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Montana Offer of Judgment Rule: Let's Provide Bonafide Settlement Incentives

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MONTANA OFFER OF JUDGMENT RULE: LET'S PROVIDE BONAFIDE SETTLEMENT INCENTIVES

Russell C. Fagg*

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I. INTRODUCTION

The Montana Supreme Court Advisory Commission (Advisory Commission) submitted a proposal to amend Rule 68 of the Montana Rules of Civil Procedure on September 19, 1998. In an Order dated October 20, 1998, the Montana Supreme Court proposed the amendment to the bench and bar, and initiated a comment period until February 19, 1999.¹ Earlier, at its mid-year meeting in 1996, the American Bar Association (ABA) adopted a resolution regarding Rule 68 of the Federal Rules of Civil Procedure, the Offer of Judgment Rule.² The ABA Report concludes Rule 68³ is “deeply flawed” because it is not available to plaintiffs, it only shifts costs, not attorney’s fees, and it gives no discretion to judges if unfairness results.⁴ With the Advisory Commission proposal specifically under consideration in Montana, it is time to analyze the intent of Rule 68 and these two proposals.

Currently, Rule 68 does not create strong incentives for settlement, which is the rule’s intended purpose.⁵ Generally, attorney’s fees are the single biggest cost in litigation. By only shifting costs, but not attorney’s fees, the rule’s purpose of promoting settlement is significantly diminished. Moreover, it is neither fair nor appropriate that only defendants are allowed to make offers of judgment. This denies plaintiffs the opportunity to facilitate case settlement. Previous efforts in

1. See *In Re: Proposed Amendments to the Montana Rules of Civil Procedure* (Oct. 20, 1998) (order initiating 120 day comment period for proposed amendments to MONT. R. CIV. P. 68).

2. See Walter H. Beckham & Lawrence J. Fox, Report on Offer of Judgment Legislation, 1996 ABA Section of Tort and Insurance Practice and Litigation Section (Feb. 5, 1996) (on file with author & ABA) [hereinafter Beckham & Fox]. Only the Resolution Adopted by House of Delegates, February 5, 1996, is ABA policy. The “Report on Offer of Judgment Legislation” and the “Offer of Judgment Procedure” are not ABA policy.

3. References to Rule 68 will include Rule 68, FED. R. CIV. P., as well as Rule 68, MONT. R. CIV. P., which are identical.

4. Beckham & Fox, *supra* note 2, at ¶ 4.

5. See 7 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 68.02 (2d ed. 1994).

Montana to amend Rule 68 have been unsuccessful.⁶ Likewise, efforts to amend Federal Rule 68 have been unsuccessful.⁷

As a trial court judge, I am encouraged by the Montana Supreme Court's willingness to consider amending Rule 68. In the Thirteenth Judicial District, civil jury trials are currently scheduled three to six deep, dockets are becoming increasingly crowded, and scheduling is becoming more and more difficult. It is my belief Rule 68 does not sufficiently promote settlement incentives, which would alleviate some of these docket problems.

To test this hypothesis, all civil cases in Yellowstone County between 1994 and 1997 were researched to determine how many offers of judgment were filed. Those cases where an offer of judgment was made were then individually reviewed to determine how many offers were accepted, how many were rejected, and in how many cases costs were imposed. Based on this analysis, it appears clear the current offer of judgment rule in Montana is not accomplishing its stated purpose of promoting settlements.

This article is organized as follows: First, the Montana experience with Rule 68 is analyzed. Second, the proposed Montana Supreme Court and ABA amendment to Rule 68 and the policy considerations in support and opposition to these proposals are set forth. Third, offer of judgment rules in other jurisdictions will be summarized with special emphasis on those states which allow both sides to make an offer and which allow attorney's fees to be shifted. Lastly, a conclusion is set forth recommending that the Montana Supreme Court amend Rule 68.

Montana is at a crossroads. Montana can provide bonafide settlement incentives by adopting either the Montana Supreme Court proposal or the ABA proposal. Alternatively, Montana can simply do nothing and miss a great opportunity to better

6. As a legislator, the author sponsored House Joint Resolution No. 1 in the 1993 Legislature, which would have allowed both plaintiffs and defendants to make offers of judgment and would have shifted attorney's fees as well as costs. H.R.J. Res. 1 failed, primarily due to concerns that this was an area for the Montana Supreme Court to address without legislative intervention. H.R.J. Res. 1, 53d Leg. (Mont. 1993).

7. In 1983 and 1984, the Federal Rules Advisory Committee unsuccessfully proposed amendments in an effort to address the ineffectiveness of Rule 68. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 361-67 (1983) [hereinafter 1983 Proposed Amendments]; Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 102 F.R.D. 425, 432-37 (1984) [hereinafter 1984 Proposed Amendments].

effectuate case settlements. Indeed, Montana would be well served by adopting either one of the proposals amending Rule 68. For perspective, the background of Federal Rule 68 will be analyzed below to give a bit of history behind the debate.

A. Background Of Federal Rule

Rule 68 of the Federal Rules of Civil Procedure was first implemented by the Supreme Court in 1937.⁸ Of interest, Federal Rule 68 was adopted from the state statutes of Montana, Minnesota, and New York.⁹ As noted earlier, Rule 68 has not lived up to its expected purpose of encouraging settlement and thus, has been criticized accordingly.¹⁰ The Federal Rules Advisory Committee has proposed amendments to Rule 68, but these proposals have not been implemented.¹¹

Arguably, the single biggest problem with Rule 68 in its current form is that "costs" does not typically include attorney's fees. The seminal case decided by the Supreme Court on this issue is *Marek v. Chesny*,¹² where the Court held the term "costs" as set forth in Rule 68 "was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."¹³ Later, in *Delta Air Lines v. August*,¹⁴ the Court restricted its earlier ruling and held that "costs" will generally only include costs awarded under Rule 54(d).¹⁵ Because costs do not generally include attorney's fees, which are the major expense of litigation, offers of judgment are seldom made, let alone accepted.¹⁶ Part II of this article bears this conclusion out.

8. FED. R. CIV. P. 68 advisory committee's notes. See also *Delta Air Lines v. August*, 450 U.S. 346, 372-74 (1981) (Rehnquist, J., dissenting), for a good discussion of the history of Rule 68.

9. See *Delta Air Lines*, 450 U.S. at 374 n.2.

10. See 1983 Proposed Amendments, *supra* note 7, at 363-67; 1984 Proposed Amendments, *supra* note 7, at 433-37.

11. See 1983 Proposed Amendments, *supra* note 7, at 361-67; 1984 Proposed Amendments, *supra* note 7, at 432-37.

12. 473 U.S. 1 (1985).

13. *Id.* at 9.

14. 450 U.S. 346 (1981).

15. *Id.* at 352-361 (Rule 54(d)(1) and (2) provides in pertinent part: "... costs other than attorney's fees shall be allowed as of course to the prevailing party . . . Claims for attorney's fees and related nontaxable expenses shall be made by motion . . .") (emphasis added).

16. See Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 6-9 (1985).

The second biggest problem with Rule 68 is that only defendants can make offers of judgment.¹⁷ Although a successful plaintiff may recover his costs under Rule 54,¹⁸ Rule 68 clearly gives defendants an advantage in litigation due to the mandatory nature of cost shifting in Rule 68.¹⁹

II. THE MONTANA EXPERIENCE WITH CURRENT RULE 68

In order to objectively evaluate the effectiveness of Montana Rule 68, the author researched the 4,653 civil cases filed in Yellowstone County between January 1, 1994, and December 31, 1997. In all, offers of judgment were made in only 59 of these cases.²⁰ Thus, in only approximately 1.3% of the cases in Yellowstone County (the busiest civil calendar in Montana)²¹ was an offer of judgment actually made. The specifics of those cases where an offer of judgment was made are analyzed below.

A. Ineffectiveness of Montana Rule

Perhaps the best way to present the data is by way of a graph.²²

	1994	1995	1996	1997	Totals
Civil Cases	1276	1136	1107	1134	4653
Offer of Judgment Filed	23	13	16	7 ²³	59
Offer of Judgment Accepted	0	1	1	0	2
Costs Assessed	1	1	0	1	3

17. FED. R. CIV. P. 68 (“[A] party *defending* against a claim may serve upon the adverse party an offer to allow judgment. . .”) (emphasis added).

18. FED. R. CIV. P. 54 (“[C]osts other than attorneys’ fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . .”).

19. See Simon, *supra* note 16, at 8-9.

20. See Thirteenth Judicial District Court Statistics, Yellowstone County Clerk of District Court (1994-97) (on file with the author).

21. See 1997 Annual Report of the Montana Judiciary, Table 6, at 16.

22. See *supra* note 20.

23. It is possible additional offers of judgment will be filed, as many of these cases are active.

The review of four years of recent cases readily demonstrates the ineffectiveness of Rule 68. Over 4,600 cases were filed in that four year period. While it is still conceivable that additional offers of judgment may be filed in the later cases, at least one full year has passed since the 1997 cases were filed. In Yellowstone County, a civil case is typically tried within 12-18 months of filing.²⁴

As can be seen from the graph, while a very small number of cases have an offer of judgment filed in them, in even fewer cases is the offer of judgment actually accepted. In fact, in the over *four thousand* cases filed, an offer of judgment was accepted only *twice*.²⁵ In the first case, an offer of judgment was filed for \$100.00.²⁶ Later, after the first offer of judgment was refused, a second offer of judgment was filed in the amount of \$4,100.00.²⁷ The offer of judgment was then accepted by the plaintiff and the case was settled for \$4,100.00. In the second case, the defendant offered \$3,000.00 and the plaintiff accepted.²⁸

Likewise, in only three cases during this four year period were costs assessed after an offer of judgment was refused and the verdict came in less than the offer. In the first case, the defendant initially offered \$8,000.00 and then amended the offer of judgment to \$10,000.00. The plaintiff rejected both offers and the jury returned a verdict of \$10,000.00. Thus, the plaintiff had to pay defendant's costs of \$919.00, which accrued after the second offer of judgment was made.²⁹ In the second case, two offers of judgment were made, one for \$30,000.00 and one for \$50,000.00. Neither of the offers was accepted and the jury verdict came in at \$20,235.00. Accordingly, the defendant was awarded his costs in the amount of \$1,262.15.³⁰ In the third case, the defendant was awarded \$3,178.00 in costs after a \$15,000.00 offer of judgment was made because the jury awarded only \$2,025.00.³¹

In one other case of note, a plaintiff attempted to make an offer of judgment. The defendant objected to the plaintiff's offer

24. See *supra* note 20.

25. See *supra* note 20.

26. See Offer of Judgment, Sullivan v. Yakawich, No. DV 95-304 (May 22, 1995).

27. See *id.* (Dec. 5, 1995).

28. See Offer of Judgment, Carranco v. Daniel, No. DV 96-799 (June 4, 1998) (acceptance occurred on June 11, 1998).

29. See Offer of Judgment, David v. Ruden, No. DV 94-1176 (Oct. 12, 1995).

30. See Offers of Judgment, Lowery v. German, No. DV 95-984 (July 30, 1996 & Sept. 19, 1997).

31. See Offer of Judgment, Trullender v. Strobel, No. DV 97-380 (Aug. 27, 1998).

of judgment and the court ruled the plaintiff could not make an offer of judgment. In the end, the case settled for an undisclosed amount.³² This case is interesting because it indicates that at least some plaintiffs would like to make offers of judgment.

The offers of judgment that were made ranged from a low of \$50.00 to a high of \$225,000.00.³³ The \$225,000.00 offer is somewhat of an anomaly as the second highest offer of judgment was \$60,000.00, and most of the offers of judgment were in the \$5,000.00-\$10,000.00 range.³⁴ Of course, some cases may have settled due to movement caused by the offer of judgment, but very few offers of judgment were actually accepted. These results are in conformity with national studies which conclude that Rule 68 is rarely effective in achieving settlement.³⁵ Attorney surveys also confirm that Rule 68 is seldom used and does not facilitate settlement.³⁶ Thus, based upon the statistics of civil cases in Yellowstone County and the general conclusions referenced above, it is clear Rule 68 does little to encourage settlement. Due to the limited effectiveness of Rule 68, other jurisdictions have amended their versions of Rule 68 in various ways. The Montana Supreme Court and the ABA have both proposed amendments to Rule 68. These two proposals are analyzed below.

III. THE MONTANA SUPREME COURT PROPOSAL

As noted above, the Montana Supreme Court Advisory Commission submitted a proposal to the Montana Supreme Court on September 18, 1998, to amend Rule 68 of the Montana Rules of Civil Procedure.³⁷ The Montana Supreme Court amended the proposal and requested comments from the bench

32. See Offer of Judgment, *Burton v. Cowley*, No. DV 94-116 (Aug. 15, 1997).

33. See *supra* note 20.

34. See *supra* note 20.

35. 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, 52 (1997) [hereinafter Solimine & Pacheco]. "Even in its present form, the option provided by Rule 68 is apparently rarely used." *Id.* See also Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108 (Larry Kramer ed., 1996). "Rule 68 has been viewed by many, including me, as an uninteresting provision that remains on the fringe of procedure because it has been little used to scant effect." *Id.*; See also 1984 Proposed Amendments, *supra* note 7, at 433 (stating Rule 68 is rarely used).

36. See JOHN E. SHAPARD, *LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE* (1995).

37. See *supra* note 1.

and the bar on the proposed rule change. Comments are to be submitted by February 19, 1999, which provides for a one hundred twenty (120) day comment period.³⁸ The proposed amendment is discussed below.

A. Rule Language

The Montana Supreme Court proposal is relatively simple, particularly when compared to the ABA proposal discussed later in this article. A complete copy of the Montana Supreme Court proposal appears in Appendix A. This proposal deletes the rule as it currently exists and substitutes a new rule, essentially adopted from Wyoming.³⁹

The first of the two most important changes in the Montana Supreme Court proposal is found in the first sentence which allows "any party" to make an offer to settle a lawsuit.⁴⁰ This cures one of the two defects in the current rule by allowing plaintiffs to also make an offer. Of interest, the title "Offer of Judgment" is changed to "Offer of Settlement."

The time period for when an offer can be made is also changed. The current rule allows an offer to be made up to ten (10) days before trial. The new rule allows an offer to be made sixty (60) days after the complaint is served, up to thirty (30) days before trial.⁴¹ This amendment may reduce last minute settlements which waste the time of the court, counsel, parties and jurors.

The procedure after an offer is accepted is the same as the current rule. Likewise, an unaccepted offer is also considered withdrawn after ten (10) days and inadmissible in court, unless there is a separate hearing to assess costs.⁴²

The second and biggest amendment is the section defining "costs"— now including attorney's fees.⁴³ The ramifications of this change are discussed in detail below. The proposal concludes similar to the current rule by allowing later offers, and allowing offers before the damage phase of a trial, if it has been bifurcated.⁴⁴

38. See *supra* note 1.

39. See Proposed Amendments to Rule 68 of the Montana Rules of Civil Procedure, Advisory Commission Note, at 3.

40. *Id.*

41. See *id.* at 2.

42. See *id.*

43. *Id.*

44. See *id.* at 3.

B. Rule History

The history of this proposal is necessarily brief. The Advisory Commission Note states the rule was “essentially adopted from the Wyoming rule.”⁴⁵ However, the commission note indicates that attorney’s fees were added to the definition of costs by the Montana Supreme Court.⁴⁶ This addition is very important and is discussed in detail below. The history of the Wyoming rule is less important due to the addition made by the Montana Supreme Court to include attorney’s fees as costs. While the author applauds the Montana Supreme Court’s addition, the specific genesis of that amendment is unknown.⁴⁷

C. Policy Considerations

Policy Considerations Supporting The Montana Supreme Court Proposal

As noted in other parts of this article, the purpose behind Rule 68 is to promote settlement. Currently, as evidenced by the Yellowstone County experience, Montana Rule 68 does not significantly promote settlement. However, by allowing plaintiffs and defendants to make an offer of settlement, the opportunity to achieve settlement increases significantly. There will probably be little, if any, debate by the Montana bar to allow both plaintiffs and defendants to make an offer of settlement.

On the other hand, the proposal to allow attorney’s fees to be assessed as costs if an offer of settlement is turned down and the offeree is not more successful at trial will raise significant debate. The biggest factor supporting the Montana Supreme Court proposal is that putting attorney’s fees at issue will put teeth into Rule 68. An offer of settlement must be seriously considered when rejecting it not only subjects a party to pay his own attorney’s fees but also the opposing party’s attorney’s fees from that point forward.

Financial risk is an important factor in lawsuits. There is no question that putting attorney’s fees in the mix will significantly increase case settlement discussions, and

45. *Id.*

46. *See id.*

47. The author spoke to a Montana Supreme Court Justice who declined to comment on the amendment because the matter is pending before the court.

ultimately, case settlements. This is important and appropriate. A party will be put on notice that attorney's fees are at risk from that point forward by the offer of judgment. There is no stratagem. A cold, calculated assessment of the case is then in order. Risk and gain are evaluated. This reckoning, which may well lead to settlement, is the single most persuasive argument in favor of the Advisory Commission's proposal, as amended by the Montana Supreme Court.

Holding the offeree accountable for attorney's fees after the offer is turned down, and the offeree is less successful at trial, is fair. After all, if a reasonable offer is made, turned down, and the jury determines the value of the case to be less than the offer, why should the prevailing party have to pay their attorney's fees from that point forward. The case should have settled. If it had settled, no additional attorney's fees would have been incurred.

The Montana Supreme Court proposal is also a simple one which will be easily understood by the Montana bench and bar. In fact, the proposed rule is substantially similar to the current rule, with the noted changes regarding attorney's fees and allowing plaintiffs to make an offer of settlement. In comparison to the ABA proposal which makes significant changes to Rule 68, the Montana Supreme Court's proposal is straightforward and simple.

Likewise, the implementation of the rule and the effect of the rule will be straightforward and simple. Unlike the ABA proposal, the Montana proposal does not have either the "undue hardship" safety valve or the 25% margin for error component, which will lead to increased complexity.

The Montana Supreme Court has obviously had a significant hand in the drafting of the proposed rule, which bodes well for future interpretation of Rule 68. The court should give effect to the rule's purpose, as shown by their important contribution to the Montana proposal. This is encouraging.

In summary, the Montana Supreme Court proposal should prove an effective and potent weapon for settling cases. By adding attorney's fees to costs, the Montana Supreme Court has taken a bold, yet warranted, step in improving the intent of Rule 68. There are, however, some policy considerations opposing the proposed rule which are set forth below.

Policy Considerations Opposing the Montana Supreme Court Proposal

As with the ABA proposal discussed next, the primary opposition to amending Rule 68 centers on access to justice issues. As attorney's fees are the hammer which will promote settlements, attorney's fees are also the hammer which could force potential litigants out of the litigation arena if faced with paying the opposing party's attorney's fees. Thus, those less fortunate may be further disenfranchised from litigation if attorney's fees are on the table. This issue has been the primary argument used by opponents throughout the "English Rule" debate. When a party has to consider paying not only his own attorney's fees, but also his opponent's attorney's fees, he may feel compelled to settle a case he would prefer to take to trial.

Another argument against the Montana Supreme Court proposal is that litigation pushing the envelope of acceptable legal precedent may be discouraged. An argument can be made that some of the best advances in American civilization have been made by creative lawyers moving beyond established precedent. For example, products liability litigation has undoubtedly made consumer products safer. Likewise, there can be little question that working conditions have improved for blue collar Americans in the last 100 years due in part to trial attorneys holding employers accountable through litigation involving unsafe working conditions. Concededly, some of this progressive litigation may be curtailed if Rule 68 is amended as called for by the Montana Supreme Court proposal or the ABA proposal.

Like the ABA proposal, there is the chance that the Montana Supreme Court proposal may actually increase litigation due to arguments over accepted or rejected offers, or arguments over whether or not costs should be assessed and the amount of those costs. These side arguments could become more prevalent as the issue of attorney's fees is introduced.

Finally, while the Montana Supreme Court proposal is simpler and more straightforward, it lacks the safeguards some argue are necessary to make Rule 68 equitable in its application. One such safeguard in the ABA proposal is the 25% margin of error rule. Another safeguard is the discretion given to the judge to waive Rule 68 sanction costs if undue hardship would result. As a judge, this outlet is both a blessing and curse. It is a blessing because there may be certain cases when the effect of

the rule will be too draconian. It is a curse because all too often parties will attempt to get out of paying attorney's fees for less than compelling reasons.

In summary, the policy considerations opposing the Montana Supreme Court proposal center on the assessment of attorney's fees. Just as the assessment of attorney's fees is essential to making Rule 68 effective, it is that potential assessment which spawns the biggest arguments against any amendment allowing attorney's fees to be a part of costs. The policymaker in this case, the Montana Supreme Court, should receive some thoughtful and provocative comments from the bench and bar on this point.

IV. THE ABA PROPOSAL

The American Bar Association House of Delegates adopted a resolution on February 5, 1996, asking Congress to consider a specific "Offer of Judgment Procedure" before enacting any fee shifting rules or legislation.⁴⁸ The ABA did not specifically endorse the enactment of the offer of judgment legislation,⁴⁹ but wanted to present "a thoughtful and balanced procedure" in the fee shifting debate.⁵⁰

A. Rule Language

The ABA proposal itself is broken down into twelve sections. A complete copy of the ABA proposal appears in Appendix B. A brief review of the proposal is set forth below.

Section 1. Offer Of Judgment

Section One cures one of the two biggest defects of Rule 68 by allowing "any party" to make an offer to settle a monetary damage claim. The offer must be made at least sixty (60) days after the complaint is served and no later than sixty (60) days before the trial date.⁵¹ This is a significant step in the right direction in amending Rule 68 because it allows the plaintiff, as well as the defendant, to make an offer to settle a case. The current rule diminishes the settlement possibilities by half because only one party may make an offer of judgment.

48. Beckham & Fox, *supra* note 2, at 1.

49. See Beckham & Fox, *supra* note 2, at 1.

50. Beckham & Fox, *supra* note 2, at 86.

51. See Offer of Judgment Procedure, *supra* note 2, at § 1.

Section 2. Form Of Offer Of Judgment

The form of the offer of judgment is important, as more than one party has been tripped up by failing to define precisely the offer being made to that party's detriment.⁵² Section Two has a number of specific requirements: the offer must be in writing; it must specify the money offered; and it must specifically state whether the offer includes costs, attorney's fees, interest, and anything else that may be awarded. It is clear Section Two intends offers to be as clear and unambiguous as possible.

Section 3. Determination Of Applicability

Section Three, which was later added to the original proposal, allows a party upon application to know from the beginning of the lawsuit whether this rule applies or not.⁵³ The court may defer ruling on the applicability of this rule until after judgment is obtained. The early determination of the applicability of the rule may be strategically important for a trial attorney.

Section 4. Time Period During Which Offer Remains Open

To be a valid offer, the offer must remain open for at least sixty (60) days. If an offer does not state how long it remains open, it shall be deemed to remain open for up to sixty (60) days before the trial, unless the offer is withdrawn.⁵⁴ It is obviously the intent of the drafters of the ABA proposal to provide sufficient time for the opposing party to consider the offer of judgment.

Section 5. Extension Of Time Period During Which Offer Remains Open

Section Five first giveth, and then taketh away. Section Five states the offeree may apply to the court to extend the time an offer will remain open. However, the offeror may withdraw the offer if the court extends the time for the offer to remain open. Section Five also includes a good cause standard for the

52. See, e.g., *Holland v. Roeser*, 37 F.3d 501 (9th Cir. 1994) (where a stated limitation of fees was ambiguous and thus plaintiffs who had accepted an offer of judgment were entitled to recover post-offer fees).

53. See Offer of Judgment Procedure, *supra* note 2, at § 3.

54. See Offer of Judgment Procedure, *supra* note 2, at § 4.

court to use when determining whether to extend the time an offer remains open.⁵⁵

Section 6. Acceptance Of Offer

An offer must be accepted in writing, without qualification, and within the specified time period.⁵⁶ Once again, it is clear the ABA proposal drafters do not want any ambiguities in the process. It is understandable that the offer must be in writing. However, it is interesting to note the offer must be accepted “without qualification.” This area could be amended in the future to allow a counter-offer. On the other hand, since both parties can make an offer of judgment, the offeree could reject the proposed offer and submit their own offer. Thus, in the final analysis, the “without qualification” language does not hinder settlement opportunities.

Section 7. Refusal Of Offer

Any offer not accepted within the time period set forth in the offer is deemed refused.⁵⁷ This section was inserted to prevent any misunderstanding between the parties which could occur as the result of a late acceptance of an offer.

Section 8. Withdrawal Of Offer

Generally, an offer, once made, may not be withdrawn before the expiration time stated in the original offer. The exception is with consent of the court “for good cause shown and to prevent manifest injustice.”⁵⁸ It is important that it takes meeting a stringent standard to withdraw an offer. This difficult standard discourages withdrawals of offers before the opposing party has had adequate time to analyze the offer.

Section 9. Inadmissibility Of An Offer Not Accepted

An unaccepted offer is not admissible until the proceeding assessing costs and fees.⁵⁹ This is important because an offeror

55. See Offer of Judgment Procedure, *supra* note 2, at § 5.

56. See Offer of Judgment Procedure, *supra* note 2, at § 6.

57. See Offer of Judgment Procedure, *supra* note 2, at § 7.

58. Offer of Judgment Procedure, *supra* note 2, at § 8.

59. See Offer of Judgment Procedure, *supra* note 2, at § 9.

does not want his offer presented as evidence to the factfinder, who may consider it to be an admission of liability or case worth.

Section 10. Subsequent Offers

A party may make more than one offer of judgment. Significantly, if more than one offer is made and not accepted, and the offeror is able to seek costs and fees, then the offeror may seek costs and fees under *any* one of the unaccepted offers.⁶⁰

Section 11. Effect Of Rejection Of An Offer

Section Eleven is the heart of the ABA proposal. Section Eleven addresses what happens when an offer is not accepted and the offeror is more successful at trial than the terms of the offer of judgment. If this occurs, the offeror files the offer and proof of service of the offer after final judgment or disposition. However, a judgment stemming from a settlement agreement does not trigger fee shifting unless the settlement agreement provides for that result.⁶¹

The court, after allowing both parties to submit proposed findings, will enter judgment using the 25% plus or minus rule. This rule was the critical factor in winning the support of both the pro-plaintiff Section of Litigation and pro-defendant Section of Tort and Insurance Practice for the ABA proposal. The 25% plus or minus rule works as follows: If a plaintiff does not accept an offer and the final judgment is 75% or less of the offered amount, the plaintiff must pay the offeror's costs incurred after the offer was made, including reasonable attorney's fees and expenses. Expert witness fees and expenses are not included as expenses. However, in no case may the costs exceed the judgment.⁶²

On the other hand, if a defendant does not accept an offer made by a plaintiff and the judgment is more than 125% of the offer, the defendant shall pay the plaintiff's costs incurred after the offer was made, which again include reasonable attorney's fees and expenses. Expert witness fees and expenses are not

60. See Offer of Judgment Procedure, *supra* note 2, at § 10.

61. See Offer of Judgment Procedure, *supra* note 2, at § 11.

62. See Offer of Judgment Procedure, *supra* note 2, at § 11(a).

included as expenses. Again, the costs awarded cannot be greater than the judgment.⁶³

When the court compares the offer of judgment with the final judgment, the final judgment may not include costs, attorney's fees, etc., unless the offer of judgment specifically included those amounts.⁶⁴ If attorney's fees are awarded under either a contract or court rule, those attorney's fees are excluded from the judgment and thus not allowed as an offset.⁶⁵

As a final safety valve, the court may reduce or eliminate entirely the fees and costs shifted "to avoid undue hardship, or in the interest of justice, or for any other compelling reason. . . ."⁶⁶ As a judge who is interested in encouraging settlements, the author hopes that judges will refrain from exercising this safety valve unless an extraordinary situation is presented. The rule would be abated if parties who are made to pay the other side's attorney's fees and costs went to the court and had that obligation diminished, or reduced entirely, for less than exceptional reasons.

The final safety valve in section eleven provides that attorney's fees must be reasonable, they must be calculated on an hourly rate, and the reasonableness of the fees will be considered in the context of the case's complexity and the attorney's qualifications.⁶⁷ In any case, the attorney's fees awarded may not exceed the attorney's fees of the offeree, or, if there is a contingency agreement, they cannot exceed those fees which would have been incurred if the time put in by the offeree's attorney was broken down on an hourly basis.⁶⁸

Section 12. Non-Applicability

Section Twelve simply states this rule does not apply to various categories of cases, including dissolution cases, landlord/tenant cases, class actions, actions based on constitutional rights or cases where "attorneys fees are statutorily available to a prevailing party. . . ."⁶⁹

63. See Offer of Judgment Procedure, *supra* note 2, at § 11(b).

64. See Offer of Judgment Procedure, *supra* note 2, at § 11(c).

65. See Offer of Judgment Procedure, *supra* note 2, at § 10(a), (b) & (d).

66. Offer of Judgment Procedure, *supra* note 2, at § 11(d).

67. See Offer of Judgment Procedure, *supra* note 2, at § 11(e).

68. See Offer of Judgment Procedure, *supra* note 2, at § 11(e)(1) & (2).

69. Offer of Judgment Procedure, *supra* note 2, at § 12.

B. Rule History

The primary impetus for the ABA proposal was passage of the Attorney Accountability Act, H.R. 988, by the United States Congress on March 7, 1995.⁷⁰ The Attorney Accountability Act was part of the GOP's "Contract with America" and allowed attorney's fees to be assessed after an offer of judgment was made. In addition, the United States Senate and various state legislatures were also debating attorney fee shifting bills. In response, the ABA Section of Tort and Insurance Practice put together a "Task Force" shortly after the Attorney Accountability Act passed the House in order to look at legislation effecting the offer of judgment rule.⁷¹

The Task Force was formed to put together a "comprehensive study of 'offer of judgment' rules."⁷² After the Task Force was formed, the primarily pro-plaintiff Litigation Section requested representation on the Task Force, and two people from that section served on the Task Force.⁷³

The Task Force reiterated the ABA's position opposing any "loser pays" rules or legislation. However, the Task Force recognized that fee-shifting proposals were being promulgated across the United States and to be a player in that debate, they needed to come up with a reasonable proposal, rather than simply opposing loser pay rules.⁷⁴ The proposal itself was first recommended to the ABA House of Delegates at the 1995 Annual Meeting, but action was deferred until the 1996 mid-year meeting because various ABA Sections, including the Consortium on Legal Services and the Standing Committee on Legal Aid and Indigent Defendants, needed more time to study the proposal and its possible limitations on access to justice.⁷⁵ This delay also allowed state and local bar delegates to comment on the proposal which, in turn, allowed the Task Force to improve the proposed rule based on those comments. The final report to the American Bar Association was adopted by the House of Delegates on February 5, 1996.⁷⁶

70. See Beckham & Fox, *supra* note 2, at 1.

71. Beckham & Fox, *supra* note 2, at 1.

72. Beckham & Fox, *supra* note 2, at 1.

73. See Beckham & Fox, *supra* note 2, at 1.

74. See Beckham & Fox, *supra* note 2, at 1.

75. See Beckham & Fox, *supra* note 2, at 2-3.

76. See Beckham & Fox, *supra* note 2, at 2-3.

C. Policy Considerations

Policy Considerations Supporting the ABA Proposal

First and foremost, the policy in support of amending Rule 68 is to promote quick and reasonable settlements.⁷⁷ Settlement negotiations are enhanced immediately because not only defendants, but also plaintiffs, can make an offer to settle the case. Right from the start, then, the possibility of settlement has, in theory, doubled.

In addition, by putting attorney's fees on the table, the incentive to take a thorough look at an offer has increased tremendously, even considering the plus or minus 25% rule. Simply put, the current "fear" of paying the other side's costs is not significant enough to force a party to seriously consider an offer.

Moreover, the ABA proposal is a practical one that allows judicial discretion to prevent the rule from severely impacting a party. Section eleven, discussed above, sets forth the standard for allowing a judge to remedy any unjust results.

Likewise, the 25% margin for error rule provides protection for parties. Any trial lawyer knows it is difficult to predict a verdict with certainty. The 25% margin for error rule allows room for error by attorneys when evaluating a case.⁷⁸

The ABA proposal is also a balanced proposal due to the "collaborative" input from the primarily pro-plaintiff Section of Litigation and the primarily pro-defendant Section of Tort and Insurance Practice. The proposal is neither pro-plaintiff nor pro-defendant. The proposal simply encourages both plaintiffs and defendants to accurately evaluate cases.⁷⁹

Another benefit of the proposed rule is that it should reduce speculative litigation. Moreover, protracted defense of undefendable lawsuits is limited if a party knows it may be subject to the other party's attorney's fees. Likewise, excessive and fruitless discovery and filing of unnecessary motions should be reduced not only because of early settlement of cases, but also if attorney's fees are on the table, a party may hesitate to make

77. Unedited Transcript at ¶ 89, 1996 A.B.A. Mid-Year Meeting (Feb. 5, 1996) (on file with author & ABA) [hereinafter Unedited Transcript].

78. See Unedited Transcript, *supra* note 77, at ¶ 86.

79. See Unedited Transcript, *supra* note 77, at ¶ 100.

the case any more complicated and time consuming than absolutely necessary.

In summary, the primary benefit of the ABA proposal is that it is a thoughtful and balanced proposal written by trial lawyers who understand the settlement opportunities as well as the access to justice concerns. The proposal is a compromise that allows both plaintiffs and defendants to be players in the settlement game. Of course, more is at risk with attorney's fees being part of that game, but it is the attorney's fees that will put teeth into the offer of judgment rule.

Policy Considerations Opposing the ABA Proposal

The primary concern raised by opponents of the ABA proposal centers on the access to justice issue. Specifically, there is a concern that if attorney's fees may be assessed against parties then those parties may be frozen out of the system because they cannot afford the exposure to the other side's attorney's fees.⁸⁰ Opponents generally characterize the ABA proposal as a fee shifting proposal which will deny American citizens access to our court system.⁸¹

Opponents also contend the 25% margin for error rule is unfair to defendants in cases where a plaintiff rejects an offer and pushes a case to trial but only receives a marginal verdict. For example, if a plaintiff receives a \$1,000 verdict, then Section eleven of the proposal limits the attorney's fees and costs award to \$1,000. Thus, there is an argument that this is a pro-plaintiff proposal, as opposed to the current Rule 68, which is generally considered pro-defendant.⁸² In fact, this is a legitimate argument. However, to ensure access to the judicial system by all Americans, the 25% margin of error rule and judgment cap rules are appropriate safeguards which force plaintiffs to decide whether their case is really worth trying, but are not so punitive that it shuts them out.

Another argument against the proposal is that it is simply bad public policy in that it could spawn additional litigation. Specifically, the reasonableness of the attorney's fees and whether the safeguards set forth in the proposed rule should be implemented are ripe for dispute. Thus, some conclude this

80. See Unedited Transcript, *supra* note 77, at ¶ 87.

81. See Unedited Transcript, *supra* note 77, at ¶ 88.

82. See Unedited Transcript, *supra* note 77, at ¶ 91.

proposal will actually prolong litigation, not shorten it.⁸³ While the argument has some merit, the benefits of increased settlement opportunities override this concern.

Last, there is an argument against the ABA proposal on the basis an offer should be allowed to be withdrawn in fewer than sixty (60) days if the person who made the offer learns of information that shows the offer to be too generous. The argument espouses the thought that an offeror should be able to withdraw their offer at anytime and that the sixty (60) day period the offer must remain open is unreasonable.⁸⁴ Frankly, settlement offers are rarely, if ever, "too generous." Any settled case is more of a win-win situation than the alternative of going to trial, which results in a clear winner and a clear loser.

V. OFFER OF JUDGMENT RULES IN OTHER JURISDICTIONS

A. States Which Allow Both Sides to Make an Offer of Judgment

In all, thirteen states have amended their offer of judgment rule to allow both plaintiffs and defendants to make an offer of judgment. The following states have made such a change: Alaska,⁸⁵ Arizona,⁸⁶ California,⁸⁷ Colorado,⁸⁸ Connecticut,⁸⁹ Florida,⁹⁰ Michigan,⁹¹ Minnesota,⁹² Nevada,⁹³ New Jersey,⁹⁴ North Dakota,⁹⁵ Wisconsin,⁹⁶ Wyoming.⁹⁷ Thus, more than a quarter of the states have made the policy decision to allow plaintiffs to also make an offer of judgment. Both proposals incorporate this change in Section one.⁹⁸ This indicates a push,

83. See Unedited Transcript, *supra* note 77, at ¶¶ 98-99.

84. See Unedited Transcript, *supra* note 77, at ¶ 90.

85. ALASKA R. CIV. P. 68; ALASKA STAT. § 09.30.065 (Michie 1996).

86. ARIZ. R. CIV. P. 68.

87. CAL. CIV. PROC. CODE § 998 (West 1993).

88. COLO. REV. STAT. ANN. § 13-17-202 (West 1996).

89. CONN. GEN. STAT. ANN. § 52-195 (West 1997).

90. FLA. STAT. ANN. § 768.79 (West 1997).

91. MICH. R. CT. 2.405 (1994).

92. MINN. R. CIV. P. 68.

93. NEV. R. CIV. P. 68.

94. N.J. CT. R. 4:58 (West 1992).

95. N.D.R. CIV. P. 68.

96. WIS. STAT. ANN. § 807.01 (West 1995).

97. WYO. R. CIV. P. 68.

98. See Offer of Judgment Procedure, *supra* note 2, at § 1; Order *supra* note 1, at 2. ("[A]ny party may make an offer to an adverse party . . .") (emphasis added).

of sorts, to at least allow plaintiffs and defendants to make an offer of judgment.

B. States Which Allow Attorney's Fees to be Shifted

Fewer states allow attorney's fees to be shifted after an offer of judgment has been made and rejected. In fact, only six states, Connecticut,⁹⁹ Florida,¹⁰⁰ Idaho,¹⁰¹ Michigan,¹⁰² Minnesota¹⁰³ and Nevada,¹⁰⁴ allow attorney's fees to be shifted under certain circumstances. The circumstances under which attorney's fees can be shifted are beyond the scope of this paper.¹⁰⁵ The point is that there is some movement across the country to recognize the importance of allowing attorney's fees to be assessed as costs to make Rule 68 a more effective settlement tool.

In addition, as noted earlier, "serious consideration is being given by Congress and various state legislatures to allow for 'offer of judgment' fee-shifting proposals."¹⁰⁶ We know now that the Attorney Accountability Act, H.R. 988, did not pass the United States Senate. The fact remains, however, that there is discussion nationwide aimed at implementing the "loser-pays" rule. While none of the six states referenced above have implemented a strict English Rule, each of the states has recognized that attorney's fees are the major cost of litigation and have concluded that an effective offer of judgment rule must include them.

VI. CONCLUSION

Rule 68 is, indeed, "deeply flawed."¹⁰⁷ The purpose of Rule 68 is to promote settlement. Unfortunately, Rule 68 is seldom used and, when used, rarely effective. The experience of civil cases in Yellowstone County filed over the last four years mirrors experiences nationwide. Simply put, Rule 68 does not work.

99. CONN. GEN. STAT. ANN. § 52-192a (West 1997) (cap at \$350).

100. FLA. STAT. ANN. § 768.79 (West 1997).

101. IDAHO R. CIV. P. 68.

102. MICH. R. CT. 2.405 (1994).

103. MINN. R. CIV. P. 68.

104. NEV. R. CIV. P. 68.

105. See Solimine & Pacheco, *supra* note 34, at 63-71, for a good overview of what states are doing with Rule 68.

106. Beckham & Fox, *supra* note 2, at 2.

107. Beckham & Fox, *supra* note 2, at 1.

The Advisory Commission should be commended for bringing Rule 68 to the attention of the Montana Supreme Court. Likewise, the Montana Supreme Court should be applauded for including attorney's fees as costs in the proposal and bringing Rule 68 to the attention of the bench and bar. In addition, the ABA Task Force has done a commendable job with their "comprehensive study of 'offer of judgment' rules."¹⁰⁸ This author believes the Montana Supreme Court should implement either the Advisory Commission proposal or the ABA proposal. Either would be a significant improvement over the current rule.

The Montana Supreme Court proposal addresses the two major concerns with Rule 68 in a simple and straightforward manner. If concerns are brought up regarding this proposal, then the Montana Supreme Court could turn to the ABA proposal. Additional safeguards are in place in the ABA proposal which weaken the rule, but address access to justice concerns.

Rule 68 has a laudable purpose and we need to allow the rule to work. Plaintiffs must be allowed to make offers of settlement. Last, but not least, attorney's fees must be assessed to provide bonafide settlement incentives.

108. Beckham & Fox, *supra* note 2, at 1.

APPENDIX A

The following is the amendment to Rule 68 of the Montana Rules of Civil Procedure proposed by the Montana Supreme Court on October 20, 1998.

Rule 68. Offer of settlement.

At any time more than 60 days after service of the complaint and more than 30 days before the trial begins, any party may serve upon the 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 the offer, with costs then accrued. 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 court shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. 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. As used herein, "costs" includes attorney's fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. 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 settlement under this rule, 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.

APPENDIX B

The following is the Offer of Judgment legislation proposed by the American Bar Association House of Delegates on February 5, 1996.

§ 1. *Offer of Judgment.*

At any time in a suit in which the claims are monetary damages, or where any non-monetary claims are ancillary and incident to the monetary claims, but at least 60 days after the service to the complaint and not later than 60 days before the trial date, any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer.

When there are multiple plaintiffs or multiple defendants, this provision shall not apply unless; 1) in the case of multiple plaintiffs, the right of each such plaintiff to recovery is identical to the right of every other plaintiff and only one award of damages may be made; and 2) in the case of multiple defendants, the liability of each such defendant is joint and not several.

§ 2. *Form of Offer of Judgment.*

An offer of judgment must be in writing and state that it is made under this rule; must be served upon the opposing party to whom the offer is made but not be filed with the court except under the conditions stated in § 11; must specify the total amount of money offered; and must state whether the total amount of money offered is inclusive or exclusive of costs, interest, attorney's fees and any other amount which the offeror may be awarded pursuant to statute or rule. Only items expressly referenced shall be deemed included in the offer.

§ 3. *Determination of Applicability.*

At any time after the commencement of the action, any party may seek a ruling from the court that this rule shall not apply as between the moving party or parties and any opposing party or parties by reason of the fact that an exception to the rule exists or that one or more of the circumstances set forth in

Section 11(e) for eliminating the application of the rule exists. The court, upon receiving and considering any such application, may grant the application, deny the application, or, in its discretion, defer a ruling on the application until a later time including a time after the entry of judgment. Any moving party obtaining the relief sought under such a motion prior to judgment may not, itself, use the rule as to any opposing party to which the motion is applied.

§4. Time Period During Which Offer Remains Open.

An offer may state the time period during which it remains open, which in no event may be less than 60 days. An offer that states a time period of less than 60 days is an invalid offer. An offer that does not state the time period during which it remains open is deemed to remain open for 60 days, and thereafter indefinitely until 60 days before the date set for trial unless withdrawn pursuant to the provisions of §8 in which case it shall have no further consequence under this rule.

§5. Extension of Time Period During Which Offer Remains Open.

Upon the application of the offeree, the court may, for good cause shown, extend the time period during which an offer remains open. If the court extends the time period during which an offer may remain open, the offeror has the option of withdrawing the offer.

§6. Acceptance of Offer.

An offer is accepted when a party receiving an offer of judgment serves written notice on the offeror, within the time period during which the offer remains open, that the offer is accepted without qualification.

§7. Refusal of Offer.

An offer is deemed to be refused if it is not accepted within the time period during which the offer remains open.

§8. Withdrawal of Offer.

An offer may not be withdrawn, except with the consent of the court for good cause shown and to prevent manifest injustice, before the expiration of the time period during which

the offer stated that it would remain open. An offer not made subject to an expressly stated time period may be withdrawn after 60 days by serving the offeree with written notice of the withdrawal and shall have no further consequence under this rule.

§9. *Inadmissibility of an Offer Not Accepted.*

Evidence of an offer not accepted is not admissible for any purpose except in a proceeding to determine costs and attorney's fees under a statute or rule permitting recovery thereof or pursuant to an entry of judgment under §11.

§10. *Subsequent Offers.*

The fact that an offer is made but not accepted does not preclude any party from making subsequent offers. If more than one offer made by an offeror is not accepted within the time period during which the offers remained open, and therefore are deemed to be rejected, the offeror would be entitled to seek fee-shifting under §11(a) or (b) as to any one of such offers.

§11. *Effect of Rejection of an Offer.*

If an offer made by a party is not accepted and is not withdrawn before final disposition of the claim that is the subject of the offer, the offeror may file with the clerk of the court, within 10 days after the final disposition is entered, the offer and proof of service thereof. A final disposition is a verdict, order on motion for summary judgment, or other final order on which a judgment can be entered, including a final judgment, but a judgment based on a settlement agreement will not result in cost-shifting unless the parties expressly agree to cost-shifting rights under this rule. The court, after due deliberation and after providing the parties to the offer an opportunity to submit proposed findings, will enter judgment as follows:

(a) If a final judgment obtained by a claimant who did not accept an offer from an adverse party is not greater than 75% of the amount of the offer, the claimant offeree shall pay the offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment.

Such recovery shall be in addition to any right of the offeror to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorney fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off. This subsection (a) shall not apply if the claimant offeree receives a take-nothing judgment.

(b) If a final judgment obtained by a claimant against an adverse party who did not accept an offer from such claimant is greater than 125% of the amount of the offer, the offeree shall pay the claimant offeror's costs, including all reasonable attorney's fees and expenses, but excluding expert witness fees and expenses, incurred after the date the offer was made, except that the fee award may not exceed the total money amount of the judgment. Such recovery shall be in addition to any right of the claimant to recover any other costs pursuant to statute or rule, except that the offeror may not recover twice for the same costs, attorney's fees, or expenses. If an offeree subject to attorneys fees under this rule is entitled to attorney fees under court rule or contract, the court shall determine the amount of those attorneys fees to which the offeree is so entitled and exclude such fees from the judgment for purposes of this subsection so that they are not available to the offeror as a set off.

(c) In comparing the amount of a monetary offer with the final judgment, which shall take into account any additur or remittitur, the latter shall not include any amounts that are attributable to costs, interest, attorney's fees, and any other amount which the offeror may be awarded pursuant to statute or rule, unless the amount of the offer expressly included any such amount.

(d) If both the offeree and the offeror may be entitled to recovery of attorneys fees under rules or contract, the court shall determine the amount of the recovery of such attorneys' fees by either side by the application of this rule, of such other rule as may apply to the recovery of fees, the language of any contract providing for fees and general principles of law.

(e) The court may reduce or eliminate the amounts to be paid under subsections (a) and (b) to avoid undue hardship, or in the interest of justice, or for any other compelling reason that

justifies the offeree party in having sought a judicial resolution of the suit rather than accepting the offer of judgment.

(f) The amount of any attorney's fees to be paid under subsections (a) and (b) shall be a reasonable attorney's fee for services incurred in the case as to the claims for monetary damages after the date the offer was made, calculated on the basis of an hourly rate which may not exceed as to the claims for monetary damages that which the court considers acceptable in the jurisdiction of final disposition of the action, taking into account the attorney's qualifications and experience and the complexity of the case, except that any attorney's fees to be paid by an offeree shall not:

(1) exceed the actual amount of the attorney's fees incurred by the offeree as to the claims for monetary damages after the date of the offer; or

(2) if the offeree had a contingency fee agreement with its attorney, exceed the amount of the reasonable attorney's fees that would have been incurred by the offeree as to the claims for monetary damages on an hourly basis for the services in connection with the case.

§12. *Nonapplicability.*

This provision does not apply to an offer made in action certified as a class or derivative action, involving family law or divorce, between a landlord and a tenant as to a residence, or in which there are claims based on state or deferral constitutional rights.

This provision for fee shifting also does not apply to any case in which attorneys fees are statutorily available to a prevailing party to insure the ability of claimants to prosecute a claim in implementation of the public policy of the statute.