

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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TABLE OF CONTENTS

1

2 **I. INTRODUCTION** 5

3 **II. PROPOSED AMENDMENTS AND REPLACEMENT RULES** 7

4 **A. NRCP Rule 5. *Service and Filing of Pleadings and Other Papers:***
5 **Amendments shown** 7

6 **B. JCRCP Rule 5. *Service and Filing of Pleadings and Other Papers:***
7 **Amendments shown** 10

8 **C. NRCP Rule 68. *Offers of Judgment: Illustrative amendments shown*** . . 14

9 **D. NRCP Rule 68. *Offers of Judgment: Replacement rule*** 21

10 **E. JCRCP Rule 68. *Offers of Judgment: Replacement rule*** 26

11 **III. DISCUSSION** 31

12 **A. Rule 5. *Service and Filing of Pleadings and Other Papers.*** 31

13 Subsection 5(d). *Filing.* 31

14 **B. Rule 68. *Offers of Judgment.*** 32

15 Subsection 68(a). *Contents of Offer and Timing.* 32

16 Subdivision 68(a)(1). 32

17 Subdivision 68(a)(2). 33

18 Subdivision 68(a)(3). 35

19 Subdivision 68(a)(4). 36

20 Subdivision 68(a)(5). 38

21 Subdivision 68(a)(6). 39

22 Subdivision 68(a)(7). 40

23 Subdivision 68(a)(8). 41

Subdivision 68(a)(9). 42

Subdivision 68(a)(10). 43

Subsection 68(b). *Apportioned Conditional Offers to Multiple Parties.* 45

Subsection 68(c). *Unapportioned Offers Jointly Made by Multiple Parties.* . . 45

Subsection 68(d). *Joint Unapportioned Offers to Multiple Parties.* 46

Subdivision 68(d)(1). *Offers to Multiple Defending Parties.* 46

Subdivision 68(d)(2). *Offers to Multiple Claimants.* 49

1	Subdivision 68(d)(3). <i>Offers to Joint Tenants</i>	50
2	Subsection 68(e). <i>Judgment Entered Upon Acceptance</i>	51
	Subdivision 68(e)(1).	51
3	Subdivision 68(e)(2).	52
4	Subdivision 68(e)(3).	58
	Subdivision 68(e)(4).	58
5	Subdivision 68(e)(5).	59
6	Subdivision 68(e)(6).	60
7	Subsection 68(f). <i>Acceptance Period and the Effect of the Failure to Accept an Offer</i>	61
8	Subdivision 68(f)(1).	61
	Subdivision 68(f)(2).	61
9	Subdivision 68(f)(3).	64
10	Subdivision 68(f)(4).	66
	Subdivision 68(f)(5).	67
11	Subdivision 68(f)(6).	68
12	Subsection 68(g). <i>Sanctions for Rejection of Offer</i>	69
13	Subdivision 68(g)(1)(A).	69
	Subdivision 68(g)(1)(B).	70
14	Subdivision 68(g)(1)(C).	74
15	Subdivision 68(g)(1)(D).	74
	Subdivision 68(g)(1)(E).	75
16	Subdivision 68(g)(2).	78
17	Subdivision 68(g)(3).	79
	Subdivision 68(g)(4).	81
18	Subsection 68(h). <i>Determination of More Favorable Judgment</i>	82
19	Subdivision 68(h)(1).	82
20	Subdivision 68(h)(2).	84
	Subdivision 68(h)(3).	84
21	Subsection 68(i). <i>Signing of Offers</i>	85
22	Subsection 68(j). <i>Filing Requirements</i>	86
23	Subsection 68(k). <i>When Inapplicable</i>	86

1	IV. PROPOSED AMENDMENTS TO NRCP APPENDIX OF FORMS	87
2	Form 33. Lump-Sum Offer of Judgment Under Rule 68.	87
3	Form 34. Non-Lump-Sum Offer of Judgment Under Rule 68	87
4	Form 35. Lump-Sum Apportioned Offer of Judgment Under Rule 68 to Multiple Offerees and Conditioned Upon the Acceptance by All Offerees	87
5	Form 36. Lump-Sum Apportioned Offer of Judgment Under Rule 68 to Multiple Offerees and Not Conditioned Upon the Acceptance by All Offerees	88
6	Form 37. Lump-Sum Unapportioned Offer of Judgment Under Rule 68 jointly made from Multiple Offerors	88
7	Form 38. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 to Multiple Plaintiffs	88
8	Form 39. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 to Multiple Defending Parties	89
9	Form 40. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 Jointly Made from Multiple Offerors to Multiple Offerees	89
10	Form 41. Lump-Sum Apportioned Offer of Judgment Under Rule 68 Jointly Made from Multiple Offerors to Multiple Offerees Conditioned Upon the Acceptance by All Offerees	89
11	Form 42. Non-Lump-Sum Offer of Judgment Under Rule 68 to Quiet Title in Easement	90
12		
13		
14		
15		
16	V. CONCLUSION	91

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19 ♦ ♦ ♦
20 ♦ ♦ ♦
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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 AMENDMENTS¹ 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.

¹ 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
11 made;
- 12 (ii) the appropriate address or location for such
13 service, such as the electronic-mail address or facsimile number;
- 14 (iii) the format to be used for attachments; and
- 15 (iv) any other limits on the scope or duration of
16 the consent.

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

(3) Service by electronic means under Rule 5(b)(2)(D) is not
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*
24 *proceeding to determine costs and attorneys' fees. Evidence of a*
25 *void offer is not admissible in a proceeding to determine the*
26 *attorneys fees of any party.*

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

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

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

42 **~~(f)~~ (g) [Penalties] Sanctions for Rejection of Offer. [If the**
43 ~~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~~
3 ~~and shall not recover interest for the period after the service of the~~
4 ~~offer and before the judgment; and~~

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

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

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

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

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

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

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

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

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

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

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

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

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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
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
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
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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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.²

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.³

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

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19 ² 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 ³ See generally *McCrary v. Bianco*, 131 P.3d 573 (Nev. 2006); *Albios v. Horizon Cmty.,*
23 *Inc.*, 132 P.3d 1022 (Nev. 2006).

⁴ See *supra* Part III(B).

⁵ *Id.*

1 **RULE 68. OFFERS OF JUDGMENT**

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

3 * * * *

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).⁶ The
12 requirement that an offer be in writing is addressed in proposed subsection 68(i) and is
13 unchanged.⁷

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.⁸

18 ⁶ 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 ⁷ See *supra* Part III(B).

25 ⁸ 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.⁹

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

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

23 ¹⁰ 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),¹¹ 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,”¹² 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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¹¹ See *supra* Part III(B).

¹² *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.**

3 * * * *

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.¹³

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.¹⁴ At present, the Nevada Supreme Court will construe any ambiguity against

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

18 ¹⁴ 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,¹⁵ but clarity and predictability will be greatly enhanced on this important and
2 recurring issue if the rule explicitly addresses the topic.¹⁶

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.¹⁷

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

13 ¹⁶ “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 ¹⁷ *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).

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.¹⁹ Moreover, this also makes explicit that an
7 offer may be made with reference to both Rule 68 and NRS § 17.115.²⁰ 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 68.²¹

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

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

22 ²¹ *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.²² This makes reference to an exception that is recognized in Arizona and is discussed below under proposed subdivision 68(f)(2).²³

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

1 **RULE 68. OFFERS OF JUDGMENT**

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

3 * * * *

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 68.²⁴ 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.²⁵ Further, where additional material

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21 ²⁴ 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 ²⁵ 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."²⁶ 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).²⁷

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

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

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

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.”²⁸ 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 ²⁸ *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 § 17.115.²⁹

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22 ²⁹ *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.**

3 * * * *

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.³⁰ 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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³⁰ *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.³¹

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23 . . .

21 ³¹ 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.**

3 * * * *

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

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

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

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

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.³⁴ 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 valid³⁵ –
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

19

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

21 ³⁵ 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.³⁶ No
3 prejudgment interest will be awarded for such an indeterminate verdict,³⁷ 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.³⁸

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

9
10 ³⁶ NEV. REV. STAT. § 17.130 (2005).

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

12 ³⁸ 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.

³⁹ *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.⁴⁰ Of course, an offeror can also avoid the application of this rule by serving an offer
18 that precludes an award of interest.

19
20 ⁴⁰ 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,”⁴¹ 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 § 17.130.⁴²

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

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

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

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.

27 ...

28 ...

1 **RULE 68. OFFERS OF JUDGMENT**

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

3 * * * *

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.⁴³ 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.⁴⁴ Thus, this provision establishes that a judgment
14 will have the effect of a claim preclusion,⁴⁵ and not issue preclusion, between the parties.

15 . . .

16 ⁴³ 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 ⁴⁴ See *Clark v. Columbia/HCA Info. Servs., Inc.*, 25 P.3d 215, 224 (Nev. 2001).

19 ⁴⁵ “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,⁴⁶ it would appear that the
2005 amendment to Rule 6(a) does not apply to that computation. However, the amendment
does appear to apply to the calculation of the period within which a timely acceptance may
be made,⁴⁷ and for when an offer is deemed rejected if not accepted.⁴⁸ Thus, the bare text of

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

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

23 ⁴⁸ 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.⁴⁹ Of course, an expansion of
12

13 ⁴⁹ *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).⁵⁰ 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.

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 ⁵⁰ 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).⁵¹ 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

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

23 ⁵³ *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;⁵⁴ 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;⁵⁵ the offeree is entitled not to be rushed into
16 a hasty decision.⁵⁶ 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.⁵⁷

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

20 ⁵⁵ *Id.* at 61.

21 ⁵⁶ *Id.*

22 ⁵⁷ *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)).

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RULE 68. OFFERS OF JUDGMENT

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

* * * *

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

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

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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.⁵⁸

22 ⁵⁸ *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,⁵⁹ 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' fees⁶⁰ and a *mandatory* award of

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

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

1 litigation costs.⁶¹ 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,⁶² and with the overwhelming majority of jurisdictions,⁶³ and would punish the
7
8 under NEV. REV. STAT. § 108.237 (2005).

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

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

11 ⁶³ 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
4

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.⁶⁴
24 Inasmuch as this Petition argues that the penalty should be reflective of the litigation
25 expenses incurred as a result of the offeree’s rejection, it asserts that the penalties should not
26 include expert witness fees that were incurred before the service of the offer.

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

30 ⁶⁴ NEV. REV. STAT. § 17.115 (2005).

1 deducted from the *attorney's* fee.⁶⁵ 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.⁶⁶ 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”).⁶⁷

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 ⁶⁵ 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 ⁶⁶ *Final Committee Notes and Proposed Revised Rule 68, IN THE MATTER OF THE REPEAL*
OF NEVADA RULE OF CIVIL PROCEDURE 68, ADKT 151 (Mar. 25, 1998).

22 ⁶⁷ 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.

* * * *

(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.**

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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.⁶⁸ 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.⁶⁹

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

14 ⁶⁸ 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 ⁶⁹ *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).

⁷⁰ 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.⁷¹ 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.⁷² 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 ⁷¹ See *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983) (stating that Rule 68 is not
intended to force plaintiffs unfairly to forego legitimate claims).

22 ⁷² 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.⁷³ Instead, the offeree may be the prevailing party even though the offer of judgment penalties will apply against the offeree.⁷⁴

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

⁷⁴ *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.⁷⁵

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

30 ⁷⁵ 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 prejudgment 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.⁷⁶ 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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22 ⁷⁶ *Id.* at 1033 n.39.

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

* * * *

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

This 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.⁷⁷

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

* * * *

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

This 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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⁷⁷ 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.]~~⁷⁸

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

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RULE 68. OFFERS OF JUDGMENT

(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.

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

RULE 68. OFFERS OF JUDGMENT

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

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

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

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⁷⁹ *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.

7
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-
captioned action. This apportioned offer of judgment is not conditioned upon the
acceptance of all plaintiffs.

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

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

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

22 **Form 38. Lump-Sum Joint Unapportioned Offer of Judgment Under Rule 68 to**
23 **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.

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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**
2 **Easement.**

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

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

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

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

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

21 Following acceptance, the plaintiff may seek accrued interest, costs and attorneys'
22 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
