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SHOULD EVIDENCE OF SETTLEMENT NEGOTIATIONS AFFECT ATTORNEYS' FEES AWARDS?

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INTRODUCTION

In October 2012, the U.S. Court of Appeals for the First Circuit held that a district court erred by reducing a prevailing plaintiff's requested attorneys' fees based on evidence of settlement negotiations in which the plaintiff rejected a settlement offer that far exceeded what the plaintiff was awarded at trial.[1] This created a circuit split, breaking from the precedent established by the Third, Fourth, Seventh, Eighth, and Ninth Circuits. These courts had approved district courts' consideration of settlement negotiations as part of their assessments of the degrees of success obtained—a key factor in adjustments of attorneys' fees awards calculated under the lodestar method.[2]

This circuit split creates a substantial inconsistency across the six circuits listed above and enhances uncertainty in the jurisdictions that have not yet addressed the issue. And, although procedural issues related to attorneys' fees might not capture the public's imagination, they have been recognized as an important part of the tactical terrain of everyday litigation.[3] Accordingly, it is reasonable to project that, if petitioned, the Supreme Court might grant certiorari in the First Circuit case or another case presenting similar issues.

This Article begins by providing a brief background on the "American Rule," fee-shifting statutes, the general principles and processes used to calculate attorneys' fees awards under the fee-shifting statues, and a description of Federal Rule of Civil Procedure 68. Next, the Article surveys the holdings in the six cases that have addressed whether a district court may consider evidence of settlement negotiations when determining an award of attorneys' fees. The Article then discusses issues with these courts' analyses, assessing whether evidence of settlement negotiations is inadmissible pursuant to Federal Rule of Evidence 408, the extent to which such evidence is reasonably probative of the amount truly sought by

1. Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150 (1st Cir. 2012).

2. *See* Ingram v. Oroudjian, 647 F.3d 925, 927 (9th Cir. 2011); Lohman v. Duryea Borough, 574 F.3d 163 (3d Cir. 2009); Parke v. First Reliance Standard Life Ins. Co., 368 F.3d 999 (8th Cir. 2004); Moriarty v. Svec, 233 F.3d 955 (7th Cir. 2000); Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1337 (4th Cir. 1996). The Sixth Circuit also addressed this question prior to the publication of this Article, but the printing schedule of this Issue did not permit a full discussion of this opinion. McKelvey v. Sec'y of U.S. Army, No. 13-2427, 2014 WL 4637754, at *6 (6th Cir. Sept. 18, 2014).

3. *See supra* note 2; *see also* Taniguchi v. Kan Pacific Saipan, Ltd., 132 S. Ct. 1997 (2012) (addressing whether the costs that may be awarded to prevailing parties under 28 U.S.C. § 1920 includes the cost of translating documents).

the plaintiff, and the policy ramifications related to either permitting or prohibiting district courts from considering such evidence.

The Article argues that the First Circuit's position is problematic because it relies heavily on an attenuated and implicit negative implication of Rule 68 and ignores the empirical research that reveals endemic agency issues in the attorney-client relationship. But the Article also contends that, rather than adopting a prophylactic rule aimed at discouraging lawyers from counseling their clients against settlement in the hopes of accruing additional fees, the better path is to use either monetary sanctions or referrals to state bar agencies upon a finding of misconduct in specific cases.

I.
BACKGROUND

A. The American Rule and Fee-Shifting Statutes

The American Rule requires parties to pay their own attorneys' fees in the usual course of civil litigation.[4] This stands in contrast to the practice in England, where for centuries courts have been authorized to award costs, including attorneys' fees, to the prevailing party.[5] But there are more than 150 federal statutes that permit the award of attorneys' fees, most predicated on the party achieving some degree of success.[6] These statutes cover a variety of areas, including consumer credit, copyright, and environmental law.[7] Statutes pertaining to the enforcement of civil rights frequently permit the award of reasonable attorneys' fees to prevailing parties and are some of the most utilized sources of authority for fee-shifting awards.[8] The goal of fee awards in civil rights cases is to ensure that competent counsel is available while not producing windfalls to the attorneys.[9] This rationale also generally applies when fee-shifting is authorized in cases involving the vindication of other statutory or constitutional rights.[10] In other contexts, such as when a litigant has acted in bad faith by unreasonably removing a case to federal court,

4. *See* Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

5. *Id.*

6. *See* Ruckelshaus v. Sierra Club, 463 U.S. 680, 684 (1983).

7. *See* Michael Kao, *Calculating Lawyers' Fees: Theory and Reality*, 51 UCLA L. REV. 825, 827 (2004).

8. *Id.* at 827–28.

9. *See* S. REP. NO. 94-1011, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913.

10. *See generally* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 735 (1987) (Blackmun, J., dissenting).

the goal of the fee awards is to punish and deter unethical conduct.[11]

B. Calculating Attorneys' Fees Awards

Most courts use the lodestar method to determine a reasonable attorneys' fee award.[12] In its basic form, the court determines a reasonable hourly rate and multiplies this figure by the number of hours reasonably expended by the attorney to derive a lodestar amount.[13] This amount generally carries a presumption of reasonableness.[14] But the lodestar may be adjusted downward or upward based on a variety of factors such as the novelty and difficulty of the questions, the skill necessary to perform the legal service, whether the fee is fixed or contingent, and the result obtained.[15] This final factor—the degree of success obtained—is the most important factor and is measured by comparing the relief sought and the relief awarded.[16]

C. Federal Rule of Civil Procedure 68

Federal Rule of Civil Procedure 68 provides a procedural mechanism by which defendants may constrain costs. The purpose of the rule is to encourage settlement.[17] Pursuant to the rule, at least fourteen days before the trial, a defendant may serve an "offer to allow judgment on specified terms, with the costs then accrued."[18] The opposing party has fourteen days to accept this offer by serving a written notice of acceptance.[19] If the opposing party does not accept the offer, it is considered withdrawn but does not preclude a later offer.[20] Evidence of an unaccepted offer is only admissible in a proceeding to determine costs.[21] If the judgment that the offeree finally obtains is less favorable than the unaccepted

11. *See, e.g.*, Martin v. Franklin Capital Corp., 546 U.S. 132, 140–41 (2005); Chambers v. NASCO, Inc., 501 U.S. 32, 53–54 (1991).

12. Kao, *supra* note 8, at 828–29.

13. *Id.* at 829.

14. Blum v. Stenson, 465 U.S. 886, 897 (1984).

15. *See* Hensley v. Eckerhart, 461 U.S. 424, 434 & n.9 (1983) (noting that the district court may consider the factors set forth in Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717–19 (5th Cir. 1974)).

16. *See id.* at 436; City of Riverside v. Rivera, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment).

17. Delta Air Lines, Inc. v. August, 450 U.S. 346, 352 (1981).

18. FED. R. CIV. P. 68(a).

19. *Id.*

20. FED. R. CIV. P. 68(b).

21. *Id.*

offer, the opposing party must pay the costs incurred after the offer was made.[22] If the underlying statute includes attorneys' fees as part of its definition of "costs," then attorneys' fees are included in Rule 68's post-offer costs.[23]

D. Circuit Cases Evaluating Whether Evidence of Settlement Negotiations Should Affect Attorneys' Fees Awards

1. Fourth Circuit: *Sheppard v. Riverview Nursing Center, Inc.*

In *Sheppard v. Riverview Nursing Center, Inc.*, the Fourth Circuit held that the district court failed to appreciate its full discretion regarding its award of attorneys' fees and remanded the case for the district court's reconsideration.[24] In *Sheppard*, the plaintiff received $40,000 in attorneys' fees after the district court granted her declaratory relief in a mixed-motive employment discrimination claim.[25] In its ruling, the district court rejected the defendant's argument that Rule 68 prohibited the plaintiff from recovering fees incurred after its pre-trial settlement offer of $5,000, which had been rejected by the plaintiff.[26]

On appeal, the Fourth Circuit held that Rule 68 did not apply but that "a court may consider a plaintiff's rejection of a settlement offer as one of several factors generally informing its discretionary inquiry" under the applicable fee-shifting provision.[27] The Fourth Circuit observed that, pursuant to the Supreme Court's guidance in *Farrar v. Hobby*,[28] the district court's determination regarding the appropriate amount of fees should have considered both the plaintiff's degree of success and the public purposes served by the litigation.[29] The Fourth Circuit asserted that "refusing a reasonable offer of settlement promotes few public interests when the plaintiff ultimately receives a less favorable recovery after trial."[30] The Fourth Circuit ultimately remanded the case for reconsideration in accordance with the principles laid out in its opinion.[31]

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22. FED. R. CIV. P. 68(d).
23. *See* Marek v. Chesny, 473 U.S. 1, 9 (1985).
24. 88 F.3d 1332, 1333–34 (4th Cir. 1996).
25. *Id.* at 1334.
26. *Id.* at 1334–35.
27. *Id.* at 1337.
28. 506 U.S. 103 (1992).
29. *Sheppard*, 88 F.3d at 1337.
30. *Id.*
31. *Id.* at 1339.

2. Seventh Circuit: *Moriarty v. Svec*

In *Moriarty v. Svec*, the Seventh Circuit held that a district court must consider a substantial settlement offer in determining whether to adjust an award of attorneys' fees calculated under the lodestar method.[32] The plaintiff—the trustee of several pension funds—sought delinquent Employee Retirement Income Security Act (ERISA) contributions totaling about $50,000.[33] Before the matter proceeded to trial, the defendant made a settlement offer of $43,000.[34] The plaintiff's ultimate recovery was significantly less than the offer, but the plaintiff was still awarded a substantial amount in attorneys' fees.[35] The Seventh Circuit remanded the matter to the district court because its order awarding attorneys' fees did not mention the settlement offer.[36]

In support of its holding that a district court must consider a substantial settlement offer in determining whether to adjust an award of attorneys' fees calculated under the lodestar method, the Seventh Circuit cited to *Sheppard* and additionally reasoned that "attorney's fees accumulated after a party rejects a substantial offer provide minimal benefit to the prevailing party, and thus a reasonable attorney's fee may be less than the lodestar calculation."[37] The Seventh Circuit confirmed that the district court may choose to award no fees incurred after the settlement offer but that it need not reduce the lodestar at all.[38]

3. Eighth Circuit: *Parke v. First Reliance Standard Life Ins. Co.*

In *Parke v. First Reliance Standard Life Ins. Co.*, the plaintiff succeeded on an ERISA benefits claim, recovering less than $700 in damages and over $90,000 in attorneys' fees.[39] Prior to trial, the defendant offered the plaintiff $25,000 in settlement, but this was rejected.[40] In its determination of the fee award, the district court stated that it could consider the rejected settlement but, ultimately, granted the plaintiff almost all of the requested attorneys' fees.[41]

32. 233 F.3d 955, 967 (7th Cir. 2000).
33. *Id.* at 960.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 960 (citing Marek v. Chesny, 473 U.S. 1, 11 (1985)).
38. *Moriarty*, 233 F.3d at 967.
39. 368 F.3d 999, 1009–10 (8th Cir. 2004).
40. *Id.* at 1012.
41. *Id.* at 1012; *see also* Parke v. First Reliance Standard Life Ins. Co., No. 99-cv-1039, 2003 WL 131731, at *3–4 (D. Minn. Jan. 8, 2003) (citing *Moriarty*, 233 F.3d 955 and Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332 (4th Cir. 1996)).

Without specifically discussing this issue, the Eighth Circuit affirmed the district court's attorneys' fee award with one exception that is not relevant here.[42]

4. Third Circuit: *Lohman v. Duryea Borough*

In *Lohman v. Duryea Borough*, the Third Circuit held that the district court did not commit reversible error by considering the plaintiff's rejection of a substantial settlement offer when determining an award of attorneys' fees.[43] In the district court proceeding, the plaintiff prevailed on a wrongful discharge action, receiving approximately $12,000 in lost wages and nominal damages.[44] Using the lodestar method, the district court arrived at a product of $63,000 for the plaintiff's attorneys' fees.[45] The district court then reduced the award to $30,000.[46] The district court reduced the lodestar, in part, because the plaintiff had rejected a $75,000 settlement offer and the district court viewed this as probative of the level of the plaintiff's ultimate success.[47]

The Third Circuit agreed with the district court that Federal Rule of Evidence 408 did not bar the district court's consideration of settlement negotiations in its determination of the attorneys' fees award because Rule 408 only excludes such evidence when it goes to the validity of the claim.[48] The Third Circuit then asserted that settlement negotiations might be an indicator of the measure of success achieved by a plaintiff and that such factual determinations are best left to the discretion of the district court.[49]

The Third Circuit then turned to the plaintiff-appellant's arguments. First, the Third Circuit rejected the plaintiff-appellant's argument that permitting the use of evidence from settlement negotiations to reduce attorneys' fees went against the public policy of encouraging civil rights litigation because it would penalize civil rights attorneys who achieve only partial success.[50] The Third Cir-

42. *Parke*, 368 F.3d at 1012–13. The Eighth Circuit reversed the district court on part of the attorneys' fee award, holding that work done for pre-litigation administrative hearings could not be included as part of the fee.

43. 574 F.3d 163, 168–69 (3d Cir. 2009).

44. *Id.* at 164–65.

45. *Id.* at 166.

46. *Id.*

47. *Id.* at 166.

48. *Id.* at 167.

49. *Lohman*, 574 F.3d at 167–68.

50. *Id.* at 168.

cuit observed that such reductions were well established and that no exception had been made for fee awards in civil rights cases.[51]

Next, the Third Circuit stated that permitting settlement negotiations to be considered would not hamper such discussions, but instead would "encourage reasonable and realistic settlement negotiations."[52] The Third Circuit's ostensible reasoning was that the settlement negotiations were only being used for the accepted purposes of discerning what the plaintiff sought to achieve by litigating.[53]

The Third Circuit also asserted that the existence of Rule 68 did not preclude the district court from considering informal negotiations for the unrelated purpose of determining the extent of relief sought by a plaintiff.[54] In a footnote, the Third Circuit distinguished several cases relied upon by the plaintiff-appellant, finding that they were factually distinguishable and did not set forth an applicable categorical rule.[55] The Third Circuit also noted that, in the case before it, the district court did not deny the plaintiff all fees and costs incurred after he rejected the settlement offer but merely reduced the fee award in part because the plaintiff was ultimately awarded substantially less than he sought.[56]

Finally, the Third Circuit noted that its holding permitted district courts to consider settlement negotiations when measuring success but did not require any reduction.[57]

5. Ninth Circuit: *Ingram v. Oroudjian*

In *Ingram v. Oroudjian*, the Ninth Circuit held that the district court did not err by considering a rejected settlement offer when determining an award of attorneys' fees.[58] The district court had encouraged the parties to settle.[59] The plaintiffs opened with a demand of $425,000.[60] The case later settled for a total of $32,000.[61] The plaintiffs sought almost $90,000 in attorneys' fees.[62] The dis-

51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Lohman*, 574 F.3d at 168 n.4.
56. *Id.* at 168–89.
57. *Id.* at 169.
58. 647 F.3d 925, 927 (9th Cir. 2011).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*

trict court awarded approximately $30,000.[63] The plaintiffs argued in part that the district court should not have considered the settlement proceedings.[64] The Ninth Circuit rejected this argument based on its agreement with the reasoning of the Third Circuit in *Lohman* that the settlement proceedings were probative as to the ultimate success achieved.[65]

6. First Circuit: *Diaz v. Jiten Hotel Management, Inc.*

In *Diaz v. Jiten Hotel Management, Inc.*, the First Circuit held that the district court erred by reducing a prevailing plaintiff's requested attorneys' fees from $44,766 to $25,000 based on the plaintiff's rejection of a pre-trial settlement offer of $75,000 and the jury's subsequent award of only $7,650 in compensatory damages.[66] The First Circuit observed that the district court disclaimed any indication of impropriety by the plaintiff's counsel, but nevertheless assumed that there was "a perverse incentive for attorneys to encourage clients to reject reasonable offers and proceed to trial to earn more in fees."[67]

The First Circuit began by asserting that a contingent fee arrangement does not cap the amount an attorney may recover under fee-shifting statutes.[68] It then stated that the inherent uncertainty in taking a case to trial creates proper incentives for civil rights attorneys to encourage their clients to take reasonable settlement offers because the suit might fail and the attorney would then be ineligible for the recovery of any fees at all.[69] The First Circuit also asserted that, contrary to its statement regarding the lack of indicia of impropriety, the district court implicitly assumed that the attorney was not concerned with violating her ethical duty, which requires that the plaintiff (and not her attorney) make the ultimate settlement decision.[70]

Finally, the First Circuit noted that Rule 68 provides a mechanism by which a defendant can contain fees and costs through a reasonable settlement offer.[71] The First Circuit cited precedent from its jurisdiction that a "garden-variety settlement offer made

63. *Id.*
64. *Ingram*, 647 F.3d at 927.
65. *Id.*
66. 704 F.3d 150, 155 (1st Cir. 2012).
67. *Id.* at 154.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*

without resort to Rule 68 affords the offeror no similar protection" and concluded that the defendant could not use an informal offer as a sword.[72]

II.
DISCUSSION

A. Whether Federal Rule of Evidence 408 Prohibits Consideration of Settlement Negotiations when Determining Attorneys' Fees Awards

Given the existence of Federal Rule of Evidence 408, the first issue that must be addressed is whether evidence of settlement negotiations is even admissible for the purposes of evaluating the degree of success achieved in the litigation. In *Lohman*, the Third Circuit analyzed whether Federal Rule of Evidence 408 barred the district court's consideration of the settlement negotiations.[73] Rule 408 states:

> (a) Prohibited Uses. Evidence of the following is not admissible—on behalf of any party—either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> (1) furnishing, promising, or offering—or accepting, promising to accept, or offering to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or a statement made during compromise negotiations about the claim . . . .
>
> (b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The Third Circuit held that the evidence of the settlement negotiations was admissible and did "not offend the clear terms of Rule 408" because it was not being used to prove the validity of the claim.[74] The Third Circuit stated that the evidence of the settlement negotiations was instead a measure of the success of the suit.[75] The Third Circuit essentially characterized the use of this evidence

72. *Diaz*, 704 F.3d at 154 (quoting Spooner v. EEN, Inc., 644 F.3d 62, 71 (1st Cir. 2011)).

73. 574 F.3d at 167.

74. *Id.* at 167–68.

75. *Id.* at 168.

as going to the evaluation of the fee award, not the amount of the disputed claim.[76]

As part of this discussion, the Third Circuit noted that the district court had discussed several cases on the issue, including: *Alphonso v. Pitney Bowes, Inc.*,[77] which prohibited the introduction of evidence of settlement negotiations; and *EMI Catalogue Partnership v. CBS/Fox Co.*,[78] which allowed it.[79] The Third Circuit distinguished *Alphonso*, stating that the plaintiff there sought to introduce evidence of negotiations to demonstrate that the defendants believed that the plaintiff's claim had merit.[80]

The Third Circuit failed to explain how evidence of what the plaintiff sought (or what the defendant offered) does not go to proving the amount of the disputed claim. It appears to have relied on the fact that the district court was not using the information to determine the merits award to which the plaintiff was entitled.[81] Such an approach is consistent with the tendency of some courts to narrowly define the term "disputed" to allow in evidence of settlement negotiations.[82] But, ultimately, the determination of the attorneys' fees award is driven by resolving a dispute as to the true amount of the claim—as part of the court's assessment of the degree of success achieved by the plaintiff—that is being proved by evidence of settlement negotiations. Rule 408's prohibition on evidence of settlement negotiations is not, by its explicit terms, limited solely to the court's calculation of the merits award. Instead, Rule 408 simply prohibits evidence of settlement negotiations to prove the amount of a disputed claim, without reference to any specific context. This stands in contrast to the explicit provision of Federal Rule of Civil Procedure 68, which provides that an unaccepted offer of judgment is not admissible *except* in a proceeding to determine costs.[83]

The Third Circuit's attempt to distinguish the situation before it from that in *Alphonso* is unconvincing. In *Alphonso*, the court already had determined that the plaintiff's claim had no basis (i.e., the merits of the claim were no longer at issue).[84] Instead, the ques-

76. *Id.* at 167–68.

77. 356 F. Supp. 2d 442 (D.N.J. 2005).

78. No. 86-cv-1149, 1996 WL 280813 (S.D.N.Y. May 24, 1996).

79. *Lohman*, 574 F.3d at 165.

80. *Id.* at 167.

81. *Id.* at 167–68; *see also EMI Catalogue P'ship*, 1996 WL 280813, at *2.

82. *See generally* Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 966 (1988).

83. FED. R. CIV. P. 68(b).

84. *Alphonso v. Pitney Bowes, Inc.*, 356 F. Supp. 2d 442, 445 (D.N.J. 2005).

tion was whether the defendants were entitled to attorneys' fees pursuant to 28 U.S.C. § 1927, which permits the court to order an attorney who unreasonably and vexatiously multiplies the litigation to personally satisfy the excess costs, expenses, and attorneys' fees reasonably incurred as a result of the misconduct.[85] The plaintiff sought to introduce evidence that the defendants made a settlement offer, arguing that the offer undermined the defendants' assertions that the plaintiff's damage claims were frivolous and vexatious.[86] The district court concluded that, under Rule 408, it was improper for the plaintiff to introduce this evidence to demonstrate the validity of the plaintiff's claim—even though the merits of the claim had already been determined by the jury and the court was being asked to assess the evidence of the merits only to see if attorneys' fees were warranted.[87]

On the other hand, the Ninth Circuit has approved consideration of evidence of settlement negotiations in determining attorneys' fees too.[88] But, even there, the Ninth Circuit noted that courts generally refrain from referencing proposed settlement agreements and that, in the case before it, both parties wished for the evidence to be considered.[89]

While evidence of settlement negotiations is not obviously admissible pursuant to Rule 408, only the Third Circuit has addressed this question directly. Given the existing case law that implicitly approves the use of the evidence, the questions raised above cannot, as a pragmatic matter, resolve the question as to whether district courts should consider evidence of settlement negotiations when calculating an attorneys' fees award. Accordingly, additional analysis is warranted to assess the propriety of a court's consideration of evidence of settlement negotiations as part of its attorneys' fees determinations.

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85. *Id.*

86. *Id.* at 447 n.4.

87. *Id.*

88. *See* McCown v. City of Fontana, 565 F.3d 1097, 1104 n.4 (9th Cir. 2009); *see also* Ferraro v. Kelley, No. 08-cv-11065, 2011 WL 576074, at *8 (D. Mass. Feb. 8, 2011).

89. *McCown*, 565 F.3d at 1105 n.4; *see also* Van Asdale v. Int'l Game, Tech., No. 3:04-cv-00703, 2011 WL 2118637, at *6 (D. Nev. May 24, 2011).

B. The Probative Value of Plaintiffs' Settlement Demands and Rejections of Defendants' Settlement Offers as to the Degree of Success Achieved

The circuit courts that permit consideration of evidence of settlement negotiations as part of the calculation of attorneys' fees generally reason that a plaintiff's settlement demand or a plaintiff's rejection of a defendant's settlement offer is relevant to assessing the degree of success achieved in the litigation.[90] (The First Circuit, which does not permit consideration of such evidence, did not address whether the evidence was relevant to this determination.[91]) The approach set forth in *Sheppard*, *Moriarty*, *Lohman*, and *Ingram* follows from the discussion in *Farrar* in which the Supreme Court noted that the degree of success achieved in a lawsuit is evaluated by comparing the amount of damages awarded to the amount sought.[92]

But it is not obvious that evidence of settlement negotiations is highly probative as to the amount sought by a plaintiff. As many courts have acknowledged, an early settlement demand might be mere puffery and might not accurately reflect the true amount sought in the litigation.[93] This issue often arises in the context of federal jurisdiction determinations where some courts have re-

90. *See* Ingram v. Oroudjian, 647 F.3d 925, 927 (9th Cir. 2011); Lohman v. Duryea Borough, 574 F.3d 163, 167–68 (3d Cir. 2009); Moriary v. Svec, 233 F.3d 955, 967 (7th Cir. 2000); Sheppard v. Riverview Nursing Ctr., Inc., 88 F.3d 1332, 1337 (4th Cir. 1996).

91. Diaz v. Jiten Hotel Mgmt., Inc., 704 F.3d 150 (1st Cir. 2012).

92. 506 U.S. at 114 (quoting City of Riverside v. Rivera, 477 U.S. 561, 585 (1986) (Powell, J., concurring in judgment)).

93. *See, e.g.*, Young v. Am. Cas. Co., 416 F.2d 906, 910–11 (2d Cir. 1969) ("The initial demand of plaintiff's counsel often will be as far removed from the actual figure acceptable in settlement as the *ad damnum* in the complaint is removed from the initial settlement demand, especially in a personal injury action. It is a matter of common knowledge that it is a rare case where exploration of the possibilities of settlement, beyond the mere receipt of the plaintiff's demand, will not result in some substantial reduction of the amount."); *see also* Laducer v. Dish Network Serv., L.L.C., 691 F. Supp. 2d 1042, 1045 (D.N.D. 2010) ("The early settlement demand of $175,000 is standard puffery and posturing at best. Such an unreasonable demand does not establish by a preponderance of the evidence that the amount-in-controversy exceeds $75,000, particularly when one considers that the *maximum* recoverable damages under North Dakota law for a claim of conversion and consumer fraud in this case would be in the range of $1,000 plus reasonable costs and attorney's fees." (emphasis in original)); Randall v. Chevron U.S.A., Inc., No. 89-cv-4346, 1992 WL 25707, at *1 (E.D. La. Jan. 28, 1992) ("[A]lthough plaintiffs' complaint sought damages well in excess of the judgment ultimately awarded (10 million dollars as compared to 2 million dollars), plaintiffs' initial demand was, as most, not the amount sought.").

jected attempts by defendants to use a plaintiff's settlement demand as a basis for meeting the required amount-in-controversy threshold under 28 U.S.C. § 1332.[94] Treating settlement demands as truly reflective of the amount sought is particularly questionable given that some plaintiffs make settlement demands that exceed the amount sought in their complaints. For example, in *Sfirakis v. Allstate Insurance Company*, the complaint demanded judgment in an amount not to exceed $20,000.[95] After the filing of the complaint, the plaintiff presented a letter to the defendant stating that the plaintiff would not settle the case unless the defendant paid the plaintiff $300,000.[96] The district court determined that where the complaint unequivocally stated that damages did not exceed $20,000 and was filed in a court of limited jurisdiction, the plaintiff's demand letter could not be considered any more than "posturing by counsel seeking to stake out a position for settlement purposes."[97] On the other hand, the limited probative value primarily goes to the weight that a district court might assign the evidence of settlement negotiations, not whether such evidence is relevant and should be considered.[98]

Additionally, as discussed in *Fletcher v. City of Fort Wayne*,[99] there are policy reasons why courts might choose to treat settlement demands as accurately reflecting the amounts sought, even if it is clear that they are exaggerated. In *Fletcher*, one plaintiff demanded $150,000 to settle his claim and the other plaintiff demanded $30,000.[100] The first plaintiff ultimately accepted a Rule 68 settlement offer of $5,000 and the second plaintiff accepted a Rule 68

94. *See, e.g.*, Golden v. Dodge-Markham Co., 1 F. Supp. 2d 1360, 1364–65 (M.D. Fla. 1998) ("However, Defendant has not persuaded this Court that Plaintiff's settlement demand was an honest assessment of damages. Therefore, this Court will not consider Plaintiff's settlement demand as evidence the amount in controversy is satisfied." (citations omitted)); Saunders v. Rider, 805 F. Supp. 17, 19 (E.D. La. 1992) ("Plainly, the mere assertions of the defendants as to their estimates of the value of the plaintiff's claim can not [sic] satisfy a legal certainty standard of proof [for purposes of determining whether the damages meet § 1332's monetary threshold]."); *cf.* Broderick v. Dellasandro, 859 F. Supp. 176, 179 (E.D. Pa. 1994).

95. No. 91-cv-3092, 1991 WL 147482, at *1 (E.D. Pa. July 24, 1991).

96. *Id.*

97. *Id.*, at *3.

98. *See, e.g.*, Beardsworth v. Bd. of Comm'r, No. 95-cv-2868, 1995 WL 617585, at *3 (E.D. La. Oct. 18, 1995) (attaching "very little weight" to letters written as part of preliminary settlement discussions in a discussion of whether the monetary threshold required for diversity jurisdiction was met).

99. 162 F.3d 975 (7th Cir. 1998).

100. *Id.* at 976.

settlement offer of $2,500.[101] The plaintiffs then sought attorneys' fees as prevailing parties.[102] The district court denied the attorneys' fees requests because it found that the plaintiffs were not prevailing parties and had just received nuisance value settlements.[103] On appeal, the plaintiffs did not seriously challenge the district court's characterization of the settlements and effectively admitted that their initial demands were puffery.[104] While the case ultimately hinged on whether the plaintiffs were prevailing parties, the Seventh Circuit discussed the issues raised by the plaintiffs' changed positions, concluding that the court ultimately could only rely on the plaintiffs' initial demands as the amounts that they sought.[105] The Seventh Circuit further stated that this policy ensured that a plaintiff who revealed the extent of his or her injury and recovered in full received a benefit compared with a plaintiff who bluffs, which has the effect of encouraging candor and promoting settlement by enabling the parties to agree on the suit's true value.[106]

C. Policy Implications

1. Settlements

The most obvious policy implication of a rule regarding the consideration of settlement negotiations when determining whether to adjust an award of attorneys' fees calculated under the lodestar method is the rule's likely effect on the parties' willingness to engage in productive settlement negotiations.

Federal policy favors the voluntary settlement of civil disputes.[107] The primary reasons for this policy are avoiding the expense and delay of on-going litigation borne by the parties and the burdens of adjudicating the issue borne by the courts.[108] For better or worse, settlement is a necessary component of the litigation process, as it is unclear that the federal judiciary has the capacity to hear every case in full.[109]

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Fletcher*, 162 F.3d at 976–77.

106. *Id.* at 976.

107. *See* FED. R. CIV. P. 16(a)(5); FED. R. EVID. 408 advisory committee's note; Zurich Am. Ins. Co. v. Watts Indus., Inc., 417 F.3d 682, 689 (7th Cir. 2005) (noting "that the law favors out-of-court settlements . . . ").

108. *See* Pennwalt Corp. v. Plough, Inc., 676 F.2d 77, 80 (3d Cir. 1982).

109. *See* Reichenbach v. Smith, 528 F.2d 1072, 1074 (5th Cir. 1976).

It is generally accepted that ensuring the confidentiality of settlement negotiations promotes candor that ultimately leads to settlements.[110] And, thus, the First Circuit's prohibition on consideration of settlement demands and offers when determining whether to adjust an award of attorneys' fees calculated under the lodestar method arguably best promotes settlements because it removes a potential disincentive for the plaintiff to engage in robust discussions.[111] On the other hand, the rule that permits district courts to consider such evidence creates a strong incentive for plaintiffs to be honest about the true amount sought in the litigation, which might hasten settlement.[112]

An approach that might strike a balance between these competing concerns would be to allow district courts to consider only rejected settlement offers. This would ameliorate concerns that plaintiffs might balk at making settlement demands if they knew the district courts might use these demands to reduce their recovery of attorneys' fees in the event that the case did not settle and they ultimately prevailed. But it would also still encourage defendants to extend good -faith offers that would promote an honest dialogue in pursuit of settlement in that there is no reason to assume that a rejected settlement offer does not, at minimum, establish a lower bound to the plaintiff's true estimation of the value of his or her claims. This type of flexible approach is consistent with how courts have approached the introduction of evidence of settlement negotiations in other contexts.[113]

With that said, to the extent that such an approach resembles a less formal variation of the Rule 68 mechanism for constraining costs, it raises the question as to the role—if any—that Rule 68 should play in a court's determination as to whether to consider evidence of settlement negotiation when considering whether to adjust an attorneys' fee award.

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110. *See* FED. R. EVID. 408 advisory committee's note; *Zurich Am. Ins. Co.*, 417 F.3d at 689 (noting that "allowing offers of compromise to be used as admissions of liability might chill voluntary efforts at dispute resolution").

111. *Cf. Fletcher*, 162 F.3d at 976.

112. *Id.*

113. *See* McCown v. City of Fontana, 565 F.3d 1097, 1104 n.4 (9th Cir. 2009); *Zurich Am. Ins. Co.*, 417 F.3d at 689 ("In deciding whether Rule 408 should be applied to exclude evidence, courts must consider the spirit and purpose of the rule and decide whether the need for the settlement evidence outweighs the potentially chilling effect on future settlement negotiations.").

2. Interactions with Rule 68

Recall that, as part of its rationale for disapproving of the district court's consideration of the settlement negotiations in *Diaz*, the First Circuit distinguished informal offers from Rule 68 offers, noting that the rule provides a mechanism by which a defendant can contain fees and costs through a reasonable settlement offer.[114]

While not entirely rigid, Rule 68 articulates a formal incentive that cautions plaintiffs against rejecting reasonable settlement offers by barring recovery of costs incurred after a rejected settlement offer larger than the ultimate recovery and by making the plaintiffs liable for the post-offer costs incurred by the defendants.[115] On the other side of the ledger, the structural costs of Rule 68 offers to the defendants differ from those associated with informal settlement negotiations. For example, a Rule 68 offer is irrevocable during the statutory time period, even as it permits the plaintiff to make counteroffers.[116] Another difference is that a Rule 68 offer cannot be an offer to compromise but must be an offer of judgment.[117]

Accordingly, the First Circuit's reasoning in *Diaz* can be understood as being driven by the principle that the defendant must be bound by both the bitter and the sweet of Rule 68.[118] The further implication is that the First Circuit views the Rule 68 mechanisms as encouraging settlements and, thus, its special status must be honored.[119] But, as is described below, it is not clear that Rule 68 casts such a long shadow that it prevents district courts from viewing evidence of rejected informal settlement offers as warranting a reduction in fees.

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114. 704 F.3d 150, 154 (1st Cir. 2012).

115. FED. R. CIV. P. 68; *see also* August v. Delta Air Lines, Inc., 600 F.2d 699, 700 (7th Cir. 1979) (holding that an unreasonable Rule 68 offer does not mechanically result in the benefits of the rule).

116. *See* Richardson v. Nat'l R.R. Passenger Corp., 49 F.3d 760, 765 (D.C. Cir. 1995) ("[A] Rule 68 offer is simply not revocable during the 10-day period . . . unlike a normal contract offer, an offer of judgment under the Rule imposes certain consequences that can be costly for the plaintiff who declines the offer."); Pope v. Lil Abner's Corp., 92 F. Supp. 2d 1327, 1328 (S.D. Fla. 2000) (holding that a "counteroffer does not terminate the power to accept an irrevocable offer" in the context of a Rule 68 offer).

117. *See, e.g.*, Caraballo Cordero v. Banco Financiero de Puerto Rico, 208 F. Supp. 2d 185, 191 (D.P.R. 2002); Cox v. Brookshire Grocery Co., 919 F.2d 354, 358 (5th Cir. 1990).

118. 704 F.3d at 154.

119. *Id.*; *see also* Spooner v. EEN, Inc., 644 F.3d 62, 70–71 (1st Cir. 2011); Coutin v. Young & Rubicam P.R., Inc., 124 F.3d 331, 341 & n.8 (1st Cir. 1997).

In *Lohman*, the Third Circuit rejected the plaintiff's argument that the failure of the defendants to make a Rule 68 offer precluded the district court from considering settlement negotiations in determining the degree of success achieved in the matter.[120] The Third Circuit stated that it failed to see how the existence of Rule 68 "should preclude a district court from considering informal negotiations for the unrelated purpose of determining the extent of relief sought by a plaintiff."[121] In a footnote, the Third Circuit dealt cursorily with several cases involving Rule 68 arguments from other circuits, purporting to distinguish them on factual grounds.[122] In effect, the Third Circuit—similarly to how it treats the implications of Rule 408—takes it as self-evident that the attorneys' fees calculation is a different beast.

Likewise, in *Sheppard*, the Fourth Circuit explained that Rule 68 did not carry a negative implication that extended to the district court's ability, under the *Farrar* framework, to assess the degree of success of the litigation as part of its fees determination.[123] This made clear that the Fourth Circuit did not view an earlier Rule 68 case, *Clark v. Sims*,[124] as controlling in *Sheppard*. In *Clark*, the district court limited a prevailing party's fee award to attorney hours expended before an informal settlement offer that arguably exceeded the amount ultimately recovered.[125] The Fourth Circuit then held that the district court erred because the settlement offer did not meet the requirements of Rule 68 and, on remand, the district court could not use the settlement offer as a basis for limiting the plaintiffs' fees under the provisions of Rule 68.[126]

The Ninth Circuit's precedent parallels that of the Fourth Circuit. In *Berkla v. Corel Corp.*, the district court denied the plaintiff's motion for costs (not including fees, which were denied on state law grounds) based on its finding that the plaintiff had unnecessarily extended the litigation by rejecting the defendant's offer to settle the case for an amount far in excess of the ultimate recovery.[127] Reversing the lower court's decision, the Ninth Circuit agreed with the precedent from other circuits—including the Fourth Circuit's decision in *Clark*—to hold that "absent a Rule 68 offer of judgment,

120. 574 F.3d 163, 168 (3d Cir. 2009).
121. *Id.* at 168.
122. *Id.* at 168–69 n.4.
123. 88 F.3d 1332, 1337 (4th Cir. 1996).
124. 28 F.3d 420 (4th Cir. 1994).
125. *Id.* at 422–23.
126. *Id.* at 424.
127. 302 F.3d 909, 920–22 (9th Cir. 2002).

a plaintiff's failure to accept a settlement offer that turns out to be less than the amount recovered at trial is not a legitimate basis for denying an award of costs."[128] The Ninth Circuit explained that "[t]o hold otherwise would render Rule 68 largely meaningless."[129] In *Ingram*, the Ninth Circuit did not discuss either *Berkla* specifically or Rule 68 generally but, given the precedent parallels with the Fourth Circuit's *Clark* and *Sheppard*, it is reasonable to assume that the reasoning in *Sheppard* also applies in *Ingram*.

Moreover, it is not clear that Rule 68 removed the district courts' traditional equitable powers and discretion regarding fee awards after a plaintiff has rejected a settlement offer greater than the ultimate recovery.[130] Additionally, the conventional view that Rule 68's original purpose was to encourage settlements has been challenged.[131] With these factors in mind, there is even less support for the First Circuit's position that Rule 68's existence implicitly bars a defendant from presenting evidence of rejected settlement offers as a gauge of the success achieved by the plaintiff.

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128. *Id.* at 922.

129. *Id.*

130. *Compare* Sharpe v. Cureton, 319 F.3d 259, 276 (6th Cir. 2003) ("Both the district court, as well as this Court, are without equitable discretion to alter the effect of Rule 68."), *and* Jordan v. Time, Inc., 111 F.3d 102, 105 (11th Cir. 1997) ("The language contained in Rule 68 is mandatory; the district court does not have the discretion to rule otherwise."), *with* August v. Delta Air Lines, Inc., 600 F.2d 699, 701 (7th Cir. 1979), *and* Crutcher v. Joyce, 146 F.2d 518, 520–21 (10th Cir. 1945) (illustrating the general principle that, under the equitable powers of the court, a prevailing party could be denied costs after refusing an offer of settlement larger than the prevailing party's ultimate recovery).

131. *Compare* Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1562 (2008) (explaining that the original drafters of the Federal Rules of Civil Procedure "simply adopted the offer of judgment rule that existed in state codes" and "[i]nsofar as one can determine from the historical record, they were designed to prevent plaintiffs from imposing costs unfairly when the defendant offered what the plaintiff was entitled to receive from trial, and to enable defendants to avoid paying those costs when the plaintiff persisted with the suit"), *with* Jay Horowitz, *Rule 68: The Settlement Promotion Tool that Has Not Promoted Settlements*, 87 DENV. U. L. REV. 485, 485 (2010) ("Notwithstanding these facts, Rule 68 of the Federal Rules of Civil Procedure, uniformly recognized as a rule whose sole purpose is to serve the function of settlement promotion, refers on its face only to costs and not to attorney's fees [sic] Rule 68's focus in this regard is counter-intuitive.").

3. Attorney-Client Conflicts and the Judiciary's Role in Policing Unethical Lawyers

In *Diaz*, the First Circuit identified the district court's disavowed, but apparent, concern regarding the incentives for the plaintiff's counsel to encourage the plaintiff to reject a reasonable settlement offer.[132] In the lower court proceedings in *Diaz*, the plaintiff's counsel would have received approximately $25,000 if the plaintiff had accepted the defendant's settlement offer of $75,000, but after the trial the attorney stood to make much more than that while the plaintiff received only $7,650.[133] The district court explained that this situation—in which the attorney had a strong financial incentive to encourage her client to take the low value claim to trial instead of settling—had the "perverse effect of discouraging the private settlement of disputes, and the end result is yet more transfer of the benefits of litigation from the litigants to the lawyers."[134] While, in its next breath, the district court stated that it "expresses no opinion on the interactions . . . between" the lawyer and the plaintiff,[135] the district court's ultimate decision to consider the settlement negotiations reveals its overriding apprehension regarding the structural incentives for attorneys to prolong litigation in certain cases. The First Circuit rejected the district court's concern as a basis for considering the evidence of the rejected offer, noting that the decision to proceed to trial creates uncertainty because a failed suit might result in no fee recovery and professional ethics dictates that the plaintiff make the ultimate settlement decision.[136]

Of the six federal appellate cases addressing whether a district court may consider evidence of settlement negotiations in its determination of attorneys' fees, the opinion in *Diaz* is the only one to explicitly address the agency issues about which a district court might worry as it observes a case proceed to trial after a substantial settlement offer has been made. The First Circuit's approach in *Diaz* is consistent with the general principle that the judiciary may not apply sanctions without a finding of misconduct after a proceeding that gives the alleged wrongdoer an opportunity to present his or her defense.[137]

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132. 704 F.3d 150, 153 (1st Cir. 2012).

133. 822 F. Supp. 2d 74, 82 (D. Mass. 2011).

134. *Id.*

135. *Id.*

136. *Diaz*, 704 F.3d at 154.

137. *See* Roadway Express Inc. v. Piper, 447 U.S. 752, 767 (1980).

The main problem with the First Circuit's approach in *Diaz* is that it ignores the realities of the usual attorney-client relationship dynamic. Notwithstanding the professional ethics rules dictating that the plaintiff make the ultimate settlement decision, lawyers—not clients—often control the course of a case, including settlement decisions.[138] Illustrating this, a 1989 empirical study found that fifty-six percent of the polled litigants stated that they had "a little" or "not much" control over how their cases were handled.[139] Scholars have suggested different ways by which a lawyer might exert control over a case. For example, it has been suggested that an attorney might exploit the client's reliance on the attorney's expertise regarding the possible amount and certainty of an award.[140] Also, the lawyer might implicitly communicate that, if a client does not choose to accept a settlement offer, the lawyer might not persist with the utmost zeal.[141] Additionally, a lawyer might refuse to advance expert witness fees.[142]

Furthermore, the First Circuit's implicit reliance on the professional conduct rules is unpersuasive given the typical reluctance of federal courts to proactively investigate and police potential attorney misconduct.[143] Federal judges have an ethical obligation to take appropriate action if they have information that suggests a lawyer might have violated the applicable rules of professional conduct.[144] But scholars have noted that federal courts often focus only on attorney misconduct that impacts the judicial system because the judges do not view themselves as responsible for overseeing the legal profession.[145] More generally, judges often are reluctant to pursue potential misconduct because it might embarrass the attorney, harm the reputation of the reporting judge within the legal community by creating the impression that the judge is a snitch, or re-

138. *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 284–87 (1996); Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–97 (1989).

139. Hensler, *supra* note 138, at 95.

140. Brickman, *supra* note 138, at 286.

141. *Id.*

142. *Id.*

143. *See* Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537 (2009); Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View from the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1428, 1439–40, 1447 (2004); Leslie W. Abramson, *The Judge's Ethical Duty to Report Misconduct by Other Judges and Lawyers and Its Effect on Judicial Independence*, 25 HOFSTRA L. REV. 751, 779–80 (1997).

144. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(B)(5).

145. McMorrow, *supra* note 143, at 1439–40.

sult in lessened support from the bar for reelection or other appointments.[146]

It is possible that, in permitting consideration of evidence of settlement negotiations, the other circuits, influenced by a concern with agency issues like those voiced by the district court in *Diaz*, promulgated a prophylactic rule aimed at discouraging lawyers from counseling their clients against settlement in the hopes of accruing additional fees. But this approach is unnecessarily obtuse because it creates a broad rule regarding the consideration of evidence of settlement negotiations instead of simply proactively and directly addressing the agency issues that might exist between a party and its counsel.

III.
RECOMMENDATION

As it stands, there are issues with both sides of the circuit split over whether a district court may consider evidence of settlement negotiations when deciding whether to adjust an award of attorneys' fees calculated under the lodestar method.

The majority rule, which permits consideration of the evidence, does not provide a convincing rationale for ignoring Federal Rule of Evidence 408, which generally bars such evidence from being used to assess the merits of a case. Rule 408 sets up a quandary for the majority rule: if the evidence is used to assess the merits of the case, it is inadmissible, but if the evidence does not go to the merits of the case, it presumably is not truly probative of the parties' valuations and therefore cannot truly shed light on the degree of success achieved. Moreover, the majority rule potentially creates disincentives for the plaintiffs to engage in robust negotiations, which undercuts the policy behind Rule 408 and a wide body of case law.

In addition to the evidentiary issues, as discussed in the preceding section, the majority approach creates a broad rule that appears rooted in concerns about agency issues between lawyers and clients. Such a broad rule is unnecessary because district courts, if faced with a situation in which agency issues appear to exist, can directly address such issues either through referrals to the state bar, referrals to a settlement judge, or an order to show cause that gives the lawyers the opportunity to address the issue before the district court itself.

146. Greenbaum, *supra* note 143, at 545; Georgene Vairo, *Rule 11 and the Profession*, 67 FORDHAM L. REV. 589, 595 (1998); Abramson, *supra* note 143, at 779–80.

On the other hand, the minority rule ignores the practical reality that attorneys often control settlement decisions and might have financial incentives that differ from their clients.

The majority rule can be improved by allowing consideration of rejected settlement offers only, which hews closely to Federal Rule of Civil Procedure 68 without materially undercutting its purpose. When a party rejects a settlement offer, the logical inference is that the party values his or her case more highly than the offer. This is unlike the affirmative extension of an offer, which might be more geared towards anchoring the negotiations than providing a window into the party's true valuation of the case. Additionally, to the extent that there are concerns about the lawyers' roles in settlement negotiations, the district courts should address the issue directly, using either monetary sanctions or referrals to state bar agencies upon a procedurally sound finding of misconduct. This would bring to the fore the agency issues that appear to provide part of the rationale for the majority rule.

CONCLUSION

In sum, the stronger legal and policy arguments favor permitting a district court to consider a plaintiff's settlement demand or rejection of a substantial settlement offer that is greater than the ultimate relief achieved when deciding whether to adjust an award of attorneys' fees calculated under the lodestar method as part of the court's assessment of the degree of success obtained. But this majority rule can be improved by allowing consideration of rejected settlement offers only. Finally, while the First Circuit is wise to explicitly address the attorney-client agency issues at play, it appears to ignore the practical reality that attorneys often control settlement decisions and might have financial incentives that differ from their clients. And, though this should not lead courts to try to exert backchannel control over such attorneys through adjustments to requested fee awards, it is an important point to remember and suggests that courts should not shy away from directly addressing such issues as they arise with formal fact-finding and disciplinary actions.