

A PROPOSAL TO CLARIFY RULE 68 OF THE NEVADA RULES OF CIVIL PROCEDURE REGARDING OFFERS OF JUDGMENT

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I. INTRODUCTION

The Nevada rule was replaced in 1998. It is substantially different from the federal rule. – Drafter’s Note to the 2004 amendments to the Nevada Rules of Civil Procedure.

While Nevada Rule of Civil Procedure 68 and Nevada Revised Statute § 17.115 have been replaced, substantially amended, and clarified over the years, they are incomplete when viewed in isolation. The gaps left by the text of Rule 68 and NRS § 17.115 have been partially filled through three decades of court opinions. This Article argues that it is time to amend Rule 68 to codify this corpus of decisional law, make this law more accessible, and address a limited number of significant issues that have yet to be resolved by the Nevada Supreme Court in its published opinions.

The Nevada Supreme Court’s 1998 adoption of a new Rule 68 introduced a tremendous degree of flexibility to parties that choose to serve offers of judgment. This high degree of flexibility is unique to Nevada, and it has greatly complicated Nevada’s offer of judgment law. In departing from prior law, the new Rule allows for the following: unapportioned offers of judgment may be served to multiple parties under limited circumstances; any unrelated parties may serve an unapportioned offer to any party; a party may draft an offer for a lump sum or for an amount that includes any combination of costs, attorneys’ fees and interest; a party may draft an offer that apportions the offered amounts by claim; a party (or multiple parties) may serve an apportioned offer to multiple parties that includes a condition that it be accepted by all parties; and a party may proceed to trial but shield itself from offer of judgment penalties by “accepting” an apportioned offer of judgment that is conditioned by the acceptance of all parties where all parties do not accept.

Collateral proceedings have resulted over the meaning of Rule 68 and, given the substantial differences between Nevada’s rule and that of every other jurisdiction in the United States, it is likely that increasingly complex collateral proceedings will continue to occur if this rule is not substantially clarified. Fairness requires that parties to litigation be able to discern promptly how the offer of judgment law will operate when receiving an offer and, to a lesser

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extent, when crafting an offer. However, under current law a practitioner for the offeree party must, within ten days, consult an extensive body of decisional law to form an opinion on the probabilities of how a court should or will respond to every possible trial outcome. A clarified rule will expedite the practitioner's analysis and will greatly promote the Rule's goal of encouraging settlement.

This Article proposes to replace Rule 68 with a clarified version that appears in the following pages. This proposal is presented as an amendment to aid the reader in discerning the differences between the proposed rule and the current rule. This Article also includes corresponding forms to be included in the NRCF Appendix of Forms.

Other commentators, courts, and lawmakers across the country have disputed the utility and policy of offers of judgment and have proposed a number of corresponding modifications to the rule, up to and including the total abolition of offers of judgment. This Article does not join that debate. The law and policy in Nevada is generally settled and this Article proposes amendments that track current law and policy. Where there is no discernable policy but where experiences in other states are instructive, this Article proposes amendments that track the experiences in those states.

II. PROPOSED AMENDMENTS¹

RULE 68. OFFERS OF JUDGMENT: *Amendments Shown*

(a) ~~[The]~~ *Contents of Offer and Timing.*

(1) At any time ~~[more than 10 days]~~ before trial, any party may serve ~~[an offer in writing]~~ to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

(2) When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, at any time before the commencement of the proceeding to determine the amount or extent of liability, any party may serve to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

(3) No party shall be subject to the sanctions of section (g) for the rejection of an offer that:

(A) is made pursuant to paragraph (1) and served less than 11 days before trial; or

(B) is made pursuant to paragraph (2) and served less than 11 days before the commencement of the proceeding.

(4) The offer shall allow judgment to be taken in accordance with its terms ~~[and conditions]~~ and may include equitable remedies. Unless otherwise specified, an offer is deemed to be for a lump-sum, meaning the terms of the offer are deemed to preclude separate post-acceptance awards of costs, attorneys' fees and interest.

(5) The offer may specify that it is conditioned upon a determination of good faith settlement.

(6) The offer may specify a longer acceptance period than the period prescribed by paragraph (1) of section (f), but may not permit an acceptance after the commencement of a trial if the offer is made pursuant to paragraph (1) and may not

¹ Matter in *italics* is new; matter in brackets [omitted material] is material to be omitted.

permit an acceptance after the commencement of the proceeding if the offer is made pursuant to paragraph (2).

(7) The offer shall specify that it is based upon this rule or it shall specify the complete basis of the offer if it is based upon a combination of this rule and NRS 17.115. An offer is not void because it is based upon this rule, NRS 17.115, or both.

(8) An offer that resolves less than all of the claims between all the offerees and all the offerors is void.

(9) An offer may not be withdrawn except by written stipulation or as provided in paragraph (2) of section (f).

(10) An offer that specifies material conditions that are in addition to those provided by this rule or that conflict with those provided by this rule is void.

(b) Apportioned Conditional Offers to Multiple Parties. An apportioned offer ~~[of judgment]~~ jointly made to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed.

(c) ~~[Joint]~~ Unapportioned Offers Jointly Made By Multiple Parties. [~~———(1) Multiple Offerors. A joint offer may be~~] An offer jointly made by multiple offerors is not required to be apportioned between the offerors.

(d) Joint Unapportioned Offers to Multiple Parties.

~~[(2)] (1) Offers to Multiple ~~[defendants]~~ Defending Parties. [An offer made to multiple defendants will invoke the penalties of this rule only if] An unapportioned offer jointly made to multiple parties against whom claims, counterclaims or cross-claims are asserted may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims against all the offerees and:~~

~~(A) there is a single common theory of liability against all the ~~[offeree defendants, such as where]~~ offerees;~~

~~(B) the liability of some ~~[is]~~ offerees are entirely derivative of the common acts or liability of the others; or ~~[where]~~~~

~~(C) the liability of all ~~[is]~~ offerees are derivative of the common acts ~~[by]~~ or liability of another[, and (B) the same entity, person or group is authorized to decide whether to settle the claims against the offerees].~~

~~[(3)] (2) Offers to Multiple ~~[Plaintiffs]~~ Claimants. [An offer made to multiple plaintiffs will invoke the penalties of this rule only if] An unapportioned offer jointly made to multiple claimants may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims of all the offerees and:~~

~~(A) ~~[the damages claimed by all the offeree plaintiffs are solely derivative, such as that]~~ there is a single common theory of liability claimed by all the offerees;~~

~~(B) the damages claimed by some offerees are entirely derivative of an injury to the others; or ~~[that]~~~~

~~(C) the damages claimed by all offerees are derivative of an injury to another[, and (B) the same entity, person or group is authorized to decide whether to settle the claims of the offerees].~~

(3) Offers to Joint Tenants. No combination of offerees that jointly claim or defend under the same common theory of liability concerning jointly owned property is a group as that term is used in this section. When two or more offerees jointly claim or defend under the same common theory of liability concerning jointly owned

property, the burden is on any offeree to establish that no one person has authority to accept or reject an offer of settlement for all the offerees.

~~[(d)]~~ (e) Judgment Entered Upon Acceptance.

(1) If ~~[within 10 days after the service of the offer,]~~ the offeree serves written notice that the offer is accepted within the acceptance period provided by paragraph (1) of section (f), the offer shall be deemed accepted and either party may then file the offer and notice of acceptance together with proof of service. The offer and notice of acceptance must be filed within 7 days after service of the written notice that the offer is accepted or before trial or other applicable proceeding, whichever occurs earlier.

(2) ~~[The]~~ Except as otherwise provided in paragraph (6) of section (f), the clerk or judge shall enter judgment accordingly. ~~[The]~~ If permitted by law or contract, the court shall ~~[allow]~~ award costs in accordance with NRS 18.110 ~~[unless]~~, attorneys' fees and interest as applicable, but shall not make such awards if the terms of the offer preclude ~~[a]~~ separate ~~[award]~~ awards of costs, attorneys' fees and interest. If the terms of the offer permit an award of interest, any portion of any claim or demand for damages that is asserted or disclosed in writing before the offer is served draws interest but the entire claim or demand for damages that is asserted or disclosed in writing before the offer is served does not draw interest, and the offer contains no apportionment between claims that do and do not draw interest:

(A) the court shall award interest on the entirety of all damages when the offer is made to a claimant and judgment is entered pursuant to this rule; and

(B) the court shall not award interest on any damages when the offer is made to a defending party and judgment is entered pursuant to this rule.

(3) Any judgment entered pursuant to this ~~[section]~~ rule shall be expressly designated a compromise and settlement of a disputed claim.

(4) ~~[At his option, a defendant may within a reasonable time pay the amount of the offer and obtain a dismissal of the claim, rather than a judgment]~~ A defending party that pays the principal amount of the offer within a reasonable time after the filing of the offer and notice of acceptance and that pays any applicable awards of costs, attorneys' fees and interest within a reasonable time after the awards are ordered shall obtain an order of dismissal with prejudice and, if applicable, an order withdrawing the judgment.

(5) A claimant that has not been paid within a reasonable time may obtain an order to amend the judgment and remove the paragraph (3) designation of compromise and settlement.

(6) A final judgment or order of dismissal entered pursuant to this rule shall have the preclusive effect of a valid judgment on the merits.

~~[(e)]~~ (f) Acceptance Period and the Effect of the Failure to Accept an Offer.

(1) ~~[If the offer is not accepted within 10 days after service it shall be considered]~~ An offer made pursuant to paragraph (1) of section (a) may be accepted before trial or within 10 days after service, whichever period is shorter. An offer made pursuant to paragraph (2) of section (a) may be accepted before the commencement of the proceeding or within 10 days after service, whichever period is shorter.

(2) The offer shall be deemed rejected by the offeree ~~[and deemed withdrawn by the offeror,]~~ if not accepted within the period prescribed by paragraph (1). If this period is enlarged by the court, the offeror may serve a written withdrawal of the offer at any time after the expiration of the initial acceptance period and prior to acceptance of the offer.

(3) Evidence of the offer is not admissible except in a proceeding to determine costs and attorneys' fees. Evidence of a void offer is not admissible in a proceeding to determine the attorneys fees of any party.

(4) The fact that an offer is made but not accepted does not preclude a subsequent offer. The service of a subsequent offer does not operate to revoke a prior offer. No party shall be subject to the sanctions of section (g) for the rejection of a prior offer from the same offeror.

(5) *The service of a counter-offer does not operate as a rejection of a prior offer.*

(6) [With] For apportioned offers to multiple offerees that are conditioned upon the acceptance by all parties to whom the offer was directed, each offeree may serve a separate acceptance of the [apportioned] offer, but if the offer is not accepted by all offerees, no judgment or order of dismissal may be entered pursuant to section (e) and the action shall proceed as to all. Any offeree who fails to accept the offer [may] shall be subject to the [penalties of this rule] sanctions section (g).

~~[(f)] (g) [Penalties] Sanctions for Rejection of Offer. [If the offeree rejects an offer and fails to obtain a more favorable judgment,~~

~~—— (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and~~

~~—— (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.]~~

(1) Except as otherwise provided in paragraph (3), if a party who rejects an offer fails to obtain a more favorable judgment, the court:

(A) shall not award to the party any discretionary costs or discretionary attorneys' fees from the commencement of the action to the entry of the judgment;

(B) shall not award to the party any other costs or attorneys' fees for the period from the date of the service of the offer to the entry of the judgment;

(C) shall not award to the party any interest for the period from the date of service of the offer to the date of entry of the judgment;

(D) shall order the party to pay the taxable costs and applicable interest incurred by the offering party or parties from the date of the service of the offer to the entry of the judgment; and

(E) May order the party to pay the offering party any or all of the following:

(i) Reasonable costs incurred by the offering party for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case for the period from the date of the service of the offer to the date of the entry of judgment, together with any applicable interest.

(ii) Reasonable attorneys' fees incurred by the offering party for the period from the date of the service of the offer to the date of entry of the judgment, together with any applicable interest.

(2) *An award against a party made pursuant to this section shall not exceed that portion of the costs, attorneys' fees and applicable interest that are severally attributable to the party.*

(3) *The court may suspend the application of this section to prevent manifest injustice or if the offer was made in bad faith.*

(4) *An offeror shall not be deemed the prevailing party solely due to the offeree's failure to obtain a more favorable judgment.*

~~[(g)] (h) [How Costs Are Considered] Determination of More Favorable Judgment. [To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. Where the offer provided that costs would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs. Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment.]~~

(1) To determine whether a party who rejected an offer failed to obtain a more favorable judgment:

(A) If the offer provided that the court could award costs, attorneys' fees or interest upon acceptance, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, attorneys' fees or interest.

(B) If the offer precluded a separate award of costs, attorneys' fees or interest upon acceptance, the court must compare the amount of the offer with the sum of:

(i) The principal amount of the judgment; and

(ii) The amount of applicable taxable costs, attorneys' fees and interest, including applicable interest on such costs and attorneys' fees, incurred up to and including the date the offer was served. In making this comparison, the court shall calculate interest at the rate in effect on the date the offer was rejected.

(2) *The court shall take into account any additur or remittitur before making the comparison.*

(3) *The court shall assign no value to a determination of good faith settlement when making the comparison.*

~~[(h) Offers After Determination of Liability. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.]~~

(i) **Signing of Offers.** Every offer shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. An unsigned offer is void. The signature of the attorney or party certifies that the offer is made in good faith and for the purpose of obtaining a settlement.

(j) **When inapplicable.** This rule is not applicable to suits for divorce, alimony, separate maintenance or custody of children.

RULE 68. OFFERS OF JUDGMENT: *As amended*

(a) Contents of Offer and Timing.

(1) At any time before trial, any party may serve to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

(2) When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined

by further proceedings, at any time before the commencement of the proceeding to determine the amount or extent of liability, any party may serve to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

(3) No party shall be subject to the sanctions of section (g) for the rejection of an offer that:

(A) is made pursuant to paragraph (1) and served less than 11 days before trial; or

(B) is made pursuant to paragraph (2) and served less than 11 days before the commencement of the proceeding.

(4) The offer shall allow judgment to be taken in accordance with its terms and may include equitable remedies. Unless otherwise specified, an offer is deemed to be for a lump-sum, meaning the terms of the offer are deemed to preclude separate post-acceptance awards of costs, attorneys' fees and interest.

(5) The offer may specify that it is conditioned upon a determination of good faith settlement.

(6) The offer may specify a longer acceptance period than the period prescribed by paragraph (1) of section (f), but may not permit an acceptance after the commencement of a trial if the offer is made pursuant to paragraph (1) and may not permit an acceptance after the commencement of the proceeding if the offer is made pursuant to paragraph (2).

(7) The offer shall specify that it is based upon this rule or it shall specify the complete basis of the offer if it is based upon a combination of this rule and NRS 17.115. An offer is not void because it is based upon this rule, NRS 17.115, or both.

(8) An offer that resolves less than all of the claims between all the offerors and all the offerees is void.

(9) An offer may not be withdrawn except by written stipulation or as provided in paragraph (2) of section (f).

(10) An offer that specifies material conditions that are in addition to those provided by this rule or that conflict with those provided by this rule is void.

(b) Apportioned Conditional Offers to Multiple Parties. An apportioned offer jointly made to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed.

(c) Unapportioned Offers Jointly Made By Multiple Parties. An offer jointly made by multiple offerors is not required to be apportioned between the offerors.

(d) Joint Unapportioned Offers to Multiple Parties.

(1) Offers to Multiple Defending Parties. An unapportioned offer jointly made to multiple parties against whom claims, counterclaims or cross-claims are asserted may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims against all the offerees and:

(A) there is a single common theory of liability against all the offerees;

(B) the liability of some offerees are entirely derivative of the common acts or liability of the others; or

(C) the liability of all offerees are derivative of the common acts or liability of another.

(2) Offers to Multiple Claimants. An unapportioned offer jointly made to multiple claimants may be conditioned upon the acceptance by all parties to whom

the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims of all the offerees and:

(A) there is a single common theory of liability claimed by all the offerees;

(B) the damages claimed by some offerees are entirely derivative of an injury to the others; or

(C) the damages claimed by all offerees are derivative of an injury to another.

(3) Offers to Joint Tenants. No combination of offerees that jointly claim or defend under the same common theory of liability concerning jointly owned property is a group as that term is used in this section. When two or more offerees jointly claim or defend under the same common theory of liability concerning jointly owned property, the burden is on any offeree to establish that no one person has authority to accept or reject an offer of settlement for all the offerees.

(e) Judgment Entered Upon Acceptance.

(1) If the offeree serves written notice that the offer is accepted within the acceptance period provided by paragraph (1) of section (f), the offer shall be deemed accepted and either party may then file the offer and notice of acceptance together with proof of service. The offer and notice of acceptance must be filed within 7 days after service of the written notice that the offer is accepted or before trial or other applicable proceeding, whichever occurs earlier.

(2) Except as otherwise provided in paragraph (6) of section (f), the clerk or judge shall enter judgment accordingly. If permitted by law or contract, the court shall award costs in accordance with NRS 18.110, attorneys' fees and interest as applicable, but shall not make such awards if the terms of the offer preclude separate awards of costs, attorneys' fees and interest. If the terms of the offer permit an award of interest, any portion of any claim or demand for damages that is asserted or disclosed in writing before the offer is served draws interest but the entire claim or demand for damages that is asserted or disclosed in writing before the offer is served does not draw interest, and the offer contains no apportionment between claims that do and do not draw interest:

(A) the court shall award interest on the entirety of all damages when the offer is made to a claimant and judgment is entered pursuant to this rule; and

(B) the court shall not award interest on any damages when the offer is made to a defending party and judgment is entered pursuant to this rule.

(3) Any judgment entered pursuant to this rule shall be expressly designated a compromise and settlement of a disputed claim.

(4) A defending party that pays the principal amount of the offer within a reasonable time after the filing of the offer and notice of acceptance and that pays any applicable awards of costs, attorneys' fees and interest within a reasonable time after the awards are ordered shall obtain an order of dismissal with prejudice and, if applicable, an order withdrawing the judgment.

(5) A claimant that has not been paid within a reasonable time may obtain an order to amend the judgment and remove the paragraph (3) designation of compromise and settlement.

(6) A final judgment or order of dismissal entered pursuant to this rule shall have the preclusive effect of a valid judgment on the merits.

(f) Acceptance Period and the Effect of the Failure to Accept an Offer.

(1) An offer made pursuant to paragraph (1) of section (a) may be accepted before trial or within 10 days after service, whichever period is shorter. An offer

made pursuant to paragraph (2) of section (a) may be accepted before the commencement of the proceeding or within 10 days after service, whichever period is shorter.

(2) The offer shall be deemed rejected by the offeree if not accepted within the period prescribed by paragraph (1). If this period is enlarged by the court, the offeror may serve a written withdrawal of the offer at any time after the expiration of the initial acceptance period and prior to acceptance of the offer.

(3) Evidence of the offer is not admissible except in a proceeding to determine costs and attorneys' fees. Evidence of a void offer is not admissible in a proceeding to determine the attorneys' fees of any party.

(4) The fact that an offer is made but not accepted does not preclude a subsequent offer. The service of a subsequent offer does not operate to revoke a prior offer. No party shall be subject to the sanctions of section (g) for the rejection of a prior offer from the same offeror.

(5) The service of a counter-offer does not operate as a rejection of a prior offer.

(6) For apportioned offers to multiple offerees that are conditioned upon the acceptance by all parties to whom the offer was directed, each offeree may serve a separate acceptance of the offer, but if the offer is not accepted by all offerees, no judgment or order of dismissal may be entered pursuant to section (e) and the action shall proceed as to all. Any offeree who fails to accept the offer shall be subject to the sanctions section (g).

(g) Sanctions for Rejection of Offer.

(1) Except as otherwise provided in paragraph (3), if a party who rejects an offer fails to obtain a more favorable judgment, the court:

(A) shall not award to the party any discretionary costs or discretionary attorneys' fees from the commencement of the action to the entry of the judgment;

(B) shall not award to the party any other costs or attorneys' fees for the period from the date of the service of the offer to the entry of the judgment;

(C) shall not award to the party any interest for the period from the date of service of the offer to the date of entry of the judgment;

(D) shall order the party to pay the taxable costs and applicable interest incurred by the offering party or parties from the date of the service of the offer to the entry of the judgment; and

(E) May order the party to pay the offering party any or all of the following:

(i) Reasonable costs incurred by the offering party for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case for the period from the date of the service of the offer to the date of the entry of judgment, together with any applicable interest.

(ii) Reasonable attorneys' fees incurred by the offering party for the period from the date of the service of the offer to the date of entry of the judgment, together with any applicable interest.

(2) An award against a party made pursuant to this section shall not exceed that portion of the costs, attorneys' fees and applicable interest that are severally attributable to the party.

(3) The court may suspend the application of this section to prevent manifest injustice or if the offer was made in bad faith.

(4) An offeror shall not be deemed the prevailing party solely due to the offeree's failure to obtain a more favorable judgment.

(h) Determination of More Favorable Judgment.

(1) To determine whether a party who rejected an offer failed to obtain a more favorable judgment:

(A) If the offer provided that the court could award costs, attorneys' fees or interest upon acceptance, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, attorneys' fees or interest.

(B) If the offer precluded a separate award of costs, attorneys' fees or interest upon acceptance, the court must compare the amount of the offer with the sum of:

(i) The principal amount of the judgment; and

(ii) The amount of applicable taxable costs, attorneys' fees and interest, including applicable interest on such costs and attorneys' fees, incurred up to and including the date the offer was served. In making this comparison, the court shall calculate interest at the rate in effect on the date the offer was rejected.

(2) The court shall take into account any additur or remittitur before making the comparison.

(3) The court shall assign no value to a determination of good faith settlement when making the comparison.

(i) **Signing of Offers.** Every offer shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. An unsigned offer is void. The signature of the attorney or party certifies that the offer is made in good faith and for the purpose of obtaining a settlement.

(j) **When inapplicable.** This rule is not applicable to suits for divorce, alimony, separate maintenance or custody of children.

III. DISCUSSION AND DRAFTERS' NOTES

RULE 68. OFFERS OF JUDGMENT

(a) ~~[The]~~ *Contents of Offer and Timing.*

(1) At any time ~~[more than 10 days]~~ before trial, any party may serve ~~[an offer in writing]~~ to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

This amendment first establishes that an offer must resolve all claims to be valid.² Next, this amendment codifies that the offer resolves the claims as accrued through the date of the service of the offer, as opposed to the date that the offer is accepted or the date that judgment is entered.³

The timing of an offer is addressed in proposed Rule 68(a)(3)(A), and is unchanged.⁴ The requirement that an offer be in writing is addressed in proposed Rule 68(i), and is unchanged.⁵

² See *Clark v. Lubritz*, 944 P.2d 861, 868 (Nev. 1997) ("An offer of judgment is an offer to settle the entire case, including claims both known and unknown and both certain and uncertain.").

³ See generally *McCrary v. Bianco*, 131 P.3d 573 (Nev. 2006); *Albios v. Horizon Cmty., Inc.*, 132 P.3d 1022 (Nev. 2006).

⁴ See *supra* Part II.

⁵ *Id.*

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(2) When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, at any time before the commencement of the proceeding to determine the amount or extent of liability, any party may serve to any other party an offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.

This amendment relocates the provision currently found in Rule 68(h).⁶ The requirement that an offer be in writing is addressed in proposed Rule 68(i) and is unchanged.⁷

Next, this amendment establishes that *any* party may serve an offer of judgment after the determination of liability. The current version lacks reciprocity because it limits the power to serve an offer on the defending party and deprives the claimant of the benefits of this rule. This amendment also clarifies that, to be valid, an offer must resolve all claims.⁸

Finally, this amendment codifies that the offer resolves the claims as accrued through the date of the service of the offer, as opposed to the date that the offer is accepted or the date that judgment is entered.⁹

The timing of such an offer is addressed in Rule 68(a)(3)(B), and is unchanged.¹⁰

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(3) No party shall be subject to the sanctions of section (g) for the rejection of an offer that:

(A) is made pursuant to paragraph (1) and served less than 11 days before trial; or

(B) is made pursuant to paragraph (2) and served less than 11 days before the commencement of the proceeding.

⁶ The following is a "redline" comparison of Nev. R. Civ. P. 68(h) and proposed Nev. R. Civ. P. 68(a)(2):

~~[(h) Offers After Determination of Liability.]~~ When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, [the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability] *at any time before the commencement of the proceeding to determine the amount or extent of liability, any party may serve to any other party a offer to enter judgment to resolve all claims in the action between those parties accrued through the date of the offer.*

⁷ See *supra* Part II.

⁸ See *Clark v. Lubritz*, 944 P.2d 861, 868 (Nev. 1997) ("An offer of judgment is an offer to settle the entire case, including claims both known and unknown and both certain and uncertain.") (citing *Lutynski v. B.B. & J. Trucking, Inc.*, 628 A.2d 1, 5 (Conn. App. Ct. 1993)).

⁹ See generally *McCrary v. Bianco*, 131 P.3d 573 (Nev. 2006); *Albios v. Horizon Cmty., Inc.*, 132 P.3d 1022 (Nev. 2006).

¹⁰ See *supra* Part II.

This amendment establishes that an offer cannot support the offeror's motion for offer of judgment sanctions if the offer is served too close to the commencement of trial or other proceeding. These provisions are relocated from Rule 68(h) and from the first sentence of the current version of Rule 68(a) without substantive modification.

When viewed in conjunction with Rule 68(f)(1),¹¹ this amendment clarifies that an offer is not void if served less than eleven days before the commencement of trial or other proceeding. Rule 68(f)(1) further provides that such an offer may be accepted at any time before the commencement of trial or other proceeding. While an offeree can avoid penalties if she rejects such an offer because she "is entitled not to be rushed into a hasty decision,"¹² an offeree should nonetheless be able to waive this entitlement and elect to make a hasty decision if she chooses to do so. This result promotes settlement.

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(4) The offer shall allow judgment to be taken in accordance with its terms ~~[and conditions.]~~ *and may include equitable remedies. Unless otherwise specified, an offer is deemed to be for a lump-sum, meaning the terms of the offer are deemed to preclude separate post-acceptance awards of costs, attorneys' fees and interest.*

This amendment makes explicit that offers of judgment are valid even if their terms contain non-monetary equitable relief, such as an offer to divide property in a partition action.¹³

Next, the amendment would rectify a current gap in the law. Currently, neither Rule 68 nor NRS § 17.115 address how to construe an offer that fails to account for attorneys' fees or interest explicitly. Instead, Rule 68(d) and NRS § 17.115(2)(b) address the construction of an offer that fails to account for costs, and only costs, explicitly upon acceptance.¹⁴ At present, the Nevada Supreme Court will construe any ambiguity against the drafter,¹⁵ but clarity and predictability will be greatly enhanced on this important and recurring issue if the rule explicitly addresses the topic.¹⁶

¹¹ See *supra* Part II.

¹² *Nava v. Second Judicial Dist. Court*, 46 P.3d 60, 61 (Nev. 2002).

¹³ *Kent v. Kent*, 835 P.2d 8, 11 (Nev. 1992).

¹⁴ If an offer of judgment for a lump-sum that makes no reference to costs is accepted, then the district "court shall allow costs in accordance with NRS 18.110[.]" because the offer does not explicitly "preclude a separate award of costs." NEV. R. CIV. P. 68(d); *accord* NEV. REV. STAT. § 17.115(2)(b) (2005). Thus, it follows that while making the comparison in post-trial proceedings, a district court should treat this type of offer as one that *allows* a separate cost award upon acceptance (i.e., one that is for a sum exclusive of costs). In other words, the district court should compare the offer with the principal amount of the judgment and disregard the pre-offer costs. Prior to 1998 such an offer would likely have been given effect by virtue of the dictum included in *Fleischer v. August*, 737 P.2d 518 (Nev. 1987), but the holding of that opinion appears dependent upon text within Rule 68 (that is, "with costs then accrued"). As that text is not replicated in the current rule, the continuing value of this dictum is in doubt.

¹⁵ *McCrary v. Bianco*, 131 P.3d 573, 577-78 (Nev. 2006).

¹⁶ "If the offer of judgment is silent about whether it includes prejudgment interest, or if the intent of the offeror cannot otherwise be clearly determined, it should be presumed that the

This amendment would clearly give effect to an offer “for \$10,000” by deeming the offer to be one that is for a lump-sum that includes all claims, inclusive of costs, interest, and attorneys’ fees. The court has strongly implied that such offers should be given effect.¹⁷

Since a court is required to construe the meaning of an offer when an offer is rejected as well as when it is accepted, the more logical placement for this clarifying provision is in proposed Rule 68(a), in addition to or instead of Rule 68(d).

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(5) *The offer may specify that it is conditioned upon a determination of good faith settlement.*

This amendment establishes that an offer may be conditioned upon a determination of good faith settlement by the court, which will encourage settlement in certain actions involving multiple defendants. Proposed Rule 68(h)(3)¹⁸ establishes that this condition is to be afforded no value when making a when making a post-adjudication comparison to determine whether the judgment was more favorable than the offer.

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(6) The offer may specify a longer acceptance period than the period prescribed by paragraph (1) of section (f), but may not permit an acceptance after the commencement of a trial if the offer is made pursuant to paragraph (1) and may not permit an acceptance after the commencement of the proceeding if the offer is made pursuant to paragraph (2).

This amendment establishes that an offer may specify a longer acceptance period than the ten-day acceptance period established by the rule, as the service of such an offer should be a factor when determining whether the offer was

offer includes prejudgment interest.” *State Drywall, Inc. v. Rhodes Design & Dev.*, 127 P.3d 1082, 1087 (Nev. 2006). If the offer is for “all complaints and counter claims” and allows a separate award of costs upon acceptance, then the holding of the *McCrary* opinion would operate to exclude pre-offer attorneys’ fees when performing the comparison. *See McCrary*, 131 P.3d at 577. The Nevada Supreme Court has not published an opinion to address the situation that arises when an offer precludes a separate post-acceptance award of costs that makes no reference to attorneys’ fees (e.g., for a lump-sum “including costs and prejudgment interest accrued to date”). Also, the *McCrary* and *State Drywall* opinions each arose in the context of performing a post-judgment comparison to determine if the judgment was more favorable than the offer. It is not clear that these holdings will be extended to cover the situation when such offers are accepted.

¹⁷ *McCrary*, 131 P.3d at 578 n.16 (citing with approval to *Real Estate Pros v. Byars*, 90 P.3d 110, 113-15 (Wyo. 2004), holding that an offer referring to “all claims” was not ambiguous and included claim for attorney fees”); *Fleischer*, 737 P.2d at 520 (lump-sum offer need not separately recite the amount of the costs because offerors “would understandably be reluctant to make settlement offers” if they were not allowed to make lump-sum offers which represent their total liability).

¹⁸ *See infra*.

made in good faith. This amendment also establishes that the offer may not permit an acceptance after the commencement of trial or other proceeding.

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(7) The offer shall specify that it is based upon this rule or it shall specify the complete basis of the offer if it is based upon a combination of this rule and NRS 17.115. An offer is not void because it is based upon this rule, NRS 17.115, or both.

This amendment makes explicit the requirement that, to be valid, an offer must specify the statute or rule that the offer is based on.¹⁹ Moreover, this amendment also makes explicit that an offer may be made with reference to both Rule 68 and NRS § 17.115.²⁰ The amendment also clarifies that where an offer is made under Rule 68 and not under NRS § 17.115, it will still be given effect under Rule 68.²¹

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(8) An offer that resolves less than all of the claims between all the offerors and all the offerees is void.

While proposed Rule 68(a)(1) provides that a party may serve an offer to resolve all claims, this amendment clarifies that an offer is void if it does not resolve all claims.

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(9) An offer may not be withdrawn except by written stipulation or as provided in paragraph (2) of section (f).

This amendment establishes that a non-defective offer of judgment may not be unilaterally withdrawn by the offeror during the ten-day acceptance period.²² This amendment makes reference to an exception that is recognized in Arizona and is discussed below under Rule 68(f)(2).²³

RULE 68. OFFERS OF JUDGMENT

(a) Contents of Offer and Timing.

* * * *

(10) An offer that specifies material conditions that are in addition to those provided by this rule or that conflict with those provided by this rule is void.

¹⁹ RTTC Commc'ns v. Saratoga Flier, Inc., 110 P.3d 24, 28 (Nev. 2005); Ramadanis v. Stupak, 752 P.2d 767, 768 (Nev. 1988).

²⁰ Bowyer v. Taack, 817 P.2d 1176, 1178 (Nev. 1991).

²¹ Carpenters for S. Nev. Health & Welfare Trust v. Better Bldg. Co., 710 P.2d 1379, 1383 (Nev. 1985); see also Waddell v. L.V.R.V., Inc., 125 P.3d 1160, 1165-66 (Nev. 2006).

²² Nava v. Second Judicial Dist. Court, 46 P.3d 60, 61 (Nev. 2002).

²³ See *infra*.

This amendment establishes that no offer is valid if it purports to impose conditions beyond those explicitly provided by Rule 68.²⁴ In addition to codifying existing law, this amendment is urged for adoption due to the difficulty associated with evaluating whether a judgment finally obtained is “more favorable” than an offer that contains a condition not expressly permitted by Rule 68 or NRS § 17.115. Currently, neither the rule nor the statute address whether an offer may be made with conditions that are not expressly permitted by law, such as a condition of confidentiality, a cap on an award of costs or attorneys’ fees, of a district court’s determination of good faith settlement for purposes of NRS § 17.245, or of a condition that extends the acceptance period beyond ten days. This amendment would invalidate an offer that contains any of the first two conditions; an offer that contains the latter two conditions would be given effect pursuant to the express provisions of Rule 68(a)(5) and Rule 68(a)(6), respectively.

Next, this amendment specifies that only the inclusion of a *material* condition will invalidate an offer. The Nevada Supreme Court appears ready to give effect to a condition that the offeree must execute a dismissal and release.²⁵ Further, where additional material conditions are invalid under current law, it is also unclear if the entire offer is invalid or if court will give effect to the offer but not the contingency within the offer. This amendment provides that no effect shall be given to an offer with an illegal contingency, as it would be unfair to the offeror to bind that party to a judgment that has materially different terms than those contained in the settlement offer.

RULE 68. OFFERS OF JUDGMENT

(b) Apportioned Conditional Offers to Multiple Parties. An apportioned offer [~~of judgment~~] *jointly made* to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed.

This is a clarification.

RULE 68. OFFERS OF JUDGMENT

(c) [~~Joint~~] Unapportioned Offers Jointly Made By Multiple Parties. [~~— (1) Multiple Offerors. A joint offer may be~~] *An offer jointly made by multiple offerors is not required to be apportioned between the offerors.*

This is a technical amendment that clarifies the meaning of “joint offer” as used in Rule 68(c) (2005).

RULE 68. OFFERS OF JUDGMENT

(d) Joint Unapportioned Offers to Multiple Parties.

[~~(2)~~] (1) Offers to Multiple [~~defendants~~] Defending Parties. [~~An offer made to multiple defendants will invoke the penalties of this rule only if~~] *An unapportioned offer jointly made to multiple parties against whom claims, counterclaims*

²⁴ See *Wickliffe v. Fletcher Jones of Las Vegas, Inc.*, 661 P.2d 1295, 1298 (Nev. 1983) (offer invalid to support motion for attorneys’ fees because its terms allowed less than the ten days to accept as provided by Rule 68).

²⁵ See, e.g., *MAY v. ANDERSON*, 119 P.3d 1254, 1258 (Nev. 2005) (citing *Earnest & Stewart, Inc. v. Codina*, 732 So.2d 364, 366 (Fla. Dist. Ct. App. 1999), where the court characterized such a condition as surplusage as opposed to one that affects substantial rights).

or cross-claims are asserted may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims against all the offerees and:

(A) there is a single common theory of liability against all the ~~[offeree defendants, such as where]~~ offerees;

(B) the liability of some ~~[is]~~ offerees are entirely derivative of the common acts or liability of the others; or ~~[where]~~

(C) the liability of all ~~[is]~~ offerees are derivative of the common acts ~~[by] or liability of another[, and (B) the same entity, person or group is authorized to decide whether to settle the claims against the offerees].~~

This amendment and the following amendment designated as Rule 68(d)(2) would harmonize the text of Rule 68's treatment of unapportioned offers to multiple parties with the text of NRS § 17.115. These two amendments would also eliminate the current limitation of the rule to "Defendants" and "Plaintiffs," as the court clearly prefers the rule to apply to all variety of defending parties and claimants.²⁶ The amendments' usages of the terms "defending parties" and "claimants" are similar to word usages in Rule 56 and in the 2005 amendment to NRS § 17.115(5).²⁷

Next, this amendment and the following amendment designated as Rule 68(d)(2) would substitute the text "authorized to decide whether to settle" with "authorized to accept or reject an offer of settlement." Both Rule 68 and NRS § 17.115 permit valid joint unapportioned offers to be served to multiple offerees when there is a single decider "authorized to decide whether to settle the claims" of or against all of the offerees. However, this quoted text is somewhat vague. There is no published opinion from the Nevada Supreme Court that addresses the issue of whether this condition will operate to limit the validity of offers of judgment to those circumstances where a single decider is authorized to accept or reject any offer of compromise, as opposed to the more expansive interpretation, which is that the condition is satisfied whenever a single decider (including any group of offerees acting as a body corporate) is authorized to accept, reject, *or make* any settlement offer for all offerees. It appears that the policy supports limiting this condition to the former interpretation, and these two amendments reflect this.

The provisions of Rule 68(c)(1) and NRS§ 17.115(6) are so permissive that all unapportioned offers jointly made from any combination of parties will always be valid. Thus, *any and all unrelated parties* can decide to make jointly a single offer of judgment. This is because the apportionment problems that were present under the former version of the rule when evaluating an unapportioned offer are not present for such offers, as the parties "have already agreed to an apportionment when they authorized the [making of the] offer."²⁸ However, where there is agreement between parties to fund and apportion an offer jointly made from them, it does not logically follow that the agreement was intended to bind those same parties to the same apportionment for a different

²⁶ *Matthews v. Collman*, 878 P.2d 971, 977 n.5 (Nev. 1994) ("Of course, counterclaimants and parties with cross-claims would also fit within the rules pertaining to offerees with a potential for an award of damages.").

²⁷ 2005 NEV. STAT., CH. 58, § 1, at 116.

²⁸ *Final Committee Notes and Proposed Revised Rule 68, IN THE MATTER OF THE REPEAL OF NEVADA RULE OF CIVIL PROCEDURE 68, ADKT 151* (Mar. 25, 1998).

amount. For example, two unrelated codefendants in a negligence action may chose to fund an offer to a plaintiff based upon their estimate of future litigation expenses instead of their perceived degree of fault. A policy that treats the tender of a jointly made offer as a trigger that will render valid any counter-unapportioned offer, regardless of the relation (or lack of relation) of the offerors will operate as a disincentive for unrelated parties to make joint offers of judgment under Rule 68(c)(1) and NRS § 17.115(6). Since public policy encourages the making of offers of judgment, this amendment proposes to replace the text “authorized to decide to settle claims” with text that clearly limits the condition to those instances where one person, entity or group is authorized to accept or reject an offer of compromise tendered to all the offerees without regard to the existence or non-existence of an offer jointly made from those same offerees.

RULE 68. OFFERS OF JUDGMENT

(d) Joint Unapportioned Offers to Multiple Parties.

* * * *

~~[(3)] (2) Offers to Multiple [Plaintiffs] Claimants. [An offer made to multiple plaintiffs will invoke the penalties of this rule only if]~~ An unapportioned offer jointly made to multiple claimants may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims of all the offerees and:

(A) ~~[the damages claimed by all the offeree plaintiffs are solely derivative, such as that]~~ there is a single common theory of liability claimed by all the offerees;

(B) the damages claimed by some offerees are entirely derivative of an injury to the others; or ~~[that]~~

(C) the damages claimed by all offerees are derivative of an injury to another~~[- and (B) the same entity, person or group is authorized to decide whether to settle the claims of the offerees]~~.

In addition to those items explained in the prior amendment, this amendment adds “common theory of liability” to the types of relationships that may exist between multiple claimants that permissibly allow their opponents to invoke the benefits of the offer of judgment law. This change harmonizes Rule 68(c) with NRS § 17.115(9) and is in accord with the Nevada Supreme Court’s discussion on the interpretation and construction when such offers are served under *both* Rule 68 and NRS § 17.115.²⁹

RULE 68. OFFERS OF JUDGMENT

(d) Joint Unapportioned Offers to Multiple Parties.

* * * *

(3) **Offers to Joint Tenants.** No combination of offerees that jointly claim or defend under the same common theory of liability concerning jointly owned property is a group as that term is used in this section. When two or more offerees jointly claim or defend under the same common theory of liability concerning jointly owned property, the burden is on any offeree to establish that no one person has authority to accept or reject an offer of settlement for all the offerees.

²⁹ Albios v. Horizon Cmtys., Inc., 132 P.3d 1022, 1031 (Nev. 2006).

This amendment codifies and expands upon the court's treatment of spouses maintaining an action based upon property held in joint tenancy.³⁰ This amendment also extends the *Albios* holding to defendant spouses, as *Albios* only involved claimant spouses. Finally, this amendment extends the holding to all offeree joint tenants so that non-married joint tenants are not treated more favorably than married joint tenants.

RULE 68. OFFERS OF JUDGMENT

~~(d)~~ (e) Judgment Entered Upon Acceptance.

(1) If [~~within 10 days after the service of the offer,~~] the offeree serves written notice that the offer is accepted *within the acceptance period provided by paragraph (1) of section (f), the offer shall be deemed accepted* and either party may then file the offer and notice of acceptance together with proof of service. *The offer and notice of acceptance must be filed within 7 days after service of the written notice that the offer is accepted or before trial or other applicable proceeding, whichever occurs earlier.*

This amendment eliminates redundancy by limiting the "acceptance period" to a single location in Rule 68(f)(1).

The rule also imposes a new requirement, which is to compel the parties to file a notice within seven days after an offer is accepted. In addition to the obvious benefits associated with informing the court of a settlement as soon as possible, this rule would reduce the possibility of unfair surprise should a party wait several months to file notice of an "acceptance" that is disputed. At least one state has a three-day requirement.³¹

RULE 68. OFFERS OF JUDGMENT

(e) Judgment Entered Upon Acceptance.

* * * *

(2) [~~The~~] *Except as otherwise provided in paragraph (6) of section (f), the clerk or judge shall enter judgment accordingly. [~~The~~] If permitted by law or contract, the court shall [allow] award costs in accordance with NRS 18.110 [unless], attorneys' fees and interest as applicable, but shall not make such awards if the terms of the offer preclude [a] separate [award] awards of costs, attorneys' fees and interest. If the terms of the offer permit an award of interest, any portion of any claim or demand for damages that is asserted or disclosed in writing before the offer is served draws interest but the entire claim or demand for damages that is asserted or disclosed in writing before the offer is served does not draw interest, and the offer contains no apportionment between claims that do and do not draw interest:*

(A) *the court shall award interest on the entirety of all damages when the offer is made to a claimant and judgment is entered pursuant to this rule; and*

(B) *the court shall not award interest on any damages when the offer is made to a defending party and judgment is entered pursuant to this rule.*

This amendment parallels the 2005 revision to Rule 68(d) of the Nevada Justice Court Rules of Civil Procedure by empowering a judge to enter judg-

³⁰ *Id.*

³¹ OR. R. Civ. P. 54(E)(2) ("If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim . . .").

ment in addition to the clerk.³² The amendment also adds an explicit reference to attorneys' fees in addition to the rule's current reference to costs and interest.³³

The third sentence of this amendment establishes that, unless the offer specifically provides otherwise, an award of interest will be allowed on all the claims and demands for damages in their entirety upon acceptance of an offer, provided the offer allows a separate interest award, the affected claimant has alleged an entitlement to damages in writing before the offer is served, interest is permitted by law or contract on any portion of any claim or demand, and the offer is made by a defending party.³⁴ Alternatively, when the offer is made by a claimant under identical circumstances, no interest will be awarded to the claimant. This amendment resolves an ambiguity over the validity and treatment of an offer that allows a post-acceptance award of interest in the following two examples:

- (1) the claimant seeks past damages, future damages and prejudgment interest;
or
- (2) the claimant seeks past damages, punitive damages, and prejudgment interest.

Absent this amendment, such offers made pursuant the current version of Rule 68 may not resolve all claims and demands if accepted – and therefore may not be valid³⁵ – because they may not support the plaintiff's post-acceptance motion for prejudgment interest. This complication was introduced by the amendments to Rule 68 and NRS § 17.115 in 1998/1999 that allowed an offeror greater flexibility in the drafting the terms of an offer of judgment. The proposed amendment complements these prior amendments by defining how such offers will be given effect and thereby eliminating the risk that such offers will be invalidated in collateral proceedings.

The offer in the first example is akin to a general verdict that awards past and future damages but where it is impossible to determine from the trial record that portion of the total verdict that was awarded for past damages, which would support an award of prejudgment interest, as opposed to future damages, where prejudgment interest is not allowed.³⁶ No prejudgment interest will be awarded for such an indeterminate verdict,³⁷ and so it follows that no prejudgment interest would be awarded in the first example. If so, then under that example the offer that allows a post-acceptance award of interest cannot resolve all of the claimant's claims if accepted and therefore may be invalid.³⁸

³² NEV. JUSTICE COURT R. CIV. P. 68(d).

³³ Cf. NEV. ARBITRATION R. 20(B)(3) (in comparing an arbitration award with a judgment, the district court shall not include costs, attorneys' fees, or interest).

³⁴ The distinction between "claims" and "demands" is controlled by NEV. R. CIV. P. 8(a).

³⁵ See *Clark v. Lubritz*, 944 P.2d 861 (Nev. 1997) ("An offer of judgment is an offer to settle the entire case, including claims both known and unknown and both certain and uncertain.") (citing *Lutynski v. B.B. & J. Trucking, Inc.*, 628 A.2d 1, 5 (Conn. App. Ct. 1993)).

³⁶ NEV. REV. STAT. § 17.130 (2005).

³⁷ See *Stickler v. Quilici*, 655 P.2d 527, 528 (Nev. 1982).

³⁸ For example, consider a personal injury action where the plaintiff's complaint seeks damages "in excess of \$10,000," makes a pre-suit written settlement offer for past damages of \$4,000, future damages of \$15,000, and the complaint contains a demand for judgment in excess of \$10,000 along with statutory costs, attorneys' fees and interest. The defendant

The offer in the second example is problematic because, like future damages, no prejudgment interest is recoverable on a punitive damages award.³⁹ Like the first example, if the offer made under the current rule cannot support a post-acceptance motion for prejudgment interest, the offer cannot resolve all of the claimant's claims and therefore may be invalid.

The proposed rule is crafted to permit the award of prejudgment interest on the entire damages instead of denying such interest when the defending party makes the offer. A contrary rule would render illusory certain prejudgment interest statutes and would thereby unfairly force claimants to forego legitimate claims for prejudgment interest. The rule provides reciprocal treatment when an offer is made by the claimant so that an incautious or crafty claimant will not brook no benefit from this rule at the defendant's expense.

By providing that an offer may be drafted in a manner that will avoid the operation of the rule in the third sentence of proposed Rule 68(e)(2), this amendment establishes that an offer's terms may apportion values to different claims and demands. Thus, an offer that allows a post-acceptance award of interest may explicitly apportion the amounts for past damages, future damages, or punitive damages. If accepted, the court will award interest where allowed by law pursuant to the terms of the offer (i.e., for past damages only). If rejected, the court will compare the judgment finally obtained against the sum of the total offer.⁴⁰ Of course, an offeror can also avoid the application of this rule by serving an offer that precludes an award of interest.

The following four examples illustrate the operation of the rule contained in the third sentence of proposed Rule 68(e)(2):

(A) Suppose a personal injury claimant's complaint demands "judgment against defendant in an amount in excess of \$10,000 and costs,"⁴¹ discovery produces writ-

answers by denying liability and, in alternative, asserts that the damages are inflated. Defendant makes an early nuisance value offer "for \$10,000, exclusive of costs, attorneys' fees and interest," and the plaintiff accepts. While the offer clearly allows the plaintiff to file a post-acceptance motion for, among other things, prejudgment interest, is not clear how a court should rule on the motion under the present Rule. Possible alternatives are for the court to either: (1) take evidence and make a finding of fact on the past damages (and defeat the purpose of encouraging settlement and avoiding protracted litigation); (2) award no prejudgment interest (therefore rendering illusory the statutory interest component and force the plaintiff to forego a legitimate claim to such interest); (3) determine that the offer is invalid because it cannot resolve the plaintiff's claim for interest on past damages, and remind the defendant that it had the sole power to avoid this problem by drafting an apportionment in the offer to guide the court's treatment of past and future damages or, in the alternative, that the defendant could have served a lump-sum offer; or (4) construe the ambiguity in the offer against the defendant by awarding prejudgment interest on the entire offered amount of \$10,000. This Article embraces and codifies the latter option because it is the only option that tends to promote settlement and encourages the careful drafting of offers.

³⁹ *Ramada Inns, Inc. v. Sharp*, 711 P.2d 1, 2 (Nev. 1985).

⁴⁰ That is, a judgment exceeds the amount offered pursuant to proposed Rule 68(h) if the total judgment exceeds the total offer, even if some awards within the judgment are less than the corresponding apportionment in the offer. For example, a rejected offer allowing a post-acceptance award of costs, fees and interest for \$150,000, where 100,000 is apportioned for past damages and \$50,000 is apportioned for future damages is more favorable than a judgment entered upon a jury verdict of \$90,000, where \$35,000 is apportioned by the jury for past damages and \$55,000 is apportioned for future damages.

⁴¹ This is modeled upon Appendix to NEV. R. CIV. P., Form 9, *Complaint for Negligence*.

ten evidence of \$60,000 in special damages and indeterminate future damages. An offer is thereafter served by the defendant to resolve all claims in favor of claimant "for \$100,000 excluding interest," and a notice of acceptance is filed. The amendment will operate to allow judgment to be entered for \$100,000 and prejudgment interest on the entire \$100,000 will be added to the judgment because interest is permitted on a portion of the claimant's claim/demand for damages. Specifically, special damages are eligible for interest to pursuant to NRS § 17.130. In addition, the claimant will be entitled to a post-acceptance award of prejudgment interest on its taxable costs under NRS § 17.130.⁴²

(B) Consider the same facts as above, but the plaintiff serves the offer. Judgment will be entered for \$100,000 and no prejudgment interest will be added to the judgment because interest is permitted on a portion, but not the entirety, of the claimant's disclosed damages. Interest is awarded on taxable costs as above.

(C) If a personal injury claimant's complaint makes a demand identical to the one in example A, the only evidence adduced in discovery to date is for future damages, an offer is thereafter served by the defendant to resolve the claim in favor of claimant "for \$100,000 excluding interest," and the offer is accepted, then the amendment will operate to allow a judgment to be entered for \$100,000. The claimant will also be entitled to a post-acceptance award of prejudgment interest on its taxable costs, but no portion of the claimed damages is eligible for an interest award because NRS § 17.130(2) prohibits an award of prejudgment interest for future damages. While interest is allowed on the costs, the amendment is not triggered because taxable costs are not "damages."

(D) Consider the same facts as example C, but in addition the plaintiff asserts a demand for special damages by a written settlement demand or an invalid written offer of judgment, but there is no evidence adduced to date to support the claim before the valid offer is accepted. Judgment will be entered for \$100,000 and prejudgment interest on the entire \$100,000 will be added to the judgment because interest is permitted on a portion of the claimant's pre-offer demand for damages. Interest is awarded on taxable costs as above.

By limiting the operation of this amendment to those instances "when judgment is entered pursuant to this rule," the third sentence in the proposed Rule 68(e)(2) will have no applicability when the offer is rejected and judgment is then entered pursuant to other law, such as after a jury's verdict or a bench trial.

RULE 68. OFFERS OF JUDGMENT

(e) Judgment Entered Upon Acceptance.

* * *

(3) Any judgment entered pursuant to this [section] rule shall be expressly designated a compromise and settlement of a disputed claim.

This is a clarification.

⁴² Such costs are calculated from the time the costs are incurred, and the recovering party must prove when the costs were incurred. *Albios v. Horizon Cmtys.*, 132 P.3d 1022, 1035 (Nev. 2006); *Bobby Berossini, Ltd. v. PETA*, 971 P.2d 383, 387-88 (Nev. 1998); *Gibellini v. Klindt*, 885 P.2d 540, 544 (Nev. 1994). If the party fails to prove when the costs were incurred, interest on the costs is awarded only from date of the judgment. *Id.*; see also *Albios*, 132 P.3d at 1033 (because the offeror "expressly excluded attorney fees and costs, only pre-offer prejudgment interest awarded on the [verdict] can be considered" in a post-verdict comparison).

RULE 68. OFFERS OF JUDGMENT***(e) Judgment Entered Upon Acceptance.***

* * * *

(4) ~~[At his option, a defendant may within a reasonable time pay the amount of the offer and obtain a dismissal of the claim, rather than a judgment]~~ A defending party that pays the principal amount of the offer within a reasonable time after the filing of the offer and notice of acceptance and that pays any applicable awards of costs, attorneys' fees and interest within a reasonable time after the awards are ordered shall obtain an order of dismissal with prejudice and, if applicable, an order withdrawing the judgment.

This amendment retains the provision that allows a defending party to obtain a dismissal in lieu of a judgment if the defending party pays the principal amount of the offer in a reasonable time. This amendment clarifies that the dismissal shall be with prejudice and, if applicable, an order may be entered to withdraw the judgment.

This amendment also encourages settlement by clarifying that a defending party is rewarded by its prompt satisfaction of the principal amount of the offer, which can be significant when the entitlement to attorneys' fees, interest and/or costs is disputed and thereafter appealed.

RULE 68. OFFERS OF JUDGMENT***(e) Judgment Entered Upon Acceptance.***

* * * *

(5) A claimant that has not been paid within a reasonable time may obtain an order to amend the judgment and remove the paragraph (3) designation of compromise and settlement.

This amendment adds a reciprocal benefit to claimants that is not explicit in the current Rule. The value of a judgment that is designated a "compromise and settlement" is of lesser value to a claimant that must domesticate the judgment in a foreign jurisdiction. The policy of promoting settlements will be enhanced if the claimant knows their judgment will be given full effect should the defending party refuse to satisfy a judgment.

Also, if an offer was contingent upon a determination of good faith settlement, and such determination is made, this proposed amendment would give the claimant standing to reverse that determination if she does not obtain the full benefits of a settlement. The policy of promoting settlements will be enhanced if the defending party knows that the benefits of a determination of good faith settlement will be jeopardized if payment is not made with reasonable promptness.

RULE 68. OFFERS OF JUDGMENT***(e) Judgment Entered Upon Acceptance.***

* * * *

(6) A final judgment or order of dismissal entered pursuant to this rule shall have the preclusive effect of a valid judgment on the merits.

This amendment clarifies that a judgment or order of dismissal entered pursuant to Rule 68 – including one designated as a "compromise settlement" –

shall have the effect of a valid judgment on the merits.⁴³ Under existing law, a judgment is “on the merits” when it in fact determines the substantive legal rights of the parties in connection with the dispute before the court. Dismissals on the basis of purely procedural or technical failings ordinarily do not constitute judgments on the merits. Similarly, a dismissal without prejudice is not a judgment on the merits.⁴⁴ Thus, this amendment establishes that a judgment will have the effect of a claim preclusion,⁴⁵ and not issue preclusion, between the parties.

RULE 68. OFFERS OF JUDGMENT

~~[(e)]~~ (f) *Acceptance Period and the Effect of the Failure to Accept an Offer.*

~~(1) [If the offer is not accepted within 10 days after service it shall be considered]~~ An offer made pursuant to paragraph (1) of section (a) may be accepted before trial or within 10 days after service, whichever period is shorter. An offer made pursuant to paragraph (2) of section (a) may be accepted before the commencement of the proceeding or within 10 days after service, whichever period is shorter.

(2) The offer shall be deemed rejected by the offeree ~~[and deemed withdrawn by the offeror.]~~ if not accepted within the period prescribed by paragraph (1). If this period is enlarged by the court, the offeror may serve a written withdrawal of the offer at any time after the expiration of the initial acceptance period and prior to acceptance of the offer.

This amendment establishes that an offer may be open for a longer period of acceptance if the offer so provides. This amendment, in conjunction with the provisions in proposed Rule 68(a)(6), also establishes that every offer that is accepted must be accepted before trial. This should be made explicit because the 2005 amendment to Rule 6(a) now establishes that when any judicial period of time is less than eleven days, intermediate Saturdays, Sundays, and nonjudicial days are excluded from the computation. Since a valid offer of judgment must be served “more than 10 days” before trial,⁴⁶ it would appear that the 2005 amendment to Rule 6(a) does not apply to that computation. However, the amendment *does* appear to apply to the calculation of the period within which a timely acceptance may be made,⁴⁷ and for when an offer is deemed rejected if not accepted.⁴⁸ Thus, the bare text of Rule 6(a) and Rule 68 in their

⁴³ See *Hall v. Enter. Leasing Co.*, 137 P.3d 1104, 1109 (Nev. 2006) (acceptance of offer of judgment extinguishes the offeror’s legal liability to the offeree).

⁴⁴ See *Clark v. Columbia/HCA Info. Servs., Inc.*, 25 P.3d 215, 224 (Nev. 2001).

⁴⁵ “Claim preclusion” is the concept that a decision in a case involving a claim results in a final determination of the matter and precludes further litigation on the subject, at least between the parties who were involved in the lawsuit. If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment. If there is any further claim by the plaintiff, it is a claim based on winning judgment such as a motion to enforce an injunction or to collect on a judgment. See RESTATEMENT OF JUDGMENTS § 17 (1996). If the judgment is in favor of the defendant, the claim against defendant is extinguished and the plaintiff may not bring a subsequent action against the defendant on this claim. *Id.*; see generally *Ayala v. Caesars Palace*, 71 P.3d 490, 492 (Nev. 2003); *Executive Mgmt. Ltd. v. Tigor Title Ins. Co.*, 963 P.2d 465, 473 (Nev. 1998); *Univ. of Nev. v. Tarkanian*, 879 P.2d 1180, 1191 (Nev. 1994).

⁴⁶ NEV. R. CIV. P. 68(a); NEV. REV. STAT. § 17.115(1) (2005).

⁴⁷ NEV. R. CIV. P. 68(d); NEV. REV. STAT. § 17.115(2) (2005).

⁴⁸ NEV. R. CIV. P. 68(e); NEV. REV. STAT. § 17.115(3) (2005).

present form allows an offer of judgment to be accepted several days after the trial commences. This frustrates the purpose of the offer of judgment rules and leads to absurd results, especially in short trials.

Another alternative that would resolve this ambiguity and greatly simplify the text of the rule is to change the periods within which to serve a timely offer, a timely acceptance, or both. However, the amendment does not propose a change of either time period because there is no indication in the published opinions or in the applicable legislative or rulemaking history that Nevada policymakers have considered expanding either time period. An expansion of the acceptance period would be in harmony with Nevada's policy to give offerees time to carefully consider the likely value of pursuing a claim in light of the offer of judgment and the possible penalties that flow from rejection.⁴⁹ Of course, an expansion of the acceptance period would necessitate an expansion of the allowable period to serve an offer of judgment currently provided in Rule 68(a). A third alternative would be to amend the Rule 6(a) provision that addresses periods of time under eleven days so that Rule 68 is exempted from its operation. This alternative is not proposed because it is beyond the scope of this Article to propose amendments to anything other than Rule 68.

The amendment also provides that an offeror may withdraw an offer if a court enlarges an acceptance period. This is modeled upon Arizona Rule of

⁴⁹ *Nava v. Second Judicial Dist. Court*, 46 P.3d 60, 61 (Nev. 2002). Of those states with offers of judgment law, several have expanded the time to accept an offer when compared to the narrow 10-day time periods established by FED. R. CIV. P. 68 and by Nevada law. *See*, ARIZ. R. CIV. P. 68(a), (e) (timely if made thirty days before trial and offeree has thirty days to accept, but the periods are extended to sixty days to accept if offer is made within sixty days of service of summons and complaint); COLO. REV. STAT. § 13-17-202 (2006) (timely if made fourteen days before trial and fourteen days to accept); CONN. GEN. STAT. § 52-192a(a) (2006) (timely if made thirty days before trial and offeree has thirty days to accept); FLA. R. CIV. P. 1.442(b), (f) (timely if made forty-five days before trial, offeree has thirty days to accept); GA. CODE ANN. § 9-11-68 (2006) (timely if made thirty days before trial and thirty days to accept); IDAHO R. CIV. P. 68(a) (timely if made fourteen days before trial and fourteen days to accept); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-08A (2006) (timely if made forty-five days before trial, offeree has fifteen days to accept); MICH. CT. R. 2.405(B), (C)(1) (timely if made twenty-eight days before trial, offeree has twenty-one days to accept).

Several states have advanced the time to serve an offer to dates further away from the commencement of trial but retain the narrow 10 day acceptance period. *See*, ALA. R. CIV. P. 68 (timely if made fifteen days before trial, offeree has ten days to accept); KAN. STAT. ANN. § 60-2002(b) (2005) (timely if made fifteen days before trial, offeree has ten days to accept); LA. CODE. CIV. PROC. ANN. art. 970(A) (2006) (timely if made thirty days before trial, offeree has ten days to accept); MISS. R. CIV. P. 68 (timely if made fifteen days before trial, offeree has ten days to accept); MO. R. CIV. P. 77.04 (timely if made thirty days before trial, offeree has ten days to accept); N.J. CT. R. 4:58-1 (timely if made twenty days before trial, offeree has ten days to accept); S.C. R. CIV. P. 68(a) (timely if made twenty days before trial, offeree has 20 days to accept but not later than 10 days before trial); WIS. STAT. ANN. § 807.01 (2006) (timely if made twenty days before trial, offeree has ten days to accept); WYO. R. CIV. P. 68 (timely if made thirty days before trial, offeree has ten days to accept).

Two states allow less than ten days to accept, but the penalties for rejection are not as consequential as Nevada's penalties. IOWA CODE § 677.8 (2005) (offeree has five days to accept), *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230 (Iowa 1984) (interpreting Iowa Code § 677.10 to provide that penalized offeree retains pre-offer costs, loses post-offer costs, pays offeror's post-offer costs but not attorneys' fees); NEB. REV. STAT. § 25-901 (2006) (offeree has five days to accept and the penalty is to pay the offeror's post-offer costs).

Civil Procedure 68(e).⁵⁰ This encourages settlement, as parties may be reluctant to serve an offer if a material term in their offer, such as the time of acceptance, is modified without their consent by a court. This amendment respects and preserves the court's power to enlarge the acceptance period for good cause. In Nevada, there are serious consequences for failing to obtain a more favorable judgment, and the risk of loss is borne solely by the offeree, so the court's power to grant an offeree's request to enlarge the acceptance period should be generously exercised.

RULE 68. OFFERS OF JUDGMENT

(f) Acceptance Period and the Effect of the Failure to Accept an Offer.

* * * *

(3) Evidence of the offer is not admissible except in a proceeding to determine costs and attorneys' fees. Evidence of a void offer is not admissible in a proceeding to determine the attorneys' fees of any party.

This amendment clarifies that void offers of judgment shall not be considered by a district court when determining the amount of an award of attorneys' fees. A district court can consider the amount of an offer of judgment as a factor in its determination of the amount of an offeree's attorneys' fees award when the offeree obtains a more favorable judgment (and has a basis for an entitlement to such fees).⁵¹ However, it is not clear if the district court may consider the amount of an invalid offer as a factor when it determines the amount of an award for attorneys' fees.

Nevada's law is unique in that it is always possible to draft a valid offer of judgment in civil litigation, so it is always inexcusable to draft an invalid offer of judgment. The amendment provides that an invalid offer of judgment cannot be used by a court to penalize a party that purportedly failed to beat such an offer. This is proposed because the purpose of offers of judgment is to encourage settlement by imposing a significant risk upon the recipient for the failure to accept an offer, yet an invalid offer carries no risk. Also, parties that receive invalid offers of judgment are under no obligation to inform their adversary of the defect in the offers. Unlike typical settlement offers, an attorney receiving a defective offer of judgment may place his at an extreme disadvantage if he informs or otherwise alerts the adversaries of the defect in the offer. Thus, an offer of judgment is not an invitation to negotiate; it is a non-negotiable strategic device that is intended to harm the recipient if the "terms of surrender" are not accepted unconditionally. Since an award of attorneys' fees often affects the substantial rights of the parties, it seems fair to both parties that the judge should only consider valid offers of judgments when determining the amount of an attorneys' fees award, as only a valid offer has and should have any legal significance.

The amendment would not affect the admissibility of invalid offers other purposes, such as a proceeding to seek sanctions against a party or attorney.

⁵⁰ ARIZ. R. CIV. P. 68(e).

⁵¹ Scott v. Zhou, 98 P.3d 313, 315 (Nev. 2004).

RULE 68. OFFERS OF JUDGMENT**(f) Acceptance Period and the Effect of the Failure to Accept an Offer.**

* * * *

(4) The fact that an offer is made but not accepted does not preclude a subsequent offer. The service of a subsequent offer does not operate to revoke a prior offer. No party shall be subject to the sanctions of section (g) for the rejection of a prior offer from the same offeror.

This amendment establishes that, for the purposes of determining if a more favorable verdict was obtained, the district court may consider only the most recent offer of judgment.⁵² This amendment also establishes that while an offeror can only rely upon the most recent offer of judgment in post-trial proceedings, the offeree can accept any offer within the applicable ten-day acceptance period because the offers are irrevocable.⁵³ In other words, the offeree's power to accept an offer is not extinguished by the service of a subsequent offer.

RULE 68. OFFERS OF JUDGMENT**(f) Acceptance Period and the Effect of the Failure to Accept an Offer.**

* * * *

(5) *The service of a counter-offer does not operate as a rejection of a prior offer.*

This amendment establishes that the service of a counter-offer of judgment does not operate as a rejection of a prior offer of judgment. The Nevada Supreme Court has not addressed this issue in a published opinion. However, this policy appears consistent with the Nevada Supreme Court's rationale in other offer of judgment cases. Specifically, the Nevada Supreme Court has determined that policy behind Rule 68 and NRS § 17.115 supports the position that an offer of judgment should be irrevocable during the ten-day acceptance period;⁵⁴ the ten-day acceptance period is designed to give the offeree time to consider carefully the likely value of pursuing a claim in light of the offer of judgment and the possible penalties that flow from rejection;⁵⁵ the offeree is entitled not to be rushed into a hasty decision.⁵⁶ Those courts that have addressed this issue appear to hold uniformly that the service of a counter-offer does not operate as a rejection of a prior offer of judgment.⁵⁷

RULE 68. OFFERS OF JUDGMENT**(f) Acceptance Period and the Effect of the Failure to Accept an Offer.**

* * * *

(6) [With] For apportioned offers to multiple offerees that are conditioned upon the acceptance by all parties to whom the offer was directed, each offeree may

⁵² *Albios v. Horizon Cmtys, Inc.*, 132 P.3d 1022, 1031-33 (Nev. 2006).

⁵³ *Id.* at 1033 n.36.

⁵⁴ *Nava v. Second Judicial Dist. Court*, 46 P.3d 60, 61 (Nev. 2002).

⁵⁵ *Id.* at 61.

⁵⁶ *Id.*

⁵⁷ See, e.g., *Pope v. Lil Abner's Corp.*, 92 F.Supp.2d 1327, 1328 (S.D. Fla. 2000) (in noting that a "counteroffer does not terminate the power to accept an irrevocable offer," the court cites RESTATEMENT (SECOND) OF CONTRACTS § 37, at 103 (1981) and E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.23 (1998)).

serve a separate acceptance of the [apportioned] offer, but if the offer is not accepted by all offerees, no judgment or order of dismissal may be entered pursuant to section (e) and the action shall proceed as to all. Any offeree who fails to accept the offer [may] shall be subject to the [penalties of this rule] sanctions of section (g).

This amendment makes explicit the counterintuitive operation of the current rule which establishes that there are situations where a party can "accept" an offer of judgment, but judgment cannot thereafter be entered. It also establishes that this provision applies only to apportioned offers that are conditioned upon the acceptance by all, as apportioned offers that are not so conditioned should result in a judgment when accepted.

RULE 68. OFFERS OF JUDGMENT

~~[(f)] (g) [Penalties] Sanctions for Rejection of Offer. [If the offeree rejects an offer and fails to obtain a more favorable judgment,~~

~~—— (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and~~

~~—— (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.]~~

(1) Except as otherwise provided in paragraph (3), if a party who rejects an offer fails to obtain a more favorable judgment, the court:

(A) shall not award to the party any discretionary costs or discretionary attorneys' fees from the commencement of the action to the entry of the judgment;

This amendment establishes that an offeree that fails to obtain a more favorable verdict cannot obtain an award of discretionary costs or attorneys' fees.⁵⁸

RULE 68. OFFERS OF JUDGMENT

(g) Sanctions for Rejection of Offer.

(1) Except as otherwise provided in paragraph (3), if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

* * * *

(B) shall not award to the party any other costs or attorneys' fees for the period from the date of the service of the offer to the entry of the judgment;

This amendment establishes that an offeree that fails to obtain a more favorable verdict cannot obtain an award of post-offer nondiscretionary costs or nondiscretionary attorneys' fees. It clarifies that the offer of judgment rule does not operate to defeat an offeree's entitlement to pre-offer nondiscretionary costs or nondiscretionary attorneys' fees.

⁵⁸ Palace Station Hotel & Casino, Inc. v. Jones, 978 P.2d 323, 326 (Nev. 1999) (attorneys' fees disallowed where unsuccessful offeree's basis for fees was a discretionary award allowable under NEV. REV. STAT. § 18.010(2)); Bowyer v. Taack, 817 P.2d 1176, 1179 (Nev.1991) (same).

While the Nevada Supreme Court has noted that an unsuccessful offeree is absolutely prohibited from recovering *any* costs or attorneys' fees,⁵⁹ this sweeping observation has been made and reiterated in dicta. The *Bowyer* and *Palace Station* courts squarely addressed the extent of the offer of judgment penalties and in doing so noted that the offer of judgment penalties that disallow the offerees from recovering any costs and attorneys' fees are in conflict with the statutes that entitle the offerees to discretionary awards of attorneys' fees and costs. Both courts resolved the conflict by holding that the mandatory penalties defeated the discretionary entitlements to the costs and attorneys' fees awards.

The Nevada Supreme Court has not resolved the statutory conflict that arises when an unsuccessful offeree is subject to the mandatory penalties of the rule and the statute and is concurrently entitled to a *mandatory* award of attorneys' fees⁶⁰ and a *mandatory* award of litigation costs.⁶¹ A review of the appellate briefing to Nevada Supreme Court in recent cases reveals that it was not asked to resolve, and thus did not resolve, this statutory conflict. In such an instance, a court may resolve the conflict by sustaining the unsuccessful offeree's entitlement to pre-offer costs and pre-offer attorneys' fees and disallow the offeree its post-offer costs and post-offer attorneys' fees. This result would harmonize Nevada's law with federal law,⁶² and with the overwhelming majority of jurisdictions,⁶³ and would punish the unsuccessful offeree for the

⁵⁹ *McCrary v. Bianco*, 131 P.3d 573, 576 (Nev. 2006).

⁶⁰ For example, certain lien claimants are entitled to mandatory awards of attorneys' fees under NEV. REV. STAT. § 108.237 (2005).

⁶¹ For example, parties are entitled to mandatory awards of litigation costs under NEV. REV. STAT. § 18.020 (2005).

⁶² See FED. R. CIV. P. 68; *Marek v. Chesny*, 473 U.S. 1 (1985).

⁶³ The following jurisdictions have offer of judgment protocols that either expressly provide that the appropriate penalty is to cut-off the offeree's post-offer entitlement to costs and pay the offeror's post-offer costs or have been so interpreted where indicated: *Marek*, 473 U.S. at 6 (interpreting FED. R. CIV. P. 68 to provide that penalized offeree retains pre-offer costs and loses post-offer costs); FED. R. CIV. P. 68 (text of rule provides that offeree pays offeror's post-offer costs); ALA. R. CIV. P. 68; ARIZ. R. CIV. P. 68(d) (pays double offeree's costs, including expert witness costs in medical malpractice actions); ARK. R. CIV. P. 68; COLO. REV. STAT. § 13-17-202 (2006); CONN. GEN. STAT. § 52-195(b) (2006); DEL. SUP. CT. R. CIV. P. 68; D.C. SUP. CT. R. CIV. P. 68; GA. CODE ANN. § 9-11-68 (2006); HAW. R. CIV. P. 68; IDAHO R. CIV. P. 68; IND. R. TR. PROC. 68; *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230 (Iowa 1984) (interpreting Iowa Code § 677.10 to provide that penalized offeree retains pre-offer costs, loses post-offer costs, pays offeror's post-offer costs but not attorneys' fees); KAN. STAT. ANN. § 60-2002(b) (2005); KY. CT. R. 68(3); LA. CODE CIV. PROC. ANN. art. 970(C) (2006); ME. R. CIV. P. 68; MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-08A (2006) (medical malpractice only); MASS. R. CIV. P. 68; MISS. R. CIV. P. 68; MO. R. CIV. P. 77.04; MONT. R. CIV. P. 68; NEB. REV. STAT. § 25-901 (2006); N.J. CT. R. 4:58-2; N.M. DIST. CT. R. CIV. P. 1-068 (pays double offeree's post-offer costs); N.Y. C.P.L.R. 3219-3221 (Consol. 2007); N.C. GEN. STAT. § 1A-1, R. 68(a) (2006); OKLA. STAT. ANN. tit. 12, §§ 1101, 1101.1 (2006); R.I. R. CIV. P. 68(c); S.D. CODIFIED LAWS § 15-6-68 (2006); TENN. R. CIV. P. 68; VT. R. CIV. P. 68; WASH. SUP. CT. CIV. R. 68; W. VA. R. CIV. P. 68(c); WYO. R. CIV. P. 68.

North Dakota is similar to all the jurisdictions above, but it has an additional provision whereby if the offeror tenders money in lieu of a judgment, then the penalties are for the offeree to lose all costs and pay all the offeror costs without regard to when the tender was made. N.D. R. CIV. P. 68(a), (b). California is similar to the above jurisdictions, but has

direct consequences of the rejection of the offer; the offeree would lose its entitlement to post-offer costs and post-offer attorneys' fees and become liable for all of the offerors' applicable litigation expenses incurred after the service of the offer.

If the statutory conflict is resolved by concluding that the offer of judgment penalties prevail over all other conflicting laws, Nevada would join a very small minority of states with similar penalties. Such a result will render as illusory all other conflicting legislation and will likely frustrate the purpose of the offer of judgment laws because the result would have a tendency to force parties to forego legitimate claims. A disallowance of pre-offer attorneys' fees and pre-offer costs may work a substantial injustice in a case where a party spends considerable sums in litigation expenses in order to meet the adversary in court on an equal basis and does so in reliance upon an expectation to a mandatory award of costs and attorneys' fees. This concern is especially pronounced in consumer protection litigation and in commercial litigation, where attorneys' fees and costs may be substantial and often greater than the amount of the underlying dispute. Until this issue is resolved by the Nevada Supreme Court or the Legislature, an offeree must weigh the risk that Rule 68 will be interpreted to provide that the offeree's \$1,000,000 investment (or \$50,000,000 investment) in pre-offer litigation expenses will be completely lost if the offer is made years into the litigation and a mere eleven days before trial, even if the

additional eligibility for a discretionary award of expert witness fees actually incurred from the inception of the litigation. CAL. CIV. PROC. CODE § 998(c)(1) (2006); *Regency Outdoor Adver. v. City of Los Angeles*, 139 P.3d 119, 134-35 (Cal. 2006).

Two jurisdictions have offer of judgment protocols that expressly provide that the appropriate penalty is to cut-off the offeree's post-offer entitlement to costs and pay the offeree's post-offer costs and entitle the offeror to an award of post-offer attorneys' fees. FLA. STAT. § 768.79 (2006) (discretionary post-offer offeror costs and attorneys' fees); OR. R. CIV. P. 54(e)(3).

One jurisdiction has determined that its offer of judgment allows an offeror to recover all costs, but it leaves undisturbed the offeree's entitlement to recover all costs. *Borchert v. Maloney*, 581 N.W.2d 838, 840-41 (Minn. 1998) (interpreting MINN. R. CIV. P. 68). Another jurisdiction similarly provides that the offeror shall recover all its costs incurred plus attorneys' fees necessitated by the rejection, but it does not address the offeree's entitlement to its costs or attorneys' fees. MI. CT. R. 2.405(D) (2006). A third jurisdiction awards the offeror all its costs plus an 8% interest rate on the verdict for the period following the service of the offer, but does not address the offeree's entitlement to its costs or attorneys' fees. S.C. R. CIV. P. 68(b).

Another state (Wisconsin) has different types of offers with correspondingly different penalties. The most extreme penalties require a defendant offeree to pay double the plaintiff's costs and, when the offeree is the plaintiff, the plaintiff recovers no costs and pays the defendant's cost from the inception of the litigation. WIS. STAT. § 807.01 (2006).

By contrast, Alaska's offer of judgment protocols expressly provide that the appropriate penalty is to deprive the offeree from all costs and/or attorneys' fees: ALASKA R. CIV. P. 68(b) (offeror awarded all costs and certain post-offer fees in a state that has apparently rejected the American Rule for recovery of attorneys' fees).

Texas establishes that a plaintiff may not recover post-offer interest. TEX. FIN. CODE ANN. § 304.105 (Vernon 2006).

Two states, Illinois and Ohio, have no offer of judgment penalties whatsoever. At least one state's offers of judgment law applies only to medical malpractice cases. MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-08A.

rejection of the offer was reasonable, in good faith, and the offeree is the prevailing party but fails to beat the offer by a single penny.

RULE 68. OFFERS OF JUDGMENT

(g) Sanctions for Rejection of Offer.

(1) Except as otherwise provided in paragraph (3), if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

* * * *

(C) shall not award to the party any interest for the period from the date of service of the offer to the date of entry of the judgment;

(D) shall order the party to pay the taxable costs and applicable interest incurred by the offering party or parties from the date of the service of the offer to the entry of the judgment; and

This text is relocated from existing Rule 68(f)(2) and without substantive modification.

RULE 68. OFFERS OF JUDGMENT

(g) Sanctions for Rejection of Offer.

(1) Except as otherwise provided in paragraph (3), if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:

* * * *

(E) May order the party to pay the offering party any or all of the following:

(i) Reasonable costs incurred by the offering party for each testifying expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case for the period from the date of the service of the offer to the date of the entry of judgment, together with any applicable interest.

(ii) Reasonable attorneys' fees incurred by the offering party for the period from the date of the service of the offer to the date of entry of the judgment, together with any applicable interest.

This amendment establishes that an offeror is eligible for an award of expert witness costs for testifying experts that were reasonably accrued after the service of the offer. The text of Rule 68 currently does not provide for any such award. NRS § 17.115 provides that expert fees can be awarded but only if the "services were reasonably necessary to prepare for and conduct the trial of the case," but the statute does not specify when those costs begin to accrue and does not explicitly limit recovery to costs associated with testifying experts.⁶⁴ Inasmuch as this Article argues that the penalty should be reflective of the litigation expenses incurred as a result of the offeree's rejection, it asserts that the penalties should not include expert witness fees that were incurred before the service of the offer.

This amendment also preserves the current discretionary entitlement to an award of attorneys' fees. However, it eliminates the part of the current rule that provides that if the offeror's attorney is collecting a contingent fee, the amount

⁶⁴ NEV. REV. STAT. § 17.115 (2005).

of the *party's* fee award must be deducted from the *attorney's* fee.⁶⁵ As explained in the Nevada Civil Practice Manual:

Although the Rule 68 Drafting Committee Notes indicate that this rule is intended to "prevent double recovery" for an attorney, it is not clear that the attorney would obtain a "double recovery" in the absence of this rule and, worse, it appears that that the rule does not accomplish that goal. In fact, if the text of the rule were given literal effect, there will be situations where a successful attorney will be paid nothing but will instead owe the client a windfall amount.⁶⁶ It seems more appropriate to regulate the compensation between a counselor and a client by other and more traditional means. *See, e.g.*, NRPC 1.5(c) ("A fee may be contingent on the outcome of a matter for which the service is rendered, except in a matter in which a contingent fee is [a domestic relations matter or for representation of a defendant in criminal case] or other law"); NRS 18.010(1) ("The compensation of an attorney and counselor for his services is governed by agreement, express or implied, which is not restrained by law").⁶⁷

For an example of the unintended consequences that could occur under the current rule, consider a case where a claimant's offer of \$90,000 is rejected, the claimant later obtains a judgment of \$140,000, and the court orders a Rule 68 attorneys' fees award of \$60,000 in the claimant's favor. If the claimant's attorney negotiated a simple 25% contingency fee, then the attorney that would have been paid \$50,000 but for Rule 68(f)(2) is instead indebted to the claimant for \$10,000. This windfall for the claimant exists because the text of the current rule provides that the claimant's \$60,000 attorneys' fees award must be "deducted from that [attorney's] contingent fee" of \$50,000. This creates the absurd result of a conflict between the attorney and client. Even if this were not the intended result, it is difficult to craft any construction of the current rule that would produce any incentive for a claimant's attorney to counsel the client to serve an offer of judgment. The current rule creates a disincentive for the attorney to advocate for the maximum possible attorneys' fees award when the claimant becomes eligible for such an award; yet the benefit of contingent fees is to create this very type of performance incentive. Simply put, the current fee-limiting rule does not clearly comport with the overall operation and purpose of the offer of judgment law, which is to encourage settlement through the construction of incentives that operate to achieve that end. The proposed amendment corrects this evident error and restores the law to its pre-1998 condition.

RULE 68. OFFERS OF JUDGMENT

(g) Sanctions for Rejection of Offer.

* * * *

⁶⁵ NEV. R. CIV. P. 68(f)(2) ("If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.").

⁶⁶ *Final Committee Notes and Proposed Revised Rule 68*, IN THE MATTER OF THE REPEAL OF NEVADA RULE OF CIVIL PROCEDURE 68, ADKT 151 (Mar. 25, 1998).

⁶⁷ NEVADA CIVIL PRACTICE MANUAL § 24.02[9][e] (Jeffrey W. Stempel & Dennis Kennedy eds., 5th ed. 2006).

(2) An award against a party made pursuant to this section shall not exceed that portion of the costs, attorneys' fees and applicable interest that are severally attributable to the party.

This amendment also establishes that awards for costs, attorneys' fees, and applicable interest are limited to the expenses severally attributable to the party or parties that reject an offer. This clarification is necessary to describe what limitations exist on the penalty when one or more parties accept an apportioned offer that is conditioned upon acceptance by all. Inasmuch as this Article argues that the penalty should be reflective of the litigation expenses incurred as a result of the offeree's rejection, this Article asserts that the penalties should not include expenses incurred in the same action but connection with the claims or defenses concerning another party.

RULE 68. OFFERS OF JUDGMENT

(g) Sanctions for Rejection of Offer.

* * * *

(3) *The court may suspend the application of this section to prevent manifest injustice or if the offer was made in bad faith.*

This amendment makes clear that a court may suspend the application of Rule 68 to prevent manifest injustice. This is consistent with the constitutional limitations on the Nevada Supreme Court's ability to craft rules of procedure and with the purposes of the Rules of Civil Procedure.⁶⁸ This amendment also makes explicit that an offer of judgment must be served in good faith. A district court has the discretion to invalidate an offer that is not made in good faith, that is, one that is not served for the purpose of settling a case.⁶⁹

An offer that has no reasonable prospect of acceptance under the circumstances of the particular case does not encourage settlement,⁷⁰ nor furthers the purpose of the offer of judgment law, and if given effect, would force parties to forego legitimate claims or defenses.⁷¹ It would frustrate the purpose of the offer of judgment rule if a district court were to give any effect to a defendant's

⁶⁸ NEV. CONST. art. I, § 3; *Williams v. Williams*, 877 P.2d 1081, 1083 (Nev. 1994) (the "right to jury trial 'must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable'"); FED. R. CIV. P. 1 (The Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). At least one state makes this explicit. See UTAH R. CIV. P. 68(b) ("The court may suspend the application of this rule to prevent manifest injustice.").

⁶⁹ *Allianz Ins. Co. v. Gagnon*, 860 P.2d 720, 724 (Nev. 1993) (holding that there are "good faith limitations" which operate to protect an offeree to the same degree that an offeree is protected from an untimely offer).

⁷⁰ As stated in *Elrod v. Oregon Cummins Diesel*, 195 Cal. App. 3d 692, 698 (Cal. Ct. App. 1987):

[T]he Legislature intends that only good faith settlement offers qualify as valid offers under section 998. . . . But when is a section 998 offer made in good faith? *Wear* concludes a good faith offer "must be realistically reasonable under the circumstances of the particular case." *Wear v. Calderon*, 121 Cal. App. 3d 818, 821 (1981). It must carry with it some reasonable prospect of acceptance.

Id.

⁷¹ See *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983) (stating that Rule 68 is not intended to force plaintiffs unfairly to forego legitimate claims).

token offer of judgment or other nominal offer made before meaningful discovery is obtained and the plaintiff thereafter fails to obtain a more favorable judgment in a meritorious action.⁷² A contrary result would permit the rule to be used as a tactical device solely for the purpose of obtaining costs or attorneys' fees to which an offering party would not otherwise be entitled.

RULE 68. OFFERS OF JUDGMENT

(g) Sanctions for Rejection of Offer.

* * *

(4) An offeror shall not be deemed the prevailing party solely due to the offeree's failure to obtain a more favorable judgment.

This amendment establishes that a court shall not deem the offeror as the "prevailing party" as a matter of law because the offeree failed to obtain a more favorable judgment.⁷³ Instead, the offeree may be the prevailing party even though the offer of judgment penalties will apply against the offeree.⁷⁴

RULE 68. OFFERS OF JUDGMENT

~~[(g)] (h) [How Costs Are Considered] Determination of More Favorable Judgment. [To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. Where the offer provided that costs would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs. Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment.]~~

(1) To determine whether a party who rejected an offer of judgment failed to obtain a more favorable judgment:

(A) If the offer provided that the court could award costs, attorneys' fees or interest upon acceptance, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, attorneys' fees or interest.

(B) If the offer precluded a separate award of costs, attorneys' fees or interest upon acceptance, the court must compare the amount of the offer with the sum of:

(i) The principal amount of the judgment; and

(ii) The amount of applicable taxable costs, attorneys' fees and interest, including applicable interest on such costs and attorneys' fees, incurred up to and including the date the offer was served. In making this comparison, the court shall calculate interest at the rate in effect on the date the offer was rejected.

This amendment adds clarity and precision to the method that a court must undertake to compare an offer with a judgment in that it explicitly accounts for the treatment of costs, attorneys' fees, interest, and interest on costs and attorneys' fees.⁷⁵

⁷² See *Nelson v. Anderson*, 72 Cal. App. 4th 111, 134 (Cal. Ct. App. 1999) (noting that even a modest offer may be reasonable if an action is completely lacking in merit).

⁷³ See *Armstrong v. Riggi*, 549 P.2d 753 (Nev. 1976).

⁷⁴ *Id.*

⁷⁵ See *Albios v. Horizon Cmtys., Inc.*, 132 P.3d 1022, 1033 (Nev. 2006) (when making a comparison, where the offeror "expressly excluded attorney fees and costs, only pre-offer prejudgment interest awarded on the [verdict] can be considered").

Next, this amendment departs from the Nevada Supreme Court's recent discussion on determining which interest rate to employ to make the comparison. The *Albios* court has explained that the interest rate in effect on the date the judgment is entered is the operative interest rate, and the interest rate in effect on the date of the offer is irrelevant.⁷⁶ This seems erroneous, as the crux of a court's post-judgment analysis is whether the offer should have been accepted, and therefore the interest rate in effect on the last day that acceptance was possible seems to be more appropriate for the analysis.

Finally, this amendment implicitly defines the phrase "principal amount of the judgment" to mean the amount of the judgment less any applicable taxable costs, attorneys' fees and interest. The phrase is presently used in Rule 68 and NRS § 17.115, but its meaning is vague and ambiguous in both the rule and the statute.

RULE 68. OFFERS OF JUDGMENT

(h) Determination of More Favorable Judgment.

* * * *

(2) The court shall take into account any additur or remittitur before making the comparison.

This amendment establishes that the court shall take into account any additur or remittitur before making the comparison. The Nevada Supreme Court has not yet directly determined how a trial court's post-trial additur or remittitur affects the determination of a more favorable judgment, but it seems ready to conclude that this comparison is made after the trial court's additur or remittitur.⁷⁷

RULE 68. OFFERS OF JUDGMENT

(h) Determination of More Favorable Judgment.

* * * *

(3) The court shall assign no value to a determination of good faith settlement when making the comparison.

This amendment establishes that the court shall assign no value to a determination of good faith settlement when making the comparison. Absent this instruction, a court may not be readily able to assign a value to a condition requiring a determination of good faith settlement and thus may invalidate an offer. This amendment promotes settlement in certain actions with multiple defendants.

RULE 68. OFFERS OF JUDGMENT

~~(h) Offers After Determination of Liability. When the liability of one party to another has been determined by verdict, order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer~~

⁷⁶ *Id.* at 1033 n.39.

⁷⁷ See *Lee v. Ball*, 116 P.3d 64, 67 (Nev. 2005).

~~made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.]~~⁷⁸

(i) Signing of Offers. Every offer shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. An unrepresented party shall sign the disclosure and state the party's address. An unsigned offer is void. The signature of the attorney or party certifies that the offer is made in good faith and for the purpose of obtaining a settlement.

This amendment supplements the requirement that the offer must be reduced to writing to be valid as required by Rule 68(a). This amendment alerts the signing individual that the purpose of the offer is to obtain a settlement. This is necessary to alert the signing individual and/or place *some* risk on the offeror who acts inconsistently with the purpose of Rule 68. Rule 11 alone may not be sufficient because it allows a signatory twenty-one days to withdraw the suspect paper, yet an offer will be deemed rejected if it is not accepted within the ten-day acceptance period in the absence of court intervention.

RULE 68. OFFERS OF JUDGMENT

(j) When inapplicable. This rule is not applicable to suits for divorce, alimony, separate maintenance or custody of children.

This amendment makes explicit the court's holding that the offer of judgment rules do not apply to divorce proceedings, child support cases, or child custody matters.⁷⁹ The text of this amendment replicates the first sentence of Rule 65(f).

IV. CONCLUSION

The current rule is inadequate to the task of providing certainty of outcome and therefore does not adequately promote settlement. The proposed rule is believed to be better suited to fulfill that important task.

⁷⁸ This provision has been amended and relocated to Rule 68(a)(2) & Rule 68(a)(3)(B), *supra*.

⁷⁹ *Leeming v. Leeming*, 490 P.2d 342, 345 (Nev. 1971).

APPENDIX OF FORMS

The following forms are to be used and adopted in conjunction with the proposed amendment to Rule 68. They are intended to comply with Rule 84: to be sufficient under the rule and to indicate the simplicity and brevity of statement which the rules contemplate. With the exception of the last form, they are not adequate for use under current law.

Form 33. Lump-Sum Offer of Judgment Under Rule 68.

A.B., Plaintiff,)	
v.	)	<i>Offer of Judgment</i>
C.D., Defendant.)	

Pursuant to NRCP 68, defendant C.D. hereby offers to allow judgment to be taken against defendant C.D. and in favor of plaintiff A.B. in the amount of \$100,000 to resolve all claims between the parties in the above-captioned action.

Form 34. Non-Lump-Sum Offer of Judgment Under Rule 68.

A.B., Plaintiff,)	
v.	)	<i>Offer of Judgment</i>
C.D., Defendant.)	

Pursuant to NRCP 68, plaintiff A.B. hereby offers to allow judgment to be taken in favor of plaintiff A.B. and against Defendant C.D. in the amount of \$100,000, excluding all accrued interest, costs, attorneys' fees and any other sums to resolve all claims between the parties in the above-captioned action. Following acceptance, the plaintiff may seek accrued interest, costs and attorneys' fees by separate motion.

Form 35. Lump-Sum Apportioned Offer of Judgment Under Rule 68 to Multiple Offerees and Conditioned Upon the Acceptance by All Offerees.

A.B. & C.D., Plaintiffs,)	
v.	)	<i>Offer of Judgment</i>
E.F., Defendant.)	

Pursuant to NRCP 68, defendant E.F. hereby offers to allow judgment to be taken in favor of plaintiff A.B. and against defendant E.F. in the amount of \$100,000 to resolve all claims between those parties in the above-captioned action; and offers to allow judgment to be taken in favor of plaintiff C.D. and against defendant E.F. in the amount of \$50,000 to resolve all claims between those parties in the above-captioned action. This apportioned offer of judgment is conditioned upon the acceptance of all plaintiffs.

Form 36. Lump-Sum Apportioned Offer of Judgment Under Rule 68 to Multiple Offerees and Not Conditioned Upon the Acceptance by All Offerees.

A.B. & C.D., Plaintiffs,)	
v.	)	<i>Offer of Judgment</i>
E.F., Defendant.)	

Pursuant to NRCP 68, defendant E.F. hereby offers to allow judgment to be taken in favor of plaintiff A.B. and against defendant E.F. in the amount of \$100,000 to resolve all claims between those parties in the above-captioned action; and offers to allow judgment to be taken in favor of plaintiff C.D. and against defendant E.F. in the amount of \$50,000 to resolve all claims between those parties in the above-captioned action. This apportioned offer of judgment is not conditioned upon the acceptance of all plaintiffs.

Form 37. Lump-Sum Unapportioned Offer of Judgment Under Rule 68 jointly made from Multiple Offerors.

A.B. & C.D., Plaintiffs,)	
v.	)	<i>Offer of Judgment</i>
E.F., Defendant.)	

Pursuant to NRCP 68, plaintiff A.B. and plaintiff C.D., jointly, hereby offer to allow judgment to be taken in favor of plaintiffs and against defendant E.F. for \$100,000 to resolve all claims between the parties in the above-captioned action.

Form 38. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 to Multiple Plaintiffs.

A.B. & C.D., Plaintiffs,)	
v.	)	<i>Offer of Judgment</i>
E.F., Defendant.)	

Pursuant to NRCP 68, defendant E.F. hereby offers to allow judgment to be taken against defendant E.F. and in favor of plaintiff A.B. and plaintiff C.D., jointly, for \$100,000 to resolve all claims between the parties in the above-captioned action.

Form 39. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 to Multiple Defending Parties.

A.B., Plaintiff,)	
v.	)	<i>Offer of Judgment</i>
C.D. & E.F., Defendants.)	

Pursuant to NRCP 68, plaintiff A.B. hereby offers to allow judgment to be taken in his favor and against defendants C.B. and E.F., jointly, for \$100,000 to resolve all claims between the parties in the above-captioned action.

Form 40. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 jointly made from Multiple Offerors to Multiple Offerees.

A.B. & C.D., Plaintiffs,)	
v.	)	<i>Offer of Judgment</i>
E.F. & G.H., Defendants.)	

Pursuant to NRCP 68, defendants E.F. and G.H., jointly, hereby offer to allow judgment to be taken against defendants E.F. and G.H. and in favor of plaintiff A.B. and plaintiff C.D., jointly, for \$100,000 to resolve all claims between the parties in the above-captioned action.

Form 41. Lump-Sum Apportioned Offer of Judgment Under Rule 68 jointly made from Multiple Offerors to Multiple Offerees Conditioned Upon the Acceptance by All Offerees.

A.B. & C.D., Plaintiffs,)	
v.	)	<i>Offer of Judgment</i>
E.F. & G.H., Defendants.)	

Pursuant to NRCP 68, defendants E.F. and G.H., jointly, hereby offer to allow judgment to be taken against them and apportioned as follows: in favor of plaintiff A.B. for \$100,000 to resolve all claims between the parties in the above-captioned action; and in favor of plaintiff C.D. for \$50,000 to resolve all claims between the parties in the above-captioned action. This apportioned offer of judgment is conditioned upon the acceptance of all plaintiffs.

Form 42. Non-Lump-Sum Offer of Judgment Under Rule 68 to Quiet Title in Easement.

A.B., Plaintiff,)	
v.	)	<i>Offer of Judgment</i>
C.D., Defendant.)	

Pursuant to NRCP 68, defendant C.D. hereby offers to allow judgment to be taken against defendant C.D. and in favor of plaintiff A.B. to resolve all claims between the parties in the above-captioned action as follows:

Plaintiff A.B. is entitled to have a prescriptive road easement fifteen (15) feet in width on and across the following described land: [Legal description of defendant C.D.'s real property].

Said roadway easement is more particularly described as follows: [Legal description of roadway easement on defendant C.D.'s real property].

Said road easement shall be a perpetual non-exclusive easement for ingress and egress to and from a tract of land owned by plaintiff A.B. and more particularly described as follows to wit: [Legal description of plaintiff A.B.'s real property].

Following acceptance, the plaintiff may seek accrued interest, costs and attorneys' fees by separate motion.