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RULE 68 OFFERS OF JUDGMENT: LESSONS FROM THE NEW MEXICO EXPERIENCE

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I. INTRODUCTION

Rule 68 of the Federal Rules of Civil Procedure allows a defendant to make an offer of judgment and shifts costs if the plaintiff rejects the offer and recovers less than the offer at trial.¹ Until very recently, all commentators agreed that offers of judgment are intended to encourage settlement, and Rule 68 has been criticized because it is rarely used and is considered to be largely ineffective in helping to settle cases.² Although there have been many proposals to amend Rule 68 during the last twenty-five years, none has been implemented, and Rule 68 remains unchanged and underutilized.

Prior to 2003, New Mexico's offer of judgment rule, Rule 1-068 NMRA, was virtually identical to Rule 68. In 2003 New Mexico, following the lead of a number of other states, amended Rule 1-068 to allow plaintiffs to make such offers and to award the plaintiff double costs if the verdict exceeds the Rule 1-068 offer. Because New Mexico provides a broader definition of the "costs" that may be shifted, including expert witness fees, the incentives to accept such an offer are increased.

In late 2007 and early 2008 I surveyed 200 New Mexico lawyers about their experience with Rule 1-068 offers both before and after the 2003 amendments. The survey sought to obtain objective empirical evidence concerning the use of Rule 1-068 in New Mexico.³ Survey evidence has been admissible in court for over forty-five years and has several potential advantages over less systematic approaches to gathering information.⁴ This article will report on the findings of this survey.⁵

* United States Magistrate Judge, District of New Mexico. University of Illinois (J.D., 1979); University of Nevada, Reno (M.J.S., 2001). I am grateful to the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association for providing their membership lists to me. Ted Occhialino, Greg Roth, and Bob Schuster contributed helpful comments on an early draft of this article. In addition to the survey results and the data on costs, this article also relies upon my experience with New Mexico practice as a trial attorney (Atwood, Malone, Mann & Turner, 1979-95) and as a state district court judge (Fifth Judicial District Court, State of New Mexico, 1995-2005).

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

2. There is a spirited debate about whether efforts should be made to increase settlement of cases, given the small number of cases that go to trial and the standard-setting effect that trials have on the cases that are settled. See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR tbl.4.10 (showing that in 2006, only 1.3 percent of civil cases in federal court terminated during or after trial); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L. J. 1, 78 (1992) ("Settling pending cases is not an unqualified good. Often the parties and the public interest will be better served by continuing litigation."); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 29 (2000) (Rule 68 "facilitate[s] strategic settlement and precedent manipulation [by defendants] with noneconomic motives to deter litigation.").

3. While most of the articles addressing Rule 68 are theoretical, a few authors have conducted empirical studies concerning the use of Rule 68 or a state variation of Rule 68. See JOHN E. SHAPARD, FED. JUDICIAL CTR., LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE (1995); Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (June 1, 2007); 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 (2006).

4. See Shari Seidman Diamond, *Reference Guide on Survey Research*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 231-35 (2d ed. 2000).

5. A copy of the survey is attached as Appendix A.

Part II of this article describes the use (or, more accurately, non-use) of Rule 68 in federal court, and outlines a few of the many proposals to amend it. Part II also briefly reviews the experience with offers of judgment in state court, which reflects the increasing rejection of Rule 68 as a model as states adopt innovative offer of judgment rules or statutes. Since Rule 68 shifts costs, Part III attempts to quantify the amount of costs awarded in federal court in New Mexico, and contrasts those awards with the costs awarded in New Mexico state courts. Because New Mexico allows a party to recover a greater variety of costs, the costs awarded in state court in New Mexico are much higher than the costs awarded in federal court.

Part IV describes the 2003 amendments to New Mexico's offer of judgment rule. Part V describes the methodology of the survey. Part VI reports on the experience of New Mexico's lawyers with Rule 1-068 offers, concentrating on their use of the rule after the 2003 amendments. In marked contrast to Rule 68, a very high percentage of lawyers (76 percent of plaintiffs' and 95 percent of defense lawyers) have advised their clients to make Rule 1-068 offers after the amendments. While most of the lawyers have made relatively few such offers, substantial numbers of lawyers make significant use of the rule. Although few Rule 1-068 offers are accepted, these offers lead to increased communication between the parties and further settlement discussions that often lead to settlement of the case outside the formal Rule 1-068 process. New Mexico's lawyers are much more satisfied with Rule 1-068 than are lawyers who use Rule 68 in federal court.

Part VII discusses five potential amendments to Rule 68: (1) changing the terminology of the rule to offer of "settlement" and allowing the case to be dismissed with prejudice instead of requiring the entry of a judgment; (2) allowing plaintiffs to make Rule 68 offers; (3) increasing the sanctions available under the rule by including expert witness fees as part of the costs that are shifted; (4) adding a margin-of-error provision to ensure that parties are not sanctioned when they make a serious offer but miscalculate slightly the amount the jury awards; and (5) precluding parties from making offers of judgment for a short period of time to allow the opposing party a fair opportunity to evaluate the merits of the claim.

II. OFFER OF JUDGMENT RULES IN FEDERAL AND STATE COURT

A. Offers of Judgment in Federal Court

Rule 68 of the Federal Rules of Civil Procedure allows a party defending against a claim to make an offer of judgment. This rule allows a defendant to make an offer of judgment in all cases, but precludes a plaintiff from making an offer of judgment unless the defendant has filed a counterclaim against the plaintiff.⁶ If the plaintiff accepts the offer of judgment, the offer of judgment and notice of acceptance are filed with the court and a judgment against the defendant is entered by the clerk.⁷ If the plaintiff does not accept the offer and receives a judgment at trial that is less favorable than the offer of judgment, the plaintiff is not entitled to the costs incurred

6. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3002 (2d ed. 1997).

7. FED. R. CIV P. 68(a).

after the offer and must also pay the defendant's costs incurred after that date.⁸ To determine whether the plaintiff's judgment is less favorable than the offer, the court compares the defendant's offer of judgment to the judgment actually obtained, and the court is not required to examine the reasonableness of the defendant's offer.⁹

Since prevailing plaintiffs usually receive an award of costs under Rule 54(d), although judges retain the discretion to deny them, Rule 68 reverses the operation of Rule 54 and makes mandatory the award of defendant's post-offer costs, leaving no room for the court's discretion.¹⁰ The costs that can be recovered under Rule 68 include fees to the clerk, marshal, court reporter, witnesses, court appointed experts and interpreters, and fees for printing, copying, and docketing.¹¹

Unlike most procedural rules, which generate relatively little controversy and appellate review, Rule 68 has been the subject of two decisions by the U.S. Supreme Court. In 1981, in *Delta Air Lines, Inc. v. August*, the Court held that Rule 68 does not apply if the defendant, rather than the plaintiff, obtains judgment.¹² Justice Powell, in his concurrence, commented on the anomaly that a defendant may obtain costs under Rule 68 "against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*."¹³ Since the defendant, Delta Air Lines, prevailed at trial, it was not entitled to a mandatory award of costs under Rule 68, but was subject to the court's discretion to award costs under Rule 54(d).¹⁴

Four years later, in *Marek v. Chesny*, the Court held that where the underlying statute defines "costs" to include attorney's fees, such fees are to be included as costs for the purposes of Rule 68.¹⁵ Thus, in those cases that award attorney's fees as part of costs, a plaintiff who does not recover more than the offer of judgment at trial not only forfeits his post-offer costs and must pay the defendant's post-offer costs, he also forfeits the post-offer attorney's fees that would otherwise be recoverable by statute.¹⁶ There were vigorous dissents in both cases, and both *Delta Air Lines* and *Marek* have been the subject of much critical commentary.¹⁷

Rule 68 was adopted in 1938 as part of the original Federal Rules of Civil

8. WRIGHT, MILLER & MARCUS, *supra* note 6, § 3006.

9. See *Lentomynti Oy v. Medivac, Inc.*, 997 F.2d 364, 368 (7th Cir. 1993). It can be difficult to compare an offer of judgment for money and a judgment that includes non-monetary elements such as equitable relief. See, e.g., *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 229–33 (2d Cir. 2006) (reversing the district court's determination that the defendant's offer of judgment for \$20,001 was worth more than the \$10,000 the plaintiff accepted on remittitur together with an injunction that restored the plaintiff to his former position with all of its perquisites); Thomas L. Cabbage III, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465, 478–79 (1991).

10. See, e.g., *Pouillon v. Little*, 326 F.3d 713, 718 (6th Cir. 2003) ("Although normally a district court's award or denial of costs is reviewed for abuse of discretion, Rule 68's language is mandatory and leaves a district court without any discretion.")

11. See 28 U.S.C. § 1920 (2006 & Supp. 2009).

12. 450 U.S. 346, 352 (1981).

13. *Id.* at 362 (Powell, J., concurring).

14. *Id.* at 353–54 (majority opinion).

15. 473 U.S. 1, 9 (1985).

16. *Id.* at 10–11.

17. See *Delta Air Lines*, 450 U.S. at 366 (Rehnquist, J., dissenting); *Marek*, 473 U.S. at 13 (Brennan, J., dissenting); see, e.g., Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108, 128–29 (Larry Kramer ed., 1996); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 9–10, 19–24 (1985).

Procedure.¹⁸ The conventional view of Rule 68 is that it was meant to encourage settlement of cases and decrease litigation.¹⁹ Studies show that lawyers rarely use Rule 68 and its state counterparts, and Rule 68 has been criticized for years because it is considered to be largely ineffective in settling cases.²⁰ According to the Federal Rules Advisory Committee, Rule 68 is ineffective for two principal reasons: (1) an award of post-offer costs is an insufficient sanction to motivate parties to use the rule, and (2) only parties defending against claims may make such offers, which precludes plaintiffs from making offers unless a claim has been made against them.²¹ There have been numerous proposals since the early 1980s to amend Rule 68 to make it more effective.

In 1983 and 1984, the Federal Rules Advisory Committee published two proposals to amend Rule 68.²² Both proposals allowed all parties to make offers of judgment and expanded the definition of “costs” to include attorney’s fees.²³ Both proposals also allowed the case to be dismissed with prejudice without requiring that a judgment be entered against the party who made the offer.²⁴ The 1983 proposal gave the court discretion to refuse to award costs if the court found the offer was made in bad faith, and the court could refuse to award expenses and interest if the court found such an award was unjustified or excessive.²⁵ The 1984 proposal abandoned a monetary comparison between the offer and the final judgment and proposed to award sanctions if an offer of judgment “was unreasonably rejected,” and granted significant discretion to the court to determine whether to award sanctions.²⁶ Both proposals were heavily criticized, and the

18. See 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, 1564 (2008). In 2007 the language of Rule 68 was amended as part of the general restyling of the Civil Rules to make them more easily understood. The style amendments are not supposed to make substantive changes unless specifically noted. See FED. R. CIV. P. 68 advisory committee’s note to 2007 Amendments.

19. *Marek*, 473 U.S. at 5, 10; *Delta Air Lines*, 450 U.S. at 352; Simon, *supra* note 17, at 24–25. Professor Bone has recently challenged this view of Rule 68’s purpose. After reviewing the records of the 1938 Advisory Committee proceedings, he concluded that the original drafters did not adopt Rule 68 as a settlement promotion tool. Instead, Rule 68 was adopted to deal with unreasonable plaintiffs who insisted on litigating a case even after the defendant offers what the plaintiff is entitled to receive at trial. Professor Bone believes that Rule 68 has been transformed by a pro-settlement ideology that began in the mid-1970s when critics began to search for alternatives to the costs and delays attendant to litigation. Bone, *supra* note 18, at 1562.

20. See SHAPARD, *supra* note 3, at 8–9 (noting that a survey of 800 civil cases drawn from all the federal district court cases that terminated in the first six months of 1993 found that Rule 68 offers were made in 24 percent of the civil rights cases that settled and 12 percent of the civil rights cases that went to trial); Lewis & Eaton, *supra* note 3, at 349 (“Rule 68 offers of judgment are rarely used [in federal court] in either employment discrimination or civil rights cases.”); Russell C. Fagg, *Montana Offer of Judgment Rule: Let’s Provide Bonafide Settlement Incentives*, 60 MONT. L. REV. 39, 43 (1999) (stating that offers of judgment were made in fifty-nine of the 4,653 civil cases filed in Yellowstone County, Montana, between January 1, 1994, and December 31, 1997 (approximately 1.3 percent)); see also Leslie S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 380–81 (1997); Simon, *supra* note 17, at 7–8 (1985).

21. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 337, 363 (1983).

22. *Id.* at 361–67 (1983); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 102 F.R.D. 407, 432–37 (1984).

23. 98 F.R.D. at 361–62; 102 F.R.D. at 432–33.

24. 98 F.R.D. at 361–62; 102 F.R.D. at 432–33.

25. 98 F.R.D. at 362–63.

26. 102 F.R.D. at 433.

Advisory Committee subsequently withdrew them.²⁷

In 1992 Judge William Schwarzer, director of the Federal Judicial Center, published a proposal to amend Rule 68.²⁸ Judge Schwarzer proposed to permit all parties to make offers of judgment and to allow the recovery of attorney's fees as part of costs, but his proposal limited the recovery of costs in two ways.²⁹ First, he proposed to limit recoverable costs to the amount of the judgment.³⁰ For example, if the defendant's offer of judgment was \$50,000, the plaintiff recovered only \$40,000 and the defendant incurred post-offer costs of \$60,000, the defendant could recover costs of only \$40,000. Second, Judge Schwarzer also limited recoverable costs to an amount that would make the offeror whole.³¹ Thus, if, after the plaintiff rejects defendant's offer of \$50,000, the plaintiff receives a \$40,000 judgment and the defendant incurs reasonable attorney's fees of \$15,000, the defendant is entitled to recover \$5,000. This award would put the defendant in the same position as if the offer had been accepted. Finally, this proposal gave the court discretion to reduce costs when necessary to avoid the infliction of undue hardship on a party.³² The Advisory Committee reviewed Judge Schwarzer's proposal in 1994, and after discussions about its complexity, considered whether to abrogate Rule 68 entirely, but decided not to take any formal action until it had additional information about the effects of Rule 68 or state variations of Rule 68.³³

In 1996 the American Bar Association (ABA) House of Delegates adopted a policy position in support of amending Rule 68.³⁴ The ABA proposal allowed all parties to make offers of judgment, provided that "costs" include attorney's fees but not expert witness fees and costs, and capped the amount of the attorney's fee award at the total amount of damages awarded.³⁵ The proposal introduced a 25 percent margin-of-error provision to mitigate the harshness of requiring cost-shifting when a party receives a judgment that is slightly less than a rejected offer.³⁶ The proposal further provided that the district court could refuse to impose sanctions under the rule based upon "any other compelling reason" offered by the moving party.³⁷ The ABA proposal also contained several procedural changes to the rule: no offer of

27. 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, 56–58 (1997).

28. See William W. Schwarzer, *Fee Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

29. *Id.* at 149.

30. *Id.* at 149–50.

31. *Id.*

32. *Id.* Many experienced lawyers thought that Judge Schwarzer's proposal was too complicated to understand and administer easily. Cooper, *supra* note 17, at 148 n.6.

33. Excerpts from the notes of the October 1994 meeting of the Federal Rules Advisory Committee are available at [http://www.uscourts.gov/rules/Agenda Books/CV2008-11.pdf](http://www.uscourts.gov/rules/Agenda%20Books/CV2008-11.pdf), from page 175 to 176.

34. See *ABA Urges Offer of Judgment Changes to Counter Movement to "Loser Pays" Rule*, 64 U.S.L.W. 2495 (Feb. 13, 1996); see also Bonney et al., *supra* note 20, at 415–18 (discussing the ABA proposal).

35. See *ABA Urges Offer of Judgment Changes to Counter Movement to "Loser Pays" Rule*, 64 U.S.L.W. at 2495.

36. *Id.* A margin-of-error provision gives a party some leeway to guess incorrectly about the result at trial without being subject to sanctions. Under the ABA proposal, if a defendant made an offer of judgment for \$10,000, the plaintiff would have to pay defendant's costs if plaintiff recovered less than \$7,500 at trial, while if the plaintiff made an offer of judgment of \$10,000, the defendant would pay plaintiff's costs if plaintiff recovered more than \$12,500.

37. *Id.*

judgment could be made sooner than sixty days after service of process or less than sixty days before trial, and an offer of judgment must remain open for sixty days.³⁸

In contrast to proposals for substantive changes to Rule 68, in 2007 Professor Danielle Shelton proposed re-writing Rule 68 to clear up uncertainties regarding the validity and interpretation of offers of judgment.³⁹ According to Professor Shelton, because the rule is ambiguous and cursory in form, it does not alert the parties to its many nuances.⁴⁰ Thus, defendants often draft offers that have unintended consequences, and plaintiffs who receive such offers face uncertainty when considering them. For example, because Rule 68 does not specifically address whether offers of judgment may disclaim liability, whether they may be revoked, and whether they must provide both injunctive and monetary relief when the case requests both types of relief, courts must determine whether such offers are valid.⁴¹ In other cases the court must determine whether the amount of the Rule 68 offer includes costs or attorney's fees.⁴² Professor Shelton argues that amending the rule to provide predictability and clarity about Rule 68 offers would help attorneys intelligently advise their clients about offers of judgment and allow courts to enforce such offers with uniformity and certainty.⁴³

As commentators Michael Solimine and Bryan Pacheco stated a dozen years ago, “[S]eldom has so much talk resulted in so little action. Despite (or perhaps because of) the cacophony of voices, Federal Rule 68 remains unchanged.”⁴⁴

B. Offers of Judgment in State Court

In stark contrast to the gridlock at the federal level, many states have either revised or enacted innovative offer of judgment rules or statutes. New Jersey was one of the first states to vary from Rule 68. Almost forty years ago, in 1971, New Jersey adopted an offer of judgment rule that allowed any party to make an offer of judgment and that provided for shifting attorney's fees up to a cap of \$750.⁴⁵ In 1985, both Michigan and Minnesota amended their offer of judgment rules to allow plaintiffs to make offers of judgment.⁴⁶ Arizona amended its rule in 1990 to allow all parties to make offers of judgment and also provided for an award of double costs plus reasonable expert witness fees if a party failed to receive a judgment that exceeded the offer.⁴⁷

38. See Bonney et al., *supra* note 20, at 415–16.

39. See 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, 867–69 (2007).

40. *Id.* at 867–68.

41. *Id.* at 880–88.

42. *Id.* at 888–911.

43. *Id.* at 869. Numerous other commentators have proposed changes to Rule 68. See, e.g., Bonney et al., *supra* note 20, at 427–28; Simon, *supra* note 17, at 53–75; Solimine & Pacheco, *supra* note 27, at 76–77; Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 845–47 (1984). Others have proposed that Rule 68 should be abolished. See Bone, *supra* note 18, at 1618 & n.194; Bruce P. Merenstein, *More Proposals to Amend Rule 68: Time to Sink the Ship Once and For All*, 184 F.R.D. 145, 148 (1999).

44. Solimine & Pacheco, *supra* note 27, at 52.

45. N.J. CT. R. 4:58.

46. MICH. CT. R. 2.405, 1985 staff comment; MINN. R. CIV. P. 68 advisory committee note.

47. ARIZ. R. CIV. P. 68 committee notes to amendments.

By 1997, although twenty-eight states, plus the District of Columbia, had provisions that were identical to or substantially similar to Rule 68, thirteen states had provisions that departed from Rule 68 in significant ways.⁴⁸ Some of the states allowed plaintiffs to make offers of judgment to defendants, while other states increased the potential sanctions for failing to accept an offer that was more favorable than the actual judgment received.⁴⁹

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.⁵⁰ Nine of those states shift attorney's fees as a sanction for failing to receive a judgment that exceeds an offer of judgment.⁵¹

Although almost half the states now allow plaintiffs to make offers of judgment, several states have resisted the trend and have declined to enact proposals that allow plaintiffs to do so or that shift attorney's fees as part of the costs allowed under the rule. In 1996 the Ohio Rules Advisory Committee proposed an offer of judgment rule that allowed all parties to make offers of judgment and awarded the plaintiff double costs if the plaintiff's offer of judgment was not accepted and was less than the judgment obtained by the plaintiff at trial.⁵² The proposal was opposed by the Ohio Academy of Trial Lawyers, a group of plaintiffs' lawyers, and the Ohio Supreme Court withdrew the proposal.⁵³ In 1998 the Montana Supreme Court proposed to amend its offer of judgment rule to allow plaintiffs to make offers and to include attorney's fees as part of the costs that may be shifted under the rule.⁵⁴ This proposal was rejected, and Montana's current Rule 68 is substantially similar to Federal Rule 68.⁵⁵

III. COSTS AWARDED IN FEDERAL AND STATE COURT IN NEW MEXICO

While all commentators agree that the costs that may be shifted under Rule 68 are too small to be a significant incentive to accept an offer under the rule,⁵⁶ no one has attempted to quantify the amount of costs actually awarded in federal court. To

48. Solimine & Pacheco, *supra* note 27, at 63–64.

49. *Id.* at 64–65.

50. ALASKA R. CIV. P. 68; ARIZ. R. CIV. P. 68; CAL. CIV. PROC. CODE § 998 (West 2009); COLO. REV. STAT. ANN. § 13-17-202 (West 2005 & Supp. 2008); CONN. GEN. STAT. ANN. §§ 52-192a, 52-193 (West 2005 & Supp. 2009); FLA. R. CIV. P. 1.442; GA. CODE ANN. § 9-11-68 (2006 & Supp. 2008); HAW. R. CIV. P. 68; LA. CODE CIV. PROC. ANN. art. 970 (2005 & Supp. 2009); MICH. CT. R. 2.405; MINN. R. CIV. P. 68; NEV. R. CIV. P. 68; N.J. CT. R. 4:58; Rule 1-068 NMRA; N.D. R. CIV. P. 68; OKLA. STAT. ANN. tit. 12, § 1101.1 (West 2000 & Supp. 2009); S.C. R. CIV. P. 68; S.D. Codified Laws § 15-6-68 (2005); TENN. R. CIV. P. 68; TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–.005 (Vernon 2008) (the plaintiff may make an offer once the defendant makes the initial declaration to implicate fee shifting, see § 42.002(c)); UTAH R. CIV. P. 68; WIS. STAT. ANN. § 807.01 (West 1994 & Supp. 2008); WYO. R. CIV. P. 68.

51. ALASKA R. CIV. P. 68; CONN. GEN. STAT. ANN. §§ 52-192a, 52-193; FLA. R. CIV. P. 1.442; GA. CODE ANN. § 9-11-68; MICH. CT. R. 2.405; NEV. R. CIV. P. 68; N.J. CT. R. 4:58; OKLA. STAT. ANN. tit. 12, § 1101.1; TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–.005.

52. Solimine & Pacheco, *supra* note 27, at 66.

53. *Id.* at 68–69.

54. See Fagg, *supra* note 20, at 45–47.

55. See MONT. R. CIV. P. 68.

56. Bonney et al., *supra* note 20, at 392 (“In most cases, ‘costs’ are relatively insignificant compared to the amount in controversy.”); Lewis & Eaton, *supra* note 3, at 333 (stating that costs awarded under 28 U.S.C. § 1920 are “modest”); Yoon & Baker, *supra* note 3, at 158 (noting that post-offer costs “are trivial”).

determine the amount of costs awarded, I searched the electronic database of the U.S. District Court for the District of New Mexico for orders awarding costs entered from January 1, 2007, through October 17, 2008.⁵⁷ During that time, four orders awarding costs were entered for cases that were resolved by jury trial.⁵⁸ Two of the cases alleged claims for violation of civil rights, and two involved product liability claims. The trials lasted from four to seven days in length, and the costs awarded by the district court ranged from a low of \$6,079 to a high of \$21,326.⁵⁹

Because this was such a small sample, I examined the costs awarded during the past eight years after other jury trials in federal court in New Mexico, and found great consistency in the amount of costs awarded. After a medical malpractice trial that lasted nine days, the court awarded costs of \$6,539.⁶⁰ Three cases involving claims for civil rights violations had jury trials that lasted five, seven, and eleven days, and the court awarded costs of \$3,282, \$4,229, and \$10,798 respectively.⁶¹ The court awarded costs of \$4,025 after a wrongful death trial that lasted five days.⁶² And in a case involving a claim for products liability where the trial lasted twelve days, the clerk approved the plaintiff's costs in the amount of \$17,053 and defense costs of \$9,022 before the district court reduced those amounts for comparative fault.⁶³

The costs that may be recovered under Rule 1-068 in state court are considerably broader than the costs that may be recovered in federal court. In addition to the costs that may be recovered under 28 U.S.C. § 1920, litigants in New Mexico may recover jury fees, expert witness fees, and expenses involved in the production of exhibits admitted into evidence.⁶⁴ Expert witness fees in New Mexico are limited by the provisions of section 38-6-4(B) NMSA 1978, which allows (1) per diem and mileage, and (2) "a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness's testimony."⁶⁵

57. I used the terms "Clerk's Order Settling Costs" and "Order on Motion for Bill of Costs."

58. While there were other jury trials during that time period, no costs were awarded by the court, presumably because the parties resolved that issue without court intervention. *See, e.g.,* *Joyce v. Clarke*, No. CV 06-1154 (D.N.M. verdict June 10, 2008).

59. *See* Order Affirming Clerk's Order Settling Costs, *Martinez v. Caterpillar, Inc.*, No. CV 06-236 (D.N.M. June 17, 2008) (awarding costs of \$17,802); Clerk's Orders Settling Costs, *Trujillo v. Board of Educ.*, No. CV 02-1146 & 03-1185 (D.N.M. Oct. 26, 2007) (awarding costs of \$4,764 and \$1,315); Clerk's Order Settling Costs, *Rivera v. Smith's Food and Drug Ctrs.*, No. CV 05-1049 (D.N.M. June 26, 2007) (awarding costs of \$10,840); Clerk's Order Settling Costs, *Moreland v. Ford Motor Co.*, No. CV 05-323 (D.N.M. Mar. 27, 2007) (awarding costs of \$21,326).

60. *See* Clerk's Order Settling Costs, *Domann v. Vigil*, No. CV 99-192 (D.N.M. Sept. 1, 2000) (awarding costs of \$9,726). *But see* Order, *Domann v. Vigil*, No. CV 99-192 (D.N.M. Feb. 21, 2001) (subsequently disallowing costs of \$3,186).

61. *See* Memorandum Opinion and Order Granting in Part and Denying in Part Defendant's Request to Tax Costs, *Martinez White v. Board of County Comm'rs*, No. CV 04-565 (D.N.M. Dec. 28, 2005) (awarding costs of \$3,282); Memorandum Opinion and Order on Defendants' Motion to Dismiss Plaintiffs' Appeal of Order Settling Costs and Plaintiffs' Appeal of Clerk's Order of Costs, *Williams v. W.D. Sports N.M., Inc.*, No. CV 03-1195 (D.N.M. Aug. 3, 2005) (awarding costs of \$10,798); Clerk's Order Settling Costs, *Huerta v. City of Santa Fe*, No. CV 01-968 (D.N.M. Feb. 18, 2003) (awarding costs of \$4,229).

62. *See* Clerk's Order Settling Costs, *Bain v. IMC Global Operations, Inc.*, No. CV 03-1354 (D.N.M. Sept. 26, 2005).

63. *See* Memorandum Opinion and Order, *Mariposa Farms, L.L.C. v. Westfalia-Surge, Inc.*, No. CV 03-779 (D.N.M. Oct. 7, 2005).

64. The costs recoverable by operation of Rule 1-068 are described in Rule 1-054(D) NMRA.

65. NMSA 1978, § 38-6-4(B) (1983). Some states limit the practical scope of this cost item, not only by

During the time period covered by the survey, the statute required that the expert testify in person or by deposition, and allowed recovery for only one liability expert and one damage expert “unless the court finds that additional expert testimony was reasonably necessary to the prevailing party and the expert testimony was not cumulative.”⁶⁶

There is no centralized data base to search to obtain cost bills entered in New Mexico state courts, so I contacted plaintiffs’ and defense lawyers in New Mexico and asked them to provide me with cost bills entered after the completion of a trial in state court. Because New Mexico allows a party to recover a wider variety of costs, the amount of costs awarded in New Mexico state courts is much higher than the costs awarded in federal court. Costs of \$30,000 to \$60,000 and more are not uncommon in more complicated cases, and the predominant amount of costs is often for expert witness fees. For example, in a medical malpractice case with a five-day jury trial, one court awarded costs of \$68,174; over \$40,000 of that amount was for expert witness fees.⁶⁷ In a wrongful death case where the trial lasted six days, the court awarded costs of \$66,770; \$38,802 of that amount was for expert witness fees.⁶⁸ In a case involving claims for negligence and breach of contract, where the trial lasted eight days, the court awarded two defendants costs in excess of \$60,000; the expert witness fees exceeded \$29,000.⁶⁹ In another malpractice case, the clerk taxed costs of \$48,012, and \$17,357 of that amount was for expert witness fees.⁷⁰ In other cases a party sought or the court awarded costs in excess of \$30,000.⁷¹

imposing a “reasonableness” requirement on the amount of the fees but also by constraining the compensable time to the actual time spent testifying and excluding charges for pre-trial conferences and time spent at trial waiting to testify. *See* *Hashimoto v. Marathon Pipe Line Co.*, 767 P.2d 158, 168–69 (Wyo. 1989).

66. NMSA 1978, § 38-6-4(B) (1983). In *Fernandez v. Espanola Pub. Sch. Dist.*, 2005-NMSC-026, ¶¶ 1–2, 119 P.3d 163, 164, the New Mexico Supreme Court affirmed the district court’s decision that it did not have discretion to award expert witness fees as costs because the expert witnesses had not testified by deposition or at trial. Two members of the court concurred in the opinion and suggested that district courts should be given more flexibility to award costs for expert witnesses without requiring the expert to testify. *Id.* ¶¶ 14–20, 119 P.3d at 167–69 (Bossion, J., concurring). Effective May 23, 2008, Rule 1-054(D) was amended to give the district court discretion to award expert witness fees when the expert has not testified if the court determines that “the expert witness was reasonably necessary to the litigation.” *See* Rule 1-054(D) NMRA.

67. *See* Order Granting Plaintiff’s Motion for Taxation of Costs, Pre-Judgment and Post-Judgment Interest Pursuant to Rule 1-068 NMRA 2008, *Estate of Cardon v. Ham*, No. D1314-CV-07-221 (N.M. 13th Jud. Dist. Aug. 28, 2008).

68. *See* Notice Taxing Costs, *Talbot v. Roswell Hospital Corp.*, No. CV-2002-132 (N.M. 5th Jud. Dist. Nov. 6, 2003); Plaintiffs’ Cost Bill, *Talbot v. Roswell Hospital Corp.*, No. CV-2002-132 (N.M. 5th Jud. Dist. Oct. 15, 2003).

69. *See* Order and Judgment Awarding Defendant[s] Costs, *Ballas v. Tierra Concepts, Inc.*, No. D-101-CV-2005-02477 (N.M. 1st Jud. Dist. Mar. 31, 2008); Itemized and Verified Cost Bill, *Ballas v. Tierra Concepts, Inc.*, No. D-101-CV-2005-02477 (N.M. 1st Jud. Dist. Jan. 22, 2008).

70. *See* [Plaintiff’s] Cost Bill, *Grassie v. Roswell Hospital Corp.*, No. CV-2006-00286 (N.M. 5th Jud. Dist. Sept. 27, 2007); Notice Taxing Costs, *Grassie*, No. CV-2006-00286 (Sept. 27, 2007). Plaintiff’s cost bill was later denied as untimely. *See* Order on Plaintiff’s Cost Bill, *Grassie*, No. CV-2006-00286 (Nov. 30, 2007).

71. *See* *Apodaca v. AAA Gas Co.*, 2003-NMCA-085, ¶ 96, 73 P.3d 215, 243 (defendants’ cost bill exceeded \$43,000); Final Order on Attorney’s Fees and Costs, *Sombra Cosmetics, Inc. v. Alivia Labs, Inc.*, No. CV-2005-09898 (N.M. 2d Jud. Dist. Sept. 18, 2008) (awarding costs of \$32,128, of which \$24,589 were expert witness fees, *see* Plaintiff’s Bill of Costs, *Sombra Cosmetics*, No. CV-2005-09898 (July 31, 2008)); Order Settling Cost Bill, *Speero v. Rodrigues*, No. CV-2003-434 (N.M. 5th Jud. Dist. Aug. 30, 2007) (awarding costs of \$32,871 before awarding double costs under Rule 1-068); Order Granting [Defendant’s] Bill of Costs and Cost Award, *Pearson v. Bd. of Regents of Univ. of Cal.*, No. D-0101-CV-2004-1665 (N.M. 1st Jud. Dist. Aug. 21, 2007) (awarding one defendant costs of \$40,878 of which over \$33,000 were expert witness fees, *see* [Defendant’s] Bill of Costs, *Pearson*, No. D-0101-CV-2004-1665 (July 17, 2007)); Order on Pre- and Post-Judgment Interest and Plaintiffs’

These cost awards in state court are not anomalies. I was provided with cost bills and orders awarding costs in which parties sought or the court awarded much higher costs. In *Kilgore v. Fuji Heavy Industries LTD*, a products liability case, the defendants sought to recover costs in excess of \$421,000; the expert witness fees claimed in the cost bill exceeded \$397,000.⁷² In a products liability case against Ford Motor Company, the clerk taxed costs of \$215,725; the expert witness fees exceeded \$196,000.⁷³ Large cost awards have been made in other cases.⁷⁴ Even in smaller, less complicated cases where the award of costs is more modest, expert witness fees are generally the largest element of costs.⁷⁵

IV. AMENDMENTS TO NEW MEXICO'S OFFER OF JUDGMENT RULE

Prior to its amendment, New Mexico's offer of judgment rule, Rule 1-068, was virtually identical to Rule 68: It allowed only parties defending against claims to make an offer of judgment, and closely tracked the language of Rule 68.⁷⁶ In September of 2002 the New Mexico Supreme Court proposed amending Rule 1-068.⁷⁷ The proposal suggested three major changes to the rule. First, the proposal allowed all parties to make an offer of judgment.⁷⁸ Second, because the plaintiff is normally entitled to costs under Rule 1-054(D) if the plaintiff prevails at trial,⁷⁹ the proposal allowed the plaintiff to recover double costs if the plaintiff received more than its offer of judgment at trial.⁸⁰ Third, the proposal precluded a plaintiff from making an offer of judgment prior to the expiration of 120 days after service of process on the defendant to allow the defendant time to do initial discovery to

Bill of Costs, *Guest v. Allstate Ins. Co.*, No. D-101-CV-2005-01297 (N.M. 1st Jud. Dist. Dec. 6, 2006) (awarding costs of \$51,172).

72. See Verified Cost Bill, *Kilgore v. Fuji Heavy Indus. LTD.*, No. D-0101-CV-2003-00941 (N.M. 1st Jud. Dist. Dec. 22, 2006). The district court declined to award defendants' costs under Rule 1-054, citing the economic disparity between the parties. See Order Denying Cost Bills, *Kilgore v. Fuji Heavy Indus. LTD.*, No. D-0101-CV-2003-00941 (N.M. 1st Jud. Dist. Mar. 1, 2007).

73. See Defendant's Cost Bill, *Coles v. Ford Motor Co.*, No. D-307-CV-2005-00943 (N.M. 3d Jud. Dist. Nov. 29, 2007); Taxation of Costs, *Coles v. Ford Motor Co.*, No. D-307-CV-2005-00943 (N.M. 3d Jud. Dist. Dec. 14, 2007).

74. See Order on Plaintiff's Costs, *Keith v. Manorcure, Inc.*, No. CV 2005-8066 (N.M. 2d Jud. Dist. Sept. 11, 2007) (awarding costs of \$107,392, plus double costs of \$73,517, for a total cost award of \$180,909); Order & Judgment Granting Plaintiff's Motion and Supplemental Motion for Costs, *Valley Bank of Commerce v. W. Auto. Rentals and Sales, Inc.*, No. CV-2001-395 (N.M. 5th Jud. Dist. Sept. 29, 2004) (awarding costs of \$96,818).

75. See Cost Bill of Plaintiff, *Munoz v. Castillo*, No. CV-07-637 (N.M. 3d Jud. Dist. June 26, 2008) (for \$4,741 including expert witness fees of \$2,999); Defendant's Cost Bill, *Chavez v. Gonzales*, No. CV-2004-5881 (N.M. 2d Jud. Dist. July 5, 2006) (for \$8,541 including expert witness fees of \$5,737); Cost Bill, *Strata Prod. Co. v. McGee Drilling Corp.*, No. CV-96-388 (N.M. 5th Jud. Dist. Aug. 17, 1999) (seeks \$23,151 in costs, including \$15,280 and \$5,497 for expert witness fees for a petroleum engineer and accountant).

76. The only difference between the rules concerned how judgment was entered when an offer of judgment was accepted. Rule 68 provides that "the clerk shall enter judgment" once the offer of judgment and notice of acceptance have been filed, while Rule 1-068 provided that "judgment may be entered as the court may direct." Compare FED. R. CIV. P. 68 with Rule 1-068 NMRA. See also *Shelton v. Sloan*, 1999-NMCA-048, ¶ 42, 977 P.2d 1012, 1020.

77. See *Proposed Revisions to Rule 1-068 of the Rules of Civil Procedure for the District Courts*, N.M. BAR BULL., Sept. 19, 2002, at 15 [hereinafter *2002 Proposed Revisions to Rule 1-068*].

78. *Id.* In 2002 at least sixteen states had rules that allowed plaintiffs as well as defendants to make offers of judgment. See Rule 1-068 NMRA committee commentary to 2002 Proposed Amendment.

79. *2002 Proposed Revisions to Rule 1-068*, *supra* note 77, at 15.

80. *Id.*

evaluate the plaintiff's claim.⁸¹ The proposal also stated explicitly what had been the universal construction of the rule: that when a party does not obtain a judgment more favorable than the offer, the party must not only pay the other party's costs but also is not entitled to recover its costs incurred after the offer.⁸²

The proposed amendment to Rule 1-068 generated considerable comment by New Mexico lawyers. It was enthusiastically received by the plaintiffs' bar, although several lawyers suggested that plaintiffs should be allowed to submit Rule 1-068 offers sooner, perhaps sixty days after the defendant filed an answer.⁸³ The proposal was adamantly opposed by the New Mexico Defense Lawyers Association and many defense lawyers. They particularly objected to a plaintiff recovering double costs under the rule, and labeled the proposal "entirely one-sided," "inherently unfair" and "patently inequitable."⁸⁴ They also reported three main concerns about Rule 1-068. First, they stated that defendants often will not make offers of judgment because they object to a formal entry of judgment, and suggested that the rule be titled "Offer of Consent Disposition" or "Offer of Settlement" and allow dismissal of the case without entry of a judgment.⁸⁵ Second, they claimed that defendants would not have enough time to evaluate the merits of a plaintiff's claim within 120 days of service of process, and suggested that plaintiffs be precluded from making a Rule 1-068 offer for six months after the filing of a responsive pleading to allow further time for discovery. Third, several lawyers requested that Rule 1-068 explicitly state that "costs" do not include attorney's fees and that domestic relations cases be exempted from the rule.⁸⁶

After considering the comments by the trial bar, the New Mexico Supreme Court revised Rule 1-068 and again circulated it for comment. The revised Rule 1-068 continued to allow all parties to make Rule 1-068 offers and to allow the plaintiff to recover double costs if plaintiff received more than its offer of judgment at trial, but differed from the first proposal in four significant ways.⁸⁷ First, the proposal changed the title of the rule to "Offer of Settlement" and allowed a case to be dismissed with prejudice instead of having a judgment entered against the party that made the offer.⁸⁸ Second, to allow defendants sufficient time to gather information to evaluate an offer from the plaintiff, the proposal precluded a plaintiff from making a Rule 1-068 offer prior to the expiration of 120 days after the filing of a responsive pleading by a party.⁸⁹ Third, the proposal provided that the district court could not award the plaintiff both double costs under Rule 1-068 plus prejudgment interest under New Mexico law.⁹⁰ Fourth, the proposal explicitly stated that

81. *Id.*

82. *Id.* (citing *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986)).

83. Letters on file with author. In the fall of 2002 and spring of 2003, thirty-two letters were sent to the New Mexico Rules of Civil Procedure Committee commenting on the proposed revisions to Rule 1-068. The author was the chair of the Rules Committee at that time.

84. *Id.*

85. *Id.*

86. *Id.*

87. See *Proposed Revisions to Rule 1-068 of the Rules of Civil Procedure for the District Courts*, N.M. BAR BULL., Mar. 13, 2003, at 10-11 [hereinafter *2003 Proposed Revisions to Rule 1-068*].

88. *Id.*

89. *Id.*

90. *Id.* Section 56-8-4(B) of the New Mexico Statutes allows the court to award pre-judgment interest of

attorney's fees are excluded from the costs shifted under the rule and that the rule did not apply to domestic relations cases.⁹¹ The Defense Lawyers Association again vigorously protested any change to Rule 1-068, but the New Mexico Supreme Court adopted the revised proposal, and it became effective for cases filed after August 1, 2003.⁹²

V. SURVEY DESIGN

In late 2007 and early 2008 I sent questionnaires to 200 New Mexico attorneys asking about their experience with Rule 1-068 offers in New Mexico state court from 1998 to the present. Both of the main organizations representing New Mexico's trial lawyers—the New Mexico Trial Lawyers Association (NMTLA) and the New Mexico Defense Lawyers Association (NMDLA)—provided their membership lists to me. After eliminating members of both associations who listed an address outside New Mexico, 100 attorneys were randomly selected from each membership list to participate in the survey.

To establish a baseline, the survey first sought information about how many cases each attorney handled in the five years before August 1, 2003—when the revised Rule 1-068 took effect—in which the attorney advised his or her client on decisions to make, accept, or reject offers under Rule 1-068. The remainder of the survey addressed the attorneys' experience with Rule 1-068 offers for cases filed after August 1, 2003. Thus, the survey compares five years of data concerning the use of Rule 1-068 offers of judgment before the amendments with approximately four to four-and-a-half years of data concerning the use of Rule 1-068 offers after the amendments.

The survey sought two major categories of information for cases filed after August 1, 2003: (1) whether the lawyer had advised his or her clients to make a Rule 1-068 offer of settlement, and (2) whether the lawyer had received any Rule 1-068 offers of settlement from opposing counsel. The survey asked how many Rule 1-068 offers each lawyer made, in what percentage of his or her cases the lawyer made such offers, and how many of the offers were accepted. The survey next asked how many Rule 1-068 offers each lawyer received, how many of those offers were accepted, and whether the lawyer made a Rule 1-068 offer in response to receiving a Rule 1-068 offer from opposing counsel. The survey asked whether the lawyer believed that making a Rule 1-068 offer of settlement increased the chances of settling the case or helped the case settle earlier. The survey also sought additional comments from counsel about their experience with how Rule 1-068 offers worked in their practices.

One hundred and forty lawyers responded after receiving the survey, seventy from each list. Six lawyers on the NMTLA list were defense lawyers who were

up to 10 percent from the date the complaint is served upon the defendant under certain circumstances if the defendant fails to make a reasonable and timely offer of settlement to the plaintiff. NMSA 1978, § 56-8-4(B) (2004). A plaintiff who recovers more than her offer of judgment is entitled to either interest under Section 56-8-4(B) plus costs awarded under Rule 1-054(D)(2) or double costs under Rule 1-068, but not both statutory interest and double costs. See Rule 1-068(C) NMRA.

91. 2003 Proposed Revisions to Rule 1-068, *supra* note 87, at 11.

92. See Rule 1-068 NMRA.

associate members of the NMTLA, so their responses were included for analysis with the responses from the defense lawyers on the NMDLA list. The responses from ten plaintiffs' lawyers and two defense lawyers were excluded from further analysis because they indicated that they had no experience with Rule 1-068 offers for cases filed after August 1, 2003, primarily because they practiced in federal court or practiced domestic relations law only. Thus, fifty-four plaintiffs' lawyers and seventy-four defense lawyers completed the survey, for a response rate of 64 percent.⁹³

VI. SURVEY RESULTS

A. Use of Rule 1-068 Offers of Judgment Prior to the 2003 Amendments

To determine whether the 2003 amendments increased the use of Rule 1-068 offers in New Mexico, I needed to find out to what extent New Mexico lawyers made offers of judgment before the rule was changed. The first survey question asked how many cases the lawyers handled from August 1, 1998, to August 1, 2003, in which they advised their clients on decisions to make, accept, or reject offers of judgment under Rule 1-068. The responses from the plaintiffs' and defense lawyers were very similar, as Table 1, below, indicates.

Table 1

| Number of Cases Handled from August 1, 1998, to August 1, 2003, in Which Attorney Advised Client to Make, Accept, or Reject Rule 1-068 Offer | | |
|----------------------------------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| None | 26% | 29% |
| Less than 25 | 61% | 45% |
| Between 25 and 100 | 7% | 21% |
| More than 100 | 6% | 5% |

Most commentators have concluded that offers of judgment are rarely used, yet 74 percent of the plaintiffs' lawyers and 71 percent of the defense lawyers reported they advised their clients concerning Rule 1-068 offers in the five years before the 2003 amendments.⁹⁴ Since plaintiffs could not make Rule 1-068 offers in cases filed before August 1, 2003, it is surprising that approximately the same percentage of plaintiffs' and defense lawyers advised their clients about Rule 1-068 offers.

93. John Shapard, in analyzing the results of a Federal Judicial Center survey that sought information about proposed amendments to Rule 68, reported a response rate of 55 percent, which he stated was "typical of the response rate obtained in other Federal Judicial Center surveys of counsel." SHAPARD, *supra* note 3, at 5.

94. All percentages were computed by excluding from consideration those attorneys who did not answer the relevant question.

Although the vast majority of lawyers reported either no or only modest exposure to the rule, other lawyers reported more significant use of the rule: 7 percent of the plaintiffs' lawyers and 21 percent of the defense lawyers advised their clients concerning offers of judgment in between twenty-five and one hundred cases, and 6 percent of the plaintiffs' lawyers and 5 percent of the defense lawyers reported advising their clients concerning offers of judgment in more than one hundred cases in the five-year time period.

B. Use of Rule 1-068 Offers of Settlement After the 2003 Amendments

The next step was to find out to what extent lawyers advised their clients about Rule 1-068 offers after the amendments. Once again, the responses from the plaintiffs' and defense lawyers were very similar, as shown in Table 2, below.

Table 2

| Number of Cases Filed After August 1, 2003, in Which Attorney Advised Client to Make, Accept, or Reject Rule 1-068 Offer | | |
|--------------------------------------------------------------------------------------------------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| None | 15% | 13% |
| Less than 25 | 70% | 63% |
| Between 25 and 100 | 11% | 21% |
| More than 100 | 4% | 3% |

Since the 2003 amendments allowed plaintiffs for the first time to make Rule 1-068 offers, I expected that the data would show a sharp increase in the use of Rule 1-068 by plaintiffs' lawyers as they began to make Rule 1-068 offers to defendants, and a smaller increase by defense lawyers as they advised their clients about plaintiffs' offers under the rule. The data did not confirm my hunch, and instead showed a greater increase in the use of the rule by defense lawyers. The percentage of lawyers who did not advise their clients about Rule 1-068 offers in any cases declined: for plaintiffs' lawyers, from 26 percent to 15 percent, a 42 percent decline (p-value 0.0759); and for defense lawyers, from 29 percent to 13 percent, a 55 percent decline (p-value 0.0106).⁹⁵ The data show slight increases in the percentages of plaintiffs' lawyers who advised their clients about Rule 1-068 offers, from 61 percent to 70 percent in fewer than twenty-five cases, and from 7 percent to 11

95. All tests of differences in proportions were performed using a one-tailed test. The statistical term "level of significance" (or p-value) indicates the probability that a difference in the proportions could be observed in a sample by chance alone. The lower the level of significance that results from the test, the greater the chance that the difference in sample proportions is representative of the entire population. The typical choices for levels of significance are .01, .05, and .10. GEORGE CASELLA & ROGER L. BERGER, STATISTICAL INFERENCE 361 (1990).

percent in between twenty-five and one hundred cases, but these increases are not statistically significant (p-values 0.1553 and 0.2534 respectively). In contrast, 29 percent more of the defense lawyers (from 45 percent to 63 percent) advised their clients about Rule 1-068 offers in fewer than twenty-five cases (p-value 0.0166), while 21 percent of the defense lawyers advised their clients concerning offers of settlement in between twenty-five and one hundred cases, the same percentage as before the 2003 amendments. Consistent with the earlier findings, very small percentages of lawyers reported advising their clients concerning Rule 1-068 offers in more than one hundred cases.

1. Details Concerning Rule 1-068 Offers Made

In cases filed after August 1, 2003, 76 percent of the plaintiffs' lawyers and 95 percent of the defense lawyers advised their clients to make Rule 1-068 offers of settlement. The surprisingly high percentage of lawyers that advised their clients to make offers is tempered by the fact that most lawyers made relatively few such offers, and they made them in a fairly small percentage of their cases, as Tables 3 and 4, below, show.

Table 3

| Number of Rule 1-068 Offers Made ⁹⁶ | | |
|------------------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| None | 3% | 3% |
| One | 18% | 10% |
| 3 or less | 44% | 36% |
| 5 or less | 65% | 57% |
| Between 10 and 20 | 26% | |
| Between 10 and 25 | | 23% |
| Over 20 | 6% | |
| Over 25 | | 17% |

96. The lawyers surveyed provided narrative responses to this question, and it was impossible to neatly categorize their responses.

Table 4

| Percentage of Cases in Which Rule 1-068 Offers Were Made | | |
|----------------------------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| 5% or less | 33% | 26% |
| 10% or less | 48% | 46% |
| 20% or less | 60% | 60% |
| 33% or less | 76% | 72% |
| From 50 to 100% ⁹⁷ | 24% | 28% |

Tables 3 and 4 reflect the variability of the use of Rule 1-068 offers by New Mexico lawyers. A majority of the lawyers (68 percent of plaintiffs' lawyers and 60 percent of defense lawyers) made five or fewer Rule 1-068 offers, or on average, fewer than one per year. Approximately three-fourths of the lawyers made Rule 1-068 offers in 33 percent or less of their cases. Yet a substantial number of lawyers reported more significant use of the rule: 32 percent of the plaintiffs' lawyers and 40 percent of the defense lawyers made more than ten Rule 1-068 offers, and approximately 25 percent of both plaintiffs' and defense lawyers reported that they made Rule 1-068 offers in 50 percent to 100 percent of their cases.

The data in Table 5, below, show that very few of the Rule 1-068 offers of settlement made by counsel were accepted by opposing counsel.

Table 5

| Number of Rule 1-068 Offers Accepted by Opposing Parties | | |
|----------------------------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| None | 76% | 43% |
| One | 15% | 17% |
| From 2 to 4 | 6% | 24% |
| 5 or more | 3% | 16% |

97. None of the lawyers reported that they made offers in 33 percent to 49 percent of their cases.

2. Details Concerning Rule 1-068 Offers Received

The survey next asked how many Rule 1-068 offers each lawyer had received from the opposing lawyer. 78 percent of the plaintiffs' lawyers reported that they had received Rule 1-068 offers from defense counsel, but only 52 percent of the defense lawyers received Rule 1-068 offers from plaintiff's counsel. This shows that, despite the amendment to allow plaintiffs to make offers, far fewer plaintiffs' lawyers than defense lawyers made Rule 1-068 offers (p-value 0.0026).

As Table 6, below, indicates most of the lawyers did not receive many Rule 1-068 offers from opposing counsel.

Table 6

| Number of Rule 1-068 Offers Received | | |
|--------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| 3 or less | 46% | 40% |
| 5 or less | 69% | 73% |
| 10 or less | 89% | 88% |
| More than 10 | 11% | 12% |

Finally, as evidenced in Table 7, below, most lawyers did not accept many of the Rule 1-068 offers they received from opposing counsel.

Table 7

| Number of Rule 1-068 Offers Accepted | | |
|--------------------------------------|-----------|-----------|
| | Plaintiff | Defendant |
| None | 57% | 73% |
| One | 14% | 12% |
| From 2 to 3 | 17% | 9% |
| More than 3 | 12% | 6% |

Looking solely at the number of Rule 1-068 offers accepted, one might conclude that Rule 1-068 is a dismal failure in helping to settle cases in New Mexico state courts. While the number of Rule 1-068 offers accepted is small, that tells only part of the story. Many plaintiffs' and defense lawyers wrote comments on the survey instrument that give additional insight into how Rule 1-068 offers work in their

practice. The comment most often made (by nineteen defense lawyers and ten plaintiffs' lawyers) is that Rule 1-068 offers increase communication between the parties and encourage additional settlement discussions. They reported that, even when a Rule 1-068 offer is not accepted, it elicits both Rule 1-068 counter-offers and non-Rule 1-068 counter-offers that often lead to settlement. Professors Harold Lewis and Thomas Eaton, in their study of the use of Rule 68 offers of judgment in civil rights and employment discrimination cases, suggested that defense lawyers who do not currently counsel clients to make Rule 68 offers would do so routinely if they received an offer of judgment from the plaintiff.⁹⁸ The survey results support this position, but take it one step further. Not only did 52 percent of defense lawyers report that they had made a Rule 1-068 offer in response to receiving a Rule 1-068 offer from the plaintiff, the exact same percentage of plaintiffs' lawyers, 52 percent, reported that they had made a Rule 1-068 offer in response to receiving a Rule 1-068 offer from the defendant.

Several lawyers noted a practical difficulty faced by plaintiffs' lawyers when deciding whether to make a Rule 1-068 offer. To put pressure on the defendant, the plaintiff's offer must be close to the value of the case. Yet the plaintiff may be reluctant to disclose her "bottom line" position too early in the litigation and risk setting a ceiling on her demands if the defendant does not accept the offer. This is especially true if the parties plan to engage in mediation or will be ordered to participate in a settlement conference in federal court, as most mediators/facilitators discourage a party from increasing its settlement demand at the mediation or settlement conference. This explains why several lawyers stated that Rule 1-068 offers are more effective if not made too early in the case, and are often made after an unsuccessful mediation or when the parties have reached an impasse in their settlement discussions.

Even when a Rule 1-068 offer does not lead to resolution of the case, lawyers reported that making the offer had been helpful. Three lawyers stated that such offers helped define or narrow the settlement range with opposing counsel. Three other lawyers reported that making a rejected Rule 1-068 offer was helpful later in the case, because it was factored into subsequent settlement discussions. These comments are consistent with the findings of Professors Yoon and Baker in their study of the use of offers of judgment in New Jersey. They reported that allowing all parties to make offers of judgment may encourage litigants to make more attractive offers.⁹⁹ They posit that, while a bilateral offer of judgment rule may not compel parties to reach a settlement, it may draw them closer together than they would have been in the absence of the rule.¹⁰⁰ Professors Lewis and Eaton suggest that if offers of judgment are thoughtfully made, each offer might be made at a more realistic level than the extreme initial demands and responses often seen in standard positional bargaining, which could lead to quicker settlements.¹⁰¹

The survey results suggest that this dynamic may be occurring in New Mexico because New Mexico's plaintiffs' and defense lawyers seem to be pleased with how

98. Lewis & Eaton, *supra* note 3, at 364.

99. Yoon & Baker, *supra* note 3, at 189.

100. *Id.* at 189-90.

101. Lewis & Eaton, *supra* note 3, at 364.

Rule 1-068 works in practice. Fifty-nine percent of the plaintiffs' lawyers and 69 percent of the defense lawyers surveyed believe that Rule 1-068 leads more cases to settle or helps them to settle earlier.¹⁰² In contrast, a 1994 Federal Judicial Center survey of the use of Rule 68 in civil rights cases found that only 31 percent of plaintiffs' counsel and 47 percent of defense counsel thought Rule 68 led more cases to reach settlement.¹⁰³

There were scattered additional comments about Rule 1-068. Although a few lawyers stated that the amount of costs shifted by Rule 1-068 is too small to matter, a majority of the lawyers who voiced an opinion on this issue thought that the rule provides sufficient incentives to make parties seriously consider Rule 1-068 offers. Two defense lawyers complained that the rule is not fair because only plaintiffs can recover double costs, and another suggested that awarding double costs to defendants would encourage more plaintiffs to accept such offers. One plaintiffs' lawyer reported that many plaintiffs' lawyers do not yet understand the 2003 amendments to Rule 1-068. This supposition was strengthened when a very experienced plaintiffs' lawyer stated that he had not made Rule 1-068 offers in the past but was currently considering advising several of his clients to make such offers.¹⁰⁴ Only one plaintiffs' lawyer complained about having to wait until 120 days after the filing of a responsive pleading by the defendant to make a Rule 1-068 offer. One defense lawyer stated that, because most cases settle before trial, the threat of having to pay costs under Rule 1-068 is illusory. None of the lawyers surveyed complained about the amendment from offer of judgment, with its formal entry of judgment, to offer of settlement, which allows a case to be dismissed with prejudice.

VII. POTENTIAL AMENDMENTS TO FEDERAL RULE 68

The Advisory Committee on Civil Rules is once again considering whether to attempt any revisions to Rule 68.¹⁰⁵ New Mexico's experience with amending Rule 1-068, together with the empirical studies and the experience of other states in amending their offer of judgment rules, provide valuable insight on potential amendments to Rule 68.

A. Dismissal with Prejudice

Rule 68 should be changed to an "offer of settlement" or "offer of consent

102. Twenty-seven percent of the plaintiffs' lawyers and 21 percent of the defense lawyers do not think Rule 1-068 leads more cases to settle or helps them to settle earlier, while 14 percent of the plaintiffs' lawyers and 10 percent of the defense lawyers were not sure.

103. The survey randomly sampled 800 civil cases that had been closed in federal court in the first six months of 1993. In this question, the survey asked counsel in civil rights cases how Rule 68 influenced settlement in cases similar to the case selected for the survey. The statistics were worse when reviewing only the cases identified for the survey. In those cases, Rule 68 had no influence in 61 percent of the cases that settled and in 85 percent of the cases that proceeded to trial. SHAPARD, *supra* note 3, at 3, 8–9.

104. There is anecdotal evidence that lawyers who understand offer of judgment rules make more offers under such rules. See *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases? Session Three: "Changes to Rule 68,"* 57 MERCER L. REV. 791, 801 (2006).

105. Revising Rule 68 was a topic on the Committee's agenda for its meeting in November of 2008. See Advisory Committee on Civil Rules, November 2008 Agenda, <http://www.uscourts.gov/rules/AgendaBooks/CV2008-11.pdf>.

disposition” rule and allow the case to be dismissed with prejudice instead of having a judgment entered against the defendant. Defendants may object to the entry of judgment for a number of reasons: because of adverse publicity or concerns that it might encourage copycat litigation, invoke collateral estoppel with cases that share a common factual basis, or impair credit worthiness or career advancement for individual defendants.¹⁰⁶ Both of the proposals by the Federal Rules Advisory Committee in 1983 and 1984 allowed the case to be dismissed with prejudice without requiring the entry of a judgment.¹⁰⁷ Lewis and Eaton noted “almost universal support” among the lawyers they surveyed for changing the rule’s terminology to an offer of “settlement” or “agreement.”¹⁰⁸ None of the New Mexico lawyers surveyed complained about this amendment to Rule 1-068, and it has the potential to increase the number of offers made by defendants.

B. Offers by Plaintiffs

Rule 68 should allow plaintiffs to make offers of judgment.¹⁰⁹ Allowing plaintiffs to make offers of judgment is not particularly novel or controversial; twenty-three states already do so.¹¹⁰ A 1994 Federal Judicial Center survey about the use of Rule 68 reported that nearly 75 percent of the attorneys favored amending Rule 68 to permit offers by all parties and to allow the recovery of something more than the costs allowed under 28 U.S.C. § 1920.¹¹¹ Lewis and Eaton found that plaintiffs’ lawyers overwhelmingly supported this change, and that while many defense lawyers strongly opposed it, a significant number of defense lawyers supported such a change.¹¹² New Mexico’s experience demonstrates that allowing plaintiffs to make Rule 68 offers will increase the number of offers made under the rule and will trigger both Rule 68 counter-offers and regular settlement offers that will lead to settlement or will help define or narrow the settlement range for the case.

C. Increase in Available Sanctions

Rule 68 should be amended to increase the sanctions available under the rule. Some states allow a plaintiff who receives more than her offer of judgment at trial to recover the normal costs that the plaintiff would recover under Rule 54(D).¹¹³ Since prevailing plaintiffs usually receive an award of costs under Rule 54(D)—although judges retain the discretion to deny them—this provides little additional incentive for plaintiffs to make offers of judgment. All commentators

106. Teresa Rider Built, *Practical Use and Risky Consequences of Rule 68 Offers of Judgment*, LITIG., Spring 2007, at 26, 27; Lewis & Eaton, *supra* note 3, at 350.

107. *See supra* text accompanying note 24.

108. Lewis & Eaton, *supra* note 3, at 356.

109. Rule 1-068 explicitly states that attorney’s fees are excluded from the costs shifted under the rule. I agree with Lewis’s and Eaton’s recommendation to have a separately numbered subdivision of Rule 68 for cases that arise under federal fee-shifting statutes. 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 (2008).

110. *See supra* note 50 and accompanying text.

111. SHAPARD, *supra* note 3, at 2.

112. Lewis & Eaton, *supra* note 3, at 361–62.

113. *See, e.g.*, Haw. R. Civ. P. 68; N.D. R. Civ. P. 68.

agree that the costs that may be shifted under Rule 68 are too small to be a significant incentive to make or accept an offer under the rule, and the costs that have been awarded in federal court in New Mexico from 2000 to 2008 support this proposition.¹¹⁴

Nine states have chosen to increase the sanctions available under the rule by shifting attorney's fees.¹¹⁵ In 1994 New Jersey amended its offer of judgment rule to allow the imposition of uncapped attorney's fees as a cost-shifting sanction.¹¹⁶ Yoon and Baker found that, after the rule was amended, suits in New Jersey were resolved more quickly (by an average of 2.3 months, or roughly 7 percent), which translated into a decrease in attorney's fees for the defendants' insurer of approximately 20 percent.¹¹⁷ They concluded that offer of judgment rules that allow for substantial cost-shifting would increase the efficacy of the rules.¹¹⁸

While increasing the sanctions available under Rule 68 should increase its use, the Federal Rules Advisory Committee, and states that are considering amending their offer of judgment rules, should decline to shift attorney's fees under the rule. Shifting attorney's fees is too draconian a penalty for failing to accept an offer of judgment because attorney's fees often account for the vast majority of litigation expenses.¹¹⁹ A proposal to shift attorney's fees under Rule 68 is likely to generate intense controversy and doom any proposed amendment, as it did with the proposals by the Advisory Committee in 1983 and 1984.¹²⁰ Further, many commentators are concerned that shifting attorney's fees is too much a matter of substantive right to be accomplished through amending a rule of civil procedure and would violate the Rules Enabling Act.¹²¹

Even if those concerns can be addressed, states that have adopted attorney's fee shifting under their offer of judgment rules have ignored the experience in Alaska with partial attorney's fee shifting in civil litigation. Susanne Di Pietro and Teresa Carns studied Alaska Civil Rule 82, which allows partial attorney's fee shifting, and concluded that shifting attorney's fees seldom played a significant role in civil litigation in Alaska.¹²² They found that attorney's fees were awarded in only a small percentage of cases, and that parties paid the fee award less than half the time.¹²³

114. See *supra* text accompanying notes 56–63.

115. See *supra* text accompanying note 51.

116. Yoon & Baker, *supra* note 3, at 163–64.

117. *Id.* at 185–86. The data Yoon and Baker reviewed did not report whether either party made an offer of judgment, whether such offers were accepted or rejected, and whether the offeree who rejected the offer did worse at trial. *Id.* at 169.

118. *Id.* at 191–93.

119. See, e.g., *Ellison v. Plumbers and Steam Fitters Union Local 375*, 118 P.3d 1070, 1078 (Alaska 2005) (ordering the unsuccessful plaintiff in a sexual harassment case to pay her former union and union stewards attorney's fees of \$227,000 and \$142,000 respectively); SHAPARD, *supra* note 3, at 6 (stating that attorney's fees account for approximately 80 percent of litigation expenses).

120. As Professor Cooper observed, shifting attorney's fees under Rule 68 is a "lightning rod for controversy." Cooper, *supra* note 17, at 110.

121. See, e.g., *Marek v. Chesny*, 473 U.S. 1, 21 (1985) (Brennan, J., dissenting); Edward H. Cooper, *Symposium Reflections: A Rulemaking Perspective*, 57 MERCER L. REV. 839, 845–47 (2006); Merenstein, *supra* note 43, at 155–57.

122. See Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorneys Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 77 (1996).

123. *Id.* at 78.

They found that the rule did not affect decisions to file a claim, and did not often affect litigation or settlement strategies.¹²⁴ In those cases where fee shifting did have an effect, Rule 82 discouraged (1) some parties of moderate means from filing cases that either wealthy or poor plaintiffs would file, (2) some claims of questionable merit, and (3) early settlement of strong claims because the fee award increased the likelihood of a greater recovery.¹²⁵ They cautioned against adopting fee shifting in hopes of decreasing litigation, speeding up the disposition of cases, or inducing settlement, because the impact of Rule 82 in those areas has been “complex, subtle and often contradictory.”¹²⁶ They also found that Rule 82 did not significantly deter frivolous litigation, and that two-way fee shifting in theory becomes a one-way shift in practice because defendants are unable to collect fees from unsuccessful plaintiffs.¹²⁷

The sanctions available under Rule 68 must be significant enough to influence pre-trial negotiations. The experience with New Mexico’s Rule 1-068 suggests that there is a middle way between the current Rule 68, which does not shift significant costs, and those states that shift attorney’s fees, which can be a crushing burden. Because New Mexico allows for the recovery of a broader variety of costs, including expert witness fees, the cost awards in New Mexico state court are much higher than the costs awarded in federal court.¹²⁸ Amending 28 U.S.C. § 1920 to include expert witness fees would create greater incentives under Rule 68.¹²⁹

Under Rule 1-068, New Mexico awards double costs to plaintiffs who receive more than their offer of settlement at trial.¹³⁰ Since this change was fiercely opposed by New Mexico’s defense lawyers, it is surprising that only three defense lawyers mentioned this issue when responding to the survey. While allowing double costs to plaintiffs, and only single costs to defendants, may seem asymmetrical, it is not because two negative consequences occur when a plaintiff receives a judgment that is less than the defendant’s offer of judgment; the plaintiff must pay the defendant’s costs incurred after the date of the offer, and she is also denied her costs incurred after the offer, even though, as the prevailing party, she would normally recover such costs.¹³¹ Judge Posner, a leading scholar of law and economics, believes that awarding double costs to the plaintiff is equivalent to the sanction imposed on a plaintiff who rejects an offer of judgment from the defendant and then recovers less at trial.¹³² Rule 68 should be amended to allow double costs to plaintiffs when they

124. *Id.*

125. *Id.* at 79–84.

126. *Id.* at 87.

127. *Id.* at 88–89.

128. See *supra* text accompanying notes 64–66. Other states that allow the recovery of expert witness fees include Arizona, California, and Colorado. See ARIZ. R. CIV. P. 68(g); CAL. CIV. PROC. CODE § 998(c)(1) (West 2005); COLO. REV. STAT. ANN. § 13-17-202(1)(b) (West 2005 & Supp. 2008).

129. See, e.g., Cooper, *supra* note 17, at 131.

130. See Order on Plaintiff’s Costs, Keith v. Manorcara, Inc., No. CV 2005-8066 (N.M. 2d Jud. Dist. Sept. 11, 2007) (awarding pre-offer costs of \$107,392 and double the post-offer costs of \$36,758, for a total cost award in excess of \$180,000); Order Settling Cost Bill, Speero v. Rodrigues, No. CV-2003-434 (N.M. 5th Jud. Dist. Aug. 30, 2007) (awarding pre-offer costs of \$13,296 and double the post-offer costs of \$19,575 for a total cost recovery in excess of \$52,000). Minnesota has recently amended its offer of judgment rule to award double costs to plaintiffs when they receive more than their offer of judgment at trial. See MINN. R. CIV. P. 68.03 (effective July 1, 2008).

131. See Crossman v. Marcoccio, 806 F.2d 329, 331–33 (1st Cir. 1986).

132. See S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 308 (7th Cir. 1995).

receive more than their offer of judgment at trial.

D. Margin of Error

If more severe sanctions are to be imposed for failure to accept an offer of judgment, Rule 68 should be amended to add a margin-of-error provision. As currently drafted, Rule 68 imposes sanctions whenever the “judgment finally obtained by the offeree is not more favorable than the offer.”¹³³ Some cases present difficult issues of liability, while others present genuine uncertainty as to damages, and jury unpredictability is an ever-present danger even for experienced trial lawyers.¹³⁴ Rule 68 should not impose sanctions because a party cannot predict to the penny what the jury might award.¹³⁵ For example, in *Bright v. Land O’Lakes*, the Seventh Circuit affirmed an award of costs under Rule 68 even though it concluded that the offer of judgment came “surprisingly close” to the actual damage award.¹³⁶ The proposal by the ABA House of Delegates in 1996 included a 25 percent margin-of-error provision to mitigate the harshness of requiring cost-shifting when a party receives a judgment that is slightly less than a rejected Rule 68 offer.¹³⁷ Several states have 25 percent margin-of-error provisions, while New Jersey has a 20 percent provision and Alaska has a 5 percent margin-of-error provision.¹³⁸ Including a margin-of-error provision of 10 percent to 20 percent would ensure that parties are not sanctioned when they made a serious offer but miscalculated slightly what the jury would award.

E. Timing of Offer

If plaintiffs are allowed to make Rule 68 offers, they should be precluded from doing so for a period of time to allow the defendant a fair opportunity to evaluate the merits of the case.¹³⁹ Otherwise, the plaintiff could make a Rule 68 offer when suit was filed.¹⁴⁰ How long it takes to evaluate a case depends upon its complexity and whether the parties have informally exchanged information before suit is filed.

133. FED. R. CIV. P. 68(d).

134. See Marc Galanter & Mia Cahill, “Most Cases Settle”: *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1347 (1994) (noting that there can be enormous variability in trial results “because lawyers, judges, and juries may produce very different results in the same case”).

135. Many years ago, when I was a young attorney struggling to value a case, one of my senior partners told me: “Anyone can tell the difference between cases that are worth \$15,000 and \$150,000, but no one can tell what will make one jury award \$10,000 and another \$15,000 in similar cases.”

136. The defendants made an offer of judgment for \$225,000, and the plaintiff won “either \$250,000 or \$226,608.91, which is the \$250,000 amount less the \$23,391.09 counterclaim won” by one of the defendants. *Bright v. Land O’Lakes, Inc.*, 844 F.2d 436, 443 (7th Cir. 1988). See also *Gilmore v. Duderstadt*, 1998-NMCA-086, ¶36, 961 P.2d 175, 185 (costs were awarded under Rule 1-068 even though the defendants’ offer of judgment for \$75,000 was quite close to the final judgment, which included an award of prejudgment interest, of \$76,747.31).

137. See *supra* note 36 and accompanying text.

138. See ALASKA R. CIV. P. 68(b) (5 percent); GA. CODE ANN. § 9-11-68(b) (2008) (25 percent); LA. CODE CIV. PROC. ANN. art. 970(c) (25 percent); N.J. CT. R. 4:58-2(a) (20 percent).

139. Likewise, defendants who file counterclaims should be precluded from making an offer of judgment for a period of time after the counterclaim has been filed to allow the plaintiff an opportunity to evaluate the merits of the counterclaim.

140. Rule 68(a) provides that an offer of judgment may be made any time more “than 10 days before the trial begins.”

In many cases some discovery may be necessary before the parties can estimate the likely outcome of the case. An experienced defense attorney may be able to evaluate simple cases—such as tort litigation arising out of an automobile accident—fairly quickly, but more complicated cases will take more time to evaluate. Lewis and Eaton reported that the lawyers they surveyed overwhelmingly agreed that a defense lawyer can value a civil rights or employment discrimination case within four to six months after the case is filed.¹⁴¹

New Mexico precludes a plaintiff from making a Rule 1-068 offer prior to the expiration of 120 days after the filing of a responsive pleading by a party. Only one plaintiff's lawyer complained that he could not make an offer before that time, and none of the defense lawyers claimed that they did not have enough time to evaluate a Rule 1-068 offer.¹⁴² Given Lewis's and Eaton's finding and the responses from New Mexico's lawyers, precluding plaintiffs' offers until 120 days after a responsive pleading has been filed appears to allow a reasonable time period for defendants to evaluate offers under Rule 68.

VIII. CONCLUSIONS

Although Rule 68 has been in existence for many years, a consensus has developed over the last thirty years that it is in serious need of reform. This consensus is reflected in the literature and in the trend by the states to vary from the Rule 68 pattern and adopt innovative offer of judgment rules. The recent empirical studies by Harold Lewis, Thomas Eaton, Albert Yoon, and Tom Baker, together with the earlier work done by John Shapard, demonstrate that Rule 68 could be enhanced by allowing all parties to make offers of judgment and by increasing the sanctions available under the rule.

New Mexico's experience with its amended Rule 1-068 suggests that including expert witness fees as part of the costs that can be shifted will increase the incentives to make offers of judgment, but not to the level of attorney's fee shifting, which is too draconian a penalty. If Rule 68 is to be amended, the Federal Rules Advisory Committee should also consider (1) changing the terminology of the rule to "offer of settlement" and allow the case to be dismissed without entry of a judgment, (2) adding a margin-of-error provision, and (3) prohibiting the parties from making offers of judgment for a period of time to allow the opposing party a fair opportunity to evaluate the merits of the claim. New Mexico's experience with its amendments demonstrates that they increase the use of Rule 1-068 offers and that, even though such offers are not often accepted, they lead to further settlement discussions that often lead to settlement of the case outside the formal Rule 1-068 process. Adopting these amendments will have the potential to transform Rule 68 from a one-way rule with limited incentives into a rule with more significant incentives that may assist all parties to resolve litigation more quickly.

141. Lewis & Eaton, *supra* note 3, at 353.

142. Rule 1-068 supplements but does not supplant the traditional settlement process. Plaintiffs in New Mexico remain free to make settlement offers immediately after the case has been filed; they simply are precluded from making a Rule 1-068 offer, with its increased sanctions, for the specified period of time.

APPENDIX A

QUESTIONNAIRE CONCERNING RULE 1-068

1. Approximately how many cases did you handle in the five years before August 1, 2003, in which you advised your client on decisions to make, accept, or reject offers under Rule 1-068?

- a. none
- b. less than 25
- c. between 25 and 100
- d. more than 100

2. Approximately how many cases filed after August 1, 2003, have you handled in which you advised your client on decisions to make, accept, or reject offers under Rule 1-068?

- a. none
- b. less than 25
- c. between 25 and 100
- d. more than 100

3. Whom do you primarily represent?

- a. plaintiffs
- b. defendants

If you primarily represent plaintiffs, please answer question 4.

If you primarily represent defendants, please answer question 5.

If you wish to make additional comments about Rule 1-068, please make them here or on the back of this page.

4(A). If you primarily represent plaintiffs, have you advised your client (plaintiff) to make a Rule 1-068 offer of settlement in cases filed after August 1, 2003?

- a. yes
- b. no

If you answered yes to this question:

1. How many Rule 1-068 offers of settlement have you made?
2. In what percentage of your cases did you make such offers?
3. How many of your offers of settlement were accepted?
4. In general, do you believe that making a Rule 1-068 offer of settlement increases the chances of settling the case, or helps the case settle earlier? Please explain.

4(B). Since August 1, 2003, have you received offers of settlement from defendants under Rule 1-068?

- a. yes
- b. no

If you answered yes:

1. How many Rule 1-068 offers of settlement did you receive?
2. How many Rule 1-068 offers of settlement did you accept?

3. Did you make a Rule 1-068 offer of settlement in response to receiving a Rule 1-068 offer from defendant?

5(A). If you primarily represent defendants, have you advised your client (defendant) to make a Rule 1-068 offer of settlement in cases filed after August 1, 2003?

- a. yes
 b. no

If you answered yes to this question:

1. How many Rule 1-068 offers of settlement have you made?
2. In what percentage of your cases did you make such offers?
3. How many of your offers of settlement were accepted?
4. In general, do you believe that making a Rule 1-068 offer of settlement increases the chances of settling the case, or helps the case settle earlier? Please explain.

5(B). Since August 1, 2003, have you received offers of settlement from plaintiffs under Rule 1-068?

- a. yes
 b. no

If you answered yes:

1. How many Rule 1-068 offers of settlement did you receive?
2. How many Rule 1-068 offers of settlement did you accept?
3. Did you make a Rule 1-068 offer of settlement in response to receiving a Rule 1-068 offer from plaintiff?