

Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure

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Introduction

This is the report of a 1994 Federal Judicial Center survey intended to assist the Advisory Committee on Civil Rules of the Judicial Conference of the United States in its consideration of possible amendments to Federal Rule of Civil Procedure 68. A number of possible alternatives have been suggested, including abolition of the current rule.

Rule 68 is an offer-of-judgment provision that seeks to encourage settlement and to avoid unneeded trials. It permits a defendant to make a settlement offer¹ that raises the stakes for the plaintiff who would continue the litigation: If the offer is not accepted within ten days and the ultimate judgment is not greater than the offer, the plaintiff must pay the statutory costs² incurred by the defendant after the offer is made.

Critics of Rule 68 claim it is ineffective for two reasons. First, attorneys' fees, which account for the bulk of litigation expenses, are not usually included in statutory costs. Statutory costs are usually far lower than the amount at stake in the case; thus the incentives for defendants to make offers of judgment and for plaintiffs to accept them are weak.³ Second, Rule 68 is available only to defendants—it is a one-way rule.

In light of the perceived flaws in the current rule's operation, various proposals have been made to amend Rule 68. Possible amendments would allow any party to make an offer of judgment⁴ and would increase the incentive for making and accepting offers by allowing the offeror to re-

1. The offer is phrased as an offer to "allow judgment to be entered" on the specified terms; hence the *offer of judgment* moniker. Although *settlement* is here often used as shorthand for offer of judgment, it is important to recognize that the two are not identical. Settlements often include provisions that prohibit the parties from revealing the settlement terms to others. An offer of judgment, on the other hand, is an offer to allow entry of judgment on the record of the case, which would ordinarily be a public record.

2. 28 U.S.C. § 1920, Taxation of Costs.

3. However, where the costs recoverable pursuant to Rule 68 include statutory attorneys' fees for a prevailing plaintiff "as part of costs," Rule 68 may provide significant incentives for making and accepting settlement offers. By far the most numerous such cases are civil rights actions, primarily employment discrimination cases and cases covered under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988). In these cases, a defendant's Rule 68 offer, if not accepted and not improved on by an eventual judgment for a plaintiff, operates to cut off a plaintiff's entitlement to recovery of post-offer attorneys' fees (as well as to require that a plaintiff pay all other post-offer statutory costs). *Marek v. Chesny*, 473 U.S. 1 (1985). These cases afford an opportunity to assess how a fee-shifting offer-of-judgment provision—albeit a one-way provision—operates in current federal civil litigation.

4. Because prevailing plaintiffs usually receive an award for statutory costs (although judges retain discretion to deny costs under Rule 54(d)), amending the one-way nature of Rule 68 to permit offers by plaintiffs would simply convert the routine discretionary award of costs into a mandatory award in the cases in which plaintiffs win a judgment more favorable than the unaccepted offer.

cover some portion of its post-offer attorneys' fees⁵ or other expenses not now allowed as "costs." Before the Federal Judicial Center's survey there existed only anecdotal evidence and abstract theory on which to base an assessment of the proposed amendments' effects. The Center's survey sought to obtain objective empirical information relevant to the principal issues of theoretical debate about probable effects of the proposed amendments.

The survey results suggest that amending Rule 68 to permit offers to be made by any party and to provide more significant incentives for making or accepting reasonable offers could contribute significantly to more speedy and inexpensive case determinations.

Summary

The key findings of the survey are as follows:

- The median expense of litigation in federal civil cases of the type in our sample was about \$35,000 per party in cases that went to trial, and about \$10,000 per party in cases that were disposed of by settlement.
- Settlement was not a feasible alternative in all cases, owing to the nature of or significant differences in the parties' interests, but about 40% of all tried cases could have settled, and 15%-20% very likely would have settled if the parties simply had engaged in more negotiation.
- Nearly one-third of cases that were disposed of by pretrial settlement could have settled earlier and saved about 50% of litigation expenses.
- About 20% of all litigation expenses were a result of perceived unreasonable or abusive practices, and it is generally feasible to use pretrial procedures to drive up an opponent's expenses. On average, for every dollar a party spent initiating a motion or discovery request, the opposing party had to spend more than two dollars to respond.
- About 9% of all litigants in the sampled cases—both plaintiffs and defendants—were forced to accept settlements inferior to what they would have achieved if they could afford the risk of continued litigation.
- Nearly 75% of the attorneys who responded to our survey favored amending Rule 68 to permit offers from both parties and to include more significant incentives. Most of the responding attorneys, re-

5. The phrase *post-offer attorneys' fees* is used here as shorthand for the reasonable attorneys' fees incurred by the offeror subsequent to the date of the offer, or, when the relevant provision so provides, subsequent to the expiration of some grace period (e.g., thirty days) following the date of the offer. Attorneys' fees also may encompass other reasonable litigation expenses (e.g., expert witness fees) if the rule so provides.

regardless of whether they represented plaintiffs or defendants, favored an amendment that would allow recovery of at least some portion of the offering party's post-offer attorney's fees.

- Even in civil rights cases, in which Rule 68 is often said to operate entirely to the benefit of defendants, almost 50% of plaintiffs' attorneys favored retaining the basic approach of the existing rule, while only 27% favored abolishing the current rule. Twenty-three percent preferred a rule that would permit offers by both parties but limit the incentive to expenses other than attorneys' fees.

In spite of the dominance of opinion supporting an amendment to strengthen Rule 68 by allowing any party to make an offer of judgment and allowing the offeror to recover at least some portion of its post-offer attorneys' fees, it is important to recognize that attorneys have strong opinions on both sides of the issue. The majority believe strongly that a strengthened Rule 68 would enhance access to the courts, increase fairness, and reduce litigation expenses and delay. A minority believe just as strongly, however, that such a rule would penalize those seeking access to the courts; produce unfair results; and increase the costs, delay, and complexity of litigation.

The objective results, however, suggest that a strengthened Rule 68 may produce more fairness and achieve a sizable reduction in litigation expenses that are unnecessary, abusive, or at least avoidable by encouraging settlement of cases instead of trial or by encouraging earlier settlements. Such a rule could also expedite disposition for settled cases that could have settled earlier and for tried cases that could reasonably settle rather than go to trial. A strengthened Rule 68 that precludes an award of expenses in excess of the amount of a plaintiff's judgment would most likely increase the incidence of risk aversion only slightly while encouraging litigation of small but strong claims and discouraging pursuit of weak but high-stakes cases.

Survey Design

Questionnaires

Questionnaires were sent in March 1994 to 1,951 attorneys from a sample of 800 federal civil cases drawn from the population of all federal district court civil cases that had terminated in the first six months of 1993 (the most recent six months for which we had the relevant data at the time the case sample was selected). The sample represents all attorneys whose names appeared on the dockets of those cases (including all pro se litigants). When more than one attorney from the same firm appeared, we randomly chose only one of those attorneys to receive the questionnaire.

The survey sought information about specific features of the cases in which the attorneys had been involved, as well as the respondents' views

on the existing Rule 68 and possible amendments. Two versions of the questionnaire were used. One version was designed for attorneys involved in federal civil rights cases, in which Rule 68 is thought to operate more frequently and more effectively than in other kinds of litigation (see Appendix B). The second version was designed for attorneys in the other kinds of federal litigation studied, which are described more fully below (see Appendix A).

Sample

An offer-of-judgment rule comes into play only when cases reach the stage at which it is reasonable for the parties to choose between settlement and trial.⁶ We eliminated from the sample the large proportion (about 70%)⁷ of civil cases that were disposed of before they reached that stage.

Of the 70% of civil cases that we eliminated, about 10% were “terminated” by the district court without necessarily reaching actual disposition: by remand to state court or to an administrative agency or by transfer to another district. Nearly one-third were disposed of in a manner that implies little likelihood that trial or settlement were possibilities: by default judgment, by dismissal on motion (e.g., for failure to state a claim or for lack of jurisdiction), or by sua sponte dismissal for lack of prosecution. Although some of these cases may in fact have settled, presumably most did not. Another 15% were disposed of by motion for summary judgment, a form of disposition that does not preclude settlement (e.g., the parties may consider settlement before the motion is decided), but again presumably most were disposed of before the point at which settlement was considered. Finally, about 15% were excluded because they were of a type in which settlement is rarely contemplated by one or both parties. The most obvious of these are prisoner actions for habeas corpus or mandamus relief, appeals from Social Security benefits decisions, and appeals from bankruptcy court decisions. This category also includes prisoner-civil-rights actions (alleging constitutional infirmity in conditions of imprisonment), since only about 10% of these cases reach either trial or settlement, in contrast to 35% of all civil cases.

6. An offer-of-judgment rule may also influence the decision whether to file a lawsuit or to undertake the defense of one. Weak cases that are now nonetheless economically sound gambles might go unfiled if a routine and prompt offer of judgment would eliminate any prospect of economic gain. On the other hand, an offer-of-judgment rule might encourage filing of strong cases involving modest money damages that are not economical to pursue if there is no prospect of recovering attorney’s fees from a recalcitrant opponent.

7. Of the 113,928 civil cases terminated in the first half of 1993, 79,443 were excluded, which left 34,485 from which to select the sample.

Among the remaining cases, we sampled from four case types: contract, tort, civil rights, and other.⁸ Within each group, we selected 100 cases that ended in trial and 100 that ended in settlement.⁹

Survey Results

Of the 1,951 questionnaires mailed, 954 were completed and returned; 860 were never returned. Seventy-eight attorneys (4%) returned the questionnaire but indicated they had not been sufficiently involved in the sample case to complete it. Fifty-nine (3%) of the questionnaires were returned by the post office as undeliverable. Thus, the response rate was 55%, which is typical of the response rate obtained in other Federal Judicial Center surveys of counsel (i.e., it is neither high nor low).

The discussion that follows includes frequent footnote references to tables in Appendix C, in which the questionnaire responses are presented in detail. The tables that accompany the text are summaries of the tables that appear in Appendix C. However, because this survey was not designed to quantify precisely the variables addressed, but instead to reveal general patterns, the reader should not assume that differences in averages or proportions are meaningful unless their significance is specifically noted in the text. Differences of a few percentage points in average litigation expenses, for instance, are most likely due to chance and should not be assumed to reflect real differences.

In this section we discuss the survey results as they relate to the policy debate over the likely consequences of potential variations on the standard offer-of-judgment provision. The following questions frame the debate:

1. How much does litigation cost?
2. What proportion of cases that go to trial could have settled?
3. What proportion of settled cases might settle earlier with less expense?
4. What proportion of litigation expenses might be saved whether or not cases settle?

8. In the population of cases from which the sample was drawn, 26% were contract cases, 27% tort, 16% civil rights, and 31% other. Sampling evenly from the four groups ensured an adequate number of civil rights cases and avoided an excess number in the “other” category. The “other” category is especially problematic to understand in the Rule 68 context, because it includes many types of cases for which conventional litigation—discovery and motions practice followed by either settlement or trial—may often be inapposite. These include land condemnation cases, U.S.-plaintiff forfeiture and penalty cases, labor cases of various types, actions under environmental and agricultural acts, and a large group of “other” statutory actions.

9. The separate sampling of tried and nontried cases was used to ensure that the sample contained an adequate number of tried cases while remaining manageable in size. Because tried cases accounted for only about 9% of the cases remaining after the exclusions mentioned above, a total sample of more than 4,000 cases would have been required to obtain 400 tried cases.

5. Would an offer-of-judgment rule hurt the risk-averse litigant?
6. What are the attorneys' views about offer-of-judgment rules?

How Much Does Litigation Cost?

The potential benefits of an offer-of-judgment rule involve reducing the expense of litigation (1) by leading the parties to settle cases that would otherwise go to trial, (2) by leading the parties to settle earlier than they otherwise would have, or (3) by reducing the incidence of abusive or unreasonable discovery and motions practice in settled or tried cases.¹⁰ Before considering any of these specific possible effects, it is useful to understand the nature of litigation expenses.

We asked counsel two questions that reveal the general magnitude of litigation expenses. First, we asked what litigation expenses were incurred on behalf of the client if “litigation expenses” included attorneys’ fees or, in cases not billed on an hourly basis, the money value of counsel’s time expenditures (see Table 1). The median estimated litigation expense in cases that went to trial was about \$40,000 for plaintiffs and \$30,000 for defendants; about 20% of the parties incurred expenses of less than \$10,000 to \$15,000, and 20% incurred expenses of \$100,000 or more.¹¹ In cases that settled before trial, the median estimated expense was about \$10,000 for both plaintiffs and defendants;¹² 20% incurred expenses below \$3,000, and 20% incurred expenses exceeding \$35,000.¹³ Among all cases, attorneys’ fees accounted for an average of 80% of expenses (median was 85%); there was little variation by type of case, case disposition, or type of party. These figures must be viewed in light of

10. The third possibility arises because the existence of an unaccepted offer of settlement and the consequent possibility that the offeree may have to pay a portion of the offeror’s litigation expenses may mitigate discovery or motions that impose costs on an opponent without significant promise of benefit to the initiating party.

11. All reported percentages were computed by excluding from consideration those respondents who did not answer the relevant question(s). Hence a statement that 10% of respondents chose Answer a means that 10% of those who gave any answer chose Answer a.

Where responses are reported separately for tried cases and for settled cases, these refer to the separate samples of cases—those that reached trial and those that were disposed of in a manner that suggested settlement. For many cases it is not possible to characterize the disposition with a single term, such as *settled*. For example, in a multiparty case, one party may be removed from a case by dismissal, another by summary judgment, and a third by settlement before the case is finally tried by the remaining parties. Nonetheless, at least 80% of respondents in each sample agreed with the characterization of the case as tried or settled.

12. For some items, responses are tabulated separately for plaintiffs and defendants. This distinction is based on the responses to a question that asked the respondent what type of party he or she represented. Counsel were characterized as neither plaintiffs’ nor defendants’ counsel if they indicated that their party was not simply a plaintiff or a defendant but instead both (i.e., a counterclaim was filed), a third-party defendant, not a real party in interest, and the like. This accounts for the apparent anomaly that in some tabulations, the percentage of all respondents giving a particular answer differs from the average of the percentages given for plaintiffs and defendants (e.g., it is possible for 12% of all respondents to have given a particular answer, but only 10% of plaintiffs and 10% of defendants).

13. See Appendix C, Table 17 for detailed tabulations.

the amount of money—or the money value of other matters—at stake in the litigation. If the amount at stake is \$500,000, \$40,000 in litigation expenses is not as significant as it is when the amount at stake is \$50,000.

Second, we asked counsel to indicate the “bottom-line” settlement offer they would have advised their client to make or accept. The answer provides a rough measure of the amount at stake. The median amount plaintiffs’ attorneys would have recommended to their clients in settlement of tried cases varied from \$50,000 in civil rights cases to \$150,000 in tort cases. The median amount defendants’ attorneys would have recommended to their clients ranged from \$15,000 in civil rights cases to \$75,000 in the “other” category of cases.¹⁴

Table 1. Litigation Expenses Incurred and Bottom-Line Settlement Offer Recommended by Counsel

Type of case	Party represented	Median litigation expenses	Median bottom-line settlement offer
Contract, tort, and “other” cases			
Tried	Plaintiff	\$40,000	\$100,000
	Defendant	\$30,000	\$40,000
Settled	Plaintiff	\$10,000	\$45,000
	Defendant	\$10,000	\$25,000
Civil rights cases			
Tried	Plaintiff	\$39,000	\$52,500
	Defendant	\$26,000	\$15,000
Settled	Plaintiff	\$10,000	\$32,000
	Defendant	\$12,500	\$35,000

Although the litigation expenses in tried cases in our sample tended to be three or four times the expenses in settled cases, we cannot conclude that settlement typically saves that much in litigation expenses. It may be that even if our tried cases had settled, they might have involved greater litigation expenses than are characteristic of all settled cases. A better estimate of savings achieved by settlement is based on counsel’s estimates; we asked those in settled cases how much additional expense would have been required to take the case to trial. The median ratio of

14. See Appendix C, Table 17. These figures are notably lower than is often thought. It is a common impression that federal civil cases involve at least \$250,000 and expenses of at least \$100,000 per side. But this scale of stakes and expenses is in fact more characteristic of the top 20% of the sampled cases, whether tried or settled (note further that since the sampled cases represent only about 30% of all federal civil actions, it may be that fewer than 6% of all federal civil cases involve stakes of more than \$250,000). Note in Table 17 the anomaly that the median settlement offer for defendants in the “other” case category is slightly greater than the median of plaintiffs’ demands. This may be because for many cases we have responses from only one party. The responding defendants’ counsel in the “other” cases were probably involved in cases of higher average stakes than the cases of the responding plaintiffs’ counsel.

estimated additional expenses to actual expenses was 81%, which suggests that settlement typically results in a 45% saving in litigation expenses.¹⁵ Although this affords a general idea of the expenses saved by settlements, we cannot assume that the same level of saving would be achieved in cases induced to settle by virtue of an amended Rule 68. The level of saving could be higher or lower than 45%, depending on whether cases that settled because of an amended rule tended to settle comparatively early or late. Average saving would probably exceed 25% of expenses, however, inasmuch as 80% of respondents indicated that at least that proportion of expenses was saved by settlement.

What Proportion of Cases That Go to Trial Could Have Settled?

Our results suggest that between 20% and 40% of tried cases of the types in our sample could have settled before trial and might have been moved toward settlement by a strengthened offer-of-judgment rule.

First, we asked counsel in non-civil rights cases that went to trial how a fee-shifting offer-of-judgment rule would have influenced the case.¹⁶ Specifically, we asked counsel how they thought a two-way offer-of-judgment rule that provides awards of 50% of reasonable post-offer attorneys' fees (a compromise between stronger and weaker incentive provisions outlined earlier in the questionnaire) would have affected the case. Not surprisingly, given that all these cases had reached trial, most respondents (55% of plaintiffs' counsel and 65% of defendants' counsel) said that the rule would have made no difference in the case. A sizable proportion, however, thought that the rule would have made settlement more likely (32% of plaintiffs' counsel and 23% of defendants' counsel).¹⁷

We asked counsel in civil rights cases what role Rule 68 had played in the identified case (see Table 2).¹⁸ Rule 68 offers had been made and accepted in 4% of settled cases, and made but not accepted in 20% of settled cases (these cases settled other than by acceptance of the Rule 68 offer). In another 15% of the settled cases, counsel indicated that a Rule 68 offer had not been made, but that settlement negotiations had been influenced by the possibility of such an offer. Hence it appears that Rule 68 was invoked in or played some role in settlement for almost 40% of the civil rights cases that settled. Rule 68 offers had been made in 12% of tried cases,¹⁹ and the rule had influenced settlement negotiations in another 3%. Counsel indicated that the rule had had no influence in 61% of settled cases and 85% of tried cases.

15. The 81% figure implies that total expenses to try the case would have been 181% of reported expenses; the reduction from 181 to 100 is a 45% decrease.

16. See Appendix A, Question 13.

17. See Appendix C, Table 18.

18. See Appendix B, Questions 13 and 14.

19. In all but one or two of these cases, the trial judgment was for the defendant, in one case the judgment was for the plaintiff for an amount greater than the Rule 68 offer, and in

Table 2. Role of Rule 68 in Sample Civil Rights Cases

Response	Settled cases	Tried cases
Rule 68 offer made and accepted.	4%	—
Rule 68 offer made but not accepted.	20%	12%
Rule 68 influenced settlement negotiations (no offer made).	15%	3%
Rule 68 had no effect.	61%	85%

Counsel in civil rights cases were also asked how Rule 68 influences cases similar to the sampled case.²⁰ Thirty-one percent of plaintiffs' counsel and 47% of defendants' counsel said they believe that Rule 68 leads more cases to reach settlement.²¹

For both civil rights and non-civil rights cases that were tried, we asked counsel to indicate why the case did not settle. The objective of this question was to distinguish cases that could have been settled (e.g., if the parties had been less recalcitrant, more reasonable, or simply closer in their assessments of the likely outcome) from those that would not have settled even if there had been more reasonable settlement offers or more incentive afforded by an offer-of-judgment rule. The responses are summarized in Table 3. The most common response, given by roughly 50% of respondents, was "Had one or both sides been more reasonable or realistic, settlement might have occurred." The answers deemed most likely to indicate that settlement was possible were e, g, and h. If we count those cases for which answers e, g, and h were the only answers given, about 40% apparently might have settled (44% of plaintiffs' counsel and 36% of defendants' counsel).²²

Finally, we asked counsel to indicate the "bottom-line" settlement they would have recommended that their client make or accept. By comparing those amounts as reported by plaintiffs' and defendants' counsel in the same case, we could identify cases that apparently should have settled but did not. Both plaintiffs' and defendants' counsel provided answers to the relevant questions for sixty-eight tried cases.²³ The amount the de

one case, counsel did not indicate what effect the Rule 68 offer had vis-à-vis the trial verdict. Hence the Rule 68 cost-recovery provision came into play in at most one case.

20. See Appendix B, Question 15.

21. See Appendix C, Table 20.

22. See Appendix C, Table 13.

23. See Appendix A, Question 12, and Appendix B, Question 11.

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defendant was willing to pay equaled or exceeded the plaintiff's minimum demand in 13% of these cases and came very close in another 12%,²⁴ suggesting that 25% of these cases would have settled if the parties had made settlement offers close to their bottom-line positions (or if, given counsel's recommendation to make or accept such an offer, the client had more incentive to do so).

Table 3. Reasons Tried Sample Cases Failed to Settle

Response	Plaintiffs' counsel (n = 211)	Defendants' counsel (n = 216)
a. The matters at stake extended beyond the relief sought in this particular case (e.g., one or both parties sought to establish legal precedent, or were concerned that a settlement in this case would encourage or discourage other litigation).	9%	18%
b. One or both parties were more concerned about matters of principle or were too emotionally invested in the case to accept a compromise resolution.	21%	29%
c. The stakes in the case were so great that the costs of litigation were relatively insignificant, so that there was little incentive for settlement on the part of at least one party.	9%	10%
d. The outcome of the case was so highly unpredictable that there really was no way to find a satisfactory compromise.	15%	7%
e. The parties (and/or counsel) were simply too far apart in their assessment of the likely outcome of the case. Had one or both sides been more reasonable or realistic, settlement might have occurred.	45%	50%
f. This was a multiparty case in which the multiple interests involved made it very difficult, if not impossible, to fashion a satisfactory settlement.	2%	4%
g. No serious settlement offers were made. I don't understand why.	24%	5%
h. Serious settlement negotiations occurred, but failed. I don't understand why they failed.	2%	2%
i. Other.	14%	18%

24. The close cases were as follows (some numbers have been rounded to protect the confidentiality of responses):

Defendant would have paid	Plaintiff demanded
\$175,000	\$200,000
\$25,000	\$30,000
\$35,000	\$40,000
\$30,000	\$35,000
\$45,000	\$50,000
\$5,000	\$8,000
\$5,000	\$6,000

What Proportion of Settled Cases Might Settle Earlier with Less Expense?

Settlement of a civil case is often motivated by a desire to avoid the expense and delay associated with taking the case to trial, or to avoid the risk of a trial outcome significantly more adverse than the outcome achievable through settlement. These factors are time-dependent. The avoidable expense and delay of litigation are at their maximum at the outset of a case and diminish as time progresses and expenses are actually incurred. Only expenses yet to be incurred are avoidable by settlement, so, in general, there is more incentive to settle early in a case than there is after significant expenses have been incurred.²⁵ This does not necessarily mean that we should expect settlements to occur at the outset of litigation. In many cases, including the kinds of cases in which a fee-shifting provision is likely to operate, some discovery is needed before both parties can estimate the likely outcome of the case, and both discovery and motions activity may be necessary before the parties' estimates of likely outcome are sufficiently close to make settlement possible.²⁶

We asked counsel in cases that reached settlement whether they could have settled earlier and with significant savings in litigation expenses. Overall, about 40% thought they had settled "as soon as the parties had adequate information to evaluate the case." Thirty-two percent said they could have settled earlier, but not with significant savings in litigation expenses. The 28% of respondents who thought they could have settled earlier and with reduced litigation expenses estimated potential savings

25. This is not strictly true with respect to expenses that may or will be borne by the opponent, as occurs in a civil rights case if a plaintiff prevails or in a case in which an offer of judgment may result in one party paying a portion of the other's expenses. Some critics claim that an offer-of-judgment rule would deter settlement and increase litigation expenses when a party is confident of recovering expenses by virtue of an offer made by that party; however, this supposes an unusual degree of confidence in the outcome of a case bound for trial. Only 11% of counsel in tried cases indicated that they thought there was "not much uncertainty" about either liability or damages. (See Appendix C, Table 16.) Further, fee-shifting provisions generally allow recovery only of "reasonable" litigation expenses (or just reasonable attorneys' fees). Unnecessary or excessive expenses are not likely to be allowed as reasonable, but expenses incurred in necessary response to such activity will probably be readily allowed as reasonable. So, for instance, a party betting on recovery of expenses who engages in excessive discovery not only may be disallowed his or her own expenses for that activity but also may be held accountable for an opponent's expenses of responding to excessive discovery requests if an opponent's offer of judgment is vindicated by a trial verdict. Given the level of risk entailed, counsel would have an incentive to run up the litigation bill only when counsel are extraordinarily confident that the judgment will better the offer amount.

26. Theorists have argued that discovery and motions activity should naturally bring the parties closer together in their estimates of likely outcome. In the majority of cases, however, both parties probably have a fairly accurate estimate of outcome probabilities early in the litigation, and further pretrial activity most often serves to confirm the expected and so enhance confidence in outcome probabilities without necessarily changing the estimates or reducing the uncertainty. Thus, counsel who initially estimate that a plaintiff has a 50% chance of winning \$100,000 and a 50% chance of losing may alter that view little if at all as discovery and motions yield more information, but they may become increasingly confident in the correctness of that estimate.

of 50%.²⁷ This suggests that a fee-shifting offer-of-judgment rule might lead the parties in about 60% of the cases that would settle anyway to settle more quickly and might save up to 50% of expenses in half those cases.

The actual time cases took to be terminated correlated with the attorneys' answers about whether the cases could have settled earlier. Cases that settled "as soon as the parties had adequate information" had a median age of ten months (mean was thirteen months). Cases that could have settled earlier but without significant savings had a median age of thirteen months (mean was fifteen), while those that an attorney said could have settled earlier with reduced litigation expenses had a median age of eighteen months (mean was twenty-two). Not surprisingly, tried cases had the highest median age: twenty months (mean was twenty-three). This does not necessarily mean that delay in resolution by itself leads to greater expenses, but it does lend support to the respondents' judgments about whether they could have settled earlier than they did.

What Proportion of Litigation Expenses Might Be Saved Whether or Not Cases Settle?

An offer-of-judgment rule may reduce litigation expenses by creating risks associated with imposing unnecessary expenses in the course of litigation. Although a party who has rejected a realistic settlement offer proceeds at the risk of having to pay reasonable post-offer expenses incurred by the opponent,²⁸ the risk probably will not reduce litigation expenses that are necessary or not feasibly avoidable. Discovery or motions activity that is necessary to the litigation will most likely continue with little hindrance, but expenses that are questionable or that are unnecessarily imposed on the other party might be considerably reduced. Thus the significance of possible reductions in expenses depends heavily on whether significant expenses are now incurred in responding to actions that are unnecessary or unreasonable.

To probe the character of litigation expenses, we asked counsel to apportion their clients' litigation expenses into categories that distinguished expenses incurred at counsels' own initiative (e.g., making a discovery request) from those incurred in response to opponents' initiatives (e.g., responding to a discovery request), and, within the latter category, to characterize expenses resulting from opponents' actions as abusive, merely unreasonable, or reasonable. "Abusive" expenses were described as those "incurred in necessary response to actions of an opponent that were probably taken primarily for the purpose of increasing my client's expenses, and/or delaying or complicating the litigation." "Unreasonable" expenses were "incurred in necessary response to actions of an opponent that were

27. See Appendix C, Table 14A.

28. Whether an offer must be realistic to create such a risk depends on the nature of the rule. For instance, an offer to settle for an amount that is less than any possible judgment for a plaintiff will create no risk to a plaintiff if the rule precludes recovery of fees from a losing plaintiff.

unreasonable or ill-considered, although probably not undertaken primarily to increase my client's expenses or to delay or complicate the litigation."²⁹

Overall, about 20% of litigation expenses were characterized as incurred in response to unreasonable or abusive actions of opposing counsel—each category accounting for about 10%—and some expenses were attributed to at least one of those categories by about 60% of respondents. The figures varied little by case type or party represented. The low for expenses deemed unreasonable or abusive was 12% in tort cases, and the high was 28% in the “other” cases. This suggests that between 10% and 20% of all litigation expenses might be eliminated if counsel who make such abusive or unreasonable requests realize that their clients may ultimately have to pay those expenses.

Another observation concerning the apportionment of expenses lends considerable additional weight to the proposition that expenses can be significantly reduced. Overall, counsel attributed about 15%–20% of their clients' litigation expenses to actions undertaken on their part that did not result in expenses for opponents, another 25% to actions they initiated and that required the opponents to incur expenses in response, and 55%–60% to actions initiated by opponents. What is noteworthy is the ratio of the percentages attributed to the last two categories, which deal with all expenses arising in the various activities of litigation wherein one party demands something of another, such as by filing a motion or initiating a deposition. The respondents indicated that the expenses incurred in responding *to* opponents were more than twice as great as the expenses incurred in actions that required a response *from* the opponent. This cannot be written off as an obvious bias in perception, on the view that these two categories of expenses should naturally be equal; logically they could be disproportionate in either direction. Serving an opponent with a set of standard interrogatories is an activity for which the expenses for the party serving the interrogatories are naturally much less than those for the party who must respond to them. Moreover, these figures are not mere generalizations about the sad or mean state of litigation; they are instead the aggregate of responses about expenses in particular cases.³⁰

29. See Appendix A, Question 9, and Appendix B, Question 8. See also Appendix C, Table 18.

30. It may be argued that the responses to this question exaggerate the expenses associated with unreasonable or abusive practices in litigation because of a natural tendency to see others' actions—but not one's own—as unreasonable or abusive. This may be true, and the extent of expenses attributable to truly unreasonable or abusive actions may be less than 20%. It is difficult, however, to doubt the general proposition that there is an imbalance between the costs of responding to an initiative and the costs of making an initiative that requires the opponent to respond. Even among counsel who attributed none of their expenses to abusive or unreasonable initiatives by their opponents, expenses incurred in responding to opponents' reasonable initiatives were about 2.5 times those incurred in initiatives that required opponents to respond (52% versus 21%). This imbalance unavoidably provides an incentive to take actions—whether reasonable or not—if they will cost the opponent much more than they will cost the initiator.

The data on apportionment of expenses suggest that, on average, for each dollar spent by one party in actions requiring a response from the opponent, the opponent will spend more than two dollars in responding. This implies that a clear incentive exists for the often-alleged battle of bank accounts that can occur in civil litigation. The survey results suggest that a party can generally succeed in driving up an opponent's expenses at comparably modest expense on its part if the party thinks that mounting expenses may lead an opponent to withdraw or at least accept a settlement biased in the party's favor.³¹ An offer-of-judgment rule may be most effective against actions motivated by a desire to impose costs on one's opponent, because the expenses that a court is most likely to allow as reasonable and recoverable are those incurred in response to an opponent's unreasonable actions. Hence the existence of an unaccepted but realistic offer may put an abrupt end to any thought the offeree may have of using discovery or motions to drive up the offeror's expenses.

Would an Offer-of-Judgment Rule Hurt the Risk-Averse Litigant?

Perhaps the most significant concern about an offer-of-judgment rule is that the prospect of paying opponents' attorneys' fees may coerce "risk-averse" parties into accepting unfair settlements. Risk aversion is most often understood as the tendency to choose an affordable loss rather than accept even a slight chance of a disastrous loss. If a defendant anticipates a 30% chance that the plaintiff will win a judgment for \$1,000,000 and a 70% chance of a judgment for the defendant, on strictly mathematical grounds, it would be economically rational to settle the case for \$300,000.³² However, if the defendant can afford a loss of \$400,000 but would be severely harmed by a \$1,000,000 loss, the defendant may agree to settle the case for the unreasonable sum of \$400,000 rather than run the 30% risk of financial ruin.

Risk aversion is not limited to concerns about financial losses; it also plays a part in evaluating possible financial gains. For a plaintiff of modest means with a 30% chance of winning \$1,000,000 and a 70% chance of winning nothing, a settlement for even \$200,000 might be far more attractive than the 70% risk of winning nothing, even though the reason-

31. If each party can drive up the other's litigation expenses with equal ease, a mutual-threat deterrent effect may inhibit the practice. However, if one party is better situated than the other to drive up expenses, the threat is not mutual and there is no deterrent to the incentive to drive up the opponent's expenses.

32. The "expected" outcome of \$300,000 is the average loss to a defendant who faces a large number of lawsuits with these outcome possibilities (30% chance of losing \$1,000,000 and 70% chance of no loss). Insurance companies presumably adhere fairly closely to expected outcome as the standard for acceptable settlement terms, since to pay more than expected outcome is in the long run a losing proposition. But it is a mistake to assume that only insurance companies and other repeat players in litigation should operate in this risk-neutral manner. Adherence to expected outcome is the economically rational approach for any litigant—repeat player or one-timer—who can readily afford the worst possible outcome. Risk aversion affects all parties, including repeat players, when the worst possible outcome is economically drastic, but the expected outcome is not.

able settlement value of the case would be \$300,000. Any of these sums—\$200,000, \$300,000, or \$1,000,000—would represent a very large increase in the plaintiff’s wealth, and a settlement of \$200,000 might seem far more attractive than a mere 30% chance of winning \$1,000,000. A plaintiff’s modest means evoke risk aversion in this context and might lead to the acceptance of an inadequate settlement.

The respondents were asked to indicate which of several propositions they agreed with concerning the nature and existence of risk aversion in civil litigation. Their responses suggest widespread awareness of risk aversion but imply either that counsel do not fully understand the phenomenon or that there is a notable measure of irrationality in litigation expenditures. Although the two “correct” responses—aversion to financially ruinous outcomes and aversion to loss of an inadequate but nonetheless wealth-enhancing settlement—were chosen by 58% and 33% of respondents, respectively,³³ even more respondents (63%) indicated, incorrectly, that wealthier parties are always at an advantage in litigation, regardless of possible case outcomes. This is not an economically rational position for parties who are wealthy enough to afford all possible outcomes, because no outcome would make a large difference in their overall wealth. Although it may be true that a party willing and able to spend enough money can obtain better results, it does not generally make sense to spend more on a lawsuit than the amount of the expected judgment. The level of agreement with this proposition may reflect a perception that bank account battles are common or that litigation expenses are frequently out of proportion to the amount at stake.³⁴

To assess the actual incidence of risk aversion, we asked counsel to indicate whether their clients had accepted an inadequate settlement because of risk aversion (namely, whether “[the] settlement in this case provided my client with a less favorable outcome than he (or she or it) would have accepted had he been financially able to accept the risks of going to trial, and hence able to insist on better settlement terms”).³⁵ Overall, about 9% of respondents said “yes,” and the proportions were about equal for plaintiffs and defendants except among civil rights cases, in which about 27% of plaintiffs and no defendants were disadvantaged by risk aversion. In addition, plaintiffs represented on an hourly-fee basis were significantly more risk averse than those represented on a contingent-fee basis.

To see how an offer-of-judgment rule might affect risk aversion, we looked at the varying incidence of risk aversion among the types of parties in settled cases (see Table 4). Contingent-fee plaintiffs are the least subject to risk aversion (4%), which makes sense for two reasons. First, the typical percentage-of-judgment contingent-fee arrangement protects

33. See Appendix C, Table 21.

34. Theoretical analysis of settlement behavior assumes economically rational behavior, but evidence of some irrational behavior on the part of litigants does not make the theoretical analysis irrelevant. Instead, it serves to remind us that the analysis applies only insofar as decisions to make or accept settlement offers are influenced by financial concerns.

35. See Appendix C, Table 14B.

the plaintiff from incurring attorneys' fees in the event of an adverse trial verdict or other judgment: Plaintiffs pay their attorneys only if they win. Second, counsel are unlikely to accept a case on a contingent-fee basis unless they believe it has a good chance of producing a favorable verdict with a damage award high enough to yield an adequate contingent fee. Hence risk aversion is mitigated by both the character of the fee arrangement and the requirement that the case be relatively strong and able to yield an ample judgment. Contingent-fee plaintiffs can be risk averse, not for fear of having to pay attorneys' fees, but for fear of gaining nothing if they do not accept a settlement offer. In contrast, hourly- or flat-fee litigants must pay their attorneys whether they win or lose; thus they face some risk that the result may be a large out-of-pocket expense.

Table 4. Incidence of Risk Aversion in Settled Sample Cases

Response	Contract, tort, and other cases			Civil rights cases	
	Contingent-fee plaintiffs' counsel (n = 73)	Hourly-fee plaintiffs' counsel (n = 41)	Hourly-fee defendants' counsel (n = 119)	Plaintiffs' counsel (n = 44)	Defendants' counsel (n = 50)
Settlement provided a less favorable outcome than would have been accepted had client been able to accept the risks of going to trial.	4%	10%	7%	27%	0%

Defendants are also less likely to experience risk aversion for reasons similar to those in contingent-fee cases; that is, because a plaintiff ordinarily will not sue a defendant who has insufficient means to pay an adequate judgment or settlement, potential defendants most likely to be risk averse are weeded out before a suit is filed. Some defendants are still risk averse, such as those who can afford a \$30,000 settlement but cannot risk even a 20% chance of a \$100,000 verdict. Hourly- or flat-fee plaintiffs, on the other hand, need only enough money to pay attorneys' fees for a case to be a financially viable proposition; thus they generally need less wealth than those they elect to sue. In sum, this analysis suggests that hourly-fee plaintiffs are more frequently risk averse than hourly-fee defendants, and contingent-fee plaintiffs exhibit the lowest risk aversion.

In fact, however, risk aversion is common among civil rights plaintiffs, nearly all of whom are represented on a contingent-fee basis. There are two apparent reasons for this. First, plaintiffs' counsel who accept contingent-fee civil rights cases do not have to limit themselves to cases likely to yield money damages sufficient to support adequate attorneys' fees. Because a prevailing plaintiff's attorneys' fees are paid by the defendant, a case need only have good prospects for a favorable verdict to be worth accepting; the likely amount of money damages is not crucial as it is in

other cases. This, of course, is the intention of such statutes as 42 U.S.C. § 1988—to make economical the pursuit of claims that would be uneconomical to pursue absent recovery of attorneys' fees. The effectiveness of Section 1988 is evident from the fact that the median amount at stake in civil rights cases is the lowest of the amounts in the four case categories in the study, and from the frequency with which plaintiff's litigation expenses equal or exceed the amount at stake in these cases. Plaintiff's litigation expenses exceeded 80% of the amount at stake (plaintiff's bottom-line settlement demand) in 47% of civil rights cases, but in only 12% of all other cases.

The comparatively modest stakes in civil rights cases may reflect the comparatively modest means of most civil rights plaintiffs. Victims of employment discrimination or other civil rights violations are more likely to be from society's lower economic strata and thus more prone to risk aversion. The purpose and success of Section 1988 might then be understood as allowing pursuit of claims by people whose risk aversion and limited resources would preclude access to legal remedy without the prospect of recovering attorneys' fees. In other words, risk aversion comes with the territory. For these plaintiffs, however, risk aversion is presumably preferable to the inability to pursue their claims in the first instance.

Although the existing Rule 68 may exacerbate the risk aversion of civil rights plaintiffs, this should occur only in limited circumstances. An unaccepted Rule 68 offer affects the plaintiff's recovery only if the plaintiff obtains a judgment but fails to obtain a judgment superior to the terms of the Rule 68 offer; the rule has no consequence if the plaintiff loses the case.³⁶ Hence the Rule 68 offer must be greater than the smallest feasible plaintiff's judgment to be useful (a lower offer may be accepted by the plaintiff, but the fact that it is a Rule 68 offer should make no difference in the plaintiff's decision).

When liability is seriously at issue, a reasonable settlement offer is likely to be less than any feasible plaintiff's judgment, while an offer sufficient to put Rule 68 into play will most likely be acceptable to the plaintiff even if it is made outside of Rule 68 (as a conventional settlement offer). If the odds of a plaintiff's judgment were 50–50 and damages for such a judgment would fall between \$30,000 and \$70,000, with \$50,000 most likely, an economically rational settlement figure for such a case—if it were to settle—would be \$25,000. However, Rule 68 would have no force if the defendant made an offer of less than \$30,000, because the plaintiff would either lose altogether or win at least \$30,000, and Rule 68 would have no consequence in either event. An offer of \$30,000 or more would most likely be acceptable whether or not it was made under Rule 68.

In contrast, if in the same case liability were fairly clear, then a rational settlement would be close to \$50,000, but a Rule 68 offer of \$35,000 could result in the plaintiff's winning a judgment of \$30,000 while forfeiting

36. See *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981).

post-offer attorneys' fees. Only in this kind of circumstance can Rule 68 pressure a risk-averse plaintiff into accepting an inadequate settlement.

Apparently, Rule 68 does not often exacerbate the risk aversion of civil rights plaintiffs. We asked counsel to characterize the uncertainty in the case by indicating whether liability, damages, both liability and damages, or neither were the principal matters at issue. In cases in which liability was uncertain—and Rule 68 was unlikely to influence risk aversion—26% of counsel indicated that their clients had accepted an inadequate settlement because of risk aversion. Among cases in which liability was fairly clear, 29% of plaintiffs were risk averse. The number of responses is not sufficient to conclude that Rule 68 leads to inadequate settlements in only 3% of civil rights cases. However, it does appear that Rule 68 does little to exacerbate the risk aversion characteristic of many civil rights plaintiffs.

How, then, can we estimate the effects of a fee-shifting offer-of-judgment rule on risk aversion in non-civil rights cases? Given the apparently modest influence of the existing rule in civil rights cases, we would generally anticipate comparatively modest effects in other types of cases; however, much depends on whether the offer-of-judgment rule would put plaintiffs at risk of an out-of-pocket loss (i.e., paying some of a defendant's attorneys' fees even when a defendant obtains judgment). Recall that hourly-fee plaintiffs are about twice as likely to be risk averse as are contingent-fee plaintiffs, and the likely reason for the difference is that hourly-fee plaintiffs are at risk of paying their attorneys' fees even if they lose, whereas contingent-fee plaintiffs are usually protected from all but modest out-of-pocket losses. An offer-of-judgment rule that protects plaintiffs from any sizable net loss would have much less influence on risk aversion than a rule that puts a plaintiff at risk of paying all of a defendant's post-offer fees even when the plaintiff loses the case. A rule that puts plaintiffs at risk might increase the incidence of risk aversion to 10% for contingent-fee plaintiffs and to somewhat more than 10% for hourly-fee plaintiffs. A rule that protects plaintiffs might have a much smaller influence on risk aversion for all plaintiffs. There is less basis for estimating the effect of an offer-of-judgment rule on risk aversion among defendants, but the variation among plaintiffs suggests that it would be quite modest, increasing from the current level of about 7% to a level of probably less than 12%.

However, the likely influence of an offer-of-judgment rule on cases such as those currently litigated in the federal courts is only part of the story. An offer-of-judgment rule would undoubtedly have some of the same influence that fee recovery has had on civil rights cases: It would make economical the pursuit of some claims that are not economical without the prospect of recovering at least some attorneys' fees. This includes cases similar to civil rights cases—cases with modest stakes but good prospects for success—as well as defenses against weak claims. A “nuisance value” settlement can be the financially realistic course when the cost to defend a claim would exceed the amount of the settlement, and this may be the unavoidable course for a risk-averse defendant who

cannot afford the expense of litigation. An offer-of-judgment rule will make such cases more feasible to defend, although the benefit will be limited if the rule protects losing plaintiffs from liability for defendants' fees. As with civil rights cases, the fee recovery afforded by an offer-of-judgment rule will encourage filing of small but strong claims (and the pursuit of strong defenses), and the parties in these cases will be more risk averse than is now typical of civil litigants. But again, these parties surely would rather accept settlement terms inferior to those a richer party might accept than be precluded from pursuing their claim or defense altogether.

Finally, an offer-of-judgment rule will probably drive a small proportion of cases out of the courts. As the prospect of fee recovery attracts small but strong claims, it also repels marginal claims that are weak but nonetheless worth pursuing either for nuisance value or because a favorable judgment will be large even if unlikely. (On strictly economic terms, a 10% chance of a judgment for \$1,000,000 is worth pursuing if the anticipated total litigation expenses are less than \$100,000, but a risk of paying some of an opponent's attorneys' fees can tilt the balance, making such a case not worth pursuing.)

What Are Attorneys' Views About Offer-of-Judgment Rules?

Although theoretical analysis of variations on the offer-of-judgment rule may help predict how they would influence civil litigation, it is also useful to understand how attorneys believe such rules would or do affect civil litigation in general, and the cases in the sample in particular. To this end, we asked counsel three questions: (1) How might a fee-shifting offer-of-judgment rule (or, for civil rights cases, how did Rule 68) affect the specific case in the sample? (2) How might (or does) such a rule affect civil cases in general? and (3) What, if any, amendments to Rule 68 would generally lead to the fairest outcomes for all parties in civil litigation? The responses reflect substantial support for making Rule 68 a two-way provision with more "teeth" than mere recovery of statutory costs. Because the potential influence of offer-of-judgment rules on cases in which prevailing plaintiffs ordinarily recover attorneys' fees can differ markedly from their influence on cases without routine fee recovery, the two groups are discussed separately.

General (Non-Civil Rights) Cases

When we asked counsel about potential amendments to Rule 68, nearly three-fourths from the contract, tort, and "other" case samples indicated a preference for some form of two-way offer-of-judgment provision that would allow recovery of something more than mere statutory costs by an offeror whose offer was not accepted and not improved on at trial (see Table 5). Most respondents (63% overall) favored including at least some attorneys' fees in addition to statutory costs; the variation among counsel by party represented or by type of case was quite modest, ranging from 54% of plaintiffs' counsel to 71% of defendants' counsel favoring a two-

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way fee-shifting rule. The percentage of plaintiffs' counsel who favored abolishing the rule (25%) was notably higher than the percentage of defendants' counsel (13%).³⁷

Table 5. Recommended Amendments to Rule 68

Response	All respondents (<i>n</i> = 748)	Plaintiffs' counsel (<i>n</i> = 295)	Defendants' counsel (<i>n</i> = 289)
Allow offeror to recover at least some portion of post-offer attorney's fees.	63%	54%	71%
Allow recovery of post-offer costs plus expert witness fees or other expenses not ordinarily taxable as costs (e.g., pre-judgment interest, discovery expenses, multiple costs, a percentage of the judgment).	9%	10%	8%
Abolish Rule 68 altogether.	18%	25%	13%
Leave Rule 68 as it is.	9%	10%	10%

When we asked how the identified case from the sample would have been affected by a two-way rule providing for recovery of 50% of an offeror's reasonable attorneys' fees, 61% indicated that the rule would have made no difference (e.g., because the case settled early and satisfactorily), and 27% indicated that it would have made settlement more likely or made settlement occur earlier and so reduced litigation expenses.³⁸ (See Table 6.) Seventeen percent indicated that the rule would have affected the outcome of the case (about two-thirds of those expected a better outcome for their client, and one-third expected a worse outcome). Again, there was little variation by party represented or by type of case, except that plaintiffs' counsel were somewhat more likely to expect more or earlier settlements (32%) than were defendants' counsel (23%).

We asked counsel to select from a long list of potential effects of the 50% fee-recovery rule those effects they thought likely to occur in civil cases generally.³⁹ Nearly 75% indicated that such a rule would result in more settlements; 60% thought it would lead to earlier settlements; 43% said it would decrease the expenses of litigation; 35% said it would inhibit abusive tactics; and 23% said it would result in fairer case outcomes. Overall, 50% chose only these positive effects, while 33% indicated that the rule would have both positive and negative effects. The negative consequences mentioned most frequently were that the rule might inhibit reasonable and necessary pretrial activity because a party may be afraid of having to compensate opponents for their expenses of responding (15%) and that the rule would lead to less fair outcomes (25%). Overall, 12% of respondents anticipated only negative consequences from the rule, and 6% thought the rule would make no difference.

37. See Appendix C, Table 9.

38. See Appendix C, Table 19.

39. See Appendix C, Table 20.

Table 6. Likely Effect on the Sample Cases of an Offer-of-Judgment Rule Providing Recovery of 50% of Attorneys' Fees

Response	All respondents (n = 737)	Plaintiffs' counsel (n = 296)	Defendants' counsel (n = 282)
No difference in this case.	61%	55%	65%
Made settlement more likely or led to an earlier settlement, and thus probably resulted in significant savings in litigation expenses.	27%	32%	23%
Delayed settlement, and probably led to greater litigation expenses.	2%	1%	3%
Made settlement less likely.	3%	2%	3%
Resulted in a less favorable result for my client.	6%	6%	7%
Resulted in a more favorable result for my client.	11%	12%	9%
Caused my client never to have brought or defended the case, or led me to refuse to accept the case.	2%	4%	1%

A substantial proportion of respondents identified both positive and negative effects of an amended offer-of-judgment rule. Presumably, respondents predicted positive effects in some cases and negative effects in others, and thus sometimes chose both of two answers that the author had meant to be mutually exclusive (e.g., some indicated that the rule would produce case outcomes unduly generous to defendants but also that it would lead to case outcomes that are more fair). This impression is reinforced by the fact that a two-way fee-shifting offer-of-judgment rule was favored by 50% of respondents who identified negative consequences from such a rule. This is less than the 63% overall who favored such a rule, but it is still a fairly high level of endorsement.

Civil Rights Cases

In civil rights cases Rule 68 is often presumed to operate to the exclusive benefit of defendants. The rule may be invoked only by defendants, and failure to accept a Rule 68 offer can only work to the detriment of the plaintiff. However, Rule 68 may benefit a plaintiff by creating an incentive for the defendant to make a realistic offer, and thus lead to an earlier or more generous settlement than might otherwise occur. We asked counsel in civil rights cases two questions about Rule 68: (1) what are their views of it as it now operates? and (2) what, if any, amendments should be made to the rule? Although plaintiffs' counsel generally favored the rule much less than defendants' counsel did, there was nonetheless a surprising amount of support among plaintiffs' counsel for the offer-of-judgment concept.

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We asked counsel which of several offer-of-judgment provisions would generally lead to the fairest outcomes for all parties in civil cases in which a prevailing plaintiff ordinarily recovers its reasonable attorneys' fees (see Table 7). Forty-nine percent of plaintiffs' counsel supported retaining the existing one-way fee-shifting structure, either as is (27%), strengthened to include payment by plaintiff of a defendant's post-offer fees (6%), or moderated to limit the forfeiture of a plaintiff's post-offer fees (16%).⁴⁰ Another 29% supported abolition of the rule, and 23% supported a change to make the rule a two-way provision allowing recovery of statutory costs and other expenses (e.g., expert witness fees) but not attorneys' fees. Counsel for defendants were far more supportive of extending the existing rule to provide for payment by plaintiff of defendant's reasonable post-offer attorneys' fees (63%). Only 4% suggested abolishing the rule, and 12% supported the two-way approach.

Table 7. Amendment to Rule 68 That Would Lead to the Fairest Outcomes for All Parties in Civil Rights Cases

Response	All respondents (<i>n</i> = 212)	Plaintiffs' counsel (<i>n</i> = 88)	Defendants' counsel (<i>n</i> = 116)
Strengthen the existing rule. (Allow a defendant-offeror not only to avoid payment of plaintiff's fees, but also to recover from plaintiff defendant's reasonable post-offer fees.)	38%	6%	63%
Leave Rule 68 as it is.	19%	27%	14%
Moderate the existing rule. (Allow defendant-offeror to avoid payment of plaintiff's post-offer attorneys' fees, but only to the extent that those fees exceed the difference between the offer and the judgment.)	11%	16%	8%
Make the rule two-way and allow recovery of significant expenses but not attorneys' fees. (Allow offers to be made by either plaintiff or defendant, and provide that a party whose offer is not accepted and not improved on at trial may recover some multiple of statutory costs, expert witness fees, and/or other expenses not ordinarily taxed as costs (other than attorneys' fees).)	16%	23%	12%
Abolish Rule 68 altogether.	15%	29%	4%

40. See Appendix C, Table 10.

We presented counsel in civil rights cases with a list of possible responses to the question, “[H]ow do you believe the existing Rule 68 influences [civil rights cases]?”⁴¹ (See Table 8.) Again, plaintiffs’ counsel offered a surprisingly positive appraisal: 19% indicated only favorable effects, 23% indicated both favorable and unfavorable effects, and 22% indicated only unfavorable effects (36% said the rule makes no difference). Defendants’ counsel were much more positive: 59% indicated that the rule has only favorable effects. But the striking result is the level of positive response from plaintiffs’ counsel. Although only 42% had anything positive to say about the existing rule, the level of favorable assessment is a clear repudiation of the view that the existing rule can provide only an unfair advantage to defendants.

Table 8. Effects of Existing Rule 68 on Civil Rights Cases

Response	Plaintiffs’ counsel (<i>n</i> = 86)	Defendants’ counsel (<i>n</i> = 113)
Only favorable effects: more or earlier settlements, fairer outcomes, decreased litigation expenses, inhibits unreasonable or abusive tactics, and/or encourages reasonable litigation (answers a, c, e, l, m, or p).	19%	59%
Only unfavorable effects: the opposite of any effect listed above (all other answers except q—makes no difference).	22%	8%
Both favorable and unfavorable effects.	23%	7%
Makes no difference.	36%	26%

Other Findings

Several of the survey questions yielded unexpected responses.

We asked counsel how they assess the value of a case for purposes of settlement. The question was meant to determine the extent to which counsel are familiar with and use the concept of expected value in assessing settlement offers. Assuming that counsel are not generally sophisticated in the explicit mathematical approach to the concept—although they may be sophisticated in their intuitive or subjective judgments—we framed the question in elementary terms. The results suggest that we underestimated counsel’s sophistication. Forty percent selected the answer intended to best represent the way an economist would assess case value, but an additional 23% selected the “other” response and explained an approach more sophisticated than any we had outlined—either a combination of our proffered responses or a more explicit explanation of the expected value concept. The results suggest that most attorneys are familiar with the probability concepts that would be made especially relevant to settlement decisions by an offer-of-judgment rule.

41. See Appendix C, Table 20.

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We asked two questions to gauge the respondents' experience and to determine whether their views favoring a given type of change to Rule 68 correlated with their experience. The results are confusing. First, we asked counsel to indicate in how many cases in the past ten years they had played a major role in advising on decisions to make, accept, or reject offers of settlement.⁴² Our scale of responses (3 or fewer, between 4 and 11, between 11 and 25, more than 25) was inadequate. Eighty percent indicated they had played a role in 25 or more cases. Because so few respondents indicated experience in fewer than 25 cases, we had little room to assess correlations. A strengthened Rule 68 was favored by 70% of 742 counsel with involvement in 25 or more cases, versus 74% of 205 counsel with involvement in fewer than 25 cases, a difference that is marginal at best. Second, we asked counsel what percentage of their civil cases are in federal court. Overall, the average was 41%, and the median was 30%. Again, the correlation with views about strengthening Rule 68 was marginal but arguably at odds with the difference noted above. A strengthened Rule 68 was favored by 74% of 452 counsel with more than 30% of their cases in federal court, and by 67% of 471 counsel with 30% or less in federal court. Although various explanations for these patterns might be offered, none is compelling, and the correlations are too weak to imply much in any event.

We asked what type of relief was sought in the sample case in order to assess the extent of problems that might be involved in determining whether a judgment is "not more favorable" than an offer when either a judgment or an offer involves nonmonetary relief.⁴³ The problem is illustrated by trying to compare an offer to settle for \$100,000 with a judgment awarding reinstatement and back pay of \$40,000. The percentage of cases involving exclusively monetary relief varied from 95% in tort cases to 47% in the "other" category, and the percentage of cases involving "significant" nonmonetary relief varied from 35% in the "other" category to 3% in tort cases.

At the end of the questionnaire, we invited respondents to reconsider Questions 1 and 2⁴⁴ (about what amendment to Rule 68 would be fairest to all) and provide new answers if their views had changed in the course of answering other questions. We expected that the attorneys' responses to these questions might change after later questions created awareness of the various potential positive and negative consequences of an offer-of-judgment rule. Only 3% responded to the invitation to change their answers to Question 1 or 2, and all tabulations of those questions reported here incorporate the few revised answers.

42. See Appendix A, Question 17.

43. See Appendix A, Question 6, and Appendix B, Question 5; see also Appendix C, Table 15.

44. Only counsel in non-civil rights cases were asked to reconsider Question 2.

Other Offer-of-Judgment Rules

The respondents identified and recommended a number of other offer-of-judgment rules that are now in effect in various jurisdictions. This section describes these rules and outlines one additional approach, elective arbitration combined with recovery of expenses.

Michigan Rules of Court, Rule 2.405

This is a two-way fee-shifting offer-of-judgment rule that has an intriguing feature: If both parties make offers under the rule and neither is accepted, then an award of actual costs (including post-offer attorneys' fees, albeit subject to the limitation that the court may refuse to award attorneys' fees in the interests of justice) is to be made if the verdict is more favorable to an offeror than the *average* of the two offers. Thus, for example, if the plaintiff offers to accept \$60,000 and the defendant refuses, the plaintiff is entitled to an award of costs if the verdict is greater than \$60,000; but if the defendant makes a counteroffer of \$40,000, the plaintiff will be entitled to costs if the verdict exceeds \$50,000, and the defendant will recover costs if the verdict is less than \$50,000.

This rule creates a strong incentive to avoid making an unreasonable offer. Using the average offer and counteroffer as the threshold for determining awards of expenses makes an unreasonable offer work to the disadvantage of the offeror. If, for instance, the plaintiff demands \$70,000 to settle a case in which the verdict is likely to be about \$50,000, the defendant can make an offer to settle for \$40,000. If the plaintiff rejects the counteroffer, then any verdict less than \$55,000 will result in an award of actual costs to the defendant. Similarly, an unrealistic counteroffer to a reasonable offer will only serve (if rejected) to the advantage of the offeree.

Florida Statutes, Section 768.79

This is a two-way rule providing for recovery of post-offer attorneys' fees, costs, and investigative expenses in cases in which the verdict is at least 25% below the offer when the offer is made by the defendant, or 25% above when the offer is made by the plaintiff. For instance, an offer to settle for \$100,000 will trigger the award of post-offer expenses if the plaintiff-offeree fails to obtain a verdict of at least \$75,000 or the defendant-offeree suffers a verdict greater than \$125,000. A verdict between \$75,000 and \$125,000 will not result in an award of expenses. The Florida rule specifically provides for awards against plaintiffs in excess of any verdict for the plaintiff; the rule also directs the court to account for a number of factors in determining the reasonableness of an award of attorneys' fees.

The 25% margin embodied in this rule has appeal in that it may be thought to protect an offeree from severe consequences for "missing by a small margin." The notion is that a defendant who rejects an offer to set-

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tle for \$100,000 and then suffers a \$101,000 verdict was wrong by only a small margin—but that is an illusory notion. We cannot know by what margin the defendant misestimated the case outcome unless we know what the defendant was willing to pay in settlement. All we know is that the defendant was not willing to pay \$100,000. If the defendant had been willing to pay, say, \$97,000, or even \$90,000, the defendant would almost certainly have made a counteroffer.

Moreover, the Florida approach has the unfortunate consequence of allowing recovery of expenses by only those parties least likely to have incurred losses because of the offeree's failure to accept their offer. A plaintiff who offers to settle for \$100,000 and obtains a verdict for more than \$125,000 will be better off if the offer is rejected unless the plaintiff's post-offer expenses exceed the difference between the offer and the verdict (at least \$25,000).

Nevada Rules of Civil Procedure, Rule 68

This is a two-way fee-shifting rule that affords the court discretion to allow recovery of post-offer attorneys' fees. Apparently, however, awards of post-offer attorneys' fees are generally restricted to cases in which rejection of the offer was deemed unreasonable or grossly unreasonable.⁴⁵

California Code of Civil Procedure, Sections 998 and 3291

Section 998 permits offers to be made by any party. If the offeree does not obtain a judgment superior to the offer, the court must award post-offer costs when the offeror is the defendant, and it may, in its discretion, award pre-offer costs and reasonable expenses for the services of expert witnesses. Awards against losing plaintiffs are specifically permitted. Section 3291 permits awards to include interest from the date of the offer.

Wisconsin Statutes, Section 807.01

Section 807.01 permits offers to be made by the plaintiff or the defendant. If an offer is rejected and the offeror obtains a superior result at trial, then (1) the defendant-offeror recovers costs from the date of the offer, or (2) the plaintiff-offeror recovers double costs plus 12% post-offer interest on the judgment. This rule also provides specifically for an offer (by the defendant) to establish the amount of damages to be awarded if a trial verdict establishes the defendant's liability. If the plaintiff rejects such an offer and obtains a judgment for no more than the amount of the offer, then neither party may recover costs.

Pennsylvania Rules of Civil Procedure, Rule 238

This rule entitles prevailing plaintiffs in actions for personal injury, wrongful death, or property damage to recover prejudgment interest (prime rate plus 1%; termed *damages for delay*) for the period beginning

45. See *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983).

one year after service of the complaint and ending on the date of the verdict. The rule also permits defendants to make offers of judgment and denies post-offer prejudgment interest to a plaintiff who does not accept such an offer and does not recover at least 25% more than the amount of the offer.

U.S. District Court for the Eastern District of Texas, General Order No. 93-13

This is a two-way provision with a 10% margin comparable to the Florida provision (i.e., the offeror may recover expenses only if the verdict is at least 10% superior for the offeror than was the offer). The amount awardable includes all reasonable post-offer expenses (including attorney's fees). The court may reduce the award to prevent undue hardship to a party, and the award may not exceed the amount of the final judgment in contingent-fee cases involving personal injury or civil rights.

Elective Arbitration Combined with Recovery of Expenses

A system to ensure fair offers might mitigate concerns that an offer-of-judgment provision can place a risk-averse offeree in the position of having to accept an unfair settlement rather than accept the risk of an intolerable out-of-pocket loss. Court-sponsored arbitration and early neutral evaluation programs suggest a model for such a system; the general idea is to permit offers of settlement on terms to be established by a neutral third party. Either or both of the following might be used:

- Allow any party to refer the case for decision by a settlement arbitrator who hears evidence in a comparatively abbreviated and inexpensive hearing and renders an award. The party referring the case would be bound to accept the award, but the opponent is free to reject the award. If the award is rejected and the eventual judgment in the case is not more favorable than the award, the rejecting party is required to pay the full reasonable expenses incurred by the referring party after the date of the award. In effect, the party referring the case thereby makes an offer of judgment, in which the terms of the offer are set by the arbitrator.
- Allow a party who has received a conventional offer of judgment to refer the case for decision by a settlement arbitrator. This referral would have the same effect as that outlined above and two additional consequences: (1) if the award is more favorable to the offeree than the offer, the offer is void—the offeror cannot recover any expenses by virtue of that offer; and (2) if the award is less favorable than the offer, neither party may reject it, but the party referring the case to arbitration must pay the offeror's reasonable expenses of the arbitration proceeding.

**Appendix A: Cover Letter and Questionnaire
Sent to Counsel in Contract, Tort,
and “Other” Cases**

Amendments to Rule 68

THE FEDERAL JUDICIAL CENTER
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, D.C. 20002-8003

Office of the Director
Telephone: (202) 273-4160

Board of the Federal Judicial Center
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Judge Michael A. Telesca
Judge J. Harvie Wilkinson, III
Honorable L. Ralph Mecham
Judge William W Schwarzer, Director

March 3, 1994

RE:[case docket number and caption], U.S. Dist. Ct.,[district]
Dear Counselor,

The Advisory Committee on Civil Rules of the Judicial Conference of the U.S. is considering amending Rule 68, concerning offers of judgment. The Advisory Committee is the body responsible for initiating proposed amendments to the Rules of Civil Procedure. The Federal Judicial Center, which is the research arm of the federal courts, has undertaken a study to assist the committee in determining how such an amendment might affect federal civil litigation.

I write to you because I understand that you were counsel in the above-referenced case, which is one of a sample of cases selected for the Judicial Center's study. I have enclosed a questionnaire that I ask you to complete and return at your earliest convenience.

Amendments to Rule 68 could have major effects on litigation of civil cases in the federal courts, and it is crucial that the Advisory Committee understand the views of trial lawyers concerning those effects. Although the Advisory Committee always receives public comment on formally proposed amendments, it often hears only from a limited audience, including legal scholars and organizations representing particular segments of the bar or particular interests. Responses to the enclosed questionnaire will provide the committee with the views of a more representative sample of federal civil trial lawyers, including some from whom the committee might not otherwise hear.

As you will see from the questionnaire, assessing possible amendments to Rule 68 requires reflection. I recognize that questionnaires are rarely welcome, but your response will make a valuable contribution to improving the administration of justice in the federal courts.

Your responses will be kept confidential. The questionnaire is marked with an identifying code that will allow us to relate your responses to information about the above-referenced case, but no one outside of the five-member research project team will be able to associate you or your case to the answers you provide. Your responses will be released only as part of aggregate statistics, and the questionnaire you complete will be destroyed after it is coded into our database.

The Judicial Center and the Advisory Committee will be very grateful for your cooperation in completing the questionnaire. You may check the box at the end of the questionnaire if you wish to receive a copy of the report of this study.

Sincerely,

William W Schwarzer

Established by 28 U.S.C. § 620, the Federal Judicial Center conducts research to further the development and adoption of improved judicial administration in the courts of the United States.

Questionnaire Concerning Proposed Amendments to Rule 68, FRCP

Explanation of Rule 68 and Possible Amendments

No proposed amendment has yet been published for comment or otherwise formally entertained by the Advisory Committee on Civil Rules. The committee wishes to consider a number of possible alternatives, including abolition of the current rule.

As it now stands, the rule allows a party defending against a claim to serve an offer of judgment. If the offer is not accepted within 10 days and the judgment finally obtained is not more favorable to the offeree than was the offer, the offeree must pay the statutory costs incurred after making the offer. The existing rule is thought to have little use or effect, at least in cases where costs are minor compared to the amount at stake in the case. The rule may be significant in cases where a statute permits the prevailing plaintiff to recover attorneys' fees "as part of the costs" in the action, since the Rule has been interpreted to include such attorneys' fees. Hence an unaccepted Rule 68 offer can result in plaintiff failing to recover the post-offer attorneys' fees to which plaintiff would ordinarily be entitled.

The current rule has been criticized not only because the incentive of cost recovery is thought to be too weak to be effective, but also because it is available only to defendants—it is a "one-way" rule. Most ideas for amending the Rule call for making it a "two-way" rule, available to plaintiffs as well as defendants, and increasing the incentives by allowing recovery of sums greater than post-offer costs. Some alternative types of incentive are set forth in question 1, on the next page.

Application of the existing Rule 68 or of possible amended versions of the rule to cases in which a prevailing party might otherwise be entitled to recover attorneys' fees (e.g., class actions, civil rights) raises different questions than does application to cases in which each side ordinarily bears its own attorneys' fees. All questions in this questionnaire pertain *only* to the application of an offer of judgment rule to cases in which each side would ordinarily bear its own litigation expenses, except for taxation of statutory costs.

Part I

1. Several ideas have been proposed for amending Rule 68 to increase the incentive to make and accept early and reasonable settlement offers. Another idea, advocated in the belief that the current rule is unfair or pointless, is simply to abolish Rule 68. Which of the following options for amending Rule 68 do you believe would generally lead to the fairest outcomes for all parties in civil litigation? (Please check one)

- a. Allow recovery of the reasonable attorney's fees incurred by the offeror after making the offer.
- b. Same as a, above, but allow recovery of some percentage of reasonable post-offer attorney's fees (which could be more or less than 100%). What percentage?: _____% of reasonable fees.
- c. Allow recovery of reasonable attorney's fees, but only to the extent that they exceed the difference between the offer and the judgment. The rationale of this idea is that rejection of the offer has benefited the offeror to the extent that the judgment is superior to the offer. For instance, a judgment for \$100,000 is \$20,000 better than plaintiff's offer to accept \$80,000 (or defendant's offer to pay \$120,000).⁴⁶ In either case, if offeror's reasonable post-offer attorney's fees were \$30,000, the offeree would be obliged to pay only \$10,000 in compensation for those fees.
- d. Allow recovery of some multiple of statutory costs. What multiple? ___ times costs.
- e. Allow recovery of post-offer costs plus expert witness fees or other expenses not ordinarily taxable as costs (what other expenses?: _____).
- f. Allow recovery of a percentage of the amount of the judgment. What percentage?: _____%
- g. Abolish Rule 68 altogether.
- h. Leave Rule 68 as it is.

2. Another proposal, that can be added to any of the first six ideas mentioned above, is to preclude recovery in an amount that exceeds the value of the judgment. If, for instance, plaintiff obtained judgment for \$10,000, the amount of post-offer fees or other expenses recoverable by either party could not exceed \$10,000. Hence a plaintiff could lose the entire amount of the judgment, but not more. Do you favor or oppose this provision?

- a. Favor
- b. Oppose
- c. Unsure or inapplicable (e.g., because I support abolition of Rule 68)

46. The questionnaire initially contained an error in this sentence: The numbers \$80,000 and \$120,000 were transposed, inviting confusion about the provision and hence uncertainty about what Answer c represented. Those who chose this answer were counted only as supporting an offer-of-judgment provision that permits recovery of some portion of post-offer expenses.

Part II

Note: The questions in this part pertain specifically to the case referenced in the cover letter. Before answering the following questions, you may find it helpful to retrieve your files on the referenced case in order to refresh your memory concerning its litigation and the associated expenses. Please understand that our motive in asking these questions is not to pry about details of your case, but rather to provide systematic information—which does not now exist—about factors that may influence the effectiveness of Rule 68.

3. How was this case resolved? (please check only one answer)

- a. It has not been resolved (Please indicate “NA” next to any subsequent questions that you are unable to answer because the case has not been concluded.)
- b. By verdict after a jury trial
- c. By verdict after a bench trial
- d. By summary judgment
- e. By dismissal with prejudice
- f. By voluntary dismissal without prejudice
- g. By a stipulated disposition that amounted to capitulation by plaintiff or defendant
- h. By a compromise settlement or consent judgment entered into before the case reached judgment in the district court
- i. By a settlement entered into after verdict or other final judgment (e.g., pending appeal)
- j Other. Please explain:

4. If this case was not settled, why not? Please check each answer that is applicable to this case. (If the case did settle, skip this question.)

- a. The matters at stake extended beyond the relief sought in this particular case (e.g., one or both parties sought to establish legal precedent, or were concerned that a settlement in this case would encourage or discourage other litigation).
- b. One or both parties were more concerned about matters of principle or were too emotionally invested in the case to accept a compromise resolution.
- c. The stakes in the case were so great that the costs of litigation were relatively insignificant, so that there was little incentive for settlement on the part of at least one party.
- d. The outcome of the case was so highly unpredictable that there really was no way to find a satisfactory compromise.
- e. The parties (and/or counsel) were simply too far apart in their assessment of the likely outcome of the case. Had one or both sides

Amendments to Rule 68

been more reasonable or realistic, settlement might have occurred.

- f. This was a multiparty case in which the multiple interests involved made it very difficult, if not impossible, to fashion a satisfactory settlement.
- g. No serious settlement offers were made. I don't understand why.
- h. Serious settlement negotiations occurred, but failed. I don't understand why they failed.
- i. Other. Please explain:

5. Please check each of the following statements that is applicable to the settlement of this case. (If the case did not settle, skip this question.)

- a. This case settled as soon as the parties had adequate information to evaluate the case. It could not reasonably have settled earlier than it did.
- b. This case could have settled earlier than it did, although not at significant savings in litigation expenses.
- c. This case could have settled earlier than it did, with significant savings in litigation expenses. About what percentage of total litigation expenses could have been saved?: _____%
- d. The settlement in this case provided my client with a less favorable outcome than he (or she or it) would have accepted had he been financially able to accept the risks of going to trial, and hence able to insist on better settlement terms.

6. What remedy or remedies were sought in this case? (please check only one)

- a. Monetary relief only
- b. Nonmonetary relief only
- c. Both monetary and nonmonetary relief, with the monetary relief much more significant than the nonmonetary relief
- d. Both monetary and nonmonetary relief, with the nonmonetary relief much more significant than the monetary relief
- e. Both monetary and nonmonetary relief, with both being of considerable significance (i.e., not c or d)

7. When the outcome of a case is a matter of significant uncertainty, the uncertainty may be due mainly to: (1) uncertainty about damages (with liability fairly clear), (2) uncertainty about liability—or at least about liability for some significant component of alleged damages (with the measure of damages relatively clear), or (3) both of these. Please select one of the following statements to indicate the nature of the uncertainties in this case.

- a. Liability was seriously at issue, but damages were fairly clear
- b. Liability was fairly clear, but damages were uncertain
- c. Both liability and damages were uncertain
- d. There was not much uncertainty about either damages or liability

8. Litigation expenses for your client. *Litigation expenses* refers to attorney's fees, statutory costs, and other actual expenses incurred in representing your client in this case, by *all* counsel who took part in that representation. If your client was not charged on an hourly basis (e.g., because the arrangement was a contingent fee, flat fee, or you are in-house counsel), please estimate what the attorney's fees would have been had you charged on an hourly basis at rates that are standard in your locality for counsel of your level of experience and reputation.

- a. What was the approximate total litigation expense for your client in this case? \$ _____
- b. About what percentage of total litigation expenses was attributable to attorney's fees? _____%
- c. If this case settled, about how much additional litigation expense would have been required to take the case through trial or other final disposition (e.g., if the case likely would have been decided by summary judgment or have been appealed)? \$ _____

9. Please estimate what percentage of the total litigation expenses in this case fell into each of the following categories (The percentages should sum to 100%.)

- a. _____% Expenses incurred in necessary response to actions of an opponent that were probably taken primarily for the purpose of increasing my client's expenses, and/or delaying or complicating the litigation.
- b. _____% Expenses incurred in necessary response to actions of an opponent that were unreasonable or ill-considered, although probably *not* undertaken primarily to increase my client's expenses or to delay or complicate the litigation.
- c. _____% Expenses incurred in necessary response to actions of an opponent that were reasonable in light of the circumstances of the case.
- d. _____% Expenses incurred at the initiative of me or my client, and which did not necessarily require that opponent incur expense in response.
- e. _____% Expenses incurred at the initiative of me or my client, and which probably or clearly required that opponent incur expense in response.

10. What was the nature of the fee arrangement with your client in this case?

- a. Hourly fee (exclusively or primarily)
- b. Contingent fee
- c. In-house counsel or other compensation unrelated to time spent or result achieved
- d. Flat fee
- e. Other. Please explain:

Amendments to Rule 68

11. What type of party was your client in this case?

- a. Plaintiff or claimant only
- b. Defendant (party against whom a claim is asserted)
- c. Both claimant and party defending against a claim (e.g., a counterclaim was at issue)
- d. Other real party in interest (e.g., third party defendant)
- e. A nominal party (not a real party in interest)
- f. Other. Please explain:

12. Approximately what was the final, “bottom line” settlement offer you would have recommended that your client make or accept in this case—the offer most favorable to opponent that you thought an acceptable alternative to trial or other court disposition of the case? Please provide a monetary figure. Answer “NA” if the settlement terms cannot be equated to a monetary amount or if your client would have been unwilling to settle due to an interest in establishing precedent, vindicating principles, or the like. (Place answer in the appropriate space to indicate whether the final offer would have involved paying or accepting a sum in settlement.)

a. Pay \$_____ to settle

b. Accept \$_____ to settle

13. Suppose that Rule 68 were amended to permit offers by plaintiffs as well as defendants, with 50% of reasonable post-offer attorney’s fees payable by a party who fails to accept an offer and does not obtain a better result in the judgment. Please check each of the following statements that is applicable to this case (whether or not it settled).

Such an amended Rule 68 probably would have:

- a. made no difference in this case
- b. made settlement more likely or led to an earlier settlement, and thus probably resulted in significant savings in litigation expenses
- c. delayed settlement, and probably led to greater litigation expenses
- d. made settlement less likely
- e. resulted in a less favorable result for my client
- f. resulted in a more favorable result for my client
- g. caused my client never to have brought or defended the case, or led me to refuse to accept the case

Part III

The questions in this part pertain to your general experience, practice, or opinions concerning civil litigation.

14. Again suppose that Rule 68 were amended as explained in the previous question. Please check each of the following statements with which you agree concerning the likely effects of the rule, in civil cases generally. The amended rule probably would:

- a. result in more cases reaching settlement
- b. result in fewer cases reaching settlement
- c. lead cases to settle earlier than they would in the absence of the rule
- d. delay settlement
- e. lead to case outcomes (*net* outcome from settlement or trial) that are more fair
- f. lead to case outcomes that are unduly generous to plaintiffs
- g. lead to case outcomes that are unduly generous to defendants
- h. lead to case outcomes that are unduly generous to wealthier litigants
- i. lead to case outcomes that are unduly generous to poorer litigants
- j. lead to case outcomes that are less fair, although not necessarily to the advantage or disadvantage of any particular class of litigants
- k. increase the expenses of litigation
- l. decrease the expenses of litigation
- m. inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation
- n. increase the frequency of actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation
- o. inhibit taking reasonable and/or necessary steps in litigation, out of fear that the party may have to compensate opponent for the expense of responding to those actions
- p. encourage taking reasonable and/or necessary steps in litigation, owing to the possibility that those expenses will be compensated by opponent
- q. make no difference

Amendments to Rule 68

15. For the types of cases you litigate, please check each statement that you agree with concerning how a party's financial means affects the fairness of results in these cases.

- a. Financially weaker parties are generally at no disadvantage compared to wealthier parties.
- b. A party is at a disadvantage compared to a wealthier party when the worst possible outcome would be financially ruinous to the poorer party.
- c. A party is at a disadvantage compared to a wealthier party when a settlement offer that is unfair to that party is nonetheless a large increase in wealth for the poorer party.
- d. Financially weaker parties are generally at a disadvantage compared to wealthier parties, regardless of the range of possible outcomes in the case.
- e. Financially weaker parties generally have an advantage, or at least an offset to other disadvantages, because juries are inclined to render generous verdicts against wealthier parties and/or inadequate verdicts against poorer parties.

16. Please check the statement that best describes how you generally arrive at a *final*, bottom line settlement offer that you would recommend your client make or accept. Please check only one answer.

- a. I estimate the average or most likely verdict (or other case outcome), and subtract the litigation expenses likely required of my client for further litigation.
- b. I ignore litigation expenses, and consider only the average or most likely expected judgment.
- c. I try to determine how the opponent assesses the case, and thus estimate the offer most advantageous to my client that the opponent might be willing to make or accept.
- d. I simply explain to the client what I see as the likely or possible outcomes, and let the client decide whether to make or accept an offer. I usually do not make any specific recommendation.
- e. Other. Please explain:

17. Approximately how many civil cases have you handled or worked on in the past ten years in which you played a major role in advising on decisions to make, accept, or reject offers of settlement?

- a. 3 or fewer
- b. between 4 and 10
- c. between 11 and 25
- d. more than 25

18. Approximately what percentage of the civil cases that you handle or work on are cases in federal district court?

_____ %

19. If your reflections in the course of answering this questionnaire have led you to change your opinion regarding possible amendments to (or abolition of) Rule 68, please return to questions 1 and 2 and answer them again, this time placing the numeral "2" next to the answer you now prefer.

20. Please provide on the back of this page any additional comments or suggestions you may have concerning Rule 68.

Please check here if you wish to receive a copy of the report of this study. If your address is not shown correctly on the cover letter, please indicate the correct address here:

Thank you for your cooperation and assistance. Please return the questionnaire in the enclosed envelope (or addressed to: Research Division, The Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003, Attn.: Rule 68). If you have questions concerning the survey, please contact John Shapard at (202) 273-4070, ext. 357.

**Appendix B: Questionnaire Sent to Counsel
in Civil Rights Cases**

Questionnaire Concerning Proposed Amendments to Rule 68, FRCP

Explanation of Rule 68 and Possible Amendments

No proposed amendment has yet been published for comment or otherwise formally entertained by the Advisory Committee on Civil Rules. The committee wishes to consider a number of possible alternatives, including abolition of the current rule.

As it now stands, the rule allows a party defending against a claim to serve an offer of judgment. If the offer is not accepted within 10 days and the judgment finally obtained is not more favorable to the offeree than was the offer, the offeree must pay the costs incurred after making the offer. In cases where a prevailing plaintiff is ordinarily entitled to recover attorney's fees as part of its costs, Rule 68 can prevent plaintiff from recovering attorney's fees incurred after the offer was made.

This questionnaire is concerned particularly with the effects of Rule 68 or possible amendments to the rule as applied to cases in which a prevailing plaintiff would ordinarily recover attorney's fees as part of the costs in the action.

Part I

1. Several ideas have been proposed for amending Rule 68 to alter its effects in cases where a prevailing plaintiff ordinarily recovers attorney's fees. Another idea, advocated in the belief that the current rule is unfair or pointless, is simply to abolish Rule 68. Which of the following options for amending Rule 68 do you believe would generally lead to the fairest outcomes for all parties in civil cases where a prevailing plaintiff ordinarily recovers its reasonable attorney's fees? (Please check one)

- a. Allow a defendant-offeror not only to avoid payment of plaintiff's fees, but also to recover from plaintiff defendant's reasonable post-offer fees.
- b. Allow defendant-offeror to avoid payment of plaintiff's post-offer of attorney's fees, but only to the extent that those fees exceed the difference between the offer and the judgment. The rationale of this idea is that rejection of the offer has benefited the defendant to the extent that the judgment is superior to the offer. For instance, a judgment for \$80,000 is \$20,000 better than defendant's offer to pay \$100,000. Defendant would be liable for plaintiff's reasonable post-offer attorney's fees up to \$20,000, but no more.
- c. Allow offers to be made by either plaintiff or defendant, and provide that a party whose offer is not accepted and not improved on at trial may recover some multiple of statutory costs (other than attorney's fees). What multiple? ___ times costs.
- d. Allow offers to be made by either plaintiff or defendant, and provide that a party whose offer is not accepted and not improved on at trial may recover statutory costs (other than attorney's fees) plus expert witness fees or other expenses not ordinarily taxable as costs. What other expenses?: _____).
- g. Abolish Rule 68 altogether.
- h. Leave Rule 68 as it is.
- i. Other. Please explain:

Part II

Note: The questions in this part pertain specifically to the case referenced in the cover letter. Before answering the following questions, you may find it helpful to retrieve your files on the referenced case in order to refresh your memory concerning its litigation and the associated expenses. Please understand that our motive in asking these questions is not to pry about details of your case, but rather to provide systematic information—which does not now exist—about factors that may influence the effectiveness of Rule 68.

2. How was this case resolved? (please check only one answer)

- a. It has not been resolved (Please indicate “NA” next to any subsequent questions that you are unable to answer because the case has not been concluded.)
- b. By verdict after a jury trial
- c. By verdict after a bench trial
- d. By summary judgment
- e. By dismissal with prejudice
- f. By voluntary dismissal without prejudice
- g. By a stipulated disposition that amounted to capitulation by plaintiff or defendant
- h. By a compromise settlement or consent judgment entered into before the case reached judgment in the district court
- i. By a settlement entered into after verdict or other final judgment (e.g., pending appeal)
- j. Other. Please explain:

3. If this case was not settled, why not? Please check each answer that is applicable to this case. (If the case did settle, skip this question.)

- a. The matters at stake extended beyond the relief sought in this particular case (e.g., one or both parties sought to establish legal precedent, or were concerned that a settlement in this case would encourage or discourage other litigation).
- b. One or both parties were more concerned about matters of principle or were too emotionally invested in the case to accept a compromise resolution.
- c. The stakes in the case were so great that the costs of litigation were relatively insignificant, so that there was little incentive for settlement on the part of at least one party.
- d. The outcome of the case was so highly unpredictable that there really was no way to find a satisfactory compromise.
- e. The parties (and/or counsel) were simply too far apart in their assessment of the likely outcome of the case. Had one or both sides

been more reasonable or realistic, settlement might have occurred.

- f. This was a multiparty case in which the multiple interests involved made it very difficult, if not impossible, to fashion a satisfactory settlement.
- g. No serious settlement offers were made. I don't understand why.
- h. Serious settlement negotiations occurred, but failed. I don't understand why they failed.
- i. Other. Please explain:

4. Please check each of the following statements that is applicable to the settlement of this case. (If the case did not settle, skip this question.)

- a. This case settled as soon as the parties had adequate information to evaluate the case. It could not reasonably have settled earlier than it did.
- b. This case could have settled earlier than it did, although not at significant savings in litigation expenses.
- c. This case could have settled earlier than it did, with significant savings in litigation expenses. About what percentage of total litigation expenses could have been saved?: _____%
- d. The settlement in this case provided my client with a less favorable outcome than he (or she or it) would have accepted had he been financially able to accept the risks of going to trial, and hence able to insist on better settlement terms.

5. What remedy or remedies were sought in this case? (please check only one)

- a. Monetary relief only
- b. Nonmonetary relief only
- c. Both monetary and nonmonetary relief, with the monetary relief much more significant than the nonmonetary relief
- d. Both monetary and nonmonetary relief, with the nonmonetary relief much more significant than the monetary relief
- e. Both monetary and nonmonetary relief, with both being of considerable significance (i.e., not c or d)

6. When the outcome of a case is a matter of significant uncertainty, the uncertainty may be due mainly to: (1) uncertainty about the extent of damages or other relief (with liability fairly clear), (2) uncertainty about liability—or at least about liability for some significant component of alleged damages (with the measure of relief relatively clear), or (3) both of these. Please select one of the following statements to indicate the nature of the uncertainties in this case.

- a. Liability was seriously at issue, but the measure of damages or other relief was fairly clear
- b. Liability was fairly clear, but relief was uncertain
- c. Both liability and relief were uncertain
- d. there was not much uncertainty about either relief or liability

7. Litigation expenses for your client. *Litigation expenses* refers to attorney fees, statutory costs, and other actual expenses incurred in representing your client in this case, by all counsel who took part in that representation. If your client was not charged on an hourly basis (e.g., because the arrangement was a contingent fee, flat fee, or you are in-house counsel), please estimate what the attorney's fees would have been had you charged on an hourly basis at rates that are standard in your locality for counsel of your level of experience and reputation.

- a. What was the approximate total litigation expense for your client in this case? \$ _____
- b. About what percentage of total litigation expenses was attributable to attorney's fees? _____%
- c. If this case settled, about how much additional litigation expense would have been required to take the case through trial or other final disposition (e.g., if the case likely would have been decided by summary judgment or have been appealed)? \$ _____

8. Please estimate what percentage of the total litigation expenses in this case fell into each of the following categories (The percentages should sum to 100%.)

- a. _____% Expenses incurred in necessary response to actions of an opponent that were probably taken primarily for the purpose of increasing my client's expenses, and/or delaying or complicating the litigation.
- b. _____% Expenses incurred in necessary response to actions of an opponent that were unreasonable or ill-considered, although probably *not* undertaken primarily to increase my client's expenses or to delay or complicate the litigation.
- c. _____% Expenses incurred in necessary response to actions of an opponent that were reasonable in light of the circumstances of the case.
- d. _____% Expenses incurred at the initiative of me or my client, and which did not necessarily require that opponent incur expense in response.
- e. _____% Expenses incurred at the initiative of me or my client, and which probably or clearly required that opponent incur expense in response.

9. What was the nature of the fee arrangement with your client in this case?

- a. Hourly fee (exclusively or primarily)
- b. Contingent fee
- c. In-house counsel or other compensation unrelated to time spent or result achieved
- d. Flat fee
- e. Other. Please explain:

10. What type of party was your client in this case?

- a. Plaintiff or claimant only
- b. Defendant (party against whom a claim is asserted)
- c. Both claimant and party defending against a claim (e.g., a counterclaim was at issue)
- d. Other real party in interest (e.g., third party defendant)
- e. A nominal party (not a real party in interest)
- f. Other. Please explain:

11. Approximately what was the final, “bottom line” settlement offer you would have recommended that your client make or accept in this case—the offer most favorable to opponent that you thought an acceptable alternative to trial or other court disposition of the case. Please provide a monetary figure. Answer “NA” if the settlement terms cannot be equated to a monetary amount or if your client would have been unwilling to settle due to an interest in establishing precedent, vindicating principles, or the like. (Place answer in the appropriate space to indicate whether the final offer would have involved paying or accepting a sum in settlement.)

- a. Pay \$_____ to settle b. Accept \$_____ to settle

12. Was this case one for which a statute provides for recovery of reasonable attorney’s fees by a prevailing party?

- a. No.
- b. Yes, but only a prevailing plaintiff is normally allowed to recover attorney’s fees.
- c. Yes, the prevailing party—plaintiff or defendant—is normally allowed to recover attorney’s fees.

13. Did the existing Rule 68 play any role in this case? Please check each of the following statements that apply.

- a. A Rule 68 offer was made and accepted in this case.
- b. A Rule 68 offer was made but not accepted.
- c. No Rule 68 offer was made in this case, but the fact that defendant could make such an offer did have an influence on settlement negotiations.
- d. Rule 68 had no influence in this case.

14. If a Rule 68 offer was made but not accepted in this case, please indicate which of the following occurred as a result of that offer.

- a. The judgment finally obtained by plaintiff was superior to the terms of the offer, so the cost-payment provision of Rule 68 was not invoked.
- b. The plaintiff obtained a judgment that was not more favorable than the offer, and plaintiff therefore was assessed post-offer costs and did not recover post-offer attorney’s fees.

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- c. Judgment was entered for the defendant, so the Rule 68 cost-payment provision was not invoked (by virtue of the holding in *Delta Airlines v. August*, 450 U.S. 346).
- d. The case settled other than by acceptance of the Rule 68 offer.

Part III

The questions in this part pertain to your general experience, practice, or opinions concerning civil litigation.

15. Considering your experience concerning litigation of cases like that referred to in the cover letter, how do you believe the existing Rule 68 influences such cases? Please check each statement with which you agree.

Rule 68 . . .

- a. results in more cases reaching settlement
- b. results in fewer cases reaching settlement
- c. leads cases to settle earlier than they would in the absence of the rule
- d. delays settlement
- e. leads to case outcomes (net outcome from settlement or trial) that are more fair
- f. leads to case outcomes that are unduly generous to plaintiffs
- g. leads to case outcomes that are unduly generous to defendants
- h. leads to case outcomes that are unduly generous to wealthier litigants
- i. leads to case outcomes that are unduly generous to poorer litigants
- j. leads to case outcomes that are less fair, although not necessarily to the advantage or disadvantage of any particular class of litigants
- k. increases the expenses of litigation
- l. decreases the expenses of litigation
- m. inhibits actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation
- n. increases the frequency of actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation
- o. inhibits taking reasonable and/or necessary steps in litigation, out of fear that the party may have to compensate opponent for the expense of responding to those actions
- p. encourages taking reasonable and/or necessary steps in litigation, owing to the possibility that those expenses will be compensated by opponent
- q. makes no difference

16. For the types of cases you litigate, please check each statement that you agree with concerning how a party's financial means affects the fairness of results in these cases.

- a. Financially weaker parties are generally at no disadvantage compared to wealthier parties.
- b. A party is at a disadvantage compared to a wealthier party when the worst possible outcome would be financially ruinous to the poorer party.
- c. A party is at a disadvantage compared to a wealthier party when a settlement offer that is unfair to that party is nonetheless a large increase in wealth for the poorer party.
- d. Financially weaker parties are generally at a disadvantage compared to wealthier parties, regardless of the range of possible outcomes in the case.
- e. Financially weaker parties generally have an advantage, or at least an offset to other disadvantages, because juries are inclined to render generous verdicts against wealthier parties and/or inadequate verdicts against poorer parties.

17. Please check the statement that best describes how you generally arrive at a final, bottom line settlement offer that you would recommend your client make or accept. Please check only one answer.

- a. I estimate the average or most likely verdict (or other case outcome), and subtract the litigation expenses likely required of my client for further litigation.
- b. I ignore litigation expenses, and consider only the average or most likely expected judgment.
- c. I try to determine how the opponent assesses the case, and thus estimate the offer most advantageous to my client that the opponent might be willing to make or accept.
- d. I simply explain to the client what I see as the likely or possible outcomes, and let the client decide whether to make or accept an offer. I usually do not make any specific recommendation.
- e. Other. Please explain:

18. Approximately how many civil cases have you handled or worked on in the past ten years in which you played a major role in advising on decisions to make, accept, or reject offers of settlement?

- a. 3 or fewer
- b. between 4 and 10
- c. between 11 and 25
- d. more than 25

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19. Approximately what percentage of the civil cases that you handle or work on are cases in federal district court?

_____ %

20. If your reflections in the course of answering this questionnaire have led you to change your opinion regarding possible amendments to (or abolition of) Rule 68, please return to question 1 and answer it again, this time placing the numeral "2" next to the answer you now prefer.

21. Please provide on the back of this page any additional comments or suggestions you may have concerning Rule 68.

- Please check here if you wish to receive a copy of the report of this study. If your address is not shown correctly on the cover letter, please indicate the correct address here:

Thank you for your cooperation and assistance. Please return the questionnaire in the enclosed envelope (or addressed to: Research Division, The Federal Judicial Center, One Columbus Circle, N.E., Washington, DC 20002-8003, Attn.: Rule 68). If you have questions concerning the survey, please contact John Shapard at (202) 273-4070, ext. 357.

Appendix C: Tabulations of Questionnaire Responses

The tables that follow generally provide more detailed tabulations of questionnaire responses than those set out in the body of the report. In some instances, however, the body mentions results that are not included in this appendix. Readers interested in more detailed analyses may obtain the raw data from the author.

In all tables, the number in parentheses in the column headings is the number of counsel in the particular category responding to the relevant question or questions. The tables include responses from counsel in civil rights cases (Civil Rights Questionnaire) and from counsel in contract, tort, and other cases (General Questionnaire).

Table 9. Options for Amending Rule 68—Responses to General Questionnaire, Question 1

Several ideas have been proposed for amending Rule 68 to increase the incentive to make and accept early and reasonable settlement offers. Another idea, advocated in the belief that the current rule is unfair or pointless, is simply to abolish Rule 68. Which of the following options for amending Rule 68 do you believe would generally lead to the fairest outcomes for all parties in civil litigation?

Response	All respondents (n = 748)	Plaintiffs' counsel (n = 295)	Defendants' counsel (n = 289)	Counsel in contract cases (n = 263)	Counsel in tort cases (n = 249)	Counsel in other cases (n = 246)
a. Allow recovery of the reasonable attorney's fees incurred by the offeror after making the offer.	38%	28%	46%	40%	31%	36%
b. Same as a, above, but allow recovery of some percentage of reasonable post-offer attorney's fees (which could be more or less than 100%). What percentage of reasonable fees? ¹	7%	7%	7%	6%	8%	7%
c. Allow recovery of reasonable attorney's fees, but only to the extent that they exceed the difference between the offer and the judgment. The rationale of this idea is that rejection of the offer has benefited the offeror to the extent that the judgment is superior to the offer. For instance, a judgment for \$100,000 is \$20,000 better than plaintiff's offer to accept \$80,000 (or defendant's offer to pay \$120,000). In either case, if offeror's reasonable post-offer attorney's fees were \$30,000, the offeree would be obliged to pay only \$10,000 in compensation for those fees.	18%	19%	18%	19%	15%	22%
d. Allow recovery of some multiple of statutory costs. What multiple times costs? ²	1%	1%	0%	2%	0%	0%
e. Allow recovery of post-offer costs plus expert witness fees or other expenses not ordinarily taxable as costs (what other expenses?). ³	6%	7%	7%	6%	13%	7%
f. Allow recovery of some percentage of the amount of the judgment. What percentage? ⁴	2%	2%	1%	3%	1%	2%
g. Abolish Rule 68 altogether.	18%	25%	13%	16%	20%	20%
h. Leave Rule 68 as it is.	9%	10%	10%	8%	11%	7%

Note: In Question 19 we asked respondents to revise their answers to Question 1. This table presents the data for the revised responses to Question 1.

¹Most respondents indicated a percentage of 50%; the range was 25% to 150%.

²The suggested multiple ranged from 1 to 5.

³Suggestions included prejudgment interest, all discovery costs, expert witness fees, and/or all out-of-pocket expenses.

⁴Suggestions ranged from 10% to 40%; the median was 25%.

Table 10. Options for Amending Rule 68—Responses to Civil Rights Questionnaire, Question 1

Several ideas have been proposed for amending Rule 68 to alter its effects in cases where a prevailing plaintiff ordinarily recovers attorney’s fees. Another idea, advocated in the belief that the current rule is unfair or pointless, is simply to abolish Rule 68. Which of the following options for amending Rule 68 do you believe would generally lead to the fairest outcomes for all parties in civil cases where a prevailing plaintiff ordinarily recovers its reasonable attorney’s fees?

Response	All respondents (n = 212)	Plaintiffs’ counsel (n = 88)	Defendants’ counsel (n = 116)
a. Allow a defendant-offeror not only to avoid payment of plaintiff’s fees, but also to recover from plaintiff defendant’s reasonable post-offer fees.	38%	6%	63%
b. Allow defendant-offeror to avoid payment of plaintiff’s post-offer attorney’s fees, but only to the extent that those fees exceed the difference between the offer and the judgment. The rationale of this idea is that rejection of the offer has benefited the defendant to the extent that the judgment is superior to the offer. For instance, a judgment for \$80,000 is \$20,000 better than defendant’s offer to pay \$100,000. Defendant would be liable for plaintiff’s reasonable post-offer attorney’s fees up to \$20,000, but no more.	11%	16%	8%
c. Allow offers to be made by either plaintiff or defendant, and provide that a party whose offer is not accepted and not improved on at trial may recover some multiple of statutory costs (other than attorney’s fees). What multiple times costs. ¹	5%	8%	3%
d. Allow offers to be made by either plaintiff or defendant, and provide that a party whose offer is not accepted and not improved on at trial may recover statutory costs (other than attorney’s fees) plus expert witness fees or other expenses not ordinarily taxed as costs.	11%	15%	9%
g. Abolish Rule 68 altogether.	15%	29%	4%
h. Leave Rule 68 as it is.	18%	24%	14%
i. Other. ²	1%	3%	0%

¹Suggestions ranged from 3 to 5 times costs.

²Most respondents suggested some variation on a–d; a few noted difficulties with the current rule concerning offers that include statutory fees and damages in a lump sum, making it problematic to determine how a final judgment compares with an offer.

Table 11. Option of Precluding Recovery in Amount That Exceeds Judgment—Responses to General Questionnaire, Question 2

Another proposal is to preclude recovery in an amount that exceeds the value of the judgment. If, for instance, plaintiff obtained judgment for \$10,000, the amount of post-offer fees or other expenses recoverable by either party could not exceed \$10,000. Hence a plaintiff could lose the entire amount of the judgment but not more. Do you favor or oppose this provision?

Response	All respondents (n = 743)	Plaintiffs' counsel (n = 291)	Defendants' counsel (n = 289)
a. Favor	33%	34%	33%
b. Oppose	49%	43%	54%
c. Unsure or inapplicable	18%	23%	13%

Note: In Question 19 we asked respondents to revise their answers to Question 2. This table presents the data for the revised responses to Question 2.

Table 12. Resolution of Sample Case—Responses to General Questionnaire, Question 3, and Civil Rights Questionnaire, Question 2

How was this case [the case referenced in the cover letter] resolved?

Response	Counsel in all cases (<i>n</i> = 958)	Counsel in tried cases (<i>n</i> = 534)	Counsel in nontried cases (<i>n</i> = 424)
a. It has not been resolved.	6%	10%	1%
b. By verdict after a jury trial.	24%	43%	0%
c. By verdict after a bench trial.	14%	25%	0%
d. By summary judgment.	2%	1%	2%
e. By dismissal with prejudice.	3%	1%	6%
f. By voluntary dismissal without prejudice.	2%	0%	4%
g. By a stipulated disposition that amounted to capitulation by plaintiff or defendant.	4%	1%	8%
h. By a compromise settlement or consent judgment entered into before the case reached judgment in the district court.	33%	4%	70%
i. By a settlement entered into after verdict or other final judgment (e.g., pending appeal).	4%	6%	1%
j. Other. ¹	8%	10%	7%

Note: This question was included on both questionnaires to check the reliability of the tried/not-tried indicator used to select the sample, and to discern what proportion of non-tried cases were in fact settlements. Some tried cases were reported as resolved by settlement, dismissal, or summary judgment because the respondent answered the question with respect to his or her client—who settled—even though the case later went to trial between non-settling parties.

¹Most of the “other” responses indicate a pending appeal or a case still active in the courts after appeal and remand.

Table 13. Reasons for Failure to Settle Sample Case—Responses to General Questionnaire, Question 4, and Civil Rights Questionnaire, Question 3

If this case was not settled, why not?

Response	All respondents (n = 523)	Plaintiffs' counsel (n = 211)	Defendants' counsel (n = 216)	Counsel in contract cases (n = 143)	Counsel in tort cases (n = 136)	Counsel in civil rights cases (n = 114)	Counsel in other cases (n = 130)
a. The matters at stake extended beyond the relief sought in this particular case (e.g., one or both parties sought to establish legal precedent, or were concerned that a settlement in this case would encourage or discourage other litigation).	13%	9%	18%	8%	10%	19%	15%
b. One or both parties were more concerned about matters of principle or were too emotionally invested in the case to accept a compromise resolution.	26%	21%	29%	23%	12%	42%	30%
c. The stakes in the case were so great that the costs of litigation were relatively insignificant, so that there was little incentive for settlement on the part of at least one party.	11%	9%	10%	13%	13%	4%	13%
d. The outcome of the case was so highly unpredictable that there really was no way to find a satisfactory compromise.	11%	15%	7%	10%	18%	8%	8%
e. The parties (and/or counsel) were simply too far apart in their assessment of the likely outcome of the case. Had one or both sides been more reasonable or realistic, settlement might have occurred.	50%	45%	50%	53%	60%	39%	45%
f. This was a multi-party case in which the multiple interests involved made it very difficult, if not impossible, to fashion a satisfactory settlement.	5%	2%	4%	5%	4%	3%	6%
g. No serious settlement offers were made. I don't understand why.	14%	24%	5%	17%	14%	15%	8%
h. Serious settlement negotiations occurred, but failed. I don't understand why they failed.	3%	2%	2%	1%	2%	4%	5%
i. Other.	15%	14%	18%	14%	13%	11%	21%

Table 14A. Promptness of Settlement of Sample Case—Responses to General Questionnaire, Question 5, and Civil Rights Questionnaire, Question 4

Please check each of the following statements that is applicable to the settlement of this case [the case referenced in the cover letter].

Response	All respondents (n = 433)	Plaintiffs' counsel (n = 190)	Defendants' counsel (n = 179)	Counsel in contract cases (n = 115)	Counsel in tort cases (n = 103)	Counsel in civil rights cases (n = 97)	Counsel in other cases (n = 118)
a. This case settled as soon as the parties had adequate information to evaluate the case. It could not reasonably have settled earlier than it did.	40%	39%	42%	38%	42%	44%	39%
b. This case could have settled earlier than it did, although not at significant savings in litigation expenses.	32%	37%	30%	34%	39%	29%	25%
c. This case could have settled earlier than it did, with significant savings in litigation expenses. About what percentage of total litigation expenses could have been saved? ¹	28%	25%	27%	28%	21%	27%	36%

¹Estimates of the percentage of expenses that could have been saved ranged from 15% to 90%; the mean and median were 50%.

Table 14B. Adequacy of Settlement in Sample Case—Responses to General Questionnaire, Question 5, and Civil Rights Questionnaire, Question 4

Please check each of the following statements that is applicable to the settlement of this case [the case referenced in the cover letter].

Response	Contract, tort, and other cases			Civil rights cases	
	Contingent-fee plaintiffs' counsel (<i>n</i> = 73)	Hourly-fee plaintiffs' counsel (<i>n</i> = 41)	Hourly-fee defendants' counsel (<i>n</i> = 119)	Plaintiffs' counsel (<i>n</i> = 44)	Defendants' counsel (<i>n</i> = 50)
d. The settlement in this case provided my client with a less favorable outcome than he (or she or it) would have accepted had he been financially able to accept the risks of going to trial, and hence able to insist on better settlement terms.	4%	10%	7%	27%	0%

Table 15. Relief Sought in Sample Case—Responses to General Questionnaire, Question 6, and Civil Rights Questionnaire, Question 5

What remedy or remedies were sought in this case?

Response	Counsel in contract cases (<i>n</i> = 259)	Counsel in tort cases (<i>n</i> = 236)	Counsel in civil rights cases (<i>n</i> = 214)	Counsel in other cases (<i>n</i> = 248)
a. Monetary relief only.	79%	95%	50%	47%
b. Non-monetary relief only.	2%	0%	0%	7%
c. Both monetary and non-monetary relief, with the monetary relief much more significant than the non-monetary relief.	10%	1%	25%	11%
d. Both monetary and non-monetary relief, with the non-monetary relief much more significant than the monetary relief.	3%	1%	10%	13%
e. Both monetary and non-monetary relief, with both being of considerable significance (i.e., not c or d).	7%	2%	15%	23%

Table 16. Nature of Uncertainty in Sample Case—Responses to General Questionnaire, Question 7, and Civil Rights Questionnaire, Question 6

When the outcome of a case is a matter of significant uncertainty, the uncertainty may be due mainly to: (1) uncertainty about damages (with liability fairly clear), (2) uncertainty about liability—or at least about liability for some significant component of alleged damages (with the measure of damages relatively clear), or (3) both of these. Please select one of the following statements to indicate the nature of the uncertainties in this case.

Response	All respondents (<i>n</i> = 950)	Plaintiffs' counsel (<i>n</i> = 388)	Defendants' counsel (<i>n</i> = 399)	Counsel in tried cases (<i>n</i> = 527)	Counsel in settled cases (<i>n</i> = 423)	Counsel in contract cases (<i>n</i> = 256)	Counsel in tort cases (<i>n</i> = 238)	Counsel in civil rights cases (<i>n</i> = 212)	Counsel in other cases (<i>n</i> = 244)
a. Liability was seriously at issue, but damages were fairly clear.	31%	35%	28%	37%	23%	29%	31%	29%	33%
b. Liability was fairly clear, but damages were uncertain.	13%	17%	10%	10%	17%	11%	15%	12%	16%
c. Both liability and damages were uncertain.	40%	31%	50%	42%	39%	39%	44%	49%	32%
d. There was not much uncertainty about either damages or liability.	15%	18%	13%	11%	21%	21%	11%	10%	19%

Table 17. Litigation Expenses and Amounts at Stake in Sample Case—Responses to General Questionnaire, Questions 8 and 12, and Civil Rights Questionnaire, Questions 7 and 11

What were the litigation expenses for your client? Approximately what was the final “bottom line” settlement offer you would have recommended that your client make or accept in this case?

Type of case		Party represented	Median litigation expenses	20% counsel indicated expenses less than	20% counsel indicated expenses more than	Median percentage attributable to attorney’s fees	Median additional expenses to try case	Median ratio of additional to actual expenses	Median bottom-line settlement offer
Contract	Tried	Plaintiff	\$40,000	\$10,000	\$100,000	85%			\$100,000
		Defendant	\$30,000	\$15,000	\$230,000	90%			\$30,000
	Settled	Plaintiff	\$10,000	\$2,500	\$20,000	90%	\$10,000	88%	\$35,000
		Defendant	\$10,000	\$1,500	\$25,000	90%	\$10,000	133%	\$25,000
Tort	Tried	Plaintiff	\$40,000	\$15,000	\$90,000	75%			\$150,000
		Defendant	\$30,000	\$10,000	\$80,000	80%			\$30,000
	Settled	Plaintiff	\$16,000	\$5,000	\$95,000	80%	\$10,000	40%	\$65,000
		Defendant	\$10,000	\$5,000	\$35,000	85%	\$10,000	71%	\$50,000
Civil rights	Tried	Plaintiff	\$39,000	\$10,000	\$90,000	85%			\$52,500
		Defendant	\$26,000	\$10,000	\$50,000	90%			\$15,000
	Settled	Plaintiff	\$10,000	\$3,500	\$20,000	85%	\$10,000	75%	\$32,000
		Defendant	\$12,500	\$4,000	\$35,000	90%	\$15,000	125%	\$35,000
Other	Tried	Plaintiff	\$30,000	\$13,000	\$180,000	80%			\$60,000
		Defendant	\$75,000	\$20,000	\$250,000	85%			\$75,000
	Settled	Plaintiff	\$8,300	\$2,000	\$20,000	81%	\$10,000	100%	\$25,000
		Defendant	\$12,000	\$5,000	\$35,000	90%	\$20,000	200%	\$25,000

Table 18. Breakdown of Litigation Expenses in Sample Case—Responses to General Questionnaire, Question 9, and Civil Rights Questionnaire, Question 8

Please estimate what percentage of the total litigation expenses in this case fell into each of the following categories. (The percentages should sum to 100%).

Response ¹	All respondents		Plaintiffs' counsel		Defendants' counsel		Counsel in tried cases		Counsel in settled cases		Counsel in contract cases		Counsel in tort cases		Counsel in civil rights cases		Counsel in other cases	
	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0	Avg. %	% > 0
a. Responsive: Abusive	10	38%	11	43%	7	28%	10	41%	9	34%	9	39%	5	23%	9	40%	15	49%
b. Responsive: Unreasonable	11	48%	7	45%	11	45%	11	51%	11	43%	10	49%	7	35%	13	53%	13	54%
c. Responsive: Reasonable	39		35		45		39		39		39		40		42		34	
d. Incurred at own initiative, no consequence to opponent	17		20		16		18		17		17		24		14		15	
e. Incurred at own initiative, consequences to opponent	24		26		21		24		23		24		24		22		24	
Sum of a and b	20	58%	19	58%	19	52%	20	60%	20	55%	20	58%	12	42%	22	63%	28	67%

Note: Each pair of columns shows the average percentage of expenses attributed to the category and the percentage of respondents who attributed some portion of expenses to that category.

¹The actual descriptions of the categories of expenses were as follows:

- a. Expenses incurred in necessary response to actions of an opponent that were probably taken primarily for the purpose of increasing my client's expenses, and/or delaying or complicating the litigation.
- b. Expenses incurred in necessary response to actions of an opponent that were unreasonable or ill-considered, although probably not undertaken primarily to increase my client's expenses or to delay or complicate the litigation.
- c. Expenses incurred in necessary response to actions of an opponent that were reasonable in light of the circumstances of the case.
- d. Expenses incurred at the initiative of me or my client, and which did not necessarily require that opponent incur expense in response.
- e. Expenses incurred at the initiative of me or my client, and which probably or clearly required that opponent incur expense in response.

Table 19. Likely Effects on Sample Case of a Two-Way Offer-of-Judgment Rule Providing for Recovery of 50% of Offeror’s Attorney’s Fees—Responses to General Questionnaire, Question 13

Suppose that Rule 68 were amended to permit offers by plaintiffs as well as defendants, with 50% of reasonable post-offer attorney’s fees payable by a party who fails to accept an offer and does not obtain a better result in the judgment. Such an amended Rule 68 probably would have:

Response	All respondents (<i>n</i> = 737)	Plaintiffs’ counsel (<i>n</i> = 296)	Defendants’ counsel (<i>n</i> = 282)	Counsel in tried cases (<i>n</i> = 422)	Plaintiffs’ counsel in tried cases (<i>n</i> = 166)	Defendants’ counsel in tried cases (<i>n</i> = 160)	Counsel in settled cases (<i>n</i> = 315)	Plaintiffs’ counsel in settled cases (<i>n</i> = 130)	Defendants’ counsel in settled cases (<i>n</i> = 122)
a. Made no difference in this case.	61%	55%	65%	60%	54%	65%	61%	57%	66%
b. Made settlement more likely or led to an earlier settlement, and thus probably resulted in significant savings in litigation expenses.	27%	32%	23%	27%	34%	22%	26%	28%	24%
c. Delayed settlement, and probably led to greater litigation expenses.	2%	1%	3%	1%	0%	2%	4%	3%	5%
d. Made settlement less likely.	3%	2%	3%	2%	1%	2%	3%	3%	4%
e. Resulted in a less favorable result for my client.	6%	6%	7%	8%	7%	8%	4%	4%	6%
f. Resulted in a more favorable result for my client.	11%	12%	9%	12%	14%	9%	11%	9%	9%
g. Caused my client never to have brought or defended the case, or led me to refuse to accept the case.	2%	4%	1%	3%	4%	1%	2%	3%	1%

Table 20. Perceived or Anticipated Effects of a Two-Way Offer-of-Judgment Rule—Responses to General Questionnaire, Question 14, and Civil Rights Questionnaire, Question 15

Again suppose that Rule 68 were amended as explained in the previous question. Please check each of the following statements with which you agree concerning the likely effects of the rule, in civil cases generally. The amended rule probably would:¹

Response	Civil rights cases		All other cases	
	Plaintiffs' counsel	Defendants' counsel	Plaintiffs' counsel	Defendants' counsel
a. Result in more cases reaching settlement.	31%	47%	73%	73%
b. Result in fewer cases reaching settlement.	1%	1%	3%	3%
c. Lead cases to settle earlier than they would in the absence of the rule.	21%	50%	61%	62%
d. Delay settlement.	5%	1%	3%	2%
e. Lead to case outcomes (net outcome from settlement or trial) that are more fair.	9%	24%	20%	23%
f. Lead to case outcomes that are unduly generous to plaintiffs.	0%	4%	1%	6%
g. Lead to case outcomes that are unduly generous to defendants.	20%	2%	4%	2%
h. Lead to case outcomes that are unduly generous to wealthier litigants.	12%	2%	17%	7%
i. Lead to case outcomes that are unduly generous to poorer litigants.	0%	2%	2%	4%
j. Lead to case outcomes that are less fair, although not necessarily to the advantage or disadvantage of any particular class of litigants.	8%	2%	12%	12%
k. Increase the expenses of litigation.	9%	4%	10%	11%
l. Decrease the expenses of litigation.	15%	40%	42%	42%
m. Inhibit actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation.	13%	23%	32%	34%
n. Increase the frequency of actions taken for the primary purpose of imposing expenses on an opposing party, or delaying or complicating litigation.	13%	4%	7%	8%
o. Inhibit taking reasonable and/or necessary steps in litigation, out of fear that the party may have to compensate opponent for the expense of responding to those actions.	13%	5%	16%	16%
p. Encourage taking reasonable and/or necessary steps in litigation, owing to the possibility that those expenses will be compensated by opponent.	12%	15%	11%	11%
q. Make no difference.	36%	26%	6%	7%

Note: The percentages total more than 100 because multiple responses were allowed.

¹Counsel in civil rights cases were asked a question different from that asked of counsel in the other cases, but both were provided with the same response choices.

Table 21. Financial Means' Effect on Fairness of Results—Responses to General Questionnaire, Question 15, and Civil Rights Questionnaire, Question 16

For the types of cases you litigate, please check each statement that you agree with concerning how a party's financial means affects the fairness of results in these cases.

Response	All respondents (n = 913)	Counsel in contract cases (n = 252)	Counsel in tort cases (n = 230)	Counsel in civil rights cases (n = 194)	Counsel in other cases (n = 237)	Plaintiffs' counsel (n = 371)	Defendants' counsel (n = 376)
a. Financially weaker parties are generally at no disadvantage compared to wealthier parties.	17%	14%	23%	23%	11%	11%	25%
b. A party is at a disadvantage compared to a wealthier party when the worst possible outcome would be financially ruinous to the poorer party.	58%	64%	57%	46%	64%	66%	50%
c. A party is at a disadvantage compared to a wealthier party when a settlement offer that is unfair to that party is nonetheless a large increase in wealth for the poorer party.	33%	34%	33%	29%	35%	42%	27%
d. Financially weaker parties are generally at a disadvantage compared to wealthier parties, regardless of the range of possible outcomes in the case.	63%	66%	59%	57%	70%	72%	53%
e. Financially weaker parties generally have an advantage, or at least an offset to other disadvantages, because juries are inclined to render generous verdicts against wealthier parties and/or inadequate verdicts against poorer parties.	19%	18%	21%	25%	14%	8%	30%

Note: The percentages total more than 100 because multiple responses were allowed.