Drake
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Hon. Mark W. Bennett (Ret.)
Director, Institute for Justice Reform & Innovation
mark.bennett@drake.edu

T 515-271-2908
F 515-271-1958

June 17, 2019

ADVISORY COMMITTEE ON CIVIL RULES
Chair, Advisory Committee on Civil Rules
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United States District Court
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W., Room 4114
Washington, DC 20001

Reporter, Advisory Committee on Civil Rules
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University of Michigan Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Associate Reporter, Advisory Committee on Civil Rules
Professor Richard L. Marcus
University of California
Hastings College of the Law
200 McAllister Street
San Francisco, CA 94102-4978

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United States District Court
John Joseph Moakley
United States Courthouse
One Courthouse Way, Room 6400
Boston, MA 02210-3002

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219 South Dearborn Street, Room 1978
Chicago, IL 60604

Honorable Joan N. Ericksen
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United States Courthouse
300 South Fourth Street, Room 12W
Minneapolis, MN 55415

Honorable Joseph H. Hunt
Assistant Attorney General (ex officio)
United States Department of Justice, Civil Div.
950 Pennsylvania Ave., N.W., Suite 3601
Washington, DC 20530

Honorable Kent A. Jordan
United States Court of Appeals
J. Caleb Boggs Federal Building
844 North King Street, Room 5100
Wilmington, DE 19801-3519

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Utah Supreme Court
450 South State, PO Box 140210
Salt Lake City, UT 84114-0210

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United States Courthouse
Two South Main Street, Room 526
Akron, OH 44308

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United States District Court
Missouri River Courthouse
125 Central Avenue West, Suite 301
Great Falls, MT 59404

Honorable Robin L Rosenberg
United States District Court
Paul G. Rogers Federal Building and
United States Courthouse
701 Clematis Street, Room 453
West Palm Beach, FL 33401

Virginia A. Seitz, Esq.
Sidley Austin LLP
1501 K Street, N.W.
Washington DC 20005

Joseph M. Sellers, Esq.
Cohen Milstein Sellers & Toll PLLC
1100 New York Avenue N.W., Fifth Floor
Washington, DC 20005

A. Benjamin Spencer
Justice Thurgood Marshall Distinguished
Professor of Law
University of Virginia Law School
580 Massie Road, Rm. WB173E
Charlottesville, VA 22903

Ariana J. Tadler, Esq.
Milberg Tadler Phillips Grossman LLP
One Penn Plaza, Suite 1920
New York, NY 10119

Helen E. Witt, Esq.
Kirkland & Ellis LLP
300 North LaSalle
Chicago, IL 60654

Peter D. Keisler, Esq.
Sidley Austin, LLP
1501 K Street, N.W.
Washington DC 20005

Honorable A. Benjamin Goldgar
United States Bankruptcy Court
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street, Room 638
Chicago, IL 60604

Clerk of Court Representative,
Advisory Committee on Civil Rules
Laura A. Briggs
Clerk of Court
United States District Court
105 Birch Bayh Federal Building and U.S.
Courthouse
46 East Ohio Street
Indianapolis, IN 46204

Rebecca A. Womeldorf
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Chief Counsel
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544

Re: Suggestions to change Rule 68 and Rule 26(b) (4) (E)

Dear Members of the Advisory Committee on Civil Rules:

By way of introduction I recently retired as a U.S. district court judge in the N.D. of Iowa after 24 years of service to become a fulltime academic. One of my colleagues here at the Drake University Law School, Professor Danielle M. Shelton, a 1995 *magna cum laude* graduate of the Harvard Law School, who also practices law, has written two excellent law review articles, which are enclosed.

Her articles brilliantly analyze specific problems encountered by courts and litigants with regard to Rule 68 and Rule 26(b)(4)(E). Perhaps even more helpfully, each article provides a practical and well thought-out solution.

I have never written any rules committee member before but because I was so struck by the profound wisdom of Professor Shelton's articles wanted to write each of you. I have personally encountered many of the problems Professor Shelton writes about and wholeheartedly endorse her proposed changes. These are not your typical law professor pie-in-the-sky solutions but very practical suggestions on how to improve each rule to achieve greater fairness, efficiency, and justice. The proposed changes would greatly reduce litigation expenses in these areas by providing much more clarity on issues that are frequently litigated. Thomas A. Edison observed: "There's a way to do it better – find it." Professor Shelton has done just that.

Sincerely,

Mark W. Bennett

Hon. Mark W. Bennett (Ret. U.S. District Judge), Director
Institute for Justice Reform & Innovation
Drake Univ. Law School
2507 Univ. Ave. Des Moines, Iowa 50311
515-271-2908
Bennett's SSRN page: https://ssrn.com/author=703083

"*The arc of the moral universe is long, but it bends towards justice.*" –
MLK, Jr. & Rev. Theodore Parker. The thing of it is it does not bend on its own.

91 Minn. L. Rev. 865

Minnesota Law Review
April, 2007

Article
Danielle M. Shelton [d1]

REWRITING RULE 68: REALIZING THE BENEFITS OF THE FEDERAL SETTLEMENT RULE BY INJECTING CERTAINTY INTO OFFERS OF JUDGMENT

> "If there is any occasion in civil litigation which calls for caution and care by counsel, it is the drafting of a Rule 68 offer." [1]

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***867** Enacted more than sixty years ago, Federal Rule of Civil Procedure 68[2] has never lived up to its promise of "encourag[ing] settlements and avoid[ing] protracted litigation."[3] Yet in recent years, as the popularity of alternative dispute resolution waxes, the rule has earned favor among academics.[4] Still, to most practitioners the rule remains a second-class citizen. The rule's inferior citizenship is well-deserved. Due to its ambiguity, Rule 68 often creates more uncertainty, and more burdensome litigation, than it resolves. As such, many defendants either avoid it or use it at their peril.

The problem lies in the lack of definition and clarity in the rule itself. The rule, which is the only federal rule of civil procedure that governs formal settlement offers, is supposed to operate to encourage plaintiffs to "think hard" about accepting reasonable settlement offers. Plaintiffs who refuse a Rule 68 offer, and then receive a less favorable outcome at trial, are penalized; they not only lose their ability to recover their post-offer costs and applicable attorneys' fees but also must pay the other side's post-offer costs.[5]

In practice, though, the rule's operation is much less clear. Because the rule is cursory in form and does not alert the parties to its many nuances, defendants often are uncertain or ***868** misguided about how to draft a Rule 68 offer. Defendants often end up drafting offers that carry unintended consequences. Similarly, plaintiffs who receive Rule 68 offers face uncertainty. A plaintiff must decide whether to accept or reject a given offer, knowing that either decision carries consequences that hinge upon how a court will construe the offer or how a court will compare the offer to the judgment received at trial. It is not surprising that defendants largely avoid the rule and plaintiffs decry the rule as unfair.

Both defendants and plaintiffs are correct in their assessments--the case law is replete with instances in which judges have construed Rule 68 offers as something very different from what the parties intended to offer or accept. The end result of this uncertainty is that cases that would be good candidates for Rule 68 settlements are not so settled, and those in which Rule 68 offers are attempted often result in costly collateral litigation. A defendant who thinks he is making a lump-sum offer for $15,000 ends up being told by the court that in fact he also must pay a six-figure attorney fee award. Likewise, a plaintiff who thinks she just accepted an offer for $75,000 exclusive of attorneys' fees is surprised to learn from the court--after she accepted the offer--that in fact the offer already included such fees and thus she cannot recover her six-figure attorneys' fees in addition to the offer.

It does not have to be this way. The rule can and should be amended so that it becomes a predictable and useful tool for practitioners to settle cases. This Article focuses on amending the primary part of the rule that leads to uncertainty--the Rule 68 offer.

Part I provides an overview of the basic features of Rule 68, including the rule's purpose. It also describes the components of Rule 68 offers and the roles of defendants, plaintiffs, and courts in relation to such offers.

Part II examines the current uncertainty surrounding the validity and interpretation of offers under Rule 68. By examining federal court cases in which Rule 68 is applied, it explores uncertainty surrounding the interpretation of such offers. It also explores the implications of such uncertainty, including the failure of defendants to use the rule, the drafting problems when defendants use the rule, the difficulties plaintiffs face in evaluating offers, and the resulting collateral litigation.

Part III proposes an amendment to the rule that would provide clarity and predictability to defendants making Rule 68 ***869** offers and to plaintiffs and courts called upon to evaluate such offers. Specifically, it proposes an amendment to the rule that would define what must be included in a Rule 68 offer and direct how courts must interpret such offers. Part III devotes particular attention to amending the rule to eliminate much of the current confusion over whether costs and fees are included in an offer.

With this amendment, defense attorneys will understand and use the rule without fear. Plaintiffs' attorneys, too, will be on notice as to how courts will construe an offer, and will be able to make informed decisions about whether to accept or reject an offer. The end result of such clarity and predictability will be not only that Rule 68 offers will be properly made and properly assessed, but also that such offers will be enforced with only minimal court intervention and limited collateral litigation. With greater certainty in the rule, Federal Rule of Civil Procedure 68 can begin to live up to its purpose of fostering settlements and promoting judicial economy.

I. THE PROMISE OF RULE 68 OFFERS OF JUDGMENT

A. A Primer on Rule 68 and Its Purpose

Federal Rule of Civil Procedure 68[6] is the only settlement device or federal rule of any kind, that "deals directly with the consequences of an unreasonable refusal to settle."[7] Under the rule, a defendant may make an offer of judgment to the plaintiff, ***870** which allows judgment to be taken against the defendant.[8] While the rule requires few formalities, the offer must be for damages as well as costs then accrued.[9] If the plaintiff accepts the offer, judgment is entered for the amount of the offer as a matter of course. If, instead, the plaintiff rejects the offer but receives less at trial, Rule 68 penalizes the plaintiff by shifting all post-offer costs to the plaintiff.[10] The penalty is two-fold: the plaintiff must pay the defendant's post-offer costs and the plaintiff cannot recover her own post-offer costs.[11] These shifting costs can be particularly high in actions in which attorneys' fees are defined as "costs,"[12] such that the plaintiff is precluded from recovering otherwise applicable attorneys' fees on a successful verdict that is less than the amount of the Rule 68 offer.[13]

***871** Because of Rule 68's ability to change the financial incentives of pursuing litigation, the rule requires plaintiffs to "think hard" before rejecting Rule 68 offers.[14] A prototypical case is one in which the defendant makes a Rule 68 offer for $100,000 plus costs then accrued. If the plaintiff accepts the offer, judgment is entered for $100,000 and the plaintiff also may recover her costs then accrued. If the plaintiff rejects the offer, and then recovers $105,000 at trial, the rule has no consequence. The plaintiff recovers the amount of the judgment as well as any costs. If, instead, the plaintiff rejects the offer, but recovers only $80,000 at trial, the rule is triggered and costs shift. Thus, the plaintiff recovers the $80,000 but cannot recover her post-offer costs and instead must pay the defendant's post-offer costs. This sanction is of particular consequence in fee-shifting cases in which the plaintiff's claim is one under which "costs" are defined to include attorneys' fees.[15] In such cases, the plaintiff cannot recover the post-offer attorneys' fees to which she otherwise would have been entitled.

The often-touted purpose of Rule 68 is "to encourage settlement and avoid litigation."[16] The rule does so by "prompt[ing] both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood

of success upon trial on the merits." [17] The rule's policy of encouraging settlement is said to be neutral, "favoring neither plaintiffs nor defendants." [18]

***872** Despite the rule's clear purpose, it is not clear that much thought was put into drafting the rule. [19] The rule itself is rather cursory in form and "has long been among the most enigmatic of the Federal Rules of Civil Procedure." [20] Since 1983, several proposals have been made to amend Rule 68, but none has been adopted. [21] Most of these proposals have focused on changing the incentives under the current rule [22] and stem from the widespread belief that the rule is underutilized, unfair, or ineffective. Indeed, the anecdotal evidence and empirical research on Rule 68 demonstrates that the rule is used infrequently, [23] and some research also suggests that the current incentives are inadequate to achieve the rule's purpose. [24]

B. The Rule 68 Offer: Requirements and Consequences

At the core of much litigation involving Rule 68 lies the offer of judgment itself. However, the text of the rule provides little guidance as to what an offer must include and how a court will interpret it: [25] "[A] party defending against a claim may ***873** serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued." [26]

Under well-established case law following the Supreme Court's decision in Marek v. Chesny, an offer must include costs. [27] Costs can be included as part of the offer (i.e., the defendant makes a lump-sum offer that is inclusive of costs) or costs can be included after the fact (i.e., the defendant makes an offer for a certain amount that is not inclusive of costs, thus allowing costs to be added later). [28]

Once a defendant makes a Rule 68 offer, the offer itself is non-negotiable. [29] The offeree-plaintiff has only two choices: accept the offer on its face or reject it. Either way, a plaintiff must assess what exactly the offer is, because "a Rule 68 . . . offer has a binding effect when refused as well as when accepted." [30] If the offer is accepted, Rule 68 operates automatically and without the court's discretion. [31] As such, if the plaintiff accepts the offer, the court must enter judgment for the amount specified in the offer. [32] The court may not second guess the terms of the offer, as "[e]ntry of a Rule 68 judgment is ministerial rather than discretionary." [33]

***874** If the plaintiff chooses to reject the offer and instead elects to proceed to trial, the rule's cost-shifting mechanism is triggered if "the judgment finally obtained by the [plaintiff] is not more favorable than the offer." [34] The cost-shifting mechanism is mandatory; under the rule, the plaintiff "must pay the costs incurred after the making of the offer." [35] In practice, this means that the plaintiff must bear her own post-offer costs (that otherwise would be recoverable) and also must pay the post-offer costs of the defendant. [36] The offer "stands as the marker by which the plaintiff's results are ultimately measured." [37] That is, the offer becomes the benchmark a plaintiff must surpass at trial to avoid the shifting of costs--both her own and those of the defendant--under Rule 68. [38]

Further, in comparing the offer and the judgment, a court should be mindful that an apples-to-apples comparison be made: if the offer includes costs, the judgment amount, too, should account for or include costs accrued from the time of the offer. [39] Because plaintiffs must respond with either acceptance or silence to a Rule 68 settlement offer, and because either response has consequences, [40] one court has reflected that "plaintiffs are at their peril whether they accept or reject a Rule 68 offer." [41]

The question that arises is what constitutes "costs" under Rule 68. The rule itself does not define costs but instead adopts ***875** the statutory definition [42] of 28 U.S.C. § 1920, the federal taxation-of-costs statute. [43] Under that statute, "costs" include clerk's court costs, court reporter fees, witness fees, and other incidental costs of trial. [44] Attorneys' fees, on the other hand, are not considered costs within the meaning of § 1920. [45] Even so, some statutes expand the § 1920 definition of costs to include attorneys' fees. [46] In those cases in which costs are broadly defined, the practical effect is that "a plaintiff who refuses a Rule 68 offer may lose entitlement to some portion of attorneys' fees if the plaintiff does not recover more in the litigation than the defendant offered in settlement via Rule 68." [47]

Because a plaintiff's decision to accept or to reject the offer depends on how a court will construe the non-negotiable Rule 68 offer, any uncertainty about the court's interpretation of the offer creates risk for the plaintiff. [48] A risk-averse plaintiff will be particularly susceptible to the pressure of accepting a Rule 68 offer, even if the offer is unclear, lest she otherwise risk losing attorneys' fees and paying the defendant's costs later. [49]

***876 II. DIFFICULTIES IN INTERPRETING OFFERS: UNCERTAINTIES IN RULE 68 OFFERS UNDERMINE THE RULE'S PURPOSE**

Despite Rule 68's promise of promoting settlements and ending unnecessary litigation, [50] the rule has done little to advance either goal. Instead, the rule's ambiguity has served to discourage its use as a settlement vehicle. Under the current rule, plaintiffs are not the only ones who have to "think hard" about a Rule 68 offer--defendants, too, must "think hard" about whether and how to make such an offer in the first place. [51] Uncertain how courts will interpret their offers and not wanting to be in a worse position after making an offer, many defendants make the prudent choice to avoid the rule altogether. [52] Of equal concern is what happens when a defendant does make an offer. Defendants, uncertain as to the parameters of Rule 68, [53] draft arguably ambiguous offers that ultimately subject the defendants to unintended consequences, while at the same time leaving plaintiffs unable to value such offers accurately. [54] The combined result of litigants' uncertainty is that the rule--whether avoided or used-- does little to achieve its purpose of furthering financial and judicial economy. [55]

***877 A. The Nature of the Uncertainty in Drafting and Evaluating Rule 68 Offers**

In theory, "[Rule 68] prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits." [56] However, under Rule 68, evaluating the value of a case has come to include much more than a party simply determining whether and how much it is likely to win or lose at trial--an evaluation every party engaged in settlement discussions must make. [57] Instead, parties making or contemplating acceptance of a Rule 68 offer must consider how the court is likely to interpret the terms of such offer; the wording of the offer becomes all-important. [58] Even seemingly straightforward Rule 68 offers become a riddle for the unsuspecting practitioner. [59]

***878** Much of the uncertainty in Rule 68 litigation pertains to recovery of costs and attorneys' fees. In Marek v. Chesny, the Supreme Court held that all Rule 68 offers must include costs. [60] Defendants may include costs by offering a lump-sum settlement inclusive of costs or by offering a settlement exclusive of costs to which costs willlater be added if accepted. Attorneys' fees complicate the question because they are not considered part of "costs," and therefore they are not included in the lump-sum settlement, unless the statute under which the lawsuit is brought so defines them. [61] For example, attorneys' fees are defined as part of costs in § 1983 actions [62] but are defined separately from costs in

Age Discrimination in Employment Act (ADEA) claims.[63] To add to the complication, even for claims brought under statutes such as the ADEA in which attorneys' fees are not defined as costs, courts may still add attorneys' fees to an offer that does not clearly exclude them.[64] The result is that Rule 68's application varies greatly depending on how the statute underlying a plaintiff's claim defines attorneys' fees and how the particular offer is drafted.[65]

***879** Consider the following hypothetical: A plaintiff receives a Rule 68 offer of judgment for $175,000 and must weigh that offer against her assessment of the value of her case at that time. If she thinks she is likely to recover $150,000 at trial, it would appear at first blush that she should accept the offer. But what if the offer also arguably is inclusive of costs? Imagine the offer is for "$175,000 including costs." If her costs at that point are only $10,000 then it would still appear she should accept the offer. But what if it is a civil rights case under which the relevant statute defines attorneys' fees as part of "costs?" If her attorneys' fees at that point are $40,000, then the offer no longer appears to be a good settlement for her. She is now comparing the offer of $175,000 to her expected recovery (at that point) of $200,000. Even so, the offer would be a good settlement for her if her claims were brought under a statute that allowed recovery of attorneys' fees, although not defining such fees as "costs." In that situation, she would expect that if she accepted the offer, she would be able to seek recovery of her attorneys' fees in addition to the $175,000.

Her uncertainty in evaluating the offer would be magnified if the offer stated that it was for "$175,000 with costs." Does the term "with costs" mean that if she accepts the offer, costs will be awarded in addition to the $175,000, or does it mean costs are included within the $175,000? What if the offer was for "$175,000 in full satisfaction of all claims?" What if the offer stated "$175,000 including costs (but not attorneys' fees)?" And last, what if it purported to be a "lump sum offer for $175,000" yet did not explicitly refer to costs and attorneys' fees?

These hypothetical questions have no clear or easy answers. The text of Rule 68 provides little guidance on how to draft a Rule 68 offer and little notice to plaintiffs about how a court will interpret an offer.[66] In addition, the case law applying the rule to specific offers does not establish a consistent test for litigants to use in drafting and evaluating Rule 68 offers.[67] Thus, even if litigants had unlimited resources to research and ***880** evaluate Rule 68 before making or accepting an offer--a dubious assumption, especially for a rule intended to promote financial economy[68]--considerable uncertainty would still accompany the current rule.

What are the particular uncertainties and risks litigants face under Rule 68? The only purposeful risk is the risk that the rule was intended to create-- the risk to the plaintiff of not being able to recover post-offer costs (and attorneys' fees if the claim is brought under a fee-shifting statute that defines fees as "costs") if the judgment obtained at trial is less than the offer.[69] The other risks--and risks that do not advance the rule's purpose--are those which stem from the uncertainties surrounding the application of the rule to determine the validity and meaning of particular offers.

The cases discussed below highlight the uncertainty that currently surrounds the interpretation of Rule 68 offers.[70] Much of this uncertainty stems from the lack of clarity in the rule itself. For the litigant who is unfamiliar with the rule, the rule's text provides neither notice nor guidance as to how courts will construe Rule 68 offers.[71] And even for the reasonably informed litigator, the rule's cursory form leaves considerable uncertainty.

B. Canvass of Cases in Which Confusion Exists Regarding Validity of Offer

Uncertainty arises in Rule 68 cases with regard to whether particular offers are valid. Courts are called upon to decide the validity of offers that disclaim liability (or at least do not admit it),[72] the validity of offers for which revocation is attempted,[73] and the validity of offers that do not provide for both injunctive and monetary relief when both types of relief are requested.[74] Neither the text of the rule nor the case law clearly resolves ***881** these issues of validity.[75] This

section explores the uncertainty regarding particular offers' validity, and examines the implications to litigants resulting from this lack of certainty.

1. Whether Offers May Disclaim Liability

One type of uncertainty that arises is whether offers that disclaim liability are invalid. A Rule 68 offer of judgment, unlike a typical settlement offer, is filed with the court upon acceptance, after which a formal judgment is entered against the defendant.[76] Some defendants, concerned about the negative publicity that may arise from an adverse judgment being entered against them, choose to include a statement in their offer that disclaims liability and/or wrongdoing. Still other defendants say nothing one or way or the other about admitting or denying liability in their offers. It is unclear from the rule or the attendant case law whether such a disclaimer, or the absence of an express admission of liability, invalidates a Rule 68 offer.

Most courts to examine the issue have held that an offer is not rendered invalid because it disclaims liability or fails to admit liability. For example, in Jolly v. Coughlin, the plaintiff argued that the Rule 68 offer was invalid because the offer specified that it was "not to be construed either as an admission that defendants are liable in this action, or that plaintiff has ***882** suffered any damage."[77] While the court agreed that the statement constituted an "express denial of liability,"[78] it found no problem with such a disclaimer.[79] The court reasoned that nothing in the rule or the decisions interpreting the rule imposed a requirement that an offer admit liability, and that, by extension, nothing in the rule disallowed expressly disclaiming liability.[80] Indeed, as the court observed, to hold otherwise would discourage use of the rule and thereby reduce the rule's effectiveness as a settlement tool.[81] Similarly, courts have rejected the argument that a Rule 68 offer must expressly admit liability, with one court dismissing such an argument as "utterly without merit."[82]

Despite the near uniformity among courts addressing this issue, parties still continue to engage in collateral litigation regarding the significance of an offer's language (or lack of language) regarding liability. Recently, in Barrow v. Greenville Independent School District, the plaintiff argued that the defendant's Rule 68 offer was invalid because it did not admit liability.[83] While the district court rejected that argument,[84] another court, in City of Boca Raton v. Faragher, appears to have accepted it, holding that an offer that does not expressly admit liability does not comply with Rule 68.[85]

Although the district court in Faragher was reversed on appeal on other grounds,[86] the case demonstrates the existence ***883** of continuing uncertainty and resulting collateral litigation.[87] Without clarification about the necessity and/or propriety of a liability clause, both plaintiffs and defendants face uncertainty at the offer stage. For example, a plaintiff who would like to reject an offer that contains a liability disclaimer because to her it detracts from the value of the offer must decide whether the court will nevertheless uphold the offer as valid. And a defendant who would like to make an offer containing a liability disclaimer also faces uncertainty in deciding whether the inclusion of such a disclaimer will render the offer invalid for Rule 68 purposes. Under such circumstances, a defendant may elect not to make a Rule 68 offer or to make such an offer, only to have a court later hold the offer was invalid. Either scenario detracts from the rule's effectiveness as a tool of settlement.

2. Whether Offers May Be Revoked

Confusion also arises as to whether Rule 68 offers are revocable. The rule itself provides that the offeree has ten days in which to accept the offer, after which time the offer is "deemed withdrawn."[88] Still, uncertainty arises because "the rule is silent on whether the defending party may withdraw the offer before ***884** the ten-day period has elapsed and while the claimant is still considering it."[89] Courts addressing the issue of a Rule 68 offer's revocability have reached different conclusions. Because of this uncertainty, litigants are unsure whether a given offer will be deemed valid under Rule 68.

Some courts have taken a bright-line approach and have held that Rule 68 offers are categorically not revocable.[90] In Richardson v. National Railroad Passenger Corp., the defendant attempted to revoke his Rule 68 offer upon learning new information in discovery about the extent of the plaintiff's damages.[91] The court on appeal held that "a Rule 68 offer is simply not revocable during the 10-day period."[92] To hold otherwise would be counter to the rule's "finely tuned procedure."[93] The rule puts "significant pressure on the plaintiff to think hard about the likely value of its claim," and in return gives the plaintiff "10 days to ponder the matter."[94] If Rule 68 offers were revocable, "the pressure on the plaintiff would be greater than the [r]ule contemplates, because the [r]ule so construed would allow a defendant to engage in tactical pressuring maneuvers."[95] Other circuits have adopted a bright-line test, similar to that of Richardson, and have deemed Rule 68 offers per se irrevocable.[96]

In contrast, other courts have left the door open to allow defendants the opportunity to revoke their Rule 68 offers. In Cesar v. Rubie's Costume Co., the court allowed the revocation of a Rule 68 offer within the ten-day period.[97] In doing so, the court adopted a four-prong test that considers the equities to the parties in allowing the revocation.[98] Applying that fact- ***885** specific test, the court concluded that the defendant had clearly demonstrated that the offer contained a "clerical error" which a "reasonable attorney could have easily made."[99] Given the condensed timing of the offer, revocation, and acceptance, the court held that "there can not be any doubt that the plaintiff can be restored to its ex ante position."[100] Although the court recognized that "[t]here is undoubtedly a valid concern that defendants could strategically use Rule 68 offers to engage in tactical pressuring maneuvers if Rule 68 offers were generally revocable," it downplayed this concern in situations in which there exists an "obvious mistake" in the text of the offer.[101]

While Rubie's Costume Co. did not involve an evidentiary hearing, other revocation cases have resulted in extensive costs and delays, stemming in large part from such hearings. Indeed, the trial court proceedings in Richardson v. National Railroad Corp. demonstrate the type of legal maneuvers related to revocation and the attendant costs and delays.[102] There, the defendant's motion relating to revocation of his offer set in place a series of costly legal proceedings. Specifically, the evidentiary hearings were held over a nine-month period, during which time sixteen different experts testified in support of the defendant's revocation claim.[103] Following the hearings, the district court somewhat reluctantly denied the defendant's motion, and the Rule 68 offer was formally entered as judgment.[104] As noted ***886** above, an appeal followed, with the result that the plaintiff expended years and significant fees on the issue of revocation.[105]

The rule's lack of clarity about revocation, and the divergent case law, leaves litigants with considerable uncertainty as to whether and under what circumstances a court will allow a Rule 68 offer to be revoked.[106] Moreover, in jurisdictions in which the rule has been construed to allow such revocation, the uncertainty is magnified, negatively affecting both litigants as well as the courts. Litigants must make decisions in the face of such uncertainty. Defendants may choose to avoid the rule because its parameters are unclear. And plaintiffs, as the court opined in Richardson, may be forced to accept a Rule 68 offer prematurely, lest an intervening event occur such that the court allows the defendant to revoke the as-of-yet unaccepted offer. Courts, lacking a clear test from the rule itself, are left to sift through the arguments. These ambiguities undermine the purported self-executing nature of the rule.[107]

3. Whether Offers Must Provide for Relief Requested in the Complaint

Injunctive relief also creates confusion in interpreting Rule 68 offers. While it is well-established that a Rule 68 offer must dispose of the case as a whole,[108] some confusion still exists regarding whether an offer made in a case in which

both monetary and injunctive relief is sought must offer both types of relief. Specifically, litigants are uncertain whether an offer that only provides for injunctive relief when money damages also are sought is valid and, conversely, whether an offer that only provides for damages when injunctive relief also is sought is valid. [109]

***887** The rule itself does not speak directly to this issue. [110] Even so, most courts have held that the rule does not require that an offer specifically provide for all types of relief sought. [111] In Leach v. Northern Telecom, Inc., the court rejected the plaintiff's motion to strike the offer of judgment. [112] The plaintiff contended that the offer was invalid because it did not include the equitable relief it sought in its complaint. [113] The court upheld the offer's validity and stated: "Nothing in Rule 68 requires equitable relief to be included as part [of] an offer of judgment when the complaint seeks both equitable and monetary relief." [114]

Yet some courts--even within the same jurisdiction--have held otherwise. For example, in Whitcher v. Town of Matthews, the defendant offered monetary damages only, even though the plaintiff also had sought injunctive relief. [115] In its acceptance of the offer, the plaintiff stated that the defendant had "made no Offer of Judgment concerning Plaintiff[s'] request for injunctive relief and for a declaratory judgment" and that "[t]hese portions of the complaint remain[ed] pending." [116] The court disagreed, holding that the offer was all-inclusive. [117] In explaining its holding, the court stated that offers that did not include ***888** both monetary and injunctive relief, when both such forms of relief were requested in the complaint, would be invalid:

> An offer that does not include money damages prayed, but only consents to the plaintiff having the equitable relief demanded, is not consistent with the requirement of the Rule that offers be unconditional. In the same light, offers including only monetary damages but excluding equitable or injunctive relief would also be inconsistent with the [r]ule. [118]

The rule's ambiguity as to how courts should construe offers when plaintiffs seek injunctive relief affects both litigants and courts. Defendants are uncertain whether their offers will later be deemed invalid because they do not expressly provide for injunctive relief. Plaintiffs, too, do not know how a court will rule on offers' validity under such circumstances, and thus must make a decision to accept or reject an offer in the face of such uncertainty. Courts, like those in Leach and Whitcher, must resolve collateral litigation about whether offers are valid when they do not provide for injunctive relief sought (or, alternately, only provide for injunctive relief sought). And thus, this "self-executing" settlement rule becomes a catalyst for more litigation. [119]

C. Canvass of Cases in Which Confusion Exists Regarding Scope of Offers Related to Costs and Attorneys' Fees

By far the greatest confusion in interpreting Rule 68 offers relates to the question of the scope of particular offers. This section examines cases showing the various types of confusion inherent under the current rule: whether the amount of the offer includes costs, and whether the amount of the offer includes attorneys' fees. In reviewing the case law, this section explores the problems that result from the rule's ambiguity.

1. Whether the Amount of the Offer Includes Costs

Rule 68 requires that all offers include "costs then accrued." [120] The Supreme Court explained in Marek v. Chesny:

> ***889** If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and

> an amount for costs is not specified, the court will be obliged by the terms of [Rule 68] to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs. [121]

The question that arises in particular cases is whether costs were in fact included within the terms of the offer, or whether the court must add them to the offer. The stakes as to whether costs were included are especially high in fee-shifting cases in which the statute underlying the plaintiff's claim authorizes attorneys' fees to be awarded to the prevailing plaintiff as costs, such as civil rights and copyright cases. [122]

a. Confusion When the Offer Mentions Costs

Defendants' choice of language regarding "costs" in drafting Rule 68 offers often creates considerable confusion. Perhaps because the rule itself requires that an offer of judgment be made for a specified sum "with costs then accrued," [123] some defendants draft their offers using the "with costs" language. In such circumstances, problems arise because of ambiguity surrounding whether "with costs" means that the offer is inclusive of costs or, on the other hand, whether the offer is for a certain amount plus costs. The court in Kyreakakis v. Paternoster faced this issue when the defendant offered, and the plaintiff accepted, a Rule 68 offer "for $50,000.00 with costs now accrued." [124] The defendant urged the court to construe the offer as a lump-sum offer inclusive of costs, and to deny the ***890** plaintiff" s motion seeking costs. [125] The court held, however, that the language was ambiguous [126] and thus looked to the "totality of the circumstances" surrounding the offer to determine its meaning. [127] The court concluded that under the particular circumstances the offer's language "with costs" did not mean that costs were included. [128]

Yet in another case with almost identical facts, the court refused to enforce a Rule 68 offer that used the "with costs" language. In Christian v. R. Wood Motors, Inc., the court held that an offer for "Thirty Seven Thousand Five Hundred and no/100 Dollars ($37,500.00) with costs" was ambiguous, as it could be construed as plus costs or could be construed as inclusive of costs. [129] Although urged to consider extrinsic evidence to determine the offer's meaning, the court refused to do so. [130] Under principles of contract interpretation, the court stated, it must look only to the offer itself--and not to extrinsic evidence of the parties' intent and understanding--to determine whether the offer is ambiguous. [131] To do otherwise, would risk "collateral proceedings [that] would undermine entirely the purpose of the rule." [132] Thus, the court held that the offer lacked a "definite and precise" meaning, such that no meeting of the minds existed between the litigants. [133] It therefore refused to enforce the offer in a post-trial proceeding in which the defendant sought to cut off the plaintiff's award of costs. [134] In concluding, the court noted that its ruling "in no way should . . . be ***891** construed as a finding that all Rule 68 offers which track the language of that [r]ule are necessarily ambiguous" and that instead its ruling was "limited to the unique facts of this case." [135]

Even leaving aside concerns about fairness to defendants who seemingly track the language of Rule 68 yet end up unpleasantly surprised, rulings such as Kyreakakis create a factually intensive, less than bright-line rule that casts uncertainty on future litigants trying to evaluate how a court might construe "with costs" language. [136] Moreover, the different approaches taken by courts in construing "with costs" language--language which appears to be driven at least in part by policy considerations [137] --leave litigants without guidance as to which approach a court might take. Indeed, the Christian court expressly leaves open the possibility of the same court reaching the opposite conclusion were it instead faced with a plaintiff who had accepted an offer and then sought to recover costs as part of that offer. [138]

b. Confusion When the Offer Does Not Mention Costs

The uncertainty regarding whether an offer is lump-sum is exacerbated when the language of the offer is silent as to costs. For example, in Rohrer v. Slatile Roofing & Sheet Metal Co., the defendant was surprised to learn that what it intended to ***892** be an all-inclusive offer actually subjected it to a judgment for the amount of the accepted offer as well as costs, which included attorneys' fees. [139] The offer stated that it was "to allow Judgment to be taken against [Defendant] in this action for the aggregate sum of $3200, i.e. $800 for each of the Plaintiffs." [140] Upon the plaintiffs' motion for costs, the court held that "[u]nless a defendant's offer expressly provides that the amount includes all costs, the court should determine costs under Rule 68." [141] The court rejected the defendant's argument--similar to the holding in Christian--that the offer was, at the very least, not enforceable because the defendant had intended for the offer to be inclusive of all costs and fees and thus there was no "meeting of minds." [142]

Instead, the court in Rohrer focused on "not whether the parties' minds have met on each component of the judgment, but rather whether the defendant offered to have judgment entered against it and whether the plaintiffs have accepted the offer of entry of judgment." [143] The court's ruling was especially damaging to the defendant because the case was brought under Title VII, under which attorneys' fees are defined as "costs"; as such, the court required the defendant to pay costs, including attorneys' fees, in addition to the $3200 offered pursuant to Rule 68. [144] While the court left the amount of such costs and fees open for consideration upon further briefing, the defendant clearly ended up much worse off than it intended when it made the $3200 offer. [145]

***893** While the Rohrer court did not elaborate on the reasons for construing an offer's silence against the defendant, the court in Said v. Virginia Commonwealth University [146] did. There, in ruling that a Rule 68 offer that was silent as to costs was not inclusive of costs, the court emphasized the unique posture of Rule 68 offers. Because Rule 68 offerees are "bound by an offer of judgment whether it is accepted or not," an offeree must "be able to discern with certainty what the precise terms of that offer are." [147] As such, courts should be "reluctant" to consider extrinsic evidence and instead should construe the offer against the defendant drafter. [148]

The problems stemming from the uncertainty in how courts interpret a Rule 68 offer are exacerbated by the inconsistencies in how courts interpret such offers. In a case almost identical to Rohrer, the court considered an offer that made no reference to costs yet reached a holding opposite to Rohrer. [149] Specifically, the court in Stewart refused to construe the offer, which made no mention of costs, against the defendant. The court started with the plain language of the offer, which provided that "judgment be entered on any or all counts against Defendant in a total amount not to exceed FOUR THOUSAND FIVE HUNDRED AND No/100 DOLLARS ($4,500.00) as provided in Rule 68." [150] The court framed the issue as "involv[ing] whether the parties intended that an offer of judgment under [Rule] 68 was to include attorney' fees and costs." [151] The court went on to hold that because the parties had different intentions, "[n]o mutual assent was shown to the same terms so there was no valid offer and acceptance under Rule 68." [152] The court then vacated the judgment that had been entered by the district court on behalf of the plaintiff--for $4500 plus attorneys' fees of approximately $31,000--and remanded the case to the district court. [153]

***894** Other courts have gone a step further and held that a Rule 68 offer that is silent as to costs is nevertheless inclusive of such costs. For example, the court in Blumel v. Mylander concluded that an offer for $501 "to settle all pending claims" was inclusive of costs. [154] The court in particular noted the "large disparity" between the amount of the offer ($501) and the additional amount sought for costs including fees ($5162.50). [155] In another case, McCain v. Detroit II Auto Finance Center, Inc., the district court similarly concluded that an offer that did not mention costs was "sufficiently

clear" in including costs.[156] The court reasoned that because the offer was for "$3,000.00 as to all claims and causes of actions for this case," it was clear that the defendant intended the settlement to be for one lump sum.[157]

A party seeking certainty about how a court would interpret a Rule 68 offer would gain little assurance from these cases. The inconsistency between these cases casts doubt on how a court, especially one that has not addressed this issue, would rule. While one case (Rohrer) makes clear that the interpretation of a Rule 68 offer does "not [depend on] whether the parties' minds have met on each component of the judgment,"[158] another case (Stewart) expressly bases its holding on the lack of any such meeting of the minds.[159] Other cases --Blumel as well as the district court's opinion in McCain-- create another level of uncertainty that stems from the potential that a court may read costs into the terms of a Rule 68 offer that does not even mention them.[160] A plaintiff cannot reasonably ***895** and fairly value a Rule 68 offer that does not mention costs--and make a decision to accept or reject it--without knowing if a court down the road will read such an offer to include or exclude costs. Still that is precisely what plaintiffs must do, given the fact that Rule 68 offers are "non-negotiable" yet consequential even if rejected.[161]

Even apart from the uncertainty created by inconsistencies between courts, cases in which courts interpret Rule 68 offers by looking at extrinsic evidence, such as Stewart, create uncertainty.[162] This uncertainty has not gone unnoticed. According to the Seventh Circuit, "[u]nless the defendant allows the plaintiff to resolve or eliminate ambiguities, the plaintiff will be forced to guess whether and how the court would interpret the extrinsic evidence."[163] Besides being unfair to plaintiffs, courts' consideration of extrinsic evidence--namely, evidence regarding defendants' intentions-- has another price. It opens the door to "collateral proceedings [that] would undermine entirely the purpose of the rule."[164] Instead of "encouraging settlement and avoiding protracted litigation," Rule 68 offers, when left open to courts' interpretations, breed their own litigation.[165]

***896** 2. Whether the Amount of the Offer Includes Attorneys' Fees

It is curious that, while many Rule 68 offers hinge on the question of attorneys' fees, the Rule itself does not mention the term "attorneys' fees." Indeed nothing in the text of the rule alerts a litigant to the significance of attorneys' fees in the drafting and evaluation of an offer. As one commentator frames the issue:

> One of the ironies of Rule 68 is that a lawyer just reading the rule would not see its major consequence because the rule has never been amended to state what Marek v. Chesny holds . . . that is in a federal fee recovery case when the rule is triggered the plaintiff forfeits not only post-offer costs but also post-offer fees.[166]

Given the lack of guidance and notice in the rule, it is not surprising that much collateral litigation under the current rule relates to the availability of attorneys' fees in relation to Rule 68 offers.[167]

While Marek v. Chesny holds that defendants must always include "costs" in the amount of the offer or the court will add them on, no uniform requirement exists regarding whether offers must include attorneys' fees. Instead, the question of whether an offer must or does include attorneys' fees hinges on the type of case and, specifically, how the underlying statute in that case defines attorneys' fees. While most commentators agree that it at least somewhat "bizarre" to make the question of Rule 68's treatment of attorneys' fees depend on whether a "particular statute happens to have chosen to express the right to attorneys' fees as costs or not," that law is well-established under the legacy of Marek.[168]

***897** Thus, when the underlying statute defines attorneys' fees as "costs," as many civil rights and copyright statutes do, then attorneys' fees,[169] like costs, must be included in the offer.[170] If, on the other hand, the underlying statute provides for attorneys' fees as separate from costs, then there is no requirement that the offer include such fees. The fact that the defendant is not required to include fees does not mean that that these cases do not present complex questions regarding whether the offer includes fees. Indeed, as discussed in Part II.C.2.b below, the complexities and confusion from these cases is perhaps heightened, primarily because litigants face uncertainty regarding how courts will construe offers that are "silent" as to fees.

a. When Attorneys' Fees Are Defined as "Costs": Uncertainty in Fees-as-Costs Cases

In theory, when a statute defines attorneys' fees as costs, there should be no uncertainty regarding whether such fees are included, other than the typical uncertainty regarding costs themselves.[171] The sole inquiry would seem to be whether costs are included or not, with the availability of attorneys' fees hinging on that answer. However, two types of confusion still arise. First, despite Marek, some litigants still fail to recognize that, when the underlying statute defines attorneys' fees as costs, the Rule 68 offer will be interpreted to treat attorneys' fees exactly as it does costs.[172] That is, if the court deems the offer to be lump-sum and thus inclusive of costs, it will by the same measure deem the offer to be inclusive of attorneys' fees which are a part of costs. Alternately, if the offer is for a dollar ***898** amount that the court deems is not inclusive of costs, then it similarly will not deem the amount to be inclusive of attorneys' fees.[173] Second, confusion also exists as to whether the underlying statute that provides for attorneys' fees defines attorneys' fees as costs. Such confusion may arise because the statute is unclear in defining attorneys' fees or because the plaintiff's pleadings are unclear as to the claims raised.

i. Confusion About Fees-as-Costs

Although the Supreme Court decided Marek decades ago, litigants still make, accept, and refuse Rule 68 offers without recognizing the consequences regarding recovery of attorneys' fees. For example, in Erdman v. Cochise County, the defendant made a Rule 68 offer for "$7,500 with costs now accrued."[174] The offer was made pursuant to a claim under 42 U.S.C. § 1983, the fee provision of which defines attorneys' fees as costs.[175] The defendant was surprised when the plaintiff, after accepting the offer, sought a five-figure attorney fee award in addition to the specific amount offered. The defendant raised two arguments, both of which the court rejected. First, it argued that "'with costs' was intended to mean 'including costs' rather than 'plus costs.'"[176] The court did not address this argument, except to implicitly reject it.[177]

Second, the defendant argued that it did not realize the implication of Marek that "costs" in actions under § 1983 automatically include attorneys' fees.[178] The court rejected the defendant's argument, found that the defendant had made a "drafting error," and held that the offer "should be construed against [the defendant], rather than against the plaintiff."[179] Thus, the defendant was not allowed to withdraw its offer based upon its mistake and instead was required to pay, in addition ***899** to the amount of the offer, the plaintiff's costs, including his attorneys' fees.

The problem of litigants failing to understand the implication of Marek is not passing with time. In a recent decision, Henderson v. Horace Mann Insurance Co., the court rejected the defendant's attempt to vacate a Rule 68 judgment on grounds that the defendant had been mistaken as to the consequences of its offer language under Marek.[180] Nor is the problem limited to defendants. One commentator recently expressed concern that a plaintiff, "confronted with the unfamiliar beast of a formal Rule 68 offer, will read the rule and escape without any inkling of the most serious consequence that may flow from rejection."[181] Thus litigants, unaware from the face of the rule what implications an offer may have with regard to fees, may draft and evaluate offers that leave the issue of fees unclear or, in the eyes of the court, clear, although not what the litigant intended.

ii. Confusion About Attorney Fee Provisions in Particular Cases

Other uncertainty arises in fees-as-costs cases due to confusion about whether the claims for which the offer is made actually define fees as costs. For example, although fees are defined as costs in most actions arising under Title VII, that is not uniformly the case. The attorneys' fee provision for Title VII mixed-motive claims allows recovery of "attorneys' fees and costs." [182] As such, litigants who assume that an offer for costs is inclusive of attorneys' fees in every Title VII action may end up making, accepting, and rejecting offers without knowing all of the implications. [183]

Even litigants who make every effort to analyze whether an offer is being made pursuant to a fees-as-costs provision face ***900** obstacles. One such obstacle is the complexity that arises when offers are made in cases involving multiple claims, when such claims define the recovery of attorneys' fees differently. For example, in Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, Inc., the issue before the court was whether attorneys' fees were a part of "costs" under the offer made. [184] The inquiry was complicated because the lawsuit involved multiple claims, one of which arguably defined fees-as-costs (breach of contract) and the other which did not (trade secret violation). [185]

Regarding the breach of contract claim, the court engaged in a lengthy discussion first of whether a contract, rather than a statute, could define "costs" for Rule 68 purposes. Because Marek "held that the term 'costs' in Rule 68 'was intended to refer to all costs properly awardable under the relevant substantive statute or other authority,"' the court held it is proper under Marek to look to the underlying contract, in a breach of contract claim, to determine whether it defines attorneys' fees as costs. [186] The Utility Automation 2000 court declined to reach the issue of how to resolve the tension inherent in a Rule 68 offer made pursuant to multiple claims that define fees differently because it ultimately held that neither the statute nor the contract underlying the lawsuit defined attorneys' fees as costs. [187]

That issue, however, was highlighted in Wilson v. Nomura Securities International, Inc. [188] In Wilson, the plaintiff accepted the defendant's offer of judgment to settle a racial discrimination case, which was brought under federal, state, and municipal law. [189] The offer stated that it was for "$15,000.00 inclusive of all costs available under all local, state or federal statutes accrued to date." [190] Complications arose because the statutes under which the plaintiff's claims were brought defined attorneys' fees differently. [191] The municipal law under which the plaintiff sought relief did not define attorneys' ***901** fees as costs. [192] Thus, the plaintiff argued that the offer was not inclusive of such fees, [193] and she sought to recover some attorneys' fees in addition to the offer. [194] The court disagreed and held that no additional fees should be awarded. [195] Specifically, the court held that the applicable federal law was one in which fees were defined as costs (and thus clearly included in the offer already) and that the municipal claim was "factually and legally identical" to the federal claim. [196] The dissent argued that the plaintiff should be able to recover at least some additional fees based upon the municipal claim, because the plain language of the offer left open that possibility. [197]

These cases illustrate the type of collateral litigation that occurs regarding disputes over whether attorneys' fees are properly awarded as costs. In some of these cases, the uncertainty and thus collateral litigation arises because unsophisticated litigants make and evaluate Rule 68 offers without regard to the nuances revolving around costs and, in turn, fees. In other cases, the uncertainties are intrinsic to the current rule, especially for Rule 68 settlements of multi-count claims when the underlying fee statutes define fees differently. While the Wilson case provides one example of the type of dispute that occurs in such a multi-count case, the possibilities are numerous for confusion and complicated legal analysis. [198] Yet because ***902** so much of the Rule 68 offer rests on what is a "cost," it is inevitable that such litigation will continue under the current rule.

b. When Attorneys' Fees Are Not Defined as "Costs": Uncertainty in Fees-as-Separate-from-Costs Cases

In the fees-as-costs cases described above, the uncertainty stems from whether fees are defined as costs in the underlying statute or contract. Once the court makes that determination, the attorneys' fees question is bootstrapped onto the costs question. The court looks to see what the offer says about costs. If the offer says nothing, the court adds costs (and fees defined as costs) on to the amount of the offer. Much less clarity exists regarding how a court will construe an offer with regard to fees in cases where attorneys' fees are not defined as costs.[199] In such cases, two levels of uncertainty arise-- first, uncertainty arises in the determination of whether fees are defined as costs and, if fees are not defined as costs, an additional uncertainty arises in the determination of whether fees (separate from the matter of costs) were part of the offer.

When attorneys' fees are not part of costs, a defendant under the current rule is not required to include--either explicitly or implicitly--such fees as part of its Rule 68 offer. Unlike costs, such attorneys' fees will not automatically be added on if not included in the offer. Defendants can, and sometimes do, make offers that specifically provide that no attorneys' fees should be added on to the amount of the offer.[200] Still, many offers fail to make this exclusion explicit. And because no default exists regarding how to construe an offer's silence regarding attorneys' fees, litigants face a conundrum--will the court treat the offer as a lump sum settlement and thus inclusive of any applicable attorneys' fees, or will the court interpret the offer's silence on the issue of attorneys' fees as leaving the door open ***903** to recovery of such fees? As discussed below, no clear and readily available answers exist for a litigant facing this issue.[201]

i. Offers That Are Deemed Ambiguous Regarding Attorneys' Fees

When an offer is silent as to attorneys' fees, some courts have held that the plaintiff may recover such fees.[202] Specifically, "'where the underlying statute does not make attorney fees part of costs, it is incumbent on the defendant making a Rule 68 offer to state clearly that attorney fees are included as part of the total sum for which judgment may be entered.'"[203] A defendant who fails to do so risks "exposure to attorney fees in addition to the sum offered plus costs."[204] If the defendant does not so specify, the court may add attorneys' fees on to the amount of the offer.[205] Accordingly, in Webb v. James, the court ***904** allowed the plaintiff to recover attorneys' fees in addition to the amount of the Rule 68 offer when the offer was for "judgment in the . . . amount of Fifty Thousand Dollars ($50,000)" and made no reference to costs or fees.[206]

The Seventh Circuit noted that the underlying statute in that case did not define attorneys' fees as costs, but did separately provide for the recovery of such fees to the "prevailing party."[207] The court squarely placed the burden on defendants to "make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party."[208] Because the defendant could have, but did not, draft a lump-sum settlement inclusive of costs and fees, the court reasoned it was fair to award an additional amount to cover fees.[209]

***905** Like the Webb court, other courts have concluded that an offer that is silent regarding attorneys' fees is not inclusive of such fees. In Utility Automation 2000, the Eleventh Circuit held that an offer for "the sum of Forty-five thousand and 00/100 Dollars ($45,000) with costs accrued" was not inclusive of attorneys' fees.[210] First, the court held that under the statute at issue attorneys' fees were not defined as costs.[211] Next, the court analyzed whether, like the plaintiff in Webb, the plaintiff could recover attorneys' fees in addition to the amount of the offer.[212] The court held that it could.[213] It pointed out that "the offer says nothing one way or the other about fees; attorneys' fees are not mentioned at all."[214] Thus, the court concluded, "[W]e--much as the offerees--are left to speculate whether the offer was intended to include attorneys' fees or not."[215] Because a "Rule 68 offeree is at the mercy of the offeror's choice of language," any

ambiguity must be construed against the defendant.[216] Accordingly, the court held that the plaintiff would be allowed to seek attorneys' fees in addition to the amount of the accepted offer.[217]

***906** But the apparent bright lines from these decisions are not really so bright because other courts have reached opposite conclusions, even when faced with similar offer language.[218] In particular, some courts have held offers that are silent as to fees to be unenforceable because they are ambiguous; other courts have held that certain offers that are silent as to fees are "unambiguously" inclusive of such fees.[219] Other courts have held that such offers are revocable by the offeror on grounds that the offeror was mistaken as to the fact that the offer was not inclusive of attorneys' fees.[220] The result is considerable uncertainty about how a court will interpret an offer that is silent as to fees.[221]

Rather than construing ambiguity in the offer regarding whether fees are included against the defendant, as did the court in Webb, other courts have used the offer's ambiguity as grounds to consider extrinsic evidence as to what the parties intended regarding fees.[222] Specifically, the court in Radecki v. ***907** Amoco Oil Co. rejected the plaintiff's argument that the offer's silence as to fees should be conclusive that fees were not included.[223] Instead, the court reasoned that "it runs counter to the purpose of Rule 68 to assume that forms of relief not mentioned are not intended to be included within the sum offered."[224] Thus, the court considered extrinsic evidence of the parties' pre-offer settlement discussions.[225] After "[c]arefully reviewing all of the evidence," the court held that it was "firmly convinced that [the defendant] intended to include attorney fees in its . . . offer."[226] Finding "no mutual assent, and hence no binding agreement," the court vacated the Rule 68 judgment and remanded the case to the district court "for the parties to approach the settlement question anew."[227]

***908** Other courts have taken Radecki a step further and have held that offers that are silent as to fees are nonetheless inclusive of such fees. Instead of finding "no mutual assent," these courts have affirmatively interpreted the offer to be inclusive of fees. For example, in Basha v. Mitsubishi Motor Credit of America, Inc., the court affirmed the district court's refusal to award attorneys' fees to a plaintiff who had accepted a Rule 68 "offer to pay plaintiff $2,000."[228] In doing so, it stated: "Although the . . . offer does not expressly address attorney[s'] fees, we agree with the district court that the circumstances surrounding the offer, if not the text itself, strongly support the view that the parties intended to settle all claims, including those for attorney[s'] fees."[229] Thus, the court affirmed the judgment entered on the offer, as well as the district court's denial of attorneys' fees.[230]

ii. Offers That Are Deemed Unambiguous Regarding Attorneys' Fees

Other courts have enforced Rule 68 offers that are silent as to fees as being inclusive of such fees when the offer is "completely unambiguous" in including fees.[231] In Nordby v. Anchor Hocking Packaging Co., the Seventh Circuit held that an offer that did not explicitly refer to attorneys' fees was nonetheless "unambiguously" inclusive of such fees.[232] Had the court found the offer to be ambiguous, it would have been forced, based upon its holding in Webb, to construe the offer against the defendant.[233] Instead, the court distinguished the offer from that ***909** in Webb, holding that this offer was for "$56,003.00 plus $1,000 in costs as one total sum as to all counts of the amended complaint."[234] Because one of the counts specifically sought relief for attorneys' fees, the court held that such relief was unambiguously encompassed by the offer.[235] Unlike the offer in Webb, which did not make clear that it was all-encompassing, the court held that the offer in Nordby left no room for doubt about its lump-sum nature.[236]

All of these cases leave litigants wrestling with uncertainty about how a court will construe a Rule 68 offer. First, it is unclear when a court will construe a Rule 68 offer as "completely unambiguous" with regard to the inclusion of fees.

Nordby itself highlights this type of uncertainty. Rather than providing a bright line to alert litigants to what makes an offer inclusive of fees, these cases provide litigants with a blurred line between what makes an offer "ambiguous" as in Webb and what makes it "completely unambiguous" as in Nordby.[237] And while a litigant who engages in substantial research will learn from these precedents that an offer of "one total sum as to all counts of the amended complaint" is inclusive of fees when one count specifically seeks relief for attorneys' fees, she will be left with uncertainty should she receive an offer for, say, "$25,000 in total settlement."[238] Any deviation in the language creates ambiguity.

***910** But, in fact, application of the rule is not even that straightforward. Courts likely will construe even identical language in an offer differently depending on the law under which the plaintiff seeks a fee award. As the court pointed out in Nordby, if the defendant had made the offer instead in a case in which "the plaintiff [was] seeking an award of fees under a statute or rule or common law principle not cited in any of the counts of the complaint," a different result might have occurred.[239] In such a case, "it would be arguable that the reference to 'one total sum as to all counts' did not include such an award."[240] And presumably, if it were at least arguable that the offer was not inclusive of fees, the court would deem the offer to be ambiguous and thus construe it against the defendant as not inclusive of fees.[241]

Additionally, it is unclear how a court will interpret a Rule 68 offer that is ambiguous with regard to fees. While some courts construe such offers against the defendant without considering extrinsic evidence, others first consider extrinsic evidence.[242] Because not all circuits have addressed the issue, many litigants cannot predict what approach their court will take. Even litigants who know their court will consider extrinsic evidence face considerable uncertainty.[243] They do not know what the court will determine to be the actual value of the offer--inclusive ***911** or exclusive of fees--and, as Nordby warns, "can't make an intelligent choice whether to accept it."[244]

3. The Other Side of the Coin: Uncertainty in the Interpretation of Offers When Comparing Unaccepted Offers to Judgments Obtained

While many cases dealing with the terms of a Rule 68 offer involve an accepted offer, the same issues regarding what an offer means arise when an offer is rejected and the defendant moves, after trial, to have costs shifted. Specifically, the defendant, who must show that the offer is more favorable than the judgment, must demonstrate the terms of the offer to the court so that the court may compare the offer to the judgment.[245] As such, the same disputes about the terms of the offer arise in cases involving rejected Rule 68 offers, because the amount of the offer is the basis for comparison to the judgment.[246]

This type of uncertainty arose in B&H Manufacturing Co. v. Bright, where the defendant sought to have costs shifted by arguing that the refused Rule 68 offer was more favorable than ***912** the judgment the plaintiff obtained at trial.[247] The rejected offer was for one million dollars plus injunctive relief, but did not include costs.[248] At trial, the plaintiff recovered only $851,500 plus injunctive relief and attorneys' fees.[249] Thus, the defendant argued that the offer was more favorable. Leaving aside the question of the value of the injunctive relief, the court held that the relevant comparison was between one million dollars and $851,500 plus plaintiff's pre-offer attorneys' fees.[250] With attorneys' fees added on to the amount of the judgment, the court held that the offer was not more favorable than the judgment.[251]

Notably, the relevant apples-to-apples comparison, and likely the ultimate outcome pursuant to Rule 68, would have been different in B&H Manufacturing Co. had attorneys' fees been defined as costs in the statutes underlying the claims asserted.[252] Because a Rule 68 offer must include costs-- either explicitly or implicitly--the court would have deemed the B&H offer to have required that costs (and thus attorneys' fees when such fees are defined as "costs") be added to the amount of the offer rather than implicitly included as part of the offer.[253] If so, the comparison would have

been between the one million dollars offered plus pre-offer costs (including attorneys' fees) and the $851,500 judgment plus pre-offer costs (including attorneys' fees). The costs (including attorneys' fees) would have cancelled each other out, making the amount of the offer and the amount of the judgment an apples-to-apples comparison. [254]

***913** In other cases, courts have ruled on an offer's silence as to attorneys' fees in the context of a post-trial motion by the defendant to trigger Rule 68's cost-shifting mechanism. In Bevard v. Farmers Insurance Exchange, the Ninth Circuit held that Rule 68's cost-shifting mechanism was triggered because the judgment was less favorable than the Rule 68 offer. [255] The court's holding depended on whether it interpreted the Rule 68 offer as inclusive of attorneys' fees. [256] The court held that the offer did not include such fees. [257] In doing so, the court followed its holding in Nusom v. COMH Woodburn, Inc., a case in which it held, in the context of an accepted offer, that "a Rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorneys' fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorneys' fees a part of costs." [258] While the court's holding in Nusom favored the plaintiff by allowing it to recover attorneys' fees in addition to the amount of the offer, its holding in Bevard disfavored the plaintiff. Specifically, because attorneys' fees were not deemed to be part of the offer, the court also did not, when determining the amount of the judgment for purposes of comparing it to the offer, include attorneys' fees as part of that judgment. [259] As such, the apples-to-apples comparison was deemed to be the amount of the offer ($8001, which by its terms ***914** was inclusive of costs) versus the amount of the judgment ($5625 plus pre-offer costs of $1916). [260]

Had the court determined that the offer was inclusive of attorneys' fees as well as costs, then the relevant comparison would have been between the "offer" ($8001, inclusive of costs and attorneys' fees) versus the amount of the judgment ($5625 plus pre-offer costs of $1916 and pre-offer attorneys' fees). As long as the pre-offer attorneys' fees were more than $460, the judgment would have been more favorable than the offer and thus the rule's cost-shifting consequences would not have been triggered.

The court's decision in Bevard creates uncertainty for plaintiffs by construing an offer that is silent as to fees in a manner that ultimately is unfavorable for plaintiffs. Unlike the cases in which an accepted offer's silence as to attorneys' fees is used against the drafting defendant, in Bevard the court construed the offer's silence (and thus ambiguity) against the plaintiff. [261] In doing so, the court seemed to ignore the reasoning of its underlying precedent, Nusom, which held that the defendant must bear the risk of uncertainty in an offer. [262] Rather than penalizing the defendant for its failure to "state clearly that attorneys' fees are included as part of the total sum for which judgment may be entered," [263] Bevard allowed the defendant to use that ambiguity to its advantage. It is the plaintiff who was penalized, having to "speculate whether the offer was intended to include attorneys' fees or not." [264]

***915** One court has described the defendant's opportunity to argue after-the-fact about what its offer meant as allowing the defendant to "have its cake and eat it too." [265] Rather than having to live with its drafting choices, the defendant gets to "sit back and interpret the offer based upon the factual circumstances it finds itself in." [266] The court in Rateree v. Rockett posed the following scenario to highlight the defendant's advantage:

> [A] likely scenario would have been that if Plaintiffs had rejected the offer and received a verdict of anything less than $71,000 at trial, the Defendant would have argued that the plain language of the offer excluded fees and costs, and therefore Plaintiff would be responsible for the costs incurred after rejection of the offer. [267]

In addition to the unfairness to plaintiffs, allowing defendants to pick and choose the meaning of the offer depending on the context directly contravenes Rule 68's purpose of "avoiding protracted litigation." [268] Instead of ending the litigation,

the Rule 68 offer spawns its own branch of litigation. If the door is open to collateral litigation, there will at least be one party that will seek to challenge the terms of the offer after the fact.

*916 D. The Overall Effects of Uncertainty Defeat the Rule's Purpose: Gun Shy Defendants, Daunted Plaintiffs, and Overburdened Courts

The uncertainty regarding how to interpret Rule 68 offers has a price. It makes defendants reluctant to make Rule 68 offers, lest they fall prey to one of the rule's many pitfalls. When defendants do make offers, those offers often have unintended and unwelcome results. Without guidance from the rule itself, defendants draft offers that do not reflect their intentions. Plaintiffs, too, are affected by the rule's uncertainty. Plaintiffs cannot choose to avoid the rule, and must make educated guesses about how a court will interpret a particular offer.[269] The end result is that cases that could have been resolved through Rule 68 remain unresolved because the defendant never makes a Rule 68 offer or because the defendant makes an offer that results in costly and unpredictable collateral litigation. Thus, instead of litigants "evaluat[ing] the risk and costs of litigation"[270] as intended by the rule, litigants instead end up evaluating the risks and costs of Rule 68. None of these results makes sense for a rule designed to reduce litigation and promote settlement.

1. Avoidance by Defendants

The uncertainty created for defendants deters them from making Rule 68 offers. As the cases discussed above demonstrate, defendants all too often discover that a court's interpretation of a Rule 68 offer differs from what the defendant intended. The rule itself does not put the defendant on notice to the rule's traps for the unknowing, nor is the case law a model of clarity. Many practice guides do not adequately advise defendants of the potential pitfalls in drafting Rule 68 offers, and thus may mislead a defendant into making an offer that leaves the defendant vulnerable, particularly with regard to attorneys' ***917** fees.[271] Given the uncertainty, defendants can and will avoid a rule that seems arbitrary or overly complicated.[272] Those defendants who do make Rule 68 offers must conduct considerable research to make sure the offer is drafted to reflect the defendant's intent. Ultimately, the uncertainties in the rule undermine the very financial efficiencies that the rule was intended to promote.

It is doubtful that only defendants who are uninformed as to the rule attempt avoid it. Even the informed yet prudent defendant must consider the risk that the court will misinterpret an offer (along with the costs of researching and drafting the offer's language) and weigh that risk against the expected benefit.[273] Any risk may be too much if the expected payoff is low. And even a substantial expected payoff--such as cutting offthe plaintiff's attorneys' fees--may not be enough to induce the defendant to make an offer. Even in cases in which the expected payoff for the defendant would seem to be high, such as cases involving fee-shifting statutes, defendants have ended up worse off from having to pay more than they expected.[274] Such "unforeseen ***918** liability" acts to "discourage settlements and, thus, highly frustrate[s] the policy behind Rule 68."[275]

2. Unfairness to the Plaintiff

The inconsistencies and uncertainties described in the cases above show a problem in the rule that cannot simply be dismissed as a defendant's problem. Even if it were within the power of defendants to fix the problem by drafting clear offers--a dubious assumption given the rule's lack of guidance to litigants and courts alike--their failure to do so would still cause problems for the plaintiffs and courts left to evaluate poorly drafted offers. While defendants, at least in theory, can "preempt Rule 68 disputes," plaintiffs cannot.[276] Plaintiffs are stuck with defendants' drafting choices and cannot, as in typical settlement discussions, exchange drafts of the settlement offer's language.

The lack of clarity in the rule places plaintiffs in a double bind when an offer is unclear as to fees: Does a plaintiff accept the offer, on the gamble that she will be able to recover fees in addition to it? Or does she reject the offer, only later to discover that it did not, in the court's view, include fees? In the latter scenario, the interpretation of the offer as not including attorneys' fees might be the trigger for Rule 68's cost-shifting mechanism to apply. [277] Any uncertainty about how a court will interpret a Rule 68 offer that is silent as to fees potentially leaves a plaintiff in "the position of guessing what a court will later hold the offer means." [278]

Even in situations in which a plaintiff's educated guess turns out to be correct, the costs of the rule's uncertainty still ***919** exist. First, even in cases in which the expected recovery is relatively small, plaintiffs must expend considerable attorneys' fees and costs simply to analyze the court's likely application of the rule to a given offer. These costs are particularly high for the plaintiff whose counsel does not regularly litigate cases in which Rule 68 is invoked. [279] Indeed the worst-case scenario, and one that likely exists given the rule's lack of notice, is one in which the plaintiff's counsel accepts or rejects an offer unaware of the question of whether it includes costs and attorneys' fees. [280] Second, even for the plaintiff whose lawyer does sufficient research, considerable uncertainty still exists in a given case because of the fact-based approach that many courts take in construing Rule 68 offers. How, for example, can a plaintiff know how a court will construe an offer for a certain sum "with costs" or an offer that is silent as to fees when neither the rule or courts have provided a bright-line test?

And even bright lines sometimes elicit their own problems. In trying to create bright lines by issuing warnings directed toward defendants, courts may unintentionally create more uncertainty for plaintiffs. For example, a litigant who took literally a court's warning that "offers must explicitly include reference to attorneys' fees" would almost certainty have misevaluated the offer presented in Nordby. [281] And a plaintiff who researched the case law enough to learn that fees are recoverable in addition to an offer so long as the offer did not "clearly specify that [it] include[d] attorney[s'] fees" would miss the mark in a fees-as-costs case in which costs were included in the offer. [282]

***920** 3. Costs to Courts

Rule 68's lack of clarity regarding how offers should be construed imposes costs on the court as well as litigants. Because the rule's language provides little guidance, litigants who are uncertain as to the meaning of particular offers under Rule 68 must turn to courts to resolve their disputes. And courts, for their part, often resolve such disputes by resorting to case-by-case rulings. The end result is frequent, and often extensive, collateral litigation about the meaning of Rule 68 offers. [283] For an already burdened judicial system, litigation arising from a settlement rule that is intended to curb litigation is both ironic and disappointing.

In addition to the costs of litigation, the uncertainties under the current rule have other less tangible, but nevertheless serious, costs to courts. The Federal Rules of Civil Procedure are intended to create uniformity in the federal judicial system. [284] As leading commentators in the area have pointed out, the benefits of uniformity under the Federal Rules of Civil Procedure are several: fairness to litigants, such that the costs of litigation do not vary greatly by district; avoidance of forum shopping; and standardization, which enables lawyers easily to practice law across districts. [285] This last benefit is especially noteworthy in the context of Rule 68. Specifically:

> If rules vary among districts, lawyers must expend substantial time learning the individual rules for each district. Inevitably, lawyers will sometimes err in dealing with unfamiliar procedures, leading to additional court time in admonishing attorneys and enforcing compliance. [286]

Given the complexity of and inconsistencies in the law surrounding Rule 68 offers, it is not surprising that courts do in fact expend considerable time enforcing Rule 68. [287] It also is not ***921** surprising that--given the rule's optional nature for defendants--litigants often avoid the rule.

4. Overall, Lack of Certainty Undermines the Rule's Purpose

For a rule established to foster settlement and reduce the burdens of litigation, the rule's lack of clarity with regard to offers undermines its very purpose. Simply because certain aspects of litigation are inherently risky and uncertain does not excuse building such uncertainty into the Federal Rules of Civil Procedure. [288] Allowing this uncertainty is particularly un-desirable if the purpose of Rule 68 is not just to act as a private benefit to litigants but also to provide a public benefit to the legal system.

III. LIVING UP TO THE PROMISE: A PROPOSAL TO REVISE AND CLARIFY RULE 68 WITH REGARD TO OFFERS

With soaring litigation expenses and burgeoning court dockets, Rule 68 theoretically should serve as a useful tool for litigants and courts alike. [289] In practice, though, the rule serves as a rarely used tool that, even when employed, ends up spawning the very litigation that it is intended to decrease. The cases above demonstrate that the failure of litigants to use the rule, as well as the collateral litigation that results when they do, stems largely from a lack of clarity in the rule itself. [290] Much of this ambiguity exists with regard to the meaning of Rule 68 offers. Litigants who are uncertain about how an offer will be interpreted will be disinclined to make such offers. Likewise, litigants who make, accept, or reject an offer, only later to discover that they were mistaken in their understanding of that offer, will litigate the matter. All of this uncertainty has a cost, both to the litigants and to the courts.

The question becomes how best to diminish the current uncertainties surrounding interpretation of Rule 68 offers. [291] Any ***922** such solution must decrease uncertainty at the points when it matters most--when the defendant is contemplating making a Rule 68 offer and when the plaintiff is contemplating accepting a Rule 68 offer. Both parties must be able to predict how a court will later interpret the offer. Such predictability is especially important concerning whether an offer will be deemed inclusive of costs and attorneys' fees. At the same time, any amendment to the rule must not undermine the rule's purpose in other ways. [292] Thus, the solution lies in creating clarity within the rule itself, such that parties are not left to guess how a court will later interpret an offer under the rule.

Accordingly, the rule should be revised to make clear how offers will be interpreted. At the very least, the rule must alert parties to the pivotal issues regarding costs and attorneys' fees, as well as the validity of offers. The rule should be sufficiently user-friendly so that litigants do not need to expend excessive time and resources to determine whether an offer includes or excludes costs and attorneys' fees. Instead, the rule itself should provide a clear test for litigants to determine whether courts would interpret a given offer as inclusive of costs and fees.

A. Specific Changes to Rule 68's Provisions Relating to Offers

The proposed revised rule provides two general ways for defendants to make Rule 68 offers: “damages-only” offers and ***923** “lump-sum” offers. The proposed rule establishes the “damages-only” offer as the default. As such, all offers will be interpreted to be “damages only,” and thus not inclusive of costs and attorneys' fees unless they strictly comply with the opt-out provision regarding lump-sum offers. In addition, under the proposed rule, a lump-sum offer by definition must include not only costs, but any applicable attorneys' fees as well. [293] Thus, under either type of offer--damages-only or lump-sum--costs and attorneys' fees are treated the same, thereby eliminating the need to differentiate between those fees that are defined as costs and those that are not.

B. Proposed Revised Rule 68

Proposed Federal Rule of Civil Procedure 68: Offer of Judgment [294]

(a)At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an damages only or lump sum offer to allow judgment to be taken against the defending party for the money or property to the effect specified in the <<strike through>>offer, with costs then accrued<<end strike through>>.

(b)If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment.

(c)An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

(d) All offers must be construed as "damages only" unless the text of the offer complies with part (h) of this Rule. Offers may be for monetary and/or nonmonetary relief.

(e)Damages-only offers must be construed as inclusive of any applicable prejudgment interest then accrued and ***924** as not inclusive of costs then accrued or any applicable attorneys' fees then accrued.

(f) Upon acceptance of an offer, the adverse party's costs then accrued and applicable attorneys' fees then accrued shall be added to the offer, and judgment entered accordingly. The only exception to this provision is pursuant to an offer made under Rule 68(h) below, to which no additional amount shall be added.

(g) If the judgment [295] finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

(h) For an offer to be construed as a "lump-sum" offer, the offeror must state in the text of its offer the following: "This offer is being made pursuant to Rule 68(h) and represents a lump-sum offer inclusive of prejudgment interest then accrued, costs then accrued, and any applicable attorneys' fees then accrued."

(i) "Applicable attorneys' fees then accrued" are any attorneys' fees to which the adverse party is entitled by statute, rule, or contract for one or more of the claims resolved by an offer made under this Rule.

(1) Notwithstanding the provisions of this Rule, the court must still decide under a damages-only offer what attorneys' fees are applicable under the relevant authority.

(2) Nothing in this Rule shall be construed to create a substantive right to attorneys' fees, not already provided for under the applicable substantive law.

(3) The term "applicable attorneys' fees then accrued" includes any litigation expenses to which the adverse party is entitled.

(j) An offer made and/or accepted under this Rule does not constitute an admission of liability. An offeror may include language in the text of the offer to this effect.

***925** (k) The fact that an offer is made but not accepted does not preclude a subsequent offer.

(l) Unexpired offers are not revocable.

(m) When the liability of one party to another has been determined by verdict or order of 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.

C. Benefits of the Proposed Rule

The proposed rule will benefit litigants and courts alike. Rather than requiring extreme "caution and care by counsel," the proposed rule provides counsel with certainty in drafting and evaluating Rule 68 offers. [296] It does this by providing clarity in the rule itself. At the front end, the proposed revised rule will allow litigants to draft and evaluate Rule 68 offers with awareness of what is required by the rule, and with particular awareness of the role of costs and attorneys' fees in relation to the offer. Thus, collateral litigation regarding Rule 68 offers will be greatly curbed because, rather than analyzing the meaning of unlimited drafting possibilities, parties and courts will learn that Rule 68 offers must take one of two forms.

Second, in those occasions in which litigants do dispute an offer's terms, the proposed revised rule will provide courts with a bright-line test to apply in resolving disputes. A defendant who, for example, wishes to argue that its offer was for a lump-sum amount, notwithstanding the fact that it purported to exclude attorneys' fees, will, as always, be able to have a bite at the apple. But because the plain language of Rule 68 gives courts no discretion to treat an offer as lump-sum unless

it complies with the express requirements of the rule, courts presumably would deal with such a challenge summarily and inexpensively. The sections that follow explain the particular benefits of the proposed revised rule, demonstrating that the uncertainties revealed in Parts II.B and II.C are resolved by rewriting the rule. The net effects of the revised rule's greater ***926** clarity would be increased use of the rule by defendants, fairness to plaintiffs who must respond to offers under the rule, and less collateral litigation.

1. Clarity Regarding Components of a Rule 68 Offer

Perhaps because the rule was drafted decades ago, it does not alert litigants to the basic components of a Rule 68 offer. The revised rule provides clarity for litigants in this regard. Specifically, the text of the proposed rule alerts litigants to the required components of a Rule 68 offer with particular attention to the role of costs and attorneys' fees in the offer. [297]

Such clarity is important for two reasons. First, defendants who do not understand the basic components of a Rule 68 offer tend either to avoid the rule or to draft offers that do not include such components, or at least do not include them clearly. [298] Moreover, the current rule is self-defeating to the extent that its purpose of promoting settlement and decreasing litigation is undermined by defendants' hesitancy to use it and by the rule's propensity to spawn collateral litigation. [299] Second, clarity in the rule about the components of Rule 68 offers is important to plaintiffs as well as defendants. Plaintiffs who must respond to a Rule 68 offer need to understand what is at stake and what effect a particular offer has on costs and attorneys' fees. [300]

While it is true, as some courts have suggested, that a litigant who conducts basic research on Rule 68 would uncover the Marek decision, that fact alone would simply alert the litigant to the potential for attorneys' fees to be treated as part of costs. [301] The litigant still would need to conduct further research into other bodies of law to discern whether costs in that particular case are inclusive of fees. Moreover, focusing on what litigants could or should uncover in their research raises ***927** the question of why the rule itself should not provide such basic illumination. Not all cases involve large dollar amounts, and not all litigants are repeat players within the Rule 68 universe. Why should a rule intended to decrease costs instead require litigants to expend resources becoming veritable experts on the rule? Moreover, because the rule is intended to serve the public function of promoting settlements generally, not simply to perform a private function for individual litigants, [302] the public good is served by alerting litigants to the components of Rule 68 offers.

2. Clarity Regarding Whether Particular Offers Are Valid

Litigants know that absent a valid offer, Rule 68 has no impact. But under the current rule, litigants do not know what is required in order for an offer to be deemed valid. [303] This uncertainty results in underutilization of the rule as well as difficulties in assessing offers that are made. The text of the revised rule addresses this problem by explicitly providing guidance in three areas in which significant confusion exists regarding the validity of offers.

Specifically, part (j) of the rule provides that a Rule 68 offer does not constitute an admission of liability, thus eliminating the need for defendants to specify whether the offer is an admission or not. In addition, part (l) of the rule provides that Rule 68 offers are never revocable. Finally, part (d) states that an offer may include monetary and/or nonmonetary relief, making clear that either or both is sufficient.

All of these revisions enable litigants to know at the front end whether courts will deem particular offers valid. The result is that defendants are more likely to make offers under the rule, because they are confident their offers will not later be invalidated. The revisions also create a more level playing field for plaintiffs, who have no input into an offer's language and should not be required to second-guess whether a particular offer will be deemed valid.

The potential downside of these revisions is slight. First, a defendant who may want to admit liability, because he thinks a plaintiff might value such an admission, cannot factor the admission ***928** into the value of the offer. However, nothing prevents a defendant from making the same settlement offer, with an admission of liability, apart from Rule 68. If the offer is accepted, it makes little difference whether it is accepted pursuant to Rule 68 or not, because cost-shifting implications are triggered. Second, a defendant who, perhaps because of newly discovered information, wants to revoke a Rule 68 offer within the ten-day acceptance period cannot do so. While circumstances of obvious clerical error[304] may make this provision troubling, the reality is that disallowing revocations makes defendants no worse off than plaintiffs. Just as a plaintiff cannot withdraw her acceptance of a Rule 68 offer upon discovering new information that makes the offer less appealing, the defendant too must remain bound by its offer for the ten-day period.

3. Clarity Regarding Whether an Offer Is Inclusive of Costs

Too much uncertainty exists regarding whether offers are inclusive of costs. While uncertainty is reduced by alerting litigants to the components of Rule 68 offers,[305] this alone is not enough. Simply put, there are too many potentialities in Rule 68 offers to achieve clarity under the current rule.[306] And, unlike typical settlement offers, in which litigants can mutually resolve uncertainties at the drafting stage, the uncertainties in Rule 68 offers instead are resolved through collateral litigation.[307]

The revised rule eliminates the confusion that arises from the various drafting potentialities by limiting the types of Rule 68 offers a party can make. Specifically, the rule allows defendants to make only two types of offers: damages-only offers and lump-sum offers. In addition, the revised rule establishes damages-only offers as the default. Thus, unless the defendant uses the specific language contained in part (h) of the rule to opt out of the default and thus make a lump-sum offer, the offer will uniformly be construed as a damages-only offer.

***929** The benefits of restricting the types of Rule 68 offers defendants can make are several. First, the revised rule eliminates the need to construe on a case-by-case basis the variety of offers that arise in Rule 68 cases. Thus, instead of the current uncertainty that arises when an offer is silent as to costs, the revised rule makes clear that an offer must not only mention costs but also comply with the other requirements of part (h) in order to be deemed inclusive of costs. Second, and related, the revised rule provides clarity to litigants at the front end, rather than in the course of collateral litigation when it is too late. It should be clear to defendants drafting offers, and to plaintiffs evaluating offers, whether the offer is lump-sum or not.

Third, revising the rule helps ensure that litigants making and evaluating Rule 68 offers have the same understanding of the terms of the offer, thereby eliminating the kinds of surprises that too often arise in Rule 68 cases.[308] While it is counterproductive to the rule's purpose of encouraging settlements to require an actual meeting of the minds, the clarity and specificity of the revised rule at least make it more likely that the litigants will have mutual understanding of the meaning of the offer. This characteristic alone will greatly encourage the use of the rule by defendants[309] and will make the rule's use fair for plaintiffs.

Fourth, the bright-line nature of the revised rule eliminates any need for courts to consider extrinsic evidence in construing Rule 68 offers. This result makes sense for multiple reasons, not the least of which is that the consideration of extrinsic evidence is expensive and inherently uncertain. Moreover, the consideration of such evidence after-the-fact leaves plaintiffs vulnerable because they must evaluate and decide upon the meaning of a Rule 68 offer even though a court has not yet decided that meaning.[310]

Undoubtedly, even under the proposed revised rule some defendants still will make mistakes when drafting their Rule 68 offers. A defendant might make an offer that it intends to be ***930** lump-sum, but that does not comply with part

(h). Under the plain language of the rule, such an offer will be deemed to be for damages only and, if accepted, costs and any applicable attorneys' fees will be added to it. While this result is unfortunate for the particular defendant, it is necessary if the rule is to provide the level of certainty necessary to enable plaintiffs to fairly evaluate offers and to cut off collateral litigation. The alternative--leaving in place the current uncertainty about whether an offer is lump-sum or not and thus making the plaintiff guess as to how the court will construe it--is more unfair and more burdensome on courts.

Similarly, it is true that eliminating the lump-sum option altogether would add even more clarity at the offer stage. However, that change would not be desirable. Perhaps most important, preserving a defendant's ability to make a lump-sum settlement offer is necessary for the simple reason that many defense attorneys would not make Rule 68 offers if such offers left the issue of fees open. For example, one prominent defense attorney has stated that he has never drafted a Rule 68 offer exclusive of attorneys' fees, because it would be too much of a "wild card" to leave the issue of attorneys' fees up to the court. [311] On the other hand, another prominent defense attorney has stated that "the preferred way that we like to make offers of judgment is a sum certain plus reasonable attorneys' fees and costs incurred to date to be determined by the court." [312] Thus, in order to maximize the use of the rule, any proposed change should keep both options open, as the proposed revised rule does.

4. Clarity Regarding Whether an Offer Is Inclusive of Attorneys' Fees

Because the rule's value to defendants is greatest when attorneys' fees are at issue, defendants are most likely to make Rule 68 offers in cases in which a fee-shifting statute is involved. [313] Yet the current rule's failure to mention attorneys' fees at all creates considerable uncertainty regarding how to construe offers in fee-shifting cases. This intersection of the ***931** rule's lack of clarity regarding attorneys' fees combined with its increased use in fee-shifting cases hasled to significant uncertainty on the part of litigants and has resulted in complex collateral litigation.

As described in Part II.C.2 above, the sources of litigants' uncertainty about whether attorneys' fees are included in the offer are several. Sometimes litigants are unaware that attorneys' fees are implicated in any way by Rule 68. [314] Yet more often the confusion stems from uncertainty about how the underlying fee-shifting statute characterizes attorneys' fees, [315] and about whether attorneys' fees may be recovered when the offer is silent as to fees. [316] These uncertainties are inherent under the current rule, in which the interpretation of offers is bootstrapped on to the underlying fee-shifting statute.

The revised rule reduces uncertainty regarding attorneys' fees by alerting litigants to the issue of attorneys' fees and by specifying what an offer must say in order to be construed as inclusive of such fees. Yet these two changes alone, which are discussed in detail above in Part III.C.1 and III.C.3, are not sufficient to resolve the uncertainties that now accompany Rule 68 offers in fees-shifting cases. [317] Greater clarification is needed because under the current rule, the meaning of a Rule 68 offer is entirely dependent on the fee-shifting statute involved. [318] Thus, identical language from two Rule 68 offers is construed as having two different meanings simply because the offers were made in cases involving different fee-shifting statutes. [319]

***932** To eliminate this distinction without true meaning, [320] which is the source of far too much uncertainty under the current rule, the revised rule effectively replaces the concept of "costs" at the offer stage with the concept of "costs and applicable attorneys' fees." The result is that under the plain language of the rule, offers must be construed without regard to the underlying fee statute involved. [321] So, for example, a "lump-sum" offer must always be inclusive of applicable attorneys' fees as well as costs (regardless of how the underlying fee statute defines attorneys' fees). And a damages-only offer cannot be inclusive of either attorneys' fees or costs. [322]

This change in the rule is particularly necessary to reduce collateral litigation in cases in which offers are silent with regard to attorneys' fees.[323] Under the current rule, such an offer's meaning is resolved by the court, long after the plaintiff is required to accept or reject the offer, based upon the court's conclusion as to whether the offer is ambiguous.[324] And even ***933** whether a court labels an offer ambiguous is not necessarily conclusive of the result, given the varying consequences that courts attach to ambiguous offers.[325] While a determination of ambiguity sometimes depends only on the fee-shifting statute at issue, at other times it depends on the particular causes of actions and relief specified in the complaint.[326] Hence, a plaintiff who wants to know what meaning a court may attach to an offer that does not mention attorneys' fees has to distinguish between language like "total settlement" versus "one total sum as to all counts," as well as what the latter means if the counts specified in the complaint did not include a fee award.[327]

None of this makes sense under any set of circumstances, but it is particularly troublesome in the context of a rule intended to curb litigation costs. Thus, under the revised rule, litigants are not required to second-guess whether a court will deem an offer unambiguous. The rule makes clear that all offers are damages only (and thus by definition not inclusive of costs and applicable attorneys' fees) unless the offer strictly complies with the lump-sum provisions contained in part (h). Thus, an offer that does not mention fees by definition would not comply with part (h) and would be just another example of a damages-only offer to which applicable fees should be added if accepted.

In addition, eliminating distinctions in offers based upon underlying fee statutes adds particular clarity in cases in which Rule 68 offers involve two different types of fee statutes. Under the current rule, considerable confusion and collateral litigation arises in such cases because it is unclear how a court will construe an offer that "includes costs" when the case itself arises under two fee-shifting statutes that define costs differently. Namely, it is unclear in such cases whether a court will define costs with reference to the underlying fees-as-costs statute, the underlying fees-as-separate-from-costs statute, or some combination ***934** thereof.[328] The revised rule, in eliminating the distinction between costs and fees, makes the type of underlying fee statute irrelevant for purposes of evaluating the offer. No uncertainty regarding the offer need arise because under the revised rule, attorneys' fees are treated, for purposes of evaluating the offer, the same as costs, regardless of the type of fee statutes involved.[329] Thus, the type of collateral litigation that arose in the Wilson case--where one claim involved a fees-as-costs statute and another claim involved a fees-as-separate-from-costs statute--could not arise under the revised rule. Rather, the inquiry would be limited to determining if the offer were lump-sum or not, with that answer determining whether attorneys' fees were included.

Notably, the revised rule does not permit defendants to make damages-only offers that are inclusive of costs but not attorneys' fees. This limitation has always existed in fees-as-costs cases, in which attorneys' fees by definition are part of costs.[330] However, the revised rule also extends this limitation to fees-as-separate-from-costs cases.[331] While the revision allows defendants less freedom to craft individualized offers, it is necessary due to the uncertainty that arises precisely because offers often vary so greatly. Moreover, this revision does not have a significant downside, because costs as a category separate from fees typically are not sizeable.[332] Fewer options create more certainty; what some courts have hailed as flexibility under the ***935** current rule[333] may just as well be a buzzword for collateral litigation.[334] Thus, the proposed revised rule benefits litigants and courts alike by eliminating, at least for purposes of the offer, this distinction for which there is no rational basis.[335]

5. Clarity Regarding the Comparison Between an Unaccepted Offer and the Judgment

By creating certainty as to whether an offer is lump-sum or not--and what the lump sum includes--the proposed rule would eliminate the uncertainty that currently exists when courts compare an unaccepted offer with a judgment. Under the current rule, the same uncertainties that exist in the context of accepted offers occur when defendants seek to shift costs after trial for offers alleged to be more favorable than the judgment obtained.[336]

As in the context of accepted offers, the proposed revised rule creates clarity at the comparison stage because it simplifies the apples-to-apples comparison between the judgment obtained and the offer. Specifically, under the revised rule the defendant may make only two possible types of offers--damages-only offers and lump-sum offers. And because of the mandatory language in the rule itself, litigants and courts should be able easily to discern which type of offer is being made. [337] As such, the process of comparison post-trial should be straightforward. The costly and complicated collateral litigation concerning whether the rule was in fact triggered, as in B&H Manufacturing ***936** Co. v. Bright, [338] would not exist under the revised rule. Instead, the language would make clear whether the offer was lump-sum or not, and thus it would also make clear--regardless of the type of fee-shifting statute--whether attorneys' fees were part of the offer.

6. Comparison of the Offer's Meaning Under the Current Rule Versus the Revised Rule

In sum, the proposed revisions to the rule would inject certainty into the meaning of Rule 68 offers. Such certainty is necessary in order to curb the collateral litigation that the current rule perpetuates and to better effectuate the rule's purpose of encouraging settlements. For example, the revised rule should eliminate collateral litigation in which litigants wrestle over the arguable distinctions between an offer for a certain sum "with costs" versus one that instead states that it is "including costs." Similarly, the rule will curtail collateral litigation about whether an offer for "one total sum" includes attorneys' fees or not, and will also eliminate the need to look to the underlying fees-shifting statute in order to answer that question.

Thus, the questions posed by the hypothetical described in Part II.A would all easily be resolved under the proposed revised rule. In assessing the offer's value, the plaintiff would not need to consider the type of fee-shifting statute involved, nor would she need to carefully examine discrete drafting choices contained in the offer. So, for example, the plaintiff would only need to determine whether the offer were lump-sum or not, and then, having so determined, make the relevant comparison. To the extent the defendant purported to make a lump-sum settlement of sorts, say for "$175,000 in full satisfaction of all claims," the mandatory language of the revised rule would treat that offer as damages-only unless it complied with part (h).

CONCLUSION

Federal Rule of Civil Procedure 68 was created as a tool to promote settlement and decrease litigation. Its need has never been greater as litigation expenses continue to skyrocket and courts' dockets continue to increase. Yet because much uncertainty surrounds how courts interpret Rule 68 offers, the rule's ***937** purpose has not been achieved. The rule is rarely used and, when it is, collateral litigation often results. Much of this collateral litigation pertains to confusion about how Rule 68 offers should be interpreted, with heightened confusion regarding whether costs or attorneys' fees are included as part of the offer.

This Article proposes a revised rule that eliminates significant confusion regarding the meaning of Rule 68 offers. The revised rule explicitly instructs litigants regarding how Rule 68 offers will be interpreted, so that litigants need not resort to expensive and time-consuming research on the nuances of interpreting Rule 68 offers. Most notably, because the revised rule creates a bright line, clarifying that a lump-sum settlement only exists if certain criteria are met, litigants should encounter no confusion regarding whether an offer is lump-sum or not. Also, because the revised rule requires that both costs and any allowable attorneys' fees be treated together for purposes of the offer--either as part of a lump-sum offer or to be added on to a damages only offer--there should be little or no confusion. The clarity in the rule itself should provide litigants with certainty about how offers will be interpreted, so that defendants are not discouraged from making Rule 68 offers, and so that plaintiffs are able to fairly and accurately evaluate offers. With key in hand to unlock the puzzle of Rule 68, litigants will be able to access the rule without resorting to extensive research or collateral litigation.

Footnotes

d1 Associate Professor of Law, Drake University; Of Counsel, Belin Lamson McCormick Zumbach Flynn, P.C.; B.A. 1992, summa cum laude, Augustana College; J.D. 1995, magna cum laude, Harvard Law School; Law Clerk to Judge Ed Carnes, United States Court of Appeals for the Eleventh Circuit (1995-96). The author gratefully acknowledges the receipt of a John & Leslie Fletcher Law School Endowed Faculty Research Stipend. The author thanks Megan Gerriets and Christine Fleming for their research assistance, and also thanks Thomas Mayes, Harold Lewis, and Laurie Doré for reviewing a draft of this Article.

1 Sampson v. Embassy Suites, Inc., No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998).

2 Fed. R. Civ. P. 68.

3 12 Charles Alan Wright et al., Federal Practice and Procedure: Civil § 3001, at 66 (2d ed. 1997).

4 Daniel Glimcher, Note, Legal Dentistry: How Attorney's Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes, 27 Cardozo L. Rev. 1449, 1452 (2006).

5 Fed. R. Civ. P. 68. For the full text of the rule, see infra note 6.

6 Fed. R. Civ. P. 68. The relevant text of the "Offer of Judgment" rule is as follows:
At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.
Id.

7 John E. Sprizzo, Unjustifiable Refusals to Settle and Rule 68, 62 St. John's L. Rev. 443, 443 (1988).

8 See Wright et al., supra note 3, § 3002, at 90. By its plain text, Rule 68 is available only to the party seeking to make an offer, which typically is the defendant. Id.

9 Id. (quoting Marek v. Chesny, 473 U.S. 1, 6 (1985)); see also Monica Wiseman Latin, Note, Avoiding Disaster: The Applicability of Federal Rule 68 When Multiple Offers of Judgment Result in a Settlement, 12 Rev. Litig. 687, 696 (1993).

10 See Fed. R. Civ. P. 68; Marek, 473 U.S. at 5. Notably, Rule 68 is not triggered if the judgment is in favor of the defendant. Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981). This result has been criticized on grounds that it is arbitrary and contrary to the rule's purpose. See J. Karen Arnold, Note, Delta Air Lines, Inc. v. August: Taking the Teeth out of Rule 68, 43 U. Pitt. L. Rev. 765, 765 (1982).

11 Marek, 473 U.S. at 7. Courts have almost uniformly held that defendants cannot recover their attorneys' fees as "costs" pursuant to Rule 68. See Megan Barbero, Note, Interpreting Rule 68 to Conform with the Rules Enabling Act, 57 Stan. L. Rev. 2017, 2025 (2005) ("In sum, the majority of the circuit courts to have considered the issue have held that the 'properly awardable' language of Marek prohibits defendants from recovering attorney's fees from the plaintiffs as part of Rule 68 costs because either the defendant is not the 'prevailing party,' or because the suit is not unreasonable or frivolous and the underlying statute requires the suit to be so for there to be an award of attorney's fees ....").

12 Although in Marek the question before the Court was whether the underlying federal fee-shifting statute defined attorneys' fees as "costs," the Court made clear that Rule 68's reference to "costs" applies to "all costs properly awardable under the relevant substantive statute or other authority." 473 U.S. at 9. Thus, under Rule 68, attorneys' fees are properly treated as part of "costs" so long as they are so defined by a federal fee-shifting statute, state fee-shifting statute, or contract. 13 James

W. Moore et al., Moore's Federal Practice § 68.02[4], at 68-9 (citing Champion Produce, Inc. v. Ruby Robinson Co., 342 F.3d 1016, 1027-28 (9th Cir. 2003); Crossman v. Marcoccio, 806 F.2d 329, 332-34 (1st Cir. 1986)).

13 Some commentators have questioned whether Marek's interpretation of "costs" raises implications under the Rules Enabling Act. See Marek, 473 U.S. at 36 (Brennan, J., dissenting) (arguing that the majority's interpretation of Rule 68 would "surely ... operate to 'abridge' and to 'modify' [the] statutory right to reasonable attorney's fees"); Edward H. Cooper, Symposium Reflections: A Rulemaking Perspective, 57 Mercer L. Rev. 839, 845-47 (2006) (discussing the Rules Enabling Act in the context of revisions to Rule 68); Barbero, supra note 11 (exploring whether Marek's interpretation of "costs" as inclusive of attorneys' fees defined as costs abridges, enlarges, or modifies a plaintiff's arguably substantive right to attorneys' fees).

14 Marek, 473 U.S. at 11; see also Richardson v. Nat'l R.R. Passenger Corp., 49 F.3d 760, 765 (D.C. Cir. 1995) ("[A] Rule [68 offer] imposes certain consequences that can be costly for the [offeree] who declines the offer. The Rule is thus designed to put significant pressure on the [offeree] to think hard about the likely value of its claim as compared to the [offeror's] offer.").

15 See, e.g., 42 U.S.C. § 1988 (2000) (defining fees-as-costs in § 1983 actions).

16 Marek, 473 U.S. at 5; see also Wright et al., supra note 3, § 3001, at 66.

17 Marek, 473 U.S. at 5.

18 Id. at 10.

19 Wright et al., supra note 3, § 3001, at 67.

20 Id. at 75 (citing Crossman v. Marcoccio, 806 F.2d 329, 331 (1st Cir. 1986)).

21 Indeed, the rule's substance has not been amended since 1946. See Moore et al., supra note 12, § 68 App.01-.04; Anna Aven Sumner, Note, Is the Gummy Rule of Today Truly Better than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified, 52 Duke L.J. 1055, 1055 (2003). In contrast, several states have either revised or enacted offer of judgment rules in recent years. See John E. Shapard, Fed. Judicial Ctr., Likely Consequences of Amendments to Rule 68, Federal Rules of Civil Procedure 25-27 (1995); Lesley S. Bonney et al., Rule 68: Awakening a Sleeping Giant, 65 Geo. Wash. L. Rev. 379, 414 n.245, 422 (1997); Sumner, supra, at 1055 n.3; Laura T. Kidwell, Annotation, Construction of State Offer of Judgment Rule--Sufficiency of Offer and Contract Formation Issues, 118 A.L.R. 91 (2004).

22 For example, several proposals involve shifting the defendant's attorneys' fees, at least in some circumstances. For a history of the proposed amendments to Rule 68, see Moore et al., supra note 12, § 68 App.101.

23 See, e.g., Glimcher, supra note 4, at 1451-52, 1455 (describing Rule 68 as "relatively obscure and vastly underutilized"); Symposium, Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases? Session One: "Background and Federal Judicial Interpretation of Rule 68," 57 Mercer L. Rev. 743, 757 (2006) ("In summary, with some notable exceptions, it appears that Rule 68 is not used very much in the very type of cases in which it might be expected to have the greatest impact.").

24 See Albert Yoon & Tom Baker, Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East, 59 Vand. L. Rev. 155, 158-60 (2006).

25 See, e.g., Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1241 (11th Cir. 2002) ("The sole constraint Rule 68 places on offers of judgment is its mandate that an offer include 'costs then accrued.'").

26 Fed. R. Civ. P. 68.

27 See 473 U.S. 1, 9 (1985).

28 Erdman v. Cochise County, 926 F.2d 877, 880 (9th Cir. 1991).

29 Nusom v. COMH Woodburn, Inc., 122 F.3d 830, 834 (9th Cir. 1997).

30 Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998).

31 Id. ("Rule 68 operates automatically, requiring that the clerk 'shall enter judgment' upon the filing of an offer, notice of acceptance and proof of service. This language removes discretion from the clerk or the trial court as to whether to enter judgment upon the filing of the accepted offer." (citing Mallory v. Eyrich, 922 F.2d 1273, 1279 (6th Cir. 1991))).

32 Although the court enters "judgment" on an accepted Rule 68 offer, that judgment does not have collateral estoppel implications. See Ian H. Fisher, Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls, 14 DePaul Bus. L.J. 89, 92 (2001) (demonstrating that Rule 68 judgments do not have collateral estoppel implications because two of the required elements of collateral estoppel--that the issue was "actually litigated" and was "essential" to the judgment--are not present).

33 Mallory, 922 F.2d at 1279 ("From the foregoing it appears that Rule 68 judgments are self-executing. Unlike imposed judgments and ordinary consent judgments, once the parties agree on the terms of a Rule 68 judgment, the court has no discretion to withhold its entry or otherwise to frustrate the agreement."); see also Fisher, supra note 32, at 105 ("Upon the filing of a Rule 68 offer ..., a court must enter judgment ... as set forth in the offer. A court has no discretion ....").

34 Fed. R. Civ. P. 68.

35 Id. (emphasis added).

36 See Moore et al., supra note 12, § 68.08[2], at 68-55 n.5 ("[A] plaintiff who refuses an offer of judgment and later fails to receive a more favorable judgment must pay the defendant's post-offer costs." (citing O'Brien v. City of Greers Ferry, 873 F.2d 1115, 1120 (8th Cir. 1989))).

37 Nusom v. COMH Woodburn, Inc., 122 F.3d 830, 834 (9th Cir. 1997).

38 See, e.g., Crossman v. Marcoccio, 806 F.2d 329, 331-33 (1st Cir. 1986) (reading Rule 68 not only to deny a plaintiff who receives a judgment less favorable than the offer her right to have the defendant pay her costs, but also to require the plaintiff to pay the defendant's post-offer costs).

39 This comparison is complicated when costs, at least arguably, include attorneys' fees. See Wright et al., supra note 3, § 3006.1, at 125 ("Although the task of comparison is usually straightforward in cases involving only monetary relief, lump-sum offers that combine substantive relief and costs can present complications, particularly where costs include attorneys' fees.... [C]ourts have recognized that Rule 68 offers that appeared better actually were not when costs were added in."). For a discussion of cases in which courts have included attorneys' fees in measuring costs, see infra Part II.C.2.a.

40 Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998).

41 Id.

42 See Moore et al., supra note 12, § 68.02[4], at 68-9 n.13 (citing Marek v. Chesny, 473 U.S. 1, 9 (1985)).

43 28 U.S.C. § 1920 (2000).

44 See Moore et al., supra note 12, §§ 68.02[4], 68.08[2].

45 Id.

46 See id. § 68.02[4], at 68-9 n.10 ("[T]he costs which are subject to the cost-shifting provisions of Rule 68 are those enumerated in 28 U.S.C. § 1920, unless the substantive law applicable to the particular cause of action expands the general § 1920 definition." (citing Parkes v. Hall, 906 F.2d 658, 660 (11th Cir. 1990))); infra Part II.C.2.a (discussing cases in which courts include attorneys' fees as part of costs); infra note 169 (referencing sources that list fee-shifting statutes defining attorneys' fees as part of costs).

47 Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998).

48 See id. at 622; infra Part II.D.2 (observing that the plaintiff faces a difficult choice when deciding whether to accept or reject an offer of judgment because the plaintiff does not know whether the court will interpret the offer amount to include or exclude fees).

49 See Moore et al., supra note 12, § 68-08[2], at 68-55 (citing Crossman v. Marcoccio, 806 F.2d 329, 333 (1st Cir. 1986)). One criticism of Rule 68 is that it creates an incentive for plaintiffs to accept offers far below the value of their case. See, e.g., Harold S. Lewis, Jr. & Thomas A. Eaton, Foreword: Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68, 57 Mercer L. Rev. 723, 735 (2006) ("The principal concern [was] that the defendants ... would routinely make early, low-ball offers of judgment; the plaintiffs, fearful of forfeiting what is often the largest part of their recovery (attorneys fees), would feel compelled to accept ...."); cf. Yoon & Baker, supra note 24, at 162 ("[Rule 68] redistributes wealth from the plaintiff to the defendant .... Rule 68, if invoked, imposes risk on the plaintiff without any corresponding risk borne by the defendant. The defendant can exploit this inequality in the settlement process, compelling a lower settlement.").

50 See Gavoni v. Dobbs House, Inc., 164 F.3d 1071, 1077 (7th Cir. 1999) ("Rule 68 is designed to encourage parties to evaluate objectively the strength of their cases; financial and judicial economy are at its core."); Wright et al., supra note 3, § 3001, at 66.

51 Some defendants are likely not aware of Rule 68 and its potential as a settlement device. Such unfamiliarity results from several factors. First, the text of the rule "affords no guidance on how to apply [its cost-shifting mechanism]." Lewis & Eaton, supra note 49, at 733. Second, most attorneys were not exposed to Rule 68 in law school. Cf. David A. Anderson & Thomas D. Rowe, Jr., Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?, 71 Chi.-Kent L. Rev. 519, 536 (1995) (suggesting that lawyers recently out of law school may be more receptive to using Rule 68 as a settlement device). Third, and related to the uncertainties explored in this Article, the rule has not established itself as a part of the defense bar's standard tool chest. See, e.g., Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 8 (1985) ("Defendants seldom make Rule 68 offers.").

52 See, e.g., Fisher, supra note 32, at 91 ("Many defendants are reluctant to make an offer of judgment ....").

53 See Lewis & Eaton, supra note 49, at 733 (noting that the text of the rule does not make its application clear); supra note 51 (providing reasons why defense attorneys may be unfamiliar with Rule 68).

54 See infra Part II.C for a discussion of the complexities arising from arguably ambiguous offers.

55 Even aside from the rule's uncertainty, most commentators agree that the rule itself is far from perfect. See, e.g., Yoon & Baker, supra note 24, at 192 (concluding that "an offer of judgment rule must have a credible cost-shifting mechanism in order to influence pre-trial negotiations" and commenting that Rule 68 has been ineffective in affecting such negotiations). Whether because of the rule's one-sided nature or its lack of incentives (especially in non-fee-shifting cases), many think the rule needs reconsideration. See, e.g., Lewis & Eaton, supra note 49, at 735 (noting the increased settlement leverage defendants have when making Rule 68 offers); see also Peter Margulies, After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes That Do and Do Not Classify Attorneys' Fees as "Costs," 73 Iowa L. Rev. 413, 441-45 (1988) (proposing a percentage-based regime that would lessen the uncertainty plaintiffs face in determining the value of their case against a defendant's offer of judgment by reducing the stakes for a plaintiff who values her case too high). Proposals related to these not uncommon criticisms are generally consistent with the proposal set forth in this Article. See infra note 291. Even so, this Article focuses on clarifying the existing rule with regard to offers in order to eliminate barriers to the rule's use and to reduce collateral litigation when parties use the rule. There is little point in fixing Rule 68's incentives to be fairer or weightier if the rule's ambiguity prevents parties from using it in the first place.

56 Marek v. Chesny, 473 U.S. 1, 5 (1985).

57 Of course, evaluating a case's potential value entails its own uncertainty. For a criticism of the rule's harsh effect on plaintiffs evaluating the value of their case relative to an offer, see Margulies, supra note 55, at 445 (contending uncertainty about a case's value causes plaintiffs to "guess low--maybe too low--because it mandates the forfeiture of attorney's fees when the plaintiff guesses too high"). Perhaps because it was written shortly after Marek, and thus without the benefit of two decades of post-Marek litigation, Margulies' article dismisses the uncertainty highlighted in this Article: the uncertainty faced by litigants who, even assuming they could accurately value the case, cannot accurately predict how a court will interpret the Rule 68 offer. See id. at 429-30 ("Little decisional uncertainty exists in this situation because Marek requires that a court consider the issue ex post. Once the judgment is known, a decision is easy if no problems arise with setting pre-offer fees or assessing the status of injunctive relief." (footnotes omitted)).

58 See Jay H. Krulewitch, Note, Anatomy of a Double Whammy: The Application of Rule 68 Offers and Fee Waivers of Civil Rights Attorneys' Fees Under Section 1988, 37 Drake L. Rev. 103, 115 (1988) ("Application of Marek by the lower courts to Rule 68 settlement offers has focused on the specific terms of the offer and its validity.").

59 See Simon, supra note 51, at 6 n.18 ("Surprisingly, courts are still debating whether the phrase 'must pay the costs incurred' in [R]ule 68 requires the offeree merely to bear his own post-offer costs or actually to pay the offeror's post-offer costs."); Symposium, Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?: Session Three, "Changes to Rule 68," 57 Mercer L. Rev. 791, 801 (2006) ("It is a complex rule as it is ....") (statement of Mr. Barry Roseman).

60 See 473 U.S. at 6, 9.

61 Moore et al., supra note 12, § 68.02[4], at 68-9 to -10. The issue of whether costs are inclusive of attorneys' fees usually arises in the context of fee-shifting statutes. Even so, Marek suggests that attorneys' fees are also properly treated as part of costs in cases in which a contract defines costs as inclusive of attorneys' fees. See Marek, 473 U.S. at 9; Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1245 (11th Cir. 2002) (indicating that under Marek, costs may include attorneys' fees if a contract between the parties so defines them).

62 See 42 U.S.C. § 1988 (2000) (defining fees-as-costs in § 1983 actions).

63 See 29 U.S.C. §§ 216(b), 626(b) (2000) (defining fees and costs separately).

64 See, e.g., Marek, 473 U.S. at 6.

65 In criticizing the majority's holding in Marek, Justice Brennan pointed out that the holding would result in "dramatically different settlement incentives depending on minor variations in the phraseology of the underlying fees-award statutes ...." 473 U.S. at 23 (Brennan, J., dissenting) (emphasis added). Indeed, as this Article proposes, not only the incentives (consequences) differ; as an initial matter the terms of Rule 68 offers themselves differ depending upon the underlying fee-award statute, thus creating substantial uncertainty about the meaning of the offer.

66 See Fisher, supra note 32, at 117 ("Despite the fact that the rule has been in existence for sixty-three years, confusion often develops in application of this rule to specific cases.").

67 See infra Part II.C (discussing the divergent interpretations of Rule 68 offers).

68 See Marek, 473 U.S. at 5 ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation.").

69 See id.

70 See infra Parts II.B-C.

71 See Fed. R. Civ. P. 68.

72 E.g., Mite v. Falstaff Brewing Corp., 106 F.R.D. 434, 435 (N.D. Ill. 1985).

73 E.g., Richardson v. Nat'l R.R. Passenger Corp., 49 F.3d 760, 764 (D.C. Cir. 1995).

74 E.g., Leach v. N. Telecom, Inc., 141 F.R.D. 420, 428 (E.D.N.C. 1991).

75 In addition, certain questions of offers' validity arise in multi-party litigation. Most of these questions, however, arise at the post-offer stage. For example, in litigation involving multiple plaintiffs, a defendant may make a Rule 68 offer to each for a particular amount, yet condition the offer on acceptance by all plaintiffs. One commentator describes the ensuing complications:

Suppose all but one [plaintiff] accept, the offer expires, and the judgment is less favorable to all? Can those who sought to accept be held to pay post-offer fees to the defendant? Should all of the burden be imposed on the one who held out? If only those who reject are subject to Rule 68 consequences, what happens if those who reject do better by the judgment and those who would have accepted do worse, as should happen whenever each made an accurate prediction of the judgment?

Edward H. Cooper, Rule 68, Fee Shifting, and the Rulemaking Process, in Reforming the Civil Justice System 108, 127 (Larry Kramer ed., 1996). Not surprisingly, courts have reached different conclusions in addressing these complications. Compare Tocwish v. Jablon, 183 F.R.D. 239, 242 (N.D. Ill. 1998) (holding an offer conditioned on acceptance by all plaintiffs invalid for cost-shifting purposes), with Lang v. Gates, 36 F.3d 73, 75 (9th Cir. 1994) (upholding an offer conditioned on acceptance by all parties and applying cost-shifting provisions to deny post-offer attorneys' fees).

76 See Fed. R. Civ. P. 68.

77 No. 92 Civ. 9026(JGK), 1999 WL 20895, at *5 (S.D.N.Y. Jan. 19, 1999).

78 Id. at *9.

79 See id. at *8.

80 See id.; see also Mite v. Falstaff Brewing Corp., 106 F.R.D. 434, 435 (N.D. Ill. 1985) (holding valid an offer that expressly disclaimed liability); Coleman v. McLaren, 92 F.R.D. 754, 757 (N.D. Ill. 1981), aff'd sub nom. Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983) (holding offer that expressly disclaimed liability valid although ultimately finding offer less favorable than the relief obtained at trial because of the disclaimer).

81 See Jolly, 1999 WL 20895, at *8.

82 Staples v. Wickesberg, 122 F.R.D. 541, 544 (E.D. Wis. 1988); see also Jolly, 1999 WL 20895, at *8 (discussing case law holding that "Rule 68 does not require that offers of judgment include[] admissions of liability").

83 See No. 3:00-CV-0913-D, 2005 WL 1867292, at *19 (N.D. Tex. Aug. 5, 2005).

84 See id.

85 See Brief of Appellant City of Boca Raton at *18, City of Boca Raton v. Faragher, No. 95-4495, 1995 WL 17063486 (11th Cir. Sept. 5, 1995) ("[T]he District Court found that because the city did not admit liability, the offer did not comply with the requirements of Rule 68.").

86 See Faragher v. City of Boca Raton, 111 F.3d 1530, 1539 (11th Cir. 1997), rev'd, 524 U.S. 775 (1998). Neither the Eleventh Circuit nor the Supreme Court addressed the Rule 68 issue.

87 While the issue is beyond the scope of this Article, litigants should be cautious in this area because liability disclaimers--even if deemed valid--may affect the court's analysis at the post-offer stage. First, some courts consider the existence of a liability disclaimer in determining whether an unaccepted offer is "more favorable" than the judgment finally obtained. See Fisher, supra note 32, at 101-02 (discussing Coleman and other cases in which an offer was deemed less favorable than a judgment because a liability disclaimer detracted from the value of the offer). A better rule would seem to be one in which a liability disclaimer does not weigh into the determination of whether the offer is more or less favorable than the judgment obtained. See Jolly v. Coughlin, No. 92 Civ. 9026(JGK), 1999 WL 20895, at *8 (S.D.N.Y. Jan. 19, 1999) ("[I]f an admission of liability were a factor considered in the Rule 68 comparison between the offer of judgment and the ultimate judgment obtained, an admission of liability by the defendant would become a de facto requirement of every offer of judgment since every judgment finally obtained by the plaintiff after a trial would necessarily contain a finding of liability.").
Second, some courts find that the existence of a liability disclaimer detracts from plaintiffs' alleged status as prevailing parties. See Aynes v. Space Guard Prods., Inc., 201 F.R.D. 445, 450-51 (S.D. Ind. 2001) (discussing case law in this area). Notably, this Article's proposed revisions to Rule 68 would eliminate both types of uncertainty that arise at the offer and post-offer stages by amending the rule so that offers are not admissions of liability; thus, the need for offers to state such a disclaimer would be eliminated. See infra Parts III.B, III.C.2.

88 Fed. R. Civ. P. 68.

89 Wright et al., supra note 3, § 3004, at 102-05.

90 See Richardson v. Nat'l R.R. Passenger Corp., 49 F.3d 760, 765 (D.C. Cir. 1995).

91 .Specifically, the defendant's offer provided $150,000 to compensate plaintiff for his shoulder injuries alleged to have resulted from defendant's negligence. See id. at 762.

92 Id. at 765.

93 Id.

94 Id.

95 Id. (citing Morris K. Udall, May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?, 19 F.R.D. 401, 405 (1957)).

96 See Cesar v. Rubie's Costume Co., 219 F.R.D. 257, 259 (E.D.N.Y. 2004) ("In a variety of contexts, the Seventh, Eighth, and D.C. Circuits have all stated that Rule 68 offers are irrevocable during the ten-day period." (citations omitted)).

97 See id. at 261.

98 See id.

99 Id.

100 Id.

101 Id. at 260.

102 49 F.3d 760 (D.C. Cir. 1995).

103 Id. at 763. Undoubtedly, the revocation issue was complicated because it dealt with the defendant's efforts to show fraud on the part of the plaintiff, which the defendant argued justified its revocation. Id. at 762. The specifics of the defendant's assertion were as follows: The defendant claimed that it discovered new information which cast doubt on the extent of the plaintiff's injuries. Id. at 762-63. Because the defendant discovered this information after it had made its Rule 68 offer, the defendant purported to withdraw its offer via a fax to the plaintiff. Id. at 762. But the plaintiff, still within the ten-day period for accepting the offer, ignored the purported withdrawal and filed its acceptance of the offer with the court the following day. Id. The defendant then filed a "Motion to Set Aside Plaintiff's Purported Acceptance," prompting the clerk to defer entering judgment. Id. The lengthy revocation proceedings were thus set into motion.

104 Id. at 763 (pointing to the district court's statement in its ruling that it was denying the motions "although not without 'a degree of reluctance"' (citations omitted)).

105 See id. at 760-63.

106 Notably, the circuits are split on the issue, and some circuits have yet to weigh in.

107 See supra note 31 and accompanying text (discussing Rule 68's intent that judgments entered pursuant to Rule 68 be self-executing).

108 See, e.g., Wright et al., supra note 3, § 3002, at 90.

109 In addition to confusion about an offer's validity, offers that involve injunctive relief also raise significant valuation questions. Such questions arise with regard to rejected offers, which require courts to compare the value of the nonmonetary relief offered to the judgment obtained. While no rewriting of Rule 68 can avoid what is an inherently difficult comparison, courts should nonetheless be mindful that as the drafter of the offer, the defendant bears the burden of demonstrating the offer's value and showing that it is more favorable than the judgment obtained. See id. § 3006.1, at 127-28 (stating that the comparison of the offer to the judgment obtained is "intrinsically more difficult where one or both involves nonmonetary relief" and that "no clear rules can guide" the comparison). See generally Thomas L. Cubbage, Note, Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread, 70 Tex. L. Rev. 465 (1991) (surveying court decisions involving the application of Rule 68 to equitable relief and discussing their methods for comparing the Rule 68 offer to the judgment obtained).

For a recent decision in which equitable relief was valued, such that the court decided the Rule 68 offer was less favorable than the judgment obtained, see Reiter v. MTA New York City Transit Authority, 457 F.3d 224, 229 (2d Cir. 2006), in which the Second Circuit valued the plaintiff's equitable relief of job reinstatement at more than $10,000, such that Rule 68 was not triggered.

110 See Fed. R. Civ. P. 68.

111 Moore et al., supra note 12, § 68.04[5], at 68-28.

112 141 F.R.D. 420, 429 (E.D.N.C. 1991).

113 See id. at 428.

114 Id. Similarly, in Barrow v. Greenville Independent School District, the court rejected the argument that the Rule 68 offer was invalid because it did not provide for the requested equitable relief. See No. 3:00-CV-0913-D, 2005 WL 1867292, at *20 (N.D. Tex. Aug. 5, 2005). The court reasoned that the rule allows a party making an offer to decide what to offer, and that parties are "not obligated to offer each type of [requested] relief in [their] Rule 68 offers." Id. at *20.

115 136 F.R.D. 582, 582 (W.D.N.C. 1991).

116 Id. at 584.

117 See id. at 585.

118 Id. (citation omitted).

119 See supra note 31 and accompanying text (discussing Rule 68's intent that judgments entered be self-executing).

120 Fed. R. Civ. P. 68; see also Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1241 (11th Cir. 2002) ("The sole constraint Rule 68 places on offers of judgment is its mandate that an offer include 'costs then accrued.'").

121 473 U.S. 1, 6 (1985) (citation omitted).

122 Marek both established and examined this question in detail. In that case, Rule 68 clearly was triggered; the judgment total was $92,000 as compared to the $100,000 offer. See id. at 3-4. Thus, the question under Marek concerned the consequences of Rule 68 being triggered, and the shifting of particular post-offer costs. See id. at 5. The court held that post-offer costs under Rule 68 include attorneys' fees when the underlying statute at issue in the litigation defined such fees as "costs." See id. at 8-9. Since Marek, litigants have, as Justice Brennan predicted in his dissent, disputed when attorneys' fees are part of the post-offer costs that shift. See id. at 24-30 (Brennan, J., dissenting) (discussing the potential inconsistencies between the statutory authorization of attorneys' fees and Rule 68). While the various consequences that attach to a plaintiff when Rule 68 is triggered are beyond the scope of this Article, the same need for certainty that occurs at the offer stage also occurs at the enforcement stage. See infra note 320.

123 Fed. R. Civ. P. 68.

124 732 F. Supp. 1287, 1289 (D.N.J. 1990).

125 See id.

126 See id. at 1292.

127 Id. at 1294.

128 Id. Other courts have similarly interpreted "with costs" language. See, e.g., Laskowski v. Buhay, 192 F.R.D. 480, 480 (M.D. Pa. 2000) (construing an offer of "$25,000, with costs accrued" as meaning $25,000 plus costs).

129 No. 91-CV-1348, 1995 WL 238981, at *1, *9 (N.D.N.Y. Apr. 21, 1995).

130 See id.

131 Id. It is well-established that such principles of contract interpretation should govern the interpretation of Rule 68 offers. See, e.g., Moore et al., supra note 12, § 68.04[6]. However, as explored in the holdings discussed above in Parts II.B-C, this unifying principle still does not offer sufficient certainty for litigants. Indeed, as one court explains, a "Rule 68 offer of judgment ... has characteristics that distinguish it from a normal contract." Said v. Va. Commonwealth Univ., 130 F.R.D. 60, 63 (E.D. Va. 1990) (refusing to consider extrinsic evidence to determine the meaning of an ambiguous offer).

132 Christian, 1995 WL 238981, at *9 (quoting Sas v. Trintex, 709 F. Supp. 455, 458 (S.D.N.Y. 1989)).

133 Id. at *10 (citation omitted).

134 See id. at *11.

135 Id.

136 This case-by-case determination of intent when faced with arguably ambiguous contract language runs counter to the holdings of other courts that ambiguity in Rule 68 contracts should be resolved against the drafter. See, e.g., Chambers v. Manning, 169 F.R.D. 5, 8 (D. Conn. 1996) (rejecting case-by-case determinations of intent and holding that ambiguous language should be construed against the drafter because plaintiffs "should not be left to guess how courts will interpret extrinsic evidence of what is, and is not, included in the offer" (citation omitted)). While the outcome under either test is the same in these particular cases, the case-by-case determination of intent approach leaves the door open to uncertainty for future litigants.

137 See Christian, 1995 WL 238981, at *11 (noting the "undeniably harsh result" that would accompany a denial of attorneys' fees).

138 See id. Although some courts have allowed plaintiffs to seek clarification of the terms of an offer before the ten-day acceptance period expires. See, e.g., Radecki v. Amoco Oil Co., 858 F.2d 397, 402 (8th Cir. 1988). Other courts have not allowed clarification. See, e.g., Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1240 (11th Cir. 2002) ("Unlike traditional settlement negotiations, in which a plaintiff may seek clarification or make a counteroffer, a plaintiff faced with a Rule 68 offer may only accept or refuse."). Moreover, such post-offer/pre-acceptance communications have the potential to breed their own collateral litigation. Cf. Sharpe v. Cureton, 319 F.3d 259, 276 n.16 (6th Cir. 2003).

139 655 F. Supp. 736 (N.D. Ind. 1987).

140 Id. at 737.

141 Id. at 738.

142 Id.

143 Id.

144 See id. at 738-39.

145 In a similar case, Webb v. James, the court also refused to alter the plain language of a Rule 68 offer in which the defendant failed to state that its offer was inclusive of costs. See 147 F.3d 617, 623 (7th Cir. 1998). To do so, the court reasoned, would undermine the rule's purpose and be unfair to plaintiffs. See id. at 621-22. Thus, the court allowed recovery of costs in addition to the amount of the Rule 68 offer. See id. at 622. The court also allowed recovery of attorneys' fees, in addition to the amount of the offer, even though such fees were not considered part of "costs." See id. The sticker shock to the defendant in Webb was considerable: the defendant had to pay over $98,000 in costs and attorneys' fees in addition to the $50,000 it offered under Rule 68. See id. at 620, 623; see also infra Part II.C.2.b.i (discussing the court's holding in Webb regarding attorneys' fees, including the court's application of Federal Rule of Civil Procedure 60 to the offer on grounds of "mistake").

146 130 F.R.D. 60, 63 (E.D. Va. 1990).

147 See id.

148 Id.

149 148 F.3d 937, 939-40 (8th Cir. 1998).

150 Id. at 938.

151 Id. (emphasis added).

152 Id. at 939.

153 See id. at 939-40 (vacating the Rule 68 judgment pursuant to Rule 60(b), which allows a court to vacate any judgment on grounds of exceptional circumstances). For a discussion of the uncertainty that arises from using Rule 60 to negate the automatic operation of Rule 68, see infra note 208.

154 165 F.R.D. 113, 115-16 (M.D. Fla. 1996).

155 Id. at 116.

156 228 F. Supp. 2d 799, 801 (E.D. Mich. 2002), rev'd in part and aff'd in part, 378 F.3d 561 (6th Cir. 2004).

157 Id. On appeal, the Sixth Circuit reversed the district court's ruling on attorneys' fees, holding that the defendant's "silence on the subject of costs in its Rule 68 offer" meant that costs were not included in the offer. McCain, 378 F.3d 561, 564 (6th Cir. 2004) (citing Marek as standing for the proposition that costs are not included in an offer unless the offer so states). This holding is similar to Rohrer. See supra text accompanying notes 139-44.

158 Rohrer v. Slatile Roofing & Sheet Metal Co., 655 F. Supp. 736, 738 (N.D. Ind. 1987).

159 See Stewart v. Prof'l Computer Ctrs., Inc., 148 F.3d 937, 939-40 (8th Cir. 1998).

160 See McCain, 228 F. Supp. 2d at 801; Blumel v. Mylander, 165 F.R.D. 113, 116 (M.D. Fla. 1996). As noted above, on appeal the Sixth Circuit held that an offer that does not mention costs should not be construed as inclusive of costs. McCain, 378 F.3d at 564. In McCain, the plaintiff ultimately recovered her $150 in costs, which undoubtedly pales in comparison to the post-offer attorneys' fees she incurred in litigating the Rule 68 issues. See id. at 566. In a related but separate issue in the case, the court held that the plaintiff could not recover her attorneys' fees in addition to the amount of the offer. See McCain v. Detroit II Auto Finance Center, 378 F.3d 561, 563, 565 (2004).

161 See Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998) ("Rule 68 operates automatically."); Nusom v. COMH Woodburn, Inc., 122 F.3d 830, 834 (9th Cir. 1997) ("[T]he offer, once made, is non-negotiable.").

162 See, e.g., Said v. Va. Commonwealth Univ., 130 F.R.D. 60, 63 (E.D. Va. 1990) ("Because of the difficulty of the choice that an offer of judgment requires a claimant to make, it is essential that he be able to discern with certainty what the precise terms of that offer are.").

163 Webb, 147 F.3d at 621 (quoting Shorter v. Valley Bank & Trust Co., 678 F. Supp. 714, 719-20 (N.D. Ill. 1988)). The court went on to state that "[a]dherence to the language of the offer whenever possible alleviates this unfairness to the plaintiff." Id. (quoting Shorter, 678 F. Supp. at 719-20). While true, this has not been the consistent view of courts interpreting such offers, which is why the rule itself needs to be amended to guide courts, and thus litigants, in interpreting such offers.

164 Sas v. Trintex, 709 F. Supp. 455, 458 (S.D.N.Y. 1989) (rejecting the defendant's argument that the court "must determine what [the defendant's] intentions were in making the offer and what the plaintiff's assumptions were in accepting it"); see also Nortek, Inc. v. Liberty Mut. Ins. Co., 843 N.E.2d 706, 715 n.15 (Mass. App. Ct. 2006) ("[T]he prospect of collateral proceedings weighing extrinsic evidence on an offeror's claim that its offer was intended to mean something other than expressed in its unambiguous terms seems particularly at odds with the purpose of the rule.").

165 See Webb, 147 F.3d at 621 (refusing to "consider challenges to the terms of a Rule 68 offer [because] [s]uch challenges undermine the [r]ule's purpose of encouraging settlement and avoiding protracted litigation").

166 Symposium, Revitalizing FRCP 68: Can Offer of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases? Session Two: "Utilization and Alternatives to Rule 68," 57 Mercer L. Rev. 771, 786 (2006).

167 See Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1241 (11th Cir. 2002) ("Rule 68 does not define the meaning of the term 'costs,' however, and consequently parties frequently dispute whether attorneys' fees are included.").

168 Symposium, supra note 59, at 811 (comments of Professor Edward H. Cooper, who serves on the Civil Rules Advisory Committee and has extensively explored Rule 68). While many scholars agree that the practical implication of Marek is "bizarre," that result is not an indictment on Marek itself. In Marek, the Court obviously had to interpret the rule as drafted, and the "bizarre" implications of Marek may simply call for amending the text of the rule. See Cooper, supra note 13, at 851 (emphasizing that there is no legal barrier to amending the rule to change Marek's outcome, because Marek's holding was dependent on the rule and not, for example, a constitutional issue).

169 For a comprehensive listing of statutes that define attorneys' fees as a "cost" and those that define attorneys' fees as separate from costs, see Bonney, supra note 21, at 414 n.245, 422. For a less comprehensive but more up-to-date listing, see Moore et al., supra note 12, § 68.02[4], at 68-10 nn.14-15. See also Marek v. Chesny, 473 U.S. 1, 43-48 (1985) (Brennan, J., dissenting) (categorizing and listing various fees-shifting statutes).

170 Indeed, an offer that seeks to limit costs to "court costs, but not attorneys' fees" under a fees-as-costs statute will be held invalid. See, e.g., Bentley v. Bolger, 110 F.R.D. 108, 111-14 (C.D. Ill. 1986).

171 As discussed above in Part II.C.1, there is considerable uncertainty regarding how offers are interpreted with regard to costs.

172 See Cooper, supra note 13, at 849 ("There is a real concern that some plaintiffs' attorneys, confronted with the unfamiliar beast of a formal Rule 68 offer, will read the rule and escape without any inkling of the most serious consequence that may flow from rejection. Is there no principle of fair notice that requires the rule to spell out this consequence?").

173 However, this same conclusion may not be true if the offer is made based upon a claim in which the underlying statute does not define fees as costs. Under such circumstances, courts have differed as to how to interpret offers that are "silent" as to attorneys' fees. Id.; see infra Part II.C.2.b.

174 926 F.2d 877, 878, 879 (9th Cir. 1991).

175 See 42 U.S.C. § 1988 (2000).

176 Erdman, 926 F.2d at 879-80.

177 See id.; see also supra Part II.C.1 (discussing confusion that arises in cases regarding meaning of Rule 68 offer's language for certain dollar amount "with costs").

178 See id. at 879.

179 Id.

180 Henderson, No. 03-CV-0526-CVE-PJC, 2006 WL 1878897, at *5 (N.D. Okla. July 6, 2006) ("'Any effort to research Rule 68 would have alerted an attentive lawyer to the possibility of attorney's fees being included under the rule ....'" (quoting Aynes v. Space Guard Prods., Inc., 201 F.R.D. 445, 449 (S.D. Ind. 2001))).

181 Cooper, supra note 13, at 849.

182 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000). For a case in which the distinction between recovery of attorneys' fees under different parts of Title VII arose, see Wilson v. Nomura Securities International, Inc., 361 F.3d 86, 89-90 (2d Cir. 2004).

183 See Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1337 (4th Cir. 1996).

184 See 298 F.3d 1238 (11th Cir. 2002).

185 See id. at 1245. The court quickly dismissed the argument that the trade secret act defined attorney fees, absent willful misappropriation, as costs. See id.

186 Id. (quoting Marek v. Chesny, 473 U.S. 1, 9 (1985)).

187 See id. at 1246; see also Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc., 260 F.3d 1054, 1059-60 (9th Cir. 2001) (denying an award of attorneys' fees to a plaintiff who accepted a Rule 68 offer in a multi-count case in which only one of the twelve counts provided for attorneys' fees).

188 361 F.3d 86, 89-91 (2d Cir. 2004).

189 See id.

190 Id. at 88.

191 See id.

192 See id. The plaintiff also argued that he was entitled to attorneys' fees under Title VII's mixed-motives prong--which defines fees as separate from costs. See id. at 89-90. The court rejected that argument. See id.

193 For a more complete discussion of the recovery of attorneys' fees when the offer is silent in fees-as-separate-from-costs cases, see infra Part II.C.2.b.

194 The question of the extent of the plaintiff's entitlement to a fee award is somewhat complicated. According to the dissent in Wilson, the plaintiff's fee award under the municipal law would have to be offset by "whatever part of the settlement amount [the defendants] can show should be attributed to settlement of the claim for attorney's fees under federal law." 361 F.3d at 93 (Newman, J., dissenting). It is not clear how courts would accomplish this, or, even if they could, that this would be the proper approach.

195 See id. at 90-91.

196 Id. at 91.

197 See id. at 93 (Newman, J., dissenting) (referring to the attorneys' fees claim under the municipal law as "indisputably outside" of the Rule 68 offer).

198 While the dissent in Wilson points out that a "careful lawyer []" would have drafted the offer to be "inclusive of costs and attorney's fees," id. at 91, the fact remains that the rule itself does not alert lawyers to this requirement in any way, nor does the case law. Indeed, if the various laws under which the plaintiff sought relief in Wilson all defined fees as costs, the offer would clearly have been inclusive of fees.

199 The question of whether attorneys' fees are included as part of a Rule 68 offer arises only in cases in which attorneys' fees are provided for in some way by the underlying statute or contract. In cases in which no right to attorneys' fees exists, a Rule 68 offer's silence with regard to attorneys' fees would be construed as not inclusive of fees.

200 See Fisher, supra note 32, at 104 (describing a proposed form for a Rule 68 offer that makes it clear that fees are not to be added on in fees-as-separate-from-costs cases).

201 See id. at 98 ("Defendants should be especially wary of situations in which the underlying substantive statute mandates a plaintiff's recovery of fees separately from costs.").

202 Notably, the question of whether a plaintiff may recover attorneys' fees in addition to the amount of the offer when such fees are not defined as costs arises only in the context of accepted offers. For offers that are rejected, even if the judgment obtained by the plaintiff is less favorable than the offer, only costs shift. If costs do not include attorneys' fees, such fees are not cut off. Still, the plaintiff's rejection of the offer may be considered by the court in determining the reasonable amount for any fee award. See, e.g., Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1337 (4th Cir. 1996) (considering rejection of a Rule 68 offer in determining the propriety and amount of an attorneys' fees award where the statute treated attorneys' fees as separate from costs).

203 Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc., 260 F.3d 1054, 1059 (9th Cir. 2001) (quoting Nusom v. COMH Woodburn, Inc., 122 F.3d 830, 834 (9th Cir. 1997)); see also Sampson v. Embassy Suites, Inc., No. Civ. A. 95-7794, 1998

WL 726649, at *1 (E.D. Pa. Oct. 16, 1998) (citing Webb v. James, 172 F.R.D. 311, 314-16 (N.D. Ill. 1997)) (holding that the burden is on the defendant to "clearly specify that the offer includes attorney's fees").

204 Nusom, 122 F.3d at 834. Some courts, like the Ninth Circuit, discuss the question of how to construe an offer in a fees-as-separate-from-costs case when the offer is silent as to attorneys' fees as one of waiver. In Nusom, the court construed a Rule 68 offer and held that any waiver of statutory attorneys' fees must be "clear and unambiguous" and that if the offer is ambiguous the defendant must show that both parties intended a waiver. Id. at 833; see also Erdman v. Cochise County, 926 F.2d 877, 880 (9th Cir. 1991).

205 The entitlement to attorneys' fees in these cases stems not from Rule 68, which requires the court to award "costs then accrued," but instead from the underlying fee-shifting statute or contract. Moore et al., supra note 12, § 68.02[4], at 68-11 to -12. Even so, it is not a certainty that such fees will be added on. The plaintiff still must show, under the relevant fee statute, that she is entitled to attorneys' fees, which frequently requires the plaintiff to demonstrate that she is the "prevailing party." See, e.g., Nusom, 122 F.3d at 833. Ordinarily, a Rule 68 judgment is sufficient to demonstrate prevailing party status; however, fees may not be awarded if the Rule 68 judgment merely reflects a nuisance settlement. See, e.g., Fletcher v. City of Fort Wayne, 162 F.3d 975, 976-78 (7th Cir. 1988) (holding in a § 1983 action that plaintiffs were not entitled to attorneys' fees because the accepted offer reflected a nuisance settlement).

206 147 F.3d 617, 619 (7th Cir. 1998); see also supra note 145 (discussing the Webb court's holding that the plaintiff was allowed to recover costs in addition to the amount of the offer).

207 Webb, 147 F.3d at 622 (applying Rule 68 to a claim involving the Americans with Disabilities Act).

208 Id. at 623. In addition to arguing that the defendant was entitled to relief under Rule 68, the defendant in Webb also argued that it should be relieved from the unintended consequences of the Rule 68 judgment under Federal Rule of Civil Procedure 60. See id. at 619-20. The court agreed, holding that the defendant appropriately sought relief under Rule 60(b)(1) based upon "mistake, inadvertence, surprise, or excusable neglect." Id. at 622. Even so, the court provided no such relief, and instead concluded that it was within the district court's discretion to find that the defendant's neglect was not excusable because "Rule 68 itself alerts the reader to the issue of costs, the ADA provision granting attorney's fees is clear and unambiguous, and Marek was decided in 1985, more than a decade before [the defendant] extended its offer of judgment." Id.
Despite Webb's ultimate holding, the court's decision on the Rule 60 issue opens the door to collateral litigation on Rule 68 judgment, albeit under Rule 60 rather than Rule 68 more limited in scope. The amendments proposed in this Article would decrease the likelihood of defendants succeeding under, and thus bringing, a Rule 60 argument to undo a Rule 68 judgment. The text of the revised rule itself would alert the defendant to the issue of attorneys' fees, making any neglect by defendants even less excusable.

209 See Kelm v. Arlington Heights Park Dist., No. 98 C 4786, 2000 WL 1508240, at *2-4 (N.D. Ill. Oct. 10, 2000) (mem.) (awarding attorneys' fees in addition to an offer for "judgment to the plaintiff in the sum of Twenty Thousand and 0/100 Dollars ($20,000.00)" because the offer "is unclear about whether attorney's fees are included in the $20,000 Offer of Judgment or not").

210 Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1239 (11th Cir. 2002).

211 See id. at 1244-45; see supra Part II.C.1 (describing cases in which courts determined whether costs are included).

212 See Util. Automation 2000, 298 F.3d at 1247.

213 Id.

214 See id. at 1244.

215 Id. In following Webb, the Eleventh Circuit had to distinguish its own precedent set by Arencibia v. Miami Shoes, Inc., 113 F.3d 1212 (11th Cir. 1997). In Arencibia, the offer was "in the amount of $4,000" and made no reference to costs or attorneys' fees. Id. at 1213. The court held that the plaintiff could obtain costs in addition to the amount of the offer, but not attorneys' fees (which were not defined as costs under the statute in that case). See id. at 1214. In explaining why the plaintiff in Utility Automation 2000 could seek fees whereas the plaintiff in Arencibia could not, the Utility Automation 2000 court stated that

the difference was in the issue presented to the court: "The only issue before this Court in Arencibia was whether the district court could grant attorneys' fees as costs 'by virtue of Rule 68.'" 298 F.3d at 1242 (quoting Arencibia, 113 F.3d at 1214).

216 Util. Automation 2000, 298 F.3d at 1244; see also Nusom v. COMH Woodburn, Inc., 122 F.3d 830, 834 (9th Cir. 1997) (holding that where the accepted offer is silent as to fees, the plaintiff is entitled to seek attorneys' fees in addition to the amount of the offer if the underlying statute provides for attorneys' fees, in addition to costs, to the "prevailing party").

217 The court left open for remand whether the amount of attorneys' fees sought by plaintiff (approximately $61,000) was reasonable. Util. Automation 2000, 298 F.3d at 1249.

218 See supra text accompanying notes 223-27 (discussing Radecki v. Amoco Oil Co., 858 F.2d 397 (8th Cir. 1988)).

219 See supra text accompanying notes 231-36 (discussing Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390 (7th Cir. 1999)).

220 See Fisher v. Stolaruk Corp., 110 F.R.D. 74, 74 (E.D. Mich. 1986) (allowing an offeror to revoke an accepted Rule 68 offer for "$5,000 'with costs then accrued"' when the offeror mistakenly believed that "costs" included attorney's fees under the claim at issue).

221 The issues that arise in fees-separate-from-costs cases in which the offer is silent in some ways parallel the issues that arise with regard to the inclusion of costs when offers are silent with regard to costs. See supra Part II.C.1.

222 Some courts and commentators contend that these different rulings do not reflect inconsistency, but instead merely reflect differences between the cases. The contention asserts that the cases are consistent because in all cases the courts apply "contract law [such] that, absent parol evidence as to the meaning of an ambiguous term, ambiguous terms of a contract are construed against the drafter of the contract." Hennessy v. Daniels Law Office, 270 F.3d 551, 553-54 (8th Cir. 2001); see also William W Schwarzer et al., California Practice Guide: Federal Civil Procedure Before Trial §15:155.3 (2006) (explaining the treatment of ambiguous Rule 68 offers).

While the search for consistency in the rule's application is noble, no unifying theory exists that adequately captures the holdings of the cases. For example, in contrast to Radecki and Basha, both Webb and Utility Automation 2000 held it inappropriate for a court to consider extrinsic evidence of an offer's alleged ambiguity. Compare Basha v. Mitsubishi Motor Credit of Am., Inc., 336 F.3d 451, 454 n.5 (5th Cir. 2003) (commenting that the Radecki court also "conducted a review of extrinsic evidence"), and Radecki v. Amoco Oil Co., 858 F.2d 397, 402 (8th Cir. 1988) (finding the offer ambiguous even after "reviewing all the evidence"), with Util. Automation 2000, 298 F.3d at 1244-46 (relying solely on the offer's language to determine the plaintiff's entitlement to attorneys' fees), and Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998) (asserting the soundness of "refus[ing] to consider challenges to the terms of a Rule 68 offer"). Specifically, in Utility Automation 2000, the court emphasized that "the responsibility for clarity and precision in the offer must reside with the offeror" and "any ambiguity in the terms of an offer must be resolved against its drafter, and therefore, absent a clear indication to the contrary the accepting party cannot be deemed to have received its fees or waived the right to seek them." 298 F.3d at 1244 (citing Nusom, 122 F.3d at 835). Similarly, in Webb, the Seventh Circuit stated that "'[u]nless the defendant allows the plaintiff to resolve or eliminate ambiguities, the plaintiff will be forced to guess whether and how the court would interpret the extrinsic evidence. Adherence to the language of the offer whenever possible alleviates this unfairness to the plaintiff.'" 147 F.3d at 621 (quoting Shorter v. Valley Bank & Trust Co., 678 F. Supp. 714, 720 (N.D. Ill. 1988)). That holding is likely why the Seventh Circuit in Nordby, bound by its precedent in Webb, concluded that the offer in the Nordby case was unambiguous (in favor of the defendant) in order to reach the result it did. See Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390, 392 (7th Cir. 1999).

In any event, it matters little to practitioners and their clients whether, as claimed by some, the law is consistent yet applied in unique ways to inconsistent facts or whether the law itself is inconsistent. Either way, the uncertainty, expense, and unfairness that often result from the rule's application significantly deter practitioners and clients from using the rule.

223 858 F.2d 397, 400 (8th Cir. 1988) (resorting to "factors outside the words themselves" to determine whether the defendant's offer was intended to include attorneys' fees since the offer itself did not address them).

224 Id. at 401.

225 Id.

226 Id. at 402.

227 One of the judges in Radecki would have enforced the Rule 68 offer as inclusive of costs. See id. at 403 (Fairchild, J., concurring in part, dissenting in part) ("[A]n offer of judgment for a specified sum, including costs, necessarily means that if the offer be accepted, the resulting judgment will be for the specified sum, without addition of an attorney's fee whether or not the attorney's fee is a part of costs.").

228 336 F.3d 451, 453 (5th Cir. 2003).

229 Id. at 453-54.

230 Id. at 455. The short opinion in Basha leaves unclear the precise basis for the court's holding. While the court calls attention to extrinsic evidence regarding the pre-offer settlement talks, suggesting that it found the offer to be ambiguous and thus resorted to extrinsic evidence, it also indicates that "the text itself" may make clear that fees are included in the offer. Id. at 454. Thus, it is likely that litigants will attempt to use Basha to show that courts should interpret an offer for a plain dollar amount, with no explicit reference to fees or anything suggesting a lump sum settlement, as inclusive of fees, even absent any supporting extrinsic evidence.

231 Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390, 392 (7th Cir. 1999).

232 See id. at 393 (rejecting a magic-words approach that would require a defendant to mention attorneys' fees expressly in favor of an approach that "gives effect to an unambiguous offer even if it does not mention attorneys' fees explicitly").

233 See id. at 391.

234 Id. at 391-92 (comparing the offers in Webb and Nordby).

235 See id. at 391.

236 See id. at 392. For yet another twist in the case law in this area, see Barrow v. Greenville Independent School District, No. 3:00-CV-0913-D, 2005 WL 1867292, at *26 (N.D. Tex. Aug. 5, 2005). Barrow cites Nordby and holds that a Rule 68 offer that is silent as to costs in a fees-as-costs case is nonetheless inclusive of attorneys' fees that are defined as costs when the offer for $100,000 states that it "encompasses any and all items of damage and recovery sought by Plaintiff, including attorney's fees." Id. (quoting the defendant's offer of judgment made on Jan. 18, 2001).

237 See Nordby, 199 F.3d at 392. For a discussion of how the question of attorneys' fees plays out in a case in which the offer includes costs but is silent as to fees, yet involves claims that arise under both types of fee-shifting statutes, see Wilson v. Nomura Securities International, Inc., 361 F.3d 86, 91 (2d Cir. 2004), which denied attorneys' fees beyond those contained in the offer.

238 The Sixth Circuit Court of Appeals also deemed language to be unambiguously inclusive of attorneys' fees in McCain v. Detroit II Auto Finance Center, another fees-as-separate-from-costs case. 378 F.3d 561, 563, 565 (6th Cir. 2004). The McCain court followed Nordby in holding that an offer of "three thousand dollars ($3000.00) as to all claims and causes of actions for this case" was unambiguous where the underlying claims all sought statutory attorneys' fees. Id. at 563. For a discussion of the costs issue in McCain, see supra Part II.C.1.b.

239 Nordby, 199 F.3d at 392-93.

240 Id. at 393.

241 See id. at 392-93.

242 This uncertainty is highlighted by Nusom v. COMH Woodburn, Inc., 122 F.3d 830 (9th Cir. 1997). While Nusom addressed a plaintiff's motion for fees which the defendant defended solely on grounds of waiver, the court appears to have left open the possibility that in further proceedings in the district court the defendant might introduce extrinsic evidence regarding the parties' intentions with regard to fees. See id. at 832, 835. Even that possibility is unclear, though, because at least two judges on the three-judge panel disagreed about whether such proceedings would be proper on remand. See id. at 835 (Goodwin, J., concurring). One judge suggested that the court's opinion closed the door to future litigants seeing relief on grounds that

there was no meeting of the minds "because defendants will now be on notice that they must make explicit that their Rule 68 offers include fees." Id. (Goodwin, J., concurring).

243 This Article focuses on the uncertainty created by courts that allow consideration of extrinsic evidence. But another critique of such decisions is that a Rule 68 offer, like a settlement agreement, that denies a plaintiff's right to attorneys' fees under § 1983 should be "clear and unambiguous." Erdman v. Cochise County, 926 F.2d 877, 880 (9th Cir. 1991).

244 Nordby, 199 F.3d at 392 (citing Wright et al., supra note 3, § 3002, at 94-96) (discussing the interpretation problems associated with Rule 68 offers that stem from the rule's automatic operation). The discussion in the plaintiff's brief to the Ninth Circuit in Lu-Mar Lobster & Shrimp, Inc. v. Sea Coast Foods, Inc. highlights the uncertainty plaintiffs face. See Brief of Appellant, Lu-Mar Lobster & Shrimp, Inc. v. Sea Coast Foods, Inc., 260 F.3d 1054 (9th Cir. 2001) (No. 99-36156). In that case, fees were not defined as costs, and the issue was whether the plaintiff could, having accepted the Rule 68 offer that was silent as to fees, recover attorneys' fees in addition to the amount of the offer. Lu-Mar Shrimp & Lobster, Inc., 260 F.3d at 1059. The trial court had not allowed recovery of such fees. Id. at 1058. In its brief on appeal, the plaintiff's counsel explained to the court that he had "struggled to define for [plaintiff] the risks inherent in rejecting [defendant's] Rule 68 offer." Brief of Appellant, supra, at *20. Ultimately, the plaintiff's counsel advised his client that fees were not included in the offer and thus could be separately sought after accepting the Rule 68 offer, but that such fees would not be available to the plaintiff if it recovered at trial less than the amount of the offer. Id. at *20-21. Not surprisingly, that advice turned out to be at least partially erroneous. See Lu-Mar Lobster & Shrimp, Inc., 260 F.3d at 1061 (holding that while the plaintiff "believes that because it accepted a Rule 68 offer ... it should receive all of its expenditures on this case, including all costs and attorneys' fees," the plaintiff is wrong).

245 See Fed. R. Civ. P. 68.

246 One interesting difference, though, is that in the post-trial cost-shifting cases, litigants "switch" roles with regard to their arguments about the scope of the offer, with defendants now arguing that the offer was not inclusive of costs and fees, and plaintiffs arguing it was. See supra note 259 for a discussion of this phenomenon.

247 No. CVF01-6619 AWI LJO, 2006 WL 547975, at *20-22 (E.D. Cal. Mar. 3, 2006).

248 Id. at *21.

249 Id.

250 Id.

251 Id. (finding that the plaintiff obtained $1,044,047.75 at trial, which was more than the one million dollar offer).

252 See 15 U.S.C.A. § 1117a (West Supp. 2006) (entitling prevailing plaintiffs to recover "the costs of the action," but only to recover "reasonable attorney fees" in "exceptional cases").

253 See B&H Mfg. Co., 2006 WL 547975, at *21.

254 The flip side of this complication, as discussed in Part II.C, relates to ascertaining the offer's scope at the time it is made. For example, imagine that B&H Manufacturing Co. involved a plaintiff seeking to evaluate the terms of the offer in order to decide whether to accept it, rather than a defendant seeking to demonstrate the offer's value to show that the rule was triggered. Such a plaintiff would have to assess whether costs were included in the offer, and whether costs in that case included attorneys' fees.

255 127 F.3d 1147, 1148 (9th Cir. 1997).

256 See id.

257 Id.

258 122 F.3d 830, 835 (9th Cir. 1997).

259 Bevard, 127 F.3d at 1148. As Bevard as compared to Nusom highlights, one difference between those cases involving an accepted Rule 68 offer versus a rejected one are the positions the parties take with regard to the scope of the offer. A plaintiff seeking to enforce an accepted Rule 68 offer typically will argue that the offer did not include costs and fees, and will seek to

recover such costs and fees in addition to the amount of the offer. On the other hand, a plaintiff seeking to defend himself from a Rule 68 cost-shifting motion based upon an offer he rejected that defendant claims is more favorable than the judgment plaintiff obtained at trial typically will argue for a broad and inclusive reading of the Rule 68 offer.
Because the rule's cost-shifting mechanism is not triggered unless the offer is more than the judgment, the plaintiff will argue that the offer included such costs and fees. That way, the relevant apples-to-apples comparison will be between the offer amount (again, inclusive of costs and attorneys' fees) and the judgment with pre-offer costs and pre-offer attorneys' fees added on--a much more favorable comparison for the plaintiff than comparing the offer amount solely to the judgment. The same switch in viewpoints, of course, occurs among defendants as well, who broadly portray the offer's scope if it is accepted but narrowly portray the offer's scope if it is rejected.

260 Bevard, 127 F.3d at 1148.

261 Indeed, the Bevard court's conclusion that the offer there is silent as to attorneys' fees is itself questionable, given that the offer provides for $8001 “including any recoverable costs and fees,” which, arguably, unambiguously includes attorneys' fees. See id. at 1149 (Norris, J., concurring in part, dissenting in part) (“Here, [the defendant's] offer was not silent as to fees. It expressly included ‘any recoverable costs and fees.’ It is hard to imagine what ‘recoverable fees' [the defendant] intended to include in the offer if not recoverable attorneys' fees.” (emphasis added)).

262 See Nusom, 122 F.3d at 834 (“[D]efendants bear the brunt of uncertainty but easily may avoid it by making explicit that their offers do or do not permit plaintiffs to recover attorneys fees.”); Erdman v. Cochise County, 926 F.2d 877, 880-81 (9th Cir. 1991) (placing the burden on the defendant to “provide clear evidence that demonstrates that an ambiguous clause was intended by both parties to provide for the waiver of fees”). While the court in Bevard quoted Nusom's statement regarding defendants bearing the “brunt of uncertainty,” the court does not appear to have followed the rationale expressed in this statement. Bevard, 127 F.3d at 1148.

263 Nusom, 122 F.3d at 834.

264 Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1244 (11th Cir. 2002).

265 Rateree v. Rockett, 668 F. Supp. 1155, 1159 (N.D. Ill. 1987). For a discussion of why placing such uncertainty on the plaintiff is unfair, see Webb v. James, 147 F.3d 617, 621 (7th Cir. 1998), stating that “because rejection of the offer can have serious consequences for the [offeree], courts have rightly been reluctant to allow [offerors] to challenge the meaning of an offer of judgment, either before or after acceptance.”

266 Rateree, 668 F. Supp. at 1159.

267 Id.

268 See, e.g., Webb, 147 F.3d at 621 (“We believe there is an additional reason [besides fairness concerns regarding the plaintiff] for district courts to refuse to consider challenges to the terms of a Rule 68 offer. Such challenges undermine the [r]ule's purpose of encouraging settlement and avoiding protracted litigation.”); Nortek, Inc. v. Liberty Mut. Ins. Co., 843 N.E.2d 706, 715 (Mass. App. Ct. 2006) (“[C]hallenges by the offeror to the meaning of an accepted offer of judgment tend to undermine the purpose of rule 68 to encourage settlement and avoid protracted litigation.”); Appellants' Reply Brief at *8, Collins v. Minn. Sch. of Bus., No. C7-01-690, 2001 WL 34727949 (Minn. Ct. App. June 29, 2001) (“Furthermore, to allow an offer[o]r to challenge the terms of its offer would undermine Rule 68's purpose of encouraging settlement and avoiding protracted litigation.” (citing Webb, 147 F.3d at 621)).

269 One commentator analyzed some of the uncertainty surrounding Rule 68 offers and concluded that “the uncertainties created by such ambiguity actually benefit a defendant.” Fisher, supra note 32, at 117. Even if this claim were true--which Parts II.B and II.C suggest is not always the case--it still would not be an excuse for leaving the rule as it is. This type of uncertainty is not part of the intent of the rule and is counter to the rule's purpose to encourage reasonable settlements, not settlements coerced by the uncertainty of a poorly drafted rule.

270 Marek v. Chesny, 473 U.S. 1, 5 (1985).

271 For example, a leading pretrial advocacy textbook contains a discussion of Rule 68 as well as a sample form to use in drafting a Rule 68 offer. See Thomas A. Mauet, Pretrial 385 (6th ed. 2005). Although the text makes clear the need to specify whether

attorneys' fees are part of the offer, the sample form makes no reference to attorneys' fees. Thus, defendants who draft offers using that form may encounter the types of problems faced by the defendants in Webb and Utility Automation 2000. See id.

272 Given Rule 68's cursory form and the fact that it is not taught in most law schools, some defense attorneys may not use the rule because they do not know about it. At a recent symposium addressing Rule 68, the discussion "prompted repeated suggestions that one reason for the relatively infrequent use of Rule 68 offers is that many defense lawyers do not know about Rule 68." Cooper, supra note 13, at 849.

273 For example, had the defense carried the day in Wilson v. Nomura Securities International, Inc., discussed supra in Part II.C.2.a.ii, the sophisticated defense attorneys likely would have wished they had avoided the rule. Indeed, because of the current rule's various pitfalls, some found through careful research and some yet-to-be-discovered, attorneys who are aware of rulings like Wilson likely will think twice before making offers under the rule.

274 One prominent practice guide advises defendants: "If you're drafting an offer of judgment, don't leave these matters in doubt. Lack of clarity exposes your client to potentially greater liability." Schwarzer et al., supra note 222, § 15:178.3. As this Article demonstrates, that statement could be revised to instead say, "Lack of clarity from the rule exposes your client to potentially greater liability."
Also, the risk that defendants weigh is not just the risk that the offer will be misinterpreted. A defendant's attorney necessarily also weighs the risk that he will be faced with a malpractice action based upon his Rule 68 offer--a risk that probably does not exist if the attorney does not make the offer. Indeed, a good defense to a malpractice case seeking damages from an attorneys' failure to file a Rule 68 offer is that given the uncertainties existing in the application of the rule, the defendant's counsel was exercising prudence.

275 Blumel v. Mylander, 165 F.R.D. 113, 116 (M.D. Fla. 1996).

276 Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390, 391-92 (7th Cir. 1999); see also Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop., 298 F.3d 1238, 1249 (11th Cir. 2002) (admonishing that defendants could "easily preempt [collateral litigation about the terms of the offer] by clearly stating their intent in the offer of judgment").

277 Specifically, a plaintiff who recovers a judgment at trial that is more than the amount of the offer might be surprised to find that the rule is triggered nonetheless because the relevant comparison is the judgment plus the attorneys' fees accumulated at the time of the rejected offer. See, e.g., Bevard v. Farmers Ins. Exch., 127 F.3d 1147, 1148 (9th Cir. 1997); see also supra Part II.C.3 (discussing Bevard).

278 Webb v. James, 147 F.3d 617, 623 (7th Cir. 1998).

279 Cooper, supra note 13, at 848-49.

280 Id. at 849 (discussing in the context of cost-shifting sanctions the concern that plaintiffs are not put on notice of costs and fees issues).

281 For example, the California Practice Guide, in discussing lump-sum offers, states that "the offer must specify that it includes costs and fees." Schwarzer et al., supra note 222, § 15:155.2. While the guide goes on to cite Nordby as holding that there is "no need to specify fees" when the offer is for "all counts of the complaint," id., litigants who are unfamiliar with the rule will likely fail to consider the nuances but instead look for the bright lines that at least seem to provide clarity.

282 Sampson v. Embassy Suites, Inc., No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998). While the focus in this subpart is on recovery of fees when fees are defined as separate from costs, certainly the plaintiff would be wrong in her assessment if such fees were defined as costs and the offer was deemed inclusive of costs. Thus, for example, a plaintiff who accepted an offer for "$5000 including costs" upon the belief that because it did not "specify that [it] includes attorneys' fees," see id., would be unpleasantly surprised to learn that attorneys' fees were included as part of costs and thus could not be recovered in addition to the Rule 68 offer amount.

283 See, e.g., supra text accompanying notes 102-05 (discussing Richardson v. Nat'l R.R. Passenger Corp., 49 F.3d 760 (D.C. Cir. 1995).

284 Erwin Chemerinsky & Barry Friedman, The Fragmentation of the Federal Rules, 46 Mercer L. Rev. 757, 757 (1995) (describing the primary argument that influenced the enactment of the Federal Rules of Civil Procedure: "procedure ought to be the same across the federal courts and the cases those courts hear[]").

285 See id. at 782 (discussing threats to uniformity stemming from the proliferation of local rules).

286 Id. at 783.

287 See supra Part II.B-C.

288 Justice Brennan, dissenting in Marek, noted the need for uniformity in application of the Federal Rules, stating: "As with all of the Federal Rules, the drafters intended Rule 68 to have uniform, consistent application in all proceedings in federal court." Marek v. Chesny, 473 U.S. 1, 23 (1985) (Brennan, J., dissenting).

289 See Latin, supra note 9, at 703.

290 See supra Part II.B-C.

291 This Article focuses on making the law governing the terms of Rule 68 offers clear, such that defendants are willing to make Rule 68 offers and plaintiffs are able to fairly assess such offers. It may also be the case--as several commentators have suggested--that other aspects of the rule need to be amended, such as the incentives with regard to consequences under Rule 68 when the rule is triggered. See, e.g., Margulies, supra note 55, at 441 (proposing a percentage-based approach). Other proposals suggest that plaintiffs, as well as defendants, should be able to make offers under Rule 68. See Wright et al., supra note 3, § 3001.2 n.2, at 80 (listing state provisions that allow plaintiffs to make offers of judgment); Geoffrey Miller, An Economic Analysis of Rule 68, 15 J. Legal Stud. 93, 125 (1986). Yet other proposals have looked at the economic impact of the current Rule 68 on wealth distribution between plaintiffs and defendants. See Simon, supra note 51, at 9. All of these proposals take the certainty of the offer as a starting point, and thus have a different focus than this Article. These proposals generally are consistent with the proposal suggested in this Article, but are not necessary to achieve the baseline benefits set forth here. This Article's proposals eliminate practical barriers to defendants making Rule 68 offers and eliminate the unfairness and collateral litigation that result from uncertainty about how courts will interpret offers.

292 See, e.g., Cooper, supra note 13, at 848 (cautioning against the "lure of drafting ever more detailed rules" and instead urging that rules be crafted "to declare general principles that guide judicial discretion").

293 Under the current rule, a lump-sum offer must include attorneys' fees in fees-as-costs cases but not in fees-as-separate-from-costs cases. See supra notes 169-70 and accompanying text.

294 The text of the proposed revised rule indicates changes to the current rule as follows: strikeouts show where text was deleted from the current rule, underlined text shows additions to the rule, and text neither underlined nor stricken is the original text.

295 While this Article focuses on amending Rule 68 to provide clarity at the offer stage, it is worth noting that the term "judgment" in Rule 68, which arises at the comparison stage, contains its own ambiguity. This ambiguity could be resolved by amending the rule to make clear what is implicit in Marek--that the "judgment" to which an unaccepted offer is compared includes not only the plaintiff's verdict but the plaintiff's pre-offer costs and, when applicable, pre-offer attorneys' fees. See Marek v. Chesny, 473 U.S. 1, 6-7 (1985); Lewis & Eaton, supra note 49, at 733.

296 Sampson v. Embassy Suites, Inc., No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998).

297 The revised rule also clarifies that prejudgment interest is included as part of a Rule 68 offer, whether the offer is for damages-only or lump-sum. While this is not an area of significant confusion under the current rule, it should be made clear in the revised rule. See, e.g., Henderson v. Horace Mann Ins. Co., No. 03-CV-0526-CVE-PJC, 2006 WL 1878897, at *4 (N.D. Okla. July 6, 2006) (citing Mock v. T.G.&Y. Stores Co., 971 F.2d 522, 527 (10th Cir. 1992)) (holding that an offer that did not mention prejudgment interest was inclusive of such interest).

298 See supra Part II.D.1.

299 See supra Part I.A for a discussion of Rule 68's purpose.

300 See supra Part II.D.2.

301 See Marek v. Chesny, 473 U.S. 1, 9 (1985); supra Part I.A.

302 See supra notes 16-18.

303 See supra Part II.B. Some observers have argued that the rule should be revised so that it does not apply to class actions. This issue is beyond the scope of this Article. For a discussion of policy arguments surrounding class actions and Rule 68, see Wright et al., supra note 3, § 3001.1, at 76-78.

304 See, e.g., supra text accompanying notes 96-101 (discussing Cesar v. Rubie's Costume Co., 219 F.R.D. 257 (E.D.N.Y. 2004)).

305 See supra Part III.C.1.

306 See supra Part II.C.1 (discussing the confusion that arises in cases in which offers are arguably ambiguous as well as cases in which offers are silent with regard to costs). Even if courts construed such offers uniformly--which these cases suggest is not the reality--differences in an offer's language or the circumstances of a particular case may engender uncertainty regarding the meaning of a particular offer. See id.

307 See supra Part II.B-C.

308 For a discussion of the various possible understandings litigants may have when an offer is silent regarding attorneys' fees, see Wilson v. Nomura Securities International, Inc., 361 F.3d 86, 92-93 (2d Cir. 2004) (Newman, J., dissenting).

309 As discussed in Part II.D.1, defendants who have been burned by the rule, or those who anticipate that possibility, will elect not to use the rule rather than risk unintended consequences.

310 See supra Part II.C.1.b (discussing why courts should be reluctant to consider extrinsic evidence in the context of Rule 68 offers).

311 Symposium, supra note 166, at 780 (comment by Mr. Richard Alfred).

312 Id. at 779 (comment by Mr. John Kennedy) (suggesting that the advantage of making the offer exclusive of fees is that "all you have to put your science on is the dollar sum, the damage sum, to measure against the trial result" instead of "trying to guess at what those fees are").

313 See Moore et al., supra note 12, § 68.02[4], at 68-13.

314 See supra Part III.C.1.

315 See supra Part II.C.2.a.

316 See supra Part II.C.2.b.

317 See supra Part II.C.2.

318 Id.

319 Id.

320 Many commentators that have considered this distinction have done so within the context of the cost-shifting penalties of the rule, under which the shifting of attorneys' fees is dependent on the type of fee-shifting statute involved. See, e.g., Cooper, supra note 13, at 849. The distinction permeates the rule with uncertainty at the offer stage as well. While beyond the scope of this Article, the Marek distinction also needs to be eliminated at the cost-shifting phase. See id. ("No one could have intended to write a rule that cuts off post-offer statutory attorney fees if the underlying statute characterizes fees expressly as costs, but not if the statute characterizes fees expressly as fees."); supra note 122. While such a revision to the rule is not necessary in order to achieve clarity at the offer stage, it would address many of the same types of concerns raised in this Article, such as predictability to defendants, fairness to plaintiffs, and a reduction in collateral litigation.

321 Not all attorneys' fee provisions are statutory in nature. See supra note 122. Fees also may be awarded pursuant to contracts. Even so, statutory attorney fee provisions are by far the most common fee entitlement, and thus this Article refers generically to such provisions.

322 Along these lines, the revised rule also defines attorneys' fees as inclusive of any applicable litigation expenses. See Proposed Revised Rule 68(i)(3), supra Part III.B. This definition makes clear that such expenses are treated as part of applicable attorneys' fees for purposes of the rule, avoiding the difficulty that arises when expenses such as expert fees are defined by an underlying statute as part of attorneys' fees or as a separately recoverable item. See, e.g., Spruill v. Winner Ford of Dover, Ltd., No. Civ. A. 94-685 MMS, 1998 WL 186895, at *2 (D. Del. Apr. 6, 1998) (noting that although expert fees are not traditionally part of attorneys' fees, Title VII and § 1988 explicitly define expert fees as part of attorneys' fees).

323 However, it is likely that insofar as the text of proposed revised Rule 68 alerts defendants to the issue of attorneys' fees, offers that are silent as to fees will be less commonplace. See supra Part III.C.1.

324 See supra Part II.C.2.b (describing cases in which uncertainty exists because offers are silent regarding fees).

325 See supra Part II.C.2.b.i (comparing Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, 298 F.3d 1238 (11th Cir. 2002), Radecki v. Amoco Oil Co., 858 F.2d 397 (8th Cir. 1988), and Basha v. Mitsubishi Motor Credit of America, Inc., 336 F.3d 451 (5th Cir. 2003)).

326 See supra Part II.C.2.b.

327 See supra Part II.C.2.b.ii (discussing the Seventh Circuit's holding in Nordby v. Anchor Hocking Packaging Co., 199 F.3d 390, 392 (7th Cir. 1999), including dicta suggesting that the particular offer's language might have been held to be ambiguous if the plaintiff had been seeking an award under some authority not cited in the complaint).

328 See supra Part II.C.2.a.ii (discussing Wilson v. Nomura Securities International, Inc., 361 F.3d 86 (2d Cir. 2004)).

329 See supra Part II.C.2.a.

330 See, e.g., Bentley v. Bolger, 110 F.R.D. 108, 111-14 (C.D. Ill. 1986).

331 While it is possible that this provision may result in less frequent use of Rule 68 in fees-as-separate-from-costs cases, defendants are more likely simply to make lump-sum offers in such cases. Defendants making a lump-sum offer retain the ability to set the total dollar amount as they wish. In any event, because attorneys' fees do not shift in these fees-as-separate-from-costs cases, perhaps the effect of the rule's clarity will be to make litigants more aware of what is at stake in these cases. The case law demonstrates that at least some defendants make offers in these cases under a misapprehension that applicable attorneys' fees always shift under the rule rather than shifting only in fees-as-costs cases per Marek. See Moore et al., supra note 12, § 68.08[3], at 68-55 to -56; supra Part II.C.2.b.

332 Even so, nothing in Marek would prevent the rule from being amended to carve out a third type of offer between the damages-only offer and the lump-sum offer, such as a "damages and costs only" offer. Because Marek was based upon a statutory interpretation question, and not a constitutional question, the Marek Court's interpretation of "costs" could essentially be written out of the rule for purposes of the offer.

333 See Webb v. James, 147 F.3d 617, 622-23 (7th Cir. 1998) (rejecting a magic-words approach in a Rule 68 context).

334 It may be that, even aside from the one-sided nature of Rule 68 offers, the flexibility under the current Rule 68 hurts plaintiffs. See Stephen Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 989-90 (1987) (observing in the context of non-Rule 68 alternative dispute resolution mechanisms, like mediation and negotiation, that the weaker party often is disadvantaged by procedures that are less predictable and consistent).

335 Unrelated to the concerns addressed in this Article, an additional benefit of requiring the defendant to include fees in the offer regardless of the fee-shifting statute is that this requirement may help avoid problems related to "low-ball offers." For a discussion of problems related to "low-ball offers," see Wright et al., supra note 3, § 3002.1, at 97-100.

336 See supra Part II.C.3.

337 For a discussion of the rule's provisions regarding the two types of offers, see supra Part III.C.3.

338 No. CVF016619 AWI LJO, 2006 WL 547975 (E.D. Cal. Mar. 3, 2006). For a discussion of the complications and uncertainties arising in B&H Manufacturing Co., see supra note 254 and accompanying text.

91 MNLR 865

49 Seton Hall L. Rev. 475

Seton Hall Law Review
2019

Article
Danielle M. Shelton [a1] [d1]

DISCOVERY OF EXPERT WITNESSES: AMENDING RULE 26(B)(4)(E) TO LIMIT EXPERT FEE SHIFTING AND REDUCE LITIGATION ABUSES

The federal expert witness discovery rule makes sense in theory: it provides for robust discovery of a testifying expert's opinions while requiring the opposing party to pay for the expenses related to its discovery of those opinions, namely payment for the expert's deposition. In practice, though, the rule was not well-drafted and is fraught with problems that make it unfair and inefficient.

First, the expert discovery rule strikes the wrong balance, which results in the opposing party being forced to pay excessive amounts for the expert's work. Second, the expert discovery rule is vague and its contours are unclear. This is particularly troubling because fee shifting of any kind is almost unheard of in the federal courts, and in the rare occasions in which it is mandated, such as for e-discovery, there exist clear procedures and safeguards. [dd1] *Not so, however, in the context of fee shifting for expert discovery expenses. The rule is unclear and district courts disagree about basic questions arising under the rule: Are an expert's fees for traveling to* ***476** *and from a deposition included in the rule? Can an expert charge a higher hourly rate for his deposition time than he charged the retaining attorney? Can the expert make the other party pay in advance or refuse to sit for his deposition? What is the court's role in ensuring that only reasonable fees are shifted despite the rule's automatic nature? And because these issues play out almost exclusively at the federal district court level and never reach the appellate courts, these questions have no consistent or uniform answers, despite having been litigated in district courts for almost twenty-five years.*

None of this makes sense given the enduring and increasing role that experts play in federal litigation. The expert fee shifting rule must be fixed so that the opposing party only has to pay fees for work that it controls and from which it benefits, and then only at a rate that is justified. Further, the rule must be amended to provide clarity about the categories of fees that are shifted as well as the process for shifting fees. Expert discovery is far too common and too costly to have an automatic fee shifting rule that is unfair and inefficient.

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*477 I. INTRODUCTION

While expert witnesses have long been a staple of federal litigation, their use and related expenses are increasing.[1] One such expense arises in the area of expert discovery.[2] Federal Rule of Civil Procedure 26(b)(4)(E), ***478** which addresses discovery of expert opinions, provides that "[u]nless manifest injustice would result, the court must require that the party seeking discovery ... pay the expert a reasonable fee for time spent in responding to discovery."[3] In other words, if a party wants to depose the opposing expert, it has to pay to do so. While this sort of fee shifting is seemingly straightforward, the rule is fraught with problems.

Many of these problems arise from the rule's lack of clarity--what, for example, does "time spent responding to discovery" mean and what differentiates "reasonable fees" from unreasonable fees? Other problems arise from the rule's failure to address key questions that arise under it, including when fees are due and the logistics of fee shifting. Finally, some problems with the rule arise from its overbreadth, which results in experts' fees shifting to an opponent without justification.

These shortcomings of the expert discovery rule have real consequences for litigants and courts. Not only is the use of experts a mainstay of federal litigation,[4] discovery--and, in particular, depositions--of such experts is likewise routine.[5] Unlike lay witnesses who are paid only a nominal witness fee per day for their depositions regardless of their profession,[6] experts are expensive and are paid professional rates. With typical rates that often exceed $500 per hour and reach upwards of $1000 ***479** per hour[7]--or even "$12,000 per day"[8] for experts that charge a flat fee--the stakes are high for the opposing party to whom expert discovery fees are shifted.[9] The already high-stakes of expert fee shifting is made even more costly, and even unfair, by the rule's shortcomings. And because these problems play out exclusively at the district court level, these shortcomings have not been resolved at the appellate level.

This Article explores the myriad ways in which the expert discovery rule falls short of its purpose and the ways in which it should be improved. Part II discusses the existing rule, focusing on its key provisions, scope, and purposes, and the larger procedural framework in which it operates. Part III addresses the various and conflicting ways in which courts have interpreted and applied the rule's key provisions. Part IV addresses the negative implications of the current rule that arise from its ambiguity and the balance it strikes in favor of excessive fee shifting. Part V proposes amendments to the rule that would minimize these problems and result in a rule that better serves the purposes behind expert fee shifting. Many of these problems can be solved by adding clarity and content to the rule, with the remaining problems lessened by adding certain guidelines and presumptions into the rule.

II. THE BASICS OF THE EXPERT FEE SHIFTING RULE

A. *Rule 26: Expert Discovery Obligations in General*

The expert fee shifting provision is contained within Rule 26. Not only does Rule 26 broadly address litigants' discovery disclosures in general, it includes several provisions relating exclusively to discovery-related obligations for expert witnesses.[10] That the expert fee shifting rule arises in ***480** the context of Rule 26 is no coincidence; the various parts of Rule 26 are designed to work in tandem.

Most notably, the shifting of discovery expert fees to the opposing party[11] is justified by the robust automatic disclosure rule that applies to most experts.[12] The broad expert disclosure rule requires that most experts provide a complete and accurate disclosure of their opinions, the basis for those opinions, and all information reviewed in forming that opinion.[13] The disclosure rule also requires most experts to disclose information about, among other things, their background, experience, expertise, and rates.[14] Because of the broad disclosure requirements, Rule 26 anticipates that it will be unnecessary for the expert to be deposed or, even if deposed, for the deposition to be significantly shorter than it would be without the disclosures.[15] In addition, the right to depose an opposing expert[16] is balanced by the obligation to pay the expert for her deposition time.[17] By making the opposing party pay for the deposition, the rule assures that the party that retained the expert will not have to pay the expert for work that the party did not request nor benefit from, such as the expert's deposition. Yet, at the same time, the rule permits the free and liberal discovery of information, which is a cornerstone of the Federal Rules of Civil Procedure.[18]

***481** B. *The Rationale for the Expert Fee Shifting Rule*

The "basic proposition" of the expert fee shifting rule "is relatively straightforward--a party that takes advantage of the opportunity afforded by Rule 26(b)(4)(A) to prepare a more forceful cross-examination should pay the expert's charges for submitting to this examination."[19] In other words, while a party is permitted to depose the opposing party's expert, the deposing party should be the one who pays the expert's deposition fees.

While this basic rationale behind expert fee shifting may appear logical, fee shifting--even when seemingly warranted--is an anomaly within the American legal system.[20] Fees are rarely shifted, let alone shifted automatically.[21] On the rare occasion in which attorneys' fees are shifted, the shifting is not automatic, but rather happens only after a detailed fee application is made. The opposing party has the opportunity to challenge the application and the court ultimately arrives at a reasonable amount.[22] Thus, the question arises: what warrants the unique and automatic rule for shifting experts' fees? The answer comes down to experts' voluntary involvement in the legal system and the fact that someone has to pay them; the tradeoff between mandatory disclosures and the perceived need for depositions; and the fact that the deposing party controls the deposition by determining the location, length, etc., and thus the related costs.

First, expert witnesses are themselves anomalies. Most witnesses in litigation have not willingly injected themselves into the legal process; they are there, generally, because they have first-hand knowledge of some fact at issue in a trial. If necessary, they can be subpoenaed and forced to provide testimony. They are paid a nominal per diem amount for their testimony, ***482** regardless of the hardship or costs imposed on them or their work as a result of providing such testimony. [23] Expert witnesses, though, are retained by one of the parties. The expert witness serves by choice and, like most people, chooses not to work for free.

As it turns out, the fact that experts are hired--and not required--to be part of the litigation process makes all the difference as to why discovery fees for experts are shifted. Rather than expert discovery being viewed as a right, like other forms of discovery, it is viewed more as a privilege with strings attached. [24] The party that hires the expert must pay the expert for time spent forming expert opinions in the case, which includes reviewing documents, talking to persons with first-hand knowledge, reviewing relevant literature in the expert's field, formulating opinions, and drafting a report. That can be costly, and it is a cost that is paid for solely by the party that retains the expert. [25] Expert discovery of those opinions is thus viewed as potentially "unfair" because it "let[s] one party have for free what the other party has paid for." [26] Therefore, historically, courts have restricted discovery of an adversary's expert, particularly as to the expert's opinions, based on "the fear that one side will benefit unduly from the other's better preparation." [27] Rule 26(b)(4)(E) shifting of expert discovery fees represents an attempt to find a middle ground that avoids this potential unfairness by allocating "expert expenses between the retaining party and the one seeking discovery." [28] The result is that discovery of experts' testimony is allowed, but the deposing party must pay for it.

Second, unlike lay witnesses, experts have to disclose their opinions. In theory, such disclosures obviate, or at least drastically reduce, the need for any, let alone lengthy, deposition testimony. This is because all of the experts' opinions, and the bases for such opinions, have already been disclosed. [29] Indeed, when Rule 26 was amended to require disclosure of ***483** expert reports, one primary reason cited for the amendment was that it would and should discourage parties from taking experts' depositions. The Rule 26 Advisory Committee reasoned that the expert's report would "eliminate the need to take a useless deposition in which the expert simply repeats what [the expert] had said in his report." By extension, the Advisory Committee believed that "forc[ing] the party taking the deposition to pay the expert's fee" would hopefully "eliminate[e] such depositions because the expert will have produced a report that clearly indicates the opinions the expert holds and will testify about at trial." [30] Put differently, the deposing party could have chosen a less expensive discovery method, such as written interrogatories, but it did not. [31] Thus, the need for an expert deposition is viewed with some skepticism, such that a party that insists on deposing the opposing expert, despite having a "complete and accurate" report, must pay for that luxury.

Finally, the third rationale is that the deposing party controls not only whether the expert is deposed, but also the length and location of the deposition. So, not only is the deposing party viewed as the beneficiary of the deposition, but it is also viewed as the party that controls the costs associated with the deposition. Put simply, if the deposing party elects to take an eight-hour deposition at a location that is remote for the expert, it should have to incur all related costs--not the party that retained the expert.

***484** C. *The Mechanics of the Expert Fee Shifting Rule*

The expert fee shifting rule is seemingly straightforward. It provides, in pertinent part, that "[u]nless manifest injustice would result ... the court must require that the party seeking discovery ... pay [the adverse party's] expert a reasonable fee for time spent in responding to discovery under [this subdivision] ...." [32] Thus, the rule, at its clearest and most basic level, provides that the party who seeks expert discovery must pay for it. It is well-settled that deposition time is compensable under Rule 26(b)(4)(E) as "time spent in responding to discovery." [33] Accordingly, the rule does not by

its express terms include trial testimony, responding to a *Daubert* motion, or any non-discovery matter.[34] Further, the rule covers discovery relating to all types of experts, whether the expert is one that is specifically retained for litigation or not.[35] Thus, fees are shifted even for experts that are the adversary's employees or for experts that have opinions due to their pre-suit involvement in the subject of the litigation, such as in treating physicians.[36] And finally, because the rule "provides an independent basis for recovery of expert fees as part of discovery," it "applies to both parties, not just to the prevailing party."[37]

For expert discovery covered by the rule, the fee-shifting provision contains two operative parts: (1) the party seeking discovery must "pay the expert a reasonable fee," and (2) the fee payment is only "for time spent in responding to discovery." While this language seems straightforward at first blush, the devil (and litigation) is in the details. Various and recurring questions arise in the context of fee shifting. What is "time spent responding to discovery?" The usual way in which experts respond to discovery is by providing deposition testimony. Still, what time relating to depositions is covered? While the actual time spent in being deposed is clearly ***485** compensable, what about the time peripheral to a deposition, such as travel time? What about the time that an expert spends preparing (e.g., reviewing the file) for the deposition?

Similarly, what constitutes a "reasonable fee?" Is a flat-fee rate of $3000 for a deposition that lasts only two hours "reasonable?" Is an hourly rate of $500 for deposition testimony "reasonable?" What if that same expert only charged $200 an hour for other work in the case? In addition, interpretative problems arise not only from what the rule says, but from what the rule does not say. The rule fails to state when fees are due or who bears the burden of proving the reasonableness of fees. Further, the rule does not address the procedures when disagreements about fees arise--a gap made all the worse by the rule's blanket pronouncement that fees must be paid unless "manifest injustice" would result. These problems associated with the rule are addressed in Part III, and the overall implications associated with those problems are discussed in Part IV.

III. PROBLEMS WITH THE FEE SHIFTING RULE

The problems with the expert fee-shifting rule arise from not only what it does say, but also from what it does not say. First and foremost, the rule is plagued by interpretive issues regarding its scope that arise from ambiguities within its four corners; key operational terms are left vague and undefined. Second, the rule makes no provisions for the logistical issues that routinely arise under it. It leaves litigants and courts alike to make educated guesses about, for example, when payments are due. Finally, even for matters in which it is clear, the rule strikes the wrong balance by shifting fees without justification. The result is that the deposing party ends up paying experts' fees that it did not request, does not control, and gains no benefits from.

A. *Interpretative Problems: What Constitutes "Reasonable Fees" for "Time Spent Responding to Discovery"*

While the rule's "basic proposition is relatively straightforward," the implementation is not.[38] Instead, "potential difficulties and unfairness lurk below the surface."[39] Most notably, the two main prongs of the rule--that the deposing party must "pay the expert a reasonable fee" and that fee must pay for "time spent in responding to discovery"--raise numerous interpretative questions.

For example, is an expert's flat fee that charges the opposing party for setting aside a full day "reasonable" regardless of the length of the ***486** deposition? Is an expert's fee "reasonable" if the expert charges a higher hourly rate for his deposition than he did for the time spent preparing his report? Is time that an expert spends travelling to and from the deposition part of "time spent in responding to discovery," such that the deposing party must pay the expert's fees for

that time? What about the time an expert spends preparing for her deposition--must the opposing party pay for such time as part of "time spent responding to discovery?"

In addition, some interpretative problems arise from what the rule fails to address. Most notably absent from the four corners of the rule is any mention of when fees are due and what process should be employed when disputes arise over fees. And despite an endless stream of district court litigation, these interpretative problems continue to mire the fee-shifting rule. Ambiguities in a rule frequently are resolved at the appellate court level. Once the appellate courts conclusively interpret a rule, its meaning becomes settled, there is uniformity, and there is no need (or ability) for district courts to continue to re-examine the issue. That has not, however, been the case for the expert fee shifting rule.[40] Rather, the same questions of law have been repeatedly litigated in federal courtrooms across the country.[41] What makes this rule different, such that the typical process for resolving its meaning has not happened despite its promulgation over twenty-five years ago?

The problem lies in the fact that almost all litigation over the rule occurs at the district court level and never reaches the appellate courts.[42] It is well-known that "the [r]ule lacks discussion at the federal appellate level."[43] The dearth of appellate discussion stems from two dynamics. First, most cases settle rather than go trial and thus there is no appeal. Second, even for those cases for which there is an appeal, the issue of which fees should have shifted would not be an issue raised on appeal because it is not an outcome-determinative issue. So while understandable, the lack of authority at the appellate level means the rule "cannot be applied consistently in a region, let ***487** alone across the United States."[44]

1. Disputes Regarding What Constitutes "Time Spent Responding to Discovery"

The largest interpretative problem from the fee shifting rule arises from the phrase "time responding to discovery." Courts must decide "what is encompassed by the phrase," ranging from "expert fees for the actual deposition only, or fees for deposition preparation and other expenses, including travel time and expense."[45] Not surprisingly, there is no consensus among courts or litigants as to what this cryptic phrase entails. Further, the Advisory Committee Note "provides only the most limited guidance."[46] It "states, without further elaboration, that 'the expert's fees for the deposition will ordinarily be borne by the party taking the deposition.'"[47] So although it is clear that an expert's fees for time spent in a deposition are covered, it is unclear and disputed whether other fees related to a deposition, such as preparation for the deposition and travel to the deposition, must be paid by the deposing party. Courts are split, such that "[t]here has ... 'been considerable disagreement among courts regarding what activities qualify as "time spent in responding to discovery."'"[48]

Some courts have observed that "[t]he Advisory Committee Note's use of the phrase 'for the deposition' suggests that the shifting of expert fees is limited to the fees attributable to the deposition itself."[49] As one court correctly conceded, however, "the Advisory Committee Note 'could be construed differently,' and is not dispositive."[50] And, indeed, many courts do construe that phrase differently. The various interpretations of this phrase are discussed below with regard to two primary areas of dispute: whether depositions preparation time is covered, and whether time spent traveling to and from a deposition is covered.[51]

***488 i. Whether Fees for Time Spent Preparing for the Deposition Are Shifted**

Whether preparation time is included under the fee shifting rule has divided the federal courts.[52] The inquiry boils down to how courts interpret the phrase "time spent responding to discovery." At one extreme, some courts hold that preparation time is always covered: "Fees awarded under this rule include time spent in preparing for the deposition, in

traveling to the deposition, and in the deposition." [53] At the other end of the spectrum, some courts hold that absent extenuating circumstances, an expert's time outside of the deposition room is not covered: "[I]n the absence of extenuating circumstances, the deposing party is not required to compensate the expert for his or her preparation time." [54] These courts reason, among other things, that "the language of the rule is too vague to directly dispose of the issue at hand." [55] Other courts have attempted to carve out middle grounds, such as including preparation time in general, but not time spent consulting with the retaining party's counsel. [56]

Without a clear standard in the rule itself, courts tend to resort to policy rationales in support of their interpretations--e.g., "even in exceptional, complex, or unusual circumstances expert deposition preparation and expert ***489** trial preparation are inextricably intertwined." [57] Some courts hold that an expert's preparation time benefits the deposing party because "preparation is often necessary to enable the witness to be fully responsive during the deposition, and that preparation 'facilitates the deposition process by avoiding repeated interruptions to enable the witness to refresh his recollection by consulting.'" [58] Other courts reach the opposite policy conclusion and hold that the beneficiary of an expert's preparation is the party that hired him, even noting that the deposing attorney might prefer the expert be unprepared: "There are doubtless some attorneys who will send an expert into a deposition unprepared, but there are surely very few inquiring attorneys who complain." [59] Because the rule does not provide clarity, and courts do not agree, widespread variation exists surrounding whether and when preparation time is covered. [60]

In light of the myriad interpretations, one court attempted to summarize the various positions taken by courts, positing four approaches:

> As relevant here, courts within the Ninth Circuit and beyond have divided on the question of whether Rule 26(b)(4)(E)(i) requires the inquiring party to reimburse the expert for his or her preparation time. A number of courts have held that reasonable preparation time is reimbursable. [61] Other courts have reached the same conclusion on reimbursement for preparation time but have specifically excluded any time that the expert spends in consultation with the retaining party's attorney. [62] Other courts ***490** (and this appears to be a minority view) have held that preparation time is not "time spent in responding to discovery" reimbursable under Rule 26(b)(4)(E)(i). [63] A final line of decisions holds that preparation time is only reimbursable in complex cases, or in extenuating circumstances. [64]

Not only do different courts interpret the rule differently, whether preparation time is covered is sufficiently ambiguous that at least one judge has reversed his position, initially taking a "middle ground" approach and later adopting a per se rule:

> In the *Fago* case, I attempted to find a middle ground for the fee provision in Fed. R. Civ. P. 26(b)(4)(C)(i) to deal with the ambiguities raised in preparing for deposition, where it may be unclear whether an expert is "responding to discovery" or engaging in trial preparation, the latter of which should not be charged to the deposing party. [A]fter careful consideration, I have come to the conclusion that my prior position was misguided. Instead, I believe that reasonable fees for the time spent by an expert for a deposition should always be paid by the party taking the deposition. [65]

In addition, some courts ignore this issue entirely and do not address whether ***491** deposition preparation time is included in Rule 26(b)(4)(E)(i). [66] Instead, these courts assume, without providing any "rationalization," that preparation time is covered. [67]

Finally, the rule's ambiguity regarding fee shifting for preparation time also results in variation among experts. Some experts include this time in their invoices, while others do not. [68] This, too, creates a lack of uniformity, insofar as experts, without any guidance from the rule, will err on different sides--some will take the lack of clarity as an opportunity to charge opposing counsel for such expenses, whereas others will note the express lack of coverage as a basis not to include such fees.

Because neither the plain language of the rule nor its advisory notes shed sufficient light on what is meant by "time spent preparing for the deposition," a few courts have resorted to issuing standing orders to clear up ambiguities in the rule. [69] For example, in a multidistrict litigation case, the court issued a two-page order with eleven protocols regarding the rule. [70] The order contains a paragraph defining what is included as "time spent responding to discovery":

> Pursuant to Rule 26(b)(4)(E), the Court shall require the party or parties seeking to depose an expert witness to pay the expert a reasonable fee for time spent by the expert in connection with his/her participation in the deposition. This shall include time spent preparing for the deposition (not including time spent conferring with counsel), actual time spent in the deposition, and travel time to and from the place where the deposition is conducted. [71]

While room exists for disagreement regarding the interpretation of the rule reflected in the standing order, the existence of a standing order at least serves to alleviate the interpretative problems and disputes in that particular court.

***492** In the vast majority of cases, there is no case precedent nor a standing order that clarifies what is included in "time spent responding to discovery." As a result, litigants and courts frequently resort to policy considerations in their interpretations. [72] The considerations range from who controls the experts' particular fees and for whose benefit such fees are truly incurred, [73] to the difficulty of gauging what preparation time is reasonable. [74] Thus, courts spend considerable time analyzing the pros and cons of including preparation time as part of "time spent responding to discovery." Not surprisingly, courts weigh the competing policies differently, resulting in varied interpretations. The result is not only inconsistency among interpretations, but also the litigation costs of having various courts decide this issue anew because there is no settled law.

ii. Whether Fees and Expenses for Traveling to and from the Deposition Are Shifted

Like deposition preparation time, no consistency exists regarding whether the deposing party must pay for time and expenses spent traveling to and from the deposition. Just as it is unresolved whether preparation time is "time spent responding to discovery," it also is unsettled whether time and expenses spent traveling to and from a deposition fall within that language. While many courts hold that time and expenses spent traveling is covered, [75] ***493** others hold that it is not contemplated by the rule. [76]

Without clear language in the rule, policy considerations--often inconsistent-- abound. These policy considerations are weighed anew, and differently, by each trial court. Some courts that interpret the rule as not encompassing travel fees and expenses note the potential for the retaining party to impose increased costs on the deposing party by hiring an expert in a remote location. [77] Although recognizing that a party "should be free to select the expert of his choice[,]" the opposing party "should not be forced to pay the increased costs associated with [a party's] decision to engage an expert from

another part of the country." [78] Other courts appear indifferent to the potential for one party to impose excessive costs on the opposing party, and do not take into account the reason for the retaining party's choice of the remote expert. [79]

***494** Closely related to the question of compensation for travel time is the interpretive question of whether travel expenses (cost of a hotel, airfare, etc.) are included in the fee shifting. Most courts treat the question as merely an extension of the travel time. [80] Such courts reason that because "travel time [is] time spent 'responding' to discovery[,]" so too must the related "expenses incurred during travel" be deemed as "time spent responding to discovery." [81] Other courts rationalize shifting expert travel expenses on grounds that lay witnesses may be compensated for "their travel expenses post-trial as part of 'costs.'" [82]

Some courts, however, have focused on the plain words of the rule, such as payment for "time spent in responding to discovery[,]" and have concluded that expenses are not compensable. For example, in rejecting the claim to shift deposition travel expenses to the opposing party, one court held:

> Like with review time, neither party directly addresses whether the costs of travel to and from a deposition, such as the ***495** cost of a plane ticket or hotel room, fall within the scope of Rule 26(b)(4)(E)(i). However, the rule only requires that a deposing party pay for an expert's *time,* not other costs or expenses. Thus, the Court will exclude such costs from its award of any expert's fees pursuant to Rule 26(b)(4)(E)(i). [83]

There is no reason that a rule of procedure, which should facilitate civil litigation, instead consumes so much time and so many resources on the part of litigants and courts, particularly for a recurring issue like travel time and expenses. First, federal rules exist so that there is uniformity. That uniformity gives parties notice of what is covered by the rule, and avoids the costs and uncertainty that arise when no clarity exists, and thus, parties can and do reasonably dispute what is covered. A federal rule that fails to provide for such clarity results in excessive time and money spent litigating its meaning. Second, even when a rule is clear--for example, assume that the rule unambiguously provided that reasonable travel fees and expenses must be paid by the opposing party--one must still question if analyzing a hotel's rate in a given market is a good use of judicial resources. [84]

This variation regarding whether fees should shift for an expert's travel time, like similar variation regarding preparation time, results in inconsistency among courts. Depending on where the case is pending, such fees may or may not be shifted. The fact that courts can and do reach diametrically opposed positions despite interpreting identical language in the rule is troubling in a federal court system premised on uniformity. It is also costly, both in terms of money and time. There is no reason in a federal system to have nearly identical issues being litigated in successive courts over and over again.

2. Disputes Regarding What Constitutes "Reasonable Fees"

For fees that are deemed included in "time spent responding to discovery [,]" the dispute quickly shifts as to what amount of fees are "reasonable." The rule does not provide any definitions, presumptions, factors, or guidelines as to what constitutes "reasonable fees." Individual courts, rather, are left to develop their own tests, with many lamenting the lack of guidance. [85] Not surprisingly, wide variation exists across ***496** jurisdictions, and good faith disputes among attorneys abound as to what constitutes "reasonable fees." [86] These disputes tend to fall into three categories: (1) the "reasonableness" of the expert's billed hourly rate and expenses; (2) the reasonableness of a "flat fee" rate; and (3) the "reasonableness" of the number of hours charged by the expert.

i. Reasonableness of Experts' Billed Hourly Rate and Expenses

First, unnecessary disputes arise regarding the "reasonableness" of experts' hourly rates. Because each expert and their work is different, there obviously will be variation in what constitutes a "reasonable fee." But the rule provides no guidance to courts about what to consider when determining what is reasonable, whether through definitions, presumptions, or factors. Thus, rather than a uniform test that all courts must apply to determine what constitutes a "reasonable fee," courts instead are left to carve out their own tests, a reality that several courts have lamented. [87] Over time, many courts have adopted the *Borel* test, which provides:

> To determine whether a fee request pursuant to Rule 26(b)(4)(E) is reasonable, courts consider seven criteria: (1) the witness's area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality, and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interest implicated by Rule 26. [88]

While the *Borel* test is more helpful than not, it is highly discretionary by nature. While some discretion is necessarily part of a "reasonableness" determination, unnecessary discretion leads to unnecessary disputes. [89]

***497** In particular, for recurring areas of disputes--i.e., ones that predominately involve a legal, rather than a fact-based, question--litigants and courts alike would benefit from a clearer test. One such question of law that arises is whether it is reasonable for an expert to charge a different-- and higher--hourly rate for time spent in a deposition versus time spent preparing the expert's report. [90] Without any guidance from the rule (or the *Borel* test, if that test has been adopted by the court), parties are left to argue in good faith how the court should interpret what constitutes a "reasonable fee." [91]

Another area in which recurring disputes occur regarding the same question of law is whether an expert's hourly rate for travel time can be the same as the expert's rate for performing work. Because the rule is silent, courts vary greatly in their interpretations of the rule, with some treating this as a case-by-case inquiry and others establishing a bright-line rule. The most common of these rules is that an expert's "reasonable" hourly rate is half of the expert's regular rate. [92] Still, other courts hold that the travel rate and ***498** work rate can be the same. [93] Like many issues that arise under the fee-shifting rule, there is a lack of uniformity among the courts.

Likewise, as to what travel expenses are reasonable, courts that shift such expenses end up engaging in a highly-factual analysis of the expenses billed. [94] Courts have, for example, declined to shift expenses for "first class travel or first class accommodations." [95] It is not uncommon for courts to play the role of a human resources officer, analyzing and policing what daily hotel rate is reasonable, for example: "the Court finds the $970 for 2 nights in a hotel for Dr. Maister to be excessive--despite the high cost of New York hotel rooms--and reduces that amount to $400 (i.e., a $570 reduction)." [96]

Finally, in determining reasonableness, some courts look behind the scenes to which party caused the travel time and expenses. [97] For example, if the retaining party could have but did not hire an expert closer, the court ***499** might hold that it is unreasonable to reimburse the expert for such expenses. [98] On the other hand, if the deposing party insisted on the expert traveling to the jurisdiction to be deposed, rather than going to the expert or conducting a phone deposition, the court might use that to justify the "reasonableness" of shifting the travel fees and expenses. [99] Inquiries into which party "caused" travel time to be incurred are not, however, universal. Many courts do not consider this factor as part

of the "reasonable fees" prong. Thus, this variation in the interpretation of what constitutes "reasonable" ends up being litigated. Without clear language in the rule or a uniform interpretation, litigants understandably disagree about what the deposing party is required to pay. Whether the disputes end up in court or not, they are expensive and time-consuming, and could be circumvented by adding presumptions to the rule.

A final issue that arises under the "reasonableness" prong, and that reveals a limitation of the *Borel* test, concerns the fifth factor: "(5) the fee actually charged to the party who retained the expert." Experts sometimes will charge a flat fee to the party that retained them, and then charge an hourly rate to the deposing party. [100] While *Borel* directs a court to compare ***500** those rates, an apples-to-apples comparison is not possible. Many courts then simply disregard this factor, notwithstanding the fact that it is arguably the most important way to gauge reasonableness--what the market has freely paid for the expert. [101]

The great variation in how courts interpret what constitutes "reasonable fees" has real consequences for litigants and experts. First, it means that the rate that is deemed "reasonable" for identical work may vary simply because of the location of the court in which the case is pending. An expert testifying in two different federal courts may be reimbursed in one court for time spent traveling at the expert's full rate, but may be reimbursed at half of that rate in the other court. Likewise, one court may conclude that it is per se unreasonable to charge different rates for deposition time and writing the report, while another may conclude that it is presumptively reasonable to do so. That lack of uniformity is the opposite of what is expected from a federal rule of procedure. [102] It also is unfair, insofar as the relative dollar amounts at stake are high. [103]

***501** In addition, the lack of guidance concerning what standard courts should apply as to what is "reasonable" means that litigants and experts alike lack notice of what a given court will deem reasonable. If everything is discretionary, then litigants can be expected as advocates to engage in disputes about what is reasonable. Such disputes, even if they never go before a court, waste time and resources when the rule could provide guidance that would limit the range of what is reasonable. Litigants may pay "unreasonable" rates because the expense of litigating the issue in court outweighs any upside from litigating.

ii. Reasonableness of Flat Fees

In addition to disputes about the "reasonableness" of the expert's billed hourly rate and expenses, other "reasonableness" disputes arise when experts charge a "flat fee" for their deposition, rather than billing by the hour. The rule does not address the practice of flat fee billing. Experts who charge a flat fee justify it on the ground that they are "forced" to set aside a full day for the deposition, regardless of whether it finishes early. Although many courts have opined that "flat fees are generally disfavored," [104] the practice continues.

Indeed the case law is replete with instances in which the parties dispute whether flat fees are reasonable. Notably, these are not cases in which the amount of the flat fee--for example, $750 per day versus $3000 per day--is disputed. Rather, these cases address the basic interpretative question of whether flat fees are "reasonable" and thus permitted. Further, these disputes involve significant sums. [105] It is not uncommon for experts to charge more than $2500 for a deposition, regardless of its length.

Courts that address this issue note that "[f]lat fees for experts are generally considered to be unreasonable." [106] Courts rightfully "expect some ***502** reasonable relationship between the services rendered and the remuneration to which an expert is entitled." [107] "By its nature, a flat fee runs counter to this principle because it is simply not reasonable to require parties in every case to pay the same amount regardless of the actual 'services rendered' or 'time spent complying with the requested discovery.'" [108] Even when the flat fee charge would, as a practical matter, yield a "reasonable" hourly

rate, courts typically still hold the flat fee unreasonable: "[T]he fact that the agreed-upon hourly rate multiplied by the number of hours actually incurred in this particular instance happens to approximate the requested flat-rate fee does not render the use of a flat flee more reasonable. [109]

Still, without a settled rule, experts continue to frequently bill for depositions at a flat-fee rate, leading to costly disputes in which courts address the relative merits of flat-fee billing. An expert typically will contend that it is "reasonable ... to charge a flat fee for deposition testimony because [the expert] is unavailable to do other work on the day of the deposition." [110] Because depositions have a start time but no end time, experts often end up setting aside more time than ultimately needed. On the other hand, the fact that depositions last for varying lengths of time is, according to some courts, a reason not to charge a flat fee. [111]

iii. Reasonableness of Number of Hours Billed

Finally, disputes regarding the "reasonableness" of experts' fees arise in the context of the number of hours billed by the expert. This issue arises for time billed for preparation time, travel time, or other time that, unlike the time spent in the deposition, is not objectively computable. Thus, in those cases where a court holds that fees for preparation and travel time are recoverable under the rule, the debate then shifts to how many hours are reasonable. [112] While what constitutes a "reasonable" number of hours billed--like an expert's hourly rate--will vary in cases, courts can and do ***503** employ presumptions and rules of thumb about ratios and other formulas that provide clarity and uniformity, at least within the employing court. The rule itself contains no guidance.

While no uniform approach exists, many federals courts across the country have adopted a "reasonableness" ratio ranging from 1:1 to 3:1 between time spent preparing for a deposition and time spent actually being deposed. [113] Some district courts that handle a high volume of fee disputes, such as the Northern District of Illinois, have arrived at a formula that further makes the ratio dependent on the complexity of the case, namely:

> To determine whether an expert's preparation time was reasonable, courts in this district have looked "to the preparation time in relation to the deposition time, and the nature or complexity of the case, to establish a reasonable ratio of preparation time to actual deposition time for the case." Courts have approved of a 1:1 ratio up to a 3:1 ratio depending on the nature of the required document review, breadth of the expert's involvement, and difficulty of the issues. Also relevant is how the expert spent his time and the specificity with which the expert describes that time in the invoice. [114]

Courts' use of ratios limits the magnitude of hours that can be shifted for preparation time, and thus lessens concerns about the deposing party having to pay for preparation time over which it has no control. [115]

***504** Courts vary in terms of how much detail the expert is required to provide about the preparation work she performed, often due to the perception that this is an area in which "misuse" could occur. One court, for example, stated:

> Although this court recognizes that the experts' preparation time falls within the ratios of preparation to deposition time that in some cases have warranted reimbursement, it agrees [that the retaining party] (or its experts) has not done enough to demonstrate how that time was spent to satisfy the court that it was reasonably spent in responding to discovery within the meaning of Rule 26(b)(4)(E)(i). [116]

The court noted that "to simply take the adverse party's unsupported word for the amount of preparation time involved is to hand it a tool of oppression to misuse." [117] This court's concern is more than theoretical; in numerous cases, experts

have billed for double-digit hours of preparation time--for example, twenty-three hours of preparation for a thirteen-hour deposition [118] and fourteen hours of preparation for an eight-hour deposition. [119]

Other courts, while allowing recovery for some preparation time, exclude from fee shifting any hours billed for time spent preparing with the retaining counsel. Other courts scrutinize what level of review is reasonable in order to prepare for a deposition and reach differing conclusions. For example, in a case where the court made a modest adjustment to the expert's hours spent for deposition preparation (fourteen hours billed reduced to ten hours recoverable), it took the expert's hours as a presumptive starting point, and reduced those hours only where clearly excessive:

> Nevertheless, while the Court declines to impose a categorical limit on the type of record review that warrants reimbursement under Rule 26(b)(4)(E), that is not to say that the record review in this case was therefore reasonable. In preparation for drafting his expert report, Pollini spent an estimated 12 to 17 hours reviewing the record. Two months later, Pollini spent 14 hours reviewing nearly the exact same materials to prepare for his deposition. While Pollini need not merely review his report and ***505** contemporaneous notes as defendants suggest, the latter, duplicative record review appears to be excessive, especially in light of Pollini's decades of experience with police practices, his prior experience testifying as an expert, and the fact that the issues in the case are not especially technical or complex. [120]

In contrast, other courts have emphasized that, with respect to deposition preparation time, Rule 26(b)(4)(E) should be applied with caution "since that time usually includes much of what ultimately is trial preparation work for the party retaining the expert." [121]

Regardless of whether a court takes a presumptively reasonable or presumptively unreasonable approach, the cases in this area tend, as in the above excerpt, to be fairly detailed with respect to the facts of the given cases and the policy considerations at issue. These same policy discussions arise in case after case, with each court determining anew its test for "reasonableness." [122] Like what is included in "time spent responding to discovery," what fees are "reasonable" need not be so ill-defined. As described below, the rule could and should have presumptions that guide reasonableness. [123]

B. *Logistical Problems: Disputes Arising from the Rule's Failure to Address When and How Fees Shift*

In addition to interpretative problems regarding what fees are "reasonable," logistical problems also arise under the rule. Even so, nothing in the rule addresses these logistical questions. It leaves litigants and courts alike to make educated guesses about, for example, when fee payments are due, what consequences arise from an expert's failure to make mandatory disclosures, and what the process is for enforcing the rule when disputes arise.

1. Disputes Regarding Timing of When Fees Must Be Billed and Paid

The rule contains no provision regarding when the experts' fees should be billed and when payment for fees is due. Without any guidance from the rule, the topic of when fees must be billed and, even more so, paid has been highly litigated. Most of the disputes about the timing of fees fall under two categories: (1) whether fees must be prepaid if the expert so demands; and ***506** (2) whether fees must be billed within a certain time frame in order to shift.

i. Timing for Payment of Fees

Although the rule is intended to be self-executing and to require minimal, if any, involvement by the court, the gap regarding when fees are due has spawned extensive and costly motions practice. Without a clear rule as to when fees must be paid, lawyers--being lawyers--may end up litigating that issue, often at great expense to their clients, the opposing parties, and the court.

Because the rule does not expressly require that fees be determined and paid before the deposition, some lawyers contend that payment before the discovery occurs is not required. This, however, is not a universally accepted interpretation of the rule. In fact, many courts have ordered parties to pay the opposing expert's deposition fees before the deposition occurs. Other courts have held that there is no basis in the rule for fees to be prepaid--and have pointed out the logistical challenges of prepayment given the uncertain length of most depositions--and thus have denied motions for fees to be prepaid. These courts have made clear that it is the retaining party's "responsibility" to pay the expert, and that "Rule 26 entitles Defendants' counsel [only] to *reimbursement* for 'reasonable fees' in connection with [the] deposition." [124]

The problem does not lie primarily in the substantive question of whether litigants should have to advance payment or simply provide reimbursement; while the reimbursement approach is more sensible for the practical reasons identified by courts, an advance payment approach could arguably be workable if certain safeguards were put in place. [125] Instead, the problem lies with the fact that there the rule provides no clear guidance. That lack of guidance means that experts and litigants alike do not know what is required or permitted by the rule, so they end up spending time and money disputing the issue of when fees are due.

***507** Take, for example, the all-too-common scenario of an expert, whether on his own accord or at the behest of the retaining attorney, who threatens not to appear for his deposition unless he is paid for his time in advance. [126] What happens in this situation? As it turns out, any number of things may happen, all of which waste time and resources. First, the lawyers engage in a back-and-forth exchange of emails and likely phone calls about the reasonableness or unreasonableness of the request for prepayment, each pointing to some supporting but unauthoritative authorities. This back-and-forth results in one of three things: (1) the expert may relent and agree to be paid after the deposition, typically as long as the deposing lawyer agrees to indeed pay the expert; (2) the deposing lawyer may relent and agree to pay the expert in advance; or (3) neither side budges, much like the Zaxes in the Dr. Seuss classic. [127] If neither side budges, no agreement is reached.

The deposing lawyer may elect to file a motion with the court, asking the court to order the expert to appear for the deposition without the advance fee payment or with a reasonable fee advanced. The retaining lawyer may elect to file a motion with the court, [128] asking the court to order the deposing party to advance the expert's fees. Or the retaining lawyer instead may send a letter informing opposing counsel that the expert will not attend the deposition without payment in advance, thus attempting to shift the burden to the deposing party. That lawyer may either: (1) ignore the letter and move forward with the deposition; or (2) bring a motion to compel the expert's ***508** attendance at the deposition. [129] Not surprisingly, the deposition often does not occur even when the deposing lawyer elects to "move forward" with it. Instead, the deposing lawyer appears, makes a record, and then brings a motion to compel the expert to appear at the deposition at a later date, as well as to recover costs for fees and costs of the aborted deposition.

Courts, like lawyers, handle this matter in various ways. Some courts, if requested, will order the deposing party to pay some or all of the expert's fees in advance. [130] Others will order the expert to appear with the condition that the deposing party agrees to pay the fees within a fixed number of days post-deposition. [131] Other courts will simply compel the expert to appear. [132] In refusing to require advance payment, these courts sometimes note the inability of the court or deposing party to foresee how long the deposition may take and thus what payment is required. [133] Finally, when the expert has

***509** failed to appear on the day for which the deposition was noticed, some courts will require the retaining party to pay the deposing party for all fees and expenses incurred because of the expert's no-show. [134]

Importantly, the Advisory Committee's notes to the rule state that the court may "order payment ... either as a condition of providing discovery or after the discovery has been completed," thus expressing no presumption either way and, instead, leaving the decision to individual courts on a case-by-case basis. [135] Not surprisingly, this perceived discretion invites lawyers to take opposing positions. [136] The result is time and money spent litigating ***510** over the simple matter of when fees must be paid.

Further, it is not only the litigants that pay the price for the rule's lack of clarity, courts do as well. When faced with disputes about the timing of fees, courts must not only look into the interpretation of a rule that gives little guidance, but also into the factual intricacies of the dispute and related policy arguments. [137] While courts may lament the fact that the parties do not just "work it out on their own," the rule's lack of guidance, the inconsistency among courts' interpretations, and the "splitting-of-the-baby" that often occurs in such disputes provides litigants with more reasons to litigate than not.

ii. Timing of Request for Fees

Other disputes regarding timing concern when the retaining party must request fees from the deposing party. Because the only hint in how the rule should be read comes from an advisory note (and one that many courts do not mention), courts differ greatly in their interpretation of the rule's ***511** requirements regarding timing of fees. At the other end of the spectrum from cases in which fees are requested before the deposition lie those cases in which no mention is made of payment for expert's fees until the conclusion of the litigation. Thus, rather than requesting payment at or around the time of the expert's deposition, the retaining lawyer requests such a payment at the conclusion of the case. [138]

Courts have handled disputes about the timing of the fee request with mixed results. Many courts enforce the rule's fee shifting language regardless of when the request for fees is made. [139] These courts frequently note the Advisory Committee's statement that the court may issue an order to pay fees as a condition of discovery "or may delay the order until after discovery [,]" as indicative of the propriety of a fee request at any point in the litigation. [140] These courts also note that, whether expressly requested by counsel at the time or not, "the Federal Rules plainly provide that notice." [141]

Some courts, however, decline to award fees if the retaining party waits too long to request them. In such situations, the court may decide that fee shifting is not permitted due to the parties' failure to discuss it around the time of the deposition, which created an implied agreement between the parties not to shift fees. [142] At least one court, in refusing to shift expert ***512** discovery fees post-trial under the rule, has expressed hostility to attempts to shift fees post-judgment, calling the party's request for such fees a "late-blooming argument" and "just silly." [143] The Court stated that

> Rule 26(b)(4)(C) ... is a discovery rule, it applies equally to both sides, and if the parties had intended to charge one another for the time their numerous experts spent in responding to discovery, they should have raised the issue at the initial Rule 16 conference, or at least at some point before the discovery was undertaken. [144]

2. Disputes Regarding Fee Requests When the Expert's Mandatory Disclosures and Report are Deficient

Occasionally, litigants ask courts to deny fee shifting on grounds that the expert failed to comply with Rule 26(a)(2)(B).[145] Experts are required to disclose, before their deposition,[146] a report that provides their opinions in a ***513** given case, the bases for such opinions, the documents examined and relied upon, as well as information about their background, experience, prior testimony, and fee schedule. Disclosures exist for a reason. For example, one court has explained the significance of disclosure of prior testimony as the way "to give the other party access to useful information to meet the proposed experts' opinions" and noted that "[t]he proliferation of marginal or unscrupulous experts will only be stopped when the other party has detailed information about prior testimony."[147]

Thus, when experts fall short in their disclosures, litigants may argue that the failure to disclose should negate, or at least reduce, the shifting of fees. The argument is premised on the fact that a deposition under such circumstances is not only necessary, but also necessarily longer, absent complete and accurate disclosures.[148]

In one case, the deposing party "argue[d] that he should not be required to reimburse Defendants because the reports submitted by some of the experts were deficient under the Federal Rules' disclosure requirements."[149] The "expert's noncompliance with this provision," the litigant argued, "is a deficiency that renders reimbursement of that expert's fees unreasonable."[150] The court acknowledged that the experts had failed to include required information in their reports.[151] Although recognizing this deficiency and the impact on the deposing party having "to spend time in a deposition ***514** developing that information when it should have been included in the report[,]" the court deemed that "impact" to be "nominal."[152] It reduced each experts' compensation by one-half hour, which likely covered but a fraction of the amount the deposing party incurred in litigating the issue.[153]

In another case, the deposing party contended that it should not have to pay for the experts' depositions because the experts had failed to disclose their hourly rate as required under Rule 26(a)(2)(B).[154] It argued that it should not have to pay the experts' allegedly "'excessive' charges which [it] would not have agreed to pay had [it] known the experts' rates before the depositions."[155] The court disagreed, stating that "the fact that the fees were not agreed to or disclosed ahead of time does not preclude defendant from seeking reimbursement for its experts under Rule 26."[156] It reasoned that, because "the timing of a party's request for discovery cost is not a bar to recovery under Rule 26[,]" the fact that the experts' rates were not known in advance was not consequential.[157] While that reasoning is consistent with several courts' admonishments that litigants should bring fee disputes to the ***515** court "after the deposition has been completed,"[158] the court failed to acknowledge the difference between the disclosure of fees versus an agreement about fees--the former of which is required by the rule.

While not highly litigated, this aspect of the rule would nonetheless benefit from making explicit what is implicit. Namely, at its core, the fee shifting rule contemplates that there has been a full and accurate disclosure, including a complete report.[159] It is that extensive disclosure that forms the rationale behind the fee shifting rule and, specifically, why it is fair to shift fees. When that implicit tradeoff--fees shifting in exchange for a full and thorough disclosure--breaks down because of incomplete disclosure, so too does the underlying rationale and fairness behind the fee shifting rule.

3. Disputes Regarding the Process for Handling and Enforcing Fee Disputes

The rule contains no mention of the process for handling and enforcing fee disputes. It does not mention when and how a party should bring the dispute to court, nor does it address who bears the burden of proof. Complicating that void is the rule's overarching language that makes the fee shifting mandatory "unless manifest injustice would result." Taken together, these aspects of the rule create unnecessary (or unnecessarily costly) litigation and strike the wrong balance.

Courts appear to uniformly hold that it is the retaining party that bears the burden of proof on the question of fee shifting. [160] Plaintiffs, in this case, bear the burden of establishing that each expert's fee is reasonable. [161] If an expert's fee is unreasonable, the Court may, in its discretion, simply fashion a reasonable alternative. [162]

***516** But saying that the retaining party bears the burden of proof and actually holding the party to that burden are two different matters. In numerous cases, courts suggest that both parties failed to explain why or why not the fees billed were reasonable, even though that burden lies with only one party. [163] And even when there is a noted lack of evidentiary support regarding the reasonableness of fees, courts still largely award such fees with only minor reductions. [164] Likewise, in cases in which the lack of evidence produced by the party who bears the burden of proof renders the court unable to assess a critical factor, the courts still award fees and simply ignore that missing factor. [165]

Despite how few words the rule contains, it decidedly puts a thumb on the scale in favor of fee shifting in two separate places, no matter how large the bill or extreme the claimed fees. First, it states that fees shift "unless manifest injustice" would result, implying that there has to be an exceptionally compelling reason not to shift fees. [166] Second, it says that the ***517** court "must order" the fee shifting. [167] Of course, the rule also says that only "reasonable fees" are shifted. [168] Yet, in failing to set parameters as to what is reasonable, the rule leaves wide discretion to courts already predisposed to shift whatever fees are billed. Likewise, the rule's lack of attention to what level of scrutiny and oversight the court should apply undermines whatever teeth the "reasonable fees" language was intended to supply, and stands in stark contrast to any other fee-shifting rule. So, while it is true that a few courts have scrutinized and drastically limited the amount of fees that are shifted, [169] those courts are in the minority.

***518** Exacerbating the problem is the lack of consequences for unfair play under the rule. It is almost unheard of in the context of Rule 26(b)(4)(E) for the court to award attorneys' fees to the party that prevails on the fee-shifting motion. For example, even when a court recognizes deficiencies or unreasonableness in one party's fee demand, it still does not award attorneys' fees. For example, in *AP Links, LLC,* the deposing party brought a motion to require the expert to appear for his deposition. The expert had refused to appear unless the deposing party paid him a flat fee in advance of the deposition. The case was pending in the Eastern District of New York, a jurisdiction that had well-established law that an expert "may not insist on advance payment, and may not set a flat fee before he knows what he will be called upon to do." [170] Even so, the court refused to award attorneys' fees to the party that was forced to bring the motion, stating:

> Finally, the request by Plaintiffs' counsel that he be awarded attorneys' fees in connection with bringing the instant motion is DENIED. Plaintiffs' counsel has not cited any case law in support of his conclusory request, nor has he identified the rule or legal authority demonstrating his entitlement to the relief he seeks. The parties are cautioned that if, going forward, the Court finds that either party is not operating in good faith with regard to the issues referenced in this Order, the Court will take appropriate action. [171]

It is hard to understand the court's statement that the moving party did not "identif[y] the rule ... demonstrating his entitlement" to fees given that the motion, like all discovery disputes, clearly falls under the purview of Federal Rule of Civil Procedure 37. In addition, the court's reticence to shift attorneys' fee is a little ironic since the underlying rule is a fee-shifting provision, such that relative fairness concerns should be heightened.

C. *Policy Problems: Issues Arising from the Rule's Overbreadth*

In some of the areas in which the rule is clear, it strikes the wrong balance. First, it does so by requiring fee shifting even for discovery of experts who have not submitted expert reports. Second, it does this by invoking the term "unless manifest injustice would result."

***519 1. The Problem with Shifting Fees for Experts Who Have Not Submitted Reports**

The fee shifting rule applies to discovery of all experts, but some experts are not subject to the mandatory disclosures and do not have to submit reports. These experts, sometimes called "non-retained experts," are experts who are "not retained or specially employed to provide expert testimony in the case." [172]

Numerous reasons exist as to why experts who do not have to provide a report should not be included in the fee shifting rule. The expert discovery fee shifting rule is premised on the fact that the expert to be deposed has already provided a complete and detailed disclosure and report, and thus a deposition is viewed as less necessary and more discretionary. Therefore, similar to the argument that fees should not shift when an expert submits an incomplete or deficient report, [173] the argument is that, with no report, a deposition is hardly a luxury but rather a necessity.

In addition, the expert discovery rule is premised on the proposition that it is "unfair" for the deposing party to get for free what the other party had to pay for--a proposition that has no validity in the context of an expert who has not submitted a report. By their very nature, experts who are not required to submit reports have not been retained, and thus have not been paid by one party for opinions reached and work performed in the litigation. Accordingly, there exists no concern that the deposing party will "get for free" what the other party has had to pay for. Finally, the deposition of an expert who has not provided a report will likely take longer. Thus, the potential "unfairness" cuts in the opposite direction, insofar as it is unfair for the deposing party to have to pay for the expert to sort through what her opinions are, the bases for them, and more during the deposition.

2. The Problem with Shifting Fees for Experts Who Are the Party's Employee

For somewhat similar reasons, it is problematic to include experts who are "the party's employee" under the fee shifting rule. First, only large, corporate defendants are likely to have such employees and thus are the only parties who benefit from such a rule. Second, an expert "whose duties as the ***520** party's employee regularly involve giving expert testimony" most likely is salaried and thus has no market-based hourly rate. In addition, not shifting such an expert's fees does not raise the fairness concerns that exist with regard to specially retained experts. It is typical for a party to pay for the time its own employee, whether a layperson or expert witness, spends responding to discovery. Litigation is, by definition, burdensome and expensive for parties, and responding to discovery is one of the biggest burdens. Even so, the discovery rules do not provide for fee shifting, and parties already incur significant discovery-related expenses occasioned by the other side's discovery requests and performed for the other side's benefit. If those requests are irrelevant, unduly burdensome, or otherwise objectionable, the party has the ability to seek a protective order. No justification exists to treat discovery costs related to a party's expert employee any differently than those costs for non-expert employees.

3. Problems Arising from the "Unless Manifest Injustice Would Result" Language

The rule's introductory language that a court must require that an expert's "reasonable fees" be shifted "[u]nless manifest injustice would result" is also problematic. [174] Such language is more commonly found in rules of criminal law and procedure than in a rule of civil procedure. [175] In any event, what "manifest injustice" entails is not defined in the rule. [176] The advisory notes to the rule suggest that the standard relates only to the ability of the deposing party to pay. [177] Thus, as one court has described it: "Implicit in the 'manifest injustice' caveat[] is that a 'rich' party should not be allowed to agree to pay excessively high fees to its expert in order to prevent a 'poorer' opposing party from being

able to afford to depose the expert." [178] ***521** Even so, other courts suggest that the "unless manifest injustice would result" language serves as a general safeguard against unreasonable fee shifting. [179] The case law, however, reveals that to be more aspirational than actual--other than a party's abject inability to pay, the manifest injustice language provides no safeguard. [180]

To the contrary, the unintended effect of that language has been to justify the lack of scrutiny applied to experts' fee requests. It is not uncommon for courts to rubber-stamp the shifting of extraordinary expert fees on grounds that the fees do not offend the "manifest injustice" caveat. Because that reflects a misunderstanding of the limited safeguard that the language actually supplies, the impact of the rule's limited safeguard--that the fees must be "reasonable"--ends up being minimized. [181]

Experts come in all forms--some charge exorbitant rates and tack on fees to their invoices for anything remotely related to the deposition, whereas others err on the side of caution, and charge only for actual time spent in the deposition. The thumb on the scale that arises from the "unless manifest injustice would result" standard incentivizes and rewards less scrupulous experts to shift greater expenses, while at the same time disincentivizing the deposing party from challenging such fees.

IV. OVERALL IMPACT OF CURRENT RULE'S SHORTCOMINGS

Fee shifting of any variety is extraordinary in the American legal system and perhaps for good reason--the inherent and unintended consequences of fee shifting are many. [182] Thus, on the rare occasion in ***522** which fee shifting is permitted, the statute or rule is typically carefully worded to achieve its purpose. Not so with Rule 26(b)(4)(E), however. That rule represents an anomaly not only from the typical ebb and flow of litigation, but also from other fee shifting rules. Despite its drastic impact--forcing one side to pay the other side's expert that it neither selected nor entered into an arm's length agreement with--the rule is plagued by the problems detailed in Part III. Taken together, these problems impact civil litigation involving experts in numerous, global ways.

First, disputes about the rule's interpretation abound because there is no clarity or uniformity regarding what types of fees the rule covers or standards for reasonableness. These disputes cost litigants and the courts time and money, and are avoidable with a better drafted rule.

Second, the lack of uniformity is anathema to the federal rules, which are premised on the uniform application of rules in the federal court system.

Third, discovery fees are often shifted even when the expert's work was not controlled by or for the benefit of the deposing party. This is not only unfair to the deposing party, but likely results in experts being paid unreasonable sums.

Fourth, the rule lacks mechanisms to fairly and efficiently shift fees and, in particular, provide the parties with proper incentives. Ideally, the retaining party and expert should be incentivized to only bill for truly reasonable fees, and the deposing party should be incentivized to only pay for truly reasonable fees.

Fifth, the rule strikes the wrong balance in terms of the courts' involvement. It tends to disincentivize and minimize a court's role in the areas in which a court is most sorely needed while involving the court for matters that are of little consequence.

Sixth, the problems with the rule are not resolving themselves, thus necessitating correction by amendment. The rule's lack of clarity, combined with the dearth of appellate review, has resulted in long-standing inconsistency.

V. FIXING THE RULE: PROPOSED CHANGES TO THE RULE AND BENEFITS

When a rule consistently yields inconsistent interpretations and unfair results, as this rule has for almost twenty-five years, it is time to amend it.[183] The proposed changes to the rule are set forth below, followed by an explanation of the changes and related benefits.

*523 A. *Proposed Amended Rule 26(b)(4)(E)*

The proposed amended rule is below, the version showing the changes is first, followed by a clean version that incorporates all of the changes.

Revised Rule Showing All Changes Proposed to Current Rule

~~Unless manifest injustice would result. The~~ Except as provided in part (vi), the court must require that the party seeking discovery ... pay ~~the~~ an expert who is required to submit a report under Rule 26(a)(2)(B) a reasonable hourly fee for time spent in responding to discovery under Rule 26(b)(4)(A):~~.~~"

(i) "Time spent responding to discovery" includes only: (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript, or time otherwise relating to being deposed; and (2) time the expert spends responding to written discovery requests and/or subpoenas served by the opposing party that require the expert to perform work that is not already required under the disclosure rule.

(ii) In determining what constitutes "reasonable fees," the party that retained the expert has the burden to prove that the amount billed is reasonable, both in terms of hourly rate and the number of hours billed. The hourly rate that the retaining party actually paid for the expert's work is the presumptively reasonable rate.

(iii) The request for payment of fees may not be filed until after the expert discovery has occurred and must include an itemized statement that includes the date and purpose for the hours billed, the rate at which each hour was billed, and a statement of the hourly rate that the expert has been paid by the retaining party. The request must be personally signed and attested to by both the expert and the retaining attorney.

(iv) Any objection to the request for fees, including an objection arising under (vi)(4), must be filed within fourteen days of the date on which the request was filed or is deemed waived.

(v) Unless a resistance to the request for fees has been timely filed: (1) payment by the deposing party of the reasonable fees is due within thirty (30) days of the date on which the request for fees was filed; and (2) interest accumulates daily for any unpaid and due balance at the statutory rate for judgments, and is automatically added on to the amount due and owing. If a resistance to the request for fees was timely filed, fees are not due until the court enters an order specifying the amount, if any, that must be paid. If the

resistance is deemed frivolous, the court shall order that interest be paid from the date on which payment was due absent the resistance.

***524** (vi) No payment is required if: (1) the party that engaged the expert failed to comply with and serve complete and accurate disclosures and a report as set forth in Rule 26(a)(2)(B) seven or more days before the date of the expert's deposition; (2) the party that engaged the expert fails to file a request for fees that complies with part (iii) within 30 days after completion of the discovery to which the fee request relates; (3) the witness is the party's employee; or (4) manifest injustice would result due to the financial circumstances of the deposing party.

Revised Rule Incorporating All Proposed Changes

Except as provided in part (iv), the court must require that the party seeking discovery ... pay an expert who is required to submit a report under Rule 26(a)(2)(B) a reasonable hourly fee for time spent in responding to discovery under Rule 26(b)(4)(A)

(i) "Time spent responding to discovery" includes only: (1) the actual time the expert spends in a deposition, including any breaks during the day, and does not include time or fees spent preparing for a deposition, traveling to or from a deposition, reviewing a deposition transcript or time otherwise relating to being deposed; and (2) time the expert spends responding to written discovery requests and/or subpoenas served by the opposing party that require the expert to perform work that is not already required under the disclosure rule.

(ii) In determining what constitutes "reasonable fees," the party that retained the expert has the burden to prove that the amount billed is reasonable, both in terms of hourly rate and the number of hours billed. The hourly rate that the retaining party actually paid for the expert's work is the presumptively reasonable rate.

(iii) The request for payment of fees may not be filed until after the expert discovery has occurred and must include an itemized statement that includes the date and purpose for the hours billed, the rate at which each hour was billed, and a statement of the hourly rate that the expert has been paid by the retaining party. The request must be personally signed and attested to by both the expert and the retaining attorney.

(iv) Any objection to the request for fees, including an objection arising under (vi)(4), must be filed within fourteen days of the date on which the request was filed or is deemed waived.

(v) Unless a resistance to the request for fees has been timely filed: (1) payment by the deposing party of the reasonable fees is due within thirty (30) days of the date on which the request for fees was filed; and (2) interest accumulates daily for any unpaid and due balance at the statutory rate for judgments, and is automatically added on to the amount due and owing. If a resistance to the request for fees was timely filed, fees are ***525** not due until the court enters an order specifying the amount, if any, that must be paid. If the

resistance is deemed frivolous, the court shall order that interest be paid from the date on which payment was due absent the resistance.

(vi) No payment is required if: (1) the party that engaged the expert failed to comply with and serve complete and accurate disclosures and a report as set forth in Rule 26(a)(2)(B) seven or more days before the date of the expert's deposition; (2) the party that engaged the expert fails to file a request for fees that complies with part (iii) within 30 days after completion of the discovery to which the fee request relates; (3) the witness is the party's employee; or (4) manifest injustice would result due to the financial circumstances of the deposing party.

B. ***Breakdown of Proposed Amendments to the Rule and Related Benefits***

1. Changes to "Costs of Responding to Discovery"

As discussed, many disputes arise under the rule due to the lack of clarity and resulting inconsistencies regarding what is included in "costs of responding to discovery." [184] The proposed amended rule should eliminate virtually all of these disputes because it provides a bright-line definition of what that its terms entail. No longer will parties be uncertain and thus pay for questionable fees because it is less expensive than bringing a motion. And no longer will courts be asked to examine and resolve whether and under what circumstances "preparation time" is covered.

In addition to the time and resources saved, the amended rule strikes a proper balance in terms of what is covered. Subject to certain caveats discussed below, there is no question that an expert should be paid for time spent in the deposition, and that time can be fairly and objectively calculated. And while it is true that the deposing party is not entirely in control of the length of the deposition--i.e., a cagey or verbose expert will necessarily take longer to depose--the deposition's length is most controlled by that party. This is especially true given that one of the reasons depositions under the current rule take longer than the deposing party controls is due to the lack of complete and accurate expert disclosure and report--a problem that is directly solved by not shifting fees if the expert has not met his obligation before the deposition. [185] Thus, the rule's shifting of fees for time spent in the deposition is sound and workable.

***526** But, there is no simple way to determine how much preparation time is necessitated by the deposition, and even less of a way to determine which party benefits from that preparation time. Further, the difficulty and risks of determining whether preparation time and travel time are "reasonable" in any given case is very factually-intensive and in most cases not warranted. Any benefits of fee shifting in a given case do not justify the overall expenditure of courts' time and resources spent determining which party is "responsible" for the fact that the expert is incurring such fees.

Thus, the best way to ensure that an expert expends and bills for only a reasonable amount of preparation time is for that amount to be paid by the party that retained the expert. [186] As one court exploring this issue concluded, "[t]o the extent that the inquiring party wishes to ensure that an expert is well-prepared, that party may voluntarily pay for the expert's preparation time."

Likewise, by not including travel time and expenses to and from the deposition, the rule eliminates disputes about whether and how much travel time and expenses are covered, as well as the potential abuse that arises by imposing costs on the other party. Not only has the retaining party not had to pay the expert for any travel, but the retaining party also knew about the expert's location and chose to retain the expert knowing the additional fees and expenses that would be incurred. In contrast, the deposing party neither selects, nor benefits from, the expert's location.

Like lay witnesses who are located outside of the jurisdiction in which the lawsuit is pending, parties can and should negotiate where expert witnesses should be deposed. Sometimes the best location will be at the expert's location, in which the parties will have to travel. Other times it will be at the parties' location, in which case the expert will be required to travel. Having the rule provide that expert travel expenses should shift to the deposing party unnecessarily changes the incentives by imposing more of the expenses of travel on the deposing party. Because the rationale behind expert fee shifting is that one party should not get for free what the other party paid for, there is scant rationale for shifting travel expenses, which by definition the retaining party has not paid for.

The amended rule also strikes a fair balance between the parties. The party that hired the expert can and should reasonably anticipate that the costs associated with preparing its expert for deposition and the costs associated with the expert travelling to and from that deposition are part of that engagement. Despite the new disclosure rules, it remains typical for parties in federal cases to depose the opposing expert. [187] Thus, those fees are ***527** foreseeable and reasonably should be part of what the retaining party considers as the costs of hiring the expert.

2. Changes to "Reasonable Fees"

As discussed, many disputes arise under the rule due to the definitions and guidance regarding what constitutes "reasonable fees." [188] First, the proposed amendment requires that the expert bill the deposing party at an hourly rate, not a flat fee. In making clear that flat fees are not simply "disfavored," they are not allowed, the amended rule will eliminate the disputes that arise regarding the uncertainty of the question of flat fee billing. [189] Additionally, this change will eliminate a large source of potential unfairness in the fee shifting rule: the imposition of a large cost on the deposing party that is untethered to the actual amount of time spent being deposed.

Further, the rule is not unfair to the expert or to the retaining party. Like many issues of expert payment, the question is not whether the expert will get paid her "flat fee" rate, but instead whether the deposing party must pay it. As one commentator has explained, "If the expert wants a minimum, the balance should come from the party who hired him and not from [the deposing party]." [190]

In addition, the proposed amended rule introduces a presumption that the experts' hourly fee charged to the deposing party should be the same as the hourly fee charged to the retaining party. That presumption is reasonable. [191] A lawyer, for example, does not charge different rates for office work versus in-court work; all of that work is part of being a lawyer and equally ties up a lawyer's time. The same is true of an expert witness who voluntarily takes on the professional role of an expert witness and, with that, all of the concomitant roles. The presumption also avoids the risks of ***528** abuse and unfairness to the deposing party. [192] Given the lack of any arm's length negotiation, it is all-too-easy for the expert to charge the deposing party a higher rate, such that the deposing party ends up effectively subsidizing the expert's work for the retaining party.

Of equal importance, the presumption of a single hourly rate--rather than a range of rates--provides a bright-line so that litigants have clarity regarding what rate is "reasonable," and courts need not expend resources examining the minutiae of whether and why a billed rate is reasonable. To the extent an expert demands a higher hourly rate for deposition time than for writing her report, the retaining party is in the best position to be aware of that at the time the expert is retained. It can attempt to negotiate the expert's rates so that the expert charges a single hourly rate, accept responsibility for making up any difference in the permitted rate of recovery, or select a different expert.

The amendment also effectively will require that a party who wants the benefit of the fee shifting rule must have compensated the expert at an hourly rate rather than flat fee. While this undoubtedly will create problems for experts

whose practice is to bill a flat fee for their work on behalf of the retaining party, [193] that downside is outweighed by the fact that the hourly rate an expert charges the retaining party is by far the best measure of the expert's actual hourly rate. The risk of unfairness to the deposing party from the expert having an hourly rate that is, for all intents and purposes, only charged to the opposing party is significant. Further, because that hourly rate will serve as a presumption for the rate that is reasonable, many disputes will be eliminated.

***529** Because preparation time and travel time are not covered by the amended rule, there is no need to address whether an expert's hourly rate for travel should be the same as the rate for work performed. That change to the rule will eliminate the inconsistencies among courts on this issue and provide much-needed uniformity in the federal courts.

C. *Timing of Payments*

As discussed, issues of timing regarding when fees must be paid and when fees may be billed consume a substantial portion of litigants' and courts' time. [194] That is wholly unnecessary and there is no reason that the rule should not provide clarity regarding the timing issues that routinely arise.

The proposed change creates bright-lines for when fees must be billed and when fees must be paid, and it eliminates advance billing. That is consistent with the better approach under the rule's current language. The prohibition of advance billing also makes sense as a practical matter. When going into a deposition for any witness, whether a lay witness or expert, no one typically knows how long the deposition will last. Thus, there is no reliable way to accurately calculate what is a reasonable advance payment. If the expert insists on advance payment, that can and should be provided by the retaining party with whom the expert has a professional relationship.

The amended rule also eliminates uncertainty and disputes about when fees are due. It makes the due date enforceable by making the amount due automatic and by automatically charging interest on any amount not timely paid. [195] This practice--having a set due date after which time interest accrues--is consistent with other court-ordered payments. [196]

D. *Make Fee Shifting Contingent on Having an Expert Report*

As discussed, under the current rule, expert deposition fees shift for all experts, including those experts that have not provided a report. [197] The primary justification for fee shifting is the fact that the expert already has provided a detailed report--and has done so at the expense of the retaining party--thus reducing or even eliminating the need for a deposition. When that justification does not exist because there is no report, it does not make sense and is not fair to shift expert deposition fees.

***530** For the same reason, fee shifting is not justified when the expert has failed to provide a complete and accurate report. A report that is deficient-- i.e., does not comply with the disclosure requirements--is, in many respects, similar to having no report. It makes a deposition unquestionably necessary in order to learn the information that should have been, but was not, disclosed. It also makes it likely that the deposition will take longer insofar as counsel will have to explore information that the expert failed to provide. In addition, when a report is deficient, the retaining party by definition has not paid for the expert to do work that the expert was supposed to do, and there thus exists far less “potential unfairness” that the deposing party will free ride off work for which the retaining party paid.

Finally, by categorically denying fee shifting when a report is deficient, the rule provides an incentive for the retaining party and expert to comply with the disclosure requirement. It is not uncommon for an expert to fail to include some required information, such as the list of prior testimony. That failure is significant because it precludes the opposing party from exploring that prior work in the deposition and eventually at trial. The solution that some courts have taken--

to simply reduce the hours billed for time attributable to the failure to provide a complete disclosure--is inadequate. It not only sends the wrong message and provides poor incentives to the retaining party, but it also results in courts having to make the case-by-case determination of how much of a reduction in hours is reasonable. That is not only time consuming when it happens but also costly enough that some deposing parties will just pay the excess amount because it is less expensive. This revised rule incentivizes a party to comply with the basic disclosure requirements and places the burden where it belongs--on the party that has failed to comply rather than on the deposing party.

E. *Process for Fee Disputes*

As discussed, the current rule is silent as to how litigants should handle disputes about fees.[198] That leaves uncertain why a party has the obligation to file a motion if a disagreement occurs, thereby creating the unintended consequence of the "reasonable" party (or at least the party that ultimately prevails) having to decide whether to incur the costs of filing a motion, and sometimes deciding not to. When the latter occurs, the unreasonable party--i.e., the expert that is charging unreasonable fees or the deposing party who is refusing to pay reasonable fees--may end up being rewarded in their unreasonable position.

On the other hand, the current rule's silence also may imply that there is no basis to challenge a fee request. Certainly aspects of the rule would ***531** counter this implication, such as if fees cannot be challenged then why does the rule only provide for payment of "reasonable fees." As the cases in this area demonstrate, however, the tendency of courts is to rubber stamp fee requests rather than apply scrutiny, and having a set process creates balance and signals the courts' role.

Because the rule streamlines the question of what fees shift and how much, it is likely that parties will only rarely have to involve courts in disputes about fees. What constitutes a reasonable fee should almost never be disputed given the rule's bright-lines and presumptions. In instances in which it is, however, the rule provides the process by which the fee should be challenged. Further, that process does not automatically penalize the party that challenges the fees, nor does it automatically reward that party. Instead, the rule provides that a court must determine if the challenge was frivolous in its order. If it was, then interest is charged from the date the payment was due absent the challenge. If it was not frivolous, though, then the party is not charged with interest.

Related to the fee dispute process, the amended rule should provide in the advisory notes that disputes arising under this rule are subject to the provisions of the discovery sanctions rule.[199] That means that, if a litigant--whether the retaining party or the deposing party--takes a frivolous position that causes the other party to incur attorneys' fees, a court should consider that action in the context of the sanctions rule. While an advisory note of that sort normally would not be necessary, here it is based upon the tendency under the current rule to not award sanctions when the retaining party acts unreasonably.[200] Because the fee shifting rule should incentivize all parties to take reasonable positions, an advisory note that makes this clear would be beneficial. That is particularly true under the revised rule which provides clarity and bright-lines, such that good faith disputes should be few and far between.

***532** F. *Move "Manifest Injustice" Language to the Part of the Rule to Which it Relates*

As discussed, the rule's prefatory language of "unless manifest injustice would result" is more problematic than not. Further, without a definition of "manifest injustice," it also is oddly out-of-place in a rule that pertains to shifting of an expert's discovery fees, and it sends the wrong signal to litigants and courts about the courts' role. Thus, the revised rule makes two changes. First, it moves the phrase "unless manifest justice would result" to the part of the rule to which it relates--the payment of fees. That is consistent with the direction in the advisory notes to the current rule in making clear that the standard has nothing to do with whether the fees are objectively "reasonable," but rather pertains solely to the deposing party's ability to pay. Second, and related to that, the rule expressly qualifies "manifest justice" as relating to a party's ability to pay.

The amended rule also adds in language to clarify the fee dispute process when a party contends it should not have to pay because such "manifest injustice would result." Specifically, it makes clear that the process for objecting to a fee request on "manifest injustice" grounds is the same as the process for any other objection to fees.

G. *Overall Benefits of the Proposed Amendments to the Rule*

Taken together, these proposed changes to the rule will result in a fee shifting that is not only clear, but that also better effectuates its purpose.

First, litigants will be on notice of what fees are covered by the rule as well as the process for fee shifting. With a shared understanding of the contours of the rule, very few disputes should arise under the rule. Moreover, when such disputes do arise, the process for handling them will be clear, with consequences attached to unreasonable demands or refusals under the rule. Put differently, the fee shifting rule will be clear and, on the flip side, litigants will have an incentive to play by the rule.

In addition, because the rule provides bright lines regarding what is covered and what is presumptively reasonable, the rule will require little court involvement. And when court involvement is necessary, it will be streamlined. Courts will not have to interpret ambiguous provisions of the rule.

Moreover, the rule's parameters are fair. By ensuring that only fees that are controlled by and of benefit to the deposing party are shifted, the rule better serves its purpose. A rule that automatically shifts fee must be fine-tuned to ensure it properly incentivizes the parties.

Finally, these changes will provide uniformity in the rule. For almost twenty-five years, such uniformity has been lacking in this rule's implementation. Aside from the fact that disputes about the rule's meaning ***533** have been costly, such disputes have resulted in different courts adopting conflicting interpretations of the rule. As a practical matter, that has meant that the types of fees and the amount of fees shifted has been contingent on which federal court happens to hear the case.

Footnotes

a1 Many of the most useful law review articles are spawned by their authors' own experiences, and this Article is no exception. For that, I thank opposing counsel who have advocated positions--both reasonable and unreasonable--regarding Rule 26 and, in doing so, brought to light many of the rule's shortcomings. In addition, I thank Melissa Weresh and Thomas Mayes for reviewing earlier versions of this Article and providing valuable feedback. I thank Drake University Law School, in particular Dean Jerry Anderson and Associate Dean Andrew Jurs, for supporting this work.

d1 Professor of Law, Drake University, Of Counsel, The Weinhardt Law Firm; B.A. 1992, *summa cum laude,* Augustana College; J.D. 1995, *magna cum laude,* Harvard Law School; Law Clerk to Judge Ed Carnes, United States Court of Appeals for the Eleventh Circuit (1995--96).

dd1 Even with such safeguards, the high costs of e-discovery, combined with the shifting of such costs to the opposing party, can be daunting and discourage litigants from litigating in federal court. *See* David J. Cook, *Mutiny on the Fee Bounty: Redrafting Fee Clauses in the Age of Trump,* 17 U.C. DAVIS BUS. L.J. 57, 88 n.67 (2016) ("[D]iscovery costs, particularly related to ESI discovery, are partly responsible for making federal litigation 'procedurally more complex, risky to prosecute, and very expensive,' causing litigants to avoid litigating in federal court.") (citing Gregory P. Joseph, *Trial Balloon: Federal Litigation-Where Did It Go Off Track?,* 34 LITIG. 5, 62 (2008)).

1 *See* Lance L. Shea, Ronn B. Kreps & Olufemi O. Solade, *An Indispensable Force of Persuasion: Navigating Expert Discovery,* 2010 FOR THE DEFENSE 14, 15 ("Expert witnesses play an increasingly common and crucial role in litigation today.").

2 Over fifteen years ago, one commentator critiqued the high fees charged by experts and the impact such fees have on the legal system:
The sky has really become the limit. For example, in some cases medical experts are now demanding hourly rates of $700, $800, or even $1,000 or more per hour for deposition testimony. Although such fees are usually excessive, sometimes these rates are paid, thereby perpetuating the notion that it is the expert, and not the judicial system, that controls such fees.
Mark Canepa, *Drawing the Line on Excessive Expert Witness Fees,* MONDAQ, http://www.mondaq.com/unitedstates/x/10024/Drawing+The+Line+On+Excessive+Expert+Witness+Fees (last updated Jan. 31, 2001).

3 FED. R. CIV. P. 26(b)(4)(E).

4 *See* Andrew W. Jurs, *Expert Prevalence, Persuasion, and Price: What Trial Participants Really Think About Experts,* 91 IND. L.J. 353, 359 (2016) ("To recap, studies have found that experts appear in between 63% and 86% of cases, with studies in the 1990s showing between 4.1 and 4.8 experts per case and the newest study in 2005 finding 3.6 experts per case.").

5 *See* Amendments to the Fed. Rules of Civil Procedure, 146 F.R.D. 401, 639 (1993) (addressing the right to take the opposing expert's deposition and stating that the report disclosure requirement "may ... eliminate the need for some such depositions or at least reduce the length of the depositions").

6 *See* Hillmann v. City of Chicago, No. 04 C 6671, 2017 WL 3521098, at *10 (N.D. Ill. Aug. 16, 2017) ("'The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821,' which provides that witnesses who travel to testify at trial or sit for a deposition must be paid an 'attendance fee' of $40 per day and must be reimbursed for their travel and related expenses.") (first citing 28 U.S.C. § 1821(a)(1), (b)-(c)(1), (c)(3)-(d)(1) (2012); and then citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 440 (1987)).

7 *See* Victoria Negron, *Expert Witness Fee Report: Facts, Figures & Trends in 2017*, EXPERT INST. (Mar. 20, 2018), https://www.theexpertinstitute.com/expert-witness-fee-report-facts-figures-trends-in-2017/ (surveying expert witnesses nationwide "across all industries and areas of practice" and finding average deposition fees of $444.31 (Northeast), $407.51 (South), $415.20 (Midwest), and $380.05 (West)).

8 EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *3 (S.D.N.Y. Jan. 21, 1999) (retaining party demanded payment of $12,000 for one day of deposition testimony by its expert).

9 It is not uncommon for the deposing party to have to pay six figures for the privilege of deposing the other side's expert. *See, e.g.*, Neutral Tandem, Inc. v. Peerless Network, Inc., No. 08 C 3402, 2011 WL 13199213, at *5 (N.D. Ill. Sept. 1, 2011) (awarding "a total of $48,020.00, pursuant to Rule 26(b)(4)(E)" for two experts' depositions).

10 Federal Rule of Civil Procedure 26, entitled "Duty to Disclose; General Provisions Governing Discovery," is divided into two parts: (a) "Required Disclosures" and (b) "Discovery Scope and Limits." Expert testimony is addressed in both parts. Part (a) addresses, among other things, the "Disclosure of Expert Testimony," and covers the timing and content of disclosure of experts' opinions. FED. R. Civ. P. 26(a)(2). That section differentiates between the disclosure requirements for experts retained specifically for purposes of litigation and other experts, and only requires the former to provide reports. Part (b) addresses, among other matters, "Trial Preparation: Experts." Namely, Rule 26(b)(4) provides that:
• "A party may depose any person who has been identified as an expert whose opinions may be presented at trial." FED. R. CIV. P. 26(b)(4)(A);
• "[D]rafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded[,]" is protected work product, as are many "communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications ...." FED. R. CIV. P. 26(b)(4)(B)-(C);
• A "party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial" absent certain exceptions. FED. R. CIV. P. 26(b)(4)(D):
• "Unless manifest injustice would result, the court must require that the party seeking discovery ... pay the expert a reasonable fee for time spent in responding to discovery ...." FED. R. CIV. P. 26(b)(4)(E).

11 FED. R. CIV. P. 26(b)(4)(E).

12 FED. R. CIV. P. 26(a)(2).

13 *See id.*

14 FED. R. CIV. P. 26(a)(2)(B).

15 *See* 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2034 (3d ed. 1998), Westlaw (database updated Nov. 2018).

16 *See* FED. R. CIV. P. 26(b)(4)(A).

17 FED. R. CIV. P. 26(b)(4)(E).

18 *See* Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case."); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules,* 39 B.C. L. REV. 691, 739 (1998) (discussing liberalization of discovery rules).

19 WRIGHT ET AL., *supra* note 15, § 2034; *see also* Eastman v. Allstate Ins. Co., No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at *4 (S.D. Cal. Feb. 29, 2016).

20 *See, e.g.,* Globe Distributors, Inc. v. Adolph Coors Co. *(In re* Globe Distributors, Inc.), 145 B.R. 728, 733 (Bankr. D.N.H. 1992) (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975)) (noting that a fee shifting statute was "contrary to the general 'American rule' that each party to a lawsuit bears its own costs (and fees)").

21 *See id.* at 733 ("Where, as here, an exception to the general rule is allowed, such [fee shifting] should be implemented in a conservative fashion.").

22 See DiNicola v. Serv. Emps. Int'l Union Local 503, No. 6:08-cv-6317-TC, 2013 WL 5781220, at *l-2 (D. Or. Oct. 25, 2013), for an example of the rigorous and detailed procedures involved in shifting attorney's fees under a federal statute. *See also* Matthew D. Klaiber, Comment, *A Uniform Fee-Setting System for Calculating Court-Awarded Attorneys' Fees: Combining Ex Ante Rates with a Multifactor Lodestar Method and a Performance-Based Mathematical Model,* 66 MD. L. REV. 228, 235 (2006) (noting development of "certain fee-calculation methodologies aimed at guiding the process of awarding attorneys' fees [,]" including "the percentage-of-recovery method, the lodestar method, and the pure factor-based method").

23 *See* 28 U.S.C.A. § 1821(b) (West 2018) ("A witness shall be paid an attendance fee of $40 per day for each day's attendance.").

24 *See* WRIGHT ET AL., *supra* note 15, § 2034.

25 *See* Mann v. Taser Int'l, Inc., No. 4:05-CV-0273-HLM, 2007 WL 9712069, at *6 (N.D. Ga. July 24, 2007) (quoting Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 645 (E.D.N.Y. 1997)) ("Rule 26(b)(4)(C)'s mandatory compensation requirement is intended 'to avoid the unfairness of requiring one party to provide expensive discovery for another party's benefit without reimbursement.'").

26 WRIGHT ET AL., *supra* note 15, § 2034.

27 FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.

28 WRIGHT ET AL., *supra* note 15, § 2034.

29 *See* Schmidt v. Solis, 272 F.R.D.1, 2 (D.D.C. 2010); Waters v. City of Chicago, 526 F. Supp. 2d. 899, 900 (N.D. Ill. 2007) ("This Court frequently reminds counsel in cases before it that an important consequence of the Rule 26(a)(2)(B) and (C) requirement of a comprehensive report from every opinion witness who is expected to testify is that the witness' trial testimony is circumscribed by that report."); *cf.* WRIGHT ET AL., *supra* note 15, § 2034 ("If, as was hoped, these disclosures serve to avoid the need for some experts' depositions, or at least to shorten the depositions, that may mean that there will be fewer occasions for payment of expert fees pursuant to Rule 26(b)(4)(C)."). For a thorough history of the expert discovery rule from

its inception to its most recent amendments in 2010, see generally Brett Lawrence, Note, *What Do I Have to Do to Get Paid Around Here?: Rule 26(b)(4)(E)(i) and the Qualms Regarding Expert Deposition Preparation Time, 14* WASH. & LEE L. REV. 2231 (2017).

30 FED. R. CIV. P. 26 advisory committee's note to 1993 amendment.
[P]aragraph (4)(A) is revised to provide that experts who are expected to be witnesses will be subject to deposition prior to trial, conforming the norm stated in the rule to the actual practice followed in most courts, in which depositions of experts have become standard. Concerns regarding the expense of such depositions should be mitigated by the fact that the expert's fees for the deposition will ordinarily be borne by the party taking the deposition. The requirement under subdivision (a)(2)(B) of a complete and detailed report of the expected testimony of certain forensic experts may, moreover, eliminate the need for some such depositions or at least reduce the length of the depositions. Accordingly, the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served.
Id.

31 Lancaster v. Lord, No. 90 Civ. 5843 (RLC), 1993 WL 97258, at *2 (S.D.N.Y. Mar. 31, 1993) ("Since the defendants chose to depose [the opposing expert] rather than to seek discovery through written interrogatories, Rule 26(b)(4)(C) applies, and plaintiff is entitled to reimbursement for [the expert's] time spent preparing for and attending the deposition[.]" (citation omitted)).

32 FED. R. CIV. P. 26(b)(4)(E). Prior to the 2010 amendment to Rule 26, the expert fee shifting rule was located at 26(b)(4)(C). Thus, in cases that predate that amendment, a reference to Rule 26(b)(4)(C) is a reference to the fee shifting rule now housed at 26(b)(4)(E). *See* Lawrence, *supra* note 29, at 2253 ("[F]ormer subdivision (b)(4)(C) became (b)(4)(E).").

33 Fisher v. Accor Hotels, Inc., No. Civ.A. 02-CV-8576, 2004 WL 73727, at * 1 (E.D. Pa. Jan. 12, 2004) (citation omitted).

34 *See* Nester v. Textron, Inc., No. 1:13-CV-920 RP, 2016 WL 6537991, at *3 (W.D. Tex. Nov. 3, 2016).

35 *See* FED. R. CIV. P. 26(b)(4)(E).

36 *See* Maxwell S. Kennedy, *Treating Physicians & Non-Retained Expert Witnesses: What Do Parties Have to Disclose Before Trial?,* LITIG. & TRIAL (Mar. 7, 2017) https://www.litigationandtrial.com/2017/03/articles/attorney/non-retained-expert-witnesses ("'Non-retained' expert witnesses are more common in federal court than many people realize: think of the doctors who treated an injured plaintiff, the government employees who investigated an accident, the engineers who worked on a defective product, or the competing inventors of a design in a patent infringement case.").

37 La. Power & Light Co. v. Kellstrom, 50 F.3d 319, 332-33 (5th Cir. 1995).

38 WRIGHT ET AL., *supra* note 15, § 2034.

39 *Id.*

40 *Id.* ("The courts have deplored the paucity of authority on the subject ....") (footnote omitted).

41 The absence of appellate authority, and thus consistency, has been noted by district courts. *See, e.g.,* Veasey v. Abbott, No. 2:13-CV-193, 2017 WL 1092307, at *1 (S.D. Tex. Mar. 23, 2017) ("The Fifth Circuit has not addressed whether Rule 26(b)(4)(E) covers fees for time spent preparing for a deposition. Other courts are split on whether the rule allows for such compensation with a slim majority allowing recovery as long as the fees are reasonable." (citing Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 277 (E.D. La. 2010))).

42 Namely, it is highly unusual for a party to raise an issue regarding expert fees on appeal. Such an issue surely would not warrant an interlocutory appeal; not only because it is not likely to irreparably alter the status quo if it goes to final judgment, but also because the likelihood of success is low given the deferential abuse of discretion standard. And for those few cases that do not settle and go to final judgment, at that point there are more consequential issues to appeal.

43 Lawrence, *supra* note 29, at 2277.

44 *Id.* (footnote omitted).

45 Durkin v. Paccar, Inc., No. 10-2013 (JHR/AMD), 2012 WL 12887769, at *3 (D.N.J. Dec. 28, 2012).

46 Eastman v. Allstate Ins. Co., No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at *5 n.1 (S.D. Cal. Feb. 29, 2016).

47 *Id.* (citing FED. R. CIV. P. 26 advisory committee's note to 1993 amendment).

48 *Id.* at *4 (quoting Fulks v. Allstate Prop. & Cas., Ins. Co., No. 3:14-cv-29473, 2016 WL 447628, at *2 (S.D. W. Va. Feb. 4, 2016)).

49 Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 635 (CD. Cal. 2011).

50 *Allstate Ins. Co.,* 2016 WL 795881, at *5 n.1 (citation omitted).

51 Other areas of dispute arise, but with less frequency and fewer consequences. For example, courts have addressed whether "time spent reviewing a deposition [transcript] falls within the scope of Rule 26(b)(4)(E)(i)." Nester v. Textron, Inc., No. 1:13-CV-920 RP, 2016 WL 6537991, at *4 (W.D. Tex. Nov. 3, 2016) ("However, like deposition preparation time, the Court finds that although the time an expert spends reviewing his or her deposition is compensable, it should be limited to the extent it is unreasonable." (citation omitted)). Interpretation issues arise because, while a deposing party may reasonably expect that an expert will read her deposition for "obvious errors or typos," an expert may bill for time spent reviewing her deposition when her review is, in essence, to help prepare for cross-examination at trial. *Id.* Thus, review time is another category of fees that warrants clarification. *See id.*

52 *See, e.g., Allstate Ins. Co.,* 2016 WL 795881, at *1.

53 Auto. Rentals, Inc. v. Keith Huber, Inc., No. 1:10CV385-LG-RHW, 2012 WL 12854841, at *1 (S.D. Miss. Jan. 10, 2012). This is, in fact, the most common approach. *See, e.g., Nester,* 2016 WL 6537991, at *3 (citing Halasa v. ITT Educ. Servs., Inc., 609 F.3d 844 (7th Cir. 2012)); Ushijima v. Samsung Elecs. Co., No. A-12-CV-318-LY, 2015 WL 11251558, at *6 (W.D. Tex. July 30, 2015) (ordering reimbursement of one hour of preparation time for every hour spent in deposition); Se-Kure Controls, Inc. v. Vanguard Prods. Grp., Inc., 873 F. Supp. 2d 939, 956 (N.D. Ill. 2012) ("In general, courts in this District have concluded that, under Rule 26(b)(4)(E), it is reasonable for a party to recover expert witness fees from the opposing party for the time an expert spent both preparing for and attending a deposition conducted by the opposing party."); Tavarez-Guerrero v. Toledo-Davila, 271 F.R.D. 426, 428 (D.P.R. 2010) ("Courts have generally found that the party taking the deposition is required by Rule 26(b)(4)(E)(i) to pay for preparation time.")).

54 *Allstate Ins. Co.,* 2016 WL 795881, at *1 ("The second question is whether Allstate, as the party seeking discovery, is required to compensate the experts not only for their testimony--which Allstate has agreed to do--but also for their time spent preparing for the depositions." (citing FED. R. Civ. P. 26(b)(4)(E)(i) ("Unless manifest injustice would result, the court must require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D).")).

55 *Id.* at *5 ("[The rule] does not specifically address whether fees can be recovered for time spent *preparing* for a deposition ....").

56 *See Allstate Ins. Co.,* 2016 WL 795881, at *4.

57 Durkin v. Paccar, Inc., No. 10-2013 (JHR/AMD), 2012 WL 12887769, at *4 (D.N.J. Dec. 28, 2012), *aff'd sub nom.,* Durkin v. Wabash Nat'l, No. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013).

58 Script Sec. Sols., LLC v. Amazon.com, Inc., No. 2:15-CV-1030-WCB, 2016 WL 6649721, at *4 (E.D. Tex. Nov. 10, 2016) (citations omitted).

59 *Allstate Ins. Co.,* 2016 WL 795881, at *5.

60 The variation exists not only across the courts of appeals, but also among the district courts in a given circuit. *See, e.g., id.* at *4 ("There is no Ninth Circuit authority on point and no consensus among district courts within this circuit.").

61 *Id.* (first citing United States *ex rel.* Liotine v. CDW-Gov't, Inc., No. 3:05-cv-33-DRH-DGW, 2012 WL 1252982, at *2 (S.D. Ill. Apr. 13, 2012); then citing Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 277 (E.D. La. 2010); then citing Packer v. SN Servicing Corp., 243 F.R.D. 39, 42 (D. Conn. 2007); then citing Lent v. Fashion Mall Partners, L.P., 223 F.R.D. 317, 318

(S.D.N.Y. 2004); then citing Mannarino v. United States, 218 F.R.D. 372, 376 (E.D.N.Y. 2003); then citing Profile Prods., LLC v. Soil Mgmt. Techs., Inc., 155 F. Supp. 2d. 880, 886 (N.D. Ill. 2001); and then citing Collins v. Vill. of Woodridge, 197 F.R.D. 354, 355 (ND. Ill. 1999)).

62 *Id.* (first citing Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, at *3 (E.D. Pa. Nov. 16, 2011); then citing All Cities Realty, Inc. v. CF Real Estate Loans, Inc., No. SA CV 05-615 AHS (MLGx), 2008 WL 10594412, at *6 (CD. Cal. Mar. 14, 2008); then citing Waters v. City of Chicago, 526 F. Supp. 2d. 899, 901 (N.D. Ill. 2007); then citing Mock v. Johnson, 218 F.R.D. 680, 683 (D. Haw. 2003); then citing Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 647 (E.D.N.Y. 1997); and then citing Hose v. Chi. & N.W. Transp. Co., 154 F.R.D. 222, 228 (S.D. Iowa 1994)); *see, e.g., All Cities Realty, Inc.,* 2008 WL 10594412, at *6 ("[T]he Court must avoid charging the opponent for the deposing party's ordinary trial preparation ... [and it] will not reimburse fees for the experts' time spent in conference with counsel prior to the depositions.").

63 *Allstate Ins. Co.,* 2016 WL 795881, at *4 (citing Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 637 (CD. Cal. 2011)).

64 *Id.* (first citing Fiber Optic Designs, Inc. v. New Eng. Pottery, LLC, 262 F.R.D. 586, 592 (D. Colo. 2009); then citing 3M Co. v. Kanbar, No. C06-01225 JW (HRL), 2007 WL 2972921, at *3 (N.D. Cal. Oct. 10, 2007); then citing M. T. McBrian, Inc. v. Liebert Corp., 173 F.R.D. 491, 493 (N.D. Ill. 1997); then citing S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 154 F.R.D. 212, 214 (E.D. Wis. 1994); and then citing Rhee v. Witco Chem. Corp., 126 F.R.D. 45, 47 (N.D. Ill. 1989)).
The Court therefore holds that fee-shifting for expert preparation is the exception, not the rule, and is only required in extenuating circumstances. The Court must next decide whether such circumstances are present in this case. In so doing, the Court does not write on a blank slate, but is guided by other courts that have similarly construed Rule 26(b)(4)(E)(i). The *Rhee* court, for instance, noted that reimbursement of expert preparation time may be appropriate "in a complex case where the expert's deposition has been repeatedly postponed over long periods of time by the seeking party causing the expert to repeatedly review voluminous documents." In *S.A. Healy,* the court similarly recognized an "exception to the general rule [against reimbursement] in complex cases where there has been a considerable lapse of time between an expert's work on a case and the date of his actual deposition." Another court allowed reimbursement for expert preparation fees where the case was 'extremely complex' and required the expert to review "voluminous documents."
Id. at *6.

65 Schmidt v. Solis, 272 F.R.D. 1, 1 (D.D.C. 2010).

66 Lawrence, *supra* note 29, at 2263.

67 *Id.*

68 The author's spouse has served as an expert in more than 100 cases in state and federal courts for approximately twenty years and has never billed the opposing party for time spent preparing for a deposition. When asked about his practice, he explained that an expert already has done the work and issued a report, and thus should already have done the "preparation" needed for a deposition. To the extent preparation time is needed, it likely is for the benefit of the party that engaged the expert, not the party taking the deposition.

69 *See, e.g.,* DEPOSITION PROTOCOL REGARDING TENDER & PAYMENT OF EXPERT WITNESSES IN CVLO MDL 875 CASES (2012), https://www.paed.uscourts.gov/documents/MDL/MDL875/15expert%20deposition%20protocol.pdf [hereinafter MDL PROTOCOL].

70 While the protocol represents a single court's response to the lack of clarity and guidance in the rule, the fact that such a protocol was deemed necessary--and that eleven different protocols all tied to Rule 26(b)(4)(E) were included--is telling and instructive.

71 MDL PROTOCOL, *supra note* 69, ¶ 2.

72 *See, e.g.,* Durkin v. Paccar, Inc., No. 10-2013 (JHR/AMD), 2012 WL 12887769, at *1 (D.N.J. Dec. 28, 2012), *aff'd sub nom.,* Durkin v. Wabash Nat'l, No. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013) ("Defendant has not cited any binding authority on the matter, but relies upon the policy behind Rule 26(b)(4) and asserts that the majority of the courts to have addressed this question permit reimbursement." (citations omitted)).

73 *See, e.g.,* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 636 (CD. Cal. 2011) ("[A]n expert's deposition preparation may encompass a variety of tasks that contribute little or nothing to the efficiency of the deposition, are largely unrelated to the deposition, or are undertaken for an entirely partisan purpose ....").

74 *See generally* Eastman v. Allstate Ins. Co., No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at *5-6 (S.D. Cal. Feb. 29, 2016) (describing various concerns with holding that fees should be shifted for time spent preparing for a deposition).

75 *See, e.g.,* Nnodimele v. City of New York, No. 13-CV-3461 (ARR), 2015 WL 4461008, at *2 (E.D.N.Y. July 21, 2015) ("Ordinarily, hours that an expert spends on preparation and travel in connection with the expert's deposition are compensable under Rule 26(b)(4)(E)."); Reit v. Post Props., Inc., No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at *2 (S.D.N.Y. Nov. 4, 2010) ("'The district courts in the Second Circuit have consistently held that time spent by an expert preparing for a deposition is compensable under Rule 26(b)(4)(C),' and that 'time spent traveling to and from the deposition, and the expenses incurred during travel, so long as they are reasonable, are compensable under Rule 26(b)(4)(C).'" (quoting New York v. Solvent Chem. Co., 210 F.R.D. 462, 471-72 (W.D.N.Y. 2002))); EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *3 (S.D.N.Y. Jan. 21, 1999) ("The EEOC therefore implicitly concedes that properly documented and reasonable travel expenses are reimbursable, and at least on the facts of this case, the Court agrees." (citing Ohuche v. British Airways, No. 97 Civ. 1853 (JSM) RLE, 1998 WL 240481, at *1 (S.D.N.Y. May 11, 1998) (granting recovery of expert's travel expenses))); Bonner v. Am. Airlines, Inc., No. 96CIV.4762(KMW)(HBP), 1997 WL 802894, at *1 (S.D.N.Y. Dec. 31, 1997) ("[T]he weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert's travel time ... in connection with a deposition, along with the expert's out-of-pocket expenses."); Harbor Software, Inc. v. Applied Sys., Inc., No. 92 Civ. 8097(HB), 1997 WL 187350, at *3 (S.D.N.Y. Apr. 15, 1997) (granting recovery of expert's travel expenses); Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 646 (E.D.N.Y. 1997) ("[T]wo issues remain, namely whether [the expert] is entitled to compensation for travel time and for time spent preparing for the deposition. The short answers are yes and yes. Travel time has been held compensable."); DeFelice v. Am. Int'l Life Assurance Co. of NY., No. 94Civ.8165(AGS)(RLE), 1995 WL 753892, at *1 (S.D.N.Y. Dec. 19, 1995) (granting recovery for expert's travel expenses); *In re* "Agent Orange" Prod. Liab. Litig., 105 F.R.D. 577, 582 (E.D.N.Y. 1985).

76 *Bonner,* 1997 WL 802894, at * 1 ("Although there are conflicting decisions, the weight of authority appears to hold that Rule 26(b)(4)(C) permits recovery of fees for an expert's travel time and preparation time in connection with a deposition, along with the expert's out-of-pocket expenses." (first citing *Magee,* 172 F.R.D. at 646; then citing McHale v. Westcott, 893 F. Supp. 143, 151 (N.D.N.Y. 1995); then citing David Tunick, Inc. v. Kornfeld, 151 F.R.D. 534, 536-37 (S.D.N.Y. 1993); then citing *"Agent Orange" Prod. Liab. Litig.,* 105 F.R.D. at 582; and then citing Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45, 53 (S.D.N.Y. 1982)).

77 Clearly such gamesmanship would not be the sole reason--or even a reason--that a party selects a particular expert. The retaining party's lack of regard for the fees and expenses associated with the expert's location does nonetheless impose increased expenses on the opposing party, and the opposing party neither controls those increased expenses nor benefits from them.

78 Durkin v. Paccar, Inc., No. 10-2013 (JHR/AMD), 2012 WL 12887769, at *4 (D.N.J. Dec. 28, 2012), *aff'd sub nom.,* Durkin v. Wabash Nat'l, No. 10-2013, 2013 WL 5466930 (D.N.J. Sept. 30, 2013) (quoting Lent v. Fashion Mall Partners, L.P., 223 F.R.D. 317, 318 (S.D.N.Y. 2004)).

79 *See, e.g.,* Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 637 (CD. Cal. 2011) (focusing on the deposing party's ability to "control the amount of time the expert spends traveling by selecting a location for an expert's deposition that minimizes an expert's travel time, potentially including opting to take the deposition by telephone or video conference [,]" without acknowledging the travel expenses that would be imposed on the deposing party to take a remote deposition).

80 *See, e.g., Durkin,* 2012 WL 12887769, at *4 (equating travel time and expenses and allowing recovery, despite not permitting recovery for deposition preparation time); Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, at *3 (E.D. Pa. Nov. 16, 2011) ("Travel expenses are also reimbursable under Rule 26(b)(4)(E)." (citing Feliciano v. Cty. of Suffolk, 246 F.R.D. 134, 137 (E.D.N.Y. 2007) ("[A] number of courts in the Second Circuit have held that [Rule 26(b)(4)(E)] 'permits recovery of fees for an expert's travel time along with the expert's out-of-pocket expenses.'"))); Dwyer v. Deutsche Lufthansa, AG, No. CV 04-3184(TCP)(AKT), 2007 WL 526606, at *4 (E.D.N.Y. Feb. 13, 2007) ("A number of courts in the Second Circuit have held that Rule 26(b)(4)(C) 'permits recovery of fees for an expert's travel time along with the expert's out-of-pocket expenses.'" (quoting *Bonner,* 1997 WL 802894, at *1)).

81 Handi-Craft Co. v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at *16 (E.D. Mo. Nov. 25, 2003).

82 *See, e.g.,* Hillmann v. City of Chicago, No. 04 C 6671, 2017 WL 3521098, at *10 (N.D. Ill. Aug. 16, 2017) ("The Court finds Plaintiff's arguments for denying [the expert's] travel expenses unpersuasive. Section 1920 authorizes awarding costs for '[f]ees and disbursements for ... witnesses.'" (quoting 28 U.S.C. § 1920(3))). "'The witness fee specified in § 1920(3) is defined in 28 U.S.C. § 1821,' which provides that witnesses who travel to testify at trial or sit for a deposition must be paid an 'attendance fee' of $40 per day and must be reimbursed for their travel and related expenses." *Id.* (quoting Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 440 (1987)); *see* 28 U.S.C. § 1821(a)(1), (b)-(c)(1), (c)(3)-(d)(1) (2018). "Collectively, 28 U.S.C. §§ 1821 and 1920(3) authorize the award of costs to reimburse witnesses for their reasonable travel and lodging expenses." *Hillmann,* 2017 WL 3521098, at *10 (quoting Majeske v. City of Chicago, 218 F.3d 816, 825-26 (7th Cir. 2000). "Accordingly, courts in this District have routinely awarded costs for expert witnesses' travel expenses." *Id.* (citing Nilssen v. Osram Sylvania, Inc., No. 01 C 3585, 2007 WL 25771, at *4 (N.D. Ill. Jan. 23, 2007) ("awarding expenses for expert witness to travel to testify at trial even though trial was belatedly rescheduled")); Vardon Golf Co. v. Karsten Mfg. Corp., No. 99 C 2785, 2003 WL 1720066, at *9 (N.D. Ill. Mar. 31, 2003) ("awarding costs for expert witness's travel expenses")). This logic, however, is limited by the fact that "costs" are only awarded to the prevailing party, and only after a judgment. *See infra* Part II.C.

83 Nester v. Textron, Inc., No. 1:13-CV-920 RP, 2016 WL 6537991, at *4 (W.D. Tex. Nov. 3, 2016) (citing FED. R. Civ. P. 26(b)(4)(E)(i)).

84 *See* EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *3 (S.D.N.Y. Jan. 21, 1999) ("J & H's reply papers cured the specificity and documentation problem of which the EEOC complains. However, the Court finds the $970 for 2 nights in a hotel for Dr. Maister to be excessive-- despite the high cost of New York hotel rooms--and reduces that amount to $400 *(i.e.,* a $570 reduction). In all other respects, the Court rejects the EEOC's objections to J & H's experts' travel expenses.").

85 *See* WRIGHT ET AL., *supra* note 15, § 2034.

86 What constitutes "reasonable fees" will never be subject to black and white rules and necessarily will involve some discretion. That does not, however, mean that the rule cannot provide clarity about what factors and/or presumptions the court must apply in making the determination of whether a certain fee application is "reasonable."

87 *See, e.g.,* Hose v. Chi. & N.W. Transp. Co., 154 F.R.D. 222, 224 (S.D. Iowa 1994) ("There is very little authority as to what is meant by the term 'a reasonable fee' in Rule 26(b)(4)(C)." (alteration in original omitted) (quoting Goldwater v. Postmaster Gen. of the U.S., 136 F.R.D. 337, 339 (D. Conn. 1991))).

88 Ovella v. B&C Constr. & Equip., LLC, No. 1:10CV285-LG-RHW, 2012 WL 12883213, at *3 (S.D. Miss. Apr. 18, 2012) (citing Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 276 (E.D. La. 2010)).

89 Indeed, "the time-consuming and expensive judicial process of litigating the fee question itself" is one of the primary rationales for "the American Rule against fee shifting." Risa L. Lieberwitz, *Attorneys' Fees, the NLRB, and the Equal Access to Justice Act: From Bad to Worse,* 2 HOFSTRA LAB. L.J. 1, 4, 10 (1984).

90 For example, in *Walker v. Spike's Tactical, LLC,* the expert sought to charge defendant's counsel $2,500 per hour for an in-person deposition as compared to the $600 per hour he had charged the plaintiff's counsel to review records and issue his report. No. 2:13-cv-01923-RFB-PAL, 2015 U.S. Dist. LEXIS 1125, at *4 (D. Nev. Jan. 2, 2015); *see also* EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *4 (S.D.N.Y. Jan. 21, 1999) ("Indeed, courts most often reduce expert fee requests when the expert seeks to charge the opposing party a higher rate than the expert charges the retaining party. (first citing Sublette v. Glidden Co., No. Civ.A. 97-CV-5047, 1998 WL 398156, at *4 (E.D. Pa. June 25, 1998) ("reducing expert fee from $600 per hour to the $200 the expert charged the retaining party"); then citing Ohuche v. British Airways, No. 97CIV. 1853(JSM)RLE, 1998 WL 240481, at *1 (S.D.N.Y. May 11, 1998) ("reducing expert fee where expert charged retaining party less than opposing counsel"); then citing Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 646 ("reducing expert's fee from $350 per hour to the $250 the expert charged retaining party"); then citing Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493, 496-97 (S.D. Iowa 1992) ("expert's fee reduced from $500 to $250, because, *inter alia,* '[i]t is double the highest hourly rate he is charging the Plaintiff who retained him"); then citing Draper v. Red Devil, Inc., 114 F.R.D. 46, 48 (E.D. Ark. 1987) ("In the absence of proof as to the reason(s) why the expert charged counsel for the Plaintiff $110.00 and counsel

for the defense $120.00 hourly, the fee will be determined at the rate of $110.00 per hour."); then citing Anthony v. Abbott Labs., 106 F.R.D. 461, 464-65 (D.R.I. 1985) ("expert fee reduced from $420 hourly to $250 hourly, the charge the expert 'was content to charge a (friendly) litigant ... for his time'"); and then citing Mathis v. NYNEX, 165 F.R.D. 23, 26 (E.D.N.Y. 1996) ("The court is especially persuaded [that the expert's fee is reasonable] by the fact that [the expert] regularly charges the same rate for his consultative services and is charging plaintiff that rate for his expert services in this case.")).

91 In a case in which the parties disputed that very issue, the court began its analysis by remarking on the lack of authority: "Both sides cite Fed. R. Civ. P. 26(b)(4) to support their respective positions. Both sides acknowledge that there are very few cases deciding the issue before the court." *Walker,* 2015 U.S. Dist. LEXIS 1125, at *4.

92 *See, e.g.,* Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, at *3 (E.D. Pa. Nov. 16, 2011) ("For example, the Eastern District of New York created a rule that compensation for travel time should be half the normal rate." (citing Mannarino v. United States, 218 F.R.D. 372, 377 (E.D.N.Y. 2003) ("The general rule, which this court follows, is that compensation for travel time should be half the regular hourly amount charged."))); Reit v. Post Props., Inc., No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at *2 (S.D.N.Y. Nov. 4, 2010) (quoting *Mannarino,* 218 F.R.D. at 377); Dwyer v. Deutsche Lufthansa, AG, No. CV 04-3184(TCP)(AKT), 2007 WL 526606, at *4 (E.D.N.Y. Feb. 13, 2007) ("[The expert's] compensation should not be at the full hourly rate charged for rendering professional services. Accordingly, it is hereby ordered that Defendants shall pay Plaintiff's expert for his travel time at half of his normal rate, or $ 175, and reasonable travel expenses." (citation omitted)).

93 *See, e.g.,* Handi-Craft Co. v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at *17 (E.D. Mo. Nov. 25, 2003).
The hourly fee charged by an expert for deposition time has also been held reasonable for a measure of compensation for travel time. Mr. Martin claims the same rate for travel time as that claimed for deposition time. Therefore, the court will order plaintiff to pay Mr. Martin his deposition rate for the time spent traveling from his home in the United Kingdom to St. Louis for his deposition.
Id. (first citing *Magee,* 172 F.R.D. at 647; and then citing David Tunick, Inc. v. Kornfeld, 151 F.R.D. 534, 536 (S.D.N.Y. 1993)).

94 There is no uniformity about what travel expenses are reasonable for experts, even in arms-length transactions. *See* Todd Hatcher, *How to Manage an Expert Witness' Travel Fees,* EXPERT INST. (Feb. 21, 2017), https://www.theexpertmstitate.com/how-to-manage-an-expert-witness-travel-fees/.
While experts usually charge set hourly fees for relevant tasks such as court testimony, depositions and file reviews, the proper compensation for an expert's travel expenses can be a more uncertain, nebulous area. It doesn't help that there are no set standards which dictate how to handle experts' travel costs.
Id.

95 Frederick v. Columbia Univ., 212 F.R.D. 176, 178 (S.D.N.Y. 2003); *see also* 28 U.S.C. § 1821(c)(1) (2012) ("Such a witness shall utilize a common carrier at the most economical rate reasonably available.").

96 EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *3 (S.D.N.Y. Jan. 21, 1999).

97 *See* WRIGHT ET AL., *supra* note 15, § 2034 ("Perhaps no overarching rule is appropriate, but judicial sensitivity to the underlying considerations surely is.").

98 *See* Don Zupanec, *Reimbursing Expert's Travel Expenses,* 19 FED. LITIGATOR 16 (2004).
[D]istrict court said the plaintiff was free to select an expert of his choice, regardless of where the person was located. But the defendants would not be compelled to pay the additional costs resulting from the decision to retain someone from Georgia. This was especially true since the plaintiff made no showing, or even claimed, that no acceptable security experts were available in the New York area .... A party retaining a "distant" expert who doesn't show that no similarly qualified "local" expert is available should not be surprised if the court is reluctant to require the deposing party to pay the expert's entire travel expenses to and from a deposition.
Id. (citing Lent v. Fashion Mall Partners, L.P., 223 F.R.D. 317, 318 (S.D.N.Y. 2004)).

99 *See, e.g.,* Hillmann v. City of Chicago, No. 04 C 6671, 2017 WL 3521098, at *10 (N.D. Ill. Aug. 16, 2017).
Although Plaintiff did at one point raise the prospect of a telephonic deposition of White, in the same correspondence Plaintiff requested dates of availability for his deposition "here in Chicago." And Plaintiff ultimately confirmed that the deposition

would take place in Chicago. Given the parties' agreement that White's deposition would take place in Chicago, Plaintiff's retrospective objection that the deposition could have been telephonic is not a basis to deny costs.
Id. (citing BASF Corp. v. Old World Trading Co., No. 86 C 5602, 1992 WL 229473, at *3 (N.D. Ill. Sept. 11, 1992) ("A joint decision on where to hold a deposition does not constitute any logical basis for refusing to grant witness travel costs which are actually incurred.")); Handi-Craft Co. v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at * 16 (E.D. Mo. Nov. 25, 2003) ("The court first notes that it is plaintiff who is demanding that Mr. Martin's deposition continue in St. Louis, and not via telephone. Thus, it is clear that plaintiff should be responsible for Mr. Martin's travel costs to St. Louis.").

100 *See, e.g.,* Walker v. Spike's Tactical, LLC, No. 2:13-cv-01923-RFB-PAL, 2015 U.S. Dist. LEXIS 1125, at *4 (D. Nev. Jan. 2, 2015) (highlighting that expert billed deposing attorney $2,500 per hour for an in-person deposition as compared to the $600 per hour he had charged the plaintiff's counsel to review records and issue his report).

101 For example, in *Mathis v. NYNEX,* the court was "especially persuaded [that the expert's fee was reasonable] by the fact that [the expert] regularly charge[d] the same rate for his consultative services and [wa]s charging plaintiff that rate for his expert services in this case." 165 F.R.D. 23, 26 (E.D.N.Y. 1996). Even so, in cases in which courts are critical of the fact that an expert cannot arrive at an hourly rate for the work he or she did for the retaining party, courts nevertheless throw out that factor rather than taking its absence as a strike against the reasonableness of the fees requested. *See, e.g.,* Garnier v. Ill. Tool Works, Inc., No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at *3 (E.D.N.Y. Apr. 24, 2006).
With respect to the fee actually being charged to the retaining party, defendants' counsel, in response to this Court's order, has represented that Dr. Glass cannot in good faith estimate the time he expended examining plaintiff and preparing a report of that examination. The Court is troubled by this position, given that Dr. Glass has testified as an expert in over 500 cases, and claims to have examined "thousands of plaintiffs and defendants in civil law suits." Dr. Glass should be able to estimate the amount of time he expended in this case, but has not done so. In any event, this factor is not dispositive; instead, the Court must balance the defendants' need for competent experts with the need to protect the opposing party with being "unfairly burdened by excessive ransoms which produce windfalls for the defendants' expert."
Id. (alterations in original omitted) (quoting Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 645 (E.D.N.Y. 1997)).

102 *See Federal Rules of Civil Procedure Establish Uniformity,* FED. JUDICIAL CTR., https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity (last visited Aug. 10, 2018) ("The rules, which went into effect on September 16, 1938, after gaining congressional approval, ensured that the procedure followed in federal courts throughout the nation would be consistent and uniform.").

103 *See, e.g.,* Neutral Tandem, Inc. v. Peerless Network, Inc., No. 08 C 3402, 2011 WL 13199213, at *1 (N.D. Ill. Sept. 1, 2011) (demonstrating a case where one side sought $38,759.13 in fees under Rule 26(b)(4)(E) and the other side sought $72,426.74).

104 *Garnier,* 2006 WL 1085080, at *2 (first citing Carafino v. Forester, No. 03 Civ. 6258PKLDF, 2005 WL 1020892, at *1 (S.D.N.Y. Apr. 29, 2005); and then citing Ramirez v. Marriott Corp., No. 98 Civ. 7007, 2005 U.S. Dist. LEXIS 23390 (S.D.N.Y. Oct. 12, 2005)).

105 *See* Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, at *8 (E.D. Pa. Nov. 16, 2011) (expert charged "a flat fee of $2,500 for his deposition testimony"); *Garnier,* 2006 WL 1085080, at *1 (detailing a dispute regarding "a flat rate of $4,000 for a full day deposition, $2,500 for four hours, ... $1,500 for two hours[,]" or "a flat fee of $4,500 ... should it take place at" a more distant location, or "a rate of $450 per hour for the deposition, applying the same rate for time spent preparing for and traveling to the deposition"); EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *3 (S.D.N.Y. Jan. 21, 1999) (flat fee of $12,000 per day billed).

106 Nnodimele v. City of New York, No. 13-CV-3461 (ARR), 2015 WL 4461008, at *2 (E.D.N.Y. July 21, 2015); *see also* Kreyn v. Gateway Target, No. CV-05-3175 (ERK)(WP), 2008 WL 2946061, at *1 (E.D.N.Y. July 31, 2008) ("A flat fee for an expert's appearance ... is generally unreasonable."); *Garnier,* 2006 WL 1085080, at *2 (noting that "flat fees are generally disfavored" and denying the expert's request for a flat fee).

107 *Nnodimele,* 2015 WL 4461008, at *2 (citing Mannarino v. United States, 218 F.R.D. 372, 375 (E.D.N.Y. 2003)).

108 *Id.* (alterations in original omitted).

109 *Id.* ("That the bottom line of the [expert's] bill approximates the amount sought here is purely coincidental, and does not make [the expert's] flat fee any more reasonable." (citing *Mannarino,* 218 F.R.D. at 375)); *cf.* Marin v. United States, No. 06 Civ. 552(SHS), 2008 WL 5351935, at *1 (S.D.N.Y. Dec. 22, 2008) ("In general, it is not reasonable to request a flat fee for deposition testimony regardless of the number of hours actually spent.").

110 *Id.* at*3.

111 *See id.* ("In any event, plaintiff conveniently ignores that [the expert] charges this flat fee regardless of the length of the deposition, which necessarily would have an effect on whether he was available to do other work on the day of a deposition.").

112 *See* Auto. Rentals, Inc. v. Keith Huber, Inc., No. 1:10CV385-LG-RHW, 2012 WL 12854841, at *1 (S.D. Miss. Jan. 10, 2012) ("Rather, [the defendant] disputes the number of hours claimed for preparation and review of documents in anticipation of the deposition.").

113 *See, e.g.,* Rote v. Zel Custom Mfg. LLC, No. 2:13-cv-1189, 2018 WL 2093619, at *4 (S.D. Ohio May 7, 2018) ("The Court acknowledges that such preparation-to-deposition ratios ... have generally been found to be reasonable." (citing Script Sec. Sols., LLC v. Amazon.com, Inc., No. 2:15-CV-1030-WCB, 2016 WL 6649721, at *6 (E.D. Tex. Nov. 10, 2016) (reviewing a vast sampling of cases addressing ratios and concluding that "many courts have limited the recovery to preparation time that does not exceed the amount of deposition time, and most have declined to require payment ... when the ratio of preparation time to deposition time exceeds three to one"))); *Keith Huber, Inc.,* 2012 WL 12854841, at *1; Neutral Tandem, Inc. v. Peerless Network, Inc., No. 08 C 3402, 2011 WL 13199213, at *5 (N.D. Ill. Sept. 1, 2011) ("Therefore, the formula employed by in *Nilssen* to determine a reasonable number of hours for deposition-preparation time is appropriate, which is a ratio of three times the length of the deposition." (citing Nilssen v. Osram Sylvania, Inc., No. 01 C 3585, 2007 WL 25771, at *5 (N.D. Ill. Jan. 23, 2007))).

114 LK Nutrition, LLC v. Premier Research Labs, LP, No. 12 CV 7905, 2015 WL 4466632, at *3 (N.D. Ill. July 21, 2015) (citations omitted).

115 *See* Nester v. Textron, Inc., No. 1:13-CV-920 RP, 2016 WL 6537991, at *4 (W.D. Tex. Nov. 3, 2016).
While Defendant is correct that some courts have chosen not to reimburse any preparation time, the concerns of these courts--that the deposing party has no control over how much time an expert prepares, and that an expert's preparation may largely consist of trial preparation--can be addressed by limiting, rather than excluding, reimbursement for deposition for preparation time.
Id. (citing Rock River Commc'ns, Inc. v. Universal Music Grp., 276 F.R.D. 633, 636 (C.D. Cal. 2011)).

116 *LK Nutrition, LLC,* 2015 WL 4466632, at *3 ("Even courts that have viewed payment for deposition preparation as mandatory under Rule 26(b)(4)(E)(i) have excluded fees where the experts do too little to justify the amount of time spent preparing.").

117 *Id.* at *3 (alterations in original omitted) (citing Profile Prods., LLC v. Soil Mgmt. Techs., Inc., 155 F. Supp. 2d. 880, 887 (N.D. Ill. 2001)).

118 *See* EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *2 (S.D.N.Y. Jan. 21, 1999) ("The Court nevertheless is troubled by the preparation time billed by J & H expert Dr. Becker, who charged for 23 hours of deposition preparation time. No other J & H expert billed for more than 9 hours of preparation time.").

119 *See* Nnodimele v. City of New York, No. 13-CV-3461 (ARR), 2015 WL 4461008, at *5-6 (E.D.N.Y. July 21, 2015).

120 *Id.* at *5 (citing Mannarino v. United States, 218 F.R.D. 372, 376 (E.D.N.Y. 2003)).

121 Constellation Power Source, Inc. v. Select Energy, Inc., No. 3:04cv983 (MRK), 2007 WL 188135, at *8 (D. Conn. Jan. 23, 2007) (citing WRIGHT ET AL., *supra* note 15, § 2034).

122 *See* WRIGHT ET AL., *supra* note 15, § 2034 ("Compensation for time spent preparing for the deposition has proved a divisive issue.").

123 *See infra* Part V.B.2.

124 AP Links, LLC v. Russ, No. CV 09-5437 (JS) (AKT), 2015 WL 9050298, at *3 (E.D.N.Y. Dec. 15, 2015) (emphasis in original) (quoting Conte v. Newsday, Inc., No. CV 06-4859 (JFB) (ETB), 2011 U.S. Dist. LEXIS 88546, at *3 (E.D.N.Y. Aug. 10, 2011)).

125 For example, in the MDL Protocol, the court issued multiple directives regarding how fees must be billed and when fees must be paid. Among other items, the court ordered that expert's fees would be "due and owing within a period of thirty (30) days from the date of receipt by counsel responsible for payment" and provided a "fifteen (15) day grace-period for payment after the initial thirty (30) days expires." MDL PROTOCOL, *supra* note 69, ¶ 4. The protocol goes on to note that once a fee is "due and owing, interest shall accrue at a rate of 3.5% per month for the length of time the invoice remains unpaid" and that a party who has failed to pay expert fees due and owing may not "utilize the transcript of that deposition in any motion." *Id.* ¶ 6. The protocol does not address, however, when fees can be billed, and leaves open the question of whether an expert can demand advance payment.

126 For example, the expert in *Santella* apparently threatened that "he might refuse to attend his deposition should the matter of his fee not be resolved in his favor." Santella v. Grizzly Indus., Inc., No. A-11-CA-181 LY, 2012 WL 12882000, at *1 n.1 (W.D. Tex. Nov. 14, 2012). While not directly addressing that threat, the court stated that its "ruling is not intended to address the propriety of exclusion of [the expert's] testimony in that circumstance." *Id.*

127 After much back-and-forth with the equally stubborn North-Going Zax, the South-Going Zax threw down the gauntlet and the zero-sum game played out:
"And I'll prove to YOU," yelled the South-Going Zax, "That I can stand here in the prairie of Prax For fifty-nine years! For I live by a rule That I learned as a boy back in South-Going School. Never budge! That's my rule. Never budge in the least! Not an inch to the west! Not an inch to the east! I'll stay here, not budging! I can and I will If it makes you and me and the whole world stand still!"
DR. SEUSS, *The Zax, in* THE SNEETCHES AND OTHER STORIES 27, 27 (1961).

128 Lawyers have styled such motions in various ways. *See, e.g.,* Rote v. Zel Custom Mfg. LLC, No. 2:13-cv-1189, 2018 WL 2093619, at *1 (S.D. Ohio May 7, 2018) (motion to compel); *AP Links, LLC,* 2015 WL 9050298, at *1 (motion to preclude or, alternatively, to order expert to appear for deposition); Handi-Craft Co. v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at *13-14 (E.D. Mo. Nov. 25, 2003) ("Motion for Protective Order and Other Relief[] requesting that the court enter a protective order requiring, *inter alia,* that plaintiff adequately compensate two of defendant's expert witnesses.").

129 One party, when faced with an opposing expert who refused to appear for his deposition because of a dispute about advance payment of his fiat fee, brought a motion to exclude the expert from testifying at trial or, in the alternative, to appear for a deposition. *AP Links, LLC,* 2015 WL 9050298, at *1 (noting that "the parties' dispute arose when they were unable to agree whether Plaintiffs' counsel was required to pay the flat fee sought by [the expert] in advance of his deposition").

130 *E.g.,* Gamier v. Ill. Tool Works, Inc., No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at *1 (E.D.N.Y. Apr. 24, 2006) ("[The expert] shall receive a 50% down payment on his fee seven days in advance of his deposition, with the balance to be remitted within two business days following his deposition.").

131 *See, e.g.,* Dwyer v. Deutsche Lufthansa, AG, No. CV 04-3184(TCP)(AKT), 2007 WL 526606, at *4 (E.D.N.Y. Feb. 13, 2007). Some courts take a hybrid approach, such as requiring some prepayment of expert fees with the balance due post-deposition. Not surprising, some of these orders are rather intricate for a seemingly straightforward matter.
With respect to Dr. Glass's requirement that he be paid for his services in advance of his deposition, the Court orders that Dr. Glass be paid a 50% down payment on the estimated fee seven days in advance of his deposition, assuming that he will be deposed for seven hours, with the balance to be remitted within two business days following his deposition. The payment of the balance may be stayed in the event that plaintiff's counsel seeks modification of the hourly rate for the reasons set forth [previously]. The Court notes that plaintiff's counsel has represented that his "firm is guaranteeing payment" of Dr. Glass's fee. *Garnier,* 2006 WL 1085080, at *4.

132 *See, e.g.,* Santella v. Grizzly Indus., Inc., No. A-11-CA-181 LY, 2012 WL 12882000, at *2-3 (W.D. Tex. Nov. 14, 2012) (stating that "neither party nor the Court has discovered any legal authority requiring the reasonableness of an expert's hourly fee be determined prior to the taking of the deposition and that the fee be tendered prior to the deposition[,]" and ordering

appearance without prepayment); Burdette v. Steadfast Commons II, LLC, No. 2:11-980-RSM, 2012 WL 3762515 (W.D. Wash. Aug. 29, 2012) (ordering appearance without prepayment).

133 *See, e.g., AP Links, LLC,* 2015 WL 9050298, at *3 ("[A]n expert 'may not insist on advance payment, and may not set a flat fee before he knows what he will be called upon to do; he may instead charge only a reasonable hourly fee.'" (quoting Johnson v. Spirit Airlines, Inc., No. CV 07-1874 (FB)(JO), 2008 WL 1995117, at *1 (E.D.N.Y. May 6, 2008))). The issues are not whether the expert will be paid in advance if she so requires. It is who will pay the expert in advance: the party that retained her or the opposing party. *See AP Links,* 2015 WL 9050298, at *3 ("The Court will not direct advance payment." (quoting Almonte v. Averna Vision & Robotics Inc., No. 11-CV-1088S(Sr), 2014 WL 287586, at *3 (W.D.N.Y. Jan. 24, 2014)). "As the court explained in *Conte,* Defendants' counsel retained [the expert] and therefore it is 'his responsibility to pay [the expert].'" *Id.* at *1 (quoting Conte v. Newsday, Inc., No. CV 06-4859 (JFB) (ETB), 2011 WL 3511071, at *3 (E.D.N.Y. Aug. 10, 2011)). "While Rule 26 entitles Defendants' counsel to *reimbursement* for 'reasonable fees' in connection with [the expert's] deposition, Plaintiffs' counsel is under no obligation to pay [the expert] a flat fee in advance of his deposition." *Id.* (emphasis in original) (quoting *Conte,* 2011 WL 3511071, at *3) (citing *Johnson,* 2008 WL 1995117, at *1).

134 *See, e.g.,* Harris v. Costco Wholesale Corp., 226 F.R.D. 675 (S.D. Cal. 2005) (expert cancelled deposition because not paid in advance; court said that if no agreement to pay fees in advance, no obligation to do so; so result there was that the party who was put out by the expert's last-minute fit was entitled to attorney's fees and costs incurred in conjunction with the cancelled deposition).

135 FED. R. CIV. P. 26 advisory committee's note to 1970 amendment.
Under subdivision (b)(4)(C), the court is directed or authorized to issue protective orders, including an order that the expert be paid a reasonable fee for time spent in responding to discovery, and that the party whose expert is made subject to discovery be paid a fair portion of the fees and expenses that the party incurred in obtaining information from the expert. The court may issue the latter order as a condition of discovery, or it may delay the order until after discovery is completed. These provisions for fees and expenses meet the objection that it is unfair to permit one side to obtain without cost the benefit of an expert's work for which the other side has paid, often a substantial sum.
Id. (first citing Walsh v. Reynolds Metal Co., 15 F.R.D. 376 (D.N.J. 1954); and then citing Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940)); *see also* WRIGHT ET AL., *supra* note 15, § 2034. On the other hand, a party may not obtain discovery simply by offering to pay fees and expenses. *Cf.* Boynton v. R. J. Reynolds Tobacco Co., 36 F. Supp. 593 (D. Mass. 1941). Notwithstanding the Advisory Committee note, some courts have refused to award expert fees in advance on grounds that the rule down not allow it. *See, e.g., Conte,* 2011 WL 3511071, at *3 (stating that the rule does not entitle the plaintiff "to payment in advance" for his expert deposition (first citing FED. R. Civ. P. 26(b)(4)(E); and then citing *Johnson,* 2008 WL 1995117, at *1)).

136 The fact that courts have such discretion does not, of course, necessarily mean that they will use that discretion to order advance payment. *See AP Links, LLC,* 2015 WL 9050298, at *2.
Defendants' counsel asserts that "the Court has discretion to order advance compensation of an expert" and cites two cases to support this proposition. However, the Court finds that the circumstances set forth in these two cases are distinct from the instant matter. Defendants' counsel has not otherwise shown that, under the facts here, the Court should exercise its discretion to require Plaintiffs to pay [the expert] in advance of his deposition.
Id. (alterations in original omitted) (first citing *Garnier,* 2006 WL 1085080, at *2-4 (plaintiff disputed the amount of the fee charged by the defendants' expert, holding that the expert was entitled to, *inter alia,* a $350 hourly rate and ordering that the expert "be paid a 50% down payment on the estimated fee seven days in advance of his deposition"); and then citing *In re* "Agent Orange" Prod. Liab. Litig., 105 F.R.D. 577, 582 (E.D.N.Y. 1985) (ordering that the plaintiffs' depositions of four of the defendants' experts in "complex 'Agent Orange' multidistrict litigation" was "conditioned on plaintiffs' payment of reasonable experts' fees and expenses incurred in discovery")).

137 For a painstaking example of these dynamics, see Mann v. Taser Int'l, Inc., No. 4:05-CV-0273-HLM, 2007 WL 9712069, at *2-3 (N.D. Ga. July 24, 2007). In that case, the court described dozens of back-and-forth communications among counsel, including letters and emails to and from the expert:
The total amount I will therefore need in advice [sic] to forward to her is $2,890.00 total or $963.33 per defendant. The above is based upon the assumption the 8 hours of deposition time can be completed within one day if we begin at 9:00 a.m.? ...

> "I need to once again try to clarify Charly Miller's fees. IN ADDITION TO THE COST OF AIRFARE [sic], HOTEL, TAXI, FOOD AND HER DEPOSITION TIME, [s]he charges $50.00 per hour portal to portal which means she will be traveling away from home about 48 hours. It takes about 12 hours to get here. She lives about 3 hours from the airport. Even if we met in Atlanta for the deposition, she would still need 2 nights because YOU ALMOST CANNOT GET HERE FROM THERE. ALL SAID, I NEED CONFIRMATION THAT THIS IS ACCEPTABLE AND SHE WILL BE PAID OR WE NEED TO FLY TO NEBRASKA.

Id. (third and fourth alternations in original). The final dollar amount awarded to plaintiff's expert was $4011.55, approximately $660.00 more than the deposing counsel offered and $890.00 less than the retaining party demanded. *Id.* at *8.

138 Sometimes parties request such fees under Rule 26. Other times, parties request reimbursement for the experts' fees under Rule 54, which allows the prevailing party in a case to recover certain costs. FED. R. Civ. P. 54. Notably, Rule 54's utility is constrained in two ways: first, it only applies to the prevailing party and second, it only applies to cases in which there is a final judgment entered. *Id.*

139 *See, e.g.,* Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, at *4 (E.D. Pa. Nov. 16, 2011) ("The fact that Defendants requested payment of expert fees for the first time after judgment was entered ... does not preclude us from granting the motion." (citing Ellis v. United Airlines, Inc., 73 F.3d 999, 1011 (10th Cir. 1996))). "In *Ellis,* the court emphasized that 'Rule 26(b)(4)(C) itself does not specify whether or when a party must demand payment of fees to its expert.'" *Id.* (first citing *Ellis,* 73 F.3d at 1011; then citing Rogers v. Penland, 232 F.R.D. 581, 582 (E.D. Tex. 2005); and then citing Fisher-Price, Inc. v. Safety 1st, Inc., 217 F.R.D. 329, 330 (D. Del. 2003)).

140 *See, e.g.,* Neutral Tandem, Inc. v. Peerless Network, Inc., No. 08 C 3402, 2011 WL 13199213, at *5 (N.D. Ill. Sept. 1, 2011) (quoting Chambers v. Ingram, 858 F.2d 351, 360-61 (7th Cir. 1988)).

> In *Chambers v. Ingram,* the plaintiff prevailed in a jury verdict against the defendant .... The plaintiff argued that his costs, however, were recoverable under Rule 26(b)(4)(C). The defendant objected because the plaintiff did not request the expert fees and costs at the time of the deposition. The Seventh Circuit noted that the Advisory Committee notes to Rule 26(b) stated that the court may issue an order to pay fees as a condition of discovery "or may delay the order until after discovery." Thus, the court held, "we do not believe that the timing of the plaintiff's request for this discovery is a bar to recovery under the rule." *Id.* (citing 858 F.2d at 360-61).

141 *Ndubizu,* 2011 WL 6046816, at *4.

142 *See* Matthews v. United States, 756 F. Supp. 511, 515 (D. Kan. 1991) ("The court is without legal authority under Rule 26(b)(4)(C) to order payment of fees and expenses incurred in taking the deposition of plaintiff's expert witness. Presumably, the deposition was taken upon the parties' agreement subject to whatever conditions and terms that were reached.").

143 Leggett & Platt, Inc. v. Vutek, Inc., No. 4:05CV788 CDP, 2007 WL 607736, at *1 (E.D. Mo. Feb. 22, 2007).

144 *Id.* In that case, the court's hostility was likely based in part on the fact that the retaining party was seeking "expert witness fees of almost a million dollars." *Id.* The party seeking the fees also was the prevailing party, so although the court cites Rule 26(b)(4)(C), it also references the fact that "that provision has nothing to do with a prevailing party's right to recover costs[,]" suggesting perhaps that the request was made in the context of a bill of costs. *Id.* Still, other courts have treated a request for expert discovery fees submitted as part of a bill of costs as nonetheless compensable under Rule 26(b)(4)(C). *See, e.g.,* Halasa v. ITT Educ. Servs., Inc., 690 F.3d 844, 850 (7th Cir. 2012) (collecting cases in which the "district courts have taken different approaches to the way in which § 1821 applies to motions for costs under Rule 26(b)(4)(E) when those particular items are also addressed in § 1821" (citations omitted)).

145 This issue comes up with some regularity, so much so that a federal practice form for expert fee motions includes this argument. *See, e.g.,* 3A JAY E. GRENIG, WEST'S FEDERAL FORMS § 21:37 (5th ed.), Westlaw (database updated 2018).

> It has been argued, in informal discussion of this matter (i.e. at the pretrial conference), that Plaintiffs had a choice as to whether to depose the defense experts, and, having made that choice, should pay the cost of doing so. This is, it is respectfully submitted, a specious argument. In the absence of making discovery, Plaintiffs would have been fatally disadvantaged at trial. The defense expert reports, for the most part, contained nothing more than net opinions. Few set forth the materials reviewed

or the facts on which the experts intended to rely. None set forth compensation or a listing of other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.
Id.

146 The requirement that expert disclosures come before the deposition appears in a different rule--the rule that permits parties to depose the opposing expert. *See* FED. R. CIV. P. 26(b)(4)(A). This rule provides that "[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial. *If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided." Id.* (emphasis added). "[T]he disclosure of prior recorded testimony is designed to give the other party access to useful information to meet the proposed experts' opinions. The proliferation of marginal or unscrupulous experts will only be stopped when the other party has detailed information about prior testimony." Elgas v. Colo. Belle Corp., 179 F.R.D. 296, 300 (D. Nev. 1998).

147 *Elgas,* 179 F.R.D. 296 at 300.

148 *See generally* Motion in Limine by Defendant, Stanczyk v. Prudential Insur. Co. of Am., No. 1:15-cv-0097 (N.D. Iowa Apr. 28, 2017), 2017 WL 1632874. The author litigated a case in which the opposing expert testified that he had participated in hundreds of cases, yet failed to disclose a list of his prior testimony as required by the rule. Instead, he brazenly stated in his expert disclosure: "Let me note that I have never maintained a list of cases of medical record reviews, Independent Medical Examination, depositions, or trial appearances. Thus, I am unable to produce any list of my prior work where I have been asked to serve as an expert." That same expert, nonetheless, characterized the nature of his prior testimony as "pro-defendant" in an effort to bolster the credibility of his opinions on behalf of the Plaintiff in that case: "In general probably 90 percent of my work is defense work."; "And, you know, I think it's important to note that I call things the way they are. I'm pretty well-known for doing that. And the majority of my work is defense work." There is no realistic way for a party to test the accuracy and veracity of an expert's characterization of his prior testimony, and its consistency with testimony in the case at hand, without having access to his prior testimony. *See generally id.*

149 Ndubizu v. Drexel Univ., No. 07-3068, 2011 WL 6046816, at *5 (E.D. Pa. Nov. 16, 2011).

150 *Id.*

151 *See id.*

152 *Id.* In another case, *Garnier v. Illinois Tool Works, Inc.*, the expert demanded advance payment of $4000 seven days before the scheduled deposition, yet had not provided adequate expert disclosure. No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at *1, *4 (E.D.N.Y. Apr. 24, 2006). The deposing party thus requested that the court order that the fees for the soon-to-occur deposition not be shifted due to the disclosure failure. *Id.* at *4. The court simply ordered the plaintiff to do what the rule already had required, stating: "[T]hey shall furnish to plaintiff complete expert disclosures, including court information, docket numbers, party and counsel names, and dates, for [the expert] in accordance with Rule 26 within three business days of the entry of this order." *Id.* (citing Coleman v. Dydula, 190 F.R.D. 316, 318 (W.D.N.Y. 1999) (Rule 26(a)(a)(B) requires disclosure of "the list of cases in which the witness has testified[, which] should at a minimum include the name of the court or administrative agency where the testimony occurred, the names of the parties, the case number, and whether the testimony was given at a deposition or trial")). While an order to comply was no doubt necessary, without any consequences other than the already-existing obligation to comply with the rule, it is unlikely the order would have much effect on that expert or the retaining party the next time around. Indeed Rule 37(a)(3)(A), which governs discovery sanctions, *already* requires compliance without a motion to compel. *See* FED. R. Civ. P. 37(a)(3)(A); *see also* WRIGHT ET AL., *supra* note 15, § 2289.1 ("The sanction is automatic in the sense that there is no need for the opposing party to make a motion to compel disclosure, as authorized by Rule 37(a)(3)(A) in order to compel a further disclosure, as a predicate for imposition of the sanction of exclusion.").

153 Indeed, the costs involved in disputing fees discourages some litigants from challenging patently unreasonable fee awards. As one commentator has explained: "[T]he cost of challenging excessive fees can, in some instances, be greater than simply paying the fee in the first place. So again, the fees get paid." Canepa, *supra* note 2.

154 This Rule requires "a statement of the compensation to be paid for the study and testimony in the case." FED. R. Civ. P. 26(a)(2)(B)(vi).

155 Handi-Craft Co. v. Action Trading, S.A., No. 4:02 CV 1731 LMB, 2003 WL 26098543, at *18 (E.D. Mo. Nov. 25, 2003).

156 *Id.*

157 *Id.* (citing Chambers v. Ingram, 858 F.2d 351, 360-61 (7th Cir. 1988)).

158 AP Links, LLC v. Russ, No. CV 09-5437 (JS) (AKT), 2015 WL 9050298, at *2 (E.D.N.Y. Dec. 15, 2015) ("If the parties are unable to agree upon the reasonableness of [the expert]'s fee, they may make an application to the Court after the deposition has been completed." (first citing Conte v. Newsday, Inc., No. CV 06-4859 (JFB) (ETB), 2011 WL 3511071, at *1 (E.D.N.Y. Aug. 10, 2011); and then citing Biernacki v. United States, No. 11-CV-973(Sr), 2012 WL 6100291, at *5 (W.D.N.Y. Dec. 7, 2012))).

159 *See supra* Part II.A, B.

160 In the author's experience, it is not uncommon for the retaining attorney to pass along the expert's invoice, which may be sorely lacking in detail or description despite requesting a large sum, as if the retaining lawyer is nothing more than the courier. The rule encourages this mentality to the extent it does not suggest rigorous scrutiny at any juncture of whether the requested fee should be shifted, but instead seems to imply a rubber stamp in all but the most extreme situations. *See* FED. R. Civ. P. 26(b)(4)(E).

161 *See* Fiber Optic Designs, Inc. v. New Eng. Pottery, LLC, 262 F.R.D. 586, 589 (D. Colo. 2009).

162 *See* Nester v. Textron, Inc., No. 1:13-CV-920 RP, 2016 WL 6537991, at *5 (W.D. Tex. Nov. 3, 2016) ("Plaintiffs bear the burden of establishing that each expert's fee is reasonable under Rule 26(b)(4)(E)(i). If an expert's fee is unreasonable, the Court may, at its discretion, fashion a reasonable alternative." (citing *Fiber Optic Designs, Inc.*, 262 F.R.D. at 589; then citing Jensen v. Lawler, 338 F. Supp. 2d 739, 747 (S.D. Tex. 2004); and then citing Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 276 (E.D. La. 2010))); Ball v. LeBlanc, No 13-00368-BAJ-SCR, 2015 WL 5793929, at *1 (M.D. La. Sept. 30, 2015).

163 *See, e.g.*, EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *4 (S.D.N.Y. Jan. 21, 1999) ("And because neither the EEOC nor J & H has provided the Court with any useful information about other factors, the Court ... will focus on the rate the expert usually charges and the rate the expert charges the retaining party (here, J & H), tempered by the Court's sense of what is unreasonable." (citing McClain v. Owens-Corning Fiberglas Corp., No. 89 C 6226, 1996 WL 650524, at *4 (N.D. Ill. Nov. 7, 1996) ("The court may use its discretion, however, where the parties offer scant evidence in support of their positions" as to reasonable expert fees.))).

164 *See, e.g.*, Reit v. Post Props., Inc., No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at *10 (S.D.N.Y. Nov. 4, 2010) (acknowledging that the retaining party "failed to submit competent evidence ... to support Dr. Head's request for compensation" and thus "did not meet [its] burden of showing that Dr. Head's requested fees are reasonable[,]" yet concluding in the apparent absence of evidence that "$400 is a reasonable hourly fee for Dr. Head's preparation time as well as his deposition time").

165 *See, e.g.*, Gamier v. Ill. Tool Works, Inc., No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at *3 (E.D.N.Y. Apr. 24, 2006). With respect to the fee actually being charged to the retaining party, defendants' counsel, in response to this Court's order, has represented that Dr. Glass cannot in good faith estimate the time he expended examining plaintiff and preparing a report of that examination. The Court is troubled by this position, given that Dr. Glass has testified as an expert in over 500 cases, and claims to have examined "thousands of plaintiffs and defendants in civil law suits." Dr. Glass should be able to estimate the amount of time he expended in this case, but has not done so. In any event, this factor is not dispositive; instead, the Court must balance the defendants' need for competent experts with the need to protect the opposing party with being "unfairly burdened by excessive ransoms which produce windfalls for the defendants' expert."
Id. (alterations in original omitted) (quoting Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 645 (E.D.N.Y. 1997)).

166 *See* FED. R. CIV. P. 26(b)(4)(E).

167 The MDL Protocol resolves much of this ambiguity regarding how disputes are handled by establishing protocols that favors the presumptive fee request. MDL PROTOCOL, *supra* note 69. Most notably, the protocol establishes methods of resolution for disputes regarding fees, such as providing that a party must "disput[e] the reasonableness of an expert's deposition fee ...

within thirty (30) days upon receipt of the expert's invoice" or be deemed to have waived any objection to the fees. *Id.* ¶ 9. The protocol further specifies that if a party has to file a motion to compel for payment of expert fees, "to the extent the motion proves successful, at the discretion of the court the moving party may be entitled to assess from the delinquent party the costs of collecting including reasonable attorney fees." *Id.* ¶ 10. The protocol does not contain a similar paragraph for shifting attorneys' fees to the deposing party if the motion proves unsuccessful.

168 Auto. Rentals, Inc. v. Keith Huber, Inc., No. 1:10CV385-LG-RHW, 2012 WL 12854841, at *1 (S.D. Miss. Jan. 10, 2012) ("[T]he Court 'has discretion to limit or alter those costs if they appear to be unreasonable.'" (quoting Knight v. Kirby Inland Marine Inc., 482 F.3d 347, 356 (5th Cir. 2007)).

169 For example, one court recognized the risk of abuse in expert fee shifting:

> To be sure, we live in an age where a grown man may be paid a seven figure annual salary to dribble a small round ball. But, the forces of the marketplace are at work in such a situation: not only supply and demand, but the variegated effects of the superstar's presence on attendance, television revenues, and the all-hallowed won/lost record. And, most important, the employer and the employee square off and bargain at arm's length in order to determine an equitable stipend, each with something to lose and something to gain. In the Rule 26(b)(4)(C) context, however, such factors are noticeably absent; the plaintiffs have handpicked the expert, and the defense has neither options nor bargaining power if it desires to obtain the pretrial discovery which the rule permits. Unless the courts patrol the battlefield to insure fairness, the circumstances invite extortionate fee-setting.
>
> In the final analysis, the mandate of Rule 26(b)(4)(C) is not that an adverse expert will be paid his heart's desire, but that he will be paid a "reasonable fee." The ultimate goal must be to calibrate the balance so that a plaintiff will not be unduly hampered in his/her efforts to attract competent experts, while at the same time, an inquiring defendant will not be unfairly burdened by excessive ransoms which produce windfalls for the plaintiff's experts. Decisionmaking in this entropic field must be fair to the parties, equitable vis-a-vis the witness, and comprehensible to the community at large.

Mann v. Taser Int'l, Inc., No. 4:05-CV-0273-HLM, 2007 WL 9712069, at *6-7 (N.D. Ga. July 24, 2007) (quoting Anthony v. Abbott Labs., 106 F.R.D. 461, 464-65 (D.R.I. 1985)).

170 AP Links, LLC v. Russ, No. CV 09-5437 (JS) (AKT), 2015 WL 9050298, at *3 (E.D.N.Y. Dec. 15, 2015) (quoting Johnson v. Spirit Airlines, Inc., No. CV 07-1874 (FB)(JO), 2008 WL 1995117, at *1 (E.D.N.Y. May 6, 2008)).

171 *Id.; see also* Rote v. Zel Custom Mfg. LLC, No. 2:13-cv-1189, 2018 WL 2093619, at *6 (S.D. Ohio May 7, 2018) (citing FED. R. Civ. P. 37(a)(5)(A)(iii) and denying moving party's "request for attorney's fees incurred in bringing this Motion ... as unjust under the circumstances"). As ironic as it may be, the one case in which a court entertained the possibility of awarding attorneys' fees, the attorney had not requested them: "Defendant ... did not request an award of attorneys' fees and expenses in its Motion. If Defendant ... had made such a request, the Court would have given serious consideration to granting it." *Mann,* 2007 WL 9712069, at 8 n.4.

172 FED. R. CIV. P. 26(a)(2)(B) ("Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report-- prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony."). It is beyond the scope of this Article to address which experts fall into which categories-- suffice to say that is a less-than-clear delineation, e.g., should a treating physician be treated as an expert that must provide a report. *See* Shea, Kreps & Solade, *supra* note 1, at 1.

173 *See supra* Part III.B.2.

174 FED. R. CIV. P. 26(b)(4)(E).

175 *See* GRENIG, *supra* note 145, § 21:37 (discussing areas in which the "manifest injustice" standard arises, including "retroactive application of statutory provisions" and "departure on manifest injustice ground" under Federal Sentencing Guidelines, and Federal Rule of Civil Procedure 16 governing pretrial orders). Notably, in Federal Rule of Civil Procedure 16(e), which permits the court to modify the final pretrial order "only to prevent manifest injustice," unlike Rule 26, the rest of the rule contains detailed substantive and procedural provisions that explain and justify the "manifest injustice" language. FED. R. CIV. P. 16(e).

176 *See* FED. R. CIV. P. 26(2)(b)(4)(E).

177 *See* WRIGHT ET AL., *supra* note 15, § 2034 n.28 ("Even in cases where the court is directed to issue a protective order, it may decline to do so if it finds that manifest injustice would result. Thus, the court can protect, when necessary and appropriate, the interests of an indigent party." (citing FED. R. CIV. P. 26 advisory committee's note to 1970 amendment)).

178 EEOC v. Johnson & Higgins, Inc., No. 93 Civ. 5481 LBS AJP, 1999 WL 32909, at *4 (S.D.N.Y. Jan. 21, 1999) (citing Pudela v. Swanson, No. 91 C 3559, 1993 WL 532546, at *3 (N.D. Ill. Dec. 20, 1993) ("Plaintiffs may have less financial resources than defendants, but they are not 'indigent' ... [and] this court perceives no injustice in requiring them to pay the fees charged by their opponents' experts for time spent in testimony at deposition.") ("That, however, is not the case here. There is no disparity between J & H's and the EEOC's ability to afford experts.")).

179 *See, e.g.,* Reit v. Post Props., Inc., No. 09 Civ. 5455(RMB)(KNF), 2010 WL 4537044, at *10 (S.D.N.Y. Nov. 4, 2010) ("Absent any evidence that manifest injustice would result from failing to pay Dr. Head for the time he 'reserved' for the March 12, 2010 deposition, the Court finds that charge to be unreasonable.").

180 In *Rogers v. Penland,* the district court did reference the "manifest injustice" standard in denying fee-shifting to an expert who was subsequently excluded from the case on *Daubert* grounds: "To require a party to pay for the costs of a witness who was not even called, and against whom the court had sustained a *Daubert* challenge is manifestly unjust." 232 F.R.D. 581, 583 (E.D. Tex. 2005).

181 *See* Mann v. Taser Int'l, Inc., No. 4:05-CV-0273-HLM, 2007 WL 9712069, at *6 (N.D. Ga. July 24, 2007) ("The mandatory language of the rule is tempered by two limitations: 1) the costs may not be imposed if doing so would result in manifest injustice, and 2) the expert's fees must be reasonable." (quoting Gwin v. Am. River Transp. Co., 482 F.3d 969, 975 (7th Cir. 2007))).

182 While these reasons are beyond the scope of this Article, for an interesting discussion of them, see David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule",* 15 IND. INT'L & COMP. L. REV. 583, 607-09 (2005).

183 While the rule has been in effect for longer, the 1993 amendment that freely permitted expert depositions triggered the slew of problems discussed in this Article. *See supra* note 30.

184 *See supra* Part III.A. 1.

185 *See supra* Part III.B.2.

186 *See* Eastman v. Allstate Ins. Co., No. 14-cv-00703-WQH (WVG), 2016 WL 795881, at *5 (S.D. Cal. Feb. 29, 2016).

187 *See id.* (explaining the need not only for deposition but deposition of more than one day: "However, with regard to expert witnesses, 'there may more often be a need for additional time--even after the submission of the report required by Rule 26(a)(2)--for full exploration of the theories upon which the witness relies.'" (citing FED. R. CIV. P. 30(d) advisory committee's note to 2000 Amendment)).

188 *See supra* Part III.A.2.

189 For example, despite the fact that flat fees are disfavored and struck down when brought to a court's attention, the practice remains prevalent. *See Expert Witness Fees: How Much Does an Expert Witness Cost?,* SEAK, https://blog.seakexperts.com/expert-witness-fees-how-much-does-an-expert-witness-cost/ (last visited Aug. 9, 2018) ("33% of all expert witnesses charge a minimum number of hours for deposition testimony.").

190 Canepa, *supra* note 2.

191 *See, e.g.,* Ball v. LeBlanc, No. 13-00368-BAJ-SCR, 2015 WL 5793929, at *2 (M.D. La. Sept. 30, 2015) ("With respect to Balsamo's deposition testimony, Defendants assert that Plaintiffs should only be reimbursed at a rate of $125 per hour because that is the rate that Balsamo charged Plaintiffs for his services." (citing Borel v. Chevron U.S.A. Inc., 265 F.R.D. 275, 277 (E.D. La. 2010))).

192 *See* Gamier v. Ill. Tool Works, Inc., No. 04CV1825(NGG)(KAM), 2006 WL 1085080, at *2 (E.D.N.Y. Apr. 24, 2006) ("[A] Court should 'balance' a party's need for competent experts with the need to protect the opposing party from being 'unfairly burdened by excessive ransoms which produce windfalls for the [party's] experts.'" (quoting Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 645 (E.D.N.Y. 1997))).

193 For example, doctors who perform independent medical exams ("IME") and medical record reviews often charge a flat fee for their work rather than an hourly rate. *See* Alex Babitsky, *How Much Does an IME (Independent Medical Examination) Cost?,* IME: RESOURCES & TRAINING, https://mdependentmedicalexamtrammg.com/how-much-does-an-ime-independent-medical-examination-cost/ (last visited Aug. 9, 2018) ("A slight majority of independent medical examiners charge a flat fee for their IMEs."). While these doctors would have to change this practice in order to have their deposition fees shifted, that is not a bad thing overall. A doctor that performs an IME, for example, may charge a $1000 flat fee and issue a report that necessitates that the retaining party conduct a five-hour deposition. If the expert charges a rate of $500 per hour for a deposition, that means that the deposing party is paying 2.5 times as much as the retaining party. That is not only an imbalance that makes one question whether each party is paying their true portion of the doctor's work, but it also significantly lessens the concern that the deposing party is "getting for free" what the other party had to pay for.

194 *See supra* Part III.B.

195 While the amount of requested fees is presumptively considered reasonable, a party may file a resistance to a fee request. When that happens, payment is not due until the court decides the dispute and issues an order. *See supra* Part V.A.

196 *See, e.g.,* 28 U.S.C. § 1961 (2012).

197 *See supra* Part III.B.3.

198 *See supra* Part III.B.3.

199 *See* FED. R. CIV. P. 37(a)(3)(A).

200 In *Rote v. Zel Custom Manufacturing LLC,* the retaining party argued that "that the law is 'clear in this district that an expert's deposition preparation time and travel time are reimbursable[,]'" while citing an authority in that federal district court. No. 2:13-cv-1189, 2018 WL 2093619, at *1 (S.D. Ohio May 7, 2018). Thus, the retaining party sought "attorney's fees for the costs incurred in bringing [a] Motion" to get its expert's preparation time and travel time paid. *Id.* Although it appears that the law in that particular district was well-settled, the court nonetheless refused to award the retaining party the attorney's fee it incurred in bringing the motion, denying the motion "as unjust under the circumstances." *Id.* at *6 (citing FED. R. CIV. P. 37(a)(5)(A)(iii)).

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