

Interplay Between Mediation and Offer of Judgment Rule Sanctions

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I. INTRODUCTION

Mediation¹ and offer of judgment² rules are procedural devices that seek to promote settlement.³ They have generally functioned independently and without interaction. They both have sanction regimes to enforce compliance with their requirements, but the mediation sanction regime is quite limited, while the offer of judgment rule sanction regime is the very centerpiece of the procedure. The offer of judgment rule could be a useful adjunct to mediation. For example, if there is an impasse in mediation, one party could make an offer of settlement based on its last offer and use the leverage of the offer of judgment rule sanctions to push the other party to settlement.⁴ The other party could also counteroffer, with the possibility that the two offers will come closer to an agreement. However, there might be concern that mediation, as a voluntary process in which the parties cannot be required to settle, would be undercut by combining it with the offer of judgment rule that pressures a party to accept an offer at the risk of sanctions if it does not do better at trial. This article examines the sanction regimes under both

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¹ Mediation is not mentioned in the Federal Rules of Civil Procedure, but many federal district courts' local rules provide for it. The Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–82 (2006), required each district court to study and develop a civil justice “expense and delay reduction” plan, including consideration of alternative dispute resolution (ADR) programs. The most used ADR device is mediation. Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers*, in ALTERNATIVE DISPUTE RESOLUTION: THE LITIGATOR'S HANDBOOK 399, 406 (Nancy F. Atlas, Stephen K. Huber & E. Wendy Trachte-Huber eds., 2000) (“Mediation has emerged as the primary ADR process in the federal district courts.”).

² FED. R. CIV. P. 68 (Offer of Judgment).

³ *Marek v. Chesney*, 473 U.S. 1, 6 (1985). *But see generally* Robert G. Bone, “To Encourage Settlement”: Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561 (2008) (questioning whether settlement promotion was the principal goal of Rule 68).

⁴ *See, e.g., Knealing v. Puleo*, 675 So. 2d 593, 595–97 (Fla. 1996) (presenting an example of use of an offer of judgment made after a mediation impasse).

processes and proposes that the processes, properly used, can complement each other with the objective of encouraging settlement.

II. A COMPARISON OF SANCTIONING REGIMES

A. *The Mediation Sanction Regime*

Mediation is a process by which the parties, assisted by a neutral third person, seek to identify points of agreement and disagreement, explore options and alternative solutions, and reach a consensual settlement of the issues relating to their conflict.⁵ A keystone of the contemporary classical mediation model is that any agreement should be voluntarily arrived at by the parties. This rests on the belief that the parties will be more satisfied, and thus more likely to abide by the agreement, if it is of their own creation, and there is evidence to support this premise.⁶ Although the parties cannot be forced to settle, the court can require parties to participate in mediation and sanction parties for noncompliance.⁷ However, courts and commentators vary in their opinions of what constitutes noncompliance and debate the

⁵ ALAN SCOTT RAU, EDWARD F. SHERMAN & SCOTT R. PEPPET, *PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS* 313–14 (4th ed. 2006).

⁶ Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 *LAW & SOC'Y REV.* 11, 40–47 (1984).

⁷ See *In re Atl. Pipe Corp.*, 304 F.3d 135, 148 (1st Cir. 2002) (upholding the inherent power of a federal district court to order parties to participate in a non-binding mediation and issue sanctions when parties fail to comply); *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648, 656–57 (7th Cir. 1989) (upholding an order that the defendant was required to send a corporate representative with authority to settle to the pretrial conference and imposing sanctions for failure to comply). However, the more formal summary jury trial was viewed in a different light. See *Strandell v. Jackson County*, 838 F.2d 884, 886–88 (7th Cir. 1987) (holding that Rule 16 does not grant authority to order a mandatory summary jury trial, and noting that it might adversely affect a party's right not to disclose certain information in advance of trial). *Contra In re NLO, Inc.*, 5 F.3d 154, 158 (6th Cir. 1993) (holding that courts lack authority under Rule 16 to compel participation in a summary jury trial, and noting that “compelling an unwilling litigant to undergo this process improperly interposes the tribunal into the normal adversarial course of litigation”); *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 448–49 (M.D. Fla. 1988) (holding that summary jury trial is a legitimate device to promote settlement). However, the Civil Justice Reform Act of 1990, which authorizes district courts to make ADR devices available and specifically mentions summary jury trial, may have resolved the authority issue. 28 U.S.C. § 473(a)(6)(B) (2006).

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propriety of levying sanctions for failure to comply with orders to “participate in good faith.”⁸

It is often said that parties cannot be required to settle in a court-ordered settlement conference or mediation.⁹ However, the mediation sanction regime extends to situations where a party fails to comply with an order that they and their counsel attend, to bring requested documents, or to participate in good faith at least to the extent of “minimal participation.”¹⁰ Nevertheless, the purpose of the sanction regime is to encourage participation in a process in which any ultimate agreement must be voluntary and not to penalize parties for failing to settle or accept any particular offer.

Another procedural mechanism may offer more potent sanctions for failure to settle after a mediation or judicial settlement conference. Federal Rule of Civil Procedure 16 authorizes judges to order the attorneys and unrepresented parties¹¹ to attend pretrial conferences, the purpose of which

⁸ For discussion in this issue, see Peter Thompson, *Good Faith Mediation in the Federal Courts*, 26 OHIO ST. J. ON DISP. RESOL. 363 (2011); Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 282 (2011); Robert Rack, *A Letter to My Successor*, 26 OHIO ST. J. ON DISP. RESOL. 429 (2011).

⁹ *G. Heileman Brewing Co.*, 871 F.2d at 653 (“[I]t is important to note that a district court cannot coerce settlement.” (quoting *Kothe v. Smith*, 771 F.2d 667, 669 (2d Cir. 1985))).

¹⁰ See Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2089–94 (1993).

¹¹ For discussion of whether the parties themselves can be required to attend, even if represented by an attorney, see *G. Heileman Brewing Co.*, 871 F.2d at 648; Sherman, *supra* note 10. Compare *In re Stone*, 986 F.2d 898, 905 (5th Cir. 1993) (holding that a government official with the ultimate authority to settle need not attend if they are fully prepared and available by telephone at the time of the settlement conference); *with In re United States*, 149 F.3d 332, 333 (5th Cir. 1998) (distinguishing *Stone*, and holding that it is not an abuse of discretion to order the government to send a person with full settlement authority to mediation); and *United States v. Lake County Bd. of Comm’rs*, 2:04cv 415, 2007 WL 1202408 (N.D. Ind. Apr. 19, 2007) (denying a motion to require the presence of the Assistant Attorney General of the United States who had final settlement authority because he oversees a staff of 300 attorneys nationwide, and his attendance can only be practically accomplished by telephone); *with Scott v. United States* 552 F. Supp. 2d 917, 918–19 (D. Minn. 2008) (finding that a cap on the settlement authority of the United States that had been imposed by Attorney General regulations was an impediment to settlement, and that the magistrate’s order requiring an Assistant Attorney General from the Department of Justice to appear by telephone at follow-up settlement conference, fully briefed and “prepared to participate meaningfully in settlement discussions,” was not clearly erroneous or contrary to law). A 1993 amendment to Federal Rule of Civil Procedure 16(c)(1) added the words “or reasonably available by other means” to the

may be to settle the case or to use “special procedures to assist in resolving the dispute when authorized by statute or local rule.”¹² That rule also provides for scheduling orders that require parties to meet deadlines for discovery, motions, and “other appropriate matters.”¹³

The exercise of a judge’s Rule 16 powers could result in an order that requires any settlement to be made before trial or by a specified date, or else the parties would suffer sanctions. A seminal case in this area of the law is *Kothe v. Smith*,¹⁴ a medical malpractice case in which the judge, having held a pretrial conference at which the parties failed to settle, warned them that “if they settled for a comparable figure after trial had begun, he would impose sanctions against the dilatory party.”¹⁵ When the parties settled after one day of trial, at a figure comparable to what the judge had recommended at the settlement conference, he sanctioned the defendant.¹⁶ The appellate court reversed the sanction based largely on the fact that the sanction was only imposed on the defendant and the plaintiff had not informed the defendant that he would settle at the figure that the jury awarded.¹⁷

Kothe is often quoted for its statement that that the law “does not sanction efforts by trial judges to effect settlements through coercion” and that Rule 16 “was not designed as a means for clubbing the parties—or one of them—into an involuntary compromise.”¹⁸ Nevertheless, the appellate court did not say that a judge cannot issue an order that requires any settlement by a certain date on threat of sanctions. The holding seemingly relied instead on the one-sided nature of the sanctions imposed.

The case management movement¹⁹ has presented the possibility of sanctions for failure to settle within certain time periods under certain situations. In *Newton v. A.C. & S., Inc.*,²⁰ the trial court entered an order setting a time limit for settlement of asbestos personal injury cases set for

provision that a court may require a party or its representative to be present at a settlement conference. FED. R. CIV. P. 16 (c)(1).

¹² FED. R. CIV. P. 16(a), (c)(2)(I).

¹³ FED. R. CIV. P. 16(b)(3)(B)(vi).

¹⁴ *Kothe v. Smith*, 771 F.2d 667 (2d Cir. 1985).

¹⁵ *Id.* at 669.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ “Case management is a subcategory of judicial administration [whose goal] is to move cases through the various pretrial stages pursuant to reasonable deadlines.” Edward F. Sherman, *A Process Model and Agenda for Civil Justice Reforms in the States*, 46 STAN. L. REV. 1553, 1562 (1994).

²⁰ *Newton v. A.C. & S., Inc.*, 918 F.2d 1121, 1124 (3d Cir. 1990).

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trial and providing a \$1,000 fine if the cases were settled after such a date. Although the lower court found that the fixed fine was arbitrary, the appellate court concluded that Rule 16 provided authority for such a program:

Rule 16 does not specifically grant authority to the district court to impose sanctions for settling after a certain date. However, imposing sanctions for unjustified failure to comply with the court's schedule for settlement is entirely consistent with the spirit of Rule 16. The purpose of Rule 16 is to maximize the efficiency of the court system by insisting that attorneys and clients cooperate with the court and abandon practices which unreasonably interfere with the expeditious management of cases....

The intent and spirit of Rule 16 is to allow courts to actively manage the timetable of case preparation so as to expedite the speedy disposition of cases. Thus, the imposition of sanctions for failure to comply with a settlement schedule is entirely consistent with the purpose of Rule 16.²¹

This extension of sanctions is particularly related to the management of a large number of similar cases which flood a court's docket and interfere with their timely resolution. It is not directly related to mediation and has to be seen as simply another settlement sanction regime.

The scope of a judge's authority to impose sanctions for failure to settle within a certain time period is not entirely clear under the case law, but obvious factors to be drawn from *Kothe* and *Newton* are that imposition of sanctions should be used sparingly and even-handedly and that docket pressures may particularly justify their use. However, such sanction orders are not common, and although they may provide an additional form of pressure to settle, such pressure, tied to a schedule, is quite different from sanctions for failure adequately to participate in a mediation or judicial settlement conference.

B. *The Federal Rule 68 Sanction Regime*

Federal Rule of Civil Procedure 68 and equivalent rules under state court procedures allow a defendant to make an offer of judgment to a plaintiff, and if the plaintiff does not accept and the judgment finally obtained is not more favorable than the offer, to require the plaintiff to pay the costs the defendant

²¹ *Id.* at 1126.

incurred following the offer.²² This provides an incentive to accept an offer rather than risk cost-shifting. This goes far beyond the scope of the mediation sanction regime. It requires the plaintiff to consider an offer and, if the plaintiff refuses the offer, to do better at trial or suffer sanctions.²³ While there is no obligation in mediation to respond to a specific offer or to agree to a settlement based on that offer, the offer of judgment rule pressures a party to accept that offer on risk of cost-shifting.

The offer of judgment rule embodied in Federal Rule 68 has never quite caught on as a settlement tool. Quite simply, both anecdotal and empirical evidence show that lawyers rarely use Federal Rule 68.²⁴ A number of reasons have been advanced for its underutilization. These range from ignorance of the rule itself to inherent limitations in its provisions and uncertainty in its application.

Although Rule 68 has been part of the Federal Rules of Civil Procedure since 1938, one reason advanced for its lack of use is that the practicing bar is simply ignorant as to its operation and its value as a settlement tool.²⁵ A corollary complaint is that the rule's own terminology is a limiting factor. Federal Rule 68's use of the term "offer of judgment" is criticized as off-putting to some litigants.²⁶ A typical privately negotiated settlement would include a non-admission of liability and likely a confidentiality provision. In contrast, a judgment is considered a formal public declaration of wrongdoing that clients want to avoid for various reasons. Concerns over copycat

²² Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1874 (1998).

²³ See *Marek v. Chesny*, 473 U.S. 1, 6 (1985).

²⁴ Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 872 (2007) ("Indeed, the anecdotal evidence and empirical research on Rule 68 demonstrates that the rule is used infrequently . . ."); see Symposium, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?*, 57 MERCER L. REV. 743, 757 (2006) ("In summary, with some notable exceptions, it appears that Rule 68 is not used very much in the very type of cases in which it might be expected to have the greatest impact."); John E. Shapard, *Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure 1995* FED. JUDICIAL CTR. 89 (1995), available at [http://www.fjc.gov/public/pdf.nsf/lookup/ru_1e68.pdf/\\$file/rule68.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ru_1e68.pdf/$file/rule68.pdf) (noting that based on a survey of 800 federal civil cases, Rule 68 offers were made in 24% of civil rights cases that settled and were made in only 12% of civil rights cases that went to trial).

²⁵ See Shelton, *supra* note 24, at 876 n.51.

²⁶ See Symposium, *supra* note 24 at 754 ("Probably the most common explanation provided concerned problems associated with the word 'judgment.'").

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litigation, adverse publicity, and negative career impact make defendants wary of the offer of judgment.²⁷ It is suggested that the phrase “offer of settlement” might be more palatable.²⁸

The Advisory Committee also identifies two inherent limitations with Federal Rule 68. First, it is a unilateral rule, only “a party defending against a claim” can take advantage of the rule’s provisions.²⁹ By limiting the application to defendants, Federal Rule 68 prohibits the potential benefits of its provisions from an entire class of litigant—plaintiffs.³⁰

A second inherent limitation in Federal Rule 68 is the limited scope of its sanction. If a plaintiff rejects the offer of judgment and the judgment finally obtained is not more favorable, the plaintiff must pay the costs incurred by the defendant after the offer.³¹ Typically, costs in federal litigation are limited to those items taxable as costs under Federal Rule 54(d).³² The relatively small amounts counted as costs minimize the incentive for both a defendant to offer and a plaintiff to accept an offer of judgment. The stakes are simply not high enough to influence party decisionmaking. By limiting the focus to shifting post-offer costs, Federal Rule 68 limits its own

²⁷ See *id.* (describing disincentives to defendants to agree to judgments); Ian H. Fisher, *Using Federal Rule 68 to Spur Settlement*, 89 ILL. B.J. 143, 143 (Mar. 2001) (describing adverse publicity as a factor to consider with Rule 68).

²⁸ See Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, 556 (2009).

²⁹ See FED. R. CIV. P. 68(a).

³⁰ The Advisory Committee noted that Federal Rule 68 is ineffective because its sanctions are available only to the party defending against a claim and not to claimants, thus, effectively preventing plaintiffs from invoking Federal Rule 68. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 363 (1983) (proposed Fed. R. Civ. P. 68 advisory committee note on the 1983 amendment).

³¹ See FED. R. CIV. P. 68(d).

³² If costs are to be awarded under Federal Rule 54(d), they likely will include at least the six items listed in Section 1920 of the Judicial Code. These include: (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; and (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services. 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE* § 2670 (3d ed. 2010).

effectiveness.³³

While post-offer costs are likely to be small sums, post-offer attorney's fees are a different story. Even though attorney's fees are not considered "costs" in typical federal litigation, the Supreme Court interprets Federal Rule 68 to include attorney's fees as costs if there is an underlying federal statute that defines attorney's fees as part of costs.³⁴ For example, the United States Congress provides that in all federal civil rights actions the court, in its discretion, may allow the prevailing party to collect reasonable attorney's fees as part of the costs.³⁵ Consequently, in a civil rights lawsuit such as one under § 1983, the fee-shifting provision allowing the prevailing party to recover attorney's fees as "costs," bootstraps attorney's fees into the Federal Rule 68 equation. In the context of a Federal Rule 68 offer of judgment in a § 1983 case, the stakes for the plaintiff are magnified. At risk are not only the typical post-offer costs, but post-offer attorney's fees as well.³⁶ The inclusion of attorney's fees into the Federal Rule 68 calculus in only certain types of cases adds another layer of complication to the operation of the rule. This is aggravated by the lack of guidance the rule itself provides on this issue. Indeed, there is nothing in the text of Federal Rule 68 that alerts counsel to the importance of this buried issue. Thus, uncertainty as to Federal Rule 68's application to attorney's fees in specific cases may contribute to its underutilization.³⁷

³³ The Advisory Committee also noted the cost limitation as a primary limitation on Federal Rule 68's effectiveness. *See supra* note 30, proposed FED. R. CIV. P. 68 advisory committee note.

³⁴ *City of Riverside v. Rivera*, 477 U.S. 561, 580 (1986) ("Furthermore, we have held that a civil rights defendant is not liable for attorney's fees incurred after a pretrial settlement offer, where the judgment recovered by the plaintiff is less than the offer."); *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (holding that where the judgment for a plaintiff was less favorable than a defendant's offer, it was a defendant's right under Federal Rule 68 to recover "costs" incurred after the offer included plaintiff's attorney's fees under the Civil Rights Attorney's Fees Award Act of 1976, which awards attorney's fees to a prevailing party as part of costs). *But see* *Gudenkauf v. Stauffer Commc'ns, Inc.*, 158 F.3d 1074 (10th Cir. 1998) (distinguishing *Marek* in a Title VII employment discrimination case as the provision in Title VII for recovery of attorney's fees by a prevailing plaintiff was amended in 1991 to avoid the application of *Marek*).

³⁵ 42 U.S.C. § 1988 (2006).

³⁶ *See, e.g., Bogan v. City of Boston*, 432 F. Supp. 2d 222, 228–35 (D. Mass. 2006) (finding that a civil rights defendant is not liable for attorney's fees incurred after a Federal Rule 68 offer where the judgment obtained by the plaintiff was for less than the offer).

³⁷ *See* *Shelton*, *supra* note 24, at 897–915 (describing various sources of confusion surrounding attorney's fees and Rule 68).

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While much of the uncertainty in Federal Rule 68 litigation surrounds recovery of attorney's fees as costs or otherwise, additional uncertainties also serve to limit its usefulness. There is confusion concerning the validity of offers that disclaim liability, or that are revoked, or that offer the plaintiff incomplete relief.³⁸ There is confusion surrounding offers using "with costs" language and whether this means the offer is inclusive of costs or for a certain sum plus costs.³⁹ Additional confusion occurs when an offer does not mention costs. Absent guidance from Federal Rule 68 itself, these festering uncertainties exact a toll: defendants are either reluctant to make offers of judgment for fear of being blindsided by an ambiguity or they draft offers that produce unintended results.⁴⁰ The irony is that the rule designed to foster settlement can actually spawn additional litigation.

Federal Rule 68 would be much more effective in encouraging settlement if, as has often been proposed but never adopted, it had been amended to allow plaintiffs to make an offer of judgment and if the sanctions included attorney's fees. Some states already extend the right to make an offer to plaintiffs and allow the recovery of attorney's fees.⁴¹ Throughout the first half of the 1980s, there were proposals to change Federal Rule 68, generally designed to make the rule bilateral (i.e., to allow plaintiffs to make such offers as well), to provide explicitly for fee-shifting in some situations, and to limit shifting to cases in which a party unreasonably rejected an offer.⁴²

The United States House of Representatives passed a modified offer of judgment rule in 1995 as part of the Republican Party's "Contract with America."⁴³ Dubbed "loser pays," it would have allowed either party to make

³⁸ See *id.* at 881–88.

³⁹ See Teresa R. Bult, *Practical Use and Risky Consequences of Rule 68 Offers of Judgment*, LITIGATION 26, at 28 (Apr. 2007).

⁴⁰ See Shelton, *supra* note 24, at 916–18.

⁴¹ See *infra* Part III.B (describing bilateral jurisdictions) and Part III.C (describing jurisdictions including attorney's fees).

⁴² For an examination of the reform movement, see generally Roy D. Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1985). Further proposals for reform have been made. See William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 147 (1992); Thomas Rowe & Neal Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 LAW & CONTEMP. PROBS. 13 (1988).

⁴³ The "Contract with America" set forth ten legislative initiatives to be proposed within the first 100 days of 104th Congress to advance the conservative cause of civil justice. See Linda S. Mullinex, *Strange Bedfellows: The Politics of Preemption*, 59 CASE W. RES. L. REV. 837, 850 (2009). The Contract with America included "The Common Sense Legal Reforms Act" which proposed several methods to curb the presumed excesses and abuses of the overly-litigious American society including awarding

an offer and, if the offer was refused and the ultimate judgment was not more favorable than the offer, the offeree would have to pay the offeror's costs, including attorney's fees.⁴⁴ This bill was not enacted. However, this led the American Bar Association to convene a task force to study the issue in light of expressed concerns that the bill would disproportionately impact plaintiffs who would be deterred from seeking access to the courts by the risk of having to pay the defendants' attorney's fees.⁴⁵ The task force concluded that allowing attorney's fees to be shifted, under an offer of judgment rule, could promote settlement, but that safeguards were needed to mitigate the disproportionate adverse effect upon plaintiffs.⁴⁶ The task force proposed a rule that included a fee-shifting formula that gave an offeree a margin of error of 25% before cost-shifting was triggered by not doing as well as the ultimate judgment obtained. The proposal also limited liability for the offeror's attorney's fees to an amount equal to the offeree's attorney's fees and gave the court discretion to reduce or eliminate cost-shifting to avoid undue hardship.⁴⁷

III. STATE EXPERIENCE WITH OFFER OF JUDGMENT RULES

A. States Following the Federal Model

Federal Rule 68 has remained essentially unchanged since the promulgation of the Federal Rules in 1937 and has served as a model for the states. Following the federal model, most states adopted an offer of judgment

attorney's fees to the prevailing party in federal civil diversity litigation. Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong. § 101 (1995). The concept resurfaced in a bill creating an offer-of-judgment device for diversity cases passed by the House of Representatives in March 1995. Attorney Accountability Act of 1995, H.R. 988, 104th Cong. § 2 (1995).

⁴⁴ Attorney Accountability Act of 1995, *supra* note 43.

⁴⁵ A.B.A. House of Delegates, Resolution, 1996.

⁴⁶ *Id.*

⁴⁷ A.B.A. Report on Offer-of-Judgment Legislation, Sec. Torts & Ins. Prac., Offer of Judgment Procedure (Feb. 1996), published as an appendix in Sherman, *supra* note 22, at 1892-1896. Neither the House bill nor the ABA proposal became law. "Loser pays" proposals continue to be proposed by business interests. See Marie Gryphon, *Greater Justice, Lower Cost: How a 'Loser Pays' Rule Would Improve the American Legal System*, 11 CIV. JUST. REP. 1 (2008), available at http://www.manhattan-institute.org/html/cjr_11.htm (this proposal from the Manhattan Institute for Policy Research was endorsed by former New York City Mayor Rudy Giuliani).

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rule that mirrored Federal Rule 68.⁴⁸ By 1997, twenty-nine states and the District of Columbia had rules identical or substantially similar to Federal Rule 68.⁴⁹ Thirteen jurisdictions departed from the federal model in a significant way; nine states had no provision at all.⁵⁰ Today, Federal Rule 68 no longer dominates the offer of judgment landscape with states abandoning the language of Federal Rule 68 in large numbers. By 2009, twenty-three states departed from the federal model in a significant way.⁵¹ These jurisdictions embrace many of the changes suggested by critics of the federal offer of judgment formula and advance additional provisions designed to encourage settlement through the offer of judgment concept.⁵²

B. *Creating a Two-Way Street*

The most significant departure by state offer of judgment rules from Federal Rule 68 is that twenty-three states now allow both parties to make offers of judgment.⁵³ Minnesota illustrates the transformation from unilateral

⁴⁸ Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 157 (2006) (“Most states subsequently adopted their own offer-of-judgment rule; the vast majority of these rules were modeled after the federal version.”).

⁴⁹ Sherman, *supra* note 22, at 1874 (“Today twenty-nine states and the District of Columbia have rules similar in language and effect to Rule 68.”).

⁵⁰ See Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 64 (1997) (“By our account, about twenty-eight states (including a majority of the federal replica jurisdictions), plus the District of Columbia, have provisions identical or substantially similar to Federal Rule 68. Another thirteen states have provisions which depart from the Federal Rule in significant ways, while nine states apparently have no provision at all.”).

⁵¹ William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, 39 N.M. L. REV. 349, 355 (2009) (“The trend away from Rule 68 has accelerated since that time. By my count, twenty-three states now allow all parties to make offers of judgment. Nine of those states shift attorney’s fees as a sanction for failing to receive a judgment that exceeds an offer of judgment.”).

⁵² See *infra* Part III.B. As state offer of judgment rules depart from Federal Rule 68, federal courts must decide which controls in diversity cases. In a recent appeal in a diversity case, the Tenth Circuit compared an Oklahoma offer of judgment statute with Federal Rule 68 and concluded that they “do not collide” and “can exist side by side” with each controlling its “own sphere of coverage without conflict.” See *Scottsdale Ins. Co. v. Tolliver*, No. 09-5150, 2011 WL 652459, at *3 (10th Cir. Feb. 24, 2011). Had the court concluded that there was a conflict, traditional *Erie* analysis would have determined whether the state statute or federal procedural law applied.

⁵³ *Id.*

to bilateral application. Prior to 1985, Minnesota Rule of Civil Procedure 68 was similar to Federal Rule 68.⁵⁴ Amendments in 1985 extended the offer of judgment or settlement to both plaintiffs and defendants.⁵⁵ Minnesota Rule 68 was then completely revised in 2008.⁵⁶ The goal of the 2008 amendments was to add certainty to the operation of the rule and to remove surprises both to parties making offers and those receiving and deciding whether to accept them.⁵⁷ Additionally, Minnesota Rule 68 was revised to better address the goal of providing incentives for both claimants and parties opposing claims.⁵⁸ Consequently, Minnesota Rule 68 no longer closely resembles its federal counterpart.

The basic premise of Minnesota Rule 68 is similar to the federal rule in shifting the burden of costs and disbursements if an offeree does not do better at trial.⁵⁹ Costs in this context refer only to taxable costs under Minnesota Rule 54, and not necessarily attorney's fees.⁶⁰ Amendments in 2008 clarified that attorney's fees may be included as "costs" in a Minnesota Rule 68 offer of judgment when the attorney's fees are awardable to a prevailing party pursuant to a statute.⁶¹ Minnesota Rule 68 also includes a new provision that requires that an offer include express reference to the rule in order to be given the cost-shifting effect of the rule.⁶² This provision was intended to

⁵⁴ Jennifer E. Ampulski, *Offers of Judgment & Rule 68*, BENCH & B. MINN., Apr. 2008, at 32.

⁵⁵ *Id.*

⁵⁶ See DAVID F. HERR & ROGER S. HAYDOCK, 2A MINNESOTA PRACTICE SERIES: CIVIL RULES ANNOTATED, § 68.2 (4th ed. 2010).

⁵⁷ See *id.* § 68.1.

⁵⁸ See MINN. R. CIV. P. 68.04, advisory committee comment.

⁵⁹ See MINN. R. CIV. P. 68.01–68.04; HERR & HAYDOCK, *supra* note 56, § 68.3.

⁶⁰ See HERR & HAYDOCK, *supra* note 56, § 68.4.

⁶¹ "'Applicable attorney fees' for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to attorney fees not provided for under the applicable substantive law." MINN. R. CIV. P. 68.04(a). Additionally, the rule, as amended in 2008, now specifically applies to costs and disbursements that will be awarded after the offer of judgment or settlement was made. MINN. R. CIV. P. 68.03(b). Prior to amendment, Minnesota Rule 68 was interpreted to include the total costs and disbursements incurred from the beginning of the lawsuit. See *Vandeneuvel v. Wagner*, 690 N.W.2d 753, 757 (Minn. 2005) (affirming the court of appeals' determination that where an offer of judgment is made and rejected by an offeree, and the net judgment is less favorable to the offeree than the offer, the offeree must pay all of the offeror's costs and disbursements, not only those costs and disbursements incurred after the offer was made).

⁶² MINN. R. CIV. P. 68.01(b).

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eliminate surprises by making it unlikely that an offer would come within the scope of the rule without the offeror intending it to do so and the offeree having notice that the offer was being made pursuant to Minnesota Rule 68.⁶³

Minnesota Rule 68 allows both parties to use the cost-shifting procedure by permitting either to make an offer of judgment or settlement.⁶⁴ The offer of settlement differs from the offer of judgment in that it does not result immediately in an entry of judgment for the amount of the offer.⁶⁵ A party may accept an offer of settlement without disclosing the terms of the settlement.⁶⁶ By making available to both parties, the drafters hoped to encourage settlement in situations where the parties were not likely to want a judgment entered as a matter of public record.⁶⁷

Not only does Minnesota permit offers of judgment or settlement, Minnesota Rule 68.01 now recognizes two types of offers: “damages-only” offers and “total-obligation” offers.⁶⁸ A “damages-only” offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney’s fees, all of which are to be added to the amount as provided by the rule.⁶⁹ A “total-obligation” offer includes then-accrued applicable prejudgment interest, costs and disbursements, and

⁶³ See Ampulski, *supra* note 54, at 33.

⁶⁴ See MINN. R. CIV. P. 68.01(a).

⁶⁵ See MINN. R. CIV. P. 68.02(c).

⁶⁶ See HERR & HAYDOCK, *supra* note 56, § 68.12.

⁶⁷ See *id.*

⁶⁸ MINN. R. CIV. P. 68.01(c)–(d). This bifurcation of offers is intended to remove a significant “trap for the unwary” where an accepted offer may be given two substantially different interpretations by offeror and offeree. Ampulski, *supra* note 54, at 32. Before the amendment, lawyers handling cases where a separate statutory basis existed for the recovery of attorney’s fees had to be especially careful with offers of judgment. Minnesota courts allowed the recovery of attorney’s fees as an amount over and above the amount contained in the offer of judgment in claims brought under certain statutes. See, e.g., *Collins v. Minn. Sch. of Bus., Inc.*, 655 N.W.2d 320, 330 (Minn. 2003). Similarly, lawyers in a litigated case in which there exists a contractual basis for attorney’s fees had to be careful with drafting and accepting offers. In *Schwickerdt, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 88 (Minn. 2004), the Minnesota Supreme Court held that an offer of judgment resolved all contractual claims, including attorney’s fees which were provided for in the underlying contract, where the offer of judgment was intended to resolve all claims and the offer did not specify that the offer amount excluded attorney’s fees. Similar uncertainty existed as to whether prejudgment interest was included in the amount of an offer. See, e.g., *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 335 (Minn. Ct. App. 1991).

⁶⁹ MINN. R. CIV. P. 68.01(c).

applicable attorney's fees.⁷⁰ The bifurcation of offers into these two categories allows the party making the offer to control and understand what costs are shifted.⁷¹ Similarly, a party deciding how to respond to an offer should be able to determine the total cost of accepting an offer. Presumably, the added precision allowed by distinguishing the types of offers permits Minnesota Rule 68 to provide greater clarity and certainty to the effect both of accepted offers and unaccepted offers.⁷²

Minnesota Rule 68 clearly describes the consequences that flow from the acceptance and rejection of offers of judgment or settlement.⁷³ If the offer accepted is an offer of judgment, the court orders an entry of judgment based upon whether it was a "damages-only" or "total-obligation" offer.⁷⁴ If the offer accepted is an offer of settlement, the settled claims are dismissed upon the filing of a stipulation of dismissal.⁷⁵

In the case of rejected offers, if the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer.⁷⁶ Also, the plaintiff-offeree may not recover its costs and disbursements incurred after service of the offer.⁷⁷ Minnesota Rule 68.03(b)(1) further provides that applicable attorney's fees available to the plaintiff-offeree are not affected by this provision.⁷⁸ In this respect,

⁷⁰ MINN. R. CIV. P. 68.01(d).

⁷¹ See MINN. R. CIV. P. 68.04, advisory committee comment.

⁷² *Id.*

⁷³ MINN. R. CIV. P. 68.02(b)-(c).

⁷⁴ If the offer is a total-obligation offer, judgment shall be for the amount of the offer. MINN. R. CIV. P. 68.02(b)(1). If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney's fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment. MINN. R. CIV. P. 68.02(b)(2).

⁷⁵ MINN. R. CIV. P. 68.02(c). A stipulation of dismissal states that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney's fees, all accrued to the date of the offer, have been satisfied or by order of the court implementing the terms of the agreement. *Id.* In practice, if the offer is accepted it is usually not necessary for the court administrator to enter judgment, as the parties will then consummate the transaction as any other settlement, and will simply file a dismissal of the action when payment and releases have been exchanged. See HERR & HAYDOCK, *supra* note 56, § 68.8.

⁷⁶ MINN. R. CIV. P. 68.03(b)(1).

⁷⁷ *Id.*

⁷⁸ *Id.*

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Minnesota Rule 68 does not incorporate the cutoff of attorney's fees that occurs under Federal Rule 68 as interpreted in *Marek*.⁷⁹

Minnesota Rule 68.03 introduces a new consequence for a defendant's rejection of a plaintiff's offer if the ultimate judgment is less favorable to the defendant-offeree—double costs.⁸⁰ If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Minnesota Rule 54.04, an amount equal to the plaintiff-offeror's offeror's costs and disbursements incurred after service of the offer.⁸¹ Again, applicable attorney's fees available to the plaintiff are unaffected by Minnesota Rule 68.03.⁸² Thus, this provision requires the defendant to pay double the offeror's costs and disbursements incurred after service of the offer.⁸³ Minnesota Rule 68 also now includes a hardship exception. If the court determines that the obligations imposed under the rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations in order to eliminate the undue hardship or inequity.⁸⁴

Despite the 2008 amendments, Minnesota continues to experience only limited use of offers of judgment or settlement. The primary reason advanced

⁷⁹ See *supra* text accompanying notes 34–36 (describing *Marek's* impact).

⁸⁰ MINN. R. CIV. P. 68.03.

⁸¹ MINN. R. CIV. P. 68.03(b)(2).

⁸² *Id.*

⁸³ Prior to this 2008 amendment, there was little incentive for plaintiffs to make Minnesota Rule 68 offers and for defendants to accept Minnesota Rule 68 offers because a prevailing plaintiff would receive costs from the defendant under Rule 54 regardless. See MINN. R. CIV. P. 68.04, advisory committee comment. If the defendant is merely required to pay the offeror's costs, there is no adverse consequence for a defendant who rejects a Minnesota Rule 68 offer. This provision attempts to balance the incentive structure to encourage plaintiff use. Ampulski, *supra* note 54, at 33. This provision has been criticized as allowing double-recovery to plaintiffs without sufficient justification and creating the potential for plaintiffs to game the process by making an early offer to create a potential cost windfall. *Id.*

⁸⁴ MINN. R. CIV. P. 68.03(b)(3). This provision has been criticized as providing an exception that will primarily favor individual plaintiffs over defendants. Ampulski, *supra* note 54, at 33. Minnesota Rule 68 also provides clarity on how to determine if the relief awarded is less favorable to the offeree than the offer under the bifurcated offer scheme. A damages-only offer is compared with the amount of damages awarded to the plaintiff. MINN. R. CIV. P. 68.03(c)(1). A total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney's fees, all as accrued since the date of the offer. MINN. R. CIV. P. 68.03(c)(2).

for the limited use is that Minnesota Rule 68 continues to shift only costs and disbursements.⁸⁵ As with federal cases, total costs and disbursements in most Minnesota state court lawsuits do not constitute a substantial amount of money. Moreover, the rule only shifts taxable costs and disbursements incurred after the offer of settlement or judgment is made.⁸⁶ Thus, the incentive for settlement intended by the rule is not realized in practice. While the latest incarnation of Minnesota Rule 68 now equalizes the incentive between plaintiffs and defendants to use the rule, it does not alter the inherently limiting focus on post-offer costs.

Minnesota Rule 68 is also underutilized because of its lack of impact on attorney's fees.⁸⁷ While a total-obligation offer can include attorney's fees, a defendant cannot avoid the obligation to pay a plaintiff's attorney's fees if required by law.⁸⁸ For example, if a plaintiff rejects a total-obligation offer and ultimately recovers less at trial, the plaintiff must pay the defendant-offeror's costs incurred after service of the offer and the plaintiff-offeree cannot recover its costs incurred.⁸⁹ But as to attorney's fees, the prevailing plaintiff is still entitled to its attorney's fees from the defendant.⁹⁰ If Minnesota Rule 68 permitted a party to avoid paying attorney's fees, it would certainly see greater use. Such a change seems unlikely. In 1985, the Advisory Committee considered including attorney's fees within the operation of the rule, but determined that such radical change was undesirable.⁹¹

C. Inclusion of Attorney's Fees

Nine states put more bite into their offer of judgment rules by incorporating attorney's fees.⁹² New Jersey, a vanguard jurisdiction on this issue, has included attorney's fees in its offer of judgment rule since it

⁸⁵ See HERR & HAYDOCK, *supra* note 56, § 68.1.

⁸⁶ *Id.*

⁸⁷ See HERR & HAYDOCK, *supra* note 56, § 68.3.

⁸⁸ MINN. R. CIV. P. 68.04, advisory committee comment.

⁸⁹ See MINN. R. CIV. P. 68.03(b)(1).

⁹⁰ See *id.*; MINN. R. CIV. P. 68.04, advisory committee comment ("The revised rule provides that the offeree does not recover its costs and disbursements incurred after service of the offer. But this change does not affect a prevailing plaintiff's right to attorney fees to which it is entitled under law or contract.").

⁹¹ See HERR & HAYDOCK, *supra* note 56, § 68.3.

⁹² Lynch, *supra* note 51, at 355.

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adopted the rule in 1971.⁹³ However, attorney's fees were capped at \$750.⁹⁴ With no provision to adjust the cap for inflation, this limitation quickly erased any benefit from its inclusion.⁹⁵ In 1994, the New Jersey Supreme Court adopted a revised rule eliminating the cap.⁹⁶ Recent empirical work by Albert Yoon and Tom Baker has focused on the effect that removal of the limitation has had on attorney's fees on insurance-based litigation in New Jersey. Yoon & Baker conclude:

Our results show that the revision of [New Jersey] Rule 4:58 appears to have had a discernable effect on insurance-based litigation. In the aftermath of the revision of the offer-of-judgment rule, which abolished the \$750 cap on attorneys' fees as a cost-shifting measure, the average duration of litigation decreased in New Jersey relative to the neighboring control states by 7 percent (2.3 months) on average. Correspondingly, the amount that Insurer X spent on its own attorneys' fees in New Jersey decreased on average by a relative margin of 20 percent (\$1,173). Both of these reductions were statistically significant. At the same time, damage awards, which had a modest relative decrease in New Jersey, did not change in any statistically significant amount.⁹⁷

While extrapolation of their findings must proceed cautiously, Yoon and Baker's results support an important premise surrounding use of offers of judgment. A credible cost-shifting mechanism is necessary to influence pre-trial negotiations.⁹⁸ New Jersey lacked such a mechanism until the removal of the attorney's fees cap. Thus, cost-shifting that includes attorney's fees appears to be a credible method for influencing litigant behavior in this context.

An expanded offer of judgment rule has been part of the "tort reform" proposals urged by business interests in many states.⁹⁹ The most sweeping

⁹³ See Yoon & Baker, *supra* note 48, at 163.

⁹⁴ See *id.* at 164.

⁹⁵ See *id.*

⁹⁶ *Id.*

⁹⁷ Yoon & Baker, *supra* note 48, at 185–86.

⁹⁸ *Id.* at 192.

⁹⁹ See Linda S. Mullinex, *The Future of Tort Reform: Possible Lessons From the World Trade Center Victim Compensation Fund*, 53 EMORY L.J. 1315, 1327–28 (2004).

was passed and signed into law in Texas in 2004.¹⁰⁰ It allows claimants or defendants to make offers and provides for the shifting of litigation expenses, including attorney's fees, fees of two testifying expert witnesses, and post-rejection litigation costs when the judgment is less favorable to the offeree by at least 20%.¹⁰¹ The Texas Supreme Court has adopted rules implementing this procedure.¹⁰²

Unlike the New Jersey experience, the new Texas scheme appears to have had little effect on civil litigation. Practitioners simply have not flocked to the new rule.¹⁰³ To date, there are no reported cases interpreting the offer of settlement statutory scheme. Anecdotal evidence suggests that it is rarely used. This is due to the fact that the offer of settlement statutory scheme is so complicated that it is hard to predict what effect it will have in a case.¹⁰⁴ Even the sponsor of the legislation, former Texas State Representative Joe Nixon, now contends that the offer of settlement statute was not meant to be used frequently, but rather it was designed for a situation in which it is clear the defense is liable, but the plaintiff was making unreasonable settlement demands.¹⁰⁵ Apparently, any incentive generated by inclusion of attorney's fees in the offer of judgment rule can be outweighed by the uncertainty produced by an overly complicated rule.

D. Rejection of Offer of Judgment Cost-Shifting

Not all states embrace the cost-shifting premise of offer of judgment rules. Prior to the adoption of the Ohio Civil Rules, the Ohio Revised Code provided that a party who refused an offer of judgment could be held responsible for costs incurred after the making of the offer if the subsequent judgment was less favorable than the offer.¹⁰⁶ These statutory provisions

¹⁰⁰ See Elaine A. Carlson, *The New Texas Offer-of-Settlement Practice—The Newest Steps in the Tort Reform Dance*, 46 S. TEX. L. REV. 733, 735–36 (2005).

¹⁰¹ See TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–42.005 (Vernon 2008); ELAINE A. CARLSON GRAFTON, 3 MCDONALD & CARLSON TEXAS CIVIL PRACTICE, §§ 17.32–17.36 (2009) (describing the new process).

¹⁰² See TEX. R. CIV. P. 167.1–167.7.

¹⁰³ Elaine A. Carlson, *The New Texas Offer of Settlement Practice—The Newest Steps in the Tort Reform Dance*, 44 THE ADVOC. (TEXAS) 104, 114 (2008) (“Practitioners have not embraced the Texas offer-of-settlement statutory scheme and wisely are reluctant to gamble by invoking Rule 167.”).

¹⁰⁴ *Id.* at 104.

¹⁰⁵ *Id.* (citing John Council, *The Perils of Loser Pays: H.B. 4 Rule Unpopular With Defense Lawyers*, 20 TEX. LAW. 1 (2004)).

¹⁰⁶ See JAMES M. KLEIN & STANTON G. DARLING II, 2 BALDWIN'S OH. PRACTICE:

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essentially codified the federal offer of judgment rule. In 1970, Ohio adopted Ohio Rule 68 explicitly rejecting Federal Rule 68's cost-shifting provision. Ohio Rule 68 provides: "An offer of judgment by any party, if refused by an opposite party, may not be filed with the court by the offering party for purposes of a proceeding to determine costs."¹⁰⁷ Ohio Rule 68 effectively repealed the earlier statutory provisions.¹⁰⁸

Interestingly, the rationale for rejecting Federal Rule 68 was to increase settlements. According to the Staff Notes:

Offers of settlement are encouraged by Rule 68 at all stages of an action in the interest of voluntary resolution of litigation. However, under Rule 68 an offer of judgment may no longer be used in a proceeding to determine costs. The use of offers of judgment as the basis of costs proceedings has in the past often had a one-sided, coercive effect. Therefore, Federal Rule 68, permitting the use of an offer of judgment as the basis of a costs proceeding, has not been adopted.¹⁰⁹

Ohio Rule 68 reiterates its role in encouraging settlement by noting that "[t]his rule shall not be construed as limiting voluntary offers of settlement made by any party."¹¹⁰

In 1996, the Ohio Supreme Court's Rules Advisory Committee revisited the issue and published for comment a new version of Ohio Rule 68.¹¹¹ The proposed rule covered offers by both plaintiffs and defendants; under this proposed rule if the plaintiff's unaccepted offer was more favorable than the relief obtained by the plaintiff at trial, then the plaintiff would be awarded double costs.¹¹² The accompanying staff note described the earlier staff note's fear of one-sided, coercive settlements as "difficult to measure" and

CIVIL PRACTICE § 68:1 (2010); 8 OHIO JURISPRUDENCE PLEADING & PRACTICE FORMS § 80:1 (West 2009).

¹⁰⁷ OHIO R. CIV. P. 68.

¹⁰⁸ OHIO R. CIV. P. 68, staff note ("In addition, Rule 68 has effectively repealed §§ 2311.14 through 2311.20, R.C. These statutes, like Federal Rule 68, also permitted the use of the offer of judgment as the basis of a costs proceeding.")

¹⁰⁹ OHIO R. CIV. P. 68, staff note.

¹¹⁰ Ohio R. Civ. P. 68.

¹¹¹ See Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 66 (1997).

¹¹² See *id.* at 66–67.

based wholly upon anecdotal evidence.¹¹³ The proposal was opposed by a group of plaintiffs' lawyers, the Ohio Academy of Trial Lawyers, and ultimately the Ohio Supreme Court withdrew the proposal.¹¹⁴

IV. THE INTERACTION OF OFFERS OF JUDGMENT AND MEDIATION

A. *Federal Rule 68 and Mediation*

While the operation of Federal Rule 68 is relatively clear when a case proceeds to trial, what happens if the case does not go to trial and resolves after a Federal Rule 68 offer expires due to settlement? In such cases where the plaintiff obtains a favorable judgment, Federal Rule 54 would customarily allow the plaintiff to recover costs.¹¹⁵ Nonetheless, some courts insist that Federal Rule 68 does not apply unless the plaintiff's judgment is obtained after trial.¹¹⁶ This approach has been characterized as flawed because a judgment entered pursuant to a settlement has been "obtained" by plaintiff if it is favorable to the plaintiff.¹¹⁷ Additionally, applying the rule encourages defendants to make Federal Rule 68 offers that are reasonable in the sense that they are more favorable than settlements subsequently accepted by plaintiffs. Indeed, Federal Rule 68 is undercut if it is not applied to cases that ultimately settle because most cases do settle short of trial.¹¹⁸ To

¹¹³ *Id.* The proposal with an accompanying proposed staff note was published as an appendix to Solimine & Pacheco, *supra* note 111, at 82–87.

¹¹⁴ See Solimine & Pacheco, *supra* note 111, at 68–69. Ohio will be revisiting the offer of judgment issue. Ohio State Senator Eric Kearney recently introduced a bill to request the Ohio Supreme Court to amend Ohio Rule 68 to more closely mirror Federal Rule 68. See S. B. No. 52, 129th Gen. Assem., Reg. Sess. (Ohio 2011). Whether the bill passes or not, the Ohio Supreme Court's Commission on the Rules of Practice & Procedure intends to reexamine the issue and has placed Ohio Rule 68 on this year's agenda.

¹¹⁵ See 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3006 (2d ed. 2010).

¹¹⁶ See *Good Timez, Inc. v. Phoenix Fire & Marine Ins.*, 754 F. Supp. 459, 461–63 (D.V.I. 1991) (holding that a plaintiff's right to seek post-offer costs and fees was not extinguished after the plaintiff rejected a Federal Rule 68 offer that was identical to the ultimate settlement reached because Federal Rule 68 only applies where the final judgment is obtained after trial); *Hutchison v. Wells*, 719 F. Supp. 1435, 1442–44 (D. Ind. 1989) (holding that the rejection of a Federal Rule 68 offer and the later acceptance of identical offer did not cut off entitlement to costs because case did not go to trial).

¹¹⁷ See WRIGHT ET AL., *supra* note 115.

¹¹⁸ *Id.*

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encourage defendants to make realistic offers of judgment, and to make plaintiffs seriously contemplate such offers, Federal Rule 68 should apply where a settlement is later made on less favorable terms than those in a rejected Federal Rule 68 offer.¹¹⁹

B. Michigan Rule Contemplating Interaction Between Mediation and Offer of Judgment

The Michigan legislature passed rules in the 1980s for both mandatory case evaluation and offer of judgment, both with cost-shifting if a party did not do better in the final judgment than was recommended or offered.¹²⁰ “Case evaluation”¹²¹ is intended to go first and a court can require the parties to participate in a hearing before a panel of three evaluators. Each trial court maintains a list of persons who meet the eligibility requirements to be an evaluator. One requirement is to have been a practicing lawyer for at least five years with a substantial proportion of work devoted to civil litigation.¹²² A judge can be a member of the panel, but in such instances, the usual \$75 fee is lowered to \$50.¹²³ Parties have the right to attend but are not required

¹¹⁹ See *Lang v. Gates*, 36 F.3d 73, 76 (9th Cir. 1994) (concluding Federal Rule 68 should apply to a case that settled because such an application would deter the plaintiff’s attorney from rejecting a reasonable offer of judgment and pursuing further litigation).

¹²⁰ MCR 2.403 (Case Evaluation) and MCR 2.405 (Offers to Stipulate to Entry of Judgment).

¹²¹ The term “mediation” was originally used for this process, but the terminology was changed in 2000 to “case evaluation.” “Mediation evaluation,” as it was originally called, was not a true mediation process since it involved a decision by the evaluators, much more akin to early neutral evaluation or court-annexed arbitration. The comment to the 2000 change observed: “‘Mediation’ will be used to describe the facilitative process established in MCR 2.411, in keeping with the generally accepted usage of the term.” MCR 2.405, staff comment to 2000 Amendment. The rules governing mediation under MCR 2.411 do not provide for cost-shifting.

¹²² MCR 2.404(B)(2).

¹²³ MCR 2.403(H)(1). The Michigan “case evaluation” rules have many of the attributes of “Early Neutral Evaluation” (ENE) or “Court-Annexed Arbitration” programs that were adopted in the 1970s and 80s in many state and federal courts. “Under ENE, a neutral—usually a respected lawyer with expertise in the subject matter of the case—meets with the parties and their lawyers for a couple of hours not long after the filing of the case and gives them a frank assessment of their cases ENE provides a fairly pristine form of ‘evaluative’ ADR. Although the outside attorney may facilitate discussion, her principal role is to hear each side’s case and give them an objective assessment. Unlike mediation, both the presentations and the evaluation tend to be couched in terms of the legal issues.” RAU, SHERMAN & PEPPET, *supra* note 5, at 534.

to do so, the rules of evidence do not apply, and oral presentations are limited to fifteen minutes per side.¹²⁴ Within fourteen days, the panel makes an evaluation that includes an award of damages.¹²⁵

Provisions for cost-shifting if the panel's decision is not accepted by parties who do not do better at trial gives this non-binding evaluation a much stronger imperative than many of the non-binding ADR devices with which courts have experimented.¹²⁶ The cost-shifting provision reads:

If a party has rejected an evaluation and the action proceeds to a verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.¹²⁷

The rules go on to state that a verdict is considered "more favorable" if it is more than 10% below or above the evaluation.¹²⁸ The costs to be shifted are costs taxable in any civil action and "a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services

Under court-annexed arbitration (sometimes called "non-binding arbitration"), three neutral attorneys typically serve for a nominal fee in a hearing where each side presents its case in an abbreviated form and the arbitrators render a non-binding decision. *Id.* at 535-43; ROBERT J. NIEMIC, DONNA STIENSTRA & RANDALL E. RAVITZ, GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 9 (Federal Judicial Center 2001).

¹²⁴ MCR 2.403(J).

¹²⁵ MCR 2.403(K).

¹²⁶ Some court-annexed arbitration programs impose a small monetary penalty on parties who do not accept the non-binding decision, but these amounts are small compared to the cost-shifting available under Michigan case evaluation. Such penalties have been criticized as undercutting the voluntariness of non-binding ADR and infringing the right to jury trial. See Stacey Keare, *Reducing the Costs of Civil Litigation: Alternative Dispute Resolution*, UC HASTINGS PUBLIC LAW RESEARCH INST., Fall 1995, <http://w3.uchastings.edu/plri/fal95tex/adr.html> ("Assessing penalties on parties who go on to trial after using ADR would certainly save money for the state by decreasing the number of disputes that go on to trial. For this reason several U.S. District Courts use such penalties. However, this avenue approaches coercion and therefore imposes substantial stress on the right to a jury trial. Given that ADR was first conceived to reduce the cost of courts and increase the speed of trials, this method does not seem to serve the goal of improving access to the justice system.").

¹²⁷ MCR 2.403(O)(1).

¹²⁸ MCR 2.403(O)(3).

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necessitated by the rejection of the case evaluation.”¹²⁹ However, “costs shall not be awarded if the case evaluation award was not unanimous.”¹³⁰

The Michigan case evaluation rules provide much stronger coercive penalties than Federal Rule 68. Participation in case evaluation is mandatory if the court so orders; both parties are subjected to the cost-shifting possibilities; if a party rejects the evaluation, it will be subjected to cost-shifting if it does not do at least 10% better in the final judgment than in the evaluation; and the cost-shifting includes actual costs plus attorney’s fees.¹³¹ One might think that such a strong rule would not require further incentives to encourage parties to settle. But coupled with the case evaluation rule is a rule for offers to stipulate to an entry of judgment.¹³² It provides that either party, up to 28 days before trial, may make a written offer of judgment “for the whole or part of the claim, including interest and costs then accrued.”¹³³ If an offer is rejected, costs are shifted as follows:

- (1) If the adjusted verdict is more favorable to the offeror than the average offer, the offeree must pay to the offeror the offeror’s actual costs incurred in the prosecution or defense of the action.
- (2) If the adjusted verdict is more favorable to the offeree than the average offer, the offeror must pay to the offeree the offeree’s actual costs incurred in the prosecution or defense of the action. However, an offeree who has not made a counteroffer may not recover actual costs unless the offer was made less than 42 days before trial.
- (3) The court shall determine the actual costs incurred. The court may, in the interest of justice, refuse to award an attorney fee under this rule.¹³⁴

These cost-shifting provisions sound a good deal like those for rejection of a case evaluation under the Michigan rules.¹³⁵ What does offer of judgment cost-shifting add to case evaluation cost-shifting? Offer of

¹²⁹ MCR 2.403(O)(6).

¹³⁰ MCR 2.403(O)(7).

¹³¹ MCR 2.403(O)(3).

¹³² MCR 2.405.

¹³³ MCR 2.405(B).

¹³⁴ MCR 2.405(D)(1)–(3).

¹³⁵ MCR 2.403(O).

judgment provides an additional incentive by allowing either party to make an actual offer to settle. A party who has refused the evaluation would already be subject to the cost-shifting provisions of the case evaluation rules. However, because one or both parties may be unhappy with the case evaluation number, further negotiations involving concrete offers are necessary to actually accomplish a settlement. Offer of judgment allows either party to make a concrete offer, which may not be the same as the number in the evaluation. Even if parties are not prepared to accept the case evaluation number at the time of the evaluation, they may be able to come together later after having a chance to reflect and the exchange of offers of judgment then narrows the difference between them. Offer of judgment thus provides an additional mechanism for fine-tuning a settlement number that one party can make to the other (and the other can fine-tune with a counter-offer). Case evaluation by three attorneys who have spent only a couple of hours hearing an abbreviated description of the case may not be the ideal last word on what the case is worth. The offer of judgment rule thus provides an additional means of pressuring the parties to reach agreement through the exchange of offers.

While there may be a valid reason to have an offer of judgment process, in addition to the cost-shifting provisions of case evaluation, the interplay between the two incentive systems can cause difficulties. This became apparent in Michigan, necessitating an amendment to the rule.¹³⁶ The original offer of judgment rule provided that where there has been a rejection of both a case evaluation award and an offer of judgment, “the cost-shifting provisions of the rule under which the later rejection occurred control.”¹³⁷ This seemed to be an attempt to encourage parties to make offers of judgment, even after rejection of case evaluation. But this led to complications, as described by the Michigan Supreme Court:

[T]he offer of judgment procedure gives a party a way of avoiding mediation sanctions, or at least of substituting the potential for offer of judgment sanctions, which may be more favorable to that party. The typical situation is one in which Party A has accepted the mediation award (and thus cannot be subject to sanctions), but Party R has rejected, and would be potentially liable for sanctions if an unfavorable verdict ultimately results. The offer of judgment procedure gives R an opportunity to make A potentially subject to

¹³⁶ MCR 2.405(E) (amended Oct. 1, 1997).

¹³⁷ *Id.*

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offer of judgment sanctions, and to avoid such vulnerability itself if A does not make a counteroffer.¹³⁸

In response to this concern, the provision on the relationship between the two rules was amended in 1997 to read as follows:

Relationship to Case Evaluation. Costs may not be awarded under this rule in a case that has been submitted to case evaluation under MCR 2.403 unless the case evaluation award was not unanimous.¹³⁹

With this change, cost-shifting pursuant to the offer of judgment rule would no longer control unless the case evaluation award was not unanimous. The intent of this change was “to reduce gamesmanship” by making it clear that “the offer of judgment costs provision should be used only in conjunction with [case evaluation] where a [case evaluation] award was not unanimous and thus case evaluation sanctions were not available under MCR 2.403.”¹⁴⁰

Although the amendment to the rule reduced the potential for a party who rejected a case evaluation award to undercut that award by making an offer of judgment, some Michigan cases have given a narrow interpretation of the amendment when a later offer of judgment does not reflect gamesmanship. For example, in *Reitmeyer v. Schultz Equipment & Parts Co.*,¹⁴¹ the case evaluation panel unanimously awarded plaintiff \$17,500.¹⁴² The defendant accepted it, and the plaintiff failed to respond (which is taken as a rejection). Thereafter plaintiff made an offer of judgment of \$27,000, and defendant made a counteroffer of \$18,000 which plaintiff rejected.¹⁴³ After trial, the jury awarded the plaintiff \$27,013. The plaintiff had done better than his offer of \$27,000 and the defendant’s counteroffer of \$18,000, and so he filed a motion for offer of judgment sanctions and attorney’s fees

¹³⁸ STATE OF MICH., REPORT OF SUPREME COURT MEDIATION RULE COMMITTEE, 451 Mich. 1205, 1232–33 (1996) (as amended by the Committee in their report of December 15, 1995).

¹³⁹ MCR 2.405(E).

¹⁴⁰ *Stitt v. Holland Abundant Life Fellowship*, 624 N.W.2d 427, 434 (Mich. Ct. App. 2000).

¹⁴¹ *Reitmeyer v. Schultz Equip. & Parts Co.*, 602 N.W.2d 596, 598 (Mich. Ct. App. 1999).

¹⁴² *Id.*

¹⁴³ *Id.*

totaling \$10,689.45. The trial court denied it, relying on the amended rule that denies sanctions where a mediation award was not unanimous.¹⁴⁴

The Michigan Court of Appeals viewed the purpose of the amendment as “attempting to eliminate the gamesmanship of using the offer of judgment rule as a way to avoid [case evaluation] sanctions while opening the possibility for offer of judgment sanctions, without a good faith intent to settle the case.”¹⁴⁵ The fact that the jury award of \$27,013 was nearly the same figure as the plaintiff’s offer of judgment of \$27,000 suggested that the offer of judgment was not used merely for gamesmanship.¹⁴⁶ It quoted language from the Michigan Supreme Court in adopting the amendment that “there are instances in which a [case evaluation] award is unrealistic and thus will not contribute to settlement of the case. In those circumstances, substitution of a more reasonable offer of judgment value can promote settlement.”¹⁴⁷ The case was remanded to determine whether plaintiff’s actions were merely gamesmanship to avoid case evaluation sanctions, or a reasonable offer conducive to settlement.¹⁴⁸ Thus the court recognized the additional incentive to a fair settlement that can result from offer of judgment cost-shifting, even where the case evaluation was rejected.

V. SUGGESTIONS FOR IMPROVING THE EFFECTIVENESS OF COST-SHIFTING RULES

A. *Changes to Federal Rule 68 and State Counterparts*

Changes in Federal Rule 68 (and its state court counterparts) could enhance its potential for encouraging settlement. The offer of judgment will remain an underutilized procedural tool for settlement as long as its inherent limitations remain. Both parties should have the right to make offers. However, as the state experience demonstrates, bilateral application alone may not spur use. What incentive exists for a plaintiff to make an offer of judgment when the only available sanction against a defendant is the costs the plaintiff is already entitled to under Rule 54? Additional encouragement is necessary.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 601.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 602 (quoting Report of Supreme Court Rule Committee, 451 Mich. 1205, 1233 (1996)).

¹⁴⁸ *Reitmeyer*, 602 N.W.2d at 598.

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One possibility is to incorporate the double costs provision of states like Minnesota and impose a heightened sanction on defendants who reject offers that turn out to be better than the result at trial.¹⁴⁹ At first glance, the double cost award to plaintiffs may appear inequitable and unduly punitive. However, considering the effects of a rejected offer on a plaintiff—payment of defendant’s post-offer costs and loss of plaintiff’s own costs incurred after the rejection—the burden of double costs on the defendant may be appropriate.¹⁵⁰

Yet costs, even double costs, may fail to motivate litigants.¹⁵¹ As an additional incentive, attorney’s fees should be included in offer of judgment rules. As state experience reflects, inclusion of attorney’s fees as part of the cost-shifting sanction would increase use of the Federal Rule 68, resolve cases more quickly, and decrease the costs of litigation.¹⁵² If there are concerns that inclusion of attorney’s fees is too draconian a measure, any risk could be tempered by a safety valve provision allowing judicial discretion to prevent undue hardship¹⁵³ or use of a margin of error provision.¹⁵⁴ Extending the right to make an offer to both parties and including attorney’s fees in the costs that are shifted would alter the fact that Federal Rule 68 is rarely used today.

¹⁴⁹ See *supra* notes 81–83 and accompanying text.

¹⁵⁰ See *S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist.*, 60 F.3d 305, 308 (7th Cir. 1995) (“Since as a prevailing party the plaintiff would be entitled to an award of costs anyway, doubling them provides a sanction equivalent to that imposed on a plaintiff who turns down a settlement offer by the defendant and then does worse at trial.”).

¹⁵¹ There is no precision in predicting what dollar amount is necessary to spur party motivation to settle. In fact, there is little quantitative data on what costs even amount to in federal litigation. See *Lynch, supra* note 51, at 355.

¹⁵² *Yoon & Baker, supra* note 48, at 159 (“Our results reveal that while the relative average damage award in New Jersey did not undergo any statistically significant change after the rule was revised, suits in that state took less time to resolve by an average of 2.3 months, or roughly 7 percent. This reduction in litigation duration affected all quartiles of damage awards, with a statistically robust effect on all but the highest quartile. Correspondingly, shorter litigation periods translated into a decrease in the insurers’ attorney’s fees by an average of nearly \$1,200, or approximately 20 percent. These findings suggest that allowing a substantial cost-shifting mechanism would be an effective means of increasing the efficacy of offer-of-judgment rules.”).

¹⁵³ See *supra* note 84 and accompanying text (discussing Minnesota provision on undue hardship).

¹⁵⁴ See *supra* note 101 and accompanying text (discussing Texas provision on margin of error).

B. *Changes to Federal Rule 16*

Including consideration of offers of judgment or settlement as part of case management directed at encouraging settlement would enhance its effectiveness. Federal Rule 16 already authorizes federal district courts to hold pretrial conferences to expedite the disposition of cases and facilitate settlement.¹⁵⁵ Pretrial scheduling conferences conducted by a federal district judge or magistrate judge under Federal Rule 16(b) also provide an ideal time to raise the potential of a Federal Rule 68 offer of judgment. Federal Rule 16(b) could be amended to explicitly include Federal Rule 68 in the list of topics to be discussed. This would certainly eliminate concerns that some lawyers simply overlook the potential of Federal Rule 68.¹⁵⁶ In cases where fee-shifting statutes raise the stakes of Federal Rule 68, Federal Rule 16 allows an opportunity for the parties and the court to carefully consider how the attorney's fees component impacts a Federal Rule 68 offer.

C. *Changes in Local Rules*

A similar benefit could be achieved when court-ordered mediation is used. Either by local rule or as part of a mediator's checklist, mediators could be instructed to consider the impact of a Federal Rule 68 offer in their facilitation of the mediation. As with the Federal Rule 16 modification, this minor change in practice serves to educate the parties on the potential of Federal Rule 68 offers.¹⁵⁷ If there is a genuine fear that Federal Rule 68 offers are being ignored by lawyers for economic reasons, this change in mediator practice would certainly reduce, if not eliminate, such concerns. Even if defense counsel prefers to continue the hourly billing of a defendant and might have an incentive to withhold suggesting use of Federal Rule 68, counsel would be forced to deal with it if the mediator raised the issue during a caucus with the defendant and counsel present. Similarly, if a plaintiff's lawyer was inclined violate the ethical obligation to the client and withhold transmission of a Federal Rule 68 offer to the plaintiff, the open discussion of

¹⁵⁵ FED. R. CIV. P. 16(a).

¹⁵⁶ See Symposium, *supra* note 24 at 785–86 (noting that Professor Harold Lewis suggested that Federal Rule 16(b) may be useful in facilitating discussion of Rule 68 offers).

¹⁵⁷ See *id.* (suggesting the reform).

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a Federal Rule 68 offer in a mediation caucus would keep that temptation at bay.¹⁵⁸

Attaching the offer of judgment process to mediation would provide a sanction regime that the mediation process lacks. The concern may be raised that this would undercut voluntariness by introducing coercion, but the coercion arises not from participation in the mediation but from the addition of the offer of judgment incentive to settle. Requiring parties to respond to offers is not a proper part of a mediation and a “good faith participation”¹⁵⁹ requirement that contemplates sanctions for failure to respond in good faith could indeed subvert the voluntariness of mediation. But if mediation does not accomplish a settlement, there would be no reason not to invoke an offer of judgment to encourage parties to bring their offers and counteroffers closer together. The Michigan experience of having two cost-shifting regimes shows that, despite some difficulties of administration, cost-shifting can provide a strong inducement to settlement.¹⁶⁰ Attaching the offer of settlement process to mediation does not raise the same problems of reconciling two different cost-shifting regimes as in Michigan and should be even easier to administer.

D. A Case Evaluation Process to Complement Offers of Judgment

A case evaluation process, like that used in Michigan, that includes cost-shifting if parties refuse the evaluation, could add an additional incentive to settle. We do not favor attaching cost-shifting or sanctions to mediation orders. Michigan amended its rule to replace the term “mediation evaluation” with “case evaluation” in appreciation of the fact that mediation is a facilitative process that is inconsistent with sanctions for failure to settle. As reflected by the debate over imposition of sanctions for failure to participate “in good faith” in mediation, sanctions related to failure to settle threaten the voluntary and facilitative nature of mediation. Only sanctions for failure to meet “minimum participation requirements” (such as not attending, not bringing certain documents as ordered, or complete failure to listen to the other side or make minimal responses) should be sanctionable.¹⁶¹ However,

¹⁵⁸ Professor Lewis, who had surveyed lawyers on the desirability of changes to Federal Rule 68 reports that “[a]s a whole the group was moderately supportive to strongly supportive, even among defense counsel.” *Id.* at 786.

¹⁵⁹ See *supra* notes 9–11.

¹⁶⁰ See *supra* Part IV.B (detailing Michigan experience).

¹⁶¹ See Sherman, *supra* note 10, at 2112 (“A ‘good faith participation’ requirement is not compatible with the objectives of court-annexed ADR and risks satellite litigation

cost-shifting mechanisms that are part of case evaluation or offer of judgment processes can provide stronger incentives to settle and, properly applied, are useful adjuncts to mediation in a court's role in promoting settlement.

VI. CONCLUSION

Federal Rule 68 and state offer of judgment rules modeled after it are destined to remain underutilized tools for settlement unless changes are made. The experience of states like Minnesota and Michigan provide considerable guidance. The scope of Federal Rule 68 must be broadened to allow plaintiffs to make offers and to allow the shifting of attorney's fees under certain circumstances. The potential use of Federal Rule 68 should be discussed during pretrial conferences, and Federal Rule 16 can be easily amended to make this explicit. Similarly, mediators should be instructed to consider the impact of Federal Rule 68 in their facilitation of court-connected mediation. While attaching cost-shifting directly to orders to mediate is unwise, adoption of a case evaluation process with cost-shifting provides the promise of additional incentives to settle. If implemented, the changes suggested here would allow offer of judgment rules and mediation practice to work in tandem to encourage settlement.

over sanctions that is inimical to effective and efficient settlement. In contrast, participation requirements for the exchange of position papers and objective information enhance the settlement process without unduly interfering with litigant autonomy. Similarly, a 'minimal meaningful participation' standard that requires only such participation as is needed to prevent frustration of the objectives of the particular ADR process is consistent with the role of ADR in the litigation system. Requirements for attendance of parties and persons with adequate authority and discretion are also critical to the settlement function of court-annexed ADR, but must be applied pragmatically to protect against unnecessary expense and inconvenience.”).