SUMMARY OF COMMENTS BY THE COURTS, LAWYERS AND ADMINISTRATION OF JUSTICE SECTION ON PROPOSED AMENDMENTS TO D.C. SUPERIOR COURT CIVIL RULE 68

The Section on Courts, Lawyers and Administration of Justice and its Court Rules Committee submits these comments on proposed amendments to Superior Court Civil Rule 68 by the Advisory Committee on Superior Court Rules of Civil Procedure, which were published in the *Daily Washington Law Reporter* on December 12, 1996.

Although the Section applauds the goal of making Rule 68 more useful in resolving cases, the Section believes that several aspects of the proposed amendments have significant disadvantages and that the amendments should be reconsidered. First of all, the Section endorses in principle the concept of making Rule 68 reciprocal, by making it available to defendants as well as plaintiffs. However, the overall effect of the changes is far from clear and may encourage gamesmanship through overuse of the Rule. Second, the Section is concerned that the expanded definition of "costs and expenses" contained in the proposed new rule is unclear, and may be invalid without statutory authorization. For instance, it is unclear whether or not the Advisory Committee proposes to include attorneys fees within the scope of recoverable "costs and expenses" because under the Rule the list of "costs and expenses" is not exclusive. Also, the Section believes that the proposal to impose new "costs and expenses" on governmental entities may be illegal in the absence of a statutory change.

Further, the Section objects to portions of the proposal which would favor the District of Columbia over private litigants in terms of timing governing offers of judgment and offers of settlement. The current version of Rule 68 does not contain this preferential treatment and the Section believes that such treatment is unwarranted.

In conclusion, the Section recommends that the proposal be reconsidered and revised in light of these comments and those made by other members of the Bar. If the proposal emerges again, the Section urges that an extended comment period be allowed for amendments which raise similar issues.

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE OF THE DISTRICT OF COLUMBIA BAR ON PROPOSED AMENDMENTS TO SCR-CIVIL RULE 68

The Advisory Committee on Superior Court Rules of Civil Procedure recently issued proposed amendments to Superior Court Rule of Civil Procedure 68 and invited comments from the Bar and the general public. The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules, submit these comments concerning proposed amendments to SCR-Civil Rule 68.

The District of Columbia Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers and the Administration of Justice. The Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules.

Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

The Section supports the goal of enhancing the likelihood that Rule 68 will be used to facilitate resolution of litigation. The Section therefore endorses in principle the idea of applying current Rule 68 to plaintiffs as well as defendants to create reciprocal incentives to value cases at an early stage. Similarly, the Section in principle approves of the proposal to include under the Rule offers of settlement as well as offers of judgment to encourage use of the Rule when a party does not wish to admit liability.

However, although some elements of the proposed amendments appear to promote that goal, the overall effect of the proposed amendments is far from clear and might encourage gamesmanship and use of the rule in a counter-productive way. For example, the expansive definition of the terms "costs and expenses" (sub-paragraph f), particularly when qualified by the phrase "but are not limited to", raises the stakes of any Rule 68 offer far beyond existing limitations on allowable costs and, aside from being of questionable legality, could prompt unintended results. The Section, therefore, for the reasons discussed below, believes that the proposal should be reconsidered and needs extensive revision before it can be implemented.

In Dillard v. Palmer, 334 A.2d 578, 580 (D.C. 1975), the court observed that "[t]here is no general statute authorizing the award of costs in this court" and concluded that "our authority for permitting costs to be included in the judgment or decree of this court stems from [28 U.S.C.] § 1920 as necessarily incorporated in D.C. Code 1973, § 11-743." Subsequently, in Robinson v. Howard University, 455 A.2d 1363, 1369-70 (D.C. 1983) the court stated:

> The authority of a court to assess a particular item as costs is partly a matter of statute (or court rule),* and partly a matter of custom, practice and usage. Newton v. Consolidated Gas Co., 265 U.S. 78, 68 L.Ed. 909, 44 S.Ct. 481 (1924); Adlung v. Gotthardt, 103 U.S.App.D.C. 195, 257 F.2d 199 (1958). However, even as to special items of costs not representing customarily taxable court costs, the decision whether to allow or disallow the award is committed to the trial court's discretion. * * *

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* For example, 28 U.S.C. § 1920 (1966 and Supp. 1982) permits the federal courts to tax court fees, witness fees, copying and printing expenses, and other such items as costs. The District of Columbia Code contains no such explicit provision defining "costs," and Super. Ct. Civ. R. 54-I does not appear to be intended to be a complete listing of the costs which are properly taxable in the District courts. Thus, we are mindful of the Supreme Court's adjuration that "the discretion . . . to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." Farmer v. Arabian American Oil Co., 379 U.S. 227, 235, 13 L.Ed. 2d 248, 85 S.Ct. 411 (1964).

At least one Superior Court Judge has followed the reasoning of Dillard and concluded that the Superior Court's power to impose costs appears to be based upon 28 U.S.C. § 1920, as necessarily incorporated in D.C. Code § 11-946 (1995 Rpl. Vol.). Judge Salzman followed this rationale in deciding a contested costs motion in Cole v. District of Columbia, Civil Action No. 90-10921, Salzman J., Order Awarding Costs, dated June 22, 1992 (copy attached for reference).

These decisions purport to follow Supreme Court and other decisions interpreting statutory provisions and the virtually identical provisions of the Federal Rules of Civil Procedure addressing recoverable costs. While the court in Robinson concluded that courts have some discretion in determining what costs are compensable, confined

somewhat by the Court's "adjuration" that discretion is to be "sparingly exercised with respect to costs not specifically allowed by statute", in West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 86-87 (1991) the Court made clear that very little, if any, such discretion exists.[1] There the Court stated:

> In Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987), we held that these provisions [the authority to tax specific costs in 28 U.S.C. §1920 and the witness fee provision of 28 U.S.C. §1821(b)] define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further. * * * "We will not lightly infer that Congress has repealed §§ 1920 and 1821, either through [Fed. Rule Civ. Proc.] 54(d) or any other provision not referring explicitly to witness fees." Id. at 455, 107 S.Ct. At 2499.

The proposed amendments to Rule 68 would substantially expand, both in type and amount, the costs that could be imposed upon a party. Absent some specific statutory authority for the imposition of "costs and expenses" not addressed in 28 U.S.C. §1920; such as "Investigator's" and "Expert witness fees" and "computerized legal research", the proposed amendments are of questionable validity.

The attempted imposition of such costs upon governmental entities would raise additional issues, in light of the restriction in SCR-Civil Rule 54(d)(1) that costs may not be imposed upon the United States or the District of Columbia beyond those "permitted by law." The imposition of substantial expenses, beyond statutorily recoverable costs, could be construed as an impermissible intrusion on the discretionary decisions of executive branch government officials, to whom the sole discretion to settle claims and lawsuits has been statutorily placed.[2]

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[1] In Casey, the Court held that expert witness fees could not be shifted to a losing party pursuant to 42 U.S.C. §1988, as part of a reasonable attorney's fee. Subsequent statutory amendments provide authority to shift expert witness expenses in certain types of cases, e.g. employment discrimination actions brought under Title VII.

[2] See, D.C. Code §1-1202 (1992 Rpl. Vol.) (Mayor given discretion to settle claims and lawsuits against the District of Columbia).

The Section also believes that the proposed Rule provides an unjustifiable preference for the District of Columbia government over private litigants. Under the proposal, the District of Columbia will enjoy up to 30 days in which to accept or reject an offer of judgment or settlement, while private parties are only granted 10 days to make the same decision. Although the Section recognizes that the government is allowed more time to respond to complaints than private parties (60 versus 20 days pursuant to SCR Rule 12(a)), after litigation is underway the government and private parties are generally subject to the same deadlines with respect to discovery, motions, etc. If the proposed Rule is adopted, it affords the District significant advantages over private parties (for example, a private party will not be able to make an offer of judgment or settlement to the District of Columbia within 60 days before trial, while the District of Columbia can make such an offer to a private litigant up to 20 days before trial, Proposed Rule 68(a)). The Section notes that current Rule 68 does not provide this timing advantage to the District of Columbia government and submits that such favoritism is unwarranted.

The proposed amendments also create a good deal of uncertainty about a party's exposure. Paragraph (f), defining the terms "costs and expenses", specifies that they "may include, but are not limited to" the items listed. While the imposition of costs under the Rule continues to be mandatory,[3] the amendments appear to grant considerable discretion to the court to restrict or expand the actual costs and expenses that might be recoverable in a given case. There are no limitations, or guidance, on the exercise of this discretion, which has prompted the Steering Committee of the D.C. Bar Injury to Persons and Property Section to question whether attorney's fees might be shifted under the rule.[4]

The substantial expansion of a party's exposure to "costs and expenses", in addition to creating the prospect of litigation over the amounts awarded, may have unintended consequences, such as, encouraging a good deal of "gamesmanship" in the making of offers. For example, in cases where damages are relatively fixed, but liability

[3] Paragraphs (d) and (e) state that reasonable costs and expenses incurred following the making of an offer "shall" be paid.

[4] See, Public Statement of the Steering Committee of the D.C. Bar Injury to Persons and Property Section, on the proposed amendments to Rule 68.

is at issue, it appears that both parties might make offers under the rule, not in an effort to settle the case, but merely to enhance their recoverable costs. Defendants could, for example, make a nominal offer so that they could recover the enhanced costs provided in the rule in the event of a defense verdict. While this possibility would be offset somewhat by the "averaging" component of the rule, that may pose other problems. In such cases, plaintiffs too, could make offers calculated to take advantage of the rule. However, in cases of relatively strong liability, they might not be able to risk offering the 20% discount that would be required to recover enhanced costs under the rule.

Parties might also be penalized somewhat, in that the enhanced costs recoverable under the rule are those incurred only after the making of the offer. Paragraph (i) provides that where costs are awarded under the rule, "then costs and expenses shall not be recoverable * * * under any other rule of this Court." A party that recovered costs under this rule would, therefore, not be able to recover normal costs incurred prior to the making of the offer. The proposal to "average" competing offers in, paragraph (e), could prompt parties to withhold offers because they would then yield to their opponent the opportunity to set the average, especially in the absence of a right to counter an offer made at the end of the offer period. Other questions may arise, such as: Would the failure to make an offer under the rule, thereby eliminating the opportunity to recover substantial trial expenses, subject an attorney to a claim of malpractice?

Lastly, use of forms of the word "file" in paragraphs (e), (i) and the comments, appear to be erroneous, because offers are to be "served" not filed with the court, except in a proceeding to determine costs as specified in paragraphs (c) and (h).

In conclusion, while the goal of the proposed amendments is laudable, there is a serious question of whether recoverable costs can be substantially expanded in the absence of statutory authorization and the effects of the proposed amendments are not sufficiently clear. The Section therefore recommends that questions raised in comments to the proposed amendments be addressed by the Civil Rules Advisory Committee, that the proposed amendments to Rule 68 be reconsidered and that an extended comment period be allowed for any similar proposed amendments to Rule 68.