COMMENTS ON PROPOSED AMENDMENTS TO RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE

SUBMITTED BY:

DIVISION 1: ADMINISTRATIVE LAW AND AGENCY PRACTICE

DIVISION 1
STEERING COMMITTEE

Eldon V.C. Greenberg, Chair
Richard A. Allen
Terry M. Banks
Diane B. Cohn
Robert R. Nordhaus*
John D. Podesta

*Principal author

FEBRUARY 23, 1984

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SUMMARY OF COMMENTS

The August 1983 Proposed Amendments to the Federal Rules of Civil Procedure include amendments to Rule 68 relating to offers of settlement. The proposed rule raises a number of difficult questions in its application to litigation arising out of Federal agency proceedings. Division 1 believes that at a minimum a number of technical amendments should be made to make the rule workable. For example, the rule should be amended to make clear how it would operate in multi-party litigation and in cases where both injunction and monetary relief are sought.

Judicial review and agency enforcement cases present a host of problems which have not been addressed by the rule. The fact that non-monetary relief is generally sought makes these cases generally inappropriate for application of the rule. Division 1 recommends that the rule be amended to exclude such cases altogether from its application.

Application of the rule is also generally inappropriate in cases in which existing statutes provide for recovery of attorneys' fees. Because those statutes are designed to serve different purposes from those of the proposed Rule 68, application of the latter rule could undermine the policies of those statutes. Accordingly, the Division also recommends that the rule be further amended to exclude cases in which other statutes authorize recovery of attorneys' fees and expenses entirely from its application.

BEFORE THE
COMMITTEE ON RULES OF PRACTICE
AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE
UNITED STATES

COMMENTS OF DIVISION 1 (ADMINISTRATIVE LAW AND AGENCY PRACTICE) OF THE DISTRICT OF COLUMBIA BAR TO PROPOSED AMENDMENT TO RULE 68

Division I of the District of Columbia Bar (Administrative Law and Agency Practice) submits these comments on the proposed amendment to Rule 68 of the Federal Rules of Civil Procedure. The comments express our concerns with problems we believe are likely to arise in applying the proposed rule to judicial review and agency enforcement proceedings, and in applying it in cases where other statutes specifically authorize recovery of attorneys' fees. Because of those problems, we believe further technical amendments are necessary at a minimum to make the rule workable. More generally, we recommend that the proposed rule be amended to exclude entirely from its application judicial review and agency enforcement proceedings, and cases where other statutes presently provide for recovery of attorney fees.

The views expressed herein represent only those of Division 1 (Administrative Law and Agency Practice) of the District of Columbia Bar and not those of the D.C. Bar or its Board of Governors.

I.

THE PROPOSED RULE

Rule 68 presently permits parties defending against a claim to make a settlement offer to the adverse party. If the offer is not accepted in 10 days, it is deemed withdrawn, and if the final judgment is "not more favorable" to the offeree than the offer, the offeree must pay the "costs" incurred by the offeror after making the offer. "Costs" include court costs (primarily court and witness fees), but generally do not include attorneys' fees and other litigation expenses.

The rule, which was designed to encourage settlements, has rarely been used because "costs" are not generally significant in amount and because it is available only to those defending against claims.

To strengthen the rule's incentives for settlement, the Committee has proposed amendments to Rule 68, the principal effects of which would (1) allow any party to make an offer of settlement and (2) allow the offeror to recover not only costs but also "expenses, including reasonable attorneys' fees incurred by the offeror after making the offer and interest from the date of the offer on any amount of money that a claimant offered to accept," in the event the final judgment is not more favorable to the offeree than the offer. The amendments would also extend the period of the offer to 30 days, and would exclude class and derivative actions from the

rule's application. In addition, the amendments would authorize the court to reduce the amount of expenses and interest recoverable "to the extent found by the court ... to be excessive or unjustified under all the circumstances."

II.

SCOPE OF COMMENTS

Division I's comments are limited to the effect of the proposed rule on litigation arising out of Federal administrative proceedings and to the relationship between the proposed rule and existing statutes authorizing recovery of attorneys' fees. Both these areas present difficulties that do not appear to have been fully considered by the Committee or in the comments that have been submitted to it.

Accordingly, we will not comment generally on the merits of the proposed rule or on such questions as whether the rule is within the authorization of the Rule Enabling Act, 28 U.S.C. § 2072.

III.

APPLICABILITY TO JUDICIAL REVIEW PROCEEDINGS

The proposed rule is unclear how, if at all, the Advisory Committee intends the amendment to apply to judicial review of Federal agency proceedings. If it is the Committee's intention to cover judicial review proceedings, the proposed amendment, together with the draft Advisory Committee Note, raises several problems which the Committee should resolve before going forward with the proposal.

First, it is unclear whether the draftsmen of the rule contemplated that it would apply at all to judicial review proceedings. The reference in the text of the proposed rule to "30 days before the trial begins" may indicate an intention to apply the rule only in the context of cases where there is some prospect of trying contested issues of material fact. Only rarely do judicial review statutes permit a reviewing court to conduct a trial de novo or to conduct any form of evidentiary proceeding. More typically, judicial review is based on the agency's evidentiary record, or its rulemaking file.

Second, assuming the proposed rule is intended to cover judicial review proceedings, its operation is inconsistent with the manner in which judicial review proceedings are settled. In our experience, if the parties to a judicial review agree on a settlement, generally they will jointly move that the court remand the matter to agency for settlement. In the case of a rulemaking this procedure is probably a necessity because of the notice and comment requirements of 5 U.S.C. § 553. In adjudications, remand may also be necessary unless all of the parties to the agency proceeding are before the district court. (Frequently, parties in the administrative proceeding who supported the agency position will not intervene on judicial review. It is unclear to what extent they are bound by a settlement agreed to by the parties to the judicial review proceeding.)

Thus, any offer of settlement which proposes more than a remand is likely to be inconsistent with present settlement practice and in many instances with the Administrative Procedure Act. Applying the rule to such offers is infeasible.

Applying the rule only to offers to remand is equally troublesome. For example, if an offer to remand is made to an agency, the agency, in deciding whether to accept the offer and the potential delay it entails, has no way of evaluating the position of persons who are not parties to the judicial review proceeding but whose assent may be necessary for the ultimate resolution of the agency proceeding. If a rulemaking is involved, there may be literally hundreds of participants in the rulemaking who are not before the court. If on remand the other participants object to a settlement, then even where the agency and the litigants in the District Court proceeding are in agreement, the agency cannot promulgate the proposed settlement as a rule without engendering judicial challenges from the other participants.

Similar problems would be faced by the plaintiffs in cases where the agency offers the settlement. Where a plaintiff was challenging an agency's decision to promulgate a rule as arbitrary, capricious, or an abuse of discretion, the government could trigger the application of the provisions of proposed Rule 68 by offering to initiate a proceeding to take comment on whether the rule should be amended or repealed. The

plaintiff would be faced with the choice of pressing the claim and potentially incurring the government's attorneys' fees or settling for the option of pleading its case to the body whose previous conduct is being contested in court.

An even more difficult choice would be faced by a plaintiff who is complaining about an agency's inaction in a rulemaking. If a plaintiff was seeking a court-imposed timetable for completion of a rulemaking, and the government merely offered to take the next step in the rulemaking process, the plaintiff would have to weigh the need for creating a court-imposed schedule on a recalcitrant agency against the threat of incurring a large attorneys' fee award.

The last example points up another practical problem of the proposed Rule, which is that in actions to review agency rulemaking decisions, the relief prayed for will almost certainly be non-monetary. In cases where the plaintiff wins some form of relief, other than that offered by the government, it will be extremely difficult to determine whether the judgment finally entered is not more favorable to the offeree than an unaccepted offer. For example, an affected party might contest an agency rulemaking decision because the agency has failed to consider an important study and failed to disclose ex parte contacts with other parties. If the agency offered to delay implementation of the rule until it considered the study, and the court ultimately ruled that it need not do so but must

disclose the ex parte contacts, the court would be faced with judging which count of the complaint was more important to the plaintiff.

Finally, if the rule were applied to judicial review proceedings, it would permit an offeror to recover attorneys' fees in proceedings brought in the District Courts, but not in the substantial number of cases where the Courts of Appeals have exclusive jurisdiction of judicial review proceedings from particular agencies or under particular statutes. In the case of the Interstate Commerce Commission, Federal Energy Regulatory Commission, National Labor Relations Board, and a number of other agencies, most judicial review proceedings are in the Courts of Appeals. For some agencies, like the Environmental Protection Agency, most major rulemakings are in the Courts of Appeals, and most other proceedings are in the District Courts. There appears no rational basis for a distinction of this nature.

The Committee should exclude judicial review proceedings from the application of the amended rule.

IV.

AGENCY ENFORCEMENT PROCEEDINGS

Federal regulatory statutes generally provide for a range of sanctions, which can include criminal penalties, civil penalties, injunctive relief, enforcement of agency cease and desist or affirmative relief orders, and monetary damages.

Under most statutes, these sanctions are ultimately imposed by the Federal district courts, either in contested proceedings or as a result of settlements or plea bargains. Experience indicates that most agency enforcement proceedings are settled (in many cases in negotiations conducted prior to commencement of any civil action). The continuing functioning of this settlement process is essential to avoid burdening courts and agencies with a several-fold increase in the number of enforcement proceedings. For that reason, examination of the impacts of the proposed rule on agency enforcement activity indicates that subjecting these proceedings to the rule is likely to be both unworkable and unfair.

A. Workability

1. Settlement offers which include plea bargains or agreements not to prosecute.

The proposed rule by its terms appears to apply to civil enforcement proceedings brought by Federal agencies. It is of course inapplicable to any criminal proceeding.

The Department of Justice in enforcing regulatory statutes of certain agencies will enter into package settlements which will provide for disposition of all civil and criminal proceedings against the parties to particular transactions. For example, a settlement offer may include injunctive relief, payment of a fine or civil penalty by the corporate defendant, and an agreement not to prosecute individual officers of the corporate defendant. If the settlement process breaks down,

then the criminal and civil proceedings will be litigated on separate tracks. Whether a subsequent civil judgment against the defendant offerees is more favorable to the defendants than the offer of settlement will be almost impossible to evaluate without also considering how each defendant fared in the separate criminal proceedings. Even if the rule were amended to permit such consideration (which raises additional questions of law and policy) evaluation would require the burdensome task of making a separate fees determination for the corporate defendant and for each individual defendant.

2. Civil Sanctions.

Litigated (or settled) enforcement proceedings almost invariably involve the potential for more than one type of relief. The government will frequently ask for application of a wide range of sanctions under a number of applicable statutes. An offer of settlement (from either side) could involve injunctive relief on some issues, civil penalties on others, dropping some issues, and a combination of injunctive relief and civil penalties in others. On final judgment, the government may prevail with respect to issues which were proposed to be dropped in the settlement, lose on issues for which sanctions would have been applied, and obtain relief different from that proposed in the settlement. Evaluation of whether the judgment was more favorable than the offer presents almost insuperable problems.

B. Fairness Issues.

Applying the rule to agency enforcement proceedings (assuming the Committee ever intended such a result) raises policy issues, both from the point of view of congressional policy toward citizen rights in enforcement proceedings and from the point of view of preventing abuses that would require the government to pay attorneys' fees in cases where such payment is clearly inappropriate.

Even in civil enforcement litigation, individual and corporate defendants have strong incentives to avoid going to trial because of the expense and perceived damage to reputation. Accordingly, there exist strong pressures to settle even cases which have little prospect of success on the government's part. Amended Rule 68, if it were applied to enforcement proceedings, would exacerbate these pressures -- particularly for individual defendants and small businesses -- and make what is already perceived as an unequal contest even more unfair.

On the other hand, Rule 68 in the hands of knowledgeable defense counsel may well turn out to be a weapon which makes it possible to finance determined resistance to a meritorious enforcement action. Agencies have enforcement policies which are known to the practicing bar and which are adhered to in accepting settlement offers. Settlement offers which contravene agency enforcement policy can with some confidence

be put forward without fear of their being accepted, even though the other terms of the settlement are acceptable to the agency and even more favorable than what the agency can obtain in litigation. If the agency turns down such an offer and does not do better on final judgment, the defendant may well receive attorneys' fees unless the agency can show bad faith.

It is the Division's view that the proposed rule may encourage this type of maneuver on the part of certain defendants and result ultimately in fewer settlements rather than more.

V.

RELATIONSHIP TO OTHER FEDERAL FEE STATUTES

Congress has enacted nearly one hundred statutes authorizing attorneys' fees awards. As the Supreme Court said in Aleyska Pipeline Service v. Wilderness Society, " . . . the circumstances under which fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. 240, 261-62 (1975). When the proposed rule is considered in the context of proceedings in which Federal fee shifting statutes apply, application of the rule will be both inappropriate and mechanically difficult because of the conflicting standards and policies reflected in proposed Rule 68 and these congressional fee shifting schemes.

In various contexts, Congress has sought to encourage the assertion of good faith claims and defenses in actions against

Federal agencies.by providing for the award of attorneys' fees. Thus, statutes such as the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 522, and The Clean Air Act, 42 U.S.C. § 7604(d), all provide for the award of attorneys' fees to private parties whose actions advance the national policies reflected in these congressional schemes. Under proposed Rule 68, however, a party which "prevails" for purposes of an attorneys' fees award under the EAJA or the FOIA may nevertheless be forced to bear the costs of its adversary's fees, even if it has rejected an offer of settlement in good faith. Rule 68 may thus reverse a series of Congressional judgments about the allocation of fees in administrative cases, thereby undermining national policies concerning the environment, the release of government information and the regulation of small businesses. Although the Advisory Committee notes indicate that courts would have discretion to reduce fees awarded under the rule in cases where they would be "unfair" or "unjustified", we do not believe that such a vague grant of discretion is sufficient protection against the possibility that the proposed rule would undermine the important policies of these federal statutes.

Aside from this danger, however, the application of the proposed rule presents difficult questions of construction in situations where there is an existing statutory provision for

attorneys' fees. In such cases, Congress has already set out specific standards for permitting the shifting of fees, and different defenses that can be asserted in opposing attorneys' fees awards. It is not at all clear how the different, and in most cases conflicting, criteria contained in the proposed rule would affect the award of attorneys' fees in these situations.

For example, under the Freedom of Information Act, fees may be awarded to a party that "substantially prevails." 5 .S.C. § 552(a)(4)(E). In view of the important policies of the FOIA, a plaintiff may be deemed to have "substantially prevailed" even if not all of the records sought are ultimately disclosed. Indeed, one court has held that, even where no documents are released, a plaintiff may nevertheless be entitled to fees if the suit compels an agency to comply with the law. See, Halperin v. Department of State, 565 F.2d 699, 706 n. 11 (D.C. Cir. 1977). Under proposed Rule 68, a court would be required not only to evaluate whether the relief ultimately obtained in some way furthers the policies of the FOIA, but whether it is more or less "favorable" than a rejected offer of settlement. Given the obvious fact that it is not just the quantity, but the quality of the released information that must be considered in making such an evaluation, the proposed rule would impose a new and difficult burden on the courts. For example a judgment having a far-reaching and ameliorative effect may actually result in the

release of very few, if any, documents in a particular case. In this situation, the requester would be deemed to have "substantially prevailed" for the purposes of the attorneys' fees provision of the FOIA. If, however, the government had earlier offered to release certain documents in an effort to avoid the establishment of a precedent in the case, Rule 68 as drafted would require award of attorneys' fees to the government rather than the plaintiff.

Similarly, in litigation under the Clean Air Act, attorneys' fees may be awarded in certain citizen suits "whenever the court determines such award is appropriate." 42 U.S.C. § 7604(d). Under this criterion, attorneys' fees are available to the plaintiff even if the defendant agency moots the case by unilaterally providing the requested relief. See, Friends of the Earth v. Carey, 535 F.2d 165 (2d Cir. 1976). Under the proposed rule, questions arise as to whether the agency instead can obtain attorneys' fees by offering a settlement to the plaintiff before the agency proceeds to obtain a dismissal of the case.

Similar questions arise in considering the proposed rule in light of the various defenses and burdens of proof which Congress deemed appropriate in such fee-shifting cases. Thus, under the Equal Access to Justice Act, a prevailing private plaintiff "shall" be awarded fees unless the Position of the agency was "substantially justified" or "special circumstances

make an award unjust." 28 U.S.C. § 2412. Under the Freedom of Information Act, the Court must also consider various criteria in addition to whether a plaintiff has "substantially prevailed." These factors include the nature of the requester's interest in the information (i.e., whether public or private) and "whether the government's withholding of the records sought had a reasonable basis in law." S. Rep. No. 93-854, 93d Cong., 2d Sess. (1974). Thus, in cases where Congress has determined to provide attorneys' fees in order to facilitate private suits, it has carefully identified the circumstances in which it has deemed such awards to be appropriate. In such cases, proposed Rule 68 may lead to results not intended by Congress in fashioning these attorneys' fees schemes.

In Alyeska Pipeline Service Co. v. Wilderness Society, supra, the Supreme Court concluded that, in view of the importance and complexity of the issue and of the history of legislative involvement, the decision to award attorneys fees is for Congress, not the courts. Proposed Rule 68 would require the courts to second-guess established legislative judgments where they differ from the standards set forth in the rule. Particularly in view of the important policies reflected in the Federal fee statutes, this result is neither warranted nor permissible.

Congress has also enacted legislation awarding attorneys' fees to the government. In employment discrimination cases, for example, the government is entitled to recover attorneys' fees if it prevails at trial and if the plaintiff's suit was vexatious, frivolous, or brought to harass or embarras the defendant. See H. R. Rep. No. 94-1558, 7 (1976); Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). The new Rule would shift the burden from the government to the claimant. Rather than the government being required to prove that a plaintiff's claim was frivolous, the government could be entitled to attorneys' fees even if the plaintiff prevailed if it had offered a settlement more favorable than the plaintiff's judgment.

VI.

MULTIPARTY LITIGATION

Most judicial review proceedings and many agency enforcement proceedings involve more than a single party opposing the government. However, the proposed rule does not specify the manner of its application to such multiparty litigation. Two questions are presented by multiparty litigation: (1) how is the rule applied where some but not all of the parties accept the offer, and (2) how is it applied where more than one party has an offer outstanding at the same time.

In multiparty litigation, offers are frequently conditioned on their being accepted by all of the parties. If the rule is interpreted as applying to multiparty litigation, and the plaintiffs serve on the defendants an offer which is accepted by some but not all of the defendants, presumably the accepting defendants are not liable for attorneys' fees and interest. Are the defendants who do not accept liable for all of the plaintiffs' attorneys' fees and all of the interest accruing from the date of the offer? If the answer is in the affirmative, offerees in multiparty litigation may find it impossible to resist any offer of settlement, regardless of its lack of merit.

Similar questions are raised where offers from different parties are pending at the same time. The proposed rule appears to permit more than one offer to be outstanding at any 30 day period. The outstanding offers can well be inconsistent with each other, particularly if the offerors' positions in litigation are adverse to each other. Must the offeree weigh each offer against each of the other offers to determine which ones are likely to be at least as favorable as the final judgment, and then accept one of those offers? If the settlement ultimately is not accepted by others, will offerees be liable for attorneys' fees of the offerors of the less favorable offers?

VII.

CONCLUSION

The proposed rule raises a number of difficult questions in its application to litigation arising out of Federal agency proceedings, and we believe that a number of technical amendments should be made to make the rule workable. For example, the rule should be amended to make clear how it would operate in multi-party litigation and in cases where both injunctive and monetary relief are sought.

As we have discussed, judicial review and enforcement cases would present a host of problems which have not been addressed by the rule. We recommend that the rule be amended to exclude such cases altogether from its applications.

Application of the Rule is also generally inappropriate in cases in which existing statutes provide for recovery of attorneys' fees. Because those statutes are designed to serve different purposes from those of the proposed Rule 68, application of the latter rule could undermine the policies of those statutes. Accordingly, we also recommend that the rule be further amended to exclude entirely from its application cases in which other statutes authorize recovery of attorneys fees and expenses.