

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

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IN THE MATTER OF OFFERS OF JUDGMENT: THE  
REPEAL AND REPLACEMENT OF NEVADA RULE  
OF CIVIL PROCEDURE 68 AND NEVADA JUSTICE  
COURT RULE OF CIVIL PROCEDURE 68; THE  
AMENDMENT OF NEVADA RULE OF CIVIL  
PROCEDURE 5 AND NEVADA JUSTICE COURT  
RULE OF CIVIL PROCEDURE 5; AND THE  
AMENDMENT OF NRCP APPENDIX OF FORMS.

ADKT

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*Submitted by:*

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State Bar of Nevada  
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1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3                   **IN THE MATTER OF OFFERS OF JUDGMENT: THE**  
4                   **REPEAL AND REPLACEMENT OF NEVADA RULE**  
5                   **OF CIVIL PROCEDURE 68 AND NEVADA JUSTICE**  
6                   **COURT RULE OF CIVIL PROCEDURE 68; THE**  
7                   **AMENDMENT OF NEVADA RULE OF CIVIL**  
8                   **PROCEDURE 5 AND NEVADA JUSTICE COURT**  
9                   **RULE OF CIVIL PROCEDURE 5; AND THE**  
10                   **AMENDMENT OF NRCP APPENDIX OF FORMS.**

11                   **COMES NOW**, Petitioner Board of Governors of the State Bar of Nevada, and  
12                   hereby submits this Petition regarding Offers of Judgment which concerns the *repeal and*  
13                   *replacement* of Nevada Rule of Civil Procedure 68 and Nevada Justice Court Rule of Civil  
14                   Procedure 68, the *amendment* of Nevada Rule of Civil Procedure 5 and Nevada Justice  
15                   Court Rule of Civil Procedure 5, and the *amendment* of NRCP Appendix of Forms.

16                   This Petition is submitted under the authority granted to the Board of Governors of  
17                   the State Bar of Nevada by this Court pursuant to S.C.R. Rule 86(9) and NRAD Section 3.2.  
18                   The Petitioner expresses no opinion on how this Court may choose to process this Petition.

19                   Except where noted, this Petition is a replication of CRAIG R. ROECKS, *A Proposal to*  
20                   *Clarify Rule 68 of the Nevada Rules of Civil Procedure Regarding Offers of Judgment*,  
21                   7 Nev. L.J. (Spring 2007). Deviations from that article are as follows: 1) formatting  
22                   corrections; 2) a more harmonious bill drafting style is employed\*; 3) amendments to NRCP  
23                   Rule 5 and JCRCP Rule 5 are added; 4) the subsection designated as Rule 68(j), *filing*  
                      *requirements*, is added; and 5) the repeal and replacement of JCRCP Rule 68 is added.

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\* For example, this Petition uses “*subdivision (a)(1)*” in lieu of “*paragraph (1) of section (a)*”, and “*subsection (a)*” is used in lieu of “*section (a)*”.

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1 **I. INTRODUCTION**

2 *The Nevada rule was replaced in 1998. It is substantially*  
3 *different from the federal rule. – Drafter’s Note to Rule 68 from the*  
4 *2004 amendments to the Nevada Rules of Civil Procedure.*

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

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

1 Collateral proceedings have resulted over the meaning of Rule 68 and, given the  
2 substantial differences between Nevada’s rule and that of every other jurisdiction in the  
3 United States, it is likely that increasingly complex collateral proceedings will continue to  
4 occur if this rule is not substantially clarified. Fairness requires that parties to litigation be  
5 able to discern promptly how the offer of judgment law will operate when receiving an offer  
6 and, to a lesser extent, when crafting an offer. However, under current law a practitioner for  
7 the offeree party must, within ten days, consult an extensive body of decisional law to form  
8 an opinion on the probabilities of how a court should or will respond to every possible trial  
9 outcome. A clarified rule will expedite the practitioner’s analysis and will greatly promote  
10 the Rule’s goal of encouraging settlement.

11 This Petition proposes to replace Rule 68 with a clarified version that appears in the  
12 following pages. This proposal is presented as an amendment to aid the reader in discerning  
13 the differences between the proposed rule and the current rule. This Petition also includes  
14 corresponding forms to be included in the NRCP Appendix of Forms and proposes a related  
15 amendment to Rule 5(d).

16 Other commentators, courts, and lawmakers across the country have disputed the  
17 utility and policy of offers of judgment and have proposed a number of corresponding  
18 modifications to the rule, up to and including the total abolition of offers of judgment. This  
19 Petition does not join that debate. The law and policy in Nevada is generally settled and this  
20 Petition proposes rules that track current law and policy. Where there is no discernable  
21 policy but where experiences in other states are instructive, this Petition proposes rules that  
22 track the experiences in those states. Finally, new rules are included to encourage parties to  
23 serve offers when they also want to pursue a judicial determination of good faith settlement.

1 II. PROPOSED AMENDMENTS<sup>1</sup> AND REPLACEMENT RULES

2 **A. NRCP RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER**  
3 **PAPERS: *Amendments shown***

4 (a) **Service: When Required.** Except as otherwise provided in  
5 these rules, every order required by its terms to be served, every  
6 pleading subsequent to the original complaint unless the court  
7 otherwise orders because of numerous defendants, every paper  
8 relating to discovery required to be served upon a party unless the  
9 court otherwise orders, every written motion other than one which  
10 may be heard *ex parte*, and every written notice, appearance,  
11 demand, offer of judgment, designation of record on appeal, and  
12 similar paper shall be served upon each of the parties. No service  
13 need be made on parties in default for failure to appear except that  
14 pleadings asserting new or additional claims for relief against them  
15 shall be served upon them in the manner provided for service of  
16 summons in Rule 4.

17 (b) **Same: How Made.**

18 (1) Whenever under these rules service is required or  
19 permitted to be made upon a party represented by an attorney, the  
20 service shall be made upon the attorney unless the court orders that  
21 service be made upon the party.

22 (2) Service under this rule is made by:

23 (A) Delivering a copy to the attorney or the party by:

(i) handing it to the attorney or to the party;

(ii) leaving it at the attorney's or party's office  
with a clerk or other person in charge, or if there is no one in charge,  
leaving it in a conspicuous place in the office; or

(iii) if the office is closed or the person to be  
served has no office, leaving it at the person's dwelling house or  
usual place of abode with some person of suitable age and discretion  
residing there.

(B) Mailing a copy to the attorney or the party at his or  
her last known address. Service by mail is complete on mailing;  
provided, however, a motion, answer or other document constituting  
the initial appearance of a party must also, if served by mail, be filed  
within the time allowed for service; and provided further, that after  
such initial appearance, service by mail be made only by mailing  
from a point within the State of Nevada.

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<sup>1</sup> Matter in *italics* is new; matter in brackets [~~omitted material~~] is material to be omitted.

1 (C) If the attorney or the party has no known address,  
leaving a copy with the clerk of the court.

2 (D) Delivering a copy by electronic means if the attorney  
3 or the party served has consented to service by electronic means.  
4 Service by electronic means is complete on transmission provided,  
5 however, a motion, answer or other document constituting the initial  
6 appearance of a party must also, if served by electronic means, be  
7 filed within the time allowed for service. The served attorney's or  
8 party's consent to service by electronic means shall be expressly  
9 stated and filed in writing with the clerk of the court and served on  
the other parties to the action. The written consent shall identify:

- 10 (i) the persons upon whom service must be  
made;
- 11 (ii) the appropriate address or location for such  
12 service, such as the electronic-mail address or facsimile number;
- 13 (iii) the format to be used for attachments; and
- 14 (iv) any other limits on the scope or duration of  
the consent.

15 An attorney's or party's consent shall remain effective until  
16 expressly revoked or until the representation of a party changes  
17 through entry, withdrawal, or substitution of counsel. An attorney or  
18 party who has consented to service by electronic means shall, within  
19 10 days after any change of electronic-mail address or facsimile  
20 number, serve and file notice of the new electronic-mail address or  
21 facsimile number.

22 (3) Service by electronic means under Rule 5(b)(2)(D) is not  
23 effective if the party making service learns that the attempted service  
did not reach the person to be served.

(4) Proof of service may be made by certificate of an  
attorney or of the attorney's employee, or by written admission, or  
by affidavit, or other proof satisfactory to the court. Failure to make  
proof of service shall not affect the validity of service.

**(c) Same: Numerous Defendants.** In any action in which there  
are unusually large numbers of defendants, the court, upon motion or  
of its own initiative, may order that service of the pleadings of the  
defendants and replies thereto need not be made as between the  
defendants and that any cross-claim, counterclaim, or matter  
constituting an avoidance or affirmative defense contained therein  
shall be deemed to be denied or avoided by all other parties and that  
the filing of any such pleading and service thereof upon the plaintiff  
constitutes due notice of it to the parties. A copy of every such order  
shall be served upon the parties in such manner and form as the court  
directs.

1           **(d) Filing.** All papers after the complaint required to be served  
2 upon a party shall be filed with the court either before service or  
3 within a reasonable time thereafter, except as otherwise provided in  
4 Rule 5(b), but, unless filing is ordered by the court on motion of a  
5 party or upon its own motion, *offers of judgment*, depositions upon  
6 oral examination and interrogatories, requests for production,  
7 requests for admission, and the answers and responses thereto, shall  
8 not be filed unless and until they are used in the proceedings.  
9 Originals of responses to requests for admissions or production and  
10 answers to interrogatories shall be served upon the party who made  
11 the request or propounded the interrogatories and that party shall  
12 make such originals available at the time of any pretrial hearing or at  
13 trial for use by any party.

14           **(e) Filing With the Court Defined.** The filing of pleadings and  
15 other papers with the court as required by these rules shall be made  
16 by filing them with the clerk of the court, except that the judge may  
17 permit the papers to be filed with the judge, in which event the judge  
18 shall note thereon the filing date and forthwith transmit them to the  
19 office of the clerk. A court may by local rule permit papers to be  
20 filed, signed or verified by electronic means that are consistent with  
21 technical standards, if any, that the Judicial Conference of the United  
22 States establishes. A paper signed by electronic means in compliance  
23 with the local rule constitutes a written paper presented for the  
purpose of applying these rules. The clerk shall not refuse to accept  
for filing any paper presented for that purpose solely because it is  
not presented in proper form as required by these rules or any local  
rules or practices.

1 **B. JCRCP RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER**  
2 **PAPERS: *Amendments shown***

3 (a) **Service: When Required.** Except as otherwise provided in  
4 these rules, every order required by its terms to be served, every  
5 pleading subsequent to the original complaint unless the court  
6 otherwise orders because of numerous defendants, every paper  
7 relating to discovery required to be served upon a party unless the  
8 court otherwise orders, every written motion other than one which  
9 may be heard *ex parte*, and every written notice, appearance,  
demand, offer of judgment, designation of record on appeal, and  
similar paper shall be served upon each of the parties. No service  
need be made on parties in default for failure to appear except that  
pleadings asserting new or additional claims for relief against them  
shall be served upon them in the manner provided for service of  
summons in Rule 4.

10 (b) **Same: How Made.**

11 (1) Whenever under these rules service is required or  
12 permitted to be made upon a party represented by an attorney, the  
13 service shall be made upon the attorney unless the court orders that  
14 service be made upon the party.

15 (2) Service under this rule is made by:

16 (A) Delivering a copy to the attorney or the party by:

17 (i) handing it to the attorney or to the party;

18 (ii) leaving it at the attorney's or party's office  
19 with a clerk or other person in charge, or if there is no one in charge,  
20 leaving it in a conspicuous place in the office; or

21 (iii) if the office is closed or the person to be  
22 served has no office, leaving it at the person's dwelling house or  
23 usual place of abode with some person of suitable age and discretion  
residing there.

(B) Mailing a copy to the attorney or the party at his or  
her last known address. Service by mail is complete on mailing;  
provided, however, a motion, answer or other document constituting  
the initial appearance of a party must also, if served by mail, be filed  
within the time allowed for service; and provided further, that after  
such initial appearance, service by mail be made only by mailing  
from a point within the State of Nevada.

(C) If the attorney or the party has no known address,  
leaving a copy with the clerk of the court.

(D) Delivering a copy by electronic means if the attorney  
or the party served has consented to service by electronic means.  
Service by electronic means is complete on transmission provided,  
however, a motion, answer or other document constituting the initial

1 appearance of a party must also, if served by electronic means, be  
2 filed within the time allowed for service. The served attorney's or  
3 party's consent to service by electronic means shall be expressly  
4 stated and filed in writing with the clerk of the court and served on  
5 the other parties to the action. The written consent shall identify:

6 (i) the persons upon whom service must be  
7 made;

8 (ii) the appropriate address or location for such  
9 service, such as the electronic-mail address or facsimile number;

10 (iii) the format to be used for attachments; and

11 (iv) any other limits on the scope or duration of  
12 the consent.

13 An attorney's or party's consent shall remain effective until  
14 expressly revoked or until the representation of a party changes  
15 through entry, withdrawal, or substitution of counsel. An attorney or  
16 party who has consented to service by electronic means shall, within  
17 10 days after any change of electronic-mail address or facsimile  
18 number, serve and file notice of the new electronic-mail address or  
19 facsimile number.

20 (3) Service by electronic means under Rule 5(b)(2)(D) is not  
21 effective if the party making service learns that the attempted service  
22 did not reach the person to be served.

23 (4) Proof of service may be made by certificate of an  
attorney or of the attorney's employee, or by written admission, or  
by affidavit, or other proof satisfactory to the court. Failure to make  
proof of service shall not affect the validity of service.

**(c) Same: Numerous Defendants.** In any action in which there  
are unusually large numbers of defendants, the court, upon motion or  
of its own initiative, may order that service of the pleadings of the  
defendants and replies thereto need not be made as between the  
defendants and that any cross-claim, counterclaim, or matter  
constituting an avoidance or affirmative defense contained therein  
shall be deemed to be denied or avoided by all other parties and that  
the filing of any such pleading and service thereof upon the plaintiff  
constitutes due notice of it to the parties. A copy of every such order  
shall be served upon the parties in such manner and form as the court  
directs.

**(d) Filing.** All papers after the complaint required to be served  
upon a party shall be filed with the court either before service or  
within a reasonable time thereafter, except as otherwise provided in  
Rule 5(b), but, unless filing is ordered by the court on motion of a  
party or upon its own motion, *offers of judgment*, depositions upon  
oral examination and interrogatories, requests for production,

1 requests for admission, and the answers and responses thereto, shall  
2 not be filed unless and until they are used in the proceedings.  
3 Originals of responses to requests for admissions or production and  
4 answers to interrogatories shall be served upon the party who made  
the request or propounded the interrogatories and that party shall  
make such originals available at the time of any pretrial hearing or at  
trial for use by any party.

5 **(e) Filing With the Court Defined.** The filing of pleadings and  
6 other papers with the court as required by these rules shall be made  
7 by filing them with the clerk of the court, if there be one, except that  
8 the justice may permit the papers to be filed with him or her. In cases  
9 where there is no clerk, the papers shall be filed with the justice. A  
10 court may by local rule permit papers to be filed, signed or verified  
11 by electronic means that are consistent with technical standards, if  
12 any, that the Judicial Conference of the United States establishes. A  
paper signed by electronic means in compliance with the local rule  
constitutes a written paper presented for the purpose of applying  
these rules. The clerk or justice shall not refuse to accept for filing  
any paper presented for that purpose solely because it is not  
presented in proper form as required by these rules or any local rules  
or practices.

13 **(f) Drop Box Filing**

14 **(1) Authorization.** The court, or clerk of the court if there  
15 be one, may maintain one or more drop boxes in which papers and  
16 pleadings may be deposited for filing with the court. If such a system  
is maintained, the court or clerk must:

17 (A) Place the drop box at a location that is easily  
18 accessible by the public;

19 (B) Ensure that the drop box is locked or otherwise  
20 constructed to prevent theft or tampering of documents; and

21 (C) Provide, in a location immediately adjacent to the  
22 drop box, a machine or other device that is capable of stamping the  
23 date and time of receipt on documents that are being deposited in the  
drop box.

**(2) Papers Eligible for Filing.** All papers and pleadings,  
including, but not limited to, motions, oppositions, replies,  
affidavits, points and authorities, and courtesy copies, may be  
deposited in the drop box. However, filings which require the  
payment of filing fees must be made directly with the clerk's office,  
or justice where there is no clerk, unless the fees accompanying the  
filing are paid by check.

**(3) Procedure.** Papers and pleadings may be deposited in  
the drop box during all hours the courthouse is open. Before such

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documents are deposited, the documents must be date and time stamped as described in subdivision (f)(1). Documents placed in the drop box shall be deemed filed as of the date and time stamped on the paper or pleading. However, if a document is placed in the drop box without being date and time stamped, that document will not be deemed filed until it is date and time stamped by the clerk's office. In addition, if a document is placed in the drop box, and the clerk's office determines that the attempted filing is defective based on the absence of filing fees or based on any other legitimate reason, that document will not be deemed filed until the defect has been cured.

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1 **C. NRCP RULE 68. OFFERS OF JUDGMENT: *Illustrative amendments shown***

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

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

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

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

16 (A) is made pursuant to subdivision (a)(1) and served  
17 less than 11 days before trial; or

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

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

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

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

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

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

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

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

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

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

10 (d) **Joint Unapportioned Offers to Multiple Parties.**  
11 ~~[(2)] (1) Offers to Multiple [defendants] Defending~~  
12 ~~Parties. [An offer made to multiple defendants will invoke the~~  
13 ~~penalties of this rule only if]~~ *An unapportioned offer jointly made to*  
14 *multiple parties against whom claims, counterclaims or cross-claims*  
15 *are asserted may be conditioned upon the acceptance by all parties*  
16 *to whom the offer is directed if one entity, person or group is*  
17 *authorized to accept or reject an offer of settlement for all the claims*  
18 *against all the offerees and:*

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

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

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

24 ~~[(3)] (2) Offers to Multiple [Plaintiffs] Claimants.~~ ~~[An~~  
25 ~~offer made to multiple plaintiffs will invoke the penalties of this rule~~  
26 ~~only if]~~ *An unapportioned offer jointly made to multiple claimants*  
27 *may be conditioned upon the acceptance by all parties to whom the*  
28 *offer is directed if one entity, person or group is authorized to accept*  
29 *or reject an offer of settlement for all the claims of all the offerees*  
30 *and:*

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

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

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

39 (3) **Offers to Joint Tenants.** *No combination of offerees that*  
40 *jointly claim or defend under the same common theory of liability*

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

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

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

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

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

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

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

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

1                   *prejudice and, if applicable, an order withdrawing the judgment.*

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

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

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

10                   (1) ~~[If the offer is not accepted within 10 days after service it~~  
11                   ~~shall be considered]~~ *An offer made pursuant to subdivision (a)(1)*  
12                   *may be accepted before trial or within 10 days after service,*  
13                   *whichever period is shorter. An offer made pursuant to*  
14                   *subdivision (a)(2) may be accepted before the commencement of the*  
15                   *proceeding or within 10 days after service, whichever period is*  
16                   *shorter.*

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

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

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

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

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

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

1 judgment,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 (i) *The principal amount of the judgment; and*

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

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

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

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

(i) *Signing of Offers. Every offer shall be signed by at least one*  
*attorney of record in the attorney's individual name, whose address*  
*shall be stated. An unrepresented party shall sign the disclosure and*  
*state the party's address. An unsigned offer is void. The signature*

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*of the attorney or party certifies that the offer is made in good faith and for the purpose of obtaining a settlement.*

***(j) Filing requirements.** An offer of judgment is void if the offeror does not file and serve a written notice of service of the offer of judgment within three days after service of the offer.*

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

1 **D. NRCP RULE 68. OFFERS OF JUDGMENT: *Replacement Rule***

2 **(a) Contents of Offer and Timing.**

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

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

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

15 (A) is made pursuant to subdivision (a)(1) and served  
16 less than 11 days before trial; or

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

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

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

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

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

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

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

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

**(b) Apportioned Conditional Offers to Multiple Parties.** An  
apportioned offer jointly made to more than one party may be

1 conditioned upon the acceptance by all parties to whom the offer is  
2 directed.

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

6 **(d) Joint Unapportioned Offers to Multiple Parties.**

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

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

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

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

20 **(2) Offers to Multiple Claimants.** An unapportioned offer  
21 jointly made to multiple claimants may be conditioned upon the  
22 acceptance by all parties to whom the offer is directed if one entity,  
23 person or group is authorized to accept or reject an offer of  
settlement for all the claims of all the offerees and:

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

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

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

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

**(e) Judgment Entered Upon Acceptance.**

(1) If the offeree serves written notice that the offer is  
accepted within the acceptance period provided by  
subdivision (f)(1), the offer shall be deemed accepted and either  
party may then file the offer and notice of acceptance together with  
proof of service. The offer and notice of acceptance must be filed  
within 7 days after service of the written notice that the offer is

1 accepted or before trial or other applicable proceeding, whichever  
occurs earlier.

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

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

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

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

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

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

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

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

19 (1) An offer made pursuant to subdivision (a)(1) may be  
accepted before trial or within 10 days after service, whichever  
20 period is shorter. An offer made pursuant to subdivision (a)(2) may  
be accepted before the commencement of the proceeding or within  
10 days after service, whichever period is shorter.

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

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

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

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

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

10 **(g) Sanctions for Rejection of Offer.**

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

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

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

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

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

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

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

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

23 (2) An award against a party made pursuant to this  
subsection shall not exceed that portion of the costs, attorneys'

1 fees and applicable interest that are severally attributable to the party.

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

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

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5 **(h) Determination of More Favorable Judgment.**

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

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

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

9 (i) The principal amount of the judgment; and

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

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

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

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

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19 **(j) Filing requirements.** An offer of judgment is void if the offeror does not file and serve a written notice of service of the offer of judgment within three days after service of the offer.

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

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1 **E. JCRCP RULE 68. OFFERS OF JUDGMENT: *Replacement rule***

2 **(a) Contents of Offer and Timing.**

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

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

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

15 (A) is made pursuant to subdivision (a)(1) and served  
16 less than 11 days before trial; or

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

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

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

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

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

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

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

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

**(b) Apportioned Conditional Offers to Multiple Parties.** An  
apportioned offer jointly made to more than one party may be

1 conditioned upon the acceptance by all parties to whom the offer is  
2 directed.

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

6 **(d) Joint Unapportioned Offers to Multiple Parties.**

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

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

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

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

20 **(2) Offers to Multiple Claimants.** An unapportioned offer  
21 jointly made to multiple claimants may be conditioned upon the  
22 acceptance by all parties to whom the offer is directed if one entity,  
23 person or group is authorized to accept or reject an offer of  
settlement for all the claims of all the offerees and:

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

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

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

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

**(e) Judgment Entered Upon Acceptance.**

(1) If the offeree serves written notice that the offer is  
accepted within the acceptance period provided by  
subdivision (f)(1), the offer shall be deemed accepted and either  
party may then file the offer and notice of acceptance together with  
proof of service. The offer and notice of acceptance must be filed  
within 7 days after service of the written notice that the offer is

1 accepted or before trial or other applicable proceeding, whichever  
occurs earlier.

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

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

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

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

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

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

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

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

19 (1) An offer made pursuant to subdivision (a)(1) may be  
accepted before trial or within 10 days after service, whichever  
20 period is shorter. An offer made pursuant to subdivision (a)(2) may  
be accepted before the commencement of the proceeding or within  
10 days after service, whichever period is shorter.

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

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

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

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

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

10 **(g) Sanctions for Rejection of Offer.**

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

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

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

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

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

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

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

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

23 (2) An award against a party made pursuant to this  
subsection shall not exceed that portion of the costs, attorneys'

1 fees and applicable interest that are severally attributable to the party.

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

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

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5 **(h) Determination of More Favorable Judgment.**

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

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

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

9 (i) The principal amount of the judgment; and

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

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

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

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

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19 **(j) Filing requirements.** An offer of judgment is void if the offeror does not file and serve a written notice of service of the offer of judgment within three days after service of the offer.

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1 III. DISCUSSION

2 **A. RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER**  
3 **PAPERS**

4 **RULE 5. SERVICE AND FILING OF PLEADINGS AND**  
5 **OTHER PAPERS**  
6 \* \* \* \*

7 (d) **Filing.** All papers after the complaint required to be served  
8 upon a party shall be filed with the court either before service or  
9 within a reasonable time thereafter, except as otherwise provided in  
10 Rule 5(b), but, unless filing is ordered by the court on motion of a  
11 party or upon its own motion, *offers of judgment*, depositions upon  
12 oral examination and interrogatories, requests for production,  
13 requests for admission, and the answers and responses thereto, shall  
14 not be filed unless and until they are used in the proceedings.  
15 Originals of responses to requests for admissions or production and  
16 answers to interrogatories shall be served upon the party who made  
17 the request or propounded the interrogatories and that party shall  
18 make such originals available at the time of any pretrial hearing or at  
19 trial for use by any party.

20 This amendment establishes that it is unnecessary to file an offer of judgment upon  
21 service. *McCrary v. Bianco*, 131 P.3d 573, 578 (Nev. 2006) (the “failure to file the offer  
22 until after trial is not fatal to relief under NRCP 68 and NRS 17.115” and is a “standard  
23 practice in this state”). Absent amendment, the part of Rule 5(d) that requires a party to file  
an offer of judgment is superfluous in light of *McCrary*.

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1 **B. RULE 68. OFFERS OF JUDGMENT**

2 **RULE 68. OFFERS OF JUDGMENT**

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

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

8 This new provision first establishes that an offer must resolve all claims to be valid.<sup>2</sup>

9 Next, this provision codifies that the offer resolves the claims as accrued through the date of  
10 the service of the offer, as opposed to the date that the offer is accepted or the date that  
11 judgment is entered.<sup>3</sup>

12 The timing of an offer is addressed in proposed subdivision 68(a)(3)(A), and is  
13 unchanged.<sup>4</sup> The requirement that an offer be in writing is addressed in proposed  
14 subsection 68(i), and is unchanged.<sup>5</sup>

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19 <sup>2</sup> See *Clark v. Lubritz*, 944 P.2d 861, 868 (Nev. 1997) (“An offer of judgment is an offer to  
20 settle the entire case, including claims both known and unknown and both certain and  
21 uncertain.”).

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

<sup>4</sup> See *supra* Part III(B).

<sup>5</sup> *Id.*

1 **RULE 68. OFFERS OF JUDGMENT**

2 **(a) Contents of Offer and Timing.**

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

11 This provision relocates the provision currently found in Rule 68(h) (2005).<sup>6</sup> The  
12 requirement that an offer be in writing is addressed in proposed subsection 68(i) and is  
13 unchanged.<sup>7</sup>

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

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18 <sup>6</sup> The following is a “redline” comparison of NEV. R. CIV. P. 68(h) (2005) and proposed  
19 NEV. R. CIV. P. 68(a)(2):

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

24 <sup>7</sup> See *supra* Part III(B).

25 <sup>8</sup> See *Clark v. Lubritz*, 944 P.2d 861, 868 (Nev. 1997) (“An offer of judgment is an offer to

1 Finally, this provision codifies that the offer resolves the claims as accrued through  
2 the date of the service of the offer, as opposed to the date that the offer is accepted or the  
3 date that judgment is entered.<sup>9</sup>

4 The timing of such an offer is addressed in proposed subdivision 68(a)(3)(B), and is  
5 unchanged.<sup>10</sup>

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19 settle the entire case, including claims both known and unknown and both certain and  
20 uncertain.”) (citing *Lutynski v. B.B. & J. Trucking, Inc.*, 628 A.2d 1, 5 (Conn. App. Ct.  
1993)).

21 <sup>9</sup> See generally *McCrary v. Bianco*, 131 P.3d 573 (Nev. 2006); *Albios v. Horizon Cmtys.*,  
22 *Inc.*, 132 P.3d 1022 (Nev. 2006).

23 <sup>10</sup> See *supra* Part III(B).

1 **RULE 68. OFFERS OF JUDGMENT**

2 **(a) Contents of Offer and Timing.**

3 \* \* \* \*

4 (3) *No party shall be subject to the sanctions of*  
5 *subsection (g) for the rejection of an offer that:*

6 (A) *is made pursuant to subdivision (a)(1) and served*  
7 *less than 11 days before trial; or*

8 (B) *is made pursuant to subdivision (a)(2) and served*  
9 *less than 11 days before the commencement of the proceeding.*

10 This provision establishes that an offer cannot support the offeror’s motion for offer of  
11 judgment sanctions if the offer is served too close to the commencement of trial or other  
12 proceeding. These provisions are relocated from Rule 68(h) (2005) and from the first  
13 sentence of the current version of Rule 68(a) (2005) without substantive modification.

14 When viewed in conjunction with proposed subdivision 68(f)(1),<sup>11</sup> this provision  
15 clarifies that an offer is not void if served less than eleven days before the commencement  
16 of trial or other proceeding. Proposed subdivision 68(f)(1) further provides that such an  
17 offer may be accepted at any time before the commencement of trial or other proceeding.  
18 While an offeree can avoid penalties if she rejects such an offer because she “is entitled not  
19 to be rushed into a hasty decision,”<sup>12</sup> an offeree should nonetheless be able to waive this  
20 entitlement and elect to make a hasty decision if she chooses to do so. This result promotes  
21 settlement.

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21 <sup>11</sup> See *supra* Part III(B).

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

1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(a) Contents of Offer and Timing.**

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

9                   This provision makes explicit that offers of judgment are valid even if their terms  
10                  contain non-monetary equitable relief, such as an offer to divide property in a partition  
11                  action.<sup>13</sup>

12                  Next, this provision would rectify a current gap in the law. Currently, neither Rule 68  
13                  nor NRS § 17.115 address how to construe an offer that fails to account for attorneys' fees  
14                  or interest explicitly. Instead, Rule 68(d) (2005) and NRS § 17.115(2)(b) address the  
15                  construction of an offer that fails to account for costs, and only costs, explicitly upon  
16                  acceptance.<sup>14</sup> At present, the Nevada Supreme Court will construe any ambiguity against

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17                  <sup>13</sup> *Kent v. Kent*, 835 P.2d 8, 11 (Nev. 1992).

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

1 the drafter,<sup>15</sup> but clarity and predictability will be greatly enhanced on this important and  
2 recurring issue if the rule explicitly addresses the topic.<sup>16</sup>

3 This provision would clearly give effect to an offer “for \$10,000” by deeming the  
4 offer to be one that is for a lump-sum that includes all claims, inclusive of costs, interest,  
5 and attorneys’ fees. This Court has strongly implied that such offers should be given  
6 effect.<sup>17</sup>

7 Since a court is required to construe the meaning of an offer when an offer is rejected  
8 as well as when it is accepted, the more logical placement for this clarifying provision is in  
9 proposed subsection 68(a), in addition to or instead of Rule 68(d) (2005) or proposed  
10 subsection 68(e).

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12 <sup>15</sup> *McCrary v. Bianco*, 131 P.3d 573, 577-78 (Nev. 2006).

13 <sup>16</sup> “If the offer of judgment is silent about whether it includes prejudgment interest, or if the  
14 intent of the offeror cannot otherwise be clearly determined, it should be presumed that the  
15 offer includes prejudgment interest.” *State Drywall, Inc. v. Rhodes Design & Dev.*, 127  
16 P.3d 1082, 1087 (Nev. 2006). If the offer is for “all complaints and counter claims” and  
17 allows a separate award of costs upon acceptance, then the holding of the *McCrary* opinion  
18 would operate to exclude pre-offer attorneys’ fees when performing the comparison. *See*  
19 *McCrary*, 131 P.3d at 577. The Nevada Supreme Court has not published an opinion to  
address the situation that arises when an offer precludes a separate post-acceptance award of  
costs that makes no reference to attorneys’ fees (e.g., for a lump-sum “including costs and  
prejudgment interest accrued to date”). Also, the *McCrary* and *State Drywall* opinions each  
arose in the context of performing a post-judgment comparison to determine if the judgment  
was more favorable than the offer. It is not clear that these holdings will be extended to  
cover the situation when such offers are accepted.

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

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**RULE 68. OFFERS OF JUDGMENT**

**(a) Contents of Offer and Timing.**

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

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

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<sup>18</sup> See *infra*.

1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(a) Contents of Offer and Timing.**

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4                   *(6) The offer may specify a longer acceptance period than*  
5                   *the period prescribed by subdivision (f)(1), but may not permit an*  
6                   *acceptance after the commencement of a trial if the offer is made*  
7                   *pursuant to subdivision (a)(1) and may not permit an acceptance*  
8                   *after the commencement of the proceeding if the offer is made*  
9                   *pursuant to subdivision (a)(2).*

10                  This provision establishes that an offer may specify a longer acceptance period than the  
11                  ten-day acceptance period established by the rule, as the service of such an offer should be a  
12                  factor when determining whether the offer was made in good faith. This provision also  
13                  establishes that the offer may not permit an acceptance after the commencement of trial or  
14                  other proceeding.

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1 **RULE 68. OFFERS OF JUDGMENT**

2 **(a) Contents of Offer and Timing.**

3 \* \* \* \*

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

5 This provision makes explicit the requirement that, to be valid, an offer must specify  
6 the statute or rule that the offer is based on.<sup>19</sup> Moreover, this also makes explicit that an  
7 offer may be made with reference to both Rule 68 and NRS § 17.115.<sup>20</sup> This provision also  
8 clarifies that where an offer is made under Rule 68 and not under NRS § 17.115, it will still  
9 be given effect under Rule 68.<sup>21</sup>

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

21 <sup>20</sup> *Bowyer v. Taack*, 817 P.2d 1176, 1178 (Nev. 1991).

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

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**RULE 68. OFFERS OF JUDGMENT**  
**(a) Contents of Offer and Timing.**

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

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

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**RULE 68. OFFERS OF JUDGMENT**  
**(a) Contents of Offer and Timing.**

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

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

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<sup>22</sup> *Nava v. Second Judicial Dist. Court*, 46 P.3d 60, 61 (Nev. 2002).  
<sup>23</sup> *See infra*.

1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(a) Contents of Offer and Timing.**

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

5                   This provision establishes that no offer is valid if it purports to impose conditions  
6 beyond those explicitly provided by Rule 68.<sup>24</sup> In addition to codifying existing law, this  
7 provision is urged for adoption due to the difficulty associated with evaluating whether a  
8 judgment finally obtained is “more favorable” than an offer that contains a condition not  
9 expressly permitted by Rule 68 or NRS § 17.115. Currently, neither the rule nor the statute  
10 address whether an offer may be made with conditions that are not expressly permitted by  
11 law, such as a condition of confidentiality, a cap on an award of costs or attorneys’ fees, of a  
12 district court’s determination of good faith settlement for purposes of NRS § 17.245, or of a  
13 condition that extends the acceptance period beyond ten days. This provision would  
14 invalidate an offer that contains any of the first two conditions; an offer that contains the  
15 latter two conditions would be given effect pursuant to the express provisions of the  
16 proposed subdivision 68(a)(5) and subdivision 68(a)(6), respectively.

17                   Next, this provision specifies that only the inclusion of a *material* condition will  
18 invalidate an offer. The Nevada Supreme Court appears ready to give effect to a condition  
19 that the offeree must execute a dismissal and release.<sup>25</sup> Further, where additional material

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

23 <sup>25</sup> See, e.g., *May v. Anderson*, 119 P.3d 1254, 1258 (Nev. 2005) (citing *Earnest & Stewart*,

1 conditions are invalid under current law, it is also unclear if the entire offer is invalid or if  
2 court will give effect to the offer but not the contingency within the offer. This provides  
3 that no effect shall be given to an offer with an illegal contingency, as it would be unfair to  
4 the offeror to bind that party to a judgment that has materially different terms than those  
5 contained in the settlement offer.

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22 *Inc. v. Codina*, 732 So.2d 364, 366 (Fla. Dist. Ct. App. 1999), where the court characterized  
23 such a condition as surplusage as opposed to one that affects substantial rights).

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**RULE 68. OFFERS OF JUDGMENT**

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

This is a clarification.

**RULE 68. OFFERS OF JUDGMENT**

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

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

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1 **RULE 68. OFFERS OF JUDGMENT**

2 *(d) Joint Unapportioned Offers to Multiple Parties.*

3 ~~[(2)] (1) Offers to Multiple [defendants] Defending~~  
4 ~~Parties. [An offer made to multiple defendants will invoke the~~  
5 ~~penalties of this rule only if] An unapportioned offer jointly made to~~  
6 ~~multiple parties against whom claims, counterclaims or cross-claims~~  
7 ~~are asserted may be conditioned upon the acceptance by all parties~~  
8 ~~to whom the offer is directed if one entity, person or group is~~  
9 ~~authorized to accept or reject an offer of settlement for all the claims~~  
10 ~~against all the offerees and:~~

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

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

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

19 This provision and the following proposed subdivision 68(d)(2) would harmonize the  
20 text of Rule 68's treatment of unapportioned offers to multiple parties with the text of NRS  
21 § 17.115. These two provisions would also eliminate the current limitation of the rule to  
22 "Defendants" and "Plaintiffs," as this Court clearly prefers the rule to apply to all variety of  
23 "defending parties and claimants."<sup>26</sup> The provisions' usages of the terms "defending parties"  
and "claimants" are similar to word usages in Rule 56 and in the 2005 amendment to NRS  
§ 17.115(5).<sup>27</sup>

Next, this provision and the following subdivision 68(d)(2) would substitute the text  
"authorized to decide whether to settle" with "authorized to accept or reject an offer of

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

<sup>27</sup> 2005 NEV. STAT., CH. 58, § 1, at 116.

1 settlement”. Both Rule 68 and NRS § 17.115 permit valid joint unapportioned offers to be  
2 served to multiple offerees when there is a single decider “authorized to decide whether to  
3 settle the claims” of or against all of the offerees. However, this quoted text is somewhat  
4 vague. There is no published opinion from the Nevada Supreme Court that addresses the  
5 issue of whether this condition will operate to limit the validity of offers of judgment to  
6 those circumstances where a single decider is authorized to accept or reject any offer of  
7 compromise, as opposed to the more expansive interpretation, which is that the condition is  
8 satisfied whenever a single decider (including any group of offerees acting as a body  
9 corporate) is authorized to accept, reject, *or make* any settlement offer for all offerees. It  
10 appears that the policy supports limiting this condition to the former interpretation, and  
11 these two provisions reflect this.

12       The provisions of current Rule 68(c)(1) (2005) (now proposed subsection 68(c)), and  
13 NRS § 17.115(6) are so permissive that all unapportioned offers jointly made from any  
14 combination of parties will always be valid. Thus, *any and all unrelated parties* can decide  
15 to make jointly a single offer of judgment. This is because the apportionment problems that  
16 were present under the former version of the rule when evaluating an unapportioned offer  
17 are not present for such offers, as the parties “have already agreed to an apportionment when  
18 they authorized the [making of the] offer.”<sup>28</sup> However, where there is agreement between  
19 parties to fund and apportion an offer jointly made from them, it does not logically follow  
20 that the agreement was intended to bind those same parties to the same apportionment for a

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

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

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1 **RULE 68. OFFERS OF JUDGMENT**

2 **(d) Joint Unapportioned Offers to Multiple Parties.**

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4 ~~[(3)]~~ (2) **Offers to Multiple [Plaintiffs] Claimants.** ~~[An offer made to multiple plaintiffs will invoke the penalties of this rule only if]~~ *An unapportioned offer jointly made to multiple claimants may be conditioned upon the acceptance by all parties to whom the offer is directed if one entity, person or group is authorized to accept or reject an offer of settlement for all the claims of all the offerees and:*

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

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

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

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11 In addition to those items explained in the prior subdivision, this provision adds  
12 “common theory of liability” to the types of relationships that may exist between multiple  
13 claimants that permissibly allow their opponents to invoke the benefits of the offer of  
14 judgment law. This change harmonizes Rule 68(c) (2005) with NRS § 17.115(9) and is in  
15 accord with the Nevada Supreme Court’s discussion on the interpretation and construction  
16 when such offers are served under *both* Rule 68 and NRS § 17.115.<sup>29</sup>

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22 <sup>29</sup> *Albios v. Horizon Cmtys., Inc.*, 132 P.3d 1022, 1031 (Nev. 2006).

1 **RULE 68. OFFERS OF JUDGMENT**

2 **(d) Joint Unapportioned Offers to Multiple Parties.**

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

12 This provision codifies and expands upon this Court’s treatment of spouses  
13 maintaining an action based upon property held in joint tenancy.<sup>30</sup> This also extends the  
14 *Albios* holding to defendant spouses, as *Albios* only involved claimant spouses. Finally, this  
15 provision extends the holding to all offeree joint tenants so that non-married joint tenants are  
16 not treated more favorably than married joint tenants.

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23 <sup>30</sup> *Id.*

1 **RULE 68. OFFERS OF JUDGMENT**

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

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

11 This provision eliminates redundancy by limiting the “acceptance period” to a single  
12 location in the proposed subdivision 68(f)(1).

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

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21 <sup>31</sup> OR. R. CIV. P. 54(E)(2) (“If the party asserting the claim accepts the offer, the party  
22 asserting the claim or such party's attorney shall endorse such acceptance thereon, and file  
23 the same with the clerk before trial, and within three days from the time it was served upon  
such party asserting the claim . . .”).

1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(e) Judgment Entered Upon Acceptance.**

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

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

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

23                   This provision parallels the 2005 revision to Rule 68(d) of the Nevada Justice Court  
Rules of Civil Procedure by empowering a judge to enter judgment in addition to the clerk.<sup>32</sup>  
The new subdivision also adds an explicit reference to attorneys' fees in addition to the  
rule's current reference to costs and interest.<sup>33</sup>

The third sentence establishes that, unless the offer specifically provides otherwise, an  
award of interest will be allowed on all the claims and demands for damages in their entirety  
upon acceptance of an offer, provided the offer allows a separate interest award, the affected

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<sup>32</sup> NEV. JUSTICE COURT R. CIV. P. 68(d).

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

1 claimant has alleged an entitlement to damages in writing before the offer is served, interest  
2 is permitted by law or contract on any portion of any claim or demand, and the offer is made  
3 by a defending party.<sup>34</sup> Alternatively, when the offer is made by a claimant under identical  
4 circumstances, no interest will be awarded to the claimant. This provision resolves an  
5 ambiguity over the validity and treatment of an offer that allows a post-acceptance award of  
6 interest in the following two examples:

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

9 Absent this new subdivision, such offers made pursuant the current version of Rule 68  
10 may not resolve all claims and demands if accepted – and therefore may not be valid<sup>35</sup> –  
11 because they may not support the plaintiff’s post-acceptance motion for prejudgment  
12 interest. This complication was introduced by the amendments to Rule 68 and NRS  
13 § 17.115 in 1998/1999 that allowed an offeror greater flexibility in the drafting the terms of  
14 an offer of judgment. The proposed subdivision complements these prior amendments by  
15 defining how such offers will be given effect and thereby eliminating the risk that such  
16 offers will be invalidated in collateral proceedings.

17 The offer in the first example is akin to a general verdict that awards past and future  
18 damages but where it is impossible to determine from the trial record that portion of the total

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20 <sup>34</sup> The distinction between “claims” and “demands” is controlled by NEV. R. CIV. P. 8(a).

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

1 verdict that was awarded for past damages, which would support an award of prejudgment  
2 interest, as opposed to future damages, where prejudgment interest is not allowed.<sup>36</sup> No  
3 prejudgment interest will be awarded for such an indeterminate verdict,<sup>37</sup> and so it follows  
4 that no prejudgment interest would be awarded in the first example. If so, then under that  
5 example the offer that allows a post-acceptance award of interest cannot resolve all of the  
6 claimant’s claims if accepted and therefore may be invalid.<sup>38</sup>

7 The offer in the second example is problematic because, like future damages, no  
8 prejudgment interest is recoverable on a punitive damages award.<sup>39</sup> Like the first example,

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10 <sup>36</sup> NEV. REV. STAT. § 17.130 (2005).

11 <sup>37</sup> See *Stickler v. Quilici*, 655 P.2d 527, 528 (Nev. 1982).

12 <sup>38</sup> For example, consider a personal injury action where the plaintiff’s complaint seeks  
13 damages “in excess of \$10,000,” makes a pre-suit written settlement offer for past damages  
14 of \$4,000, future damages of \$15,000, and the complaint contains a demand for judgment in  
15 excess of \$10,000 along with statutory costs, attorneys’ fees and interest. The defendant  
16 answers by denying liability and, in alternative, asserts that the damages are inflated.  
17 Defendant makes an early nuisance value offer “for \$10,000, exclusive of costs, attorneys’  
18 fees and interest,” and the plaintiff accepts. While the offer clearly allows the plaintiff to  
19 file a post-acceptance motion for, among other things, prejudgment interest, is not clear how  
20 a court should rule on the motion under the present Rule. Possible alternatives are for the  
21 court to either: (1) take evidence and make a finding of fact on the past damages (and defeat  
22 the purpose of encouraging settlement and avoiding protracted litigation); (2) award no  
23 prejudgment interest (therefore rendering illusory the statutory interest component and force  
the plaintiff to forego a legitimate claim to such interest); (3) determine that the offer is  
invalid because it cannot resolve the plaintiff’s claim for interest on past damages, and  
remind the defendant that it had the sole power to avoid this problem by drafting an  
apportionment in the offer to guide the court’s treatment of past and future damages or, in  
the alternative, that the defendant could have served a lump-sum offer; or (4) construe the  
ambiguity in the offer against the defendant by awarding prejudgment interest on the entire  
offered amount of \$10,000. This Article embraces and codifies the latter option because it  
is the only option that tends to promote settlement and encourages the careful drafting of  
offers.

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

1 if the offer made under the current rule cannot support a post-acceptance motion for  
2 prejudgment interest, the offer cannot resolve all of the claimant's claims and therefore may  
3 be invalid.

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

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

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

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

3 (A) Suppose a personal injury claimant’s complaint demands  
4 “judgment against defendant in an amount in excess of \$10,000 and  
5 costs,”<sup>41</sup> discovery produces written evidence of \$60,000 in special  
6 damages and indeterminate future damages. An offer is thereafter  
7 served by the defendant to resolve all claims in favor of claimant  
8 “for \$100,000 excluding interest,” and a notice of acceptance is  
9 filed. The new subdivision will operate to allow judgment to be  
10 entered for \$100,000 and prejudgment interest on the entire  
11 \$100,000 will be added to the judgment because interest is permitted  
12 on a portion of the claimant’s claim/demand for damages.  
13 Specifically, special damages are eligible for interest to pursuant to  
14 NRS § 17.130. In addition, the claimant will be entitled to a post-  
15 acceptance award of prejudgment interest on its taxable costs under  
16 NRS § 17.130.<sup>42</sup>

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

22 (C) If a personal injury claimant’s complaint makes a demand  
23 identical to the one in example A, the only evidence adduced in  
discovery to date is for future damages, an offer is thereafter served  
by the defendant to resolve the claim in favor of claimant “for  
\$100,000 excluding interest,” and the offer is accepted, then the new  
subdivision will operate to allow a judgment to be entered for  
\$100,000. The claimant will also be entitled to a post-acceptance

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18 <sup>41</sup> This is modeled upon Appendix to NEV. R. CIV. P., Form 9, *Complaint for Negligence*.

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

1 award of prejudgment interest on its taxable costs, but no portion of  
2 the claimed damages is eligible for an interest award because  
3 NRS § 17.130(2) prohibits an award of prejudgment interest for  
future damages. While interest is allowed on the costs, the new  
subdivision is not triggered because taxable costs are not “damages.”

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

9 By limiting the operation of this subdivision to those instances “when judgment is  
10 entered pursuant to this subsection,” the third sentence in the proposed subdivision 68(e)(2)  
11 will have no applicability when the offer is rejected and judgment is then entered pursuant  
12 to other law, such as after a jury’s verdict or a bench trial.

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1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(e) Judgment Entered Upon Acceptance.**

3                   \* \* \* \*

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

7                   This is a clarification.

8                   **RULE 68. OFFERS OF JUDGMENT**

9                   **(e) Judgment Entered Upon Acceptance.**

10                  \* \* \* \*

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

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

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

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1 **RULE 68. OFFERS OF JUDGMENT**

2 **(e) Judgment Entered Upon Acceptance.**

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

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

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

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1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(e) Judgment Entered Upon Acceptance.**

3                   \* \* \* \*

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

7                   This provision clarifies that a judgment or order of dismissal entered pursuant to  
8 Rule 68 – including one designated as a “compromise settlement” – shall have the effect of  
9 a valid judgment on the merits.<sup>43</sup> Under existing law, a judgment is “on the merits” when it  
10 in fact determines the substantive legal rights of the parties in connection with the dispute  
11 before the court. Dismissals on the basis of purely procedural or technical failings  
12 ordinarily do not constitute judgments on the merits. Similarly, a dismissal without  
13 prejudice is not a judgment on the merits.<sup>44</sup> Thus, this provision establishes that a judgment  
14 will have the effect of a claim preclusion,<sup>45</sup> and not issue preclusion, between the parties.

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

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

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

1                   **RULE 68. OFFERS OF JUDGMENT**

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

4                   (1) ~~[If the offer is not accepted within 10 days after service it~~  
5                   ~~shall be considered]~~ *An offer made pursuant to subdivision (a)(1)*  
6                   *may be accepted before trial or within 10 days after service,*  
7                   *whichever period is shorter. An offer made pursuant to*  
8                   *subdivision (a)(2) may be accepted before the commencement of the*  
9                   *proceeding or within 10 days after service, whichever period is*  
10                   *shorter.*

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

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

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21 <sup>46</sup> NEV. R. CIV. P. 68(a); NEV. REV. STAT. § 17.115(1) (2005).

22 <sup>47</sup> NEV. R. CIV. P. 68(d); NEV. REV. STAT. § 17.115(2) (2005).

23 <sup>48</sup> NEV. R. CIV. P. 68(e); NEV. REV. STAT. § 17.115(3) (2005).

1 Rule 6(a) and Rule 68 in their present form allows an offer of judgment to be accepted  
2 several days after the trial commences. This frustrates the purpose of the offer of judgment  
3 rules and leads to absurd results, especially in short trials.

4 Another alternative that would resolve this ambiguity and greatly simplify the text of  
5 the rule is to change the periods within which to serve a timely offer, a timely acceptance, or  
6 both. However, the new subdivision does not propose a change of either time period  
7 because there is no indication in the published opinions or in the applicable legislative or  
8 rulemaking history that Nevada policymakers have considered expanding either time period.  
9 An expansion of the acceptance period would be in harmony with Nevada's policy to give  
10 offerees time to carefully consider the likely value of pursuing a claim in light of the offer of  
11 judgment and the possible penalties that flow from rejection.<sup>49</sup> Of course, an expansion of  
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13 <sup>49</sup> *Nava v. Second Judicial Dist. Court*, 46 P.3d 60, 61 (Nev. 2002). Of those states with  
14 offers of judgment law, several have expanded the time to accept an offer when compared to  
15 the narrow 10-day time periods established by FED. R. CIV. P. 68 and by Nevada law. *See*,  
16 ARIZ. R. CIV. P. 68(a), (e) (timely if made thirty days before trial and offeree has thirty days  
17 to accept, but the periods are extended to sixty days to accept if offer is made within sixty  
18 days of service of summons and complaint); COLO. REV. STAT. § 13-17-202 (2006) (timely  
19 if made fourteen days before trial and fourteen days to accept); CONN. GEN. STAT § 52 -  
20 192a(a) (2006) (timely if made thirty days before trial and offeree has thirty days to accept);  
FLA. R. CIV. P. 1.442(b), (f) (timely if made forty-five days before trial, offeree has thirty  
days to accept); GA. CODE ANN. § 9-11-68 (2006) (timely if made thirty days before trial  
and thirty days to accept); IDAHO R. CIV. P. 68(a) (timely if made fourteen days before trial  
and fourteen days to accept); MD. CODE ANN., CTS. & JUD. PROC. § 3-2A-08A (2006)  
(timely if made forty-five days before trial, offeree has fifteen days to accept); MICH. CT. R.  
2.405(B), (C)(1) (timely if made twenty-eight days before trial, offeree has twenty-one days  
to accept).

21 Several states have advanced the time to serve an offer to dates further away from the  
22 commencement of trial but retain the narrow 10 day acceptance period. *See*, ALA. R. CIV.  
23 P. 68 (timely if made fifteen days before trial, offeree has ten days to accept); KAN. STAT.  
ANN. § 60-2002(b) (2005) (timely if made fifteen days before trial, offeree has ten days to  
accept); LA. CODE. CIV. PROC. ANN. art. 970(A) (2006) (timely if made thirty days before

1 the acceptance period would necessitate an expansion of the allowable period to serve an  
2 offer of judgment currently provided in Rule 68(a) (2005) and in proposed  
3 subdivision 68(a)(3). A third alternative would be to amend the Rule 6(a) provision that  
4 addresses periods of time under eleven days so that Rule 68 is exempted from its operation.

5 The provision also provides that an offeror may withdraw an offer if a court enlarges  
6 an acceptance period. This is modeled upon Arizona Rule of Civil Procedure 68(e).<sup>50</sup> This  
7 encourages settlement, as parties may be reluctant to serve an offer if a material term in their  
8 offer, such as the time of acceptance, is modified without their consent by a court. This  
9 provision respects and preserves the court's power to enlarge the acceptance period for good  
10 cause. In Nevada, there are serious consequences for failing to obtain a more favorable  
11 judgment, and the risk of loss is borne solely by the offeree, so the court's power to grant an  
12 offeree's request to enlarge the acceptance period should be generously exercised.

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14 trial, offeree has ten days to accept); MISS. R. CIV. P. 68 (timely if made fifteen days before  
15 trial, offeree has ten days to accept); MO. R. CIV. P. 77.04 (timely if made thirty days before  
16 trial, offeree has ten days to accept); N.J. CT. R. 4:58-1 (timely if made twenty days before  
17 trial, offeree has ten days to accept); S.C. R. CIV. P. 68(a) (timely if made twenty days  
18 before trial, offeree has 20 days to accept but not later than 10 days before trial); WIS. STAT.  
ANN. § 807.01 (2006) (timely if made twenty days before trial, offeree has ten days to  
accept); WYO. R. CIV. P. 68 (timely if made thirty days before trial, offeree has ten days to  
accept).

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

23 <sup>50</sup> ARIZ. R. CIV. P. 68(e).

1                   **RULE 68. OFFERS OF JUDGMENT**

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

4                   \* \* \* \*

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

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

16                  Nevada's law is unique in that it is always possible to draft a valid offer of judgment  
17                  in civil litigation, so it is always inexcusable to draft an invalid offer of judgment. This new  
18                  subdivision provides that an invalid offer of judgment cannot be used by a court to penalize  
19                  a party that purportedly failed to beat such an offer. This is proposed because the purpose of  
20                  offers of judgment is to encourage settlement by imposing a significant risk upon the  
21                  recipient for the failure to accept an offer, yet an invalid offer carries no risk. Also, parties  
22                  that receive invalid offers of judgment are under no obligation to inform their adversary of  
23                  the defect in the offers. Unlike typical settlement offers, an attorney receiving a defective  
24                  offer of judgment may place his at an extreme disadvantage if he informs or otherwise alerts

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<sup>51</sup> *Scott v. Zhou*, 98 P.3d 313, 315 (Nev. 2004).

1 the adversaries of the defect in the offer. Thus, an offer of judgment is not an invitation to  
2 negotiate; it is a non-negotiable strategic device that is intended to harm the recipient if the  
3 “terms of surrender” are not accepted unconditionally. Since an award of attorneys’ fees  
4 often affects the substantial rights of the parties, it seems fair to both parties that the judge  
5 should only consider valid offers of judgments when determining the amount of an  
6 attorneys’ fees award, as only a valid offer has and should have any legal significance.

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

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1                   **RULE 68. OFFERS OF JUDGMENT**

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

4                   \* \* \* \*

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

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

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

<sup>53</sup> *Id.* at 1033 n.36.

1                   **RULE 68. OFFERS OF JUDGMENT**

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

4                   \* \* \* \*

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

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

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

20                  <sup>55</sup> *Id.* at 61.

21                  <sup>56</sup> *Id.*

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

1 **RULE 68. OFFERS OF JUDGMENT**

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

4 \* \* \* \*

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

13 This provision makes explicit the counterintuitive operation of the current rule which  
14 establishes that there are situations where a party can “accept” an offer of judgment, but  
15 judgment cannot thereafter be entered. It also establishes that this provision applies only to  
16 apportioned offers that are conditioned upon the acceptance by all, as apportioned offers that  
17 are not so conditioned should result in a judgment when accepted.  
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1 **RULE 68. OFFERS OF JUDGMENT**

2 ~~[(f)] (g) [Penalties] Sanctions for Rejection of Offer. [If the~~  
3 ~~offeree rejects an offer and fails to obtain a more favorable judgment,~~  
4 ~~— (1) the offeree cannot recover any costs or attorney’s fees and~~  
5 ~~shall not recover interest for the period after the service of the offer~~  
6 ~~and before the judgment; and~~  
7 ~~— (2) the offeree shall pay the offeror’s post offer costs,~~  
8 ~~applicable interest on the judgment from the time of the offer to the~~  
9 ~~time of entry of the judgment and reasonable attorney’s fees, if any~~  
10 ~~be allowed, actually incurred by the offeror from the time of the~~  
11 ~~offer. If the offeror’s attorney is collecting a contingent fee, the~~  
12 ~~amount of any attorney’s fees awarded to the party for whom the~~  
13 ~~offer is made must be deducted from that contingent fee.]~~

14 *(1) Except as otherwise provided in subdivision (g)(3), if a*  
15 *party who rejects an offer fails to obtain a more favorable judgment,*  
16 *the court:*

17 *(A) shall not award to the party any discretionary costs*  
18 *or discretionary attorneys’ fees from the commencement of the action*  
19 *to the entry of the judgment;*

20 This provision establishes that an offeree that fails to obtain a more favorable verdict  
21 cannot obtain an award of discretionary costs or attorneys’ fees.<sup>58</sup>

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

1                   **RULE 68. OFFERS OF JUDGMENT**

2                   **(g) Sanctions for Rejection of Offer.**

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

6                   \* \* \* \*

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

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

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

22                  The Nevada Supreme Court has not resolved the statutory conflict that arises when an  
23                  unsuccessful offeree is subject to the mandatory penalties of the rule and the statute and is  
24                  concurrently entitled to a *mandatory* award of attorneys' fees<sup>60</sup> and a *mandatory* award of

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25                  <sup>59</sup> *McCrary v. Bianco*, 131 P.3d 573, 576 (Nev. 2006).

26                  <sup>60</sup> For example, certain lien claimants are entitled to mandatory awards of attorneys' fees

1 litigation costs.<sup>61</sup> A review of the appellate briefing to Nevada Supreme Court in recent  
2 cases reveals that it was not asked to resolve, and thus did not resolve, this statutory conflict.  
3 In such an instance, a court may resolve the conflict by sustaining the unsuccessful offeree's  
4 entitlement to pre-offer costs and pre-offer attorneys' fees and disallow the offeree its post-  
5 offer costs and post-offer attorneys' fees. This result would harmonize Nevada's law with  
6 federal law,<sup>62</sup> and with the overwhelming majority of jurisdictions,<sup>63</sup> and would punish the  
7  
8 under NEV. REV. STAT. § 108.237 (2005).

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

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

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

22 North Dakota is similar to all the jurisdictions above, but it has an additional provision  
23 whereby if the offeror tenders money in lieu of a judgment, then the penalties are for the  
offeree to lose all costs and pay all the offeror costs without regard to when the tender was

1 unsuccessful offeree for the direct consequences of the rejection of the offer; the offeree  
2 would lose its entitlement to post-offer costs and post-offer attorneys' fees and become  
3 liable for all of the offerors' applicable litigation expenses incurred after the service of the  
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5 made. N.D. R. CIV. P. 68(a), (b). California is similar to the above jurisdictions, but has  
6 additional eligibility for a discretionary award of expert witness fees actually incurred from  
7 the inception of the litigation. CAL. CIV. PROC. CODE § 998(c)(1) (2006); *Regency Outdoor*  
8 *Adver. v. City of Los Angeles*, 139 P.3d 119, 134-35 (Cal. 2006).

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

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

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

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

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

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

1 offer.

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

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**RULE 68. OFFERS OF JUDGMENT**

**(g) Sanctions for Rejection of Offer.**

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

\* \* \* \*

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

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

This text is relocated from existing Rule 68(f)(2) (2005) and without substantive modification.

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1 **RULE 68. OFFERS OF JUDGMENT**

2 **(g) Sanctions for Rejection of Offer.**

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

6 \* \* \* \*

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

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

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

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

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

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<sup>64</sup> NEV. REV. STAT. § 17.115 (2005).

1 deducted from the *attorney's* fee.<sup>65</sup> As explained in the Nevada Civil Practice Manual:

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

11           For an example of the unintended consequences that could occur under the current  
12 rule, consider a case where a claimant’s offer of \$90,000 is rejected, the claimant later  
13 obtains a judgment of \$140,000, and the court orders a Rule 68 attorneys’ fees award of  
14 \$60,000 in the claimant’s favor. If the claimant’s attorney negotiated a simple 25%  
15 contingency fee, then the attorney that would have been paid \$50,000 but for Rule 68(f)(2)  
16 (2005) is instead indebted to the claimant for \$10,000. This windfall for the claimant exists  
17 because the text of the current rule provides that the claimant’s \$60,000 attorneys’ fees

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19 <sup>65</sup> NEV. R. CIV. P. 68(f)(2) (“If the offeror’s attorney is collecting a contingent fee, the  
20 amount of any attorney’s fees awarded to the party for whom the offer is made must be  
deducted from that contingent fee.”).

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

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

1 award must be “deducted from that [attorney’s] contingent fee” of \$50,000. This creates the  
2 absurd result of a conflict between the attorney and client and is an absurd result. Even if  
3 this were not the intended result, it is difficult to craft any construction of the current rule  
4 that would produce any incentive for a claimant’s attorney to counsel the client to serve an  
5 offer of judgment. The current rule creates a disincentive for the attorney to advocate for  
6 the maximum possible attorneys’ fees award when the claimant becomes eligible for such  
7 an award; yet the benefit of contingent fees is to create this very type of performance  
8 incentive. Simply put, the current fee-limiting rule does not clearly comport with the overall  
9 operation and purpose of the offer of judgment law, which is to encourage settlement  
10 through the construction of incentives that operate to achieve that end. The proposed new  
11 subdivision corrects this evident error and restores the law to its pre-1998 condition.

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**RULE 68. OFFERS OF JUDGMENT**  
**(g) Sanctions for Rejection of Offer.**

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

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

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1 **RULE 68. OFFERS OF JUDGMENT**  
2 **(g) Sanctions for Rejection of Offer.**

3 \* \* \* \*

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

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

12 An offer that has no reasonable prospect of acceptance under the circumstances of the  
13 particular case does not encourage settlement,<sup>70</sup> nor furthers the purpose of the offer of

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

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

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

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

*Id.*

1 judgment law, and if given effect, would force parties to forego legitimate claims or  
2 defenses.<sup>71</sup> It would frustrate the purpose of the offer of judgment rule if a district court  
3 were to give any effect to a defendant's token offer of judgment or other nominal offer made  
4 before meaningful discovery is obtained and the plaintiff thereafter fails to obtain a more  
5 favorable judgment in a meritorious action.<sup>72</sup> A contrary result would permit the rule to be  
6 used as a tactical device solely for the purpose of obtaining costs or attorneys' fees to which  
7 an offering party would not otherwise be entitled.

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

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

**RULE 68. OFFERS OF JUDGMENT**  
**(g) Sanctions for Rejection of Offer.**

\* \* \* \*

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

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

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

<sup>74</sup> *Id.*

1 **RULE 68. OFFERS OF JUDGMENT**

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

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

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

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

21 (i) *The principal amount of the judgment; and*

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

24 This provision adds clarity and precision to the method that a court must undertake to  
25 compare an offer with a judgment in that it explicitly accounts for the treatment of costs,  
26 attorneys’ fees, interest, and interest on costs and attorneys’ fees.<sup>75</sup>

27 Next, this provision departs from the Nevada Supreme Court’s recent discussion on  
28 determining which interest rate to employ to make the comparison. The *Albios* court has  
29 explained that the interest rate in effect on the date the judgment is entered is the operative

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30 <sup>75</sup> See *Albios v. Horizon Cmtys., Inc.*, 132 P.3d 1022, 1033 (Nev. 2006) (when making a  
31 comparison, where the offeror “expressly excluded attorney fees and costs, only pre-offer  
32 pre-judgment interest awarded on the [verdict] can be considered”).

1 interest rate, and the interest rate in effect on the date of the offer is irrelevant.<sup>76</sup> This seems  
2 erroneous, as the crux of a court’s post-judgment analysis is whether the offer should have  
3 been accepted, and therefore the interest rate in effect on the last day that acceptance was  
4 possible seems to be more appropriate for the analysis.

5 Finally, this new subdivision implicitly defines the phrase “principal amount of the  
6 judgment” to mean the amount of the judgment less any applicable taxable costs, attorneys’  
7 fees and interest. The phrase is presently used in Rule 68 and NRS § 17.115, but its  
8 meaning is vague and ambiguous in both the rule and the statute.

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<sup>76</sup> *Id.* at 1033 n.39.

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**RULE 68. OFFERS OF JUDGMENT**  
**(h) Determination of More Favorable Judgment.**

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

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

**RULE 68. OFFERS OF JUDGMENT**  
**(h) Determination of More Favorable Judgment.**

\* \* \* \*

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

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

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

1 **RULE 68. OFFERS OF JUDGMENT**

2 ~~[(h) Offers After Determination of Liability. When the~~  
3 ~~liability of one party to another has been determined by verdict,~~  
4 ~~order or judgment, but the amount or extent of the liability remains~~  
5 ~~to be determined by further proceedings, the party adjudged liable~~  
6 ~~may make an offer of judgment, which shall have the same effect as~~  
7 ~~an offer made before trial if it is served within a reasonable time not~~  
8 ~~less than 10 days prior to the commencement of hearings to~~  
9 ~~determine the amount or extent of liability.]<sup>78</sup>~~

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

10 This provision relocates the requirement that the offer must be reduced to writing to  
11 be valid as required by Rule 68(a) (2005). This provision alerts the signing individual that  
12 the purpose of the offer is to obtain a settlement. This is necessary to alert the signing  
13 individual and/or place *some* risk on the offeror who acts inconsistently with the purpose of  
14 Rule 68. Rule 11 alone may not be sufficient because it allows a signatory twenty-one days  
15 to withdraw the suspect paper, yet an offer will be deemed rejected if it is not accepted  
16 within the ten-day acceptance period in the absence of court intervention.

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22 <sup>78</sup> This provision has been amended and relocated to subdivision 68(a)(2) &  
23 subdivision 68(a)(3)(B), *supra*.

1                   **RULE 68. OFFERS OF JUDGMENT**

2                   ***(j) Filing requirements.*** *An offer of judgment is void if the*  
3                   *offeror does not file and serve a written notice of service of the offer*  
4                   *of judgment within three days after service of the offer.*

5                   This provision requires the offeror to file a “notice of service of offer of judgment”  
6                   within three days after serving the offer. It is hoped that adding this filing and service  
7                   requirement will reduce the instances where an offeree denies that it received or had notice  
8                   of the offer. *See, e.g., McCrary v. Bianco*, 131 P.3d 573, 578 (Nev. 2006) (offeree found to  
9                   have received mailed offer); *McEvoy v. Aerotek, Inc.*, 34 P.3d 979, 983-86 (Ariz.App. 2001)  
10                  (trial court has discretion to receive evidence on the issue of whether an offeree actually  
11                  received an offer that was duly served by mail and has discretion to relieve the offeree from  
12                  the consequences of not responding to the offer).

13                   **RULE 68. OFFERS OF JUDGMENT**

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

16                  This provision makes explicit this Court’s holding that the offer of judgment rules do  
17                  not apply to divorce proceedings, child support cases, or child custody matters.<sup>79</sup> The text  
18                  of this subsection replicates the first sentence of Nevada Rule of Civil Procedure 65(f).

19                  This subsection is not needed and therefore should not be included in Justice Court  
20                  Rule of Civil Procedure 68.

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23                  \_\_\_\_\_ <sup>79</sup> *Leeming v. Leeming*, 490 P.2d 342, 345 (Nev. 1971).

1 **IV. PROPOSED AMENDMENTS TO NRCP APPENDIX OF FORMS**

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

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

9 A.B., Plaintiff, )  
10 v. ) *Offer of Judgment*  
C.D., Defendant. )

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

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

14 A.B., Plaintiff, )  
15 v. ) *Offer of Judgment*  
C.D., Defendant. )

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

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

21 A.B. & C.D., Plaintiffs, )  
22 v. ) *Offer of Judgment*  
E.F., Defendant. )

23 Pursuant to NRCP 68, defendant E.F. hereby offers to allow judgment to be taken  
in favor of plaintiff A.B. and against defendant E.F. in the amount of \$100,000 to

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

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

6 A.B. & C.D., Plaintiffs, )  
7 v. ) *Offer of Judgment*  
8 E.F., Defendant. )

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

16 **Form 37. Lump-Sum Unapportioned Offer of Judgment Under Rule 68 Jointly Made**  
17 **from Multiple Offerors.**

18 A.B. & C.D., Plaintiffs, )  
19 v. ) *Offer of Judgment*  
20 E.F., Defendant. )

21 Pursuant to NRCPC 68, plaintiff A.B. and plaintiff C.D., jointly, hereby offer to  
22 allow judgment to be taken in favor of plaintiffs and against defendant E.F. for  
23 \$100,000 to resolve all claims between the parties in the above-captioned action.

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

A.B. & C.D., Plaintiffs, )  
v. ) *Offer of Judgment*  
E.F., Defendant. )

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

...

...

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

3 A.B., Plaintiff, )  
4 v. ) *Offer of Judgment*  
5 C.D. & E.F., Defendants. )

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

9 **Form 40. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 Jointly**  
10 **Made from Multiple Offerors to Multiple Offerees.**

11 A.B. & C.D., Plaintiffs, )  
12 v. ) *Offer of Judgment*  
13 E.F. & G.H., Defendants. )

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

18 **Form 41. Lump-Sum Apportioned Offer of Judgment Under Rule 68 Jointly Made**  
19 **from Multiple Offerors to Multiple Offerees Conditioned Upon the Acceptance by All**  
20 **Offerees.**

21 A.B. & C.D., Plaintiffs, )  
22 v. ) *Offer of Judgment*  
23 E.F. & G.H., Defendants. )

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

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

2 A.B., Plaintiff, )  
3 v. ) *Offer of Judgment*  
4 C.D., Defendant. )

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

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

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

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

20 Following acceptance, the plaintiff may seek accrued interest, costs and attorneys'  
21 fees by separate motion.  
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**V. CONCLUSION**

The current rules and forms are inadequate to the task of providing certainty of outcome and therefore do not adequately promote settlement. The proposed replacement rules and amended rules and forms are believed to be better suited to fulfill that important task.

RESPECTFULLY SUBMITTED

This \_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_

FOR THE STATE BOARD OF GOVERNORS

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