AGENDA

JOINT PROCEDURE COMMITTEE

April 26, 2024

IV. New Business

A. Rule 8.6, N.D.R.Ct., Parenting Investigators
The committee will consider amendments to Rule 8.6 proposed by the state court administration's education department.

B. Rule 39, N.D. Sup. Ct. Admin. R., Recording District Court Trials and Proceedings; Rule 40, N.D. Sup. Ct. Admin. R., Access to Recordings in District Court
The committee will consider amendments to Rules 39 and 40 referencing the repealed N.D.C.C. § 27-02-05.2.

C. Rule 68, N.D.R.Civ.P., Offer of Settlement or Confession of Judgment; Tender
The committee will consider amendments to Rule 68 to provide a financial incentive for a plaintiff to make an offer of settlement.

D. Rule 106, N.D.R.Ev., Remainder of or Related Writings or Recorded Statements
The committee will consider amendments to Rule 106 based on the December 1, 2023 amendments to Fed.R.Ev. 106.

E. Rule 615, N.D.R.Ev., Excluding Witnesses
The committee will consider amendments to Rule 615 based on the December 1, 2023 amendments to Fed.R.Ev. 615.

MINUTES OF MEETING
(UNOFFICIAL UNITL APPROVED)
Joint Procedure Committee
January 26, 2024

TABLE OF CONTENTS

CALL TO ORDER

The meeting was called to order at 9:02 a.m., on January 26, 2024, by the Chair, Justice Lisa Fair McEvers.

ATTENDANCE

Present:
Justice Lisa Fair McEvers, Chair
Justice Douglas Bahr
Honorable Susan Bailey
Honorable Rhonda Ehlis
Honorable Stacy Louser
Honorable Kirsten Sjue
Mr. Kellen Bubach
Mr. Mark Friese
Mr. Paul Myerchin
Ms. DeAnn Pladson
Mr. Robert Quick

Mr. Michael Raum

Absent:
Honorable Bradley Cruff
Honorable Bruce Romanick
Honorable Lolita Hartl Romanick
Honorable Barb Whelan
Ms. Aften Grant
Prof. Denitsa Heinrich
Ms. Lisa Hettich
Mr. Seymour Jordan

Guest:
Judge Gail Hagerty

Staff:
Andy Forward

PRELIMINARY MATTERS

The Chair welcomed new members Judge Stacy Louser and Robert Quick. The Chair welcomed retired Judge Gail Hagerty, Uniform Law Commissioner, who was present to provide information and answer questions about a proposed rule on the meeting agenda.

APPROVAL OF MINUTES

Judge Ehlis MOVED to approve the minutes. Mr. Bubach seconded. Staff was instructed to make minor corrections to the minutes. The motion to approve the minutes with the corrections CARRIED.

RULE 55.1, N.D.R.CIV.P., CONSUMER DEBT DEFAULT JUDGMENTS (PAGES 110-152 OF THE AGENDA MATERIAL)

Staff explained Judge Hagerty presented information on a uniform law relating to consumer debt default judgments at the Supreme Court's December 19, 2023 rulemaking meeting. Judge Hagerty said there is a lot of material about the uniform act, including comments, but she wanted to provide some background information to the committee. Judge Hagerty presented a PowerPoint on the uniform act. Judge Hagerty said the uniform act was in the drafting process for two years. Judge Hagerty said the act was initiated by the Conference of Chief Justices. Judge Hagerty said some states already have laws and court rules providing enhanced pleading requirements for consumer debt cases.

Judge Hagerty said the proposed rule would apply mainly to unsecured consumer debt. She said the rule requires additional information in the complaint, including identification of the creditor and the debt. A notice to the debtor would also be required to be served with the complaint. The notice explains the actions to be taken to avoid a default judgment.

A member asked whether the act was substantive enough that it should be a law, and whether the uniformity of the act would be affected if it was a court rule instead of a statute. Judge Hagerty said uniformity would not be affected. She said state specific changes could be made to the act to make it work better in the state. She thinks this act is more procedural and could be enacted as a rule.

A member asked whether Judge Hagerty had seen a letter from a Fargo law firm raising concerns about the proposed rule. Judge Hagerty said she would like to see the concerns raised in the letter fleshed out more, and those concerns were not raised by the debt collection community during the drafting of the uniform act.

A member asked about collecting attorney's fees under the proposed rule. Some members said it was their view attorney's fees would not be allowed for consumer debt because it is prohibited by statute.

A member said he was contacted by a Bismarck attorney who raised some concerns about the proposed rule: 1) it goes above and beyond the state's notice pleadings; and 2) the act may give extra duties to the district court clerks to ensure everything is in the complaint before it is accepted for filed. Judge Hagerty said some family law cases require additional information in the pleadings. The Chair said it could be possible to require these kinds of cases to be filed in one county to ensure uniformity.

A member expressed concern that the proposed rule provides consumer protections which is a public policy issue. The member said there should be legislation enacting this uniform act. The member said citizens are expected to know the law but they are not expected to know the rules of court or the rules of civil procedure.

A member asked whether other areas of law require higher pleading standards. The member said he was unsure whether the committee should be making a policy decision relating to consumer debt. The member thought the legislature may be better suited for that. Judge Hagerty said these cases can take a lot of a judge's time, and additional information from the creditors would be helpful. A member said additional protections for the consumer isn't necessarily a bad thing.

The Chair said the committee will continue discussing the proposed rule at the April meeting. The Chair thanked Judge Hagerty for her time.

RULE 3.4, N.D.R.CT., PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT; RULE, 40, N.D. SUP. CT. ADMIN. R. 41, ACCESS TO COURT RECORDS (PAGES 16-45 OF THE AGENDA MATERIAL)

Staff said the Rule 3.4 workgroup met in December to discuss the rule and propose amendments. Staff said the workgroup retained the amendments prepared for the April meeting, and proposed additional amendments. Amendments to Rule 41 were also made to be consistent with the proposed amendments to Rule 3.4.

Ms. Pladson MOVED to adopt the proposed amendments to Rule 3.4. Mr. Raum seconded.

A member said a clerk of district court assisted with some of the amendments.

Ms. Pladson MOVED to delete "or" on line 49 and change "and" to "or" on line 50. Mr. Quick seconded. Motion CARRIED.

The Chair asked the workgroup whether there was any discussion about passwords and whether they should be redacted. Staff said it did not come up. A member said in some instances discovery documents in divorce cases are filed and sometimes passwords are shared. A member asked whether there was a problem with passwords being filed in court documents. The Chair and another member said they did not think it was a problem.

The motion to approve the proposed amendments to Rule 3.4 CARRIED.

Justice Bahr MOVED to adopt the proposed amendments to Rule 41. Ms. Pladson seconded.

Staff said the only amendments made to Rule 41 were references to the amended Rule 3.4.

The motion to approve the proposed amendments to Rule 41 CARRIED.

RULE 10.2, N.D.R.JUV.P., ADMISSIONS (PAGES 46-51 OF THE AGENDA MATERIAL)

Staff explained the committee tabled the proposed Rule 10.2 at its September 28, 2023 meeting. Staff said the proposed rule is similar to Rule 11 of the criminal rules. Staff said at the September meeting some members expressed concern over advising a juvenile on the potential future consequences of an admission.

Judge Ehlis MOVED to continue discussion and approve the proposed Rule 10.2. Judge Sjue seconded.

A member said the Southwest Judicial District uses a written notification of rights form given to juveniles and parents. The member said potential future consequences are not mentioned in the form.

The Chair mentioned the case discussed at the September meeting involving an individual who had committed a prior juvenile delinquent act being arrested at a shooting range for being a felon in possession of a firearm. A member said there are numerous potential consequences, but advising a juvenile on potential restrictions on firearm rights seems like a good idea. Some members said they advise juveniles on sex offender registration.

A member said the potential consequences affecting constitutional rights are the right to carry a firearm and sex offender registration. The member said Criminal Rule 11 was changed to add immigration consequences after *Padilla* [*v. Kentucky*, 559 U.S. 356, 374 (2010)]. The member said the concept of the proposed rule is a good idea. A member said some specific future consequences should be mentioned in the rule.

Members discussed possible language to include in the rule at page 48, lines 42-43 on advising a juvenile about specific future consequences, such as the right to carry firearms, sex offender registration, and immigration. A member mentioned the state court administrator could maintain an evolving list of potential future consequences to provide to juvenile courts. A member said a lot of calls are received about restoring firearm rights. The member said specifically notifying a juvenile about possible firearm restrictions in the future is a good idea.

Mr. Friese MOVED to replace the language in subparagraph (b)(5)(B) at page 48, lines 42-43 with the following language: "(B) the potential for offender registration, loss of firearm possession rights, and a juvenile who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future, and (C) the potential for enhanced penalties for a subsequent delinquent act or offense committed as an adult." Mr. Quick seconded.

A member said the proposed subparagraph (C) addresses enhanced penalties for driver's license consequences and DUI offenses which are raised regularly. A member said the language on immigration mirrors Criminal Rule 11.

Mr. Raum suggested a friendly amendment to add "for the" before "loss of" on line 42, and add "that" before "a juvenile" on line 43. Mr. Friese and Mr. Quick approved.

Motion CARRIED.

The motion to approve the proposed Rule 10.2 CARRIED.

RULE 5.5, N.D.R.CT., CIVIL COMPROMISE (PAGES 52-56 OF THE AGENDA MATERIAL)

Staff said at the April 28, 2023 meeting, the committee approved Rule 5.5 and included the rule as part of the annual rules petition submitted in June 2023. During the comment period, the East Central Judicial District judges submitted comments relating to proposed Rule 5.5. Staff said the judges requested clarification on two aspects of the proposed rule:

(1) whether the notice requirement in subdivision (b) was intended to be pursuant to Rule 3.2 or in lieu of Rule 3.2; and
(2) whether the State would have an opportunity to be heard as to whether the civil compromise was appropriate under the law.

Staff said the Supreme Court referred Rule 5.5 to the committee for further consideration.

Mr. Friese MOVED to continue discussion of proposed Rule 5.5. Justice Bahr seconded.

A member said Rule 3.2 should apply to motions. A member said the proposed rule requires notice but no motion. A member said notices are common in probate cases.

A member said Rule 5.4 on restoration of firearm rights does not require a motion or notice. The member said the rule was based on the statute providing the relief. The member said the relief provided by proposed Rule 5.5 is also provided by statute. The member said requiring a notice, motion, and briefing is inconsistent with the statute. The member said nothing in the proposed rule prohibits the State from objecting to a civil compromise. A member said the State can object, but the rule does not provide a timeline for the State to object.

The Chair said subdivision (b) requires notice be served on all parties. She asked who the parties in these cases are. A member said the State is a party and would receive notice.

A member said N.D.C.C. 29-01-17, dealing with compromise, mentions a court order. The member said if the court is going to order something, there should be a motion for due process purposes. A member said there are other court orders without a preceding

motion, such as an order following a petition to restore firearm rights. A member said the statutes do not provide a process for the State or another party to object.

A member said the statute on restoration of firearm rights provides the State 20 days to respond to a petition. A member said the proposed rule should require a motion or stipulation. A member said that based on the comments and the statutes on firearm restoration, there should be a time period for objections.

Mr. Friese MOVED to add a sentence in subdivision (b) after "parties." on page 53, line 6: "Any objection must be filed within 20 days of service of the notice." Mr. Quick seconded.

A member said the proposed 20 days is different than Rule 3.2, which is 14 days. Mr. Friese accepted changing "20" to "14" as a friendly amendment to his motion. Mr. Quick seconded. A member said 14 days seems sufficient. Motion CARRIED.

The Chair said the committee already approved proposed Rule 5.5, so it would not need to reapprove the rule as a whole. The Chair said the amended rule will go to the Court in the fall as part of the rules package.

RULE 6.12, N.D.R.CT., OBJECTION TO USE OF PEREMPTORY CHALLENGE (PAGES 57-65 OF THE AGENDA MATERIAL)

Staff explained the Minority Justice Implementation Committee approved proposed Rule 6.12 and forwarded the rule to the committee. The Rule was based on Washington's General Rule 37, which was aimed at eliminating implicit and explicit bias in jury selection.

Mr. Myerchin MOVED to consider the adoption of proposed Rule 6.12. Mr. Quick seconded.

A member said the rule seems to be a solution without a problem. The member asked whether there was a problem with jury selection in the state.

A member said the rule is a codification of the *Batson [v. Kentucky*, 476 U.S. 79 (1986)] challenge. A member said it seems to go farther than that because it creates presumptions that don't exist. A member said this would be applied to civil cases as well. A member said it goes beyond what the constitution requires. A member said some of the language in the rule is vague.

The motion to approve the proposed Rule 6.12 FAILED.

RULE 32, N.D.R.APP.P., FORM OF BRIEFS AND OTHER DOCUMENTS (PAGES 66-72 OF THE AGENDA MATERIAL)

Staff said committee member Mark Friese notified Staff that Rule 32 references parts of the rule that do not exist. Rule 32(a)(8)(B) states in part, "Page limits for Rule 54(b) certification are in addition to the limits set forth in (7)(A)." There is no (7)(A) in the rule. Staff changed "7" to "8" on page 69, line 48. Rule 32(b)(2) provides in part, "The form of all motion documents must comply with the requirements of paragraph (c)(4) below. There is no paragraph (c)(4) in the rule. Staff changed "c" to "b" on page 69, line 55. Staff said he also amended the explanatory note to indicate the rule was amended on August 1, 2023 (page 70, lines 72-73).

A member asked about the authority of Staff to correct clerical error in the rules. Staff said in the past it was common for staff attorneys to correct clerical errors. Staff said the current practice is to bring proposed rule changes to the Supreme Court. The Chair said the court wants to be more open with rule changes even if the changes are minor. The Chair said the court has rulemaking meetings every month.

Mr. Friese MOVED to adopt the proposed amendments to Rule 32. Mr. Bubach seconded.

A member asked whether the rule could be sent to the Supreme Court immediately or if it would be part of the annual rules package.

The motion to approve the proposed amendments to Rule 32 CARRIED. By unanimous consent, the proposed amendments will be sent immediately to the Supreme Court.

REFERENCES IN THE RULES TO "CHAMBERS" (PAGES 73-91 OF THE AGENDA MATERIAL)

Staff said the Supreme Court requested him to review the rules to find instances where the word "chambers" is used and whether the term should remain or be removed. Staff said references to "chambers" in the rules might implicate a violation of the right to a public trial. Staff said the committee removed the reference to "in chambers proceedings" in N.D. Sup. Ct. Admin. R. 21, Section 4(d) at the September meeting. Staff said he found eight rules that reference "chambers" either in the body or title of the rule.

Staff said of the eight rules, the two worth discussion are Criminal Rule 24 on trial jurors and Evidence Rule 509 on identity of informers. Staff said the committee amended Rule 24 at the April 2021 meeting. In reviewing the meeting minutes, Staff said the committee opted to leave the "chambers" language in the rule and add language requiring

a *Waller [v. Georgia*, 467 U.S. 39 (1984)] analysis to avoid a violation of the right to a public trial.

Staff said in Rule 509, "chambers" is mentioned in subdivisions (d) and (e) of the rule relating to an informer's testimony and disclosure of the informer's identity.

Justice Bahr MOVED for discussion on Rule 24. Judge Louser seconded.

A member said there doesn't appear to be problems with Rule 24. The member suggested adding a requirement that the court make a record of an individual examination of a potential juror in chambers or a closed courtroom.

A member said the reference to chambers could be removed. The member said there is no need to do anything in chambers. A member said some courthouses may not have an extra courtroom that can be used. A member said in federal court, rather than remove everyone from the courtroom, the general practice is to bring the individual juror back to chambers with the parties, counsel, and a court reporter present.

Justice Bahr MOVED to add "The court must make a record of the examination." at the end of line 17 on page 75. Mr. Quick seconded. Motion CARRIED.

Mr. Friese MOVED to delete "chambers or" on page 75, line 15. Mr. Quick seconded.

A member said sometimes it is difficult to do the *Waller* analysis on the record in public before examining a prospective juror about a sensitive or private matter. A member said you need to be vague without disclosing pertinent information, such as health issues or sexual abuse.

A member expressed concern with the word "closed" because of recent cases decided by the Supreme Court. A member said the rule allows closure if there has been a *Waller* analysis.

A member said a chambers may be the only room available in a small courthouse. A member said the word chambers could be defined broadly, such as a law library. Another member said the phrase "chambers or a closed courtroom" may not be needed because other locations are also available, such as the jury room, library, county commissioners room, or other rooms. A member said the specific room does not matter, the focus point is whether the room is closed to the public or not.

Mr. Friese and Mr. Quick agreed to a friendly amendment to replace "courtroom" with "location" on page 75, line 16. Motion CARRIED.

The motion for discussion on Rule 24 as amended CARRIED.

On Evidence Rule 509, Staff said he could not find any North Dakota cases discussing the "in chambers" language of subdivisions (d) and (e).

Judge Bailey MOVED to replace "chambers" with "a closed location" on page 85, line 19, and page 86, lines 33, 39, 41, and 43. Mr. Raum seconded.

A member asked whether this language had caused an issue in the past. A member said the change would be consistent with the changes made to Criminal Rule 24.

A member asked whether a *Waller* analysis needed to be done anytime a courtroom closure occurs, regardless of the circumstances. The member said they have not dealt with a criminal informant scenario.

A member said *Waller* dealt with a suppression motion and whether the Sixth Amendment right to a public trial applied. The member said a suppression hearing is similar to a trial. Witnesses are sworn in and cross-examined and many times the result is dispositive of the case. The member said some additional research would be helpful.

Members discussed researching the rule further to see if other courts have addressed whether *Waller* applies in this context.

Judge Bailey and Mr. Raum withdrew the motion and second.

Justice Bahr MOVED to table Rule 509 for further research and continue the discussion at the next meeting. Mr. Quick seconded. Motion CARRIED.

REFERENCES IN THE RULES TO THE UNIFORM JUVENILE COURT ACT, N.D.C.C. CH. 27-20 (REPEALED) (PAGES 92-98 OF THE AGENDA MATERIAL)

Staff said the Chair requested a search of the rules for references to the Uniform Juvenile Court Act, N.D.C.C. ch. Chapter 27-20, which was repealed in 2021. Staff said N.D.R.Crim.P. 1 and N.D.R.Civ.P. 81, Table A reference N.D.C.C. ch. 27-20. Staff removed the references to Chapter 27-20. Staff also removed references in Table A to other laws that have been repealed. Staff said it appeared the table had not been updated in a while.

Judge Ehlis MOVED to adopt the proposed amendments. Justice Bahr seconded. Motion CARRIED.

RULE 3.2, N.D.R.CT., MOTIONS (PAGES 99-105 OF THE AGENDA MATERIAL)

Staff explained Bismarck attorney Tom Dickson contacted Staff and suggested a page limitation for all briefs. Staff prepared amendments to Rule 3.2(a) establishing a page limit of 38 pages for a principal or answer brief, and 12 pages for a reply brief. Staff said the page limits are consistent with N.D.R.Civ.P. 56(c)(2)(A) on summary judgment briefs and N.D.R.App.P. 32(a)(8) on appellate briefs.

Justice Bahr MOVED to adopt the proposed amendments to Rule 3.2. Mr. Bubach seconded.

A member said page limits would be helpful to limit briefs that are really long. A member said a lawyer should know his audience and there is a risk the judge may not be able to read an entire brief if it is 50 pages or longer. The member said it would be burdensome to reject a pro se brief and send it back for rewriting. The member said these are reasons a change might not be necessary.

A member said there are already page limits for summary judgment and appellate briefs, which are probably the main types of briefs being written. The member said page limits on other briefs may not be needed. A member said a reason to write a longer brief may apply for complex civil situations, such as an appointment of a receiver.

A member said the proposed changes would provide another reason for a clerk's office to reject a brief. A member said the changes might be nice because they provide consistency.

Justice Bahr and Mr. Bubach withdrew the motion and second.

The proposed amendments to Rule 3.2 FAILED for lack of a motion.

RULE 11.10, N.D.R.CT., TITLE AND CITATION (PAGES 106-107 OF THE AGENDA MATERIAL)

Staff explained that at the September 2023 meeting, the committee approved form and style changes to the rules of court. Current Rule 11.7 on Title and Citation was renumbered to Rule 11.9. On March 1, 2024, rule amendments will go into effect, including new Rule 11.9 on limited representation. Staff renumbered Rule 11.7 to 11.10.

Judge Ehlis MOVED to approve the proposed amendments. Mr. Quick seconded. Motion CARRIED.

RULE 10.3, N.D.R.CT., ELECTRONIC COURT SEALS (PAGES 108-109 OF THE AGENDA MATERIAL)

Staff explained Staff attorney Sara Behrens recommended the adoption of a rule relating to electronic court seals. The clerks in the district courts wanted a rule on electronic court seals. Her research indicated other states allow the use of court seals on electronic documents. Her research noted that the use of an electronic stamp or seal was briefly discussed at the May 2016 meeting. Staff said the materials showed some clerks in the Grand Forks area were experimenting with the creation of electronic seals.

Mr. Raum MOVED to approve the proposed Rule 10.3. Mr. Friese seconded.

A member asked if an electronic seal could be used for certified copies of judgments. A member used the example of requiring a certified copy of letters testamentary for recording a personal representative's deed. The member said the county recorders would be required to know of this change if adopted.

A member questioned whether the statute (N.D.C.C. 1-01-38) on seals would allow for an electronic seal. A member said more research and discussion may be necessary on how the electronic seals would be used.

Mr. Raum and Mr. Friese withdrew the motion and second. The Chair said the discussion could continue at the next meeting after more information is gathered.

The proposed rule FAILED for lack of a motion.

RULE 35, N.D.R.APP.P., SCOPE OF REVIEW (PAGES 153-157 OF THE AGENDA MATERIAL)

Staff said Justice Bahr emailed Staff requesting the committee amend Rule 35. Justice Bahr's email explains Rule 35(a)(3)(B) says the Court may remand a case to the district court without relinquishing jurisdiction of the appeal "[i]f an issue or issues have not been tried or, if tried, not determined[.]" There are times when the Court remanding and retaining jurisdiction is appropriate beyond those reasons stated in the rule. Justice Bahr said another reason to remand and retain jurisdiction is to expedite resolution of a case, such as cases involving termination of parental rights or civil commitments. Staff prepared amendments to Rule 35(a)(3)(B) to state "the court may remand and retain jurisdiction to expedite the resolution of a case or in the interests of justice.".

Justice Bahr MOVED to approve the proposed amendments to Rule 35. Mr. Myerchin seconded.

A member said a remand while retaining jurisdiction can expedite the resolution of a case without making a party appeal again if the case is remanded and jurisdiction is not retained. The member said it would be nice to know the court has authority to do that under the rule.

A member said the proposed phrase "in the interests of justice" may be all that is needed and "to expedite the resolution of a case or in" may not be necessary. The movant and second accepted the change as a friendly amendment.

Motion CARRIED.

The Chair asked whether similar language on retaining jurisdiction should be adopted in subdivision (b) of Rule 35 relating to criminal appeals.

Mr. Friese MOVED to add "with or without retaining jurisdiction" after "remand the case" on page 155, line 34. Judge Louser seconded.

A member asked whether the phrase "in the interests of justice" should be included.

Mr. Friese amended his motion to delete "with or without retaining jurisdiction" and add "The court may retain jurisdiction in the interests of justice." at the end of line 34. Judge Louser seconded. Motion CARRIED.

The motion to approve the proposed amendments to Rule 35 as amended CARRIED.

RULE 58, N.D. SUP. CT. ADMIN. R., VEXATIOUS LITIGATION (PAGES 158-169 OF THE AGENDA MATERIAL)

Staff explained Staff attorney Sara Behrens proposed a rewritten version of Rule 58 on vexatious litigation. Staff said the rewritten rule addresses some issues clerks in the district courts are having with vexatious litigant filings. The rewritten rule adds a definition section and a clearer procedure on finding a litigant a vexatious litigant.

Judge Ehlis MOVED to table rewritten Rule 58 to the next meeting to look at the differences between the current rule and the proposed rule. Mr. Quick seconded.

A member asked about the definition of vexatious litigants and noted that an individual may be a vexatious litigant if they lose three cases in seven years. A member said the current rule uses similar language that allows a presiding judge to find that a person is a vexatious litigant if they lose three cases in seven years.

Motion CARRIED.

RULE 11.8, N.D.R.CT., LIMITED PROFESSIONAL GUARDIAN PRACTICE

Staff said the Guardianship Standards Workgroup requested the committee to send the proposed amendments to Rule 11.8 immediately to the Supreme Court.

By unanimous consent, the committee agreed to send the rule immediately to the Supreme Court.

Mr. Friese MOVED to reconsider the amendments to Rule 11.8 made at the September meeting. Justice Bahr seconded.

Mr. Friese MOVED for the following change beginning on line 11:

(1) ~~Submission of~~ Submitting beginning inventory reports, annual reports, final reports, and other routine reports required by statute or rule;

(2) ~~Request~~ Filing a motion for:

(A) a change of venue to another state district court in North Dakota;

(~~3~~B) ~~T~~termination of guardianship due to death of ~~W~~ward; or

(4C) ~~D~~discharge of guardian and appointment of a successor professional guardian legal entity;~~.~~

(~~5~~D) approval of guardian compensation and reimbursement;

(~~6~~E) leave to appear, or for the ward to appear, at a hearing by reliable electronic means; or

(~~7~~F) ~~Request~~ a review hearing.

Mr. Raum seconded. Motion CARRIED.

FOR THE GOOD OF THE ORDER

The Chair said the next meeting is Friday, April 26, in Fargo. The Chair reminded members to submit their expenses for attending the meeting.

Mr. Quick MOVED to adjourn the meeting. Judge Sjue seconded. Motion CARRIED.

The Chair adjourned the meeting at approximately 1:53 p.m. on January 26, 2024.

_____

Andrew Forward

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 5, 2024

RE: Rule 55.1, N.D.R.Civ.P., Consumer Debt Default Judgments

At the committee's January 26, 2024 meeting, retired Judge Hagerty provided information on a uniform act relating to default judgments on consumer debt. Judge Hagerty requested the committee approve the uniform act as a procedural rule. The committee tabled the matter to the April meeting.

Judge Hagerty emailed Staff some additional information since the January meeting, including a response letter to the Rodenburg Law Firm, Minnesota statute 548.101, and the UCDDJA drafting committee roster. The proposed Rule 55.1 is attached, along with the minutes from the January meeting and the additional information from Judge Hagerty. Staff has also attached items from the January meeting, including the letter from the Rodenburg Law Firm and the information packet on the uniform act.

RULE 55.1. CONSUMER DEBT DEFAULT JUDGMENTS

(a) Definitions. In this rule:

(1) "Charge off" means a creditor's removal of a consumer debt as an asset from the creditor's financial records.

(2) "Consumer" means an individual named as a defendant in an action for collection of a consumer debt to which this rule applies.

(3) "Consumer debt" means an obligation or alleged obligation of an individual to pay money that arises out of a transaction in which the money, property, insurance, or service that is the subject of the transaction is primarily for a personal, family, or household purpose.

(4) "Creditor" means a person to which a consumer debt is owed at the time of charge off or, if the debt was not charged off, at the time of default.

(5) "Default", except in the term default judgment, means a failure to satisfy a consumer debt that gives rise to an action to which this rule applies.

(6) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) "Finance charge" has the meaning in Section 106 of the Truth in Lending Act, 15 U.S.C. Section 1605.

(8) "Outstanding balance" means the amount owed on a consumer debt:

(A) at the time of charge off or, if the debt was not charged off, at the time of default; or

(B) after disposition of property that secured the debt.

(9) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(10) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(11) "Secured consumer debt" means a consumer debt secured by real or personal property.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(13) "Unsecured consumer debt" means a consumer debt not secured by real or personal property.

(b) Scope.

(1) Except as provided in paragraph (2), this rule applies to the award of a default judgment in an action for collection of:

(A) an unsecured consumer debt;

(B) a secured consumer debt if the action is brought solely to obtain a money judgment; or

(C) a deficiency that remains after disposition of property that secured a consumer debt.

(2) This rule does not apply to:

(A) an action to take possession of or dispose of real or personal property, even if the action includes a request for a money judgment; or

(B) an action to collect a debt owed to a government, governmental subdivision, or agency in which the government, governmental subdivision, or agency is the plaintiff.

(c) Complaint Requirements.

(1) A default judgment in an action to which this rule applies may be entered only if the complaint or amended complaint complies with this subdivision and includes the notice required under subdivision (d).

(2) The complaint or amended complaint must state:

(A) each name and address of the consumer in the records of the creditor at the time of charge off or, if the consumer debt was not charged off, at the time of default;

(B) the name of the creditor, including any merchant brand, affinity brand, or facility name associated with the debt;

(C) at least the last four digits of the account number or other account identifier used in communicating with the consumer before charge off or, if the debt was not charged off, before default;

(D) the date and amount of the last payment;

(E) the date of charge off or, if the debt was not charged off, the date of default;

(F) the amount of the outstanding balance;

(G) the amount of the judgment the plaintiff seeks, itemizing the outstanding balance and the following amounts not included in the outstanding balance:

(i) total finance charges;

(ii) total fees or costs;

(iii) total attorney's fees; and

(iv) total credits and payments;

(H) a statement whether the amount of the judgment may increase due to accrued interest, fees, or other charges;

(I) the authority of the plaintiff to commence the action;

(J) facts sufficient to demonstrate that the action is being commenced in a proper venue;

(K) facts sufficient to demonstrate that the action is being commenced within the statute of limitation period applicable to the debt; and

(L) unless the plaintiff is the creditor:

(i) the name of each person that acquired ownership of the debt after charge off or, if the debt was not charged off, after default; and

(ii) the date of each acquisition.

(4) Subject to authentication required by other law of this state and rules of procedure, the plaintiff must attach to the complaint or amended complaint:

(A) at least one of the following that is sufficient to demonstrate the existence of the consumer debt:

(i) an agreement signed by the consumer;

(ii) a record of a purchase, payment, or use of an account; or

(iii) a record otherwise demonstrating the debt was incurred; and

(B) if the plaintiff is not the creditor, documentation sufficient to demonstrate the authority of the plaintiff to collect the debt.

(d) Consumer notice.

(1) A default judgment may be entered in an action to which this rule applies only if the complaint or amended complaint served on the consumer is accompanied by a separate notice warning that a default judgment may be awarded against the consumer.

(2) The notice must be in a record substantially similar to the form in paragraph (3) stating:

(A) if the consumer does not file an answer to the complaint or amended complaint within the time and in the manner indicated in the summons, a default judgment may be entered against the consumer;

(B) if a judgment is entered against the consumer, the amount of the judgment, plus interest on the judgment as provided by other law of this state, remains in effect until at least ten years, even if the judgment no longer remains on the consumer's credit report;

(C) after entry of a judgment, the plaintiff may take steps to sell real estate owned by the consumer, sell personal property owned by the consumer, attach the consumer's bank accounts, and garnish the consumer's wages;

(D) entry of a judgment may impair access to employment, insurance, credit, or housing; and

(E) an attorney may provide assistance in understanding the complaint or amended complaint and advice about what action to take in response to the complaint or amended complaint; and

(F) the name and contact information for a legal aid or attorney referral service that may be able to help the consumer find an attorney, and if the consumer cannot afford an attorney, may be able to provide free or reduced-cost legal services.

(3) The following notice meets the requirements of this section:

Consumer Notice

Warning

If you do not act, a default judgment may be entered against you

1. Why am I getting this notice?	You are getting this notice because (name of plaintiff) says you owe money. (Name or shortened name of plaintiff) has filed a lawsuit against you to collect the money.
2. What will happen if I do nothing?	If you do not file a response to the lawsuit, a judgment may be entered against you.
3. What happens if a judgment is entered against me?	Your personal property may be taken and sold. Money may be taken directly from your bank account. Money may be taken directly from your wages. A lien may be put on your house or other real estate and the house or real estate may be sold.

	If the judgment is not paid in full, the amount due may grow because of interest charges. You will owe the amount of the judgment for at least ten years, even if it no longer appears on your credit report. [The judgment will be in effect for x years but may be renewed as allowed by state law.] The judgment may make it harder for you to get a job or insurance and more expensive for you to get a loan or credit card, rent an apartment, or buy a house or car.
4. Is help available?	Talk with a lawyer. A lawyer can explain the situation and help you decide what to do. If you cannot afford a lawyer, you may be able to obtain one for free or reduced cost.

(e) Waiver Void. A waiver by a consumer of a requirement of this rule is void. This section does not prevent a voluntary settlement agreement or judgment between the parties that does not result in a default judgment.

(f) Relation to Other Law. This rule supplements rights and remedies available to a consumer under other law of this state.

(g) Uniformity of Application and Construction. In applying and construing this rule, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

(h) Relation to Electronic Signatures in Global and National Commerce Act. This rule modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

(i) Transitional Provision. This rule applies to an action commenced on or after _____.

(j) Effective Date. This rule takes effect _____.

EXPLANATORY NOTE

Rule 55.1 was adopted effective _____.

Rule 55.1 is derived from the Uniform Consumer Debt Default Judgments Act, approved by the Uniform Law Commission in 2023.

SOURCES: Joint Procedure Committee Minutes of _____.

STATUTES AFFECTED:

CONSIDERED:

CROSS REFERENCE: N.D.R.Civ.P. 55 (Default; Default Judgment).

Mr. Michael Raum

Absent:
Honorable Bradley Cruff
Honorable Bruce Romanick
Honorable Lolita Hartl Romanick
Honorable Barb Whelan
Ms. Aften Grant
Prof. Denitsa Heinrich
Ms. Lisa Hettich
Mr. Seymour Jordan

Guest:
Judge Gail Hagerty

Staff:
Andy Forward

PRELIMINARY MATTERS

The Chair welcomed new members Judge Stacy Louser and Robert Quick. The Chair welcomed retired Judge Gail Hagerty, Uniform Law Commissioner, who was present to provide information and answer questions about a proposed rule on the meeting agenda.

APPROVAL OF MINUTES

Judge Ehlis MOVED to approve the minutes. Mr. Bubach seconded. Staff was instructed to make minor corrections to the minutes. The motion to approve the minutes with the corrections CARRIED.

RULE 55.1, N.D.R.CIV.P., CONSUMER DEBT DEFAULT JUDGMENTS (PAGES 110-152 OF THE AGENDA MATERIAL)

Staff explained Judge Hagerty presented information on a uniform law relating to consumer debt default judgments at the Supreme Court's December 19, 2023 rulemaking meeting. Judge Hagerty said there is a lot of material about the uniform act, including comments, but she wanted to provide some background information to the committee. Judge Hagerty presented a PowerPoint on the uniform act. Judge Hagerty said the uniform act was in the drafting process for two years. Judge Hagerty said the act was initiated by the Conference of Chief Justices. Judge Hagerty said some states already have laws and court rules providing enhanced pleading requirements for consumer debt cases.

Judge Hagerty said the proposed rule would apply mainly to unsecured consumer debt. She said the rule requires additional information in the complaint, including identification of the creditor and the debt. A notice to the debtor would also be required to be served with the complaint. The notice explains the actions to be taken to avoid a default judgment.

A member asked whether the act was substantive enough that it should be a law, and whether the uniformity of the act would be affected if it was a court rule instead of a statute. Judge Hagerty said uniformity would not be affected. She said state specific changes could be made to the act to make it work better in the state. She thinks this act is more procedural and could be enacted as a rule.

A member asked whether Judge Hagerty had seen a letter from a Fargo law firm raising concerns about the proposed rule. Judge Hagerty said she would like to see the concerns raised in the letter fleshed out more, and those concerns were not raised by the debt collection community during the drafting of the uniform act.

A member asked about collecting attorney's fees under the proposed rule. Some members said it was their view attorney's fees would not be allowed for consumer debt because it is prohibited by statute.

A member said he was contacted by a Bismarck attorney who raised some concerns about the proposed rule: 1) it goes above and beyond the state's notice pleadings; and 2) the act may give extra duties to the district court clerks to ensure everything is in the complaint before it is accepted for filed. Judge Hagerty said some family law cases require additional information in the pleadings. The Chair said it could be possible to require these kinds of cases to be filed in one county to ensure uniformity.

A member expressed concern that the proposed rule provides consumer protections which is a public policy issue. The member said there should be legislation enacting this uniform act. The member said citizens are expected to know the law but they are not expected to know the rules of court or the rules of civil procedure.

A member asked whether other areas of law require higher pleading standards. The member said he was unsure whether the committee should be making a policy decision relating to consumer debt. The member thought the legislature may be better suited for that. Judge Hagerty said these cases can take a lot of a judge's time, and additional information from the creditors would be helpful. A member said additional protections for the consumer isn't necessarily a bad thing.

The Chair said the committee will continue discussing the proposed rule at the April meeting. The Chair thanked Judge Hagerty for her time.

RODENBURG LAW FIRM

CREDITORS' RIGHTS LAW,
COLLECTIONS, AND
RELATED MATTERS

300 NP Ave N #105, PO Box 2427
Fargo, North Dakota 58108-2427
Tel. (701) 235-6411
Fax (701) 235-6678
Toll Free (800) 726-1821
www.rodenburgllp.com

COVERING MINNESOTA,
MONTANA, NORTH DAKOTA,
SOUTH DAKOTA AND WYOMING

January 25, 2024

Re: Uniform Consumer Debt Default Judgments Act Considerations

Members of the Joint Procedure Committee,

The Rodenburg Law Firm has represented creditors in North Dakota, Minnesota, South Dakota, Wyoming, and Montana since 1976. The possibility of adoption of this Act is very important to our firm as well as to other firms representing creditors and collection contractors. We wish to properly address the issues, which may not be readily apparent to those who are not involved in the collections industry, but unfortunately are not able to fully address them before the meeting.

We only learned yesterday that the Uniform Consumer Debt Default Judgments Act was going to be discussed at the January 26, 2024 meeting. Creditor bar associations and state collection agency groups are monitoring introduction of this Act in various state legislatures not the judicial branches.

We urge the committee to keep an open mind until all affected voices have been heard.

In an effort to highlight some of our most pressing concerns, I have put together a very brief list below for consideration. I hope either myself or another representative for the industry will be afforded an opportunity to discuss these concerns in more detail before any final decisions or recommendations are made by the Committee.

- Privacy concerns - Act conflicts with consumer privacy laws by mandating descriptions and breakdowns of debt that could expose private, uncomfortable information with respect to medical or similar debts covered by the Act
- Act conflicts with the ethics rules governing attorneys advocating for their clients
- Act conflicts with the North Dakota Rules of Civil Procedure
- Act conflicts with the Fair Debt Collection Practices Act
- Act conflicts with Federal Regulation F requirements of creditors
- Act results in disparate impact, raising questions of constitutionality
- Act will increase costs for every institution involved, costs which would inevitably be passed down to consumers/debtor defendants

Thank you in advance for your time and consideration.

Sincerely,
RODENBURG LAW FIRM

Amanda Lee
Attorney

P.O. Box 144
Bismarck, ND 58503
March 21, 2024

Amanda Lee
Attorney at Law
Rodenburg Law Firm
P.O. Box 2427
Fargo, ND 58108-2427

Dear Ms. Lee:

I am writing to obtain more information about the letter you addressed to members of the Joint Procedure Committee dated January 25, 2024. You and another member of your firm were observers during the drafting process for the Uniform Consumer Debt Default Judgments Act and did not raise concerns during that lengthy process. As you know, there were representatives of Receivables Management Association International, a non-profit which represents more than 600 companies that support the purchase, sale, and collection of performing and nonperforming receivables on the secondary market, who participated extensively in the discussion and drafting of the Act, and they did not share the concerns you have raised. There were also representatives of a number of consumer advocacy groups, the PEW Charitable Trust, financial institutions, and the National Center for State Courts involved in the process who did not share your concerns. For the information of the Joint Procedure Committee, I have attached a full roster listing those involved in the process.

While you cite privacy concerns, the consumer advocates did not share your concern. A balance can be struck which provides consumers with sufficient information to identify the source of a debt without revealing the type of information which would impact on consumer privacy concerns.

Ethics rules do not prohibit attorneys from sharing relevant information in discovery or in response to court rules which provide for sharing of information necessary to fairly resolve disputes.

The proposed rule would not conflict with the North Dakota Rules of Civil Procedure. It would supplement those rules, just as they are supplemented in other areas, including the rules in family law matters.

I'm unclear as to how you believe the proposed act would conflict with the Fair Debt Collection Practices Act or the Federal Regulation F requirements for creditors. Perhaps you could clarify that in advance of the April meeting of the Joint Procedure Committee, since those concerns weren't raised by anyone during the lengthy uniform law drafting process.

As you know, enhanced pleading provisions have been enacted in many states, and I am not aware of any evidence that those rules have resulted in increased costs to consumers or debtor defendants.

Because you practice in Minnesota, you must be aware of the enhanced pleading provisions included in Section 548.101 of the Minnesota statutes. I am attaching a copy of that provision for the benefit of the members of the Joint Procedure Committee.

Representatives of the Uniform Law Commission will be pleased to continue this discussion with you as you provide more specific information about your concerns.

Sincerely,

Gail Hagerty

548.101 ASSIGNED CONSUMER DEBT DEFAULT JUDGMENTS.
(a) A party entitled to a judgment by default in a conciliation court or district court action upon an assigned obligation arising out of any consumer debt that is primarily for personal, family, or household purposes and in default at the time of assignment shall apply to the court and submit, in addition to the request, application, or motion for judgment:

(1) a copy of the written contract between the debtor and original creditor or, if no written contract exists, other admissible evidence establishing the terms of the account relationship between the debtor and the original creditor, including the moving party's entitlement to the amounts described in clause (4). If only the balance owed at the time the debt was charged off or first assigned is claimed to be owed, evidence may include a monthly or periodic billing statement;

(2) admissible evidence establishing that the defendant owes the debt;

(3) the last four numbers of the debtor's Social Security number, if known;

(4) admissible evidence establishing that the amount claimed to be owed is accurate, including the balance owed at the time the debt was charged off or first assigned to another party by the original creditor and, if included in the request, application, or motion for judgment, a breakdown of any fees, interest, and charges added to that amount;

(5) admissible evidence establishing a valid and complete chain of assignment of the debt from the original creditor to the party requesting judgment, including documentation or a bill of sale evidencing the assignment with evidence that the particular debt at issue was included in the assignment referenced in the documentation or bill of sale;

(6) in district court cases, proof that a summons and complaint were properly served on the debtor and that the debtor did not serve a timely answer or, in conciliation court cases, proof that the party seeking the judgment or the party's attorney used reasonable efforts to provide the court administrator with the correct address for the debtor; and

(7) in district court cases, proof that the party requesting the default judgment or the party's attorney mailed a notice of intent to apply for default judgment to the debtor. The notice must be mailed to the debtor at the debtor's last known address at least 14 days before the request, application, or motion for default, and must be substantially in the following form:

Notice of Intent to Apply for Default Judgment Case Type - Consumer Credit Contract
STATE OF MINNESOTA DISTRICT COURT
COUNTY OF
.....
.....
.....
.....

.....

....

.....

.....

.....

.....

..... JUDICIAL DISTRICT

.....

.....

.....

.....

.....

..... **Plaintiff,** **NOTICE OF INTENT TO APPLY FOR DEFAULT JUDGMENT**

vs.

.....

.....

.....

.....

.....

..... **Defendant.** **Court File No.**

.....

.....

.....

.....

.....

.....

..... [Plaintiff] has sued you to collect the following consumer debt that you originally owed to ..... [original creditor]:

..... [original creditor]

..... [last four digits of the debtor's account number]

..... [amount of debt]

..... [date of charge off or account closing date]

..... [Plaintiff] served this lawsuit on you on ..... [date]. Under Minnesota law, a lawsuit may be started against you even though it has not yet been filed in court and the court has no record of this lawsuit or this paperwork. You are in default because you did not serve a written Answer on time. ..... [Plaintiff] will ask the Court to enter a judgment against you without any further court proceedings, unless you mail a written Answer or written response contesting the debt within 14 days from the date below. A judgment is a court order that you must pay a certain amount of money.

Dated:

.....

.....

.....

.....

.....

..... **LAW FIRM, P.A.**

.....
.....
.....
.....
.....
.....

Attorney Name, ID#
Address
Phone

(b) If admissible, the same item of evidence or document may be provided to satisfy more than one requirement under paragraph (a), clauses (1) to (5). A court may permit the foundation for documents submitted under paragraph (a) to be established by an affidavit.

(c) Except in conciliation court cases or if a hearing is required under court rules, the court may either:

(1) hold a hearing before entry of a default judgment; or

(2) enter an administrative default judgment without a hearing if the court determines that the evidence submitted satisfies the requirements of paragraph (a).

Request for Consideration
of the North Dakota Supreme Court
by Gail Hagerty
December 19, 2023

As a members of the North Dakota delegation to the Uniform Law Commission, Justice Tufte and I would like to bring to your attention a project regarding default judgments for the collection of consumer debts undertaken by the Commission. The project was initiated with a 2018 Resolution of the Conference of Chief Justices, *In Support of Rules Regarding Default Judgments in Debt Collection Cases*, and a 2020 Report of the National Center of State Courts and the Institute for the Advancement of the American Legal System, *Preventing Whack-a-Mole Management of Consumer Debt Cases: A Proposal for a Coherent and Comprehensive Approach for State Courts*.

After more than three years of deliberations, at its 2023 Annual Meeting the Uniform Law Commission approved a Consumer Debt Default Judgments Act. The Act, which is appropriate for adoption as a court rule. It prevents plaintiffs from applying for, and courts from granting, default judgments in consumer debt collection actions without first providing both the court and consumer with certain basic information. The Act requires plaintiffs to give consumers information needed to understand the claim being asserted against them and identify possible defenses. The Act also requires a notice to be given consumers of the adverse effects of failing to timely raise defenses or seek the voluntary settlement of claims before they are able to obtain a default judgment. The Act seeks to provide a uniform framework in which courts can fairly, efficiently, and promptly evaluate the merits of requests for default judgments while balancing the interests of all parties.

On behalf of the North Dakota Uniform Law Commission, I request the Joint Procedure Committee consider enacting the provisions of this Act in rule form. It is a procedural matter, and therefore appropriate for enactment as a Court rule..

Numerous studies report that default judgments are entered in more than half of all debt collection actions. A 2016 Consumer Financial Protection Bureau survey of debt collection firms and vendors, *Study of Third Party Debt Collection Practices* (July 2016), reported that 60 to 90 percent of judicial debt collection actions result in a default judgment, with the percentage appearing to vary by jurisdiction. Based on caseload statistics from the National Center of State Courts and from individual states, the Pew Charitable Trusts reported in 2020, *How Debt Collectors Are Transforming the Business of State Courts* (May 2020), that in jurisdictions in which data are available, 70% of all debt collection judgments were default judgments and default judgments were more common when the debtor resided in a largely minority neighborhood.

More than ten years ago, the Federal Trade Commission issued a report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), recommending that states adopt measures to make it more likely that consumers will defend in litigation by requiring debt collectors to include more information about the debt in their complaints, in particular information to avoid suits seeking collection of time-barred debt. Consistent with the FTC's recommendations, the Conference of Chief Justices' Resolution calls for the enactment of legal requirements "requiring plaintiffs in debt collection cases to file documentation demonstrating their legal entitlements to the amounts they seek to collect before entry of any default judgment."

Pennsylvania Uniform Law Commissioner Ray Pepe chaired the drafting committee. I had the privilege as serving the chair of the study committee which recommended drafting a uniform act and as the drafting committee's vice chair. The work of the drafting committee was supported by many advisors and observers, including representative of the American Bar Association, the National Center for State Courts, the National Consumer Law Center, the National Association of Consumer Advocates, the Pew Charitable Trusts, the Receivable Management Industry Association International, ACA International (The Association of Credit and Collection Professionals), the National Creditors Bar Association.

A copy of the Uniform Act is included with a very rough draft of a proposed rule.

Rule xxx. Uniform Consumer Debt Default Judgments

(a) Definitions. In this rule:

(1) "Charge off" means a creditor's removal of a consumer debt as an asset from the creditor's financial records.

(2) "Consumer" means an individual named as a defendant in an action for collection of a consumer debt to which this rule applies.

(3) "Consumer debt" means an obligation or alleged obligation of an individual to pay money that arises out of a transaction in which the money, property, insurance, or service that is the subject of the transaction is primarily for a personal, family, or household purpose.

(4) "Creditor" means a person to which a consumer debt is owed at the time of charge off or, if the debt was not charged off, at the time of default.

(5) "Default", except in the term default judgment, means a failure to satisfy a consumer debt that gives rise to an action to which this rule applies.

(6) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) "Finance charge" has the meaning in Section 106 of the Truth in Lending Act, 15 U.S.C. Section 1605[, as amended].

(8) "Outstanding balance" means the amount owed on a consumer debt:

(A) at the time of charge off or, if the debt was not charged off, at the time of default; or

(B) after disposition of property that secured the debt.

(9) "Person" means an individual, estate, business or nonprofit entity, government

or governmental subdivision, agency, or instrumentality, or other legal entity.

(10) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(11) "Secured consumer debt" means a consumer debt secured by real or personal property.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(13) "Unsecured consumer debt" means a consumer debt not secured by real or personal property.

(b) Scope.

(1) Except as provided in subsection (2), this rule applies to the award of a default judgment in an action for collection of:

(A) an unsecured consumer debt;

(B) a secured consumer debt if the action is brought solely to obtain a money judgment; or

(C) a deficiency that remains after disposition of property that secured a consumer debt.

(2) This [act] does not apply to:

(A) an action to take possession of or dispose of real or personal property, even if

the action includes a request for a money judgment; or

(B) an action to collect a debt owed to a government, governmental subdivision, or agency in which the government, governmental subdivision, or agency is the plaintiff.

(c) Complaint Requirements

(1) A default judgment in an action to which this rule applies may be entered only if the complaint or amended complaint complies with this section and includes the notice required under Section d.

(2) The complaint or amended complaint must state:

(A) each name and address of the consumer in the records of the creditor at the time of charge off or, if the consumer debt was not charged off, at the time of default;

(B) the name of the creditor, including any merchant brand, affinity brand, or facility name associated with the debt;

(C) at least the last four digits of the account number or other account identifier used in communicating with the consumer before charge off or, if the debt was not charged off, before default;

(D) the date and amount of the last payment;

(E) the date of charge off or, if the debt was not charged off, the date of default;

(F) the amount of the outstanding balance;

(G) the amount of the judgment the plaintiff seeks, itemizing the outstanding balance and the following amounts not included in the outstanding balance:

(i) total finance charges;

(ii) total fees or costs;

(iii) total attorney's fees; and

(iv) total credits and payments;

(H) a statement whether the amount of the judgment may increase due to accrued interest, fees, or other charges;

(I) the authority of the plaintiff to commence the action;

(J) facts sufficient to demonstrate that the action is being commenced in a proper venue;

(K) facts sufficient to demonstrate that the action is being commenced within the statute of limitation period applicable to the debt; and

(L) unless the plaintiff is the creditor:

(i) the name of each person that acquired ownership of the debt after charge off or, if the debt was not charged off, after default; and

(ii) the date of each acquisition.

(4) Subject to authentication required by other law of this state and rules of procedure, the plaintiff must attach to the complaint or amended complaint:

(A) at least one of the following that is sufficient to demonstrate the existence of the consumer debt:

(i) an agreement signed by the consumer;

(ii) a record of a purchase, payment, or use of an account; or

(iii) a record otherwise demonstrating the debt was incurred; and

(B) if the plaintiff is not the creditor, documentation sufficient to demonstrate the authority of the plaintiff to collect the debt.

d. Consumer Notice.

(1) A default judgment may be entered in an action to which this rule applies only if the

complaint or amended complaint served on the consumer is accompanied by a separate notice warning that a default judgment may be awarded against the consumer.

(2) The notice must be in a record substantially similar to the form in subsection (c) that states:

(A) if the consumer does not file an answer to the complaint or amended complaint within the time and in the manner indicated in the summons, a default judgment may be entered against the consumer;

(B) if a judgment is entered against the consumer, the amount of the judgment, plus interest on the judgment as provided by other law of this state, remains in effect until at least ten years, even if the judgment no longer remains on the consumer's credit report;

(C) after entry of a judgment, the plaintiff may take steps to sell real estate owned by the consumer, sell personal property owned by the consumer,attach the consumer's bank accounts, and garnish the consumer's wages;

(D) entry of a judgment may impair access to employment, insurance, credit, or housing; [and]

(E) an attorney may provide assistance in understanding the [complaint] or amended [complaint] and advice about what action to take in response to the [complaint] or amended [complaint][; and

(F) the name and contact information for a legal aid or attorney referral service that may be able to help the consumer find an attorney, and if the consumer cannot afford an attorney, may be able to provide free or reduced-cost legal services].

(3) The following notice meets the requirements of this section:

Consumer Notice

Warning
If You Do Not Act, A Default Judgment May Be Entered Against You

1. Why Am I Getting This Notice?	You are getting this notice because (name of plaintiff) says you owe money. (Name or shortened name of plaintiff) has filed a lawsuit against you to collect the money.
2. What Will Happen If I Do Nothing?	If you do not file a response to the lawsuit, a judgment may be entered against you.
3. What Happens If A Judgment Is Entered Against Me?	Your personal property may be taken and sold. Money may be taken directly from your bank account.Money may be taken directly from your wages.A lien may be put on your house or other real estate and the house or real estate may be sold. If the judgment is not paid in full, the amount due may grow because of interest charges. You will owe the amount of the judgment for at least ten years, even if it no longer appears on your credit report. The judgment may make it harder for you to get a job or insurance and more expensive for you to get a loan or credit card, rent an apartment, or buy a house or car.
4. Is Help Available?	Talk with a lawyer. A lawyer can explain the

situation and help you decide what to do. If you cannot afford a lawyer, you may be able to obtain one for free or reduced cost.

e. Waiver Void. A waiver by a consumer of a requirement of this rule is void. This section does not prevent a voluntary settlement agreement or judgment between the parties that does not result in a default judgment.

f. Relation to Other Law. This rule supplements rights and remedies available to a consumer under other law of this state.

g. Uniformity of Application and Construction. In applying and construing this rule, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

h. Relation to Electronic Signatures in Global and National Commerce Act. This rule modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

i. Transitional Provision. This rule applies to an action commenced on or after _____.

j. Severability. If a provision of this rule or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.

k. Effective Date. This rule takes effect . . .

Uniform Consumer Debt Default Judgments Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

WITH COMMENTS

October 27, 2023

ABOUT ULC

The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 132nd year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up to date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

Drafting Committee on Uniform Consumer Debt Default Judgments Act

The Committee appointed by and representing the Uniform Law Commission in preparing this act consists of the following individuals:

Raymond P. Pepe	Pennsylvania, *Chair*
Gail Hagerty	North Dakota, *Vice Chair*
Thomas J. Buiteweg	Michigan
David Certo	Indiana
Jack Davies	Minnesota
Jeffrey T. Ferriell	Ohio
Michael A. Ferry	Missouri
Lorie D. Fowlke	Utah
Eric A. Koch	Indiana
James G. Mann	Pennsylvania
Nora Winkelman	Pennsylvania, *Division Chair*
Dan Robbins	California, *President*

Other Participants

Judith Fox	Indiana, *Reporter*
Steven M. Richman	New Jersey, *American Bar Association Advisor*
Louise M. Nadeau	Connecticut, *Style Liaison*
Tim Schnabel	Illinois, *Executive Director*

Copies of this act may be obtained from:

Uniform Law Commission
111 N. Wabash Ave., Suite 1010
Chicago, IL 60602
(312) 450-6600
www.uniformlaws.org

Uniform Consumer Debt Default Judgments Act

Table of Contents

Uniform Consumer Debt Default Judgments Act

Prefatory Note

History and Need

Structure and Operation of the Act

The act is structured to prevent plaintiffs from applying for, and courts from granting, default judgments in consumer debt collection actions without first providing both the court and consumer with certain basic information. The act requires plaintiffs to give consumers information needed to understand the claim being asserted against them and identify possible defenses. Under the act, plaintiffs are also required to provide the consumer with a notice that advises them of the adverse effects of failing to timely raise defenses or seek the voluntary settlement of claims before they are able to obtain a default judgment.

The act seeks to provide a uniform framework in which courts can fairly, efficiently, and promptly evaluate the merits of requests for default judgments while balancing the interests of all parties and the courts. Additionally, it provides plaintiffs with consistent, uniform rules for how to obtain a default judgment in consumer debt collection actions.

History of the Problem the Act Seeks to Address

The Federal Reserve Bank of New York's *Quarterly Report on Household Debt and Credit* (August 2023) tells us that in the second quarter of 2023 consumers owed nearly $17.06 trillion dollars in consumer debt. Additionally, 4.6% of all consumers had at least one third-party collection account on their credit report and 8.0% of all credit card balances were more than 90 days delinquent. As a result, a substantial number of Americans are dealing with debt collection activity.

The award of judgments by default in judicial proceedings against consumers has raised concerns across the country. Numerous studies report that default judgments are entered in more than half of all debt collection actions. A 2016 Consumer Financial Protection Bureau ("CFPB") survey of debt collection firms and vendors, *Study of Third Party Debt Collection Practices* (July 2016), reported that 60 to 90 percent of judicial debt collection actions result in a default judgment, with the percentage appearing to vary by jurisdiction. Based on caseload statistics from the National Center for State Courts and from individual states, the Pew Charitable Trusts reported in 2020, *How Debt Collectors Are Transforming the Business of State Courts* (May 2020), that in jurisdictions in which data are available, 70% of all debt collection judgments were default judgments and default judgments were more common when the debtor resided in a largely minority neighborhood.

More than ten years ago, the Federal Trade Commission ("FTC") issued a report, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (July 2010), setting out the concerns and making recommendations for change. Some of the findings and recommendations are found below:

- "States should consider adopting measures to make it more likely that consumers will defend in litigation;"
- "States should require collectors to include more information about the debt in their complaints;" and
- "States should take steps to make it less likely that collectors will sue on time-barred debt and that consumers will unknowingly waive statute of limitation defenses available to them."

FTC and CFPB enforcement actions have led to the development of standards by banking regulators for the sale of debts, *Consumer Debt Sales Risk Management Guidance*, OCC Bulletin 2014-37 (August 4, 2014), and the development of standards and credentialing within the debt collection industry (*see e.g., Receivables Management Certification Program Overview*, Receivables Management Association International (March 2023). Yet, problems still exist. In August of 2018, the Conference of Chief Justices passed a resolution *In Support of Rules Regarding Default Judgments in Debt Collection Cases.* The resolution cites a number of reasons why reform is still needed, including, among other things, the following facts:

- more than one in three adults in the United States have a debt in collection;
- the vast majority of debt collection cases result in default judgments;
- defendants in debt collection cases often lack the resources to hire counsel and may not understand their rights and defenses;
- plaintiffs who obtain default judgments in debt collection cases often invoke powerful post-judgment collection remedies;
- debt collection complaints are sometimes initiated after the statute of limitations for such actions has expired;
- debt collection cases are increasingly filed by third-party debt buyers;
- debt collection complaints are often served at addresses where the defendant no longer lives; and
- plaintiffs file debt collection cases in which they frequently do not provide defendants with the information necessary to assess the validity of their claims.

The Conference of Chief Justices' resolution calls for the enactment of legal requirements "requiring plaintiffs in debt collection cases to file documentation demonstrating their legal entitlements to the amounts they seek to collect before entry of any default judgment."

The National Center for State Courts and the Institute for the Advancement of the American Legal System issued a report in 2020 entitled *Preventing Whack-a-Mole Management of Consumer Debt Cases: A Proposal for a Coherent and Comprehensive Approach for State Courts.* The report notes that "nearly one in four civil cases filed in state courts involve consumer debt collection." It explains that these cases are often filed in courts with "high-volume dockets, for which judges and court staff often lack the resources and expertise to scrutinize claims." As the report points out, courts have an obligation to monitor "compliance with procedural due process" for "both contested and uncontested cases" because so many consumer debt collection cases are resolved by default judgment.

Ad hoc measures have been implemented across the country, resulting in uneven justice and complicated procedures that differ not just from state to state, but from court to court within states. Uniform reforms are needed. Specifically, the Report of the National Center for State Courts calls for changes relating to due process involving "notice, standing, timeliness, and sufficiency of documentation supporting the relief sought." According to the report, these reforms are needed in part because "the vast majority of defendants will be navigating the rules without attorney representation."

In November of 2022, the Michigan Justice for All Commission released a report and study, *Advancing Justice for All in Debt Collection Lawsuits.* Like all previous studies, it found that debt collection was dominating the Michigan District Courts. Most cases are resolved by default, usually resulting in a wage garnishment. The Commission's recommendations mirror those of the earlier studies. They include "[i]ncreasing the amount of information to be included in the complaint to help ensure the plaintiff has provided sufficient evidence to support a default judgment." This act seeks to do just that.

Other State Laws

During the time this act was under development, close to one third of the states had enacted statutes or court rules to deal with consumer debt collection practices and default judgments. This act incorporates the provisions that are most consistent across those statutes and rules, such as a requirement to provide information about the debt in the complaint, information regarding standing to bring the case, and documentation that establishes the existence and ownership of the debt. In particular, this act seeks to incorporate provisions from rules of procedure in Texas (Tex. Fin. Code § 392.307) and Indiana (Ind. Code § 24-5-15.5-5; Trial Rule 9.2; Small Claims Rule 2(B)), recently passed laws in New York and California, and standards set by Receivables Management Association International, a debt collections trade organization. New York's Consumer Credit Fairness Act (2021 N.Y. Sess. Laws 1523 (McKinney)) and California's Fair Debt Buying Practices Act (Civil Code §§ 1788.58 & 1788.60) were passed with collaboration from financial institutions, debt buyers and debt collectors, and consumers. While both the California and New York laws deal with a broader array of consumer debt collection procedures than this act, the act adopts the core principles of those statutes to give consumers the information needed to understand claims being asserted against them and to provide courts the information needed to evaluate the circumstances in which default judgments are entered.

This act differs from many existing state laws that apply only to debt buyers. In the development of this act, observers representing the debt collection industry, courts, and consumers all rejected a narrow scope. Courts have neither the time nor the staff to evaluate each complaint to determine if the plaintiff is or is not a debt buyer. Uniform rules make it easier for courts to handle the volume of debt collection actions many courts are experiencing. Likewise, the debt collection industry objected to having different rules that apply depending on whether the collector originated, was assigned, or purchased the underlying debt. A uniform set of rules for all debts and all states is a more efficient system for all involved.

This act also expressly excludes most claims for the collection of secured debts. Secured debts are regulated by other statutes, including provisions of the Uniform Commercial Code,

state motor vehicle finance laws, mortgage foreclosure laws, and laws creating statutory liens on property. Because of the diversity and complexity of these other laws, the act focuses on the area of greatest exposure to default judgments, i.e., unsecured consumer debts, deficiency judgments, and actions seeking only money judgments.

This act is not a state corollary to the Fair Debt Collection Practices Act. The federal act deals with a broad range of debt collection activities, while this act deals only with the filing of a collection lawsuit. As a result, it will not impose any additional requirements for communications between the creditor and the consumer in the early stages of default. This act does not create or enhance any liability for attorneys involved in debt collection. Therefore, the act should be enacted as a stand-alone statute or court rule, and not as part of a state Fair Debt Collection Practices Act.

Uniform Consumer Debt Default Judgments Act

Section 1. Title

This [act] may be cited as the Uniform Consumer Debt Default Judgments Act.

Section 2. Definitions

In this [act]:

(1) "Charge off" means a creditor's removal of a consumer debt as an asset from the creditor's financial records.

(2) "Consumer" means an individual named as a defendant in an action for collection of a consumer debt to which this [act] applies.

(3) "Consumer debt" means an obligation or alleged obligation of an individual to pay money that arises out of a transaction in which the money, property, insurance, or service that is the subject of the transaction is primarily for a personal, family, or household purpose.

(4) "Creditor" means a person to which a consumer debt is owed at the time of charge off or, if the debt was not charged off, at the time of default.

(5) "Default", except in the term default judgment, means a failure to satisfy a consumer debt that gives rise to an action to which this [act] applies.

(6) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(7) "Finance charge" has the meaning in Section 106 of the Truth in Lending Act, 15 U.S.C. Section 1605[, as amended].

(8) "Outstanding balance" means the amount owed on a consumer debt:

(A) at the time of charge off or, if the debt was not charged off, at the time of default; or

(B) after disposition of property that secured the debt.

(9) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity.

(10) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(11) "Secured consumer debt" means a consumer debt secured by real or personal property.

(12) "Sign" means, with present intent to authenticate or adopt a record:

(A) execute or adopt a tangible symbol; or

(B) attach to or logically associate with the record an electronic symbol, sound, or process.

(13) "Unsecured consumer debt" means a consumer debt not secured by real or personal property.

Legislative Note: *It is the intent of this act to incorporate future amendments to the federal law cited in paragraph (7) and Section 9. A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase "as amended." A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

Comment

The definition of "charge off" is meant to mirror the accounting term of the same name. It is understood that not all creditors "charge off" their debts. However, "charge off" is the point at which most consumer debts go into collection. A consumer debt does not need to be formally "charged off" for this act to apply.

The definition of "consumer" is meant to be broad enough to include the individual obligated to repay the consumer debt as well as a guarantor of the debt or the individual's personal representative, guardian, or person acting in a representative capacity who might be the person named as defendant in the collection action.

The definition of "consumer debt" is widely used in the industry and is derived from the definition found in the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(5). The term is meant to incorporate the meaning and interpretation of consumer debt as developed in the extensive case law relating to the federal law.

A "creditor" is the person to which a consumer debt was owed at the time of charge off or default that gives rise to a cause of action subject to this act. The plaintiff, on the other hand, is the person to which the consumer debt is owed when a proceeding for collection of the debt commenced. Suppose, for example, that Bank A originated a loan, and was then acquired by Bank B, which was then acquired by Bank C. The consumer defaults on the loan and Bank C charges off the loan and commences a suit to collect the debt. Bank C would be both the "creditor" and the plaintiff for purposes of this act. Bank C remains the "creditor" even if it charged off the loan and instead of commencing a lawsuit, sold the debt to a third-party debt collector and that third party commences the suit. However, in this case, the plaintiff is now the third-party debt collector. Bank C remains the "creditor" for purposes of this act no matter how many times the debt is sold or transferred prior to commencing a suit.

The definition of "default" does not apply when the word "default" is used as part of the phrase "default judgment," such as in Section 3(a), Section 4(a), Section 5, and Section 6. "Default judgment" is not defined, but instead is determined based on other state law.

The definition of "outstanding balance" is the total amount due to the creditor at the time of charge off or default. This is normally the amount of the consumer debt incurred with the originator of the debt minus any payments made on the debt. The "outstanding balance" would include any such finance charges, costs, or fees that have been added to the original amount of the consumer debt prior to charge off or the default that led to the filing of the action. It is not necessary to itemize these items when stating the amount of the outstanding balance, unless required by other state law.

If the debt was a "secured consumer debt", the "outstanding balance" means the amount of the debt that remains unpaid after disposition of the real or personal property that secured the debt. This amount includes charges and fees incurred by the creditor when disposing of the collateral. As with unsecured debt, it is not necessary to itemize these amounts when stating the outstanding balance, unless required by other state law.

A "secured consumer debt" is a debt secured by real or personal property. Likewise, an "unsecured consumer debt" does not include any debt secured by such a lien. In both cases, personal property includes both tangible and intangible personal property.

Section 3. Scope

(a) Except as provided in subsection (b), this [act] applies to the award of a default judgment in an action for collection of:

(1) an unsecured consumer debt;

(2) a secured consumer debt if the action is brought solely to obtain a money judgment; or

(3) a deficiency that remains after disposition of property that secured a consumer debt.

(b) This [act] does not apply to:

(1) an action to take possession of or dispose of real or personal property, even if the action includes a request for a money judgment; or

(2) an action to collect a debt owed to a government, governmental subdivision, or agency in which the government, governmental subdivision, or agency is the plaintiff.

Comment

This act applies a uniform rule for all proceedings for the collection of unsecured consumer debt and a small subset of previously secured consumer debt in which the award of a default judgment is being considered, either because the consumer failed to respond to a complaint or failed to appear at a hearing.

The act does not apply to actions to take possession or dispose of real or personal property, including actions to take possession of or dispose of collateral that secures a debt, or proceedings for eviction of a tenant. Secured debts and landlord tenant disputes are governed by other law, such as the Uniform Commercial Code, motor vehicle finance laws, laws creating statutory liens, and landlord tenant laws. The act applies to a secured consumer debt only if the action is solely to request a money judgment or collect a deficiency remaining after the disposition of property that previously secured a consumer debt. Actions to gain possession of real or personal property are never subject to this act, even if they include a request for a money judgment.

A plaintiff seeking a default judgment must comply with all provisions of the act. If an action is filed that is not in compliance with Section 4 and the plaintiff later decides to pursue a default judgment, a new or amended complaint must be filed in accordance with other state law. Therefore, plaintiffs are encouraged to comply with the act in all cases to avoid the need to amend.

The act does not apply to the collection of unsecured consumer debt owed to a governmental entity when the plaintiff is that governmental entity. The collection of such debt is often covered by other state law. However, the act does apply to an unsecured consumer debt owed to a government, governmental subdivision, or agency if that debt has been sold to a third party that is not a government entity and that third party is the plaintiff in the action. The government entity remains the "creditor" under the act, but the act applies because the plaintiff is not that entity.

Section 4. [Complaint] Requirements

(a) A default judgment in an action to which this [act] applies may be entered only if the [complaint] or amended [complaint] complies with this section and includes the notice required under Section 5.

(b) The [complaint] or amended [complaint] must state:

(1) each name and address of the consumer in the records of the creditor at the time of charge off or, if the consumer debt was not charged off, at the time of default;

(2) the name of the creditor, including any merchant brand, affinity brand, or facility name associated with the debt;

(3) at least the last four digits of the account number or other account identifier used in communicating with the consumer before charge off or, if the debt was not charged off, before default;

(4) the date and amount of the last payment;

(5) the date of charge off or, if the debt was not charged off, the date of default;

(6) the amount of the outstanding balance;

(7) the amount of the judgment the plaintiff seeks, itemizing the outstanding balance and the following amounts not included in the outstanding balance:

(A) total finance charges;

(B) total fees or costs;

(C) total attorney's fees; and

(D) total credits and payments;

(8) a statement whether the amount of the judgment may increase due to accrued interest, fees, or other charges;

(9) the authority of the plaintiff to commence the action;

(10) facts sufficient to demonstrate that the action is being commenced in a proper venue;

(11) facts sufficient to demonstrate that the action is being commenced within the statute of limitation period applicable to the debt; [and]

(12) unless the plaintiff is the creditor:

(A) the name of each person that acquired ownership of the debt after charge off or, if the debt was not charged off, after default; and

(B) the date of each acquisition [; and

(13) information sufficient to demonstrate that the plaintiff possesses a valid [license, registration, certification, or bond] if required under [cite to state statute that requires a license, registration, certification, or bond for the purpose of debt collection]].

(c) Subject to authentication required by other law of this state and rules of procedure, the plaintiff must attach to the [complaint] or amended [complaint]:

(1) at least one of the following that is sufficient to demonstrate the existence of the consumer debt:

(A) an agreement signed by the consumer;

(B) a record of a purchase, payment, or use of an account; or

(C) a record otherwise demonstrating the debt was incurred; and

(2) if the plaintiff is not the creditor, documentation sufficient to demonstrate the authority of the plaintiff to collect the debt.

Legislative Note: *A state that uses a term other than "complaint" for the record that commences an action for collection of a consumer debt should insert that term in this section and throughout this act.*

A state that requires a license, registration, certification, or bond for debt collection should

include subsection (b)(13) and insert the appropriate term and statute citation.

Comment

Subsection (a) provides that a default judgment may be entered in an action subject to the act only if the complaint or amended complaint complies with both the requirements of subsections (b) and (c) of this Section and the notice requirements of Section 5. Because of the significant differences that exist among the states regarding the availability of judicial resources, caseloads, and the relationship between statutes and procedural rules, this act defers to other law and procedural rules to determine how these requirements will be implemented. For example, in some courts, the judge or other finder of fact may need to determine if the requirements of this act have been satisfied before entering a default judgment, while in other courts it may be the responsibility of the filing office to determine if the requirements of the act have been satisfied before accepting a complaint. In other courts, a court clerk or master may be responsible for checking for compliance before issuing a default judgment or a rule to show cause why a default judgment should not be entered.

The requirements of this Section and the requirements of Section 5 may be satisfied either in a complaint or amended complaint. As a result, not all complaints seeking a money judgment for enforcement of a consumer debt need comply with this act. Instead, compliance with this act is necessary only in a proceeding in which a default judgment is sought and then entered. If a plaintiff files a complaint that is not in compliance and then later wants to seek a default judgment, how and whether it may file an amended complaint is determined by other state law.

The requirements of this Section apply whether the request for default judgment is made by a record or orally at a hearing or whether a default judgment is entered pursuant to a rule of procedure that provides for a default judgment for failure of the consumer to respond to a complaint or appear at a hearing. In every situation where a default judgment is requested, it may not be entered unless the plaintiff has complied with the act.

Subsection (b) is intended to give the consumer enough information to identify the debt and determine whether it is owed as alleged.

Subsection (b)(1) requires the creditor to identify the consumer's name and address as it appears in the creditor's records at the time of charge off or, if the debt was not charged off, at the time of the default that led to the filing of the action. This is meant to assist the consumer in identifying whether they are the proper defendant in the action. So, for example, the creditor's record may indicate that this debt was originally owed by Jane Doe who lived in Big City. Jane married and changed her name to Jane Smith and moved to Small City. In a complaint seeking a judgment against Jane, subsection (b)(1) requires the plaintiff to indicate the defendant is an individual named Jane Doe, who lived in Big City, but subsequently changed her name to Jane Smith and currently lives in Small City. If an action is commenced against Jane Smith who lives in Small City, but was never named Jane Doe who lived in Big City, this subsection alerts her that the debt being collected is not her debt.

Subsection (b)(1) does not create a requirement for the plaintiff to do any investigation into the consumer's names and address that it is not currently doing as part of the normal course of business. It only requires the plaintiff to list names and addresses currently in its records that it reasonably believes are related to this consumer debt. For example, a plaintiff may conduct a skip trace analysis to locate the debtor and, through that trace, identify 52 Jane Does. The plaintiff was then able, with reasonable certainty, to eliminate 50 of those possible Jane Does because, for example, they were the wrong age or race. Subsection (b)(1) would not require the plaintiff to include those 50 extraneous names and addresses, even if they had been retained in its records. The requirement is for the plaintiff to include only those names and addresses it reasonably believes are connected to the debt in question.

Subsection (b)(2) requires the plaintiff to identify the creditor, including any merchant brand, affinity brand, or facility name associated with the debt. This is intended to identify the creditor in a way in which the consumer would recognize the debt. So, for example, if the consumer has a credit card from ABC Supply that was issued by 1st State Bank, the plaintiff should identify the creditor by both names. The consumer may not know or understand that their debt is owed to 1st State Bank and not to ABC Supply, the entity printed on the front of the card. Likewise, if a consumer did business with Lawn Specialty Inc., doing business as Joe's Landscaping Service, the consumer may not recognize a complaint coming from Lawn Specialty Inc. because the consumer never interacted with the creditor using that name. The creditor's name should not be limited to the name under which a business is organized, but should also include any fictitious name, DBA, or other identifier used in communications with the consumer.

Subsection (b)(3) requires the plaintiff to identify at least the last four digits of the account number or account identifier representing the debt that the plaintiff is attempting to collect used before charge off or default. An account identifier is a group of letters, numbers or other symbols used, other than the consumer's name and address, to identify a debt. If there is no such account number or identifier used in repeated communications with the consumer, the invoice number or identifier most recently used before charge off or default may be used. In the absence of any account or invoice number or identifier, no information must be provided to comply with this paragraph. In such circumstances, however, it would be useful to both the consumer and the court for the plaintiff to state that an account number or identifier was not used.

Some courts may require the information mandated by subsection (b)(3) to be redacted or otherwise filed in a manner so that it is not publicly available. While such action would comply with the act, the complaint sent to the defendant must not be redacted and must include the information required by subsection (b) (3) in a manner that can be read by the defendant.

Sometimes account numbers are changed as the consumer debt is sold or assigned to different entities. The consumer may not recognize the new account number. This provision only requires the plaintiff to identify account numbers or identifiers used in communicating with the consumer before charge off or, if the debt was not charged off, before default. While a plaintiff may provide both the new and old account number, the objective of the subsection is to provide the defendant with the account number that identifies the debt.

Subsection (b)(4) requires the plaintiff to provide information as to the date and amount of the last payment made on the debt. This is required whether or not that payment was made to the plaintiff, the creditor, or the previous owner of the debt. A plaintiff is required to include whatever information it has about the last payment made, including the date and the amount. If no payments were ever made on the debt, no information must be provided to comply with this subsection. However, it would be useful for both the consumer and the court for the plaintiff to affirmatively state that no payment was ever received on the debt.

Subsection (b)(5) requires the plaintiff to provide the date of the charge off or default that led to the filing of the action. A consumer may default and cure the default on a debt more than once in the life of that debt. It is not necessary for the plaintiff to list every default that may have occurred. It is only necessary to identify the last default that led to the filing of the cause of action. If the debt has been charged off, it is not necessary to identify both the default and the charge off. The plaintiff can satisfy this section by stating either the date of default or the charge off.

Subsection (b)(6) requires the plaintiff to state the outstanding balance. The outstanding balance is the total amount due to the creditor at the time of charge off or default. This is normally the amount of the consumer debt incurred with the originator of the debt minus any payments made on the debt. This includes any finance charges, costs, or fees that have been added to the original amount of the consumer debt prior to charge off or the default that led to the filing of the action. It is not necessary to itemize these items when stating the amount of the outstanding balance, unless required by other state law. Subsection (b)(6) requires a single total amount due. This does not, however, override or otherwise change any requirements that may exist in other state or federal law to provide an itemized accounting to the consumer at the time of charge off or, in the case of a secured debt, at the time the property securing the debt is sold.

Subsection (b)(7) requires an itemization of what the plaintiff is asking the court to award as a judgment in the action. This includes any additional charges or credits that have been applied to or credited from the outstanding balance. It does not require itemization of any interest, fees, or costs included in the outstanding balance at the time of charge off or default. It only requires itemization of interest, fees, and costs arising after charge off or the default from which the plaintiff is seeking to recover a judgment.

Subsection (b)(8) requires the plaintiff to notify the consumer if the amount stated in subsection (b)(7) is likely to be larger by the time judgment is entered. The amount stated in subsection (b)(7) is the amount due at the time the complaint is filed, but charges may accrue after that date. This would most commonly be interest or additional late fees, but may be other contractual fees that only become relevant after the commencement of the action. Attorney's fees are a good example of the latter. Subsection (b)(8) requires a statement informing the consumer of these facts, but not an actual number. So, for example, "the debt continues to accrue interest at a rate of $0.27 a day" would satisfy this subsection. The plaintiff may also say that the amount of attorney's fees requested in subsection (b)(7) is the amount due at the time the action was commenced, but that it may be larger depending on how the action is resolved by the court. Likewise, the plaintiff may wish to simply state that it will be requesting the court to award attorney's fees, the amount of which will be subject to the court's discretion.

Subsection (b)(9) requires the plaintiff to identify, in a simple statement, its authority to collect the debt. Some examples of statements that would satisfy this subsection are: "the plaintiff is the originator of the debt", "the plaintiff is a purchaser of the debt", or "the plaintiff is a person to whom the right to collect the debt was assigned". If the plaintiff is not the owner of the debt but has the authority to collect based on some other authority such as an assignment or joint ownership agreement, it must be disclosed here. Subsection (b)(12) requires information about each assignment. The information required by subsections (b)(9) and (b)(12) may be combined into one statement. It is not required to repeat the information. Although this provision does not require the submission of any particular record to support the information stated, subsection (c)(2) may require specific documentation of these statements.

In situations where the debt is owed to more than one person, subsection (b)(9) requires the statement to include whether the plaintiff has the authority to collect the entire consumer debt or only a portion of the debt. A statement that the plaintiff has the authority to collect the entire debt would preclude the collection of any portion of the debt by a co-owner.

Subsection (b)(10) requires a statement of facts to establish that the action was commenced in the proper venue. It is not meant to supplant any other state law or rule of civil procedure that determines venue. The plaintiff is only required to state the facts to support the choice of venue, not explain or defend that choice. A proper statement could include the address of the consumer or the place where the contract was signed.

Subsection (b)(11) requires the plaintiff to provide facts to establish that the cause of action is being filed within the statute of limitations. Determining the statute of limitations can be a complicated matter and is usually a matter of other state law. It does not require the plaintiff to state a specific statute of limitations. Instead, it is meant to provide the factual basis for the court and consumer to determine whether the action has been filed within the relevant limitation period. The plaintiff should list any of the factors that are relevant to the claim. Examples of such factors could include the date of the default that gave rise to the complaint, the date and amount of the last payment made toward repayment of the debt, the date the goods or services that are the subject of the debt were provided, or the date a request for payment was made. So, for example, a debt buyer suing on a credit card may specify the last payment or last transaction made on the card. A small business owner such as a contractor might state the date the work was completed and a request for payment was made. Nothing in subsection (b)(11) requires the plaintiff to repeat information that was previously stated as required by subsections (b)(1) through (b)(10). Instead, it may be sufficient to plead that the date of the last payment set forth in response to subsection (b)(4) and a date of default set forth in response to subsection (b)(5) establish that the action is being filed within the statute of limitations.

Subsection (b)(12) requires the plaintiff to list a chain of title for each person who owned the debt. Each person to which the debt was assigned, but not sold, should also be listed. Subsection (c)(2) requires a record to document each of these transactions.

Subsection (b)(13) is optional for states that have requirements for creditors and debt buyers to have a license, registration, certification, or bond. It requires a statement as to whether the plaintiff possesses any relevant state license, registration, certification, or bond required by other state law to collect debts. This is not a requirement to divulge any other kind of license,

registration, certification, or bond. For example, the plaintiff may have a license to make loans in a state. Information about that license is not required. Only information specific to the ability of the plaintiff to collect debts in the state is required.

Subsection (c) requires that records be attached subject to authentication as required by other state law or rules of procedure. It does not impose a specific requirement for the certification of the records. Instead, whether and when authentication is required and the manner in which authentication, when required, must be conducted is determined by other law of the state. For example, some courts may require authentication when the action is commenced, while others may only require authentication of all records at the time a motion or other request for a default judgment is filed. Some may not require authentication unless the authenticity of a record is challenged. Likewise, depending on the laws and rules of procedure of a state, authentication could be accomplished by a verification, affidavit, or certification of business records.

Subsection (c)(1) requires the complaint to include a record of any agreement signed by the consumer that gave rise to the debt. Because not all debts are the result of a signed contract, subsection (c)(2) allows a record of a purchase, payment, or use of an account to demonstrate the existence of a consumer debt. Subsection (c)(1)(C) also allows other records to demonstrate the existence of a consumer debt, such as a writing sufficient to satisfy the statute of frauds acknowledging the existence of the debt. This subsection cannot be satisfied by evidence of an oral agreement, but instead requires some record to demonstrate the existence of the debt.

If the plaintiff is not the creditor, subsection (c)(2) requires records that make specific reference to the debt that is the subject of the collection action that demonstrate plaintiff's authority to collect the debt. Examples of a record that would satisfy this requirement include a bill of sale or assignment. The record must have some specific reference to the debt that is the subject of the collection action. While this requirement is distinct and in addition to the requirement of subsections (b)(9) and (b)(12), the information required may be combined in one statement and need not be repeated as separate allegations.

Section 5. Consumer Notice

(a) A default judgment may be entered in an action to which this [act] applies only if the [complaint] or amended [complaint] served on the consumer is accompanied by a separate notice warning that a default judgment may be awarded against the consumer.

(b) The notice must be in a record substantially similar to the form in subsection (c) that states:

(1) if the consumer does not file an answer to the [complaint] or amended [complaint] within the time and in the manner indicated in the [summons] or appear for the hearing referred to in the [summons], a default judgment may be entered against the consumer;

(2) if a judgment is entered against the consumer, the amount of the judgment, plus interest on the judgment as provided by other law of this state, remains in effect until at least [insert limitation period for enforcement of the judgment], even if the judgment no longer remains on the consumer's credit report;

(3) after entry of a judgment, the plaintiff may [take steps] [initiate an action] to [sell real estate owned by the consumer][,] [or] [and] [sell personal property owned by the consumer][,] [or] [and] [attach the consumer's bank accounts][,] [or] [and] [garnish the consumer's wages];

(4) entry of a judgment may impair access to employment, insurance, credit, or housing; [and]

(5) an attorney may provide assistance in understanding the [complaint] or amended [complaint] and advice about what action to take in response to the [complaint] or amended [complaint][; and

(6) the name and contact information for a legal aid or attorney referral service that may be able to help the consumer find an attorney, and if the consumer cannot afford an attorney, may be able to provide free or reduced-cost legal services].

(c) The following notice meets the requirements of this section:

Consumer Notice

Warning
If You Do Not Act, A Default Judgment May Be Entered Against You

---

1. Why Am I Getting This Notice?	You are getting this notice because (name of plaintiff) says you owe money. (Name or shortened name of plaintiff) has filed a lawsuit against you to collect the money.

2. What Will Happen If I Do Nothing?	If you do not [file a response to the lawsuit][or][appear at a hearing on (enter date) at (time)], a judgment may be entered against you.
3. What Happens If A Judgment Is Entered Against Me?	[Your personal property may be taken and sold.] [Money may be taken directly from your bank account.] [Money may be taken directly from your wages.] [A lien may be put on your house or other real estate and the house or real estate may be sold.] If the judgment is not paid in full, the amount due may grow because of interest charges. You will owe the amount of the judgment for at least [insert limitation period for enforcement of the judgment], even if it no longer appears on your credit report. The judgment may make it harder for you to get a job or insurance and more expensive for you to get a loan or credit card, rent an apartment, or buy a house or car.
4. Is Help Available?	Talk with a lawyer. A lawyer can explain the situation and help you decide what to do. [The following office may be able to help you find a lawyer: (insert name and contact information for legal aid or lawyer referral service that may be able to help defendant find a lawyer). If you cannot afford a lawyer, you may be able to obtain one for free or reduced cost.]

Legislative Note: *In subsection (b)(1) and paragraph 2 of the form, the state should indicate what action is required by state law to avoid a default judgment. A state may need different forms. For example, state law may require a formal answer in some courts, but only an appearance at a hearing in other courts.*

In subsection (b)(2) and paragraph 3 of the form, the state should insert the applicable statute of limitations for judgments.

The state should include in subsection (b)(3) and paragraph 3 of the form only the bracketed actions that state law allows against a consumer for the satisfaction of a default judgment. The state should also select either (1) "or", if the creditor must choose only one collection method,

or (2) "and", if the creditor may use multiple collection methods.

Subsection (b)(6) is optional and, if included, can be modified to best suit the interests of the state. For example, as an alternative to using the optional text, the notice could provide contact information for a legal aid or lawyer referral service, but not indicate that free or reduced-cost services may be available, or could indicate that free or reduced-cost services may be available, but not provide contact information for a legal aid or lawyer referral service.

Paragraph 4 of the form in subsection (c) should mirror the decision regarding subsection (b)(6).

Comment

Some courts do not require the filing of a separate motion when requesting a default judgment. In others, the consumer is given notice of a hearing and, if the consumer fails to appear, a default judgment is entered. When an answer is required by rules of procedure, some courts will enter a default judgment automatically if a defendant fails to respond to a complaint. Because of these variations in state laws and in rules of procedure in courts within states, this section requires a notice warning the consumer that a default judgment may be awarded to accompany the complaint that is served on the consumer. Regardless of the procedures for requesting and obtaining a default judgment, the notice required by this Section must be served in compliance with other state law before the court may award a default judgment.

Subsection (a) requires that the notice accompany the complaint being served on the consumer. The term "served" will be determined by other state law or procedures for initiating a civil lawsuit. In the case of an arbitration, the manner for giving service may be determined by the arbitration agreement, the rules of the arbitration organization incorporated in the agreement, or other law and procedures of the state. For example, for states that have adopted the Revised Uniform Arbitration Act, notice is either provided for in the agreement or, in the absence of agreement, by certified or registered mail, return receipt requested and obtained, or by service as authorized for the commencement of a civil action.

This act does not determine the appropriate remedy for a judgment entered in violation of its requirements. Instead, the act relies on other state law regarding the reopening, modification, or vacation of a judgment to address the consequences of the entry of a judgment not in compliance with its requirements.

The consumer notice should be a separate record. The intent of this subsection is that the notice be conspicuous and not buried in the middle of the complaint. Whether it must be filed separately from the complaint will be determined by other state law and procedures. The act specifies, however, that it must be served on the consumer along with the complaint.

If the plaintiff later amends the complaint under applicable state law, the amended complaint and notice must be provided to the consumer according to the laws and procedures applicable to the filing of an amended complaint.

If the notice required by this Section is not served on the consumer in the manner required by other state law, a default judgment may not be entered. The plaintiff may cure the

defect by filing the notice as part of an amended complaint in accordance with other state law and procedures.

Subsection (b)(1) requires that the notice specify what action the consumer needs to take to avoid a default judgment. This may vary by state and even by venue within the state. The consumer notice should be tailored to the specific action.

Subsection (b)(2) requires a statement informing the consumer about the judgment, if entered. If the state allows for judgment interest, the notice should state that interest will continue to accrue on the judgment. While it is not necessary to disclose the amount of the interest, the notice should identify if the judgment will accrue at a rate determined by other state law or by the contract that created the debt. The notice must also contain a statement about the specific statute of limitations for judgments. Some states allow judgments to be renewed once the initial statute of limitations has expired. So, for example, the statute of limitations for enforcing judgments may be 5 years but could be renewed by the plaintiff if unpaid in that period. Therefore, the statement could read, "The judgment will be in effect for five years but may be renewed as allowed by state law." Many consumers mistakenly believe that because a judgment has fallen off their credit report it is no longer due. This subsection requires an affirmative statement that the judgment may remain in effect regardless of whether it appears on a consumer's credit report.

Subsection (b)(3) includes a statement of actions that state law authorizes a plaintiff to take to collect a judgment, once entered. It is important that the notice indicates the action that state law allows but does not state that the plaintiff intends to seek any specific remedy. The Fair Debt Collection Practices Act forbids a debt collector from threatening to take action it does not intend to take. Therefore, this statement should describe what other state law may allow and not what action the credit intends to take. A statement such as "(name of state) law allows a creditor to seek an order garnishing wages or placing a lien on real property" to satisfy the judgment would satisfy this subsection.

Likewise, subsection (b)(4) requires a simple statement of the possible ramifications of having a judgment entered against a consumer. These provisions are intended to warn the consumer of the possible results of ignoring the collection action. It is not a statement of what will actually occur in any individual case.

Subsection (c) provides a safe harbor form of the notice. Plaintiffs using the form are in compliance with this act.

Section 6. Waiver Void

A waiver by a consumer of a requirement of this [act] is void. This section does not prevent a voluntary settlement agreement or judgment between the parties that does not result in a default judgment.

Comment

Section 6 is intended to prevent any waiver of the procedures of this act. A waiver of the procedures in this act contained in the instrument that created the financial obligation, as well as any instrument that purports to waive the protections of this act, is void. This section does not prevent a voluntary settlement agreement or judgment between the parties that does not result in a default judgment.

Section 7. Relation to Other Law

This [act] supplements rights and remedies available to a consumer under other law of this state.

Section 8. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 9. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in 15 U.S.C. Section 7003(b).

Comment

In 2000, Congress enacted the "Electronic Signatures in Global and National Commerce Act", 106 PUB.L.NO. 229, 114 Stat. 464, 15 U.S.C. § 7001 et seq. (popularly known as "E-SIGN"). E-SIGN largely tracks the Uniform Electronic Transactions Act (UETA). Section 102 of E-Sign, entitled "Exemption to preemption," provides in pertinent part that: (a) A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 with respect to State law only if such statute, regulation, or rule of law (1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999 (with certain exceptions) or (2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if they meet certain criteria, and (B) if enacted or adopted after the date of the enactment of E-SIGN, makes specific reference to E-SIGN 15 U.S.C. § 7002(a). The inclusion of this section is necessary to comply with the requirement that the act make "specific reference" to E-SIGN pursuant to 15 U.S.C. § 7002(a)(2)(B) if the uniform or model act contains a provision authorizing electronic records or signatures in place of writings or written signatures.

Section 10. Transitional Provision

This [act] applies to an action commenced on or after [the effective date of this [act]].

[Section 11. Severability

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: *Include this section only if the state lacks a general severability statute or a decision by the highest court of the state stating a general rule of severability.*

Section 12. Effective Date

This [act] takes effect . . .

Committee Roster

Debt Collection Default Judgments, Drafting Committee on

Chair

Pepe, Raymond P.
ULC
raymond.pepe@klgates.com
(717) 231-5988
K&L Gates LLP
17 N. Second St., 18th Floor
Harrisburg, PA 17101-1507

Vice Chair

Hagerty, Gail
ULC
ghhagerty@gmail.com
(701) 471-2400
1748 Pinto Place
Bismarck, ND 58503

Member

Buiteweg, Thomas J.
ULC
buiteweg@umich.edu
(734) 369-2786
Hudson Cook, LLP
4215 Westbrook Drive
Ann Arbor, MI 48108

Certo, David
ULC
DCerto@Indy.gov
317-327-4479
Indianapolis Veterans Court & Criminal Court 12
200 East Washington Street
Room E460
Indianapolis, Indiana 46204

Davies, Jack
ULC
mndavies@aol.com
(612) 338-3309
1201 Yale Place, Unit #2004
Minneapolis, MN 55403-1961

Ferriell, Jeff Thomas
ULC
jferriell@law.capital.edu
(614) 236-6683
Capital University Law School
303 E. Broad St.
Columbus, OH 43215-3201

Ferry, Michael Alan
ULC
mferry625@gmail.com
314-939-1031
Law Office of Michael Ferry
PO Box 511011
St. Louis, MO 63151

Fowlke, Lorie D.
ULC
Lorie.Fowlke@mail.house.gov
(801) 922-5400
U.S. House of Representatives
3549 N University Ave, Yorktown Bldg, Suite #275
Congressman John Curtis
Provo, UT 84604-4487

Koch, Eric Allan
ULC
eric@kochmcauley.com
(812) 337-3120
PO Box 372
Bedford, IN 47421

Committee Roster

Mann, James Guthrie ULC	jmann@pahousegop.com (717) 783-1510	House Republican Legal Staff Room B-6, Main Capitol Bldg. P.O. Box 202228 Harrisburg, PA 17120

Division E Chair Member

Winkelman, Nora ULC	nwinkelman@comcast.net (610) 585-0748	1018 Green St. Harrisburg, PA 17102

Reporter

Fox, Judith	jfox@nd.edu (574) 631-4864	Notre Dame Law School 725 Howard St. South Bend, IN 46617

ABA Advisor

Richman, Steven M. ABA, International Law Section	SRichman@ClarkHill.com (609) 785-2911	Clark Hill PLC 210 Carnegie Ctr Ste 102 Princeton, NJ 08540-6233

Style Liaison

Nadeau, Louise M. ULC	lmvn1@aol.com (860) 956-1717	18 Linnmoore Street Hartford, CT 06114-2216

Stakeholder Outreach Liaison

Glaser, Mark F. ULC	Markfg540@gmail.com (518) 689-1413	Greenberg Traurig 54 State St., 6th Floor Albany, NY 12207

President Ex Officio

Robbins, Daniel ULC	drobbins@uniformlaws.org (818) 935-5815	Motion Picture Association 15301 Ventura Blvd., Bldg. E Sherman Oaks, CA 91403

Chair Exec. Committee

Berg, Timothy J. ULC	tberg@uniformlaws.org (602) 916-5421	Fennemore Craig 2394 E. Camelback Rd., Suite 600 Phoenix, AZ 85016

Committee Roster

Executive Director

Schnabel, Tim ULC	tschnabel@uniformlaws.org (312) 450-6604	ULC 111 N Wabash, Ste. 1010 Chicago, IL 60602

Staff Liaison

Wolff, Kaitlin D. ULC	kwolff@uniformlaws.org (312) 450-6615	Uniform Law Commission 111 N Wabash Ave Ste 1010 Chicago, IL 60602-1917

Observer

Acevedo, Alyssa Structured Finance Association	alyssa.acevedo@structuredfinance.org	Structured Finance Association 1776 I St. NW, Suite 501 Washington, DC 20006
Andres, Matthew University of Michigan Law School	mattandr@umich.edu (734) 763-2798	University of Michigan Law School 3054 Jeffries Hall Ann Arbor, MI 48109
Appel, Susan Unifund CCR, LLC	susan.appel@unifund.com (513) 489-8877 ext 141	Unifund CCR, LLC 10625 Techwoods Circle Cincinnati, OH 45242
Arlowe, Danielle Fagre American Financial Services Association	dfagre@afsamail.org (952) 922-6500	American Financial Servicers Association 919 18th St. NW, Suite 300 Washington, DC 20006
Banks, Diana American Bankers Association	DBanks@aba.com	American Bankers Association
Barkley, Whitney Center for Responsible Lending	whitney.barkley@responsiblelending.org (704) 678-6509	2801 Sparger Road Durham, NC 27705
Bjerre, Carl S. ULC	cbjerre@uoregon.edu (541) 346-3981	University of Oregon School of Law 1940 University Street Eugene, OR 97403

Committee Roster

Boon, Joel Rausch, Sturm, Israel, Enerson & Hornik, LLC	jboon@rsieh.com (262) 796-6988	Rausch, Sturm, Israel, Enerson & Hornik, LLC 3209 W. 76th Street, Suite 301 Minneapolis, MN 55435
Buchanan, Scott Student Loan Servicing Alliance	(202)262-8348	Student Loan Servicing Alliance 2210 Mount Vernon Ave., Suite 207 Alexandria, VA 22301
Calabrese, Gina M. St. John's University School of Law	calabreg@stjohns.edu (718) 990-1848	St. John's University School of Law 8000 Utopia Pkwy., Room 2-26 Jamaica, NY 11439
Chou, Brian Messerli & Kramer P.A.	BChou@messerlikramer.com	Messerli & Kramer P.A. 1025 N 3rd St., Suite 8 Bismarck, ND 58501
Cox, Thomas A. National Consumer Law Center	tac@gwi.net (207) 749-6671	Maine Attorneys Saving Home P.O. Box 1314 Portland, ME 04104
Crowley, Dan	Dan.Crowley@KLGates.com (202) 778-9447	K&L Gates PPL 1601 K. Street, N.W. Washington, DC 20006
Curtis, Christopher J. Office of the Attorney General	Christopher.Curtis@vermont.gov (802) 828-5586	Office of the Attorney General 109 State Street Montpelier, VT 05609
Dempsey, Leah ACA International	ldempsey@bhfs.com 202-383-4714	Brownstein Hyatt Farber Schreck, LLP 1155 F St NW, Ste 1200 Washington, DC 20004
Devine, Melissa Office of Attorney General	MDevine@LAW.GA.GOV	Office of Attorney General Chris Carr Georgia Department of Law 2 Martin Luther King, Jr. Drive, SE Suite 356 Atlanta, GA 30334
Douglas, Kathrine	katherine0518@icloud.com (706) 255-7375	101 Davis St., Apt. 21 Augusta, GA 30606

Committee Roster

Earyes, Jen Structured Finance Association	Jen.Earyes@StructuredFinance.org	Structured Finance Association 1776 I Street, NW, Suite 501 Washington, DC 20006
Foggie, Nicola CrossStates Credit Union Association	nfoggie@crossstate.org (609) 469-5015	CrossStates Credit Union Association
Frank, Lori Michigan Creditors Bar Association	lori@markofflaw.com (312) 698-7351	Michigan Creditors Bar Association 16155 W 12th Mile Road, Suite 6 Southfield, IL 48076
Freeman Engstrom, David Sanford Law School	dfengstrom@law.stanford.edu (650) 721-5859	Sanford Law School 559 Nathan Abbott Way Stanford, CA 94305
Fulford, Martha Upton CO Office of the Attorney General	martha.fulford@coag.gov (720) 508-6109	Colorado Department of Law Ralph D. Carr Judicial Center 1300 Broadway, 10th floor Denver, CO 80203
Gaines, Martin	mgaines@platform-properties.com (214) 356-8767	2420 Clark Street Dallas, NC 75204
Gose, Richard Credit Union National Association	RGose@cuna.coop	Credit Union National Association
Hannaford-Agor, Paula National Center for State Courts	phannaford@ncsc.org 757-259-1556	National Center for State Courts 300 Newport Avenue Williamsburg, VA 23185
Hirsch, Danielle National Center for State Courts	dhirsch@ncsc.org	
Hulse, Bill US Chamber of Commerce	bhulse@uschamber.com	US Chamber of Commerce

Committee Roster

Jimenez, Dalie UC Irvine School of Law	djimenez@law.uci.edu	
Kaericher, Abby Federation of American Hospitals	Akaericher@FAH.org	Federation of American Hospitals 750 9th St., NW, Suite 600 Washington, DC 20001
Kauffman, Brittany K.T. Institue for the Advancement of the American Legal System	brittany.kauffman@du.edu (303) 871-6619	University of Denver 2060 South Gaylord Way Denver, CO 80208
Kneidel, Jacquelyn L. Office of Attorney General	jkneidel@law.ga.gov (404) 656-3959	Office of Attorney General Chris Carr Georgia Department of Law 2 Martin Luther King, Jr. Drive, SE Suite 356 Atlanta, GA 30334
Kuehnhoff, April National Consumer Law Center	akuehnhoff@nclc.org (617) 542-8010	National Consumer Law Center 7 Winthrop square Boston, MA 02110
Lee, Amanda Rodenburg Law Firm	aleewiebolt@jrllawoffice.com	Rodenburg Law Firm 300 NP Ave, Ste 105 PO Box 2427 Fargo, ND 58108-2427
Madej, Jakub Yale	j.madej@lawsheet.com (646) 776-0066	100 Church St. New York, NY 10007
Mattox, Lucia Center for Responsible Lending	lucia.mattox@responsiblelending.org (510) 917-8931	Center for Responsible Lending 1970 Broadway., Ste. 350 Oakland, CA 94612
Maurice, Donald S. Maurice Wutscher LLP	dmaurice@mauricewutscher.com (908) 237-4570	Maurice Wutscher LLP 5 Walter Foran Blvd., Suite 2007 Flemington, NJ 08822
Milito, Elizabeth National Federation of Independence Business	elizabeth.milito@nfib.org (202) 406-4443	National Federation of Independence Business 1201 F Street NW

Committee Roster

		Washington, DC 20004
Needleman, Joann Clark Hill PLC	Jneedleman@clarkhill.com (215) 640-8536	Clark Hill PLC Two Commerce Square 2001 Market Market Street, Suite 2620 Philadelphia, PA 19103
Parker, Janice M. Illinois Attorney General	jparker@atg.state.il.us (312) 814-3945	Consumer Fraud Bureau 100 W. Randolph St., 12th floor Chicago, IL 60601
Petrone, Kim	kkpetrone@yahoo.com (479) 713-0851	University of Arkansas 2769 E. Boardwalk Ct. Fayetteville, AR 72701
Reid, David RMAi	dreid@rmaintl.org (916) 482-2492	RMAI 1050 Fulton Avenue Suite 120 Sacramento, CA 95825
Renfrew, Ann CrossState Credit Union Association	arenfrew@crossstate.org	CrossState Credit Union Association 4309 N. Front St. Harrisburg, PA 17110
Rheingold, Ira National Association of Consumer Advocates	ira@consumeradvocates.org (202) 452-1989	National Association of Consumer Advocates 1215 17th St. NW, 5th Floor Washington, DC 20036
Rickard, Erika J. The Pew Charitable Trusts	erickard@pewtrusts.org (202) 302-8205	The Pew Charitable Trusts 901 E Street, NW Washington, DC 20004
Robertson, Curtis Michigan Creditors Bar Association	crobertson@weberolcese.com (248) 633-3588	
Rose, Madison Credit Union National Association	mrose@cuna.coop (202) 508-6706	
Rowley, Keith A. ULC	keith.rowley@unlv.edu (702) 895-4993	University of Nevada Las Vegas William S. Boyd School of Law

Committee Roster

		4505 S. Maryland Pkwy., Box 451003 Las Vegas, NV 89154-1003
Schrader, Kaley Consumer Protection and Antitrust Division	kaley.schrader@ag.ks.gov (785) 368-8453	Consumer Protection and Antitrust Division 120 SE 10th Avenue, Suite 430 Topeka, KS 66612
Sobol, Neil L. Texas A&M School of Law	nsobol@law.tamu.edu (817) 212-4055	Texas A&M School of Law 1515 Commerce St. Fort Worth, TX 76102
Spector, Mary SMU Dedman School of Law	mspector@mail.smu.edu (214) 768-2578	SMU Dedman School of Law 3315 Daniel Ave Dallas, TX 75205
Stewart, Charlotte R. The Pew Charitable Trusts	cstewart@pewtrusts.org (202) 540-6533	The Pew Charitable Trusts 901 E St. NW Washington, DC 20004
Suttell, Brit J. Barron & Newburger, P.C.	britjsuttell@bn-lawyers.com (866) 476-9103	Barron & Newburger, P.C. 10 Beatty Road, Suite 200 Media, PA 19063
Tenoever, Katie Federation of American Hospitals	ktenoever@fah.org	Federation of American Hospitals
Wayland, Franci	Franci.Wayland@PRAGroup.com	150 Corporate Boulevard Norfolk, VA 23502
Weber, Derrick Messerli & Kramer, P.A.	dweber@messerlikramer.com	Messerli & Kramer P.A. 1025 N 3rd St., Suite 8 Bismarch, ND 58501
Wendorf, Eeva Rodenburg Law Firm	e.wendorf@gurstel.com (701) 235-6411	
White, Darcy Pew Charitable Trusts	dwhite@pewtrusts.org (202) 618-5141	Pew Charitable Trusts 901 E Street NW

Committee Roster

		Washington, DC 20004
Wilborn, Steve ULC	swilborn@uniformlaws.org (502) 593-2846	3428 Lyon Dr. Lexington, KY 40513
Wiley, Leonardo Otiste	posit2134@outlook.com (312) 684-0091	PO Box 1380 Chicago, IL 60624
Willner, Nathan D. National Creditors Bar Association	nathan@creditorsbar.org (202) 861-0706	National Creditors Bar Association 8043 Cooper Creek Blvd., Suite 206 University Park, FL 34201

Roster as of: 12/5/2022

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 11, 2024

RE: Rule 10.3, N.D.R.Ct., Electronic Court Seals

At the January meeting, the committee discussed proposed Rule 10.3 on electronic court seals. Section 1-01-38, N.D.C.C., defines "seal" as: "When the seal of a court, public officer, or person is required by law to be affixed to any process, commission, paper, or instrument, the word 'seal' includes an impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto."

Hawaii, Michigan, Minnesota, and North Carolina have statutes or rules allowing the use of electronic seals:

Hawaii: HRS § 606-3

(a) Each court of record shall have a seal, which shall be as approved by the supreme court. The seal shall be in the custody or control of the clerk of the court and, when impressed, embossed, stamped, or electronically imprinted upon a court document, process, or certificate, shall be accompanied by the clerk's official attestation.

(b) Any requirement that a court document, process, or certificate shall be signed, certified, acknowledged, verified, exemplified, attested, or made under oath or seal is satisfied if the document bears an electronic seal of the court and an electronic image of the signature or electronic facsimile signature of the judge, clerk, or other person authorized to perform these acts.

Michigan: Mich. Comp. Laws Ann. § 8.3n

In all cases in which the seal of any court or public office is required to be affixed to any paper or electronic document issuing from the court or office, the word "seal" shall be construed to include any of the following:

(a) The impression of the seal on the paper alone.

(b) The impression of the seal affixed to the paper by means of a wafer or wax.

(c) The seal affixed electronically on the paper or affixed to an electronic document.

Minnesota: Minn. Stat. §645.44 Subd. 10

Seal. When the seal of a court, public office, or corporation is required by law to be affixed to any paper, the word "seal" includes an impression thereof upon the paper alone, as well as an impression on a wafer, wax, or other substance thereto attached. When the seal of a court is required by law to be affixed to any paper or document, the word "seal" also includes an image of the court seal affixed by the court to an electronic image of the paper or document.

North Carolina: N.C. Super. Ct. & Dist. Ct. R. 29

In all cases in which the seal of any court or judicial office is required by law to be affixed to any paper issuing from a court or office, the word "seal" shall be construed to include an impression of the official seal, made upon the paper alone, an impression made by means of a wafer or of wax affixed thereto, or an electronic image adopted as the official seal affixed thereto. The Administrative Office of the Courts may prescribe the format and appearance of an electronic image adopted for use as an official seal.

Staff has attached the proposed Rule 10.3 and the statutes/rules from Hawaii, Michigan, Minnesota, and North Carolina.

RULE 10.3. ELECTRONIC COURT SEALS

"Electronic seal" means an electronic image of a seal of the court or clerk. Any requirement that a court document be affixed with a seal is satisfied if the document bears an electronic seal of the court and an electronic image of the signature or electronic facsimile signature of the judge, clerk, or other authorized person. The state court administrator may prescribe the format and appearance of an electronic image adopted for use as an official seal.

EXPLANATORY NOTE

Rule 10.3 was adopted effective _____.

SOURCES: Joint Procedure Committee Minutes of _____.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 1-01-38 (definition of seal).

CROSS REFERENCE: N.D.R.Ev. 901 (Requirement of Authentication or Identification); N.D.R.Ev. 902 (Self-Authentication); N.D.R.Civ.P. 44 (Proving an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

West's Hawai'i Revised Statutes Annotated
Division 4. Courts and Judicial Proceedings
Title 32. Courts and Court Officers
Chapter 606. Clerks, Reporters, Interpreters, Etc.

HRS § 606-3

§ 606-3. Seal of court; physical or electronic seal, signature, or attestation on physical or electronic court records

Currentness

(a) Each court of record shall have a seal, which shall be as approved by the supreme court. The seal shall be in the custody or control of the clerk of the court and, when impressed, embossed, stamped, or electronically imprinted upon a court document, process, or certificate, shall be accompanied by the clerk's official attestation.

(b) Any requirement that a court document, process, or certificate shall be signed, certified, acknowledged, verified, exemplified, attested, or made under oath or seal is satisfied if the document bears an electronic seal of the court and an electronic image of the signature or electronic facsimile signature of the judge, clerk, or other person authorized to perform these acts.

Credits
Laws 1892, ch. 57, § 65; R.L. 1925, § 2293; R.L. 1935, § 3692; R.L. 1945, § 9723; R.L. 1955, § 218-3; H.R.S. § 606-3; Laws 1972, ch. 88, § 4(c); Laws 2006, ch. 284, § 1.

H R S § 606-3, HI ST § 606-3
Current through the end of the 2023 Regular Session, pending text revision by the revisor of statutes.

End of Document

Michigan Compiled Laws Annotated
Chapter 8. Statutes
Statutes (Refs & Annos)

M.C.L.A. 8.3n

8.3n. “Seal” defined

Effective: April 29, 2010
Currentness

Sec. 3n. In all cases in which the seal of any court or public office is required to be affixed to any paper or electronic document issuing from the court or office, the word “seal” shall be construed to include any of the following:

(a) The impression of the seal on the paper alone.

(b) The impression of the seal affixed to the paper by means of a wafer or wax.

(c) The seal affixed electronically on the paper or affixed to an electronic document.

Credits
Amended by P.A.2010, No. 57, Imd. Eff. April 29, 2010.

M. C. L. A. 8.3n, MI ST 8.3n
The statutes are current through P.A.2023, No. 130, of the 2023 Regular Session, 102nd Legislature.

End of Document

645.44 WORDS AND PHRASES DEFINED.

Subdivision 1. **Scope.** The following words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears.

Subd. 1a. **Appellate courts.** "Appellate courts" means the supreme court and the court of appeals.

Subd. 1b. **Chair.** "Chair" includes chairman, chairwoman, and chairperson.

Subd. 2. **Court administrator.** When used in reference to court procedure, "court administrator" means the court administrator of the court in which the action or proceeding is pending, and "court administrator's office" means that court administrator's office.

Subd. 3. **County, town, city.** When a county, town or city is mentioned, without any particular description, it imports the particular county, town or city appropriate to the matter.

Subd. 3a. [Repealed, 1976 c 44 s 70]

Subd. 4. **Folio.** "Folio" means 100 words, counting as a word each number necessarily used; if there be fewer than 100 words in all, the paper shall be computed as one folio; likewise any excess over the last full folio.

Subd. 5. **Holiday.** (a) "Holiday" includes New Year's Day, January 1; Martin Luther King's Birthday, the third Monday in January; Washington's and Lincoln's Birthday, the third Monday in February; Memorial Day, the last Monday in May; Juneteenth, June 19; Independence Day, July 4; Labor Day, the first Monday in September; Indigenous Peoples Day, the second Monday in October; Veterans Day, November 11; Thanksgiving Day, the fourth Thursday in November; and Christmas Day, December 25; provided, when New Year's Day, January 1; or Juneteenth, June 19; or Independence Day, July 4; or Veterans Day, November 11; or Christmas Day, December 25; falls on Sunday, the following day shall be a holiday and, provided, when New Year's Day, January 1; or Juneteenth, June 19; or Independence Day, July 4; or Veterans Day, November 11; or Christmas Day, December 25; falls on Saturday, the preceding day shall be a holiday. No public business shall be transacted on any holiday, except in cases of necessity and except in cases of public business transacted by the legislature, nor shall any civil process be served thereon. However, for the executive branch of the state of Minnesota, "holiday" also includes the Friday after Thanksgiving but does not include Indigenous Peoples Day. Other branches of state government and political subdivisions shall have the option of determining whether Indigenous Peoples Day and the Friday after Thanksgiving shall be holidays. Where it is determined that Indigenous Peoples Day or the Friday after Thanksgiving is not a holiday, public business may be conducted thereon.

(b) Any agreement between a public employer and an employee organization citing Veterans Day as the fourth Monday in October shall be amended to cite Veterans Day as November 11.

(c) Any agreement between a public employer and an employee organization citing "Christopher Columbus Day" or "Columbus Day" shall be amended to cite "Indigenous Peoples Day."

Subd. 5a. **Public member.** "Public member" means a person who is not, or never was, a member of the profession or occupation being licensed or regulated or the spouse of any such person, or a person who does not have or has never had, a material financial interest in either the providing of the professional service being licensed or regulated, or an activity directly related to the profession or occupation being licensed or regulated.

Subd. 6. **Oath; affirmation; affirm; sworn.** "Oath" includes "affirmation" in all cases where by law an affirmation may be substituted for an oath; and in like cases "swear" includes "affirm" and "sworn" "affirmed."

Subd. 7. **Person.** "Person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.

Subd. 8. **Population; inhabitants.** When used in reference to population, "population" and "inhabitants" mean that shown by the last preceding federal decennial census unless otherwise expressly provided.

Subd. 8a. **Public waters.** "Public waters" means public waters as defined in section 103G.005, subdivision 15, and includes "public waters wetlands" as defined in section 103G.005, subdivision 15a.

Subd. 9. **Recorded; filed for record.** When an instrument in writing is required or permitted to be filed for record with or recorded by any officer, the same imports that it must be recorded by such officer in a suitable book kept for that purpose, unless otherwise expressly directed.

Subd. 10. **Seal.** When the seal of a court, public office, or corporation is required by law to be affixed to any paper, the word "seal" includes an impression thereof upon the paper alone, as well as an impression on a wafer, wax, or other substance thereto attached. When the seal of a court is required by law to be affixed to any paper or document, the word "seal" also includes an image of the court seal affixed by the court to an electronic image of the paper or document.

Subd. 11. **State; United States.** When applied to a part of the United States, "state" extends to and includes the District of Columbia and the several territories. "United States" embraces the District of Columbia and territories.

Subd. 12. **Sheriff.** "Sheriff" may be extended to any person officially performing the duties of a sheriff, either generally or in special cases.

Subd. 13. **Time; month; year.** "Month" means a calendar month and "year" means a calendar year, unless otherwise expressed; and "year" is equivalent to the expression "year of our Lord."

Subd. 13a. **Wetlands.** "Wetlands" means lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of this definition, wetlands must have the following three attributes:

(1) have a predominance of hydric soils;

(2) are inundated or saturated by surface water or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and

(3) under normal circumstances, support a prevalence of such vegetation.

Subd. 14. **Written; in writing.** "Written" and "in writing" may include any mode of representing words and letters. The signature of a person, when required by law, (1) must be in the handwriting of the person, or (2) if the person is unable to write (i) the person's mark or name written by another at the request and in the presence of the person, or (ii) by a rubber stamp facsimile of the person's actual signature, mark, or a signature of the person's name or a mark made by another and adopted for all purposes of signature by the person with a motor disability and affixed in the person's presence. The signature of a person on a document that will be filed with a court, when required by law, may also be made electronically if otherwise authorized by statute or court rule.

Subd. 15. **May.** "May" is permissive.

Subd. 15a. **Must.** "Must" is mandatory.

Subd. 16. **Shall.** "Shall" is mandatory.

Subd. 17. **Violate.** "Violate" includes failure to comply with.

Subd. 18. **Pledge; mortgage; conditional sale; lien; assignment.** "Pledge," "mortgage," "conditional sale," "lien," "assignment," and similar terms used in referring to a security interest in goods include corresponding types of security interests under article 9 of the Uniform Commercial Code.

Subd. 19. **Fee and tax.** (a) "Tax" means any fee, charge, exaction, or assessment imposed by a governmental entity on an individual, person, entity, transaction, good, service, or other thing. It excludes a price that an individual or entity chooses voluntarily to pay in return for receipt of goods or services provided by the governmental entity. A government good or service does not include access to or the authority to engage in private market transactions with a nongovernmental party, such as licenses to engage in a trade, profession, or business or to improve private property.

(b) For purposes of applying the laws of this state, a "fee," "charge," or other similar term that satisfies the functional requirements of paragraph (a) must be treated as a tax for all purposes, regardless of whether the statute or law names or describes it as a tax. The provisions of this subdivision do not exempt a person, corporation, organization, or entity from payment of a validly imposed fee, charge, exaction, or assessment, nor preempt or supersede limitations under law that apply to fees, charges, or assessments.

(c) This subdivision is not intended to extend or limit article 4, section 18, of the Minnesota Constitution.

Subd. 20. **Estimated market value.** When used in determining or calculating a limit on taxation, spending, state aid amounts, or debt, bond, certificate of indebtedness, or capital note issuance by or for a local government unit, "estimated market value" has the meaning given in section 273.032.

History: *1941 c 492 s 44; 1945 c 337 s 1; 1947 c 201 s 4; 1955 c 495 s 1; 1955 c 783 s 1; 1959 c 52 s 2; 1965 c 812 s 25; 1969 c 69 s 1; 1973 c 123 art 5 s 2,7; 1973 c 228 s 1; 1973 c 343 s 1; 1974 c 88 s 1; 1977 c 347 s 64; 1979 c 332 art 1 s 92; 1980 c 487 s 21; 1983 c 247 s 216; 1984 c 656 s 4; 1986 c 444 s 5; 1Sp1986 c 3 art 1 s 82; 1990 c 391 art 8 s 57; 1991 c 354 art 6 s 19; 1996 c 462 s 43; 2000 c 382 s 18; 1Sp2001 c 10 art 2 s 84; 2006 c 259 art 13 s 15; 2009 c 88 art 12 s 18; 2013 c 143 art 14 s 109; 2014 c 204 s 12,13; 2023 c 5 s 2; 2023 c 62 art 2 s 115,117*

West's North Carolina General Statutes Annotated
North Carolina Rules of Court
General Rules of Practice for the Superior and District Courts Supplemental to the Rules of Civil Procedure

Superior and District Courts Rule 29

Rule 29. Definition of “Seal.”

Effective: February 13, 2023
Currentness

In all cases in which the seal of any court or judicial office is required by law to be affixed to any paper issuing from a court or office, the word “seal” shall be construed to include an impression of the official seal, made upon the paper alone, an impression made by means of a wafer or of wax affixed thereto, or an electronic image adopted as the official seal affixed thereto. The Administrative Office of the Courts may prescribe the format and appearance of an electronic image adopted for use as an official seal.

Credits
[Adopted effective February 13, 2023.]

Superior and District Courts Rule 29, NC R SUPER AND DIST CTS Rule 29
Current with amendments received through September 1, 2023. Some sections may be more current, see credits for details.

End of Document

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: March 27, 2024

RE: Rule 509, N.D.R.Ev., Identity of Informer

At the January 2024 meeting, the committee discussed the references to "chambers" in N.D.R.Crim.P. 24 and N.D.R.Ev. 509. The committee removed the reference to "chambers" in N.D.R.Crim.P. 24. The committee instructed Staff to research Rule 509 to see if other states have addressed the "in chambers" language relating to a violation of the right to a public trial.

The Federal Rules of Evidence do not include a privilege rule on an informer's identity; however, the U.S. Supreme Court discussed the issue in *Roviaro v. U.S.*, 353 U.S. 53 (1957). The Court defined the privilege as "the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Id.* at 59. "The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation." *Id.*

A limitation on the use of the privilege arises from the fundamental requirements of fairness. *Roviaro*, at 60. Where the disclosure of an informer's identity, or of the contents of his or her communication, is relevant and helpful to the accused's defense, or is essential to a fair determination of a cause, the privilege must give way. *Id.* at 60-61.

In *Roviaro*, at 62, the Court did not develop a fixed rule with respect to disclosure of an informer's identity. The Court held a trial court must "balance[e] the public interest

in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure [of an informant's identity] erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.*

The following states have specific rules dealing with the privilege to withhold an informer's identity:

1) Washington (Superior Court Criminal Rule 4.7(f)(2))
2) Montana (Mont. R. Evid. 502)
3) Delaware (D.R.E. 509)
4) Texas (TX R. Evid. 508)
5) Nebraska (Neb. Rev. St. § 27-510)
6) Oklahoma (12 Okl. St. § 2510)
7) Maine (Me. R. Evid. 509)
8) Arkansas (Ark. R. Evid. 509)
9) Alabama (AL R. Evid. 509)

In some states' rules, "in camera" is used instead of "in chambers." Staff found no cases from the above states discussing the "in chambers" or "in camera" language and a violation of the right to a public trial. Staff has attached a copy of Rule 509; the "in chambers" language in subdivisions (d) and (e) is highlighted. Staff has also attached the January 2024 meeting minutes discussing N.D.R.Ev. 509.

RULE 509. IDENTITY OF INFORMER

(a) Rule of Privilege. The United States or a state or subdivision of a state has a privilege to refuse to disclose the identity of an individual who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege under this rule may be claimed by an appropriate representative of the government to which the information was furnished.

(c) Exceptions. No privilege exists under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed by a holder of the privilege or by the informer's own action to persons who would have cause to resent the communication or if the informer appears as a witness for the government.

(d) Procedures. If it appears that an informer may be able to give testimony relevant to an issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which the government is a party, and the informed government invokes the privilege, the court must give the government an opportunity to show in chambers facts relevant to determining whether the informer can, in fact, supply the testimony. The showing will ordinarily be by declaration, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon declaration. If the court finds there is a reasonable probability that the informer can give

the testimony, and the government elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant or on its own motion must grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of the defendant, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents may not otherwise be revealed without consent of the informed government. All counsel and parties may be present at every stage of a proceeding under this subdivision except a showing in chambers, if the court has determined that no counsel or party may be present.

(e) Legality of Obtaining Evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court must, on request of the government, direct that the disclosure be made in chambers. All counsel and parties concerned with the issue of legality must be permitted to be present at every stage of a proceeding under this subdivision except a disclosure in chambers, at which no counsel or party may be present. If disclosure of the identity of the informer is made in chambers, the record must be sealed and preserved to be made available to the

appellate court in the event of an appeal, and the contents may not otherwise be revealed without consent of the government.

EXPLANATORY NOTE

Rule 509 was amended, effective March 1, 2014; March 1, 2021; _____.

Rule 509 is modeled after Rule 509 of the Uniform Rules of Evidence and protects, in certain instances, the identity of one who furnishes information that aids the government in the investigation of violations of the law. The need for a privilege of this nature is clear. As McCormick has stated:

"Informers are shy and timorous folk, whether they are undercover agents of the police or merely citizens stepping forward with information about violations of law, and if their names were subject to be readily revealed, this enormously important aid to law enforcement would be almost cut off." McCormick on Evidence 111 at 236 (2d ed. 1972).

Thus, subdivision (a) grants a privilege that protects the identity of an informer. Although often called the "informer's privilege," the true holder of the privilege is the governmental entity to which the information is furnished. The privilege protects only the identity of the informer and not the informer's communication, except to the extent that protection of the contents of the communication is necessary to preserve the informer's anonymity. 8 Wigmore on Evidence 2374 at 765 (McNaughton rev. 1961).

Invocation of the privilege is most likely to occur in the context of a criminal proceeding, but the privilege is not limited to those proceedings. Prosecutions of civil

violations and investigations by legislative bodies may include the use of informers and the possibility of reprisal against them. The privilege is extended to protect the informer's identity in those situations.

Subdivision (b) provides that the privilege may be claimed by "an appropriate representative" of the entity to which the information was given. Normally, this representative will be counsel. However, in cases in which neither the United States nor the State of North Dakota is a party, other representatives should be accepted as proper claimants. See Advisory Committee's Note to Rule 510, Deleted and Superseded Material, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).

Subdivision (c) lists two instances in which the privilege does not apply. The first is whenever the identity of the informer or the informer's interest in the subject matter of the communication has been disclosed to those "who would have cause to resent the communication." This language, taken from the landmark opinion of *Roviaro v. United States*, 353 U.S. 53, 60, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), is designed to remove the privilege in those cases in which the identity of an informer is already known to those from whom it was to be shielded, and, at the same time, to leave the privilege intact whenever disclosure is otherwise made, e.g., to other enforcement authorities.

Disclosure may be made by the government or by the informer. Allowing the informer, who is not the holder of the privilege, essentially to "waive" its protection is a minor departure from the law of privileges for, normally, only a holder or representative may effect a waiver. The nature of this particular privilege and the practical necessities

involved dictate this result; the government could not reasonably restrain an informer's desire to disclose the informer's identity.

The second exception stated in subdivision (c) is that the privilege is inapplicable whenever the informer appears as a witness for the government. This exception is of constitutional origin. A defendant may not be denied his rights to confrontation of witnesses and to due process of law on the basis of an informer's privilege. *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).

Subdivision (d) states that the general rule of privilege does not apply whenever it appears that the informer may be able to give testimony relevant to "any issue in a criminal case" or to "a fair determination of a material issue on the merits in a civil case." The doctrine supporting the exception is essentially one of fairness. In each case, or at least in criminal prosecutions, a balancing of the conflicting interests must be made:

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Roviaro v. United States*, supra, 353 U.S. 62.

In *Roviaro*, the informer was also a participant in the crime. Since that decision, participation in the crime has been deemed to be a critical factor in the decision of whether disclosure of an informer's identity should be required. *See United States v. Clark*, 482 F.2d 103 (5th Cir. 1973). See generally, the cases collected in 2 Wright,

Federal Practice and Procedure, 406 (1969). An informer's participation in a crime will be a factor to consider under this rule, not in and of itself, but as it bears upon the relevancy and significance of the informer's potential testimony.

If it appears that an informer may be able to give relevant testimony and the government, when informed of this fact, invokes the privilege, this rule provides the procedure by which the validity of the claim is to be tested. The court must review, in chambers, the facts relevant to determining whether relevant information may be obtainable from the informer. This limited intrusion into what may be privileged material is deemed to be the most equitable manner of balancing the conflicting interests involved.

If the court finds that disclosure is in order and the government refuses to reveal the informer's identity, the court, in its discretion, may grant appropriate relief, as delineated in the rule.

Subdivision (e) details the extent of the privilege under this rule when an informer is relied upon to establish the legality of the means by which evidence was obtained. This subdivision was derived from a rule of privilege that was proposed for, but never enacted as part of, the Federal Rules of Evidence.

Rule 509 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 509. Several occurrences of the term "person" have been replaced with the term "individual," which is intended to mean a human being. The amendments to the rule's terminology are not intended to change any result in any ruling on evidence admissibility.

Rule 509 was amended, effective March 1, 2021, to delete the term "affidavit" and replace it with "declaration." This amendment was made in response to N.D.C.C. ch. 31-15, which allows anyone to make an unsworn declaration that has the same effect as a sworn declaration, such as an affidavit. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

SOURCES: Joint Procedure Committee Minutes of _____; April 24, 2020, pages 4-5; April 25-26, 2013, page 34; January 29, 1976, pages 9, 10. Rule 509, Uniform Rules of Evidence; Proposed Rule 509(c)(3), Federal Rules of Evidence (not enacted).

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. ch. 31-15.

The motion for discussion on Rule 24 as amended CARRIED.

On Evidence Rule 509, Staff said he could not find any North Dakota cases discussing the "in chambers" language of subdivisions (d) and (e).

Judge Bailey MOVED to replace "chambers" with "a closed location" on page 85, line 19, and page 86, lines 33, 39, 41, and 43. Mr. Raum seconded.

A member asked whether this language had caused an issue in the past. A member said the change would be consistent with the changes made to Criminal Rule 24.

A member asked whether a *Waller* analysis needed to be done anytime a courtroom closure occurs, regardless of the circumstances. The member said they have not dealt with a criminal informant scenario.

A member said *Waller* dealt with a suppression motion and whether the Sixth Amendment right to a public trial applied. The member said a suppression hearing is similar to a trial. Witnesses are sworn in and cross-examined and many times the result is dispositive of the case. The member said some additional research would be helpful.

Members discussed researching the rule further to see if other courts have addressed whether *Waller* applies in this context.

Judge Bailey and Mr. Raum withdrew the motion and second.

Justice Bahr MOVED to table Rule 509 for further research and continue the discussion at the next meeting. Mr. Quick seconded. Motion CARRIED.

REFERENCES IN THE RULES TO THE UNIFORM JUVENILE COURT ACT, N.D.C.C. CH. 27-20 (REPEALED) (PAGES 92-98 OF THE AGENDA MATERIAL)

Staff said the Chair requested a search of the rules for references to the Uniform Juvenile Court Act, N.D.C.C. ch. Chapter 27-20, which was repealed in 2021. Staff said N.D.R.Crim.P. 1 and N.D.R.Civ.P. 81, Table A reference N.D.C.C. ch. 27-20. Staff removed the references to Chapter 27-20. Staff also removed references in Table A to other laws that have been repealed. Staff said it appeared the table had not been updated in a while.

Judge Ehlis MOVED to adopt the proposed amendments. Justice Bahr seconded. Motion CARRIED.

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 9, 2024

RE: Rule 58, N.D. Sup. Ct. Admin. R., Vexatious Litigation

The committee considered a rewritten Rule 58 at the January 2024 meeting. The committee tabled the matter so members would have more time to consider the similarities and differences between the current rule and the rewritten rule. Since the January meeting, Sara Behrens made some changes to the rewritten rule, which are highlighted. The changes include in part:

1) adding small claims actions (lines 10-11)
2) amending a definition of "vexatious litigant" (lines 27-30)
3) changes to Section 7 on a pre-filing order issued by the supreme court (lines 121-122, 124)

Minor changes were also made at lines 59 and 90-91. Staff has attached Sara's memo explaining some differences between the current rule and rewritten rule, the rewritten Rule 58, current Rule 58, and the minutes on Rule 58 from the January 2024 meeting.

MEMO

TO: Joint Procedure Committee

FROM: Sara Behrens

DATE: January 16, 2024

RE: Rule 58, N.D. Sup. Ct. Admin. R., Vexatious Litigation

I have proposed a rewrite of AR 58 to be easier to use and hopefully address some issues the clerks are having with vexatious litigant filings.

Section 1 is the same as the prior rule.

Section 2 – Definitions

This section has been reworked to expand the definition of "litigation," retitle what is currently "vexatious litigant" to "vexatious conduct," and provide a definition (taken from Section 4 of the prior rule) for "vexatious litigant."

Section 3 – Procedure – Designate Vexatious Litigant

The current rule does not provide a clear procedure for having someone declared a vexatious litigant. Section 3 of the rewritten rule provides the procedure and forms can be drafted and added to the self-help website. Some forms have already been added to the self-help website.

The rewritten rule expands what can be included in a prefiling order.

Section 4 – Procedure – New Litigation and Subsequent Filings

The rewritten rule provides a clearer procedure on how a vexatious litigant may file new actions and documents. It requires the vexatious litigant to use the court-approved form. It requires the documents the vexatious litigants wish to file be submitted separately from the application. This has been an issue for clerks when a vexatious litigant submits an application which is essentially contains everything the vexatious litigant is seeking to file.

Section 4(d) now provides that a party served with new litigation by a vexatious litigant does not have to do anything in response unless that litigation is filed with the clerk. This issue has recently arisen. The party served filed a notice with the clerk but there was no file into which to put the notice as the vexatious litigation did not file anything with the clerk.

Section 4(f) makes clear that leave to file is not needed for an application for indigent defense services. The rule itself does not apply in criminal actions, but there are situations where indigent defense is assigned in a civil matter.

Section 5 provides more clear sanctions for when a vexatious litigant fails to follow the court's order.

Section 6 makes clear what can and cannot be appealed. The Supreme Court has stated that an order denying an application for leave to file is not appealable.

Section 7 is the same as the prior rule.

Section 8 prohibits vexatious litigants from filing electronically. When a vexatious litigant electronically files into a case there is no option to accept but not file the documents. Instead, the clerks are having to print the documents, try to separate out the application for leave so it can be filed, scanning in the other documents for the judge to review and then rejecting the filing.

Sections 9 and 10 are the same as the prior rule's sections 10 and 11.

N.D. Sup. Ct. Admin. R.

RULE 58. VEXATIOUS LITIGATION

Section 1. Purpose.

This rule addresses vexatious litigation, which impedes the proper functioning of the courts and court-related adjudicative bodies, while protecting reasonable access to those tribunals.

Section 2. Definitions.

(a) "Litigation" means any civil or disciplinary action or proceeding, including any appeal from an administrative agency, any review of a referee order by the district court, and any appeal to the supreme court. "Litigation" does not include criminal actions but does include small claims actions.

(b) For purposes of this rule, "presiding judge" means the presiding judge of a district under N.D. Sup. Ct. Admin. R. 2, the chair of the disciplinary board, or the chair of the judicial conduct commission. For purposes of this rule, and as context may require, references to a judge or to the court also refer to the disciplinary board or the judicial conduct commission. When the presiding judge has recused or is disqualified from a matter, the matter shall be reassigned under N.D. Sup. Ct. Admin. R. 2(9) or (10).

(c) "Vexatious conduct" means conduct that:

(1) serves primarily to harass or maliciously injure another party in litigation;

(2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;

(3) is imposed solely for delay;

(4) hinders the effective administration of justice;

(5) imposes an unacceptable burden on judicial personnel and resources; or

(6) impedes the normal and essential functioning of the judicial process.

(d) "Vexatious litigant" means a litigant, either acting pro se or through an attorney, who:

(1) In the immediately preceding seven-year period, has commenced, prosecuted, or maintained at least three litigations that:

(A) involved vexatious conduct on the part of the litigant and

(B) were finally determined adversely to that person;

(2) After a litigation has been finally determined against the person, the person has repeatedly relitigated or attempted to relitigate either:

(A) the validity of the determination against the same party or parties as to whom the litigation was finally determined; or

(B) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same party or parties as to whom the litigation was finally determined;

(3) In any litigation, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary burden, expense, or delay; or

(4) In any litigation, the person has previously been declared a vexatious litigant by any state or federal court of record in any action or proceeding.

Section 3. Procedure-Designate Vexatious Litigant.

(a) At the request of a party or on the court's own motion, the presiding judge may designate a litigant as a vexatious litigant.

(b) If the presiding judge finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the presiding judge must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If a response is filed, the presiding judge may, in the judge's discretion, grant a hearing on the proposed order. If no response is filed within 14 days, or if the presiding judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the presiding judge may issue the pre-filing order.

(c) The pre-filing order may

(A) prohibit the vexatious litigant from filing any new litigation or any new documents in existing litigation in this state without first obtaining leave of a judge of the court where the litigation is proposed to be filed.

(B) require the vexatious litigant to furnish security to assure payment of the moving party's reasonable expenses, costs, and, if authorized, attorney fees incurred in a pending action.

(C) require the vexatious litigant to take any other action reasonably necessary to curb the vexatious litigant's vexatious conduct.

(d) A pre-filing order must contain

(A) an exception allowing the person subject to the order to file an application seeking leave to file.

(B) a requirement that before ruling on the merits of any subsequent filing the court must rule on the application for leave to file.

Section 4. Procedure-New Litigation and Subsequent Filings.

(a) In order to file new litigation or documents into existing litigation, a vexatious litigant must file an application for leave to file using the form approved by the state court administrator. The documents the vexatious litigant seeks to file must be submitted separately from the application for leave to file. The documents the vexatious litigant seeks to file will not be docketed unless the court grants the application for leave to file.

(b) A court may permit the filing of new litigation or documents into existing litigation only if it appears that the litigation or document has merit and has not been filed for the purpose of harassment or delay.

(c) If the court issues an order granting leave to file new litigation or a document into existing litigation, a party's time to answer or respond will begin to run when the party is served with the order of the court and a copy of the new litigation or document.

(d) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file a notice stating that the plaintiff or complaining party in a disciplinary proceeding is a vexatious litigant subject to a pre-filing order. The filing of such notice automatically stays the litigation. The litigation must be dismissed or denied unless the plaintiff or complainant,

within 10 days of the filing of the notice, obtains an order permitting the litigation to proceed. If a party is served with new litigation but the action is not filed with the clerk, the party served is not required to respond to the new litigation unless the vexatious litigant obtains an order allowing the litigation to be filed and files and serves the new litigation.

(e) Upon receiving an application for leave to file, or upon notice from any party named in the litigation, the court must rule on the application before ruling on the merits of any proposed filing.

(f) An order granting leave to file is not required for an application for indigent defense services.

Section 5. Sanctions.

(a) Disobedience of a pre-filing order entered under this rule may be punished as a contempt of court.

(b) If a vexatious litigant subject to a pre-filing order files any new litigation without first obtaining the required leave of court, the court may summarily dismiss the action without notice.

(c) The court may award reasonable attorney's fees and costs to the party filing the notice under section 4(d) of this rule.

Section 6. Appeal.

(a) A pre-filing order entered by a presiding judge designating a person as a vexatious litigant may be appealed to the supreme court under N.D.C.C. § 28-27-02 and N.D.R.App.P. 4.

(b) A pre-filing order entered by the supreme court is not appealable.

(c) An order denying the application for leave to file by a vexatious litigant is not appealable.

Section 7. Supreme Court Order.

The supreme court may, on the court's own motion or the motion of any party to an appeal, enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court where the litigation is proposed to be filed. If the supreme court finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the court must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If a response is filed, the supreme court may, in the court's discretion, grant a hearing on the proposed order. If no response is filed within 14 days, or if the supreme court concludes following a response and any subsequent hearing that there is a basis for issuing the order, the supreme court may issue the pre-filing order.

Section 8. Electronic Filing.

Self-represented individuals who have been declared vexatious litigants will not be permitted to file documents electronically and will not be provided a user id and password to access the system. A self-represented vexatious litigant must file in paper format in compliance with all other rules of court.

Section 9. Roster.

The clerk of court must provide a copy of any pre-filing order issued under this rule to the state court administrator who will maintain a list (link to current list) of vexatious litigants subject to pre-filing orders.

Prior Rosters:

[Insert links to prior rosters]

Section 10. Effect of Pre-Filing Order.

A pre-filing order entered under this rule supersedes any other order limiting or enjoining a person's ability to file or serve papers or pleadings in any North Dakota state court litigation.

EXPLANATORY NOTE

Rule 58 was rewritten and adopted effective, _____. Previous rule was adopted effective March 1, 2017; amended effective June 21, 2017; August 11, 2021; September 1, 2022; January 25, 2023.

SOURCES: Joint Procedure Committee Minutes of _____; April 29, 2022, pages 13-14; May 12-13, 2016, pages 25-29. Idaho Ct. Admin. R. 59.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. §§ 27-05-06, 27-05-22, 27-05-23, 28-27-02.

STATE OF NORTH DAKOTA
COURTS

Administrative Rule 58 - VEXATIOUS LITIGATION

Effective Date: 1/25/2023

Section 1. Purpose.

This rule addresses vexatious litigation, which impedes the proper functioning of the courts and court-related adjudicative bodies, while protecting reasonable access to those tribunals.

Section 2. Definition.

(a) Litigation means any civil or disciplinary action or proceeding, including any appeal from an administrative agency, any review of a referee order by the district court, and any appeal to the supreme court.

(b) Vexatious litigant means a person who habitually, persistently, and without reasonable grounds engages in conduct that:

(1) serves primarily to harass or maliciously injure another party in litigation;

(2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;

(3) is imposed solely for delay;

(4) hinders the effective administration of justice;

(5) imposes an unacceptable burden on judicial personnel and resources; or

(6) impedes the normal and essential functioning of the judicial process.

(c) For purposes of this rule, presiding judge means the presiding judge of a district under N.D. Sup. Ct. Admin. R. 2, the chair of the disciplinary board, or the chair of the judicial conduct commission. For purposes of this rule, and as context may require, references to a judge or to the court also refer to the disciplinary board or the judicial conduct commission. When the presiding judge has recused or is disqualified from a matter, the matter shall be reassigned under N.D. Sup. Ct. Admin. R. 2(9) or (10).

Section 3. Pre-filing Order.

(a) The presiding judge may enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court where the litigation is proposed to be filed. A pre-filing order must contain an exception allowing the person subject to the order to file an application seeking leave to file. A pre-filing order also must contain a requirement that before ruling on the merits of any subsequent filing the court must rule on the application for leave to file.

(b) A district judge, referee, disciplinary board member, or judicial conduct commission member may request entry of a pre-filing order by the presiding judge. The presiding judge may enter a pre-filing order relating to a party to an action before the presiding judge.

Section 4. Finding.

A presiding judge may determine a person is a vexatious litigant based on one or more of the following findings:

(a) in the immediately preceding seven-year period the person has commenced, prosecuted or maintained as a self-represented party at least three litigations that have been finally determined adversely to that person;

(b) after a litigation has been finally determined against the person, the person has repeatedly relitigated or attempted to relitigate, as a self-represented party, either

(1) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined; or

(2) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined;

(c) in any litigation while acting as a self-represented party, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary burden, expense or delay;

(d) in any litigation, the person has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding; or

(e) in any disciplinary proceeding, the person has previously been declared to be a vexatious litigant in a disciplinary proceeding.

Section 5. Notice.

If the presiding judge finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the presiding judge must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If a response is filed, the presiding judge may, in the judge's discretion, grant a hearing on the proposed order. If no response is filed within 14 days, or if the presiding judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the presiding judge may issue the pre-filing order.

Section 6. Appeal.

A pre-filing order entered by a presiding judge designating a person as a vexatious litigant may be appealed to the supreme court under N.D.C.C. § 28-27-02 and N.D.R.App.P. 4.

Section 7. Supreme Court Order.

The supreme court may, on the court's own motion or the motion of any party to an appeal, enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court where the litigation is proposed to be filed. If the supreme court finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the court must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If no response is filed within 14 days, or if the supreme court concludes following a response and any subsequent hearing that there is a basis for issuing the order, the pre-filing order may be issued.

Section 8. Procedures for Subsequent Filings.

(a) Any party named in a proceeding covered by this rule may file a notice stating that the litigation plaintiff or complaining party in a disciplinary proceeding is a vexatious litigant subject to a pre-filing order. The filing of such notice stays the proceeding. The proceeding must be dismissed unless the plaintiff or complainant, within 14 days of the filing of the notice, obtains an order permitting the action to proceed. Upon receiving an application for leave to file, or upon notice from any party named in the litigation, the court must rule on the application before ruling on the merits of any proposed filing.

(b) A court may permit the filing of a document in existing litigation by a vexatious litigant subject to a pre-filing order only if it appears that the document has merit and has not been filed for the purpose of harassment or delay.

(c) If the court issues an order granting leave to file a document, a party's time to answer or respond will begin to run when the party is served with the order of the court.

Section 9. Sanctions; New Litigation.

(a) Disobedience of a pre-filing order entered under this rule may be punished as a contempt of court.

(b) A court may permit the filing of a new proceeding by a vexatious litigant subject to a pre-filing order only if it appears that the proceeding or document has merit and has not been filed for the purpose of harassment or delay.

(c) If a vexatious litigant subject to a pre-filing order files any new litigation or disciplinary action without first obtaining the required leave of court to file the proceeding, the court may summarily dismiss the action.

Section 10. Roster.

The clerk of court must provide a copy of any pre-filing order issued under this rule to the state court administrator, who will maintain a list (current list) of vexatious litigants subject to pre-filing orders.

Prior Rosters:

- 2023-01-27 Roster of Vexatious Litigants
- 2022-11-07 Roster of Vexatious Litigants
- 2022-10-05 Roster of Vexatious Litigants
- 2022-07-14 Roster of Vexatious Litigants
- 2022-05-27 Rosterof Vexatious Litigants

Section 11. Effect of Pre-filing Order.

A pre-filing order entered under this rule supersedes any other order limiting or enjoining a person's ability to file or serve papers or pleadings in any North Dakota state court litigation.

Explanatory Note

Rule 58 was adopted, effective March 1, 2017; amended effective June 21, 2017; August 11, 2021; September 1, 2022; January 25, 2023.

Rule 58 was amended, effective September 1, 2022, to make the vexatious litigant procedure applicable to the attorney and judicial disciplinary process and to small claims court. The amendments also clarify pre-filing order procedure.

Rule 58, Section 3, was amended, effective January 25, 2023, to require pre-filing approval be obtained from a judge of the court (or where applicable, the board or commission) where the proposed filing is to be made. The prior rule required leave of a judge "in the district."

SOURCES: Joint Procedure Committee Minutes of April 29, 2022, pages 13-14; May 12-13, 2016, pages 25-29. Idaho Ct. Admin. R. 59.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. §§ 27-05-06, 27-05-22, 27-05-23, 28-27-02.

Version History

A member said a remand while retaining jurisdiction can expedite the resolution of a case without making a party appeal again if the case is remanded and jurisdiction is not retained. The member said it would be nice to know the court has authority to do that under the rule.

A member said the proposed phrase "in the interests of justice" may be all that is needed and "to expedite the resolution of a case or in" may not be necessary. The movant and second accepted the change as a friendly amendment.

Motion CARRIED.

The Chair asked whether similar language on retaining jurisdiction should be adopted in subdivision (b) of Rule 35 relating to criminal appeals.

Mr. Friese MOVED to add "with or without retaining jurisdiction" after "remand the case" on page 155, line 34. Judge Louser seconded.

A member asked whether the phrase "in the interests of justice" should be included.

Mr. Friese amended his motion to delete "with or without retaining jurisdiction" and add "The court may retain jurisdiction in the interests of justice." at the end of line 34. Judge Louser seconded. Motion CARRIED.

The motion to approve the proposed amendments to Rule 35 as amended CARRIED.

RULE 58, N.D. SUP. CT. ADMIN. R., VEXATIOUS LITIGATION (PAGES 158-169 OF THE AGENDA MATERIAL)

Staff explained Staff attorney Sara Behrens proposed a rewritten version of Rule 58 on vexatious litigation. Staff said the rewritten rule addresses some issues clerks in the district courts are having with vexatious litigant filings. The rewritten rule adds a definition section and a clearer procedure on finding a litigant a vexatious litigant.

Judge Ehlis MOVED to table rewritten Rule 58 to the next meeting to look at the differences between the current rule and the proposed rule. Mr. Quick seconded.

A member asked about the definition of vexatious litigants and noted that an individual may be a vexatious litigant if they lose three cases in seven years. A member said the current rule uses similar language that allows a presiding judge to find that a person is a vexatious litigant if they lose three cases in seven years.

Motion CARRIED.

RULE 11.8, N.D.R.CT., LIMITED PROFESSIONAL GUARDIAN PRACTICE

Staff said the Guardianship Standards Workgroup requested the committee to send the proposed amendments to Rule 11.8 immediately to the Supreme Court.

By unanimous consent, the committee agreed to send the rule immediately to the Supreme Court.

Mr. Friese MOVED to reconsider the amendments to Rule 11.8 made at the September meeting. Justice Bahr seconded.

Mr. Friese MOVED for the following change beginning on line 11:

(1) ~~Submission of~~ Submitting beginning inventory reports, annual reports, final reports, and other routine reports required by statute or rule;

(2) ~~Request~~ Filing a motion for:

(A) a change of venue to another state district court in North Dakota;

(~~3~~B) ~~T~~termination of guardianship due to death of ~~W~~ward; or

(4C) ~~D~~discharge of guardian and appointment of a successor professional guardian legal entity;~~.~~

(~~5~~D) approval of guardian compensation and reimbursement;

(~~6~~E) leave to appear, or for the ward to appear, at a hearing by reliable electronic means; or

(~~7~~F) ~~Request~~ a review hearing.

Mr. Raum seconded. Motion CARRIED.

FOR THE GOOD OF THE ORDER

The Chair said the next meeting is Friday, April 26, in Fargo. The Chair reminded members to submit their expenses for attending the meeting.

Mr. Quick MOVED to adjourn the meeting. Judge Sjue seconded. Motion CARRIED.

The Chair adjourned the meeting at approximately 1:53 p.m. on January 26, 2024.

_____

Andrew Forward

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 5, 2024

RE: Rule 8.6, N.D.R.Ct., Parenting Investigators

Members of the court administration's education department, Bryan Pechtl and Lee Ann Barnhardt, proposed amendments to subdivision (b) of Rule 8.6. The proposed amendments clarify the requirements to qualify as a parenting investigator. The proposed amendments delete the language on completing a 40-hour program of specialized investigation training. Mr. Pechtl and Ms. Barnhardt did not know what that language referred to. A 40-hour program of specialized investigation training is not offered in this state.

The proposed Rule 8.6 is attached. At the September 2023 meeting, the committee approved form and style amendments to the Rules of Court, including Rule 8.6. The amendments proposed by the education department are highlighted (lines 17-29).

RULE 8.6. PARENTING INVESTIGATORS

(a) Roster of Parenting Investigators. The ~~State Court Administrator shall~~ state court administrator will maintain and monitor a roster of persons satisfying the qualifications under ~~paragraph~~ subdivision (b) to serve as parenting investigators. The roster must include the parenting investigator's name and address. The roster must be updated and published on an annual basis and be available for inspection in the clerk of district court's office. The ~~State Court Administrator~~ state court administrator may establish a reasonable fee for placement on the roster and a reasonable yearly renewal fee. Parenting investigators appointed to provide services under this rule must be selected from the roster.

(b) Qualifications. To be listed on the roster and qualify as a parenting investigator under N.D.C.C. §§14-09-06.3 and 14-09.06.4, a person ~~shall~~ must provide the ~~State Court Administrator~~ state court administrator with written credentials indicating the person satisfies the following requirements:

(1) a minimum of an ~~Associate Degree~~ associate degree in an academic field related to child care, child development, or children's services; or

(2) at least five years of experience in the delivery or supervision of child care or children's services, child development services, or in the education of children; or ~~a 40 hour program of specialized parenting investigation training;~~

(3) at least three years of experience as a family law lawyer;

(~~2~~4) completion of at least 18 hours of specialized parenting investigation training offered by the North Dakota court system~~, unless the person has obtained 40 hours of specialized training in accordance with subparagraph (1)~~;

(~~3~~5) completion of 18 hours of parenting investigation-related training every three years after receiving the initial hours of specialized training;

(~~4~~6) communication skills necessary to successfully conduct an interview, prepare a written report, and make an oral presentation; and

(~~5~~7) no criminal conviction or substantiated instance of child abuse or neglect.

(c) Investigatory Responsibilities. A parenting investigator ~~shall~~ must:

(1) become knowledgeable about the child's and family's history and present situation by reviewing the court file; reviewing records and reports, including medical, law enforcement, psychological, psychiatric, and educational records and reports; and researching information about any related criminal or child protection proceeding, investigation, or allegation;

(2) obtain necessary authorizations for release of information;

(3) interview, as appropriate, social workers and probation officers to obtain background and current information regarding the child and family;

(4) interview, as appropriate, service providers (i.e. teachers, psychologists, psychiatrists, doctors, nurses, neighbors, and others) who are knowledgeable about the child's and family's past and present situation;

(5) interview, as appropriate, the child's parents and siblings, and the people with whom the child resides or may reside, and other people who are significant in the child's daily life;

(6) meet and observe the child in a manner consistent with the child's developmental capabilities;

(7) observe, as appropriate, parent and child interaction;

(8) prepare a written report regarding the child's best interests, including conclusions and recommendations and the facts upon which they are based;

(9) file the written report with the court and serve it on the parties at least 30 days prior to the hearing; and

(10) recommend, as appropriate, psychological evaluations, psychiatric evaluations, physical evaluations, parenting evaluations, chemical dependency evaluations, or other evaluations.

(d) Court Proceedings. A parenting investigator ~~shall~~ must attend all court proceedings unless excused by the court and ~~shall~~ must testify when requested. A parenting investigator may not call a witness, question a witness, file a motion, or act as a legal advocate.

(e) Post Investigation Duties. The parenting investigator, by order of the court, may assist in parenting rights and responsibilities issues after submission of the report.

(f) Parenting Investigator Review Board. The Parenting Investigator Review Board consists of nine members: three judges and one lawyer appointed by the ~~Chief Justice~~ chief justice, two lawyers appointed by the Board of Governors of the State Bar

Association, and three lay parenting investigators who are or have been listed in good standing on the parenting investigator roster and who are appointed by the ~~Chief Justice~~ chief justice after consultation with the ~~President~~ president of the State Bar Association. Board members are appointed for three-year terms and may serve no more than three consecutive three-year terms. Of the members initially appointed and as determined by lot at the first meeting, one-third of the members will serve for one year, one-third will serve for two years, and one-third will serve for three years. Subject to the three term limit, each member is eligible for reappointment and serves until the member's successor is appointed. The ~~Chief Justice~~ chief justice appoints the board chair. Expenses incurred by members in the performance of duties are reimbursed by the appointing authority.

(1) Board Responsibilities. The board, through panels established under this rule, ~~shall~~ will receive and review complaints concerning the performance and conduct of parenting investigators providing services under this rule.

(2) Complaints - Procedures for Review.

(A) All complaints must be submitted in writing to the chair of the board. The complaint must include facts underlying the complaint, must specify the misconduct that is the subject of the complaint, and must be signed by the complainant.

(B) Upon receipt of a written complaint, the chair of the board ~~shall~~ must determine if the complaint is with regard to a pending case in which parenting investigator services are being provided. If the complaint involves parenting investigator conduct in a pending case, the chair ~~shall~~ must inform the complainant that the complaint may only be addressed before the court that is hearing the pending case, either by seeking

removal of the parenting investigator or by contesting the information or recommendation contained in the parenting investigator's report or testimony. In pending cases, review of the complaint and communications with the complainant must be handled by the chair of the board in a manner that assures the judge presiding in the case remains uninformed about the complaint. If the complaint concerns conduct unrelated to a pending case, the following procedures apply:

(i) The chair of the board ~~shall~~ must review the complaint to determine whether the allegations, if true, have merit. If the allegations are determined to be without merit, the complaint will not be reviewed further and the chair ~~shall~~ must notify the complainant of the disposition.

(ii) If the chair of the board determines the allegations in the complaint, if true, have merit, the complaint must be referred to a panel of the board appointed by the chair for further consideration. The panel must consist of three members of the board, of which at least one panel member must be a lay parenting investigator. The panel ~~shall~~ must provide a copy of the complaint to the parenting investigator and request a written response from the parenting investigator within 30 days of receipt of the request. The request must identify specific issues in the complaint to which the panel desires a response. The parenting investigator must provide a copy of the response to the complainant. The panel may, as circumstances warrant, request that the complainant and the parenting investigator meet with the panel to review the allegations in the complaint.

(3) In reviewing a complaint, the panel ~~shall~~ must consider whether the allegations in the complaint indicate any of the following forms of misconduct:

(A) failure to fulfill responsibilities required under ~~paragraph~~ subdivisions (c), (d), or (e);

(B) violation of the code of conduct for parenting investigators, which is included and incorporated in this rule as an ~~Appendix~~ appendix;

(C) misrepresentation of qualifications to serve as a parenting investigator;

(D) violation of state or local laws or court rules; or

(E) taking or failing to take any other action that would reasonably place the suitability of the person to serve as a parenting investigator in question.

(4) Findings and Dispositions. In considering the complaint and the parenting investigator's written response, the panel ~~shall~~ must make findings regarding each of the specific issues in the complaint to which the panel requested a response. The findings must indicate that either there is no merit to the issue based on the parenting investigator's response or that there is merit to the issue. The panel ~~shall~~ must determine whether the issues found to have merit indicate any form of misconduct identified under ~~sub~~paragraph (f)(3). The panel may take any of the following actions: issue a written reprimand, refer the parenting investigator to additional training, require that the parenting investigator be assigned a mentor for a specified period of time, or direct that the parenting investigator be removed from the roster. The panel ~~shall~~ must take into consideration any prior complaints that resulted in the imposition of any of the identified actions. The complainant and the parenting investigator must be notified in writing of the panel’s disposition of the complaint. If the panel directs removal from the roster, the panel may

specify the manner and time frame within which the person may apply for placement at a later time on the roster.

(5) Confidentiality. A complaint and any associated records are confidential unless the panel has determined under ~~sub~~paragraph (f)(4) that the complaint has merit. Confidential records may be disclosed only in response to a court order.

(6) Time frames for Disposition. Complaints must be resolved within 25 days of receipt of the complaint if the complaint involves a pending case. All other complaints must be resolved within 120 days of receipt of the complaint. These time frames may be extended by the chair of the board upon a finding by the chair that good cause exists for an extension.

(g) Parenting Investigator Training. The ~~State Court Administrator shall~~ state court administrator will provide for regular training programs to satisfy the qualification requirements under ~~paragraph~~ paragraphs (b)(2) and (3). The ~~State Court Administrator shall~~ state court administrator will provide for the development and maintenance of a parenting investigator manual to serve as a resource for those providing services under this rule and as a basis for parenting investigator training programs.

EXPLANATORY NOTE

Rule 8.6 was adopted, effective March 1, 2000; amended effective March 1, 2007; August 1, 2009;_____.

SOURCES: Joint Procedure Committee Minutes of _____; September 28, 2023, page 9; May 21-22, 2009, pages 44-45; September 24-25, 1998,

pages 8-15; Court Services Administration Committee Minutes of April 7, 2006 and July 14, 2006.

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: March 18, 2024

RE: Rule 39, N.D. Sup. Ct. Admin. R., Recording District Court Trials and Proceedings; Rule 40, N.D. Sup. Ct. Admin. R., Access to Recordings in District Court

Staff removed references to N.D.C.C. § 27-02-05.2 (repealed) in Rules 39 (line 8) and 40 (line 7). The rules reference policies relating to personnel and court records. Those issues are addressed in N.D.C.C. § 27-02-05.1. The proposed amendments to Rules 39 and 40 are attached.

N.D. Sup. Ct. Admin. R.

RULE 39. RECORDING DISTRICT COURT TRIALS AND PROCEEDINGS, AND PREPARING TRANSCRIPTS

Section 1. Authority

Under N.D. Const. art. VI, § 3, the supreme court has the authority to establish policies and procedures to be followed by all courts of the state. The court also has specific authority to establish policies relating to personnel and court records under N.D.C.C. § 27-02-05.1 ~~and relating to court records under N.D.C.C. § 27-02-05.2~~.

Section 2. Preserving the Record

Except in small claims court cases under N.D.C.C. ch. 27-08.1 and in traffic cases under N.D.C.C. § 39-06.1-03, the record of testimony and proceedings of the district court must be preserved using audio-recording software, video-recording software, or stenographic shorthand notes. All electronic recording software must meet the minimum specifications established in administrative policies.

Section 3. Filing

The court reporter must file all shorthand notes of the proceeding with the clerk of district court at the conclusion of the trial or proceeding or as soon after as is practical. All audio recordings and annotations or tags must be maintained in the electronic recording software.

Section 4. Access to Originals

(a) Employees

An employee of the district court, or other individual under contract with the court, who is charged with preparing the transcript may access audio recordings or shorthand notes for the purpose of preparing the transcript. All audio recordings maintained in the electronic recording software may be accessed through the electronic recording software or a recording may be replicated.

(b) Non-Employees

If the court staff who attended the proceeding is not able to prepare the transcript, the court may order that another person be allowed to access the shorthand notes or audio recording.

Section 5. Transcript – Duty to Prepare

Court staff must prepare a transcript of the proceeding upon receiving an order from the court or an order for transcript from the clerk of district court and upon payment of fees. Each district must establish procedures to ensure that transcripts are prepared in accordance with time lines established in the North Dakota Rules of Appellate Procedure.

Section 6. Criminal Action Prepared at State Expense

A judge of a district court in which a criminal action or proceeding has been tried, on the judge's own motion or on application of the defendant or the state's attorney of the county, may order a transcript of the action or proceeding, or of any part, to be made at state expense whenever there is reasonable cause.

Section 7. Form of Transcript

The transcript must be prepared in the form prescribed by N.D.R.App.P. 10.

Section 8. Certification

The transcript must be certified by the person preparing the transcript in accordance with N.D.R.App.P. 10.

Section 9. Fees

(a) Individuals Employed by the Judiciary

Court staff must receive a transcript preparation fee as established by administrative policy.

(b) Non-Judicial Employees

If the transcript is prepared by an individual who is not a judicial employee, payment will be made directly to the preparer, at a rate not to exceed administrative policy, and in accordance with N.D.R.App.P. 10.

(c) Originals and Copies

The original shorthand notes or audio recording of the proceeding are the property of the state of North Dakota. The transcript is the property of the state of North Dakota after it has been filed with the clerk of district court.

EXPLANATORY NOTE

Administrative Rule 39 was adopted, effective March 1, 1995; amended effective July 1, 1997; March 1, 1998; December 1, 2019; August 11, 2021; March 1, 2023;_____.

SOURCES: Joint Procedure Committee Minutes of _____; January 27, 2022, pages 2-4; September 30, 2021, pages 14-15; January 30, 1997, pages 9-10.

CROSS REFERENCE: N.D.R.App.P. 10 (The Record on Appeal).

N.D. Sup. Ct. Admin. R.

RULE 40. ACCESS TO RECORDINGS OF PROCEEDINGS IN DISTRICT COURT

Section 1. Authority

Under N.D. Const. Art. VI, § 3, the supreme court has the authority to establish policies and procedures to be followed by all courts of the state. The court also has specific authority to establish policies relating to court records under N.D.C.C. § 27-02-05.~~2~~1.

Section 2. Access to Recordings – Copies – On-site Access

(a) Parties and their attorneys may access or obtain copies of an audio recording of a trial court proceeding without charge, unless access is restricted by order of the court.

(b) A non-party may request a copy of an audio recording of a court proceeding by submitting a request in writing to the judge who presided over the proceeding or the judge's designee. If the proceeding was closed or confidential, no recording will be provided. The judge may restrict access to all or part of a recording of a public proceeding if:

(1) it would materially interfere with a party's right to fair trial;

(2) a witness or party has objected and shown good cause why it should not be available;

(3) it includes testimony of an adult victim or witness in a prosecution under N.D.C.C. ch. 12.1-20, or for charges in which an offense under that chapter is an included offense or an essential element of the charge, unless the victim or witness consents;

(4) it includes testimony of a juvenile victim or witness in a proceeding in which illegal sexual activity is an element of the evidence;

(5) it includes testimony of undercover agents or relocated witnesses; or

(6) it includes by testimony or other comment information protected under N.D.R.Ct. 3.4(a).

(c) A person seeking to limit access to or availability of an audio recording under subsection 2(b)(1) or (2) must submit a written motion to the court. The person must give notice of the motion to all parties to the proceedings. The court may require the person to give notice of the motion to any other persons or entities identified in the recording.

(d) If suitable, supervised accommodations are available, a non-party requesting access to an audio recording of a trial court proceeding may listen to the recording in a dedicated area, unless access is restricted by order of the court. The listener may not record or copy the recording by any electronic or other means.

(e) Each district will establish procedures to ensure timely production of audio recordings upon request of parties or non-parties.

(f) The state court administrator will establish reasonable fees and payment methods for producing an audio recording of a court proceeding for a non-party. The fee must be paid in advance.

(g) Video or electronic media coverage, if granted, is governed by N.D. Sup. Ct. Admin. R. 21.

Section 3. Status of Recording

Unless otherwise provided by court rule, the transcript of the proceeding, and not an audio recording provided under this rule, is the official record of the proceeding.

EXPLANATORY NOTE

Adopted effective January 17, 1996, subject to comment; final adoption effective March 6, 1996; amended effective January 1, 1997; October 1, 2016; August 11, 2021; March 1, 2023; March 1, 2024;_____.

SOURCES: Joint Procedure Committee Minutes of _____; April 28, 2023, page 13; January 27, 2022, pages 17-19.

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 4, 2024

RE: Rule 68, N.D.R.Civ.P., Offer of Settlement or Confession of Judgment; Tender

Committee member Kellen Bubach suggested an amendment to Rule 68 to provide a financial incentive for a plaintiff to make an offer of settlement. Under the current rule, a plaintiff does not have a financial incentive to make an offer because a plaintiff is already entitled to costs and disbursements under Rule 54 if the plaintiff prevails at trial. The proposed amendments to Paragraph (a)(4) award double costs and disbursements if the plaintiff recovers more than its unaccepted offer of settlement. Mr. Bubach also suggested an amendment to Paragraph (a)(1) to specify "[a] plaintiff may not make an offer of settlement until 150 days after commencing the action." The proposed amendments are based in part on New Mexico's offer of settlement rule.

The proposed amendments to Rule 68 are attached. Also attached is a letter from Mr. Bubach, New Mexico Rule 1-068, a law review article on New Mexico Rule 1-068, and Minnesota Rule 68.

RULE 68. OFFER OF SETTLEMENT OR CONFESSION OF JUDGMENT; TENDER

(a) Offer of Settlement.

(1) Making an Offer; Judgment on an Accepted Offer. Except as provided in this rule, ~~A~~at least 14 days before the trial begins, a party may serve on an opposing party an offer of settlement on specified terms, with the costs then accrued and to enter into a stipulation dismissing the claim or allowing judgment to be entered accordingly. A plaintiff may not make an offer of settlement until 150 days after commencing the action. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment on order of the court.

(2) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(3) Offer After Liability Is Determined. When one party's liability to another has been determined but the amount or extent of liability remains to be determined by further proceedings, any party may make an offer of settlement. It must be served at least seven days before a hearing to determine the amount or extent of liability, or as otherwise ordered by the court.

(4) Paying Costs After an Unaccepted Offer. If the judgment that the ~~offeree~~ plaintiff finally obtains is not more favorable than the defendant's unaccepted offer, the ~~offeree~~ plaintiff must pay the costs incurred after the offer was made. If the judgment that

the plaintiff finally obtains is more favorable than the plaintiff's unaccepted offer, the defendant must pay double the costs incurred after the offer was made.

(b) Tender of Money in Lieu of Judgment.

(1) Making a Tender. If the action is for the recovery of money, instead of the offer of settlement provided for in subdivision (a), any party may, at least 14 days before the trial begins, tender to the other party the full amount to which that other party is entitled, together with costs and disbursements then accrued.

(2) Unaccepted Tender. If the tender is not accepted within 14 days, the offeree may not have costs and disbursements unless the recovery is more than the sum tendered. The offeror's costs and disbursements must be deducted from the recovery, but if they exceed the recovery, the offeror is entitled to judgment for the excess. Evidence of the tender is not admissible except in a proceeding to determine costs.

(c) Confession of Judgment.

(1) A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this subdivision.

(2) A written statement must be made, signed by the defendant, and verified by oath, stating the following:

(A) the amount for which judgment may be entered and authorizing the entry of judgment; and

(B) if the judgment to be confessed is for money due or to become due, the concise facts underlying the debt, and showing that the debt is justly due or to become due; or

(C) if the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed does not exceed the amount of that liability.

(3) The statement must be presented to the court and, if it is found sufficient, the court must order the clerk to enter judgment. The statement, order for judgment, and judgment entered constitute the judgment roll.

(4) Execution of the judgment may be issued and enforced according to the statutes of this state. If the amount due on the judgment is payable in installments that are not currently due, the execution may be issued on that judgment for the collection of installments due.

(5) The execution must be in the usual form, and must contain:

(A) a direction to the sheriff to collect the amount due on the judgment;

(B) the amount due on the judgment, including interest and costs; and

(C) the signature of the attorney or person issuing the execution.

(6) Notwithstanding the issue and collection of the execution, the judgment remains as security for the future installments to become due. When future installments become due, execution may be issued for its collection and enforcement.

EXPLANATORY NOTE

Rule 68 was amended, effective March 1, 2011;_____.

Subdivision (a) derived from Fed.R.Civ.P. 68.

Paragraph (a)(1) was amended, effective March 1, 2011, to change the time period to make an offer of settlement from 10 to 14 days before a trial begins.

Paragraph (a)(3) was amended, effective March 1, 2011, to change the time for making an offer after liability is determined from 10 to 7 days before a hearing.

Paragraph (a)(1) was amended, effective _____, to specify that a plaintiff may not make an offer of settlement until 150 days after commencing the action.

Paragraph (a)(4) was amended, effective _____, to award a plaintiff double costs if the judgment obtained by the plaintiff is more favorable than the plaintiff's unaccepted offer.

Subdivision (b) is similar to subdivision (a) except the defendant may tender money instead of making an offer of settlement. Unlike the offer of settlement, this can only be made in an action for the recovery of money.

Subdivision (c) authorizes a judgment by confession to be entered without commencing an action. This subdivision is the same as Chapter 28-10, NDRC 1943, which previously governed the subject. However, depending upon the facts of a particular case a confession of judgment may be vulnerable to constitutional attack. *See D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972).

Early in its history, the North Dakota Supreme Court ruled that the authority to confess judgment must be clear and explicit and must be strictly followed. *Rasmussen v. Hagler*, 108 N.W. 541 (N.D. 1906).

Rule 68 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of _____; April 29-30, 2010, pages 16-17, 18-19; January 28-29, 2010, pages 19-20; May 21-22, 1987, pages 3-5; February 19-20, 1987, pages 17-19; September 18-19, 1986, pages 4-7; September 26-27, 1985, pages 6, 9-10;January 17-18, 1980, pages 6-7; Rule 68, FRCivP. Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254 cases and Section 2255 proceedings in the United States District Courts, Proposed Amendment to Fed.R.Civ.P. 68 (not adopted), September 1984. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Proposed Amendment to Fed.R.Civ.P. 68 (not adopted), August 1983.

CROSS REFERENCE: N.D.R.Civ.P. 12 (Defenses and Objections When and How Presented By Pleading or Motion - Motion for Judgment on Pleadings) and N.D.R.Civ.P. 67 (Deposit in Court); N.D.R.Ev. 408 (Compromise and Offers to Compromise).

April 2, 2024

Proposed Changes to North Dakota Rule of Civil Procedure 68

Dear Mr. Forward,

I am writing to respectfully request that the Joint Committee on the Rules of Civil Procedure consider an amendment to North Dakota's Rule of Civil Procedure 68. In its current form, Rule 68 only provides half the parties to a lawsuit with incentive to realistically evaluate his or her contentions. Both basic fairness and North Dakota public policy should compel the Joint Committee to amend Rule 68 and make this procedure available to all.

North Dakota has a public policy of encouraging settlements and providing speedy economic relief to injured parties. *E.g. Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Property & Cas. Co.*, 452 N.W.2d 319, 323 (1990). Rule 68 is North Dakota's rule pertaining to offers of settlement, and is similar to the Federal rule. The purpose of Fed.R.Civ. P. 68 is to encourage settlement of litigation. *See Jundt v. Jurassic Resources Development, N.A., LLC.*, 2004 ND 65, ¶ 15, 677 N.W.2d 209, 214. Like its Federal counterpart, N.D.R.Civ.P. 68 contains a cost-shifting provision. This cost-shifting provision provides a "disincentive for plaintiffs from continuing to litigate a case after being presented with a reasonable offer." *Id.* (internal citation omitted). If a defendant serves an offer of settlement that is not accepted, and the plaintiff subsequently fails to obtain a judgment that is more favorable than the offer, the offeree must pay the costs incurred after the offer is made. *See* N.D.R.Civ.P. 68(a)(4).

However, Rule 68 is a one-way street that only empowers a defendant to invoke the cost-shifting provision. This is because the only financial incentive provided by Rule 68 is recovery of costs—something a plaintiff is entitled to anyway if he or she prevails. Consequently, Rule 68 fails to provide a "disincentive" for a *defendant* to continue "to litigate a case after being presented with a reasonable offer." Because of this unfairness, the Federal version of Rule 68 has been criticized by both commentators and the Federal Rules Advisory Committee. *See* Hon. William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, Vol. 39, N.M. Law Rev., pg. 349, 351-52 (2009). In contrast to the Federal stalemate, state courts have been much more proactive in empowering claimants to also invoke Rule 68. In Judge Lynch's detailed and thoughtful 2009 law review article, cited above, he notes that the modern trend is moving away from Federal Rule 68. For your convenience, I have enclosed a copy of this law review article with this letter which was printed from the University of New Mexico Law School website.

Specifically, I request that the Joint Committee amend North Dakota's Rule 68 to provide a financial incentive for a plaintiff to make an offer of settlement. Because a North Dakota plaintiff is already entitled to costs and disbursements under Rule 54 if the plaintiff prevails at trial, the amendment to Rule 68 must provide an additional financial incentive for defendants to seriously consider a reasonable offer of settlement. I believe an award of

double costs and disbursements if the plaintiff recovers more than its offer of settlement is a modest and appropriate incentive. Any amendment should explicitly bar a plaintiff from making an offer of settlement prior to the expiration of a reasonable time after commencement of the lawsuit. In my experience, 150 days is sufficient to allow a defendant to do discovery and arrive at its own evaluation of the case. I have attached to this letter a copy of New Mexico's Rule 1-068, which was the subject of Judge Lynch's article, and is generally consistent with North Dakota's effort to maintain the simplicity of the Federal rules. As another example of how states have modified this rule, I am also enclosing with this letter a copy of Minnesota's Rule 68. This rule is similar in its effect to New Mexico's rule, but is more detailed. Judge Lynch, at fn. 50, cites rules in other states that the Joint Committee may also wish to review.

North Dakota's growth in population and corresponding growth in litigation will place a burden on the judges, lawyers, and parties charged with administering the judicial system. Even placing aside the fundamental issue of fairness, Rule 68 can more effectively promote North Dakota's public policy by empowering *all* litigants with offers of settlement, not just defendants. This is the modern trend in the United States, and North Dakota should not hesitate to join the states that have made Rule 68 a two way street. For these reasons, I respectfully request that the Joint Committee propose an amendment to Rule 68 that has the effect of encouraging all parties to a dispute to assess their claims prior to trial and removes the unfairness inherent in Rule 68's one-way street.

Please feel free to contact me with any questions regarding this letter.

Sincerely,

Kellen B. Bubach
kbubach@maringlaw.com

Encl:
1) Hon. William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, Vol. 39, N.M. Law Rev., pg. 349, 351-52 (2009);
2) N.M.R.A. 1-068; and,
3) Minn.R.Civ.P. 68.01-68.04.

C

West's New Mexico Statutes Annotated Currentness
State Court Rules
Rules of Civil Procedure for the District Courts
Article 8. Provisional and Final Remedies and Special Proceedings
RULE 1-068. OFFER OF SETTLEMENT

A. Offer of Settlement. Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until one hundred twenty (120) days after the filing of a responsive pleading by the party defending against that claim. If within ten (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 such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney's fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs, excluding attorney's fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

The fact that an offer has been 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, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.

B. Domestic Relations Actions Excluded. This rule shall not apply to domestic relations actions.

C. Awards Not Cumulative. In those cases where a claimant would be entitled to double costs under Rule 1-068 and also entitled to interest pursuant to the statute, the court should award double costs or interest plus the costs awarded to the prevailing party pursuant to Rule 1-054(D)(2) NMRA, but not both statutory interest and double costs.

CREDIT(S)

[Amended effective Aug. 1, 2003.]

COMMITTEE COMMENTARY2002 AMENDMENT

Rule 1-068 formerly was titled "Offer of judgment" and required that the accepting party "allow judgment to be taken against him for the money or to the effect specified in the offer." Rule 1-068 NMRA(superseded). Requiring that a judgment be entered for the amount of the agreed-upon offer was a disincentive to some litigants to make offers because those litigants preferred to make the Rule 1-068 offer, tender full payment of the amount of the offer and then obtain a dismissal of the lawsuit with prejudice pursuant to Rule 1-041(A) NMRA when the offer and tender were accepted. The rule now titles the procedure an "Offer of settlement" to make explicit that when either party makes an offer of settlement which is accepted, the party who thereby agreed to make a payment may tender full payment of the agreed-upon sum before a judgment is entered. When this is done, the court should enter a judgment of dismissal with prejudice rather than a money judgment in the amount specified in the offer of settlement. Because the form of judgment will depend upon whether full payment is tendered before the accepted offer results in a judgment, the offer of settlement shall not be conditioned on the form that the judgment might take, but only upon the substantive content of the settlement proposal.

This rule also applies to actions seeking relief other than money damages. *See e.g., Assoc. of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd.*, 58 P.2d 608, (Hawaii 2002) ("[F]ederal courts have overwhelmingly applied Rule 68 to cases dealing with equitable relief.").

Rule 1-068 previously permitted only a party defending against a claim to make an offer of judgment. At least sixteen states have rules that allow the claimant as well as the defending party to do so. Allowing either party to make offers of settlement increases the likelihood that settlement will occur and provides equality of opportunity to all parties to initiate the settlement process.

Rule 1-068 has always provided that when a defending party's offer of judgment is not accepted and the claimant fails to obtain a judgment more favorable than the offer, the claimant must pay the costs of the defending party incurred after the making of the offer. The rule continues to provide this remedy. Rule 1-068 also now makes explicit what has been the universal construction of the rule -- that when the claimant does not obtain a judgment more favorable than the offer, the claimant not only must pay the defending party's costs, but also is not entitled to its costs incurred after the making of the offer. *E.g., Crossman v. Maroccio*, 806 F.2d 329, 333 (1st Cir. 1986) , *cert. denied* , 481 U.S. 1029 (1987); *see Moore's Federal Practice Digest* Par. 68.08[2] (3rd ed. 2002).

When a claimant's offer of settlement is declined and the claimant obtains a judgment greater than the offer, the appropriate sanction is more complicated. Because the claimant is normally entitled to costs if the claimant prevails in obtaining a judgment in any amount, *see*Rule 1-054(D)(1) NMRA, an award only of costs would not provide additional incentive for the defending party to accept the offer. To provide additional incentive, the rule provides that costs incurred by the claimant after the making of the offer of settlement shall be doubled and the doubled amount awarded as costs.

The plaintiff often has the opportunity for extensive investigation and preparation of the claim prior to filing suit. The claimant thus may be in a position to make an offer of settlement very early in the proceedings, before the defending party has had a fair opportunity through discovery to determine the relative merits of claimant's case. For this reason, the rule provides that an offer of settlement may not be made by a claimant until one hundred twenty days after the service of a responsive pleading by the defending party who thus has additional time to evaluate the offer before deciding whether to accept or reject it. For example, if the claimant is the plaintiff, the time for making an offer begins upon service of the answer by the defendant. If the claimant is a defendant who has filed a counterclaim, the time for making an offer begins upon service of the plaintiff's reply to the counterclaim. *See*Rule 1-007(A) NMRA.

"Costs" awardable pursuant to this rule are those provided for in Rule 1-054(D). Attorney's fees are not included in Rule 1-054(D), *see*Rule 1-054(E) NMRA, and are excluded from the cost-shifting provisions of this rule even if attorney's fees are included as costs for other purposes or in other contexts. *E.g.*, 28 U.S.C. Sec. 1988(b) (attorney's fees included as costs awardable in cases involving civil rights actions). While a cost award is mandatory under the conditions specified in Rule 1-068, the amount of those costs is separately determined by the trial court pursuant to Rule 1-054(D). *See Key v. Chrysler Motors Corp.*, 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

This rule does not apply to domestic relations actions because such actions frequently provide for the award of attorney's fees in the discretion of the court and this provides sufficient incentive for parties in domestic relations cases to seek to settle their disputes. The excluded "domestic relations actions" are those described in the Committee commentary to Rule 1-120.

A statute, Section 56-8-4(B) NMSA 1978, authorizes the court to award interest to a plaintiff under certain circumstances if the defendant fails to make reasonable and timely offers of settlement to the plaintiff. This statute operates differently from Rule 1-068 in that the statute penalizes a defendant for not making offers rather than providing an incentive for plaintiffs to make offers of settlement. Nonetheless, awarding plaintiffs both double costs under this rule and interest pursuant to the statute is unduly punitive.

The broader terms "claimant" and "defending party" are used in the Rule instead of "plaintiff" and "defendant" because, for example, when a defendant files a counterclaim, the defendant also becomes a claimant and the plaintiff also becomes a defending party.

LIBRARY REFERENCES

Costs 42.
Judgment  74.1 to 82.
Westlaw Key Number Searches: 102k42; 228k74.1 to 228k82.
C.J.S. Costs § 39.
C.J.S. Judgments §§ 188 to 190, 192.

RESEARCH REFERENCES

ALR Library

34 ALR 6th 431, Recoverable Costs Under State Offer of Judgment Rule.

2 ALR 6th 279, Application and Construction of State Offer of Judgment Rule--Determining Whether Offeror is Entitled to Award.

116 ALR 5th 433, Construction of State Offer of Judgment Rule--Issues Concerning Revocation and Succession.

112 ALR 5th 47, Construction of State Offer of Judgment Rule--Issues of Time.

NOTES OF DECISIONS

1. In general

In construing offer of judgment rule, which is identical to its federal counterpart, court may look to federal law for guidance. Fed.Rules Civ.Proc.Rule 68, 28 U.S.C.A.; SCRA 1986, Rule 1-068. Pope v. Gap, Inc., 1998, 125 N.M. 376, 961 P.2d 1283. Courts 85(3)

In construing rules of procedure, court applies the same canons of construction as applied to statutes and, therefore, interprets the rules in accordance with their plain meaning. Gilmore v. Duderstadt, 1998, 125 N.M. 330, 961 P.2d 175. Courts 85(3)

2. Time for serving offer

For purposes of rule entitling party making offer of judgment to recover costs if judgment was not more favorable than offer, defendant's offer of judgment was untimely, where tenth day of offer period fell on Sunday, so that plaintiff had until end of day on Monday to accept offer, but trial started on Monday morning. SCRA 1986, Rules 1-006, 1-068. Drake v. Trujillo, 1996, 122 N.M. 374, 924 P.2d 1386. Costs 42(2); Time 10(2)

3. Consideration

Defendant motorist's eve-of-trial "notice" that defendant did not accept plaintiff motorist's and passengers' counteroffer to defendant's offer of judgment did not make defendant's offer unenforceable for lack of consideration. NMRA, Rule 1-068. Shelton v. Sloan, 1999, 127 N.M. 92, 977 P.2d 1012. Judgment 78

4. Setting offer aside

Court may set aside an offer of judgment based upon the grounds specified in rule allowing relief from judgment based on mistake, though a judgment on the offer has not been entered. NMRA, Rules 1-060, subd. B, 1-068. Fuller v. Bachen, 1999, 128 N.M. 151, 990 P.2d 825. Judgment 90

Trial court did not abuse its discretion by granting defendants' motion to set aside offer of judgment in personal injury action, where defendants made a unilateral mistake in transposing the names of the plaintiffs to whom offers of judgment of $22,001 and $4,001 were made and the larger offer was accepted. NMRA, Rules 1-060, subd. B, 1-068. Fuller v. Bachen, 1999, 128 N.M. 151, 990 P.2d 825. Judgment 90

5. Judgment on offer

Rule establishing an offeror's entitlement to an award of costs where an offer is rejected and the subsequent judgment is for amount less than the amount of the offer does not apply where a judgment is entered in the defendant's favor. Apodaca v. AAA Gas Co., 2003, 134 N.M. 77, 73 P.3d 215, certiorari granted 133 N.M. 771, 70 P.3d 761, certiorari quashed 135 N.M. 321, 88 P.3d 263. Costs 42(4)

Trial court should have considered jury's verdict when reviewing minor settlement to determine whether enforcement of defendant motorist's offer of judgment would be fair to the plaintiff children. NMRA, Rule 1-068. Shelton v. Sloan, 1999, 127 N.M. 92, 977 P.2d 1012. Judgment 78

An offer of judgment is irrevocable during the ten-day period provided by the offer of judgment rule, and thus, a plaintiff can accept the offer at any time during the period, regardless of whether plaintiff made a counteroffer to try to obtain a more favorable settlement. NMRA, Rule 1-068. Shelton v. Sloan, 1999, 127 N.M. 92, 977 P.2d 1012. Judgment 80

Court applies traditional contract principles to interpret an offer and acceptance under offer of judgment rule. NMRA, Rule 1-068. Shelton v. Sloan, 1999, 127 N.M. 92, 977 P.2d 1012. Judgment 82

Judgment entered pursuant to offer of judgment rule, if silent regarding liability, has no issue preclusive effect and is not an admission of liability by the offeror; unless the judgment expressly admits liability or states that the issue of liability is to be given collateral estoppel effect, thereby reflecting the intent of the parties, it is not an admission or adjudication that can be used to establish liability in other litigation. SCRA 1986, Rule 1-068. Pope v. Gap, Inc., 1998, 125 N.M. 376, 961 P.2d 1283. Judgment 91; Judgment 651

Offer of judgment rule leaves no discretion in the trial court to do anything but to enter the judgment once an of-

fer of judgment has been accepted; in entering the judgment, the court does not actually determine the substance of the issues presented by the parties, but only perfunctorily enters the judgment as agreed upon by the parties. SCRA 1986, Rule 1-068. Pope v. Gap, Inc., 1998, 125 N.M. 376, 961 P.2d 1283. Judgment 88

Form of judgment entered pursuant to offer of judgment rule, which was silent regarding liability, was not a determination or admission of liability that could be used against defendant in other proceedings. SCRA 1986, Rule 1-068. Pope v. Gap, Inc., 1998, 125 N.M. 376, 961 P.2d 1283. Judgment 91; Judgment 651

6. Admissibility of evidence of offer

Neither offer of judgment nor the final judgment entered against defendant would be admissible in other litigation as evidence of defendant's liability; judgment was silent as to defendant's liability. SCRA 1986, Rules 1-068, 11-803, subds. V, W. Pope v. Gap, Inc., 1998, 125 N.M. 376, 961 P.2d 1283. Evidence 207(5); Judgment 651

7. Prejudgment interest

"Judgment finally obtained" includes award of prejudgment interest by trial court, within meaning of rule that offeree under offer of judgment is a prevailing party entitled to costs if judgment finally obtained by offeree is more favorable than offer of judgment. SCRA 1986, Rules 1-054, subd. E, 1-068. Gilmore v. Duderstadt, 1998, 125 N.M. 330, 961 P.2d 175. Costs 42(5)

8. Admission of liability

Defendant knew or had reason to know the meaning attached by plaintiff to defendant's offer of judgment, that judgment would not include language negating defendant's liability or plaintiff's damages, and plaintiff did not know or have reason to know the meaning attached by defendant, that judgment would be entered with express condition that defendant was not admitting any liability or damages, and thus, defendant was contractually bound to plaintiff's form of judgment; offer was made in standard form, providing that only the offer was not to be construed as an admission of liability or damages, and defendant knew or had reason to know that plaintiff's acceptance would be with the understanding that the judgment would also be in the standard form. SCRA 1986, Rule 1-068. Pope v. Gap, Inc., 1998, 125 N.M. 376, 961 P.2d 1283. Judgment 82

9. Costs

Uninsured motorist (UM) benefits claimants were only entitled, as prevailing party whose offer of judgment was rejected, to statutory double costs for those costs actually incurred after date of their offer of judgment, which was less than the amount actually awarded. Bird v. State Farm Mut. Auto. Ins. Co., 2007, 142 N.M. 346, 165 P.3d 343, certiorari denied 142 N.M. 329, 165 P.3d 326. Costs 42(5)

Defendant driver was entitled to award of costs incurred following offer of judgment, where judgment awarding injured motorcyclist $1,250 in damages was less than offer of judgment for $2,100. Montoya v. Pearson, 2006, 140 N.M. 243, 142 P.3d 11, certiorari denied 140 N.M. 423, 143 P.3d 185. Costs 42(4)

Defendants whose offers of judgment in personal injury action were rejected were not entitled to award of post-offer costs under rule establishing entitlement to costs where final judgment is less than rejected offer, where judgment was entered in favor of defendants. Apodaca v. AAA Gas Co., 2003, 134 N.M. 77, 73 P.3d 215, certiorari granted 133 N.M. 771, 70 P.3d 761, certiorari quashed 135 N.M. 321, 88 P.3d 263. Costs 42(4)

Where judgment finally obtained is for less than offer of judgment, offeree is entitled to recover preoffer costs but is not entitled to postoffer costs and must also pay offeror's postoffer costs. SCRA 1986, Rules 1-054, subd. E, 1-068. Dunleavy v. Miller, 1992, 116 N.M. 365, 862 P.2d 1224, certiorari granted, affirmed in part , reversed in part 116 N.M. 353, 862 P.2d 1212. Costs 42(4)

Prevailing plaintiff's preoffer costs were required to be added to damage award to determine amount of "the judgment finally obtained by the offeree" under offer of judgment rule, since offer of judgment included all costs accrued to that point. SCRA 1986, Rule 1-068. Dunleavy v. Miller, 1993, 116 N.M. 353, 862 P.2d 1212. Costs 42(2)

Valid offer of judgment under offer of judgment rule must compensate plaintiff for all costs accrued through making offer. SCRA 1986, Rule 1-068. Dunleavy v. Miller, 1993, 116 N.M. 353, 862 P.2d 1212. Judgment 78

Defendants could recover their costs from date of their rejected settlement offer, where plaintiff ultimately recovered verdict of lesser amount. SCRA 1986, Rule 1-068. Dickenson v. Regent of Albuquerque, Ltd., 1991, 112 N.M. 362, 815 P.2d 658, certiorari denied 112 N.M. 388, 815 P.2d 1178. Costs 42(4)

10. Review

Abuse of discretion standard applied to appellate review of trial court's order granting defendants' motion to set aside offer of judgment. NMRA, Rules 1-060, subd. B, 1-068. Fuller v. Bachen, 1999, 128 N.M. 151, 990 P.2d 825. Appeal And Error 982(1)

Appellate court would resolve question regarding enforcement of pretrial offer of judgment by analyzing offer and acceptance, though trial court's ruling had relied on estoppel rather than offer and acceptance, as it was fair to resolve the question on a ground not relied upon by trial court; offer and acceptance was addressed in the trial court and on appeal, and the facts pertinent to the issue were uncontested and a matter of record. NMRA, Rule 1-068. Shelton v. Sloan, 1999, 127 N.M. 92, 977 P.2d 1012. Appeal And Error 856(1)

NMRA, Rule 1-068, NM R DIST CT RCP Rule 1-068

State court rules are current with amendments received through 7/15/2012.

END OF DOCUMENT

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

WILLIAM P. LYNCH*

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* Lentomyynti 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. Cubbage 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. 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 (Bosson, 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. Manorcare, 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. Manorcare, 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?

Rule 68. Offer of Judgment or Settlement

68.01 Offer

(a) Time of Offer. At any time more than 14 days before the trial begins, any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.

(b) Applicability of Rule. An offer does not have the consequences provided in Rules 68.02 and 68.03 unless it expressly refers to Rule 68.

(c) Damages-only Offers. An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which shall be added to the amount states as provided in Rule 68.02(b)(2) and (c).

(d) Total-obligation Offers. The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees.

(e) Offer Following Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 14 days before the commencement of a hearing or trial to determine the amount or extent of liability.

(f) Filing. Notwithstanding the provisions of Rule 5.04, no offer under this rule need be filed with the court unless the offer is accepted.

(Added effective July 1, 2008; amended effective January 1, 2020.)

68.02 Acceptance or Rejection of Offer

(a) Time for Acceptance. Acceptance of the offer shall be made by service of written notice of acceptance within 14 days after service of the offer. During the 14-day period the offer is irrevocable.

(b) Effect of Acceptance of Offer of Judgment. If the offer accepted is an offer of judgment, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and the court shall order entry of judgment as follows:

(1) If the offer is a total-obligation offer as provided in Rule 68.01(d), judgment shall be for the amount of the offer.

(2) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment.

(c) Effect of Acceptance of Offer of Settlement. If the offer accepted is an offer of settlement, the settled claim(s) shall be dismissed upon:

(1) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied; or

(2) order of the court implementing the terms of the agreement.

(d) Offer Deemed Withdrawn. If the offer is not accepted within the 14-day period, it shall be deemed withdrawn.

(e) Subsequent Offers. The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

(Added effective July 1, 2008; amended effective January 1, 2020.)

68.03 Effect of Unaccepted Offer

(a) Unaccepted Offer Not Admissible. Evidence of an unaccepted offer is not admissible, except in a proceeding to determine costs and disbursements.

(b) Effect of Offer on Recovery of Costs. An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(1) If the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer, and the plaintiff-offeree shall not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the plaintiff-offeree shall not be affected by this provision.

(2) If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

(3) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

(c) Measuring Result Compared to Offer. To determine for purposes of this rule if the relief awarded is less favorable to the offeree than the offer:

(1) a damages-only offer is compared with the amount of damages awarded to the plaintiff; and

(2) a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer.

(Added effective July 1, 2008.)

68.04 Applicable Attorney Fees and Prejudgment Interest

(a) "Applicable Attorney Fees" Defined. "Applicable attorney fees" for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to attorney fees not provided for under the applicable substantive law.

(b) "Applicable Prejudgment Interest" Defined. "Applicable prejudgment interest" for the purposes of Rule 68 means any prejudgment interest to which a party is entitled by statute, rule, common law, or contract for one or more of the claims resolved by an offer made under the rule.

Nothing in this rule shall be construed to create a right to prejudgment interest not provided for under the applicable substantive law.

(Added effective July 1, 2008.)

Advisory Committee Comment - 2008 Amendment

Rule 68 is extensively revamped both to clarify its operation and to make it more effective in its purpose of encouraging the settlement of litigation. The overarching goal of this set of amendments is to add certainty to the operation of the rule and to remove surprises both to parties making offers and those receiving and deciding whether to accept them. Additionally, Rule 68.03 is revised to make the mechanism of Rule 68 better address the goal of providing incentives for both claimants and parties opposing claims. This rule is not as closely modeled on its federal counterpart, Fed. R. Civ. P. 68, as is the existing rule, so that rule and decisions construing it may not be persuasive guidance in construing this rule.

Rule 68 uses the term "offer" to include offers to settle made by any party. Thus, both an offer by a defendant to pay a sum in return for a dismissal of a claim and an offer by a claimant to accept a sum in return for dismissal - often termed a "demand" and not an "offer" - are offers for the purposes of the rule.

Rule 68.01(b) is a new provision that requires that in order to be given the cost-shifting effect of the rule an offer must include express reference to the rule. See Matheiu v. Freeman, 472 N.W.2d 187 (Minn. App. 1991). This provision is intended to make it unlikely that an offer would come within the scope of the rule without the offeror intending that and the offeree having notice that it is an offer with particular consequences as defined in the rule.

The revised rule caries forward the former rule's application both to offers of judgment and to offers of settlement. The effects of these two types of offer are different, and are clarified in Rule 68.02. Rules 68.01(c) and (d) create an additional dichotomy in the rule, creating new categories of "damages-only" and "total-obligation" offers. This dichotomy is important to the operation of the rule, and is intended to remove a significant "trap for the unwary" where an accepted offer may be given two substantially different interpretations by offeror and offeree. Under the former rule, if a statute allowed the recovery of attorney fees as costs and a Rule 68 offer were made and did not expressly include reference to attorney fees, fees could be recovered in addition to the amount offered. See, e.g., Collins v. Minn. Sch. of Business, Inc., 655 N.W.2d 320 (Minn. 2003). Fees recoverable by contract, rather than statute, would be subsumed within the offer, and not be recoverable in addition to the amount of the accepted offer. See, e.g., Schwickert, Inc. v. Winnebago Seniors, Ltd., 680 N.W.2d 79 (Minn 2004). Similar uncertainty may exist as to whether prejudgment interest is included in or to be added to the amount of an offer. See, e.g., Collins; Stinson v. Clark Equip. Co., 743 N.W.2d 333 (Minn. App. 1991). Discussion of other ambiguities under the federal counterpart to Rule 68, Fed. R. Civ. P. 68, is included in 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 (2007).

The "damages-only" or "total-obligation" offer choice allows the party making the offer to control and understand the effect of the offer, if accepted; similarly, a party deciding how to respond to an offer should be able to determine the total cost of accepting an offer. Rule 68.01(c) creates a presumption that an offer made under Rule 68 is a "damages-only" offer unless it expressly meets the criteria of Rule 68.01(d) by stating that it is a "total-obligation" offer. The added precision allowed by distinguishing the types of offers permits the new rule to provide greater clarity and certainty as to the effect both of accepted offers and unaccepted offers.

Rule 68.03(b)(1) changes the effect of Rule 68 on costs and disbursements when a defendant's offer is rejected and the judgment is less favorable to the plaintiff offeree. Under the former rule, the offeree would nevertheless recover its costs and disbursements from the offeror. Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998). The revised rule provides that the offeree does not recover its costs and disbursements incurred after service of the offer. But this change does not affect a prevailing plaintiff's right to attorney fees to which it is entitled under law or contract. In this respect the revised rule, like the former rule, does not incorporate the cut-off of attorney fees that occurs under the federal Rule 68 as interpreted in Marek v. Chesney, 473 U.S. 1 (1986). Additionally, under the former rule, the offeror was entitled to its costs and disbursements incurred from the beginning of the case. Vandenheuvel v. Wagner, 690 N.W.2d 757 (Minn. 2005). As to this issue, the revised rule now has the same effect as the federal rule (although with language that is not identical), requiring the offeree to pay the offeror's costs and disbursements incurred after service of the offer.

Rule 68.03(b)(2) introduces a consequence for a defendant's rejection of a plaintiff's Rule 68 offer if the judgment is less favorable to the defendant offeree. In that circumstance, this new provision requires the defendant to pay double the offeror's costs and disbursements incurred after service of the offer. If the defendant is merely required to pay the offeror's costs, as under the current rule, there is no adverse consequence for a defendant who rejects a Rule 68 offer. In contrast, under the revised rule, a plaintiff who rejects a Rule 68 offer suffers dual adverse consequences: loss of the right to recover his costs and required payment of the defendant's costs.

Rule 68.04(a) expressly provides that the rule does not create a right to recover attorney fees. This provision is intended only to avoid confusion. The rule might affect the extent of fees recoverable by statute, common law, or by contract, but it does not create any right to recover fees that does not exist outside of Rule 68.

Similarly, Rule 68.04(b) expressly provides that the rule does not create a right to recover prejudgment interest, which right must rather be drawn from an applicable statute, rule, contract, or common law. It is noteworthy that Minnesota Statutes, section 549.09, subdivision 1, paragraph (b), which governs prejudgment interest in most cases, contains a mechanism analogous to this rule that adjusts calculation of prejudgment interest based on the relationship between the parties' offers of settlement and the ultimate judgment or award in the case.

Advisory Committee Comment - 2019 Amendments

Rule 68.01, 68.02(a) and (d) are amended as part of the extensive amendments made to the timing provisions of the rules. These amendments implement the adoption of a standard "day" for counting deadlines under the rules - counting all days regardless of the length of the period and standardizing the time periods, where practicable, to a 7-, 14-, 21- or 28-day schedule. the only change to Rule 68.01 extends the time to make an offer of judgement from 10 days before trial begins to 14 days before trial begins. The change to Rule 68.02 extends the time to respond to an offer of judgement from 10 days to 14 days. These changes affect only the time limits, and are not intended to have any other affect.

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 15, 2024

RE: Rule 106, N.D.R.Ev., Remainder of or Related Writings or Recorded Statements

Rule 106, Fed.R.Ev., was amended effective December 1, 2023. Rule 106, N.D.R.Ev., is very similar to the federal rule. According to the attached Committee Note, the rule was amended in two respects: 1) if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection; and 2) the rule was amended to cover all statements, including oral statements that have not been recorded. As to the first amendment, the federal rules committee "determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression."

The rule was also amended to cover all statements. The Committee Note states, "Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness."

Staff has attached a copy of proposed Rule 106, the amendments to Fed.R.Ev. 106, and the Committee Note discussing the amendments.

N.D.R.Ev.

RULE 106. REMAINDER OF OR RELATED ~~WRITINGS OR RECORDED~~ STATEMENTS

If a party introduces all or part of a ~~writing or recorded~~ statement, an opposing party may require the introduction, at that time, of any other part, or any other ~~writing or recorded~~ statement, that in fairness ought to be considered at the same time. The opposing party may do so over a hearsay objection.

EXPLANATORY NOTE

Rule 106 was amended, effective March 1, 1990; March 1, 2014;

_____.

Rule 106 is not a rule of admissibility, but rather one dealing with order of proof and, as such, may be considered to be but a specific application of the general dictates of Rule 611.

The standard of fairness gives the trial court wide discretion under this rule, which accords with the powers of a trial court to regulate the mode and order of proof, generally, granted by Rule 611. Thus, the court need not admit all evidence that may be related to the evidence sought to be introduced. Rules of relevancy, and other rules of admissibility, generally, should guide the trial court's decision.

Rule 106 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and

terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 106 was amended, effective _____, in response to the December 1, 2023, amendments to Fed.R.Ev. 106. According to the Committee Note, the rule was amended in two respects: 1) if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection; and 2) the rule was amended to cover all statements, including oral statements that have not been recorded.

SOURCES: Joint Procedure Committee Minutes of _____; January 26-27, 2012, page 31; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 17; October 1, 1975, page 2. Fed.R.Ev. 106; Rule 106, SBAND proposal.

CROSS REFERENCE: N.D.R.Ev. 611 (Mode and Order of Interrogation and Presentation); N.D.R.Civ.P. 32 (Using Depositions in Court Proceedings) N.D.R.Crim.P. 15 (Depositions).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 106. Remainder of or Related ~~Writings or Recorded~~ Statements

If a party introduces all or part of a ~~writing or recorded~~ statement, an adverse party may require the introduction, at that time, of any other part—or any other ~~writing or recorded~~ statement—that in fairness ought to be considered at the same time. The adverse party may do so over a hearsay objection.

Committee Note

Rule 106 has been amended in two respects:

(1) First, the amendment provides that if the existing fairness standard requires completion, then that completing statement is admissible over a hearsay objection. Courts have been in conflict over whether completing evidence properly required for completion under Rule 106 can be admitted over a hearsay objection. The Committee has determined that the rule of completeness, grounded in fairness, cannot fulfill its function if the party that creates a misimpression about the meaning of a proffered statement can then object on hearsay grounds and exclude a statement that would correct the misimpression. *See United States v.*

[1] New material is underlined; matter to be omitted is lined through.

Sutton, 801 F.2d 1346, 1368 (D.C. Cir. 1986) (noting that "[a] contrary construction raises the specter of distorted and misleading trials, and creates difficulties for both litigants and the trial court"). For example, assume the defendant in a murder case admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. In this circumstance, admitting only the statement of ownership creates a misimpression because it suggests that the defendant implied that he owned the weapon at the time of the crime—when that is not what he said. In this example the prosecution, which has created the situation that makes completion necessary, should not be permitted to invoke the hearsay rule and thereby allow the misleading statement to remain unrebutted. A party that presents a distortion can fairly be said to have forfeited its right to object on hearsay grounds to a statement that would be necessary to correct the misimpression. For similar results see Rules 502(a), 410(b)(1), and 804(b)(6).

The courts that have permitted completion over hearsay objections have not usually specified whether the completing remainder may be used for its truth or only for its non-hearsay value in showing context. Under the amended rule, the use to which a completing statement can be put will depend on the circumstances. In some cases, completion will be sufficient for the proponent of the completing statement if it is admitted to provide context for the initially proffered statement. In such situations, the completing statement is properly admitted over a hearsay objection because it is offered for a non-hearsay purpose. An example would be a completing statement that corrects a misimpression about what a party heard before undertaking a disputed action, where the party's state of mind is relevant. The completing statement in this example is admitted only to show what the party actually heard, regardless of the underlying truth of the completing statement. But in some

cases, a completing statement places an initially proffered statement in context only if the completing statement is true. An example is the defendant in a murder case who admits that he owned the murder weapon, but also simultaneously states that he sold it months before the murder. The statement about selling the weapon corrects a misimpression only if it is offered for its truth. In such cases, Rule 106 operates to allow the completing statement to be offered as proof of a fact.

(2) Second, Rule 106 has been amended to cover all statements, including oral statements that have not been recorded. Most courts have already found unrecorded completing statements to be admissible under either Rule 611(a) or the common-law rule of completeness. This procedure, while reaching the correct result, is cumbersome and creates a trap for the unwary. Most questions of completion arise when a statement is offered in the heat of trial—where neither the parties nor the court should be expected to consider the nuances of Rule 611(a) or the common law in resolving completeness questions. The amendment, as a matter of convenience, covers these questions under one rule. The rule is expanded to now cover all statements, in any form -- including statements made through conduct or sign language.

The original committee note cites "practical reasons" for limiting the coverage of the rule to writings and recordings. To the extent that the concern was about disputes over the content or existence of an unrecorded statement, that concern does not justify excluding all unrecorded statements completely from the coverage of the rule. *See United States v. Bailey*, 2017 WL 5126163, at *7 (D. Md. Nov. 16, 2017) ("A blanket rule of prohibition is unwarranted, and invites abuse. Moreover, if the content of some oral statements are disputed and difficult to prove,

others are not—because they have been summarized . . . , or because they were witnessed by enough people to assure that what was actually said can be established with sufficient certainty."). A party seeking completion with an unrecorded statement would of course need to provide admissible evidence that the statement was made. Otherwise, there would be no showing that the original statement is misleading, and the request for completion should be denied. In some cases, the court may find that the difficulty in proving.the completing statement substantially outweighs its probative value—in which case exclusion is possible under Rule 403.

The rule retains the language that completion is made at the time the original portion is introduced. That said, many courts have held that the trial court has discretion to allow completion at a later point. *See, e.g.*, *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 103 (2d Cir. 1995) ("While the wording of Rule 106 appears to require the adverse party to proffer the associated document or portion contemporaneously with the introduction of the primary document, we have not applied this requirement rigidly"). Nothing in the amendment is intended to limit the court's discretion to allow completion at a later point.

The intent of the amendment is to displace the common-law rule of completeness. In *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171–72 (1988), the Court in dictum referred to Rule 106 as a partial codification of the common-law rule of completeness. There is no other rule of evidence that is interpreted as coexisting with common-law rules of evidence, and the practical problem of a rule of evidence operating with a common-law supplement is apparent—especially when the rule is one, like the rule of completeness, that arises most often during the trial.

The amendment does not give a green light of admissibility to all excised portions of statements. It does not change the basic rule, which applies only to the narrow circumstances in which a party has created a misimpression about the statement, and the adverse party proffers a statement that in fact corrects the misimpression. The mere fact that a statement is probative and contradicts a statement offered by the opponent is not enough to justify completion under Rule 106. So, for example, the mere fact that a defendant denies guilt before later admitting it does not, without more, mandate the admission of his previous denial. *See United States v. Williams*, 930 F.3d 44 (2d Cir. 2019)

MEMO

TO: Joint Procedure Committee

FROM: Andy Forward

DATE: April 15, 2024

RE: Rule 615, N.D.R.Ev., Excluding Witnesses

Rule 615, Fed.R.Ev., was amended effective December 1, 2023. Rule 615, N.D.R.Ev., is very similar to the federal rule. According to the attached Committee Note, the rule was amended for two purposes: 1) to clarify the court may prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony; and 2) to clarify the exception from exclusion for entity representatives is limited to one designated representative per entity.

The Committee Note states "courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent witnesses from tailoring their testimony to the evidence presented at trial – and that purpose can only be effectuated by regulating out-of-context exposure to trial testimony." The Committee Note says the court has discretion to decide what requirements are appropriate in a particular case to protect against the risk that excluded witnesses will obtain trial testimony.

Staff has attached a copy of proposed Rule 615, the amendments to Fed.R.Ev. 615, and the Committee Note discussing the amendments.

N.D.R.Ev.

RULE 615. EXCLUDING WITNESSES FROM THE COURTROOM; PREVENTING AN EXCLUDED WITNESS'S ACCESS TO TRIAL TESTIMONY

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony, or the court may do so on its own. This rule does not authorize excluding:

(~~a~~1) a party who is a natural person;

(~~b~~2) ~~an~~ one officer or employee of a party that is not a natural person~~, after being~~ if that officer or employee has been designated as the party's representative by its attorney;

(~~c~~3) ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense; or

(~~d~~4) a person authorized by law to be present.

(b) Additional Orders to Prevent Disclosing and Accessing Testimony. An order under subdivision (a) operates only to exclude witnesses from the courtroom. But the court may also, by order:

(1) prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom; and

(2) prohibit excluded witnesses from accessing trial testimony.

EXPLANATORY NOTE

Rule 615 was amended, effective March 1, 1990; March 1, 2014; March 1, 2020; _____.

Rule 615 is based on Fed.R.Ev 615. It provides that it is mandatory for a court to exclude witnesses when so requested by a party, subject to stated exceptions.

Paragraph (a)(4), formerly ~~S~~subdivision (d), was amended, effective March 1, 2020, to replace "statute" with "law."

Rule 615 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 615 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 615 was amended, effective _____, in response to the December 1, 2023, amendments to Fed.R.Ev. 615. The amendments clarify: 1) the court may prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony; and 2) the exception from exclusion for entity representatives is limited to one designated representative per entity.

SOURCES: Joint Procedure Committee Minutes of _____; April 26, 2019, pages 7-8; September 28, 2018, pages 13-14; April 26-27, 2012, pages 27-29; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 5; October 1, 1975, page 6. Fed.R.Ev. 615; Rule 615, SBAND proposal.

STATUTES AFFECTED:

CONSIDERED: N.D. Const. Art. I, § 25; N.D.C.C. §§ 12.1-34-02, 29-07-13, 29-07-14.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

Rule 615. Excluding Witnesses from the Courtroom; Preventing an Excluded Witness's Access to Trial Testimony

(a) Excluding Witnesses. At a party's request, the court must order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

~~(a)~~(1) a party who is a natural person;

~~(b)~~(2) ~~an~~ one officer or employee of a party that is not a natural person, ~~after being~~ if that officer or employee has been designated as the party's representative by its attorney;

~~(c)~~(3) ~~a~~ any person whose presence a party shows to be essential to presenting the party's claim or defense, or

---

[1] New material is underlined; matter to be omitted is lined through.

17 ~~(d)~~**(4)** a person authorized by statute to be present.

18 **(b) Additional Orders to Prevent Disclosing and**

19 **Accessing Testimony.** An order under (a) operates

20 only to exclude witnesses from the courtroom. But

21 the court may also, by order:

22 **(1)** prohibit disclosure of trial testimony to

23 witnesses who are excluded from the

24 courtroom; and

25 **(2)** prohibit excluded witnesses from accessing

26 trial testimony.

Committee Note

Rule 615 has been amended for two purposes:

(1) Most importantly, the amendment clarifies that the court, in entering an order under this rule, may also prohibit excluded witnesses from learning about, obtaining, or being provided with trial testimony. Many courts have found that a "Rule 615 order" extends beyond the courtroom, to prohibit excluded witnesses from obtaining access to or being provided with trial testimony. But the terms of the rule did not so provide; and other courts have held that a Rule 615 order was limited to exclusion of witnesses from the trial. On the one hand, the courts extending Rule 615 beyond courtroom exclusion properly recognized that the core purpose of the rule is to prevent

witnesses from tailoring their testimony to the evidence presented at trial—and that purpose can only be effectuated by regulating out-of-court exposure to trial testimony. *See United States v. Robertson*, 895 F.3d 1206, 1215 (9th Cir. 2018) ("The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript."). On the other hand, a rule extending an often vague "Rule 615 order" outside the courtroom raised questions of fair notice, given that the text of the rule itself was limited to exclusion of witnesses from the courtroom.

An order under subdivision (a) operates only to exclude witnesses from the courtroom. This includes exclusion of witnesses from a virtual trial Subdivision (b) emphasizes that the court may by order extend the sequestration beyond the courtroom, to prohibit those subject to the order from disclosing trial testimony to excluded witnesses, as well as to directly prohibit excluded witnesses from trying to access trial testimony. Such an extension is often necessary to further the rule's policy of preventing tailoring of testimony.

The rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony.

Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in criminal cases, the court should address those questions on a case-by-case basis.

(2) Second, the rule has been amended to clarify that the exception from exclusion for entity representatives is limited to one designated representative per entity. This limitation, which has been followed by most courts, generally provides parity for individual and entity parties. The rule does not prohibit the court from exercising discretion to allow an entity-party to swap one representative for another as the trial progresses, so long as only one witness-representative is exempt at any one time. If an entity seeks to have more than one witness-representative protected from exclusion, it needs to show under subdivision (a)(3) that the witness is essential to presenting the party's claim or defense. Nothing in this amendment prohibits a court from exempting from exclusion multiple witnesses if they are found essential under (a)(3)