee also implied that critics should not worry about attorneys' fees because courts would not usually impose fees, even when a court found a rejection unreasonable.²¹⁵

This argument is unconvincing and largely ignores problems arising from the mere threat of attorneys' fees.²¹⁶ Lawyers ordinarily advise their clients of the worst possible result.²¹⁷ If a client cannot afford the worst result, he may feel coerced to settle a suit,

reject settlement offers. Yet the 1984 proposal, like the existing rule, allows sanctions only against an offeree, not the attorney. This contradicts the Federal Rules' usual formula that allows sanctions against the party or the attorney or both. *See, e.g.*, FED. R. CIV. P. 11, 26(g), 37(a)(4), 56(g). *But see* FED. R. CIV. P. 30(g) & 37(c) (providing for sanctions only on offending party, not on attorney).

It would seem extremely harsh to require a party to pay personally the opposing party's post-offer attorneys' fees if the rejection was based primarily on a lawyer's advice. A sanction would seem especially unjust if a client desired to accept the offer but rejected it based on his lawyer's recommendation. Although the drafters of rule 68 can partly alleviate this unfairness by allowing sanctions against attorneys as well as parties, attorneys might then become overly cautious and advise clients to accept questionable offers. The root of the problem is that the heavy sanction of attorneys' fees distorts rational decision making.

212. *See, e.g.*, Note, *The Proposed Amendment to Federal Rule of Procedure 68: Toughening the Sanctions*, 70 IOWA L. REV. 237, 260-61 (1984) (suggesting that attorneys could be sued for malpractice not only for advising clients to reject offers in cases that turn out badly, but also for failing to *make* rule 68 offers in cases that turn out well); N.Y.C. Bar Ass'n Comments on 1984 Proposal, *supra* note 92, at 7 (lawyers will be forced to disclose clients' confidences to defend against malpractice claims); NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 32 (rule will inevitably create conflicts between attorneys and clients and enmesh courts in review of settlement advice).

213. *See supra* note 209. The Advisory Committee does not officially respond to specific public comments, but its views can be gleaned from the statements of its members at public hearings and in various internal memoranda.

214. *See San Francisco Hearings on 1984 Proposal, supra* note 19, at 120-22 (exchange between Judge Walter Mansfield and Professor Judith Resnik).

215. *See id.* 100-01, 117 (statement of Judge Mansfield).

216. The Deputy Administrative Assistant to Chief Justice Warren Burger believes that this author's criticisms of the Advisory Committee regarding fee-shifting "do not give [the committee] quite enough credit." Letter from Douglas McFarland to the author (Sept. 4, 1985). However, the Advisory Committee's own internal memoranda on the subject of fee-shifting give no attention to the problems the threat of attorneys' fees pose as a rule 68 sanction. *See, e.g.*, Mansfield & Miller, Background Memorandum, *supra* note 206, at 8, 10-11 (asserting that new standard of unreasonable rejection would protect against any possible abuse of judicial power regarding sanctions, and asserting that the chilling effect of potentially heavy sanctions on impecunious and contingent-fee plaintiffs is "somewhat exaggerated").

217. D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 160 (1977).

even on unfavorable terms.²¹⁸ Thus, attorneys' fees are not fitting as a potential sanction in every case, and should never be imposed for rejections made in good faith.

On the other hand, rule 68 should deter frivolous and bad faith conduct, and compensate the victims of frivolous or bad faith conduct. The sanction of attorneys' fees has long been considered an appropriate penalty for frivolous, bad faith, or otherwise improper conduct. Rule 68 should follow this precedent by authorizing fee-shifting for rejections found to be frivolous, in bad faith, or for any other improper purpose.²¹⁹ The rule would thus notify litigants when a refusal to settle might yield a sanction of fees.²²⁰ At the

218. Burt Neuborne, National Legal Director of the ACLU, put the matter this way:

Given the vulnerability of civil rights clients to even a small award of fees or costs against them, I would be forced to reduce my estimate of an acceptable settlement to reflect the enormous risk my client would run if the offer were rejected. Indeed, once I informed my clients of the risk they ran under the proposed Rule 68, I am absolutely certain that the vast bulk of civil rights plaintiffs would be too frightened to do anything else but accept the offer Whenever a conscientious lawyer for the plaintiff harbors any doubt about a case's outcome — and in the uncertain world of civil rights litigation, that is always — counsel could not, in good faith, risk poor and vulnerable clients by exposing them to personal liability even though counsel believes the settlement offer is unreasonably low.

Statement of Burt Neuborne, Legal Director, American Civil Liberties Union, before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Concerning Proposed Rules 68 and 83 (Jan. 18, 1984), *reprinted in THE NEW AND PROPOSED FEDERAL RULES OF CIVIL PROCEDURE* 169, 171-72 (PLI 1984).

219. The terms "frivolous," "in bad faith," and "improper purpose" are taken from three different sources. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (entitling prevailing defendants to attorneys' fees in federal fee-shifting cases where the plaintiff's claim is "*frivolous, unreasonable, or groundless*," or where the plaintiff continues to litigate after it clearly becomes so) (emphasis added); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258 (1975) (discussing the well-established "bad faith" exception to the American rule on attorneys' fees in non-fee-shifting cases); FED. R. CIV. P. 11 (allowing courts to impose the sanction of attorneys' fees upon a litigant or attorney who files a pleading, motion, or other paper "for any *improper purpose*, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation") (emphasis added). Thus, the standards for shifting fees based on an improper rejection of a settlement offer would involve standards already used for shifting fees in other contexts.

220. Notice of the circumstances in which courts can impose attorneys' fees avoids due process problems. Courts unquestionably have inherent power to assess monetary sanctions, including attorneys' fees, against lawyers and parties who act in bad faith or otherwise "willfully abuse judicial processes," provided that the court first finds that the sanctioned conduct "constituted or was tantamount to bad faith." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). Courts have used the inherent power to impose monetary sanctions in the context of unreasonably late settlements. See *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 566-68 (3d Cir. 1985) (en banc) (courts can impose monetary sanctions on attorney for unjustifiably waiting to settle until day of trial, even though late settlement fell short of contempt and was not prohibited by local rule); *Martinez v. Thrifty Drug and Discount Co.*, 593 F.2d 992, 993-94 (10th Cir. 1979) (local rule allows imposition of jury costs where parties settled on morning of trial).

As with every governmental deprivation of a significant property interest, courts cannot impose sanctions for abusive conduct during settlement without notice and an opportunity to be heard. See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); e.g., *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453-54 (11th Cir. 1985) (upholding procedure used to impose sanctions on attorney who acted in bad faith during discovery); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 570-71 (3d Cir. 1985) (en banc) (reversing sanction for unjustifiably late settlement for lack of notice

same time, the rule would have a minimal chilling effect because the sanction would essentially codify existing judicial powers. Litigants who refuse a settlement offer in bad faith already face the sanction of attorneys' fees under established exceptions to the American rule.²²¹ Lawyers personally may already be charged attorneys' fees if their recommendations not to settle unreasonably and vexatiously multiply proceedings.²²² Under rule 11, courts can assess attorneys' fees against lawyers and parties who reject offers in writing frivolously or for any improper purpose.²²³ Courts can

and opportunity to be heard); *Miranda v. Southern Pac. Transp. Co.*, 710 F.2d 516, 522-23 (9th Cir. 1983) (remanding to allow attorneys an opportunity to request a hearing and show cause why the court should not impose sanctions for deficient pre-trial submissions); see also *supra* note 202 (discussing case law placing procedural protections upon imposition of sanctions against attorneys).

The notice requirement is twofold: attorneys should be notified when they have engaged in conduct that might be sanctioned, and attorneys should be forewarned that certain types of conduct may be sanctioned. As the Supreme Court stated in *Link v. Wabash R.R.*, 370 U.S. 626, 632 (1962):

The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.

Based on this principle, the Third Circuit has cautioned:

[F]undamental fairness may require some measure of prior notice to an attorney that the conduct that he or she contemplates undertaking is subject to discipline or sanction by a court. Consequently, the absence, for example, of a statute, *Federal Rule*, ethical canon, local rule or custom, court order, or . . . court admonition, proscribing the act for which a sanction is imposed in a given case may raise questions as to the sanction's validity in a particular case.

Eash, 757 F.2d at 571 (emphasis added).

Questions as to the validity of rule 68 sanctions can thus be avoided if rule 68 provides adequate notice by expressly stating that courts may impose attorneys' fees and other monetary sanctions on parties or lawyers who reject rule 68 offers frivolously, in bad faith, or for an improper purpose. Cf. *FED. R. CIV. P.* 26(g)(2) (authorizing sanction of attorneys' fees if a discovery request or response is filed "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); *id.* 56(g) (authorizing sanction of attorneys' fees if affidavits are presented "in bad faith or solely for the purpose of delay"). See generally Note, *Financial Penalties Imposed Directly Against Attorneys in Litigation Without Resort to the Contempt Power*, 26 UCLA L. REV. 855, 882-91 (1979) (arguing that alternatives to notice and hearing may be possible but concluding that policy strongly mandates that such due process should be afforded).

221. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-60 (1975).

222. See 28 U.S.C. § 1927 (1982). In recent years, courts have frequently awarded fees against counsel pursuant to section 1927. See, e.g., *Malhot v. Southern Cal. Retail Clerks Union*, 735 F.2d 1133, 1138 (9th Cir. 1984) (sanctioning attorneys whose briefs misrepresented the record and intentionally misstated the law); *Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291-92 (5th Cir. 1983) (sanctioning lawyers for bringing frivolous employment discrimination suits that multiplied needless proceedings); *Gordon v. Hymann*, 715 F.2d 531, 539 (11th Cir. 1983) (sanctioning lawyers for filing 23 cases based on same transactions). Section 1927 would certainly appear broad enough to cover abuses of the settlement process.

223. See *FED. R. CIV. P.* 11. If a paper is signed in violation of rule 11, the court must impose an "appropriate sanction" upon the attorney, his client, or both. Appropriate sanctions "may include an order to pay to the other party or parties the amount

also invoke their inherent powers to sanction many other abuses of the settlement process.²²⁴

In short, although there is no need to threaten every rejection with a heavy rule 68 sanction, the sanction of attorneys' fees is an appropriate remedy to deter glaring abuses of the settlement process.²²⁵ Indeed, even the staunchest opponents of the 1984 proposal have not opposed the sanction of attorneys' fees to punish settlement rejections that are frivolous, vexatious, or in bad faith.²²⁶

On balance, the arguments against using attorneys' fees to sanction a merely unreasonable rejection of a settlement offer are persuasive. Aside from the possibility that a sanction of attorneys' fees for a good faith rejection would violate the Rules Enabling Act or the Constitution,²²⁷ the threat of attorneys' fees would un-

of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." *Id.* Rule 11, which has expressly provided for the sanction of an opposing attorneys' fee only since August 1, 1983, is frequently invoked. *See, e.g., Eastway Constr. Corp. v. City of N.Y.*, 762 F.2d 243, 254-55 (2d Cir. 1985) (imposing appropriate sanctions on parties and attorneys who filed antitrust complaint that was "destined to fail"); *Steele v. Morris*, 608 F. Supp. 274, 277 (S.D.W. Va. 1985) (ordering defendant to pay plaintiff's reasonable attorneys' fees for opposing defendant's frivolous motion to dismiss); *Dore v. Schultz*, 582 F. Supp. 154, 158 (S.D.N.Y. 1984) (imposing sanction for frivolous action under Federal Tort Claims Act).

224. *See, e.g., Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 565-70 (3d Cir. 1985) (en banc) (upholding inherent power of court to sanction attorney who settles at "an unjustifiably late date," provided the sanction comports with due process); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263, 1270 (7th Cir. 1983) (affirming inherent power of court to assess fees against lawyers for resisting a motion in bad faith); *Rubin v. Long Island Lighting Co.*, 576 F. Supp. 608, 616 (E.D.N.Y. 1984) (asserting court's inherent power to assess defendant's fees jointly against plaintiff and his lawyer for filing a frivolous action).

225. *Cf. N.Y.C. Bar Ass'n Comments on 1984 Proposal*, *supra* note 92, at 10 (discussing "bad faith" exception to American rule). The argument that existing rules may be adequate to curb unnecessary litigation has apparently given the Advisory Committee pause. *See supra* note 142.

226. *See NAACP Fund Comments on the 1984 Proposal*, *supra* note 92, at 20-23.

227. Several commentators on the use of attorneys' fees as sanctions under rule 68 have focused primarily on the Rules Enabling Act. *See supra* note 206 and accompanying text; *see, e.g., Note, The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 829-35 (1985); *Note, The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719, 733-43 (1984). The Rules Enabling Act question, as well as the concomitant constitutional question about a federal rule's power to shift fees absent a fee-shifting statute, are important questions. Promulgating a new rule that might violate the Rules Enabling Act and the Constitution would inhibit the effectiveness of the rule while its validity was in question, would generate extensive litigation over the validity of the rule, *cf. Marek v Chesny*, 105 S. Ct. 3012, 3015, 3018 (1985) (resolving question of whether existing rule 68 violates Rules Enabling Act), and would intensify ongoing attacks on the rulemaking powers of the Supreme Court, *see generally Rules Enabling Act: Hearings on Oversight and H.R. 4144 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 98th Cong., 1st & 2d Sess. (1983-1984) (considering revisions of the Rules Enabling Act that would remove the Supreme Court from the rulemaking chain); W. BROWN, *FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES* 35-102 (Fed. Jud. Center 1981) (criticizing the existing rulemaking process and proposing changes); Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1064-85 (1982) (discussing various problems of rulemaking power not noted by original Advisory Committee); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV.

questionably undermine the policy of federal fee-shifting statutes, undercut the contingency-fee system, lead to extensive collateral litigation, and give courts excessive power to coerce or punish litigants. Thus, if the drafters of rule 68 include attorneys' fees as a potential sanction, the sanction should be expressly reserved for rejections that are made frivolously, in bad faith, or for an improper purpose.

3. *The Interest That Offerees Could Have Earned on the Amount That a Claimant Offered to Accept*

The 1984 proposal empowered claimants to make rule 68 offers, but the drafters apparently believed defendants might refuse such offers if a rejection would allow them to earn interest on their money through trial.²²⁸ The 1984 proposal therefore specified that a defendant who unreasonably rejected a rule 68 offer would have to pay the plaintiff interest on the amount the plaintiff had offered to accept.²²⁹ This sanction is superficially appealing because it counters the historical tendency of defendants to delay settlement in order to earn interest. On closer analysis, however, the sanction of prejudgment interest is unnecessary, unwise, and unfair.

Ordinarily, a defendant's primary motivation for accepting a

673, 675-77 (1975) (criticizing Supreme Court for acting as a "mere conduit" for rules written by Advisory Committees).

However, it is a serious mistake to overemphasize the Rules Enabling Act when analyzing sanctions involving attorneys' fees. First, even if a rule 68 sanction of attorneys' fees would not violate the Rules Enabling Act, there are persuasive policy reasons not to include attorneys' fees as a potential rule 68 sanction. These policy reasons should be the focus of the opposition. Moreover, the Advisory Committee has thus far been relatively unresponsive to arguments that the potential sanction of attorneys' fees would violate the Rules Enabling Act, *see* Mansfield & Miller, Background Memorandum, *supra* note 206, at 4, and the Supreme Court is unlikely to hold that rule 68 violates the Rules Enabling Act if the Court and Congress approve the rule, *see* Hanna v. Plumer, 380 U.S. 460, 472 (1965). Finally, Congress could solve the Rules Enabling Act problem by enacting a fee-shifting version of rule 68 regardless of the Supreme Court's action. Indeed, as recently as 1983, Congress reacted to criticisms of a proposed Federal Rule of Civil Procedure by enacting its own amendments to the rule. *See* Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527, 2527-30 (1983) (amending FED. R. CIV. P. 4). Thus, the policy arguments, rather than the Rules Enabling Act arguments, should be the focus of any extended analysis.

228. *See* 1984 Proposal, *supra* note 5, advisory committee note at 434. For a lively debate on whether prejudgment interest affects settlement behavior, *see* Londrigan & Smith, *Prejudgment Interest: Is There Profit in Court Delay?*, 23 JUDGES' J., Fall 1984, at 12.

229. To determine rule 68 sanctions, the proposal required the court to account for "the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment . . ." 1984 Proposal, *supra* note 5, at 433 (sentence 9); *see also id.*, advisory committee note, at 434 (rule 68 should be amended to prevent defendants from delaying offers to settle in order to collect interest on retained funds).

plaintiff's settlement offer is to avoid a larger judgment at trial.²³⁰ If the defendant can earn enough interest on the proposed settlement amount to cover the higher judgment and the expenses of going to trial, however, the defendant may reject the plaintiff's offer. The defendant's position is perfectly rational.²³¹ If the case goes to trial and the plaintiff's judgment exceeds his settlement offer by less than the amount of interest the defendant earned on the money retained after rejecting the plaintiff's offer, then the plaintiff's offer did not sufficiently discount the case to present value at the time the offer was made.²³² In other words, the plaintiff could have demanded less money and, with interest, accumulated a larger sum of money than the judgment achieved at trial. Because the plaintiff is at fault in that situation for failing to discount sufficiently (i.e., for demanding too much), a sanction of pre-judgment interest against the defendant would be unjustified.²³³

230. See Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63-69 (1982) (defendant generally will settle only if the judgment is expected to exceed the amount of the settlement by more than the defendant's projected litigation expenses if he refuses to settle). If the damages at stake are extremely large, the defendant has a much greater interest in avoiding a larger judgment at trial than in avoiding continued litigation expenses.

231. One might also consider awarding prejudgment interest to a plaintiff if a plaintiff recovers more than the defendant has offered to pay in settlement under rule 68. For example, if a defendant offers to pay only \$1,000 and the plaintiff wins \$10,000 at trial, one might argue that the plaintiff deserves interest on the \$9,000 difference because the defendant had use of that money before trial. However, because the plaintiff cannot make offers under the existing rule and the existing rule does not sanction bad faith offers or unreasonably low offers, awarding prejudgment interest to plaintiffs who receive a judgment greater than the amount offered would give defendants an incentive to extend higher offers as well as to speed up the litigation after rejection in order to avoid accruing an interest penalty. On the other hand, a prejudgment interest penalty on low offers might discourage defendants from using rule 68, especially where the downside risk of prejudgment interest was expected to exceed the upside potential of winning post-offer costs. Even where defendants did make offers, plaintiffs might be inclined to reject them in order to earn potential prejudgment interest. In such cases, the sanction would be counterproductive.

Moreover, if plaintiffs are allowed to make offers — as they are under the 1984 proposal — then prejudgment interest is an unnecessary penalty. Plaintiffs who make rule 68 offers that turn out to be less than the amount at the judgment will receive a higher judgment as well as other possible rule 68 sanctions to make up for lost interest. Therefore, this section does not discuss prejudgment interest in the context of the difference between a *defendant's* offer and a plaintiff's judgment; it discusses prejudgment interest in instances where a *plaintiff's* offer is less than the amount of the final judgment.

232. For example, suppose the defendant rejected plaintiff's offer to settle for \$100,000 and the plaintiff went on to win \$105,000 one year later at trial. Assuming prevailing interest rates of 10% during the year after the defendant rejected plaintiff's settlement offer, the \$105,000 verdict was worth only about \$95,500 when the settlement offer was rejected, and the plaintiff demanded too much by asking for \$100,000. If the plaintiff anticipated a verdict of \$105,000, he should have offered to settle a year before trial for only \$95,500. (For convenience, this example has ignored attorneys' fees.) For approaches to using present value to evaluate cases for settlement, see Greenberg, *The Lawyer's Use of Quantitative Analysis in Settlement Negotiations*, 38 BUS. LAW. 1557, 1574-85 (1983); Tersine & Johnston, *The Mathematical Evaluation of Trial Versus Settlement*, 1972 INS. L.J. 381 *passim*.

233. Continuing the preceding example, *supra* note 232, the defendant could gain by losing \$105,000 at trial after rejecting plaintiff's offer to settle for \$100,000 a year before trial, if the defendant could earn more than five percent annually on his money. The defendant thus acted reasonably, and sanctioning the defendant simply

On the other hand, if the plaintiff's judgment exceeds his settlement offer by more than the amount of interest the defendant earned on the proposed settlement amount, then the plaintiff is actually better off than he would have been if the defendant had accepted the offer. Conversely, the defendant is penalized both by the high judgment and by rule 68 sanctions.²³⁴ Consequently, an award of prejudgment interest in this situation is unnecessary either to compensate the plaintiff or to penalize the defendant. Moreover, it would be unjust to award a plaintiff interest for extensions of the prejudgment period caused by the dilatoriness of the plaintiff or the court.²³⁵

because the plaintiff's jury verdict was more favorable than the over-valued settlement offer would be a windfall to the plaintiff. The windfall should not be enhanced by awarding prejudgment interest.

Similarly, if the defendant had offered to settle for \$100,000 and the plaintiff, having rejected the offer, won \$105,000 at trial a year later, the plaintiff was probably unreasonable in rejecting the defendant's \$100,000 offer: the plaintiff could have accumulated \$110,000 by the time of trial (at 10% interest) if he had accepted the offer.

These examples, however, ignore significant factors affecting the valuation of settlements, including the difficulty of apportioning responsibility for delay, the complexity of calculating prevailing interest rates (especially if they fluctuate over the relevant period), and the tax consequences of earning interest (which is usually taxable) versus paying out a specified sum immediately by accepting a rule 68 offer (which may be immediately deductible). In short, factoring interest into determining the reasonableness of a rejection is no simple matter. For a discussion of the relationship between interest accrual and distortion of income, see Cliff & Levine, *Interest Accrual and the Time Value of Money*, 34 AM. U.L. REV. 107, 111-23 (1984).

Nevertheless, the court should consider prejudgment interest when deciding whether to relieve the defendant of sanctions even though the plaintiff's judgment was more favorable than the rejected offer. The calculation of prejudgment interest would not have to be precise, and the defendant would have the burden of making the calculation, which the court would consider together with the other factors in deciding whether to reduce or eliminate sanctions. Because the court would not need to develop a precise dollar figure to determine whether the defendant's rejection was justified, taking prejudgment interest into account would not significantly complicate collateral litigation over sanctions.

234. For example, if the defendant rejected the plaintiff's offer to accept \$100,000 and the plaintiff won \$200,000 two years later, the defendant would be far worse off than if he had accepted the \$100,000 offer, even though the defendant has invested the \$100,000 for the two years following the rejection. The defendant would have accepted the plaintiff's offer of a \$100,000 settlement if he had expected a jury verdict of \$200,000 in plaintiff's favor only two years later. Consequently, prejudgment interest is likely to have only a marginal effect on the rate and timing of settlements. In this author's view, the marginal benefits are not worth the cost.

Moreover, the sanction of prejudgment interest would be a "one-way street"; only plaintiffs would be eligible to receive prejudgment interest as a rule 68 sanction. Because one of the basic goals of amending rule 68 is to make the rule more equitable, it is difficult to justify any sanction that would favor only plaintiffs.

235. Courts are frequently forced to delay one trial because another lasts much longer than anticipated. Cf. *SCM Corp. v. Xerox Corp.*, 77 F.R.D. 10, 13 (D. Conn. 1977) (setting rules limiting the length of each side's case after fourteen weeks of protracted testimony in a case originally estimated to last six to eight months). Also, criminal matters often take precedence over the civil docket. See Speedy Trial Act, 18 U.S.C. § 3161(a) (1982) (giving precedence to criminal cases by placing them on a weekly or short-term calendar). Further, courts commonly grant continuances at the

4. *The Burden of the Sanction on the Offeree*

The 1984 proposal required courts to consider the burden of the sanction on the offeree.²³⁶ This was a major advance over the existing rule because it empowered courts to reduce sanctions on parties with meager financial resources.²³⁷

Unfortunately, the largesse of the 1984 proposal was not limited to the impoverished. The literal language of the 1984 proposal allowed everyone — including substantial corporations and wealthy individuals — to invoke the “burden” factor as a basis for reducing sanctions.²³⁸ Moreover, the language required courts to consider not only whether the burden on an offeree would be too heavy, but also whether the burden would be too *light*.²³⁹ This consideration might contribute substantially to the problem of collateral litigation by requiring courts to conduct long hearings about an offeree’s income, net worth, cash flow, and other complex financial questions.²⁴⁰

Nevertheless, to ensure just sanctions in each case, courts need discretion to reduce sanctions that would bankrupt an offeree.

request of parties who are unprepared for trial. One might plausibly argue that a defendant who reasonably rejects a rule 68 offer should pay any interest the plaintiff loses due to delays beyond the control of the parties, but there is no justification for penalizing the defendant due to delays caused by or even requested by the plaintiff. Accordingly, if prejudgment interest were a sanction, defendants would routinely argue that the plaintiff or the court caused the delays. Thus the court would need to review the conduct of the litigation after the offer, as well as the progress of the rest of the court’s docket, to determine the sources of the delay. If the court had inherited the matter from some other judge, as happens when judges die or are disqualified or when new judges are appointed, the analysis would be even more complex. This judicial burden would more than likely offset gains in any cases where defendants did settle earlier than usual to avoid the sanction of prejudgment interest.

236. 1984 Proposal, *supra* note 5, at 433 (sentence 9).

237. Civil rights plaintiffs, who generally are poor, would be particularly vulnerable to nondiscretionary sanctions. See, e.g., *District of Columbia Hearings on 1984 Proposal*, *supra* note 19, at 140 (summary by Richard Larson on behalf of the ACLU of objections to the proposed amendment).

238. Neither the 1984 proposal, *supra* note 5, nor its advisory committee note, refer to poor people or civil rights plaintiffs, or otherwise delimit the purpose or use of the “burden” factor.

239. The proposed rule does not limit a court’s power to increase rather than reduce a tentative rule 68 sanction, and the advisory committee note clearly leaves room for the court to increase a light sanction. The committee note states:

The new rule also provides that in determining the amount of any sanction, the court must take into account a number of additional factors that have been set out in the third paragraph of the rule to make certain that the award is neither excessive *nor insufficient*. The judge should make certain that the amount awarded is *in proportion* to the needs of the case.

1984 Proposal, *supra* note 5, advisory committee note at 435 (emphasis added).

240. See NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 32. Much of the evidence needed to determine the burden on the offeree would be that which courts consider — and about which litigants conduct extensive discovery — in deciding whether to impose punitive damages. See generally Stahlhuth, *Evidence of Defendant’s Financial Status in Punitive Damage Cases*, 41 J. MO. BAR, Jan.-Feb. 1985, at 5 (listing factors and documents that may be relevant in determining defendant’s ability to pay punitive damages); Woodbury, *Limiting Discovery of a Defendant’s Wealth When Punitive Damages Are Alleged*, 23 DUQ. L. REV. 349 (1985) (criticizing the shortcomings of current practices such as unfettered disclosure, individually tailored protective orders, and nondisclosure until the jury decides the merits of the punitive damage claim).

The rule should therefore allow courts to consider the burden on the offeree before imposing sanctions. But to forestall excessive collateral litigation, courts should be permitted to consider the burden on the offeree only to reduce sanctions that are too heavy, not to increase sanctions that are too light.

D. Exclusions and Exemptions

Using identical language, the Advisory Committee excluded class actions and derivative actions from both the 1983 and 1984 proposals.²⁴¹ The principal purposes of the blanket exclusion were to avoid conflicts of interest between the named class representatives and the remaining class members and to avoid exposing the class representative to potentially heavy liability for sanctions that could not be recouped from unnamed class members.²⁴² The Committee was also concerned about a conflict between rule 68 and the requirement of court approval before any settlement could become final in a class action.²⁴³

Critics of the proposed rule questioned the Committee's rationales on six grounds. First, the Committee did not exclude other situations in which settlements require court approval.²⁴⁴ Second, the rule could easily exempt from the operation of the rule any offer of settlement accepted by a party but disapproved by the court.²⁴⁵ Third, the rationale of protecting named class representatives against rule 68 sanctions does not explain why class representatives could not themselves make rule 68 offers as long as defendants in class and derivative suits were barred from making counteroffers.²⁴⁶ Fourth, excluding class actions would raise problems if a class was certified while a rule 68 offer was pending or after it was rejected.²⁴⁷ Fifth, the Federal Rules apply other

241. 1984 Proposal, *supra* note 5, at 433 (sentence 10); 1983 Proposal, *supra* note 4, at 363 (sentence 11).

242. 1984 Proposal, *supra* note 5, advisory committee note at 436 (citing *Gay v. Waiters & Dairy Lunchmen's Union*, 86 F.R.D. 500, 502 (N.D. Cal. 1980)).

243. 1984 Proposal, *supra* note 5, advisory committee note at 436. The concern about court approval focused primarily upon court workload and delay of cases. See

sanctions to class actions,²⁴⁸ and the Advisory Committee advanced no logical reason for distinguishing rule 68.²⁴⁹ Finally, excluding class actions might encourage litigants to style otherwise ordinary suits as class actions.²⁵⁰

These challenges to the Advisory Committee's rationales for excluding class actions and derivative suits have considerable logical force. Therefore, so long as the next proposal does not include attorneys' fees as a sanction, class actions and derivative suits do not deserve a blanket exclusion from rule 68.²⁵¹ Rather, the rule should empower courts to exclude cases, including class actions

granted, the rule should thereafter prohibit settlement offers and void all pending and previous offers and rejections. If class certification is denied, the rule should permit offers to be made after the denial.

248. See FED. R. CIV. P. 11, 26, 37.

249. The Advisory Committee's rationales for excluding class actions from rule 68 — to avoid potentially heavy liability on named representatives and a possible conflict between the named representatives and unnamed class members — seem applicable to other sanctions imposed by the Federal Rules of Civil Procedure. *E.g.*, FED. R. CIV. P. 37 (authorizing potentially heavy sanctions for failing to make or comply with discovery requests); *cf. Toronto Discovery Trek Leads to Record-Setting Sanctions*, Legal Times, May 6, 1985, at 1, col. 3 (reporting sanctions in excess of \$200,000 pursuant to CAL. CIV. PROC. CODE § 2034 (Deering Supp. 1985) (a provision similar to federal rule 37)). Conflicts between named and unnamed class members can arise in settlement negotiations apart from rule 68; conflicts can also arise in deciding whether to produce documents. *Cf. Varon, supra* note 158, at 838 (concluding that every step in litigation raises the conflict that class representatives must make decisions that could result in assessment of costs). Thus, it seems difficult to justify the Committee's disparate treatment of parties under rule 68. The most logical explanation is that rule 68 sanctions would be much heavier under the 1984 proposal than would sanctions under other rules.

250. Macklin, Outline of Issues, 1984 Advisory Committee Proposal to Amend Rule 68 at 18 (Dec. 1984). This problem seems rather remote. Pursuant to FED. R. CIV. P. 11, a motion for class certification must be made in good faith. It is doubtful that a plaintiff would risk immediate sanctions under rule 11 simply to avoid remote and speculative sanctions under rule 68. Moreover, because the 1984 proposal allows plaintiffs to make rule 68 offers, plaintiffs who file a questionable class action would deny themselves, as well as defendants, the opportunity to make rule 68 offers. The costs of circumventing rule 68 via class action suits are likely to discourage plaintiffs from filing otherwise ordinary suits as class actions simply to avoid rule 68.

251. On the other hand, if attorneys' fees do remain a potential sanction under rule 68, there is an overriding reason to exclude class actions and derivative suits from the operation of rule 68. Changing rule 68 into a fee-shifting proposal is essentially an economic experiment. Although proponents and critics of the proposed amendments have theorized about the effects of stronger rule 68 sanctions, those effects remain uncertain. See generally J. SHAPARD, THE INFLUENCE OF RULES RESPECTING RECOVERY OF ATTORNEYS' FEES ON SETTLEMENT OF CIVIL CASES (Fed. Jud. Center 1984) (studying the influence of different attorneys' fees rules on financial incentives in determining whether to settle or sue); Rowe, *Predicting the Effects of Attorney Fee-Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 139 (discussing the apparent uncertainties and available alternatives). Before initiating a fee-shifting experiment in the exceedingly complex world of class actions and derivative suits, the proposed changes ought to be tested in the simpler realm of ordinary litigation.

Indeed, if the next proposal to amend rule 68 includes attorneys' fees as a potential sanction, counts of a complaint governed by a federal fee-shifting statute should also be excluded from the scope of the rule. Approximately 130 federal statutes authorize courts to award reasonable attorneys' fees to prevailing parties. See 8 ATT'Y FEE AWARDS REP. 2-3 (June 1985) (listing statutes). These fee-shifting statutes include provisions in the civil rights laws, *e.g.*, Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), environmental laws, *e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g)(4) (1982), copyright laws, *e.g.*, Copyright Act, 17 U.S.C. § 505 (1982),

and derivative suits, on a case-by-case basis when the application of rule 68 would be inappropriate.

IV. *Developing an Alternative Approach*

The problematic 1984 proposal appears unsatisfactory. A better version of rule 68 can be developed. This section explores some of the alternatives.

A. *Procedures*

Nearly everyone agrees that the existing procedures under rule 68 should be changed, and few criticized the procedures proposed in 1984. If the drafters shorten the offeree's response period to thirty days,²⁵² allow offers to be made until forty-five days before trial,²⁵³ and give courts flexibility to adjust time limits,²⁵⁴ the 1984 approach would be excellent.

B. *The Standard for Triggering Sanctions*

The standard for triggering sanctions should be as objective as possible. The most objective standard is the mathematical standard used by the existing rule: Is the judgment finally obtained

and other laws of unquestioned public interest. Several arguments support the exclusion of counts brought under any of these fee-shifting statutes.

First, excluding fee-shifting counts from the scope of the next proposal to amend rule 68 would largely negate opposition by the civil rights bar.

Further, whether one agrees that the 1984 proposal would violate the Rules Enabling Act, *see supra* notes 71-73, a court is certainly less likely to hold rule 68 invalid if the amendment excludes fee-shifting counts.

Additionally, because the 1984 approach would signal a major change in the federal litigation process, it would be appropriate to try this experiment on a smaller scale before applying it generally. If the experiment is successful in non-fee-shifting cases, the rule could be amended to encompass fee-shifting cases.

Excluding fee-shifting counts also would eliminate the need to resolve some difficult philosophical issues and statutory construction problems. In particular, it is unclear whether any rule that could shift attorneys' fees would be equally fair to both plaintiffs and defendants in civil rights cases. If a defendant unreasonably rejected a civil rights plaintiff's rule 68 offer and ultimately prevailed, should the plaintiff receive full rule 68 sanctions on top of his statutory fee award? If so, rule 68 would appear to give a windfall to plaintiffs. Or would rule 68 sanctions add little or nothing to a prevailing plaintiff's fee award — in which case only defendants would derive any benefit from rule 68? For a brief discussion of these issues, *see supra* note 208 and accompanying text.

Finally, even if the new rule 68 excluded fee-shifting counts, the rule would apply to other counts in those cases. Thus, excluding fee-shifting counts from the scope of the proposed amendments would not totally destroy rule 68's effectiveness for moving the parties toward settlement in cases containing fee-shifting counts. The benefits of excluding fee-shifting counts would outweigh the costs of limiting the scope of rule 68.

252. *See supra* text accompanying notes 163-66.

253. *See supra* text accompanying notes 167-70.

254. *See supra* text accompanying notes 151-54 & 170.

more favorable to the offeree than the rejected offer?²⁵⁵ Although this standard lacks mathematical precision when the plaintiff obtains injunctive relief, it is at least more precise than the 1984 proposal's inquiry into the reasonableness of a rejection.²⁵⁶

As long as the rule grants the court discretion to modify sanctions to prevent unjust results, there is no need to introduce discretion into the standard that triggers the sanction. The drafters should therefore return to the standard of the existing rule.

C. Sanctions

The choice of sanctions is the most difficult and significant problem in amending rule 68. The sanctions must be sufficiently severe and certain to encourage offers and acceptances, yet sufficiently moderate and flexible so that they do not discourage meritorious litigation or unjustly penalize those who are sanctioned.²⁵⁷ In addition, the severity and flexibility of the sanctions should reflect the good faith or bad faith of the parties.

1. Sanctions for Rejections Made in Good Faith

Rule 68 must incorporate a workable normative sanction for a good faith rejection of an offer that was more favorable to the offeree than the final judgment. Because the sanction of attorneys' fees is unacceptably heavy and the sanction of taxable costs is usually too light,²⁵⁸ the challenge is to define an acceptable intermediate choice. The three most plausible choices are:²⁵⁹ (1) all of the

255. FED. R. CIV. P. 68 (sentence 4).

256. See 1984 Proposal, *supra* note 5, at 433 (sentence 8).

257. See *supra* text accompanying note 145.

258. See *supra* text accompanying notes 20 & 206-24.

259. There are also some implausible choices. Prejudgment interest on the amount the plaintiff offered to accept in settlement is an unnecessary, potentially unjust, and therefore inappropriate sanction. See *supra* text accompanying notes 228-35.

A standard flat amount, such as \$5,000 in every case, is implausible because no single flat amount is appropriate for all cases. Any flat amount large enough to serve as a significant incentive to settlement in a large case would chill litigation of smaller cases.

A flat dollar sanction per trial day (e.g., \$1,000 per day) is a possible variant, because a per diem sanction would tend to relate the size of the sanction to the complexity of the case and to the costs incurred in trying the case. But a per diem formula might encourage dilatory tactics by a confident offeror or cause an apprehensive offeree to put on his case too hastily.

Another implausible sanction would be attorneys' fees subject to a specific dollar limit. Some states' offer-of-judgment statutes have used this formula. See, e.g., CONN. GEN. STAT. § 52-195 (1983) (\$350 maximum for attorneys' fees); N.J. CIV. PRAC. R. 4:58-2 (\$750 maximum for attorneys' fees). At least one commentator has suggested this possibility for rule 68 of the Federal Rules. See Note, *supra* note 212, at 267. The author of the Note argued that setting an upper limit on liability for attorneys' fees permits a sanction for the "unreasonable refusal to settle without threatening a litigant with financial ruin." *Id.* (footnote omitted). However, as the commentator admitted, "the effect of 'too low' an upper limit on the amount of attorney's fees to be shifted, however, may render rule 68 inconsequential in litigation and thus eviscerate the goals of promoting early settlement and avoiding protracted litigation." *Id.* at n.263.

The author of the Note could also have noted that if the limit on attorney's fees is "too high," it would chill meritorious litigation — exactly the problem supposedly

offeror's post-offer expenses except attorneys' fees;²⁶⁰ (2) a percentage of the difference between the amount of the judgment and the amount of the rejected offer;²⁶¹ or (3) a multiple of the offeror's post-offer taxable costs, excluding attorneys' fees.

a. The Offeror's Post-Offer Expenses

The most tempting choice is to add post-offer expenses to the existing sanction of taxable costs, because expenses are generally much greater than taxable costs²⁶² but much smaller than attor-

avoided by capping the sanction. Because no single figure fits all cases, a limit on attorneys' fees is a bad idea. Those who fall within the limit would pay all their opponent's attorneys' fees; those who exceed the limit — especially if they exceed it by a great deal — might find rule 68 an inconsequential incentive to settlement. Like a regressive tax, litigants sanctioned under rule 68 in small cases would be assessed 100% of their opponents' fees, whereas litigants in huge cases that took up enormous amounts of court time might be sanctioned only a trifling percentage of their opponents' fees. The limit simply cannot have any direct relationship to the size of the litigation.

260. For purposes of this Article, expenses include both taxable costs (*i.e.*, expenses falling within the statutory definition of costs found in 28 U.S.C. § 1920) and all other reasonable expenditures (such as travel and telephone calls) related to the litigation. In this Article, expenses do not include attorneys' fees.

261. There are other theoretical bases for a percentage-based sanction, but none would work in practice. A percentage of the final judgment is unsatisfactory because many final judgments will be zero, resulting in a zero sanction. Also, a plaintiff would be sanctioned less as the amount of his final judgment declined — the opposite of what is needed to encourage settlement.

The amount of the rejected offer is similarly unsatisfactory as a sanction base. The formula for sanctions should accomplish two objectives: it should encourage defendants to make high offers and encourage plaintiffs to make low demands, because these actions are most likely to yield settlements. Using the amount of the offer as a sanctions base would encourage defendants to make high offers, because high offers (if rejected) produce high sanctions. But it would not encourage plaintiffs to make low demands because low demands (if rejected) would produce lower sanctions.

The difference between each party's final rule 68 offer is also an unsatisfactory base measure; that measure would penalize parties who tried to close the gap by making additional offers. In any event, percentage formulas of any kind do not encourage timely offers and are impractical to apply in cases involving non-monetary relief.

262. To get a grasp on the comparison between the costs and expenses, this author studied 50 cases in which costs were awarded and 50 cases in which expenses were awarded during the 10 years between 1976 and 1985. Expense awards dwarfed cost awards in every category of comparison. The median award of costs was \$2,682.09; the median award of expenses was \$4,704.75. The average award of costs was \$7,514.46; the average award of expenses in 50 cases was \$30,151.86 — about four times as great. Exactly 40% of the awards for expenses exceeded \$10,000 (20 of 50 cases), whereas only 12% of the awards for costs (6 of 50) exceeded \$10,000. Four of the expense awards exceeded \$100,000; none of the costs awards was over \$100,000. The highest award for expenses was a frightening \$343,467.48; the highest award for costs was \$92,497.17 [study on file at the *George Washington Law Review*].

Some representative cases awarding expenses are: *Thornberry v. Delta Air Lines*, 676 F.2d 1240, 1242, 1244-45 (9th Cir. 1982) (affirming award of \$90,571.92 for out-of-pocket expenses, including consulting fees and witness fees), *vacated*, 461 U.S. 952 (1983); *Gates v. Collier*, 616 F.2d 1268, 1279 (5th Cir. 1980) (affirming award of \$10,986.05 for out-of-pocket expenses); *Greenspan v. Automobile Club of Mich.*, 536 F. Supp. 411, 414-20 (E.D. Mich. 1982) (awarding \$343,467.48 in litigation expenses

neys' fees.²⁶³ The sanction of post-offer expenses also seems fair because it reimburses the offeror for nearly all out-of-pocket payments (except attorneys' fees) made necessary by the failure to settle.²⁶⁴

However, expenses have a fatal disadvantage: they are neither defined by statute nor calculated according to a standard formula.²⁶⁵ Courts would therefore have to review every case in an ad hoc manner to identify and quantify reimbursable expenses. Moreover, expenses tend to be extremely detailed, including itemized accounts for such items as travel, lodging, and meals.²⁶⁶ The indefiniteness and detail would engender frequent collateral litigation requiring courts to spend many hours determining which expenses were reasonable. Finally, expenses would favor defendants over plaintiffs, since defense lawyers as a rule can afford to spend more on litigation and tend to incur higher expenses for travel, meals, and lodging than do plaintiffs' lawyers.²⁶⁷

other than legal fees, including \$84,477.73 for consulting fees and \$36,610.94 for data processing); *Mader v. Crowell*, 506 F. Supp. 484, 488 (M.D. Tenn. 1981) (awarding \$4,704.75 for documented expenses, including long distance telephone charges). The awards of statutory attorneys' fees to prevailing parties were pursuant to various fee-shifting statutes, principally 42 U.S.C. § 1988 (1982).

263. Because many attorneys' billing rates for a single hour (in the vicinity of \$100) often exceed the cost of a hotel room and meals for an entire day, expenses as defined in this Article are virtually always much smaller than attorneys' fees. See *supra* note 260. Commentators have suggested awarding expenses as the best compromise between taxable costs and attorneys' fees. See Varon, *supra* note 158, at 846 & n.281; see also Note, *supra* note 212, at 266 (advocating awarding court fees, rather than expenses generally).

264. Some statutes and courts have defined expenses to include reasonable attorneys' fees, but in this Article "expenses" specifically excludes attorneys' fees.

265. Costs are statutorily defined in 28 U.S.C. § 1920 (1982). Expenses, however, are not defined by statute, and the term has been given meaning primarily by case law and custom. See, e.g., *Dowdell v. City of Apopka*, 698 F.2d 1181, 1191-92 (11th Cir. 1983) (allowing as costs all reasonable expenses incurred in case preparation, except routine office overhead, and including reasonable travel, telephone, and postage charges); *Alexander v. National Farmers Org.*, 696 F.2d 1210, 1212 (8th Cir. 1982) (expenses include attorneys' airfares, meals, lodging, telephone bills, and use of courier mail services), *cert. denied*, 461 U.S. 937, 938-39 (1983); *Copper Liquor, Inc. v. Adolf Coors Co.*, 684 F.2d 1087, 1100 (5th Cir. 1982) ("all the ordinary and reasonable expenses of litigation" should be allowed in antitrust suit); *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979) (allowing, incident to award of statutory attorneys' fees, all "reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client," including reasonable charges for photocopying, paralegals, travel, and telephone calls), *cert. denied*, 447 U.S. 911 (1980).

266. See, e.g., *Northcross v. Board of Educ.*, 611 F.2d 624, 639 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 623-24 (4th Cir. 1978) (litigation expenses include secretarial costs, copying, telephone charges, and costs for necessary travel); *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931, 934 (N.D. Ill. 1983) (limiting reasonable expenses to necessary travel, hotel, and meal charges); *Greenspan v. Automobile Club*, 536 F. Supp. 411, 415-19 (E.D. Mich. 1982) (reimbursable expenses include investigating claims, mailing notices to class members, photocopying, depositions, preparing a computer analysis, and payments for an expert witness).

267. The observation that defense lawyers run up higher bills for meals, travel, and lodging is based on this author's personal experience during more than five years as a litigator and three years as a clinical supervisor. The observation is also supported by logic: plaintiffs' attorneys often work on contingency, receiving fees and expenses only out of a recovery; defense attorneys usually work on a pay-as-you-go basis, receiving fees and expenses periodically, regardless of the outcome, because defendants

b. *A Percentage of the Difference Between the Final Judgment and the Rejected Offer*

Another tempting sanction is a percentage of the difference between the amount of the final judgment and the amount of the rejected offer.²⁶⁸ This formula is attractive because it relates the sanction to the magnitude of the offeree's mistake and encourages reasonable offers that approximate the likely judgment.²⁶⁹

For three compelling reasons, however, a percentage-of-the-difference formula is unsatisfactory. First, it would do nothing to encourage early offers. Because a percentage sanction is not time-based, an offer made late in the case could entitle the offeror as large a sanction as could an offer made early in the case.²⁷⁰

Second, the formula would be unworkable in cases involving

are far more likely than plaintiffs to be willing and able to pay the freight. And though the *ABA Model Code of Professional Responsibility* prohibits plaintiffs' attorneys from advancing expenses to a client unless the client remains "ultimately liable" for the expenses, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-103(B) (1981), it is common knowledge that plaintiffs' lawyers frequently cannot collect these expenses from their clients unless the clients recover. (The new *ABA Model Rules of Professional Conduct* recognize the futility of the Code's mandate, and allow lawyers to "advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e)(1) (Final Draft 1983). Moreover, the Rules allow lawyers to pay court costs and expenses on behalf of an indigent client without any repayment agreement at all. *Id.* Rule 1.8(e)(2)).

The discrepancies between the expenses of plaintiff's lawyers and the expenses of defendant's lawyers suggest a major reason that a sanction of post-offer expenses would be fundamentally unfair. To a large extent, a party's litigation expenses are within his own control. A party can keep his expenses down if he desires, at least with respect to travel, meals, and lodging. The opposing party's rejection of a settlement offer may keep the litigation going, but it does not follow that all of the offeror's additional expenses flow directly from the rejection. A court deciding a sanctions motion under rule 68 could determine which expenses were caused by the rejection and which expenses were the offeror's choice. However, an offeree might be unwilling to trust the court to eliminate excessive expenses; consequently, plaintiffs would be more intimidated by the threat of having to pay the opponent's expenses than defendants would be.

268. For example, if the sanction is established at five percent of this difference, then a defendant who rejects an offer to settle for \$100,000 but loses \$200,000 at trial would be required to pay the plaintiff an additional \$5,000 as a rule 68 sanction. Similarly, a plaintiff who refused a defendant's offer to settle for \$200,000 and ultimately recovered nothing would have to pay the defendant \$10,000 under rule 68.

269. Two underlying premises to such a formula are the assumptions that the jury's (or judge's) verdict is reasonable and that an offeree who fails to anticipate that verdict by accepting a more favorable offer is acting unreasonably. The formula encourages reasonable offers (that is, offers approximating what the judgment is expected to be) and discourages unreasonable rejections (that is, rejections of offers more favorable to the offeree than the anticipated outcome at trial).

270. In contrast, a time-based sanction, such as post-offer costs or expenses, tends to reward early rule 68 offers because costs and expenses build up over time, allowing an offeror to obtain a larger sanction by making an earlier offer. As a corollary, a time-based sanction gives offerees a greater incentive to accept early offers in order to avoid larger sanctions.

injunctive or declaratory relief. Courts already have difficulty determining whether non-monetary relief is more favorable or less favorable than the relief specified in a rejected rule 68 offer. Quantifying the value of the judgment and the offer and calculating a percentage of the difference between those values would be far more difficult, and might often be impossible. Even if a court concluded that an equitable remedy awarded to a party outweighed the remedy offered in settlement negotiations, the court might well be unable to define a value for this difference.

Third, a percentage-of-the-difference sanction would often be gargantuan, dwarfing even the unacceptably heavy sanction of attorneys' fees, especially when the defendant won or the plaintiff was awarded unexpectedly high damages.²⁷¹ Courts may have authority to reduce oppressive sanctions,²⁷² but the rule's sanction should not be one that will have to be reduced so frequently that the norm becomes meaningless.

c. *A Multiple of Costs*

A multiple of the offeror's post-offer taxable costs as defined by 28 U.S.C. § 1920 (which excludes attorneys' fees)²⁷³ provides a

271. In personal injury cases, for example, a major component of the damages may be pain and suffering and punitive damages — intangibles that are unpredictable and vary over an enormous range. A defendant might reasonably offer to settle for \$200,000 and yet get hit with an ultimate judgment of \$2.2 million. In that instance, even a relatively modest sanction of five percent of the difference between the offer and the judgment would produce a sanction of \$100,000 in favor of the plaintiff — an amount that might well exceed the plaintiff's attorneys' fees if calculated on an hourly basis. Under an Illinois State Bar Association special committee's proposal for a sanction of 25% of the difference between the offer and the judgment, *plus* all post-offer litigation expenses, the sanction in the example would be a staggering \$500,000. See ILL. STATE BAR ASS'N OFFER OF JUDGMENT COMM. DRAFT REPORT OF THE SPECIAL COMM. ON OFFER OF JUDGMENT § 2-1003a (1983). One way to attack this problem would be to have a sliding scale of percentages so that differences over a certain amount would be sanctioned at a lower percentage. For example, rule 68 could provide a sanction of five percent of the difference up to \$100,000, then three percent of the next \$400,000, and one percent of any difference over \$500,000. This would be similar in some respects to the scheme under Alaska's version of rule 68. See ALASKA CIV. R. 68 (sliding scale to reimburse offeror for attorneys' fees); see also Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, 24 JUDGES' J., Spring 1985, at 4, 6 (explaining application and effect of ALASKA CIV. R. 68). However, these sliding-scale schemes are also very complex. Another way to attack the problem would be to have a very small percentage as the basis for the sanction, or to apply the percentage sanction only up to a specified maximum, but in either of these instances the sanction might be so small as to be inconsequential.

272. See *infra* text accompanying notes 312-25.

273. 28 U.S.C. § 1920 (1982). Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services

workable and effective sanction.²⁷⁴ First, the statutory definition of costs, though not without its ambiguities,²⁷⁵ makes taxable costs more predictable and easier to calculate than either expenses or attorneys' fees.²⁷⁶ Additionally, because the size of a case roughly

under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

274. It is necessary to expressly exclude attorneys' fees from taxable costs to avoid the construction of costs given by the Court in *Marek v. Chesny*, 105 S. Ct. 3012, 3017 (1985) (holding that rule 68 costs include attorneys' fees whenever an applicable fee-shifting statute defines attorneys' fees as costs).

The sanction of post-offer costs should be combined — as should any other sanction — with a denial of post-offer costs to a prevailing plaintiff-offeree, who would otherwise ordinarily be awarded his taxable costs for the entire litigation pursuant to FED. R. CIV. P. 54(d). This denial would give continued effect to the historical purpose of rule 68, which is to stop the running of costs against the offeror after the making of an offer. See *Delta Air Lines v. August*, 450 U.S. 346, 360 & n.25 (1981).

A prevailing plaintiff whose judgment is less favorable than a rejected offer ought to be awarded his pre-offer costs, however. Denying pre-offer costs would ease the administrative burden on the courts and stiffen rule 68 sanctions. On the other hand, awarding plaintiffs their pre-offer costs will spur defendants to make rule 68 offers as early as possible in order to stop costs from accruing, and will also spur plaintiffs to conduct early discovery, before defendants can make rule 68 offers. On the balance, allowing prevailing plaintiffs to retain their pre-offer costs is likely to increase judicial efficiency by leading to earlier settlements.

The problem of pre-offer costs does not arise if the defendant prevails. If a judgment is entered in favor of the defendant, that judgment is obviously more favorable to the defendant than any rule 68 offer the plaintiff could possibly have made, and the defendant, as the "prevailing party" under FED. R. CIV. P. 54(d), will be entitled to both his pre-offer and post-offer costs. Thus, prevailing defendants, unlike prevailing plaintiffs, can never be sanctioned under rule 68 as long as the standard is a simple comparison of the offer versus the judgment.

275. An example of the ambiguities in section 1920 is the provision that the judge or clerk may tax as costs "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920 (1982). It is settled that the "stenographic transcript" includes deposition transcripts as well as trial transcripts, but "[t]he question whether a deposition was necessarily obtained for use in a case has been the subject of considerable controversy." *Hudson v. Nabisco Brands, Inc.*, 2 Fed. R. Serv. 3d 367, 375 (7th Cir. 1985). For a general discussion of the ambiguities in section 1920's definition of costs, see Peck, *Taxation of Costs in United States District Courts*, 37 F.R.D. 481 (1965); Dombroff, *In Litigation Cost Recovery, Leave no Stone Unturned*, Legal Times of Washington, May 28, 1984, at 18, col. 1. The Advisory Committee on Civil Rules could help reduce or clarify the ambiguities in defining costs if it would draft a specific Federal Rule defining costs. Currently, the Federal Rules of Civil Procedure do not define costs. See FED. R. CIV. P. 54(d).

276. See 28 U.S.C. § 1920 (1982). Cost calculations are generally so routine that costs "may be taxed by the clerk on one day's notice," without judicial action or review. FED. R. CIV. P. 54(d) (emphasis added). The court will review the clerk's assessment only if one of the parties serves a motion challenging the clerk's action within five days after the taxation of costs. *Id.* Taxable costs are relatively predictable compared to attorneys' fees or expenses because the categories of items that make up taxable costs are well known, the amounts of taxable costs are generally proportional to the size of the case, and, most importantly, the amounts spent for such major taxable costs as court reporter fees, deposition transcripts, and witness fees, can be determined at any time by either side, based on documents on file in the case. At the time a rule 68 offer is made, therefore, either side can reliably approximate the opposing side's accrued and future taxable costs. In contrast, attorneys' fees and expenses are seldom revealed to the other side or reflected in any public documents until after judgment is rendered. Thus, attorneys' fees and expenses are a far less predictable

correlates with the amount of taxable costs incurred, larger sanctions will usually be imposed only in larger cases.²⁷⁷ Finally, because courts routinely calculate costs after every case, calculating a multiple of taxable costs would put relatively little additional strain on the judiciary.²⁷⁸

This author proposes a normative sanction of ten times the offeror's post-offer taxable costs under section 1920,²⁷⁹ coupled with

sanction at the time an offeree is reviewing a pending offer. Because predictability is an element of fairness — an offeree who rejects an offer ought to be able to predict the consequences of his rejection — a predictable sanction is fairer than an unpredictable one.

277. Larger cases generally require more depositions, more witnesses, and more copies of documents, all of which contribute to increasing the taxable costs of the action. See 28 U.S.C. § 1920(2)-(4) (1982).

278. FED. R. CIV. P. 54(d) provides: "[C]osts shall be allowed as of course to the prevailing party unless the court otherwise directs . . ." 28 U.S.C. § 1920 (1982) provides: "A bill of costs shall be filed in the case and, upon allowance, be included in the judgment or decree." Courts must therefore consider whether to allow costs after every case, regardless of which side prevails. This contrasts with attorneys' fees, which are petitioned for and awarded only when authorized by statute, private contract, or a recognized exception to the American rule. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-59 (1975) (courts are not free to award attorneys' fees depending upon the public policies involved in a particular case).

279. An approximate median figure for costs for an entire case is \$2,300. This author studied 50 reported opinions between 1976 and 1985; total costs awarded to prevailing parties in these 50 cases amounted to \$375,723.13, producing an average award of \$7,514.46. Six of these 50 awards were for less than \$1,000. The median award was \$2,325.93, *Raio v. American Airlines*, 102 F.R.D. 608, 612 (E.D. Pa. 1984), which included \$290.08 for deposition transcripts, \$188.85 for copying costs, \$109 for removal fees, \$1,732 for travel and hotel expenses of three witnesses, and \$6 to obtain a certificate for a notice of deposition. See also *Roche v. City of Normandy*, 566 F. Supp. 37, 42-43 (E.D. Mo. 1983) (awarding prevailing plaintiff in age discrimination case \$2,366.25 in costs under section 1920); *Jeffries v. Georgia Residential Fin. Auth.*, 90 F.R.D. 62, 63 (N.D. Ga. 1981) (awarding \$2234.78 in "costs" to prevailing plaintiff, including \$2,234.06 in deposition costs).

The largest reported cost award under section 1920 was \$92,497.17. See *Independence Tube Corp. v. Copperweld Corp.*, 543 F. Supp. 706, 717-23 (N.D. Ill. 1982), *aff'd*, 691 F.2d 310 (11th Cir. 1982), *rev'd*, 467 U.S. 752 (1984). This was a major antitrust case, generating a final judgment of nearly \$7.5 million (after trebling) in plaintiff's favor. The largest single item of costs was \$61,928.78 for deposition transcripts. *Id.* at 719; see also *Maurice A. Garbell, Inc. v. Boeing Co.*, 546 F.2d 297, 301 (9th Cir. 1976) (awarding \$51,943.03 in costs to defendants who prevailed on all counts, and affirming 237,062.50 in attorneys' fees under patent suit fee-shifting statute, 35 U.S.C. § 285 (1982), based on trial court's findings that the plaintiff had acted in bad faith), *cert. denied*, 431 U.S. 955 (1977).

The data on costs cannot easily be translated into the context of rule 68. In the first place, reported decisions on costs are undoubtedly skewed toward the high side. Costs are awarded to the prevailing party in nearly every case that goes to trial, but are usually taxed by the clerk, without court review, pursuant to FED. R. CIV. P. 54(d). The court reviews the award only if the losing party objects to certain items or to the award as a whole. Court review is almost certainly the exception rather than the rule because it would not be economical to contest costs when the objectionable items are relatively small. Even where courts do review costs, they probably do not usually publish opinions regarding small amounts because such opinions most likely would have minimal precedential value.

Even if this author's study is taken at face value, the median cost of \$2,300 does not indicate the amount of a median rule 68 sanction under a regime of 10 times post-offer taxable costs. It is simply impossible to predict at what point a successful rule 68 offer would be made in relation to accrued costs. This author's proposal would prohibit offers for 60 days after service of the complaint, so lawyers anticipating opposing rule 68 offers might begin taking depositions and incurring other taxable costs before the opposing offer arrived. With both parties likely to receive offers, the sanction of 10

a denial of post-offer costs under section 1920 to the offeree.²⁸⁰ Ten times the offeror's post-offer taxable costs should generally be large enough to encourage parties to use rule 68, but will seldom coerce unfair settlements or levy an excessive penalty on parties who reject rule 68 offers.²⁸¹

2. Sanctions for Rejections Made Frivolously or in Bad Faith

The drafters should reject post-offer attorneys' fees as a poten-

times post-offer costs plus a denial of the offeree's own post-offer costs would encourage early discovery on both sides.

Additionally, because the first offer often would not be extended until sometime after the 60-day prohibition period, and often would not be an offer entitling the offeror to sanctions, the pre-offer period would in most cases be even longer than 60 days after service of the complaint. This will shelter still more pre-offer costs against rule 68 sanctions.

Therefore, a normative sanction of ten times costs would in most cases be well below ten times the study's \$2,300 median. If the offer which is the basis for sanctions is made 120 days after service of the complaint in the median case, and if two-thirds of all costs are incurred after the successful offer, then the median sanction will be about \$15,000 ($\$2,300 \times 67\% = \$1,541$; $\$1,541 \times 10 = \$15,000$ (approx.)), plus a denial of the offeree's post-offer costs (assumed to be two-thirds of \$2,300, or about \$1,500), for a total of a little over \$16,500 in the median case [study on file at the *George Washington Law Review*].

280. For the rationale of denying post-offer costs to the offeree, see *supra* note 274. The next proposal (or at least its advisory committee note) should expressly state that the denial of the offeree's post-offer taxable costs does not mandate the denial of the offeree's post-offer attorneys' fees even if those fees are defined by an applicable fee-shifting statute as "costs." The advisory committee note should further explain that the award of post-offer attorneys' fees to a plaintiff who has failed to obtain a judgment as favorable as a rejected offer would be governed by statutory and judicial guidelines for awarding reasonable attorneys' fees, independent of the mandatory operation of rule 68.

Although a prevailing plaintiff would often (perhaps usually) be denied his post-offer statutory attorneys' fees independent of rule 68, see *Marek v. Chesny*, 105 S. Ct. 3012, 3016 (1985), there would be some cases in which a prevailing plaintiff who failed to better the defendant's rule 68 offer at trial could still recover all or part of his post-offer fees, pursuant to the judicial discretion afforded under fee-shifting statutes, see *id.* at 3027-28 (Brennan, J., dissenting). This avoids the automatic, mandatory result of *Marek*, which requires the denial of all post-offer attorneys' fees to a prevailing plaintiff who fails to beat a rule 68 offer at trial whenever an underlying fee-shifting statute defines the statutory attorneys' fees as "costs." *Id.* at 3017-18. But see *Simon*, *supra* note 13, at 904-05 nn.72 & 74 (1984) (explaining ways in which courts can legitimately introduce flexibility into the *Marek* result).

281. The ideal multiple of post-offer taxable costs cannot be determined with certainty, because costs differ from case to case and human behavior is hard to predict. Cf. Rowe, *Predicting the Effects of Attorney Fee-Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 139 *passim* (describing various fee-shifting schemes and concluding that the effects differ widely). It thus is impossible to define exactly the multiple that would make the sanction large enough to encourage fair settlements without coercing unfair settlements.

Although one may argue persuasively against the proposed rule 68 sanction equal to ten times the offeror's post-offer taxable costs plus a denial of the offeree's post-offer taxable costs, the critical point is that the normative sanction should be based on some multiple of post-offer taxable costs. Although 10 seems to be an adequate and effective multiple, the exact multiple could be slightly higher or lower without violating the principles articulated in this Article.

tial sanction against good faith rejections of rule 68 offers, because this heavy sanction would chill a good deal of litigation that society should encourage, or at least allow. However, this rationale may not apply when the offeree has behaved improperly. It is therefore necessary to consider other rationales for not imposing the sanction of attorneys' fees on an offeree who has rejected a rule 68 offer frivolously, in bad faith, or for an improper purpose.

The first argument against attorneys' fees as a sanction for frivolous, bad faith, or improper rejections is that every litigant has a right to go to trial and should not be severely penalized for exercising this right, regardless of the party's motive for refusing to settle. This argument rests on the broad premise that the *process* of litigation serves some social values in every case. These "process values" may include the desire for a day in court, the need for finality, a desire by one or both parties for public vindication, a perception that the decision of a neutral factfinder is most likely to ensure fairness, the importance of establishing legal precedent for novel and substantial issues or for issues affecting a substantial number of non-parties, and the general psychological value to the public of knowing that a trial is available to everyone whenever necessary.²⁸² In short, these process values encompass all of the reasons that Americans consider it so important to have a federal court system that is open to all, that holds public proceedings, that publicly announces its decisions, and that guarantees the right to trial whenever genuine issues of material fact are in dispute.²⁸³

Most of these process values are readily apparent in class actions, major constitutional litigation, cases of first impression, and other cases that present novel and substantial issues of law or fact or will affect a substantial number of non-parties. But in these cases, the right to go to trial can be protected by pretrial exemptions from rule 68;²⁸⁴ the resulting immunity from rule 68 sanctions would eliminate the rule's possible infringement on litigants' rights to go to trial. These "public interest" cases are so imbued with process values that courts should not try to influence settlement in those cases, by rule 68 or by any other means. On the contrary, the public may have an interest in encouraging those cases to go to trial.²⁸⁵

282. Some of these process values are discussed in Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); and Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part I*, 1973 DUKE L.J. 1153, 1172-77. This author's articulation of "process values" is not as formal as Professor Michelman's four categories of dignity values, participation values, deterrence values, and effectuation values, but the analysis and conclusions that follow here would also apply under Professor Michelman's value system.

283. Of course, even the most ardent proponents of a right to trial do not suggest overturning FED. R. CIV. P. 56, which allows a court to enter summary judgment without any trial or hearing if the papers submitted show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

284. See *infra* note 352 (setting out proposal for pretrial exemptions from the operation of rule 68 in certain cases).

285. No bright line can be drawn between "public" and "private" disputes, but

Because novel cases would be excluded from rule 68, the question narrows to whether attorneys' fees would be an appropriate sanction for improper rejections in run-of-the-mill cases, such as personal injury or contract cases, that appear to involve and affect only the litigants.²⁸⁶ In ordinary cases, the process values generally reflect the private interests that give rise to the litigation. A plaintiff, for example, may want to complete the process of litigation in order to feel that she has had her day in court. Settlement may not satisfy this litigant even if the settlement would be more favorable than the outcome at trial; the primary concern of litigants like these is their personal feelings. Similarly, a defendant may desire to complete the process of litigation even if victory is unlikely, because victory in court may be the only way to obtain public vindication. These litigants are primarily concerned with their reputations. A corporate defendant may refuse settlements to demonstrate that future litigants should not file suit unless they are prepared to go to trial, because settlement dollars will not be forthcoming even if the settlement demands are reasonable. These defendants are primarily concerned with their pocketbooks.²⁸⁷

"there are a number of public law cases that are easily identifiable as such. These include constitutional issues, issues surrounding existing government regulation, and issues of great public concern." Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986). But see Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-87 (1984). Professor Fiss suggests in a more recent article that the compulsion of the judicial system can "close the gap between our ideals and the actual conditions of our social life." Fiss, *Out of Eden*, 94 YALE L.J. 1669, 1673 (1985).

286. This author recognizes the existence of difficult public law issues in many seemingly private disputes. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986). However, many private cases have little or no effect on anyone but the litigants. See Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U.L. REV. 267, 269 (1985). For example, in a diversity suit jury trial to determine liability in an automobile collision at an intersection, or in a diversity suit to decide who breached a contract to deliver retail goods, the public interest in the outcome is, at best, cryptic.

Despite this absence of public interest, the effect of these private interest cases on federal court dockets may be substantial. In the judicial fiscal year ending June 30, 1984 (the most recent 12-month period for which federal figures are available), tort and contract cases between private parties and based solely on diversity of citizenship — cases in which the United States was not a party and in which there was no federal question — accounted for more than 20% of all new cases filed in federal district courts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 253 (Fed. Jud. Center 1984) (Table C2) (of 261,485 total cases filed, a total of 56,574 were diversity actions in tort (25,850) or diversity actions in contract (28,724)). These private party diversity suits in tort and contract accounted for over 38% of all suits that had been pending for three years or more as of June 30, 1984. *Id.* at 158 (Table 33) (of 15,646 total civil cases pending, a total of 6,044 were private diversity actions in tort (4,476) or contract (1,568)). The same categories of cases accounted for over 41% of all civil trials held during the same 12-month period. *Id.* at 290-91 (Table C5A) (of 11,024 total civil cases reaching trial, diversity actions based on contract or tort accounted for 4,606 trials).

287. For a succinct set of materials on the economics and strategies of non-settle-

Process values such as these — feelings, reputation, and pocket-book — are not inconsequential. They represent legitimate interests, and American courts are open to private litigants partly to serve these private process values. The sum of these private values is a public value: courts are available to all to assuage feelings, vindicate reputations, or protect our pocketbooks. The question, however, is not whether private process values are worth protecting. Rather, the question is how these values can best be protected.

To analyze how private process values might best be protected, the realities of federal court litigation must first be considered. Only five percent of all federal court cases proceed to trial,²⁸⁸ yet federal courts are far too crowded.²⁸⁹ Judges and litigators alike overwhelmingly agree that federal district court judges have more work than they can comfortably handle. Much of this work involves pretrial motions, status calls, and settlement conferences.²⁹⁰ Judges have increasingly little time to devote to what is probably their most valuable function: trying cases. Consequently, the right to trial has been devalued. Many parties who would strongly prefer to go to trial end up dropping out of the

ment, see S. GILLERS & N. DORSEN, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 400-07 (1985).

288. During the 12-month period ending June 30, 1984, only five percent of all federal civil cases reached trial. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 152 (Fed. Jud. Center 1984). This five percent figure represents a steady decline since 1975, when 8.4% of all civil terminations were by trial. *Id.* (Table 29). Notwithstanding, the number of civil cases commenced in federal courts rose 8.1% for the same 12-month period. This increase is part of a steady pattern of increase in civil filings every year since 1977. *Id.* at 129. One interpretation of these data is that the increase crowds courts, thereby creating increasing delays and forcing more people to settle before trial.

The outcome of civil cases that do not go to trial is not entirely clear because the Administrative Office does not keep statistics in a manner responsive to that question. One study of federal court terminations, however, found that 22.5% of all terminations resulted from either dismissal before trial or summary judgment, with the remaining cases — roughly 70% — resolved through settlement. See Trubeck, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 89 (1983).

289. Federal court filings have shown a "dramatic rise" in recent decades with the number of civil cases filed per capita in federal court nearly doubling, from 0.5 filings per 1,000 population to 0.9 filings per 1,000 population between 1960 and 1980. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 89-90 (1981). Moreover, since 1980, filings in federal courts have continued to rise steadily, increasing 64% (from 168,789 to 261,485) between June 30, 1980 and June 30, 1984. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 124-28 (Fed. Jud. Center 1984). For some years, commentators have struggled to analyze and solve the problems this sharp increase has caused. See, e.g., Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976); Edwards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

290. Federal judges have frequently complained that district court caseloads are too heavy and require judges to become managers of pretrial activities as much as triers of cases. See, e.g., Lacey, *Holding the Center Together*, 24 JUDGE'S J., Spring 1985, at 29, 29; Schwarzer, *Beating the Trial Court Paper Chase*, 5 LITIGATION, Spring 1979, at 5, 5-6, 50-51; Shadur, *A New Judge's Thoughts*, 7 LITIGATION, Summer 1981, at 5, 5.

process, settling their cases before trial because they cannot afford the time, expense, or anxiety of seeing the controversy through to trial.²⁹¹ For many of these litigation dropouts, the right to trial must be a hollow right.

To make the right to trial more valuable, courts are searching for ways to shorten the time from filing to trial, and to streamline the process of pretrial litigation.²⁹² Rule 68 can help in achieving both of those objectives. An effective rule 68 will encourage parties to settle earlier and on fair terms in the vast majority of cases which will eventually settle anyway. Earlier settlements will cut down on judicial pretrial activities and free up more trial time. The scarcity of trial time is a major bottleneck in getting to trial;²⁹³ therefore, increasing the supply of trial time will allow parties who want trials to get to trial sooner.

Rule 68 is also likely to streamline the litigation process. Once a

291. Approximately 70% of all federal civil cases settle before trial. See *supra* note 288. Unfortunately, the percentage of the settling parties who would have preferred to go to trial but settled to avoid the time, expense, and anxiety of litigation has not been investigated. A recent survey of 1,900 litigators in California, Texas, Missouri and Florida, however, found that 46% of the respondents thought judicial involvement in the settlement discussions would increase the likelihood of fair settlements. W. BRAZIL, *SETTLING CIVIL SUITS* 56 (1985). This high figure, compared to only 23% stating that judicial involvement would not increase fairness, *id.*, suggests that many litigants currently agree to settle on terms that they consider unfair. Given the tremendous emphasis in the last several years on the rising costs and delays in litigation, the most logical explanation for parties who agree to unfair settlements rather than go to trial is that the time, expense, and anxiety of going to trial are too great.

292. Intense efforts that have been made in recent years to find ways to shorten and simplify pretrial litigation. Some of these efforts have taken the form of suggestions for more effective pretrial management techniques. See, e.g., *SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES* 7-39, 283-304, 311-42, 583-626 (Fed. Jud. Center 1975). Other efforts have concentrated on experiments with alternative forms of dispute resolution. See, e.g., Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, a Report to the Judicial Conference of the United States Committee on the Operation of the Jury System*, reprinted in 103 F.R.D. 461 (1984) [hereinafter cited as *Summary Jury Trials*]; McMillan & Siegel, *Creating A Fast-Track Alternative Under the Federal Rules of Civil Procedure*, 60 NOTRE DAME LAW. 431 (1985); Rosenberg, Rient & Rowe, *Expenses: The Roadblock to Justice*, 20 JUDGES' J., Summer 1981, at 16. Still other efforts have included amendments to the Federal Rules of Civil Procedure mandating sanctions for dilatory or oppressive conduct. See, e.g., FED. R. CIV. P. 11, 26(g) & 37(g).

293. No available empirical evidence demonstrates conclusively that a shortage of trial time poses an obstacle to affording litigants earlier trials, but this author's personal experience as a litigator and the anecdotal evidence from federal judges indicates that an increase in the amount of available trial time would lead to earlier trials. One study found no evidence of a "long trial queue" and concluded that few cases experience long waiting periods before trial. Grossman, Kritzer, Bumiller & McDougal, *Measuring the pace of civil litigation in federal and state trial courts*, 65 JUDICATURE 86, 112 (1981). But this study demonstrates only that parties continue discovery too long or that many parties drop out before trial because they cannot recoup their expenses from trial. The study did not directly address the relationship between the volume of discovery and the supply of trial time, or between the supply of trial time and the time from filing to trial.

rule 68 offer has been rejected, the rejecting party can no longer count on reimbursement of its taxable costs, and may have to pay ten times the opposing party's post-offer taxable costs.²⁹⁴ Additionally, if the rejecting party has acted frivolously, in bad faith, or for an improper purpose in rejecting the offer, he may have to pay the opposing party's attorneys' fees and expenses for continuing the litigation.²⁹⁵ The potential for these penalties under rule 68 will lead the rejecting parties to focus pretrial activities carefully — to consider discovery requests and objections with great care,²⁹⁶ and to make and oppose motions only when the stakes are high, the chances of success are reasonable, and the problems cannot be resolved through cooperation between counsel.²⁹⁷ Because the

294. See *supra* notes 273-81 and accompanying text; *infra* text accompanying note 350.

295. See *infra* text accompanying note 354.

296. Discovery abuse is perceived to be a major contributor to the high cost of civil litigation, which in turn decreases the amount of justice in the justice system. See, e.g., *Herbert v. Lando*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) (lamenting that discovery is frequently "exploited to the disadvantage of justice"); Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 217, 230-35; Pollack, *Discovery — Its Abuse and Correction*, 80 F.R.D. 219, 221-23 (1979). FED. R. CIV. P. 26(g), added to the Rules in 1983, is supposed to curb such abuse. *Id.*, advisory committee note ("Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision."). However, courts need to curb discovery overuse, not just blatant abuse, to cut costs of litigation. See McMillan, *Discovery: A Not So Magnificent Obsession*, 3 LITIGATION, Fall 1976, at 5.

297. FED. R. CIV. P. 11, amended in 1983, is already available to discourage and sanction motions that are not based on "belief formed after reasonable inquiry [that the motion] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Rule 11 also guards against motions that are made "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." *Id.* Studies covering the first two years of the amended rule's operation indicate that courts are taking the rule seriously and imposing sanctions far more frequently than in the past. See generally S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Fed. Jud. Center 1985) (studying judicial attitudes toward amended rule 11 and collecting some cases); Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181 (1985) (discussing a collection of cases and suggesting standards for imposing sanctions).

Rule 26(g), also added to the rules in 1983, discourages unfounded motions regarding discovery. FED. R. CIV. P. 26(g); see *supra* note 296; see, e.g., *Itel Containers Int'l Corp. v. Puerto Rico Management, Inc.*, 108 F.R.D. 96, 104 (D.N.J. 1985). In contrast to the flood of cases reporting sanctions under rule 11, however, cases imposing sanctions under rule 26(g) are "rare." See Vairo, *Analysis of August 1, 1983 Amendments to the Federal Rules of Civil Procedure*, reprinted in ALI/ABA, CIVIL PRACTICE AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS at 55, 144 (1985).

Moreover, local rules in most jurisdictions require attorneys to meet and confer in a good faith attempt to resolve discovery disputes before filing discovery motions with the court. E.g., E.D. MO. R. 7(C) (precluding court from hearing any discovery motion unless counsel have been unable to resolve differences after "sincere efforts" in "good faith"); see also *Perlov v. G.D. Searle Co.*, 621 F. Supp. 1146, 1149 (D. Md. 1985) (refusing to consider motion to sanction plaintiffs for deposition conduct because parties "have made no effort to resolve these differences among themselves before involving the Court," contrary to local rule 34).

The federal courts' discretionary sanctions powers may be helpful in combating the most glaring litigation abuses, but they do relatively little to affirmatively encourage good litigation practices and streamline litigation because sanctions are not imposed for lawyering that is merely mediocre or disorganized. Good litigation practices, especially careful planning and judicious use of litigation weapons, requires a conscious effort. See Leitch, *Streamlined Litigation*, 10 LITIGATION, Summer 1984, at 41, 41. An

two-way street feature of an amended rule 68 is likely to make both parties into rejecting parties at some point in the litigation,²⁹⁸ both parties will proceed with similar caution, focus, and selectivity.²⁹⁹ This careful planning will substantially streamline the litigation process, which in turn will further free up trial time for those who want to exercise their right to trial.

If a stronger form of rule 68 will shorten the time to trial and streamline the litigation process, then we are not purchasing a stronger rule at the expense of the right to trial, but are using rule 68 to enhance the right to trial. Cases having obvious public impact will be free from rule 68 penalties and will have a clear path to trial.³⁰⁰ Cases involving private process values will either settle earlier than they otherwise would, or proceed to trial sooner and less expensively. In short, rule 68 would enhance the right to trial by reducing excessive discovery, unnecessary motions, and mutually destructive delay.

Even if rule 68 would not have all of these positive effects — if the potential sanction of attorneys' fees for improper rejections would yield a net decrease of those willing to exercise their right to trial — that price should be paid. In exchange for discouraging a modest number of litigants from proceeding to trial,³⁰¹ the threat

amended version of rule 68 that imposes significant sanctions for going to trial after rejecting a settlement offer without good reason will force lawyers to plan more carefully. Although sanctions always pose a risk of chilling zealous advocacy, the more likely effect is that rule 68 sanctions will lead to better advocacy.

298. If both parties can make offers, it follows that both parties can reject offers. Because cases are not likely to settle based on the first rule 68 offer or counteroffer, it is probable that both parties will reject rule 68 offers at some point in the litigation. See *supra* text accompanying note 162.

299. Because both parties will be at risk if the trial results are not more favorable than the rule 68 offers they rejected, both parties will seek to keep their own taxable costs to a minimum and avoid provoking the opposition into incurring unnecessary taxable costs. This cautious attitude may well lead attorneys to take more discovery informally and to maximize their pre-offer or pre-rejection investigation. Encouraging earlier investigation and informal discovery will likely make litigation both less expensive and more effective. See R. SIMON, *TEACHER'S MANUAL FOR TRAINING THE ADVOCATE: THE PRETRIAL STAGE* 26-28 (1985).

Admittedly, the danger exists that some parties will act in the opposite fashion, putting off discovery until they can get a potential return (in the form of rule 68 sanctions) of \$10 for every \$1 expended. However, rules 26(b)(1), 26(c), 26(f), and 26(g) should sufficiently check excessive discovery, and the courts' power to reduce excessive sanctions should discourage those intent on turning discovery into a profit-making enterprise under this author's proposal to amend rule 68.

300. Cases having an obvious public impact, including cases presenting novel and substantial issues or questions affecting a significant number of non-parties, will have a clear path to trial because they will be exempt from the operation of rule 68 and its sanctions. See *infra* notes 326-27 and accompanying text.

301. The number of litigants discouraged from going to trial by rule 68 should be very small. Only five percent of all civil litigants in federal court go to trial under the current rules, *ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS* 152 (Fed. Jud. Center 1984), and this percentage may still be decreasing, *id.* (Table 29). Some of these cases present public issues and will be

of heavy sanctions for frivolous, bad faith, or improper rejections would deter much of the cynical and wasteful game-playing that often dominates settlement negotiations. Equally important, the imposition of heavy sanctions would compensate the victims of improper settlement behavior. If preserving a theoretically unfettered right to trial means tolerating abusive settlement tactics and leaving the victims of those abusive tactics uncompensated, then the price is too high.³⁰²

Assuming these reasons for providing rule 68 sanctions for frivolous, bad faith, or improper rejections are thus far persuasive, the next critical question must be answered: how can courts determine when the rejection of a rule 68 offer was frivolous, in bad faith, or for an improper purpose?

Defining rejections that are merely frivolous is relatively easy because some guidance is already available. In *Christiansburg Garment Co. v. EEOC*,³⁰³ the Supreme Court stated that a plaintiff might have to pay a defendant's attorneys' fees if the court finds that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."³⁰⁴ Rule 11 of the Federal Rules of Civil Procedure does not expressly use the term "frivolous," but courts have construed rule 11 to prohibit pleadings and motions that are not based on a reasonable inquiry and have little or no chance of success — pleadings and motions that are frivolous.³⁰⁵ Therefore, although a

exempt from rule 68 under this author's proposal; in other cases no rule 68 offers will be made. Moreover, many litigants can be expected to go to trial regardless of potential heavy sanctions under rule 68. Therefore, the number of cases that will settle primarily because of the threat of rule 68 sanctions will be small, and the number of litigants who feel coerced to give up their right to trial because of rule 68 will probably be offset by those rule 68 enables to go to trial as a result of the reduced court dockets and increased available trial time.

302. Opponents of heavy rule 68 penalties fear that allowing judges to assess the rationality or good faith of offerees rejecting settlement offers would embroil judges too deeply in settlement negotiations and would arm judges to coerce a settlement when they do not like the lawyers, the parties, the issues, or some other aspect of a case. As the reader will recognize, these are essentially the same arguments that were made against the standard of reasonableness in conjunction with potential sanction of attorneys' fees in the 1984 proposal. See *supra* notes 66-103 and accompanying text.

These arguments are weak. Courts already impose sanctions for improper behavior in settlement negotiations, pursuant to the judiciary's inherent power to control the docket. See *supra* note 224 and accompanying text. Moreover, FED. R. CIV. P. 16 already authorizes judges to intrude deeply into the settlement process, and many judges already twist arms to settle cases, partly as a way of relieving docket pressure. See, e.g., Note, *Judicial Authority in the Settlement of Federal Civil Cases*, 42 WASH. & LEE L. REV. 171, 173-74 (1985); Oesterle, *Trial Judges in Settlement Discussions: Mediators or Hagglers?*, 9 CORNELL L.F., June 1982, at 7, 8-9; 'Coerced' divorce settlement vacated, Chi. Daily L. Bull., Sept. 11, 1985, at 1, col. 2. Far from exacerbating this problem, rule 68 will give the parties greater opportunities for self-regulation in the settlement process, because the threat of sanctions comes primarily from the rule rather than from the power of the judge. In any event, rule 68 would control the adverse effects of potentially heavy sanctions more tightly than if the source of the sanctions were inherent judicial power, with its "shadowy" outlines.

303. 434 U.S. 412 (1978).

304. *Id.* at 422.

305. See, e.g., *Van Berkel v. Fox Farm & Road Mach.*, 581 F. Supp. 1248, 1251 (D.

refusal to settle presents a different context than drafting pleadings or filing motions, the language of rule 11 and *Christianburg* provide a useful starting point. The rejection of a rule 68 offer should be considered frivolous if the rejecting party or his attorney makes no "reasonable inquiry" into the fairness of the offer at the time it is made,³⁰⁶ or if the party makes such an inquiry and then proceeds to litigate knowing there is a minimal chance of gaining a better result at trial.³⁰⁷

This definition of frivolous rejections penalizes two undesirable types of litigants. First, it penalizes litigants who refuse to bargain

Minn. 1984) (sanctioning attorney under rule 11 for relying solely on client's word in filing suit after statute of limitations had expired); *Weisman v. Rivlin*, 598 F. Supp. 724, 726 (D.D.C. 1984) (imposing sanctions for mistakenly filing diversity suit when complaint lacked diversity on its face). Good faith is usually not a defense under rule 11. A recent survey of judicial attitudes towards amended rule 11 revealed that 61% of the judges surveyed would sanction an attorney acting in good faith who violated rule 11 for reasons beyond his control — such as incompetence, inexperience, or oversight — and 85% would sanction an attorney who violated rule 11 in good faith for reasons within his control — such as neglect or laziness. S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 28 (Fed. Jud. Center 1985) (Table 11).

306. The "reasonable inquiry" language tracks the language of rule 11, which sanctions motions and pleadings not based on a reasonable inquiry into the facts and the law. See, e.g., *Eastway Constr. Corp. v. City of N.Y.*, 762 F.2d 243, 253-54 (2d Cir. 1985) (mandating sanctions under rule 11 if, "after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading or motion is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law"). Applied to the context of rule 68, this language means that an attorney who failed to make a reasonable effort to determine the settlement value of his client's case, or who evaluated the case in a negligent or incompetent manner, would be subject to rule 68 sanctions if the rejected offer turned out to be more favorable than the final judgment. This standard would give attorneys greater incentives to research, investigate, and evaluate carefully before rejecting a rule 68 offer. Although a reasonable evaluation would not be a total defense to rule 68 sanctions, the court could take an attorney's evaluation efforts into account in determining an appropriate sanction. See *infra* text accompanying notes 313-15 (explaining judicial discretion under rule 54(d)).

307. Rule 68 would not prohibit a party from going to trial, or forbid an attorney from recommending trial, even if a trial was unlikely to produce a more favorable result than the rejected rule 68 offer: a party would still be entitled to gamble on getting a better result at trial. However, rule 68 would change the assumptions about who would have to pay if the gamble did not pay off. Thus, rule 68 would serve to compensate the offering party and the court when an offeree decided to take a long shot and go to trial. Courts have already employed this concept to sanction parties under rule 11 for filing losing motions. See *In re TCI, Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985); *Zick v. Verson Allsteel Press Co.*, 623 F. Supp. 927, 932 (N.D. Ill. 1985) (quoting *Eastway Constr. Co. v. City of N.Y.*, 762 F.2d 243, 254 (2d Cir. 1985)).

One court has also invoked rule 68 to award nearly \$11,000 in post-offer attorneys' fees to civil rights defendants when plaintiffs were awarded only \$5,010 after rejecting a rule 68 offer for \$26,000, because the court considered plaintiffs' rejection "more the action of a 'river boat gambler' than an objective evaluation of the possibilities. If anything, the offer was generous, and its rejection whimsical." *Crossman v. Marcoccio*, 108 F.R.D. 433, 437 (D.R.I. 1985). This author believes that *Crossman* was wrongly decided due to a bad overreading of *Marek v. Chesny*, 105 S. Ct. 3012 (1985). *Crossman*, however, illustrates the view that gamblers ought to pay their own way in litigation.

seriously. Second, it penalizes those who view litigation as a long-shot gamble. Gamblers have every right to go to trial, but if they lose their bets they should not be able to push the entire burden of defending against foolish litigation onto their opponents.

Defining bad faith, improper, or vexatious rejections is more difficult. Authors have struggled to define negotiation ethics, but they do not agree on the answers.³⁰⁸ Nevertheless, just as courts have been able to develop workable definitions of bad faith in the contexts of insurance cases and labor negotiations,³⁰⁹ and just as the bar has been able to develop a workable code of professional ethics,³¹⁰ courts can develop a workable code of settlement ethics.

308. One of the best known articles in the ongoing debate over negotiation ethics is White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 AM. B. FOUND. RESEARCH J. 926, 926-38 (arguing that "fairness" should be read to allow those kinds of untruthfulness that are implicitly or explicitly acceptable in the forum as defined by the subject matter and participants; to do otherwise attempts to force the attorney to act against his and his client's self-interest). Relatively little has been written on the ethics of refusing to settle a lawsuit, but lawyers take many different views on that subject and on its converse, the right to go to trial, regardless of the possibility of a reasonable settlement.

309. In labor negotiations, sections 8(a)(5) and 8(b)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), 158(b)(3) (1982), require every employer and union to bargain "in good faith" concerning wages, hours, and other terms and conditions of employment. Section 8(d) states that good faith does not compel either party to accept an adversary's proposal. *Id.* § 158(d). The Supreme Court has adopted the view that an employer who refuses to accept reasonable union proposals can be ordered to continue bargaining but not to accept the proposals. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 404 (1952). Rule 68, of course, would not give courts authority to compel parties to accept opposing offers. However, like the National Labor Relations Act, rule 68 would attach meaningful penalties to bad faith bargaining.

Insurance law obligates an insurer faced with a settlement offer to analyze the offer in good faith in deciding whether to settle the case, even if rejection would be in the insurer's best interests. See, e.g., *Herges v. Western Casualty & Sur. Co.*, 408 F.2d 1157, 1164 (8th Cir. 1969). Consequently, a refusal to settle may be found in bad faith if the insurer's main motive for rejecting a settlement was its economic interest, and not the economic interest of its policyholder. There has been some resistance to extending insurance bad-faith doctrine to other areas of law because cases involving this doctrine are based on a contract and reflect the unique circumstances of the insurance industry. See Diamond, *The Tort of Bad Faith Breach of Contract: When, If at All, Should It Be Extended Beyond Insurance Transactions?*, 64 MARQ. L. REV. 425, 428-29 (1981). Nevertheless, the definition of a bad-faith settlement rejection would be useful in defining rule 68 duties.

310. The new *ABA Model Rules of Professional Conduct* contain several provisions dealing with ethics in negotiations. E.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (Final Draft 1983) (prohibiting a lawyer from knowingly (a) making a false statement of material fact or law to the adversary, or (b) failing to disclose a material fact to the adversary when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, unless disclosure would violate the rule on confidentiality). Rule 4.1 places no affirmative duty on a lawyer to accept a reasonable settlement offer, but that duty could come from Rule 3.1, which prohibits a lawyer from defending a proceeding unless there is a non-frivolous basis for doing so, *id.* Rule 3.1, or from Rule 3.2, which requires lawyers to make reasonable efforts to expedite litigation consistent with the interests of the client, *id.* Rule 3.2. The Comment to Rule 3.2 states the test is whether a competent lawyer acting in good faith would regard the conduct in question as having "some substantial purpose other than delay." *Id.* Rule 3.2 comment. The Comment continues: "Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client." *Id.* This comment suggests that it is improper to refuse a reasonable settlement offer because the offeror is nearing the end of his financial rope and will be forced to extend a more generous offer later in the case. This Article does not argue that these ethical stan-

As a starting point, it should be considered improper to reject a settlement offer for reasons wholly irrelevant to the merits of the litigation. For example, it should be improper to reject a fair offer because the opposing party is running out of money, because the rejecting party wants to delay settlement for its own independent financial reasons, or because the rejecting party's lawyer hopes to gain notoriety by trying the case, regardless of the outcome. The drafters could flesh out this list with many other examples.³¹¹ Although many of the examples would threaten heavy sanctions for behavior that is now customary, the prevalence of these vexatious tactics cannot continue to justify their validity. As they have done with improper tactics in pleadings, motions, and discovery, federal courts should impose financial penalties on refusals to settle that are wholly divorced from the merits of the litigation.

In sum, when a party has the opportunity to settle on fair terms in a case that has little or no impact on nonparties, that party should either settle or risk paying partial compensation to the offeror for the costs and expenses of continuing the litigation. Fundamental fairness requires no less.

3. *Judicial Discretion to Reduce Sanctions*

To prevent injustices and lessen the chill on meritorious cases, courts must have discretion to reduce unduly heavy sanctions. The drafters of rule 68 could define this discretion simply by instructing courts to reduce or eliminate sanctions whenever courts would reduce or eliminate an award of costs to the prevailing party under rule 54(d).³¹²

Courts have broad discretion under rule 54(d) to consider all

dards per se are binding on federal courts, but this author does believe that courts should financially penalize conduct the bar deems unethical.

311. The Advisory Committee (or Congress) might add, for example, that it is improper to reject a reasonable settlement offer on grounds that: the trial date is extremely inconvenient for the opposition and will force them to settle rather than go to trial, embarrassment from the bad publicity from the case will force the adversary to make a better settlement offer before trial, or the opposing party is emotionally unstable and is likely to cave in to avoid the trauma of testifying at trial. The drafters should make clear that these are only illustrations and cannot possibly anticipate all of the situations in which bad faith will be found. The drafters should also clearly articulate that the only legitimate basis for rejecting a settlement offer in a case falling within the ambit of rule 68's operation is the expectation that the judgment at trial will be more favorable than the offer on the table. See generally *In re TCI, Ltd.*, 769 F.2d 441 (7th Cir. 1985) (condemning a frivolous suit which forced substantial research and other litigation expenses on defendants, stating: "A lawyer who pursues a plausible claim because of the costs the suit will impose on the other side, instead of the potential recovery on the claim, is engaged in abuse of process.").

312. FED. R. CIV. P. 54(d) provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party *unless the court otherwise directs . . .*" (emphasis added).

relevant circumstances when approving or modifying a bill of costs taxed by the clerk.³¹³ In *County of Suffolk v. Secretary of the Interior*,³¹⁴ Judge Jack Weinstein listed factors courts should ordinarily consider under rule 54(d). These factors include the parties' good faith, the novelty and substantiality of the issues, the direct and indirect benefits to the public and the parties, the need to reimburse or avoid unduly burdening nonaffluent litigants, and the potential for inhibiting similar actions in the future.³¹⁵

The wide-ranging discretion accorded courts by rule 54(d) would also allow courts to consider other factors pertinent to the rejection of an offer of settlement. For example, the court could consider the magnitude of the difference between the rejected offer and the final judgment;³¹⁶ whether the offeree negotiated in good faith by making a reasonable counteroffer;³¹⁷ and whether the offeror improperly withheld information material to the offeree's decision to reject the offer.³¹⁸

Using rule 54(d) standards to define judicial discretion under rule 68 would have two primary advantages. First, standards for judicial discretion under rule 54(d) are already familiar to courts and litigants.³¹⁹ Second, rule 54(d)'s standards allow courts flexibility to consider all relevant factors and to respond fairly in all situations.³²⁰

Using rule 54(d)'s standards in rule 68 would also have two obvi-

313. See *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 231-35 (1964) (approving district judge's reduction of a "staggering" bill of costs).

314. 76 F.R.D. 469 (E.D.N.Y. 1977), *cert. denied*, 434 U.S. 1064 (1978).

315. *Id.* at 473.

316. The magnitude of the difference between the judgment and the rejected offer is unworkable as the sole basis for imposing sanctions. See *supra* notes 268-73 and accompanying text. Nevertheless, it is an appropriate factor for deciding whether to reduce sanctions, because an offeree who has missed the mark by a lot has probably acted more unreasonably than an offeree whose judgment is close to the offer.

317. Allowing plaintiffs as well as defendants to make rule 68 offers was a universally acclaimed feature of both the 1983 and 1984 proposals. See *supra* note 144 and accompanying text. Courts should encourage the traffic of offers on this two-way street by reducing sanctions against offerees who have made reasonable counteroffers.

318. The 1984 proposal required courts to consider "whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer." 1984 Proposal, *supra* note 5, at 433 (sentence 8(3)). Although this important factor discourages courts from sanctioning an offeree due to the wrongful conduct of the offeror, the "necessary" standard of the 1984 proposal seems too high. Rule 68 should demand only that the offeror not improperly withhold "material" information — that is, information that might have changed the offeree's mind. If any offeror improperly withholds material information properly requested by the offeree, the court should ordinarily reduce or eliminate the sanctions against the offeree.

319. Rule 54(d) has been in the rules unchanged since the rules first took effect in 1938. Thus, the discretion of the courts to reduce or deny an award of costs has been the same for nearly 50 years. This should satisfy critics of the 1984 proposal who argued that the standard for imposing sanctions for unreasonable rejection was entirely new, ill-defined, and subject to unpredictable application. *E.g.*, NAACP Fund Comments on 1984 Proposal, *supra* note 92, at 20-21; *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 117-19 (testimony of Judith Resnik).

320. It might be argued that allowing courts to consider all relevant factors will spark excessive collateral litigation. See *supra* notes 176-78 and accompanying text. The problem of collateral litigation on rule 68 sanctions motions cannot be completely eliminated, however, unless all judicial discretion is completely eliminated, as it is

ous disadvantages, however. First, the flexibility of rule 54(d)'s standards would encourage collateral litigation. Because rule 54(d) allows courts to consider all relevant factors, including the reasonableness of a rejection, post-trial proceedings over sanctions could be as complex as post-trial proceedings under the 1984 proposal. Second, the flexibility of rule 54(d)'s standards would reduce the certainty that courts will impose sanctions and would thus weaken the incentives to make and accept rule 68 offers.

These arguments are logical, but neither overcomes the advantages of defining judicial discretion via rule 54(d). With respect to excessive collateral litigation, this author's proposal will yield significantly less collateral litigation than would the 1984 proposal. The stakes under this author's proposal will ordinarily be much lower than those under the 1984 proposal, not only in monetary terms but also because the offeree's attorney has much lower exposure to malpractice liability.³²¹ Further, the use of a mathematical trigger prevents motions for sanctions by those whose offers

under the existing rule. Because eliminating all discretion is unacceptable, the drafters of rule 68 must devise other ways to limit collateral litigation.

Once rule 68 incorporates judicial discretion into the rule, there are at least five ways to reduce the incidence of collateral litigation: (1) limit the circumstances in which courts may exercise their discretion, *e.g.*, deny the court discretion to impose sanctions if the judgment is less favorable than the rejected offer; (2) limit the range of the court's discretion, *e.g.*, allow the court only to reduce, but not to increase, the normative sanction; (3) keep the normative sanction small enough so that it generally will be uneconomical to challenge it, *e.g.*, eliminate attorneys' fees as a potential sanction; (4) place a cost on asking the court to exercise its discretion, *e.g.*, require the moving party to pay the expenses and attorneys' fees of the offeror if the court denies the motion to reduce sanctions; and (5) use a familiar standard for discretion that will not encourage collateral litigation to define the standard, *e.g.*, use an existing discretionary standard such as rule 54(d). This Article's proposal for amending rule 68 uses all five of these methods for reducing collateral litigation. *See infra* text accompanying notes 345-54. The 1984 proposal used none of them.

321. To prove a malpractice claim against an attorney, a client must show that his attorney acted negligently. *See, e.g.,* *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 692 (Minn. 1980). Negligence means that the attorney rendered legal advice under circumstances making it "reasonably foreseeable to the attorney that if such advice was rendered negligently, the individual receiving the advice might be injured thereby." *Id.* at 693 n.4. Under the 1984 proposal, inquiring into the reasonableness of rejecting a rule 68 offer would inevitably call into question the lawyer's advice and whether the advice to reject the offer was reasonable. If the attorney advised rejection, a judicial pronouncement that the rejection was unreasonable would be equivalent to a finding that the attorney's advice was unreasonable — tantamount to a finding that the advice was negligent. A client forced to pay heavy sanctions based on a finding that his attorney's advice was unreasonable would have good reason to sue his attorney for malpractice.

In contrast, under this author's proposal the issue of the reasonableness of a rejection would not be expressly determined unless the sanctioned party or attorney sought a reduction in sanctions on the grounds that the rejection was reasonable at the time it was made. However, even if this motion was denied the chances of a malpractice suit would still be less than under the 1984 proposal because of the milder sanctions under the suggested proposal along with their potential imposition upon the attorney rather than the client. *See infra* text accompanying notes 350-51.

were not more favorable than the final judgment. Moreover, because this author's proposal specifies a normative sanction, collateral litigation over an unspecified "appropriate" sanction will be minimized.³²² This author's proposal would allow motions to reduce sanctions, but, as an additional safeguard against excessive collateral litigation, an offeree who unsuccessfully moves to reduce sanctions will ordinarily have to pay the opposing party's reasonable expenses incurred in litigating the motion, including a reasonable attorneys' fee.³²³ Finally, except for motions asking a court to rule that an offer was rejected frivolously, improperly, or in bad faith, motions to increase sanctions will be eliminated entirely.

The argument that rule 54(d)'s standards will diminish the certainty that courts will impose sanctions, and thus diminish incentives to use rule 68, is undoubtedly correct. Any amount of judicial discretion reduces certainty. But that does not settle the issue. The value of increasing certainty under rule 68 must be weighed against the value of avoiding injustice, and the goal of achieving the fairest result in each case outweighs the goal of encouraging more settlements under rule 68.³²⁴ An inflexible rule 68 sanction would especially chill litigation by poor people. To make sanctions under the rule fair to all litigants, and to account for unusual situations, rule 68 must empower courts to reduce unduly harsh sanctions.³²⁵

In sum, neither the problem of collateral litigation nor the problem of reducing certainty overcomes the desirability of granting courts wide-ranging discretion to reduce unduly harsh sanctions. Only substantial discretion can ensure that sanctions are not greater than justice dictates. Because rule 54(d) is both familiar and flexible, it is an appropriate standard for defining judicial discretion to reduce rule 68 sanctions.

D. Exemptions and Exclusions from Rule 68

In some cases, judicial discretion to reduce or eliminate sanc-

322. 1984 Proposal, *supra* note 5, at 433 (sentence 7); see FED. R. CIV. P. 11, 26(g).

323. FED. R. CIV. P. 37(a)(4) uses this same safeguard to discourage frivolous motions to compel discovery. A court will refrain from granting the award if it finds that the motion was substantially justified or that other circumstances make an award of expenses unjust.

324. This is the reason that attorneys' fees are not unacceptable as a sanction for good faith rejections. See *supra* note 145 and accompanying text.

325. Of course, the rule could grant discretion to reduce sanctions without affording courts the broad discretion permitted under rule 54(d). For example, the rule could instruct courts to reduce sanctions only if the normative sanction would be financially oppressive to the offeree, would penalize the offeree for an unpredictable turn of events, or would reward an offeror with unclean hands. However, any effort to narrowly circumscribe the courts' authority to reduce sanctions would inevitably fail to anticipate many situations that would warrant reduced sanctions. Those unanticipated situations would force courts into the Hobson's choice of imposing unjust sanctions or straining the language of the rule. Providing the substantial range of discretion allowed by rule 54(d) will allow courts to avoid this dilemma and react fairly to every situation.

tions after trial cannot offset the chilling effect of potential sanctions. While some coercion in cases presenting only private process values may be tolerable, courts should not allow rule 68 to coerce settlements in cases laden with public process values. Consequently, courts should act before trial to exempt from rule 68 sanctions all cases that turn on novel and substantial issues of fact or law³²⁶ and all cases in which judicial resolution may substantially benefit nonparties.³²⁷

However, blanket exclusions such as the 1984 proposal's exclusion of class actions or derivative suits are unnecessary as long as attorneys' fees are not a potential sanction for good faith rejections.³²⁸ If the drafters of rule 68 adopt the normative sanction of ten times post-offer costs, then judicial discretion to exempt novel cases from rule 68 sanctions before trial and to reduce sanctions after trial should adequately protect against ruinous sanctions and coerced settlements.

V. Rule 68 and Alternative Dispute Resolution

The American Rule is predicated on the policy that anyone with a meritorious claim has the right to go to trial undeterred by the prospect of paying the opponent's attorneys' fees if he refuses to settle or if the suit is unsuccessful. This policy limits the degree to

326. Deciding novel and substantial issues is one of the principal purposes of the judiciary, and it is in the public's interest not to chill the litigation of cases presenting such issues. See Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085-90 (1984) (positing that the purpose of litigation extends beyond the parties in interest, to enforcement of authoritative community values); *San Francisco Hearings on 1984 Proposal*, *supra* note 19, at 124 (testimony of Judith Resnik) (emphasizing importance of judges' opinions and juries' views on social issues).

327. The 1984 proposal appeared to allow a post-trial exemption for "a 'test case' presenting questions of far-reaching importance affecting non-parties." *1984 Proposal*, *supra* note 5, at 433 (sentence 8(4)). Although the 1984 proposal's emphasis on questions affecting nonparties is correct, because that implies a public interest in a judicial resolution, the phrase "test case" is a poor choice of words. First, it is unclear how to define a "test case." Must it present an issue of first impression? Or may it be a case like *Brown v. Board of Educ.*, 349 U.S. 294 (1954), that asks the court to reconsider an entrenched but undesirable legal doctrine? Moreover, the significance of cases that became test cases may not be clear until after the court renders a decision. See Wasby, *How Planned is "Planned Litigation"?*, 1984 AM. B. FOUND. RESEARCH J. 83, 138 (concluding that many test cases result from situations beyond the litigator's control).

328. Both the 1983 and 1984 proposals provided that rule 68 "shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2." *1983 Proposal*, *supra* note 4, at 363 (sentence 11); *1984 Proposal*, *supra* note 5, at 433 (sentence 10). The rationale for this exclusion has been soundly criticized. See *supra* text accompanying notes 241-50.

However, if attorneys' fees are a potential sanction for good faith rejections, a blanket exclusion would be justified not only for class actions and derivative suits, but also for all cases based primarily on statutes allowing an award of attorneys' fees to the prevailing party. See *supra* note 251.

which rule 68 can encourage settlements. Any sanction weighty enough to work a substantial increase in the number of settlements or to advance significantly the timing of settlements is likely to be too strong to survive political opposition or ensure that litigants with meritorious cases are not coerced into inadequate settlements. In short, any version of rule 68 that is politically acceptable and that honors the policies embodied in the American rule may be too weak to affect the parties significantly in settlement negotiations. Even if the drafters of rule 68 fully adopt this author's suggestions for revising the rule, many parties would probably continue their current pattern of negotiating. Some increase in settlements would probably result, because rule 68 would give parties an incentive to settle and, perhaps more importantly, because rule 68 would transform an opening offer from a sign of weakness to a sign of strength.³²⁹ Nevertheless, a major obstacle to settlement would remain: a case is unlikely to settle when the parties sharply disagree on the value of the case. Parties will usually continue toward trial as long as they believe that they are more likely to gain rather than lose by continuing the litigation. Because any politically acceptable version of rule 68 would not greatly change the calculus of gains and losses, many parties that would refuse to settle absent rule 68 would maintain that posture despite rule 68.³³⁰

Conversely, as parties agree more closely on the likely outcome at trial, rule 68 is more likely to change settlement behavior. Stated another way, as the rule 68 sanction increases in relation to the difference between the parties' settlement positions, the rule is more likely to prompt a timely settlement.

329. One commentator has likened rule 68 to a cross between a white flag of surrender and a backgammon doubling cube. Varon, *supra* note 158, at 816. To the extent a rule 68 offer is like a backgammon doubling cube, it indicates the offeror's confidence in his case: The offeror raises the stakes of the litigation if he is confident that the plaintiff could not do better at trial than the amount of the rule 68 offer. On the other hand, a defendant who denies any liability at all may view the rule 68 offer more like the surrender flag than the doubling cube.

330. The Administrative Office of the United States Courts keeps no statistics on the amount in controversy in federal court cases, and this author knows of no private study of the amount in controversy. Generally, however, many lawyers consider it uneconomical to litigate a case in federal court unless the amount in controversy is at least \$50,000 to \$100,000. When the amount in controversy is over \$100,000, the parties are likely to be separated by more than a few thousand dollars in settlement negotiations. Rule 68 in its present form obviously cannot bridge this gap. As pointed out above, the median amount of taxable costs in federal court litigation appears to be about \$2,300 — and that amount encompasses all costs for the entire case, not just the post-offer costs available under rule 68. See *supra* note 279. In its present form, rule 68 might bridge a maximum gap of about \$4,600 — the plaintiff's downside risk in rejecting a rule 68 offer (losing \$2,300 in costs and paying \$2,300 of his opponent's costs). This author doubts that many settlements are blocked over amounts in the \$5,000 range, which partly explains the seemingly minimal impact of rule 68 to date in non-fee-shifting, i.e., pre-*Marek*, cases. If rule 68 carried a potential sanction of 10 times post-offer costs, however — and more in cases of bad faith, frivolous, or improper rejections — then rule 68 might bridge the gap more often. Rule 68 could now span differences far greater than \$4,600. Cases would elude this settlement incentive also, however, as long as the parties remained apart by a factor of more than 20 times costs.

There are two possible pathways for increasing rule 68 sanctions in relation to the differences between parties' negotiating positions. One way is to increase rule 68 sanctions; however, this option eventually becomes politically and philosophically unacceptable. The alternative is to reduce the differences between the parties — a solution that is preferable to increasing rule 68 sanctions.

Differences between parties can be reduced through various forms of alternative dispute resolution (ADR).³³¹ In some jurisdictions, ADR includes court-imposed arbitration programs,³³² mandatory mediation of diversity suits,³³³ or mandatory early neutral evaluation of all suits for money damages.³³⁴ In other jurisdictions, ADR includes consensual use of a master or magistrate for settlement conferences,³³⁵ or mandatory summary jury trials.³³⁶ In addition, the literature is now filled with instances in which the

331. The close link between rule 68 and ADR has also been recognized by Senator Mitch McConnell in his recently introduced Alternative Dispute Resolution Promotion Act of 1986. See S. 2038, 99th Cong., 2d Sess. (Feb. 3, 1986). In addition to proposing an amendment to rule 68 (essentially the 1984 proposal), the bill seeks to broaden incentives for parties to use methods of ADR. See *id.* One of the major goals common to various alternative dispute resolution techniques is to give the parties a neutral view as to what their cases are worth. See, e.g., Brazil, Kahn, Newman & Gold, *early neutral evaluation: an experimental effort to expedite dispute resolution*, 69 JUDICATURE 279, 280 (1986) (major goal of California program is to give parties "a frank, thoughtful assessment of the relative strengths of the parties' positions and of the overall value of the case"); Davis & Omlie, *Mini-Trials: The Courtroom in the Boardroom*, 21 WILLAMETTE L. REV. 531, 532 (1985); Lambros, *The Judge's Role in Fostering Voluntary Settlements*, 29 VILL. L. REV. 1363, 1374-75 (1984) (summary jury trial helps settle cases because it "reveals to the parties a jury's perception of their dispute").

332. See generally E. LIND & J. SHAPARD, *EVALUATION OF COURT ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS* (Fed. Jud. Center 1981) (discussing mandatory arbitration programs employed by courts for the District of Connecticut, the Eastern District of Pennsylvania, and the Northern District of California); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983) (analyzing Philadelphia's mandatory arbitration program's effectiveness and recommending congressional and federal judicial expansion of the program).

333. E.g., E.D. MICH. R. 32, reprinted in LOCAL FED. LOCAL CT. R. (Callaghan), Release No. 64, at 19-21 (Nov. 1984) ("The Court may submit any civil diversity case to mediation when the relief sought is exclusively money damages.").

334. E.g., Brazil, Kahn, Newman & Gold, *supra* note 331, at 280-83 (describing program in Northern District of California).

335. Burnett, *Practical, Innovative and Progressive Utilization of United States Magistrates to Improve the Administration of Justice in the United States District Courts*, 28 HOW. L.J. 293, 296-97 (1985) (discussing magistrate's role in helping to settle civil suits); Cooley, *Using Settlement Masters*, Case & Comment, March-Apr. 1985, at 21-24 (discussing advantages of using special masters to facilitate settlement in complex cases). See generally Susskind, *Court Appointed Masters as Mediators*, 1 NEGOTIATIONS J. 295 (1985) (discussing use of special masters in civil litigation).

336. Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 46 & n.19 (1980) (court selects cases to be set for summary jury trial and enters order setting date, court, and presiding judge).

parties themselves have initiated ADR proceedings, such as mini-trials, mediations, or neutral factfinding, that have led to settlements.³³⁷ For each of these forms of ADR — systematic, ad hoc, and voluntary — studies and anecdotal evidence indicate that ADR is a powerful tool for encouraging settlement by narrowing parties' differences.³³⁸

The essence of ADR is a neutral, nonbinding reaction to the parties' opposing positions. By allowing the parties to meet and to see their cases through a neutral lens, ADR narrows the differences between parties and promotes settlement. However, even though an ADR proceeding may bring the parties closer together, some gap is likely to remain between the parties' positions. Even if the parties greatly respect the neutral party conducting the ADR proceeding, the plaintiff is likely to want somewhat more than the neutral party advises, and the defendant is likely to want to give somewhat less than the neutral party recommends. This gap will remain as long as the parties believe they have more to gain by continuing toward trial than by making further concessions in settlement negotiations.

Rule 68 may bridge this narrowed gap by making it more expensive to continue toward trial. Once a party has made a rule 68 offer, each dollar of taxable costs incurred by the offeror may potentially cost the rejecting party ten dollars, assuming the drafters of rule 68 accept the author's formula for defining a rule 68 sanction.³³⁹ Moreover, if the rejection is made in bad faith, frivolously,

337. See, e.g., Green, Marks & Olson, *Settling Large Case Litigation: An Alternate Approach*, 11 LOY. L.A.L. REV. 493, 501-06 (1978) (discussing mini-trials in the corporate context); Nelson, *Alternative Dispute Resolution: A Supermarket for Law Reform*, 14 N.M.L. REV. 467, 473-78 (1984) (describing various methods of alternative dispute resolution); *Mini-Trials Draw Support From Bar, Corporate Officials*, L.A. Daily J., Nov. 26, 1985, at 1, col. 2; *Can We Talk? Mediation Gains in Law Disputes*, Wall St. J., May 14, 1985, § 2, at 1, col. 2.

338. There has been a spate of recent writings praising ADR methods. See, e.g., CENTER FOR PUBLIC RESOURCES, *MINI-TRIAL HANDBOOK* (E. Green, ed., 1982); *Alternative Dispute Resolution*, 29 VILL. L. REV. 1219 (1984); Edwards, *Hopes and Fears for Alternative Dispute Resolution*, 21 WILLAMETTE L. REV. 425 (1985); Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43 (1980); Nejelski & Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983); Parker & Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 38 BUS. LAW. 35 (1982); Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976) (address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice); Note, *The California Rent-A-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592 (1981). Some of the methods of alternative dispute resolution present alternatives to courts, but others — especially referral to a mediator, arbitrator, master or magistrate for a summary jury trial or mini-trial — represent alternatives within the courts. Most methods of alternative dispute resolution can thus be used even after suit is filed.

339. The possibility that a party might recoup \$10 in rule 68 sanctions for each dollar of costs expended after a rule 68 offer may lead to some abuses; some offerors may try to run up costs unreasonably after making a rule 68 offer to increase leverage for settlement. This potential for abuse is not a serious problem, however. The largest item of taxable costs is ordinarily depositions. See, e.g., *United States v. Bexar County*, 89 F.R.D. 391, 392, 394 (W.D. Tex. 1981) (costs awarded for deposition transcripts amounted to nearly \$24,000 of total taxable costs of about \$25,300). If the offeror appears to be taking needless depositions, two avenues are open to the offeree.

or for an improper purpose, the rejecting party may have to pay the offeror's attorneys' fees and other expenses, as well as the court's expenses, that are incurred as a result of the wrongful rejection.³⁴⁰ Thus, by substantially increasing the potential loss of continued litigation, rule 68 can force a settlement.

Some might argue that a more vigorous program of alternative dispute resolution would render rule 68 unnecessary. ADR programs that substantially encourage earlier settlements should be expanded, but ADR programs will not render rule 68 superfluous. Not every case is appropriate for ADR. Rule 68 may encourage earlier settlement in some cases that would not benefit by ADR. Moreover, although several studies show that ADR does ultimately lead to settlement in many cases that apparently would not otherwise settle,³⁴¹ a significant number of cases do not settle until

One avenue is to move for a protective order pursuant to FED. R. CIV. P. 26(c), to propose a discovery plan under FED. R. CIV. P. 26(f), and to move for sanctions pursuant to FED. R. CIV. P. 26(g). The second avenue is to ask the court for a pretrial ruling on the allowability of the costs the offeror is accruing. *Cf. Northcross v. Board of Educ.*, 611 F.2d 624, 640 (6th Cir. 1979) (encouraging litigants to obtain pretrial authorization from the court before incurring large items of expense); *In re Continental Ill. Sec. Litig.*, 572 F. Supp. 931, 933 (N.D. Ill. 1983) (court established pretrial guidelines regarding future awards of fees and expenses). Both of these avenues should prevent abuses before they occur.

Even if abuses cannot be prevented, they can be corrected when the court reviews the offeror's bill of costs on a motion for rule 68 sanctions after trial. A court has discretion to deny costs if the party seeking costs has unduly extended or complicated the case. *ADM Corp. v. Speedmaster Packaging Corp.*, 525 F.2d 662, 665 (3d Cir. 1975); *cf. Walters v. Roadway Express, Inc.*, 622 F.2d 162, 166 (5th Cir. 1980) (denying costs to prevailing defendant who inflated costs through a lack of diligence). Moreover, the court may decide on purely statutory grounds that excessive depositions were not "necessarily obtained for use in the case," as required by 28 U.S.C. § 1920(2) (1982). *See, e.g., Feher v. Department of Labor & Indus. Relations*, 561 F. Supp. 757, 768 (D. Hawaii 1983) (denying costs for depositions not used at trial and not shown to be otherwise necessary); *Neely v. General Elec. Co.*, 90 F.R.D. 627, 630 (N.D. Ga. 1981) (denying costs for deposition transcripts when plaintiff failed to explain why they were necessary); *Pate v. General Motors Corp.*, 89 F.R.D. 342, 344 (N.D. Miss. 1981) (same).

In any event, the possibility that an offeror may unreasonably run up costs after making an offer implies that the offeror has not run up some costs before making the offer. The offeree's acceptance of the offer may thus head off much discovery that might otherwise have occurred. If rule 68 can encourage settlement before the heaviest expenses of litigation are incurred, it will be serving a highly positive purpose.

340. *See infra* note 354.

341. Much of the evidence about the effectiveness of summary jury trials and other ADR methods is anecdotal. At the AALS Convention in New Orleans in January 1986, for example, Judge Richard Enslen of the United States District Court for the Western District of Michigan stated that 42 of the 46 cases that he had assigned to a summary jury trial had settled soon after the summary trial was over. Speech by The Honorable Richard Enslen, Program of AALS Section of Alternative Dispute Resolutions, New Orleans, La. (Jan. 5, 1986). Judge Enslen pointed out that this was an extraordinarily high rate because he assigns to summary jury trial only those cases that have reached an impasse in settlement and would very likely not settle before trial without court intervention.

Many other anecdotes are reported in the press. *E.g., Mini-Trial a Success*, Chi.

long after the ADR procedure has ended.³⁴² Rule 68 could speed up the process of settlement after the conclusion of an ADR proceeding by making each day of continued litigation potentially far more expensive than it would be without rule 68. Further, even cases that are appropriate for ADR may not be ready for ADR until relatively late in the litigation, after substantial discovery and issue-narrowing has occurred. In contrast, rule 68 offers can be made early in the litigation, thus encouraging parties to begin a settlement dialogue and evaluate settlement possibilities long before an ADR proceeding would normally take place. In addition, rule 68 offers a far less expensive settlement tool than ADR proceedings for both the parties and the courts.

At the opposite extreme, some might argue that rule 68 should be incorporated automatically into all ADR proceedings: any party who failed to obtain a judgment better than the ADR recommendation would be sanctioned. This formula is appealing because it would give more authority to ADR proceedings and make them more potent vehicles for promoting settlement. Nonetheless, it would be unwise to attach rule 68 directly to ADR proceedings. Automatically incorporating rule 68 into ADR proceedings would overvalue ADR results. In some cases, both parties may recognize that the ADR result is aberrational, in which case it would then be unfair to penalize the losing party for failing to receive a better judgment at trial. Moreover, making the ADR result the benchmark for triggering rule 68 sanctions might lead some parties to oppose ADR in order to avoid rule 68. Because ADR has independent value in encouraging settlement even without sanctions, it would be foolish to impede the ADR program. Further, some forms of ADR do not yield a specific result or monetary judgment. Summary jury trials, for example, often yield six separate verdicts from six separate jurors rather than one overall jury verdict.³⁴³ Mediators and mini-trial advisors often give no

Daily L. Bull., June 26, 1985, at 1, col. 5 (describing mini-trial that began after jury selection had begun); *Summary Jury Trials Gain Favor*, Nat'l L.J., June 10, 1985, at 1, col. 2 (half-day summary jury trial settled 10-year-old antitrust case after lawyers claimed there was no chance of settlement); *Master Lands Settlement That Almost Got Away*, Legal Times of Washington, Apr. 22, 1985, at 1, col. 3 (describing success of special settlement master in helping parties to negotiate agreement in 15-year-old fishing rights case).

The few formal studies in the literature tend to confirm the anecdotal evidence that ADR helps settle cases that would otherwise go to trial. See, e.g., Lambros, *Summary Jury Trials*, *supra* note 292, at 472; Levin, *Court-Annexed Arbitration*, 16 U. MICH. J.L. REF. 537, 543 (1983) (it is "safe to estimate that court-annexed arbitration reduces the number of trials by 50%").

342. See Lambros, *Summary Jury Trials*, *supra* note 292, at 472 (Table I); Levin, *supra* note 341, at 542-43 (of 283 cases referred to an arbitration panel in the Eastern District of Pennsylvania in 1979, 53 cases — just under 20% of those arbitrated — had either gone to trial or were still pending as of November 30, 1981).

343. See Lambros & Shunk, *The Summary Jury Trial*, 29 CLEV. ST. L. REV. 43, 48 (1980) (verdict sheet used by Judge Lambros for summary jury trials "provides a means for each juror to state his own findings should agreement be impossible"). But see *A Compendium of Judicial ADR, ALTERNATIVES TO THE HIGH COST OF LITIGATION*, Special Issue, 1985, at 5, 7 (in District of Massachusetts, each juror arrives at a

verdict at all.³⁴⁴ Making the ADR result the trigger for rule 68 sanctions would thus fail to invoke rule 68 or force parties into a form of ADR that yields a result compatible with rule 68's standard for triggering sanctions, even if that form of ADR is not the best to encourage settlement in the particular case. Thus, although rule 68 and ADR complement each other well, they should not be automatically linked. Parties should be able to use rule 68 offers and ADR proceedings independently.

By functioning independently of ADR, rule 68 will allow parties to self-regulate penalties for nonsettlement. When the parties have significantly narrowed their differences with the help of an ADR proceeding, or when the gap between the parties is not large enough to justify the time and expense of an ADR proceeding, rule 68 should provide a substantial incentive to conclude a settlement.

VI. *The Author's Proposal to Amend Rule 68*

Based on the considerations articulated in this Article, the author has developed a specific proposal for amending rule 68 that should lead to a workable and effective rule proposal:

A. *The Proposal*

The author's proposal is as follows:

Offers of Settlement

(a) *Service.* At any time more than 60 days after service of the summons and complaint upon a party but not less than 45 days before trial, any party may serve upon any adverse party or parties (but shall not file with the court) a written offer, denominated as an offer under this rule, to settle a claim for the money, property, injunctive relief, declaratory relief, or other relief specified in the offer, and to enter into a stipulation dismissing the claim or allowing judgment to be entered according to the terms of the offer.³⁴⁵

figure on damages, then the total is divided by the number of jurors to reach an average verdict).

344. See, e.g., Parker & Radoff, *The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes*, 38 BUS. LAW. 35, 43 (1982) (suggesting that neutral adviser may be unnecessary for mini-trial); Phillips & Tiazza, *How to Use Mediation*, 10 LITIGATION, Spring 1984, at 31, 31 ("The mediator does not make findings of fact or law.").

345. Subparagraph (a) essentially tracks the language of the 1984 proposal. See 1984 Proposal, *supra* note 5, at 432-33 (sentence 1). The phrases "injunctive relief" and "declaratory relief" have been added to clarify that the rule applies to actions seeking relief other than money damages.

Nevertheless, there are inherent problems in applying rule 68 to cases for non-monetary relief because, unless the defendant prevails, it is often difficult to tell

(b) *Time for acceptance.* The offer shall remain open for 30 days unless sooner withdrawn by a writing served on the offeree before the offer is accepted by the offeree. An offer that is neither withdrawn nor accepted within 30 days shall be deemed rejected.³⁴⁶

(c) *Adjustments to time limits.* For good cause shown, the court may, upon motion, lengthen or shorten any of the time periods or time limits established by this rule, except that no party shall be required to keep an offer open for more than 30 days, or be required to respond to an offer in less than seven days.³⁴⁷

(d) *Subsequent offers; admissibility.* The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible for any purpose except in proceedings to enforce a settlement, execute upon a judgment, or determine sanctions or costs under these rules.³⁴⁸

(e) *Acceptance.* If an offer or counteroffer is accepted, the offeror and offeree shall promptly carry out the terms of the offer.³⁴⁹

whether the offer is more favorable than the judgment. See *Marek v. Chesny*, 105 S. Ct. 3012, 3030 (1985) (Brennan, J., dissenting); *Garrity v. Sununu*, 752 F.2d 727, 731-33 (1st Cir. 1984); see also *Association for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 495, 498 (D.N.D. 1982) (concluding that defendants were not entitled to rule 68 reduction in costs because the offer of judgment containing "specific and detailed programs" for injunctive relief was not more favorable than injunction finally issued due to the offer's "numerous caveats in anticipation of administrative breakdowns"), *modified on other grounds*, 713 F.2d 1384 (8th Cir. 1983).

Because of this difficulty, some critics have urged the exclusion of cases involving injunctive relief from rule 68's ambit. See Note, *The "Offer of Judgment" Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 GOLDEN GATE L. REV. 963, 969-71 (1980); Letter from D. Lowell Jensen, Acting Deputy Attorney General, to Hon. Edward T. Gignoux, at 13-14 (Feb. 28, 1984) (commenting on 1984 proposal). The better view, however, is that rule 68 "should be held inapplicable only when a court concludes that the presence of injunctive and equitable issues makes the Rule 68 comparison too difficult." Varon, *supra* note 158, at 836 (footnote omitted). If rule 68 excluded cases involving injunctive or equitable relief, parties could try to immunize themselves from the rule simply by including a colorable claim for injunctive relief.

346. Allowing only 30 instead of 60 days for an offeree to consider an offer doubles the number of offers and counteroffers that can be made within a given period, compared to the 1984 proposal.

347. Courts should be empowered to lengthen or shorten time limits upon good cause shown, see FED. R. CIV. P. 6(b), but it would be unfair to require any party to keep an offer open for more than 30 days because conditions would be too likely to change. See *Staffend v. Lake Cent. Airlines*, 47 F.R.D. 218, 220 (N.D. Ohio 1969) ("No sensible defendant would make an Offer of Judgment under Rule 68 if he knew the offer might be kept open for an indefinite period of time, even though the value of the litigation might change.").

348. Subparagraph (d) is taken virtually verbatim from the 1984 proposal, see *1984 Proposal*, *supra* note 5, at 433 (sentences 5-6). However, the phrase "to execute upon a judgment" has been added, because an accepted offer of judgment could conceivably be relevant in a proceeding to enforce the judgment.

349. Subparagraph (e) is added primarily for completeness, because the 1984 proposal ignores the obligations of the parties in the event an offer is accepted. The current rule addresses acceptance by providing that if an offer is accepted "either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment." FED. R. CIV. P. 68 (sentence 2). The provision for filing the offer with the court followed by entry of judgment would be inappropriate if a party simply offered to enter into a stipulation dismissing the claim. Nevertheless, the amended rule should provide general instructions regarding accepted offers.

(f) *Sanctions for rejection.* (1) If an offer is rejected and the judgment finally entered (exclusive of post-offer costs, expenses, or attorneys' fees) appears not more favorable to the offeree than the rejected offer, the offeror may file the offer with the court (together with a bill of costs incurred after the making of the offer) in support of a motion for sanctions pursuant to this rule.

(2) If the court determines that the judgment finally entered is not more favorable to the offeree than the rejected offer, the offeree shall not recover any costs taxable under 28 U.S.C. § 1920 incurred after the date the offer was made, and the offeree, or his attorney, or both, shall pay the offeror ten times the costs taxable under 28 U.S.C. § 1920 (excluding attorneys' fees) incurred by the offeror after the date the offer was made, unless the court reduces these sanctions pursuant to subparagraph (g) of this rule. This provision shall not affect any party's entitlement to attorneys' fees allowed by statute.³⁵⁰

350. Although attorneys' fees are sometimes considered part of the judgment, *see* 28 U.S.C. § 1920 (1982), post-offer costs, expenses, and fees should not be included in the judgment for purposes of comparing the judgment to the rejected offer. *See* *Marek v. Chesny*, 105 S. Ct. 3012, 3016 (1985) (citing with approval *Chesny v. Marek*, 720 F.2d 474, 476 (7th Cir. 1983)) ("[P]ost-offer costs [including statutory attorneys' fees] merely offset part of the expense of continuing the litigation to trial, and should not be included in the calculus."). Pre-offer costs, expenses, and attorneys' fees that have accrued as of the date of the offer ought, however, to be accounted for by subtracting them from the amount of the rejected offer before the offer is compared to the judgment finally entered. *See, e.g., Chesny v. Marek*, 720 F.2d 474, 476 (7th Cir. 1983) (comparing sum of jury verdict and accrued costs and attorneys' fees to the offer), *rev'd on other grounds*, 105 S. Ct. 3012 (1985).

The advisory committee note should make clear that an offer that expressly excludes pre-offer costs, expenses, and attorneys' fees is invalid, *see Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (D. Colo. 1978) (invalidating offer that expressly excluded section 1988 attorneys' fees because "rule 68 does not permit an offeror to choose which accrued costs he is willing to pay"), and that a lump-sum offer that expressly includes pre-offer costs and attorneys' fees in a fee-shifting case is valid. *See Marek*, 105 S. Ct. at 3014-15 (holding valid a lump sum of \$100,000 including accrued pre-offer costs and attorneys' fees under 42 U.S.C. § 1988 (1982)). The advisory committee note should also endorse the result in *Fulps v. City of Springfield*, 715 F.2d 1088, 1093-95 (6th Cir. 1983). In *Fulps*, the defendant in a civil rights case made a rule 68 offer for a specified sum plus accrued costs. The plaintiff accepted the offer and petitioned for an award of attorneys' fees, arguing that the offer to pay "costs" obligated the offeror to pay the plaintiff's attorneys' fees under section 1988 in addition to the specified amount of the offer. *Id.* at 1090. The defendant argued that "costs" referred only to traditional costs under 28 U.S.C. § 1920, but the court agreed with the plaintiff and ordered the defendant to pay plaintiff's pre-offer fees. *Id.* at 1091, 1095. This result is correct because, as the *Fulps* Court indicated, a plaintiff who prevails at settlement is the "prevailing party" for purposes of section 1988 and is entitled to a full award of reasonable attorneys' fees. *Id.* at 1090; *see Maher v. Gagne*, 448 U.S. 122, 129 (1980) (plaintiff's claim to fees not weakened by prevailing through settlement rather than through litigation).

The offeror must be allowed to file the offer with the court whenever the offer "appears" more favorable to the offeree than the rejected offer. The word "appears" is used to account for cases involving equitable relief and cases in which the plaintiff's pre-offer attorneys' fees and costs are unknown; either case might not permit an offeror to determine with certainty whether the offer was more favorable than the judgment. Although a bill of costs is normally filed with the clerk, *see* FED. R. CIV. P.

(g) *Discretion to reduce sanctions.* (1) Upon its own motion or upon the motion of a party or attorney being sanctioned, the court may reduce or eliminate sanctions in any circumstances where the court would reduce or deny an award of costs to a prevailing party pursuant to rule 54(d).

(2) If a motion to reduce or eliminate sanctions is substantially denied, the court shall, after opportunity for hearing, require the moving party, or the attorney advising the moving party, or both, to pay to the party opposing the motion the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.³⁵¹

54(d), the bill of costs should be filed with the court when rule 68 applies so that the court can decide whether to reduce the amount of taxable costs.

The parenthetical insertions in subparagraph (f) essentially supersede the holding in *Marek v. Chesny* that "costs" in rule 68 include statutory attorneys' fees whenever an applicable fee-shifting statute defines those attorneys' fees as "costs." See *Marek*, 105 S. Ct. at 3016-17. Thus, under this author's proposal, a court will not automatically deny a plaintiff post-offer attorneys' fees even if the final judgment was less favorable than the rejected offer. Nor would the rule entitle the offeree (plaintiff or defendant) to ten times the post-offer statutory attorneys' fees, even if the fees are statutorily defined as "costs."

Although rule 68 will not automatically deny plaintiffs their post-offer statutory attorneys' fees, this result may have little effect in many fee-shifting cases because *Marek* strongly implied that a plaintiff who rejects *any* settlement offer — whether or not under rule 68 — is generally not entitled to statutory attorneys' fees for post-offer work if he fails to beat the offer at trial. See *Marek*, 105 S. Ct. at 3016 (most important factor for determining reasonable fee is the degree of success obtained). Even the dissent in *Marek* recognized that "a civil-rights plaintiff who *unreasonably* fails to accept a settlement offer, and who thereafter recovers less than the proffered amount in settlement, is barred under section 1988 itself from recovering fees for unproductive work performed in the wake of the rejection To this extent, the results might sometimes be the same under either § 1988's reasonableness inquiry or the Court's wooden application of Rule 68." *Id.* at 3028 (Brennan, J., dissenting) (emphasis in original). Unless Congress enacts legislation overriding this part of the *Marek* holding, plaintiffs who fail to beat offers at trial will presumptively not be entitled to fees for post-offer work.

Despite the minimal practical effect, it may be impossible as a matter of politics to get an amended version of rule 68 through the Judicial Conference or Congress if the amended version does not contradict *Marek*. The opposition from the civil rights bar is too strong to be taken lightly. This author seriously questions the wisdom of this opposition, see Simon, *supra* note 13, at 926-29 (arguing that the holding in *Marek* will actually *benefit* civil rights plaintiffs and their lawyers by encouraging early, generous settlement offers in civil rights cases), but believes it is sound politics to overrule *Marek* via an amended rule 68 to ensure that political opposition will not kill yet another rule 68 proposal.

351. In some instances, the court may be able to determine quickly on its own motion that sanctions ought to be reduced. More commonly, the court will be wise to await a motion to reduce sanctions from the offeree. Subparagraph (g) allows the court not only to reduce or deny an award to the offeror, but also to affirmatively award post-offer costs to the offeree in exceptional circumstances.

By attaching some potential penalty to an unsuccessful motion to reduce sanctions, the proposed rule discourages collateral litigation. The language of the potential sanction for an unsuccessful motion to reduce sanctions is taken virtually verbatim from FED. R. CIV. P. 37(a)(4), which deters unjustified motions to compel discovery. This language allows sanctions against either the party or his attorney.

The advisory committee note should clarify that rule 68 does not impose any sanctions for unsuccessfully *opposing* a motion to reduce sanctions. The initiation of a motion to reduce sanctions, not the opposition to the motion, is the primary cause of collateral litigation. Indeed, the opposition may assist the court in identifying and weighing the various relevant factors.

(h) *Exemptions.* At any time before final judgment is entered, upon its own motion or upon motion of any party, the court may exempt from sanctions under this rule any case or count that presents novel and substantial questions of law or fact or that presents issues substantially affecting nonparties. If a case or count is exempted from sanctions under this rule, all past and pending offers made by any party under the rule shall be void and of no effect, and no future offers shall be permitted except on leave of court.³⁵²

(i) *Bifurcated proceedings.* When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of settlement that shall have the same effect as an offer made before trial if (1) it is served more than 30 days before the commencement of further proceedings, or (2) it is served less than 30 days before the commencement of further proceedings and the court upon motion orders a response before the commencement of further proceedings.³⁵³

352. Subparagraph (h) allows exemptions for cases or counts in particular suits where continued litigation is likely to benefit the public. The court should ordinarily tailor exemptions for certain counts rather than for an entire case; otherwise parties could attempt to immunize suits from rule 68 simply by including a colorable claim presenting a novel and substantial theory. The advisory committee note should explain, however, that where novel and substantial questions of law and fact or issues substantially affecting nonparties are the predominant issues in the litigation, the entire case should be exempt from sanctions under rule 68. Moreover, if a judge recognizes early that a case qualifies for exemption under this subparagraph, the judge should issue an exemption on his own motion rather than waiting for the parties to move for an exemption.

Once the court grants an exemption, all past and pending rule 68 offers must be voided, even if some offers were rejected before the parties sought an exemption. Parties should be allowed to make future rule 68 offers if conditions substantially change (e.g., if a controlling decision is handed down by a higher court), but only on leave of court. Otherwise, frustrated offerors might continually serve rule 68 offers to force upon the offeree the expense of returning to court to continue the exemption.

353. Subparagraph (i) is taken substantially from the existing rule. See FED. R. CIV. P. 68 (sentence 6). The Advisory Committee included a similar paragraph in the 1983 proposal, see 1983 *Proposal*, *supra* note 4, at 363 (sentence 10), but dropped the provision without explanation from the 1984 proposal.

Subparagraph (i) will be useful in categories of cases, such as patent and copyright infringement cases, in which it is the common practice to bifurcate hearings on liability and damages. It will also be useful if a prevailing plaintiff petitions for statutory fees, which are determined in a separate post-trial proceeding. Because the normal time limits governing rule 68 offers would render the rule useless in many bifurcated cases, subparagraph (i) establishes special time limits for cases in which only damages remain to be determined and there may be a relatively short time period between the proceedings on damages and liability.

The proposal expressly empowers the court to order a response to a rule 68 offer before the commencement of further proceedings. This may dictate a relatively short time period for response, but it should not put any substantial hardship on the offeree: an offeree who has been through a complete liability trial should be sufficiently familiar with the facts and law to evaluate an offer quickly. Moreover, there is no evidence that the 10-day period for evaluating offers under the similar post-liability provision of the existing rule has caused any difficulty.

(j) *Frivolous, improper, or bad faith rejections.* (1) If at any time before or after final judgment the court, upon motion, determines that an offer has been rejected frivolously, in bad faith, or for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of the litigation, the court shall, after opportunity for hearing, impose upon the rejecting party, his attorney, or both, an appropriate sanction, which may include an order to pay to the offeree the amount of the reasonable expenses incurred because of the rejection, including a reasonable attorney's fee, and to pay to the Clerk of the Court the reasonable costs incurred by the court because of the rejection.³⁵⁴

(2) If a motion for sanctions under subparagraph (j)(1) is denied, the court shall require the moving party or the attorney advising the motion or both of them to pay the opposing party the reasonable expenses incurred in opposing the motion, including attorneys' fees, unless the court finds that the making of the motion was substantially justified or that other circum-

354. Subparagraph (j)(1) essentially restates the courts' inherent powers to impose sanctions, including attorneys' fees, for bad faith or vexatious conduct. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975); *Hall v. Cole*, 412 U.S. 1, 15 (1973); see also *supra* notes 220-25 and accompanying text (discussing court's inherent power to issue sanctions).

The major purpose of subparagraph (j)(1) is to provide all litigants and their attorneys with adequate notice of the possible sanctions to satisfy the requirements of due process. See *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1449-53 (11th Cir. 1985); *Eash v. Riggins Trucking Co.*, 757 F.2d 557, 568-71 (3d Cir. 1985) (en banc); see also *supra* note 220 (discussing due process requirement for notice).

Subparagraph (j)(1) closely parallels the language of FED. R. CIV. P. 11. Rule 11 penalizes a party, his attorney, or both for signing any paper without a reasonable inquiry into the facts or a good faith argument of law, or for "any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation," and commands a court finding a violation to impose upon the party, his attorney, or both, "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorneys' fee." To further guard against due process problems, however, subparagraph (j)(1) also borrows from FED. R. CIV. P. 37(a)(4) and expressly provides that courts cannot impose a sanction until there has been an opportunity for a hearing.

Rule 11 itself might not cover a rejection made frivolously, in bad faith, or for an improper purpose. Rule 11 covers only "pleadings, motions, or other papers" that are actually signed by an attorney or his client. FED. R. CIV. P. 11. A rule 68 offer can be rejected without signing any paper, because failure to respond to an offer constitutes a rejection.

Finally, although the phrase "at any time" seems innocuous it is enormously significant. No matter how strong courts make the post-trial sanctions under rule 68, some offerees (especially defendants) will reject offers in bad faith, reasoning that the case will settle before trial and rule 68 sanctions therefore will not apply. Subparagraph (j)(1) allows an offeror to move for rule 68 sanctions before trial or after settlement (assuming the settlement agreement does not expressly preclude such a motion) on the grounds that the offeree has rejected an offer in bad faith or for an improper purpose. This would substantially strengthen rule 68 and significantly reduce the number of rejections that are made for abusive purposes.

In determining "an appropriate sanction" for a bad faith rejection, the court should be guided by many of the considerations that apply to FED. R. CIV. P. 11. For a discussion of these considerations, see Schwarzer, *Sanctions Under the New Federal Rule 11 — A Closer Look*, 104 F.R.D. 181, 200-05 (1985); see also note 202 (discussing the propriety of fines payable directly to the court).

stances make an award of expenses unjust.³⁵⁵

(k)(1) *Alternative dispute resolution.* Whenever it appears to the court that it would be in the interests of justice, the court may, on motion or on its own initiative, with or without the consent of the parties, order the parties to present their cases in abbreviated form to the court or to some other neutral non-party or jury. The neutral non-party may be selected by consent of the parties or appointed by the court. The procedures for the abbreviated presentation may be agreed upon by the parties unless established by the court. Whether or not the court is present, the court may order that the parties be present for the abbreviated presentation.³⁵⁶

(2) The record (if any) of the abbreviated presentation shall be available to the parties but shall otherwise be sealed, and

355. The language in subparagraph (j)(2) closely parallels that of FED. R. CIV. P. 37(a)(4). The only important difference is that no additional hearing is provided, because a hearing is already required in subparagraph (j)(1).

356. This provision is intended to give courts explicit power to order parties to engage in some form of alternative dispute resolution whenever this would serve the interests of justice. FED. R. CIV. P. 16(c)(7) already gives courts power at pretrial conference to discuss and take action with respect to "the possibility of settlement or the use of extrajudicial procedures to resolve the dispute," and some courts have invoked this provision or other powers to justify an order that the parties engage in a summary jury trial or some other form of ADR, such as a mini-trial or neutral fact-finding. See generally *The First Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, reprinted in 100 F.R.D. 512 (1983) (discussing various types of ADR proceedings). The provision proposed, however, is far more explicit and includes some procedural details lacking from rule 16(c)(7).

Subparagraph (k)(1) is flexible enough to allow the court to order whatever type of ADR mechanism would be best suited in the particular circumstances, taking into account the relationship between the parties, the posture of the litigation, the nature of the issues, the administrative convenience of the court, as well as other factors. This subparagraph expressly authorizes parties to make a motion requesting an ADR proceeding, but because parties are sometimes reluctant to initiate settlement procedures, subparagraph (k)(1) allows a court to order the parties to participate in an ADR proceeding regardless of a motion therefor. The court has the option of establishing its own procedures or allowing the parties to establish the procedures by consent. This will be a judgment call; in some instances, the ADR proceeding will work better if the parties themselves decide on the rules. Agreement on procedures may even give momentum to the negotiation on the merits. In other instances, however, parties may not make a good faith effort to hold a meaningful ADR proceeding, especially where the court has ordered the proceeding; attempting to negotiate ADR procedures might even exacerbate the parties' differences. In those circumstances the court should simply establish the procedures. Procedures for some forms of ADR, particularly the summary jury trial, are well established and readily adaptable by any district court. See, e.g., Lambros, *Summary Jury Trials*, *supra* note 292, at 481-89.

Some parties may object to the presence of the court at the ADR proceeding, perhaps fearing that the court will make up its mind about the value of the case based on the limited ADR presentations. In these instances, the court should consider permitting the parties to conduct the ADR proceeding outside its presence. If the court considers it important to have some official court presence at the ADR hearing, the court can seek the assistance of a special master, a magistrate, or another judge.

Regardless of the type of ADR proceeding, the court should have authority to order the parties to appear personally. One of the major strengths of ADR is that it forces the parties to confront each other's cases directly.

shall not be admissible in evidence except in a proceeding to determine costs after judgment is entered. Unless the parties present their abbreviated case in the court's presence, neither the parties nor the neutral non-party or jury who hears the abbreviated presentation nor any other person may communicate the result or any part of the proceedings to the court, except upon consent of all parties to the proceeding. The decisions or findings (if any) of the neutral non-party or jury shall not be binding on the parties unless the parties consent to be bound.³⁵⁷

(3) On motion or on its own initiative, the court may invoke its powers under subparagraph (k) whether or not a rule 68 offer has been made by any party and whether or not a case or court has otherwise been exempted from the operation of rule 68 pursuant to subparagraph (h) of this rule.³⁵⁸

357. Subparagraph (k)(2) recognizes that the parties may desire to keep the proceedings secret from the judge who will be trying the case, because otherwise the court might decide the case based on the abbreviated presentations. That would be unfair to the parties and would turn a bench trial into an empty formality. The primary purpose of an ADR proceeding is to assist the parties in reaching a settlement, not to aid the court in deciding the case.

Subparagraph (k)(2) makes clear that the ADR proceeding will be non-binding unless the parties want it to be binding. Parties have the right to make the findings of a neutral party binding, just as the parties can agree to binding arbitration. But unless ADR proceedings are ordinarily non-binding, fewer parties will request ADR proceedings, and requests that are made will more frequently be opposed. However, parties who do not want the ADR proceedings to be binding for all purposes may nevertheless be willing to stipulate that the proceeding be binding for some purposes, such as for establishing certain facts or for determining whether certain claims and defenses are frivolous. The parties might also agree that the ADR results will become the trigger point for rule 68 sanctions — that a party who insists on trial and fails to beat the ADR results will automatically be subject to rule 68 sanctions. Some federal courts have experimented with the system in this form, although not in connection with rule 68. See K. SHUART, *THE WAYNE COUNTY MEDIATION PROGRAM IN THE EASTERN DISTRICT OF MICHIGAN* 9 (Fed. Jud. Center 1984) (party rejecting unanimous valuation by panel of three mediators must pay adversary's costs and attorneys' fees if the rejecting party fails to improve position by more than 10%).

The provision that the record shall not be admissible except in a proceeding to determine costs implies that the record can be used as evidence in determining the taxable costs that will be the basis of rule 68 sanctions. This provision does not necessarily favor either party. If the ADR result was far more favorable to the offeree than the final judgment, then the ADR record will be helpful to the offeror in countering a motion by the offeree to reduce sanctions. If the situation is reversed, the offeree may present the ADR record to show the reasonableness of this rejection. Allowing the ADR record to be introduced as substantive evidence in proceedings to determine costs will save courts a substantial amount of time in deciding rule 68 sanctions.

358. Subparagraph (k)(3) makes clear that the court's powers under subparagraph (k) are independent of the court's other powers under rule 68. The court can order the parties to engage in an ADR proceeding even if no rule 68 offer has been made and even if the court has otherwise exempted the case from the operation of rule 68.

The independence of rule 68 and ADR proceedings is important and desirable. In some cases, ADR proceedings may be appropriate even though rule 68 sanctions would not. In other cases, ADR proceedings may be the best catalyst for getting the parties to bargain under rule 68. If a court was without power to order an ADR proceeding until a rule 68 offer was made, parties who wished to avoid ADR would have an incentive not to make rule 68 offers, and parties who viewed the initiation of settlement negotiations as a sign of weakness might never get to the bargaining table.

However, courts should be cautious in ordering the ADR proceedings in cases that have been exempted from rule 68. In those cases, trials and binding judicial decisions are in the public interest. See Edwards, *Alternative Dispute Resolutions: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1078-1087 (1984). Especially apt is Professor Fiss's observation that the job of

B. Advantages of the Author's Proposal

The author's proposal draws on the existing rule by returning to a mathematical standard and a cost-based normative sanction. This formula has three major advantages over the subjective, multifactored, retrospective approach of the 1984 proposal. First, the author's proposal is much simpler to apply than the 1984 proposal, so far less time will be spent in collateral litigation. Second, the normative sanction of ten times the offeror's post-offer taxable costs, together with the denial of post-offer taxable costs to the offeree, is strong enough to encourage use of the rule but, when viewed in conjunction with the court's power to reduce sanctions, is not so strong that it will coerce inadequate settlements or ruin those who are sanctioned. Third, the court's express power to exempt cases or counts involving novel and substantial issues or issues substantially affecting nonparties will eliminate any chilling effect on cases in which continued litigation would serve the public's interest.

Conclusion

The existing version of rule 68 is unsatisfactory, and nearly everyone now agrees that Congress or the Advisory Committee must amend the rule.³⁵⁹ The proposal developed in this Article addresses the objections to the 1983 and 1984 proposals and remedies the weaknesses of the existing rule, so that rule 68 can at last become a fair and meaningful part of the Federal Rules of Civil Procedure.

courts is "not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes; to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle." *Id.* at 1085.

359. Recent developments suggest that the Advisory Committee has abandoned its efforts to amend rule 68. At its April 21, 1986 meeting, the Advisory Committee voted to table the 1984 proposal. The Committee did not schedule any future time to consider the 1984 proposal and is not actively considering any new proposals to amend rule 68. The Committee apparently believes that rule 68 sanctions intrude into the area of substantive law and is therefore willing to leave the task of amending rule 68 to Congress.