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10 **IN THE SUPREME COURT**  
11 **STATE OF ARIZONA**

12 In the Matter of:

Supreme Court No. R-15-0004

13 **PETITION TO AMEND RULE 11,**  
14 **ARIZONA RULES OF CIVIL**  
15 **PROCEDURE**

16 **REPLY OF**  
17 **THE STATE BAR OF ARIZONA**

18 Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona submits this  
19 reply in support of its Petition no. R-15-0004 (“the Petition”), asking this Court to  
20 amend Rule 11 of the Arizona Rules of Civil Procedure (“Rule 11” or “Arizona’s  
21 Rule 11”). In particular, the State Bar replies to the comments of the Pima County  
22 Bar Association (“the PCBA Comment”) and the Arizona Chamber of Commerce  
23 (“the Chamber Comment”), and reaffirms its support for the Petition.

24 **Overview.** The comments split between the PCBA Comment’s aim to make  
25 Arizona’s Rule 11 less strict than it is presently (by making Rule 11 sanctions  
permissive instead of mandatory), and the Chamber Comment’s aim to make  
Arizona’s Rule 11 more strict (as by mandating broader sanctions for violations of

1 Rule 11). At first blush, that two significant stakeholders diverge in this particular  
2 way suggests to the State Bar that the original Petition struck an appropriate balance  
3 between competing considerations and perspectives in its original proposal.  
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5 **The PCBA Comment: “May” Instead of “Must.”** The State Bar  
6 appreciates the PCBA’s support for the remainder of the Petition, but respectfully  
7 differs with the PCBA’s one suggested divergence from the Petition – that the word  
8 “shall” in Rule 11 be replaced with “may” instead of “must” – for the following five  
9 reasons.  
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12 First, the PCBA’s proposal would constitute a greater change in current law  
13 than any it points to in the Petition. While the PCBA comment suggests that there  
14 is a significant divergence between the present direction in Rule 11 that violations  
15 “shall” be sanctioned and the proposed direction that violations “must” be  
16 sanctioned, the PCBA’s analysis does not take proper account of the remainder of  
17 Rule 11. In particular, the sanction to be imposed under proposed Rule 11(c) is  
18 merely an “appropriate sanction.” That language confers considerable discretion  
19 upon the Superior Court in fashioning a just remedy for an adjudicated Rule 11  
20 violation. That discretion, in turn, is stacked upon the Superior Court’s discretion  
21 under Rule 11(b) to adjudicate the Rule 11 violation (or not) in the first place. Given  
22 the hydraulic relationship between these different provisions, and the discretion they  
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1 confer upon the Superior Court, the State Bar’s view is that the move from “shall”  
2 to “must” would not effect a significant change in the adjudication and imposition  
3 of sanctions under Rule 11, and that the PCBA is incorrect in suggesting that it  
4 would.  
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6       Second, by contrast, the PCBA Comment would effect a significant change in  
7 the adjudication and imposition of sanctions under Rule 11, and one the State Bar  
8 respectfully suggests would not be desirable. For one thing, “shall” is closer to  
9 “must”, as just explained, while the permissive “may” the PCBA proposes diverges  
10 greatly. If that word is swapped into Rule 11(c), Rule 11 becomes an exercise of  
11 unconstrained discretion on the part of the Superior Court. Especially given the  
12 gravity of Rule 11 sanctions, it is particularly important that they be imposed in a  
13 uniform fashion permitting uniform review in the Court of Appeals. Making  
14 sanctions entirely discretionary does precisely the opposite, which is unjust.  
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18       Third, the other safeguards in the Petition’s proposed Rule 11 make the  
19 relaxation of the Rule the PCBA proposes unnecessary. Before any Rule 11 motion  
20 reaches a Superior Court, and thus before any possibility of sanction, the Petition’s  
21 proposed Rule 11 mandates a meet and confer, and written specification to the  
22 supposed offender of the grounds for the Rule 11 motion-to-be. This mechanism  
23 promotes cooperation and conciliation, and provides the nonmovant with the tools  
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1 and the opportunity to avoid any possibility of sanctions. It is simply too lenient to  
2 require written specification of a Rule 11 violation, a meet and confer about whether  
3 to withdraw or cure the Rule 11 violation, and then to have a Rule 11 violation  
4 adjudicated, only to have the Superior Court determine that literally nothing should  
5 be done about it.  
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8 Fourth, while the State Bar joins the PCBA in prizing access to justice, it does  
9 not agree that that important principle should be invoked to justify turning Rule 11  
10 into a mechanism that permits instead of mandates sanctions. For one thing, the  
11 plaintiff posited by the PCBA that might be chilled from litigating has the same  
12 opportunities to avoid sanctions as every other litigant. The suggestion that Rule 11  
13 sanctions should be made permissive to avoid sanctioning the frivolous or  
14 unwarranted filings of one class of litigants privileges that class of litigants in a way  
15 that is at odds with the very notion of rules. It is not a proper invocation of access  
16 to justice. While statutes create presumptions in favor of prevailing plaintiffs  
17 recovering their fees while prevailing defendants generally do not – as is the case in  
18 litigation under 42 U.S.C. § 1983 – those choices are best left to legislatures, as rule  
19 sets are not meant to pick winners in that way.  
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23 Fifth, if there is to be a move toward the major change from “shall” or “must”  
24 to the far-different “may,” then the State Bar suggests that such a change should be  
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1 sought by Petition in the first place, so that the entire legal community and all  
2 stakeholders have time and an opportunity to comment. The PCBA Comment is a  
3 clear and forceful expression of one disagreement with the Petition at bar. But in  
4 offering a counterproposal that deviates significantly from current law – especially  
5 toward the end of the comment period – the PCBA Comment inadvertently steps  
6 around the comment process, at least from the standpoint of bar members and  
7 stakeholders who did not have notice of such a counterproposal and who did not  
8 have a chance to comment on it. Thus, the State Bar respectfully suggests that, to  
9 the extent the PCBA Comment is accorded persuasive weight, it should be given  
10 effect (if at all) as an argument against “must,” and not an argument for “may” in  
11 Rule 11(c).  
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15 **The Chamber Comment: Suggesting a Stricter Rule 11.** As with the  
16 PCBA Comment, the State Bar appreciates the Chamber Comment’s support for  
17 aspects of the Petition. As with the PCBA Comment, the State Bar respectfully  
18 suggests that the Court not adopt the proposal in Chamber Comment, for six reasons.  
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20 First, much of the redline attached to the Chamber Comment seeks the  
21 adoption of the in-process draft of Rule 11 still being fashioned by this Court’s Task  
22 Force on the Arizona Rules of Civil Procedure. This Court established that Task  
23 Force in November 2014, with the objective that the Task Force consult stakeholders  
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1 and present a Petition to modify the Arizona Rules of Civil Procedure by January  
2 2016. See Administrative Order No. 2014-116. That Petition would then be subject  
3 to public comment and to this Court's review, presumably during the August 2016  
4 rules session. The Chamber's Comment recommending the adoption by this Court  
5 in August 2015 of the in-process drafts of the Task Force's proposed changes to Rule  
6 11 is not consistent with the process and timing set out by this Court in  
7 Administrative Order No. 2014-116. This is true because the Task Force has not yet  
8 arrived at a final draft of Rule 11, so that what the Comment now proposes may not  
9 be what the Task Force proposes in January 2016. The Chamber Comment's  
10 proposal is also inconsistent with the process set out by this Court because the Task  
11 Force has a publicly stated goal of seeking input from stakeholders (such as the  
12 Chamber) during the balance of this year, and if this Court were to adopt in August  
13 2015 the drafts the Task Force generated in Spring 2015, the process of public input  
14 before and after the Task Force's Petition would be truncated, reducing the input of  
15 stakeholders.

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20 Second, the State Bar respectfully disagrees with the proposed expansion of  
21 the mandate to sanction in this Comment's proposed Rule 11(c), because it  
22 undesirably limits trial court discretion. The Comment's proposal would require "a  
23 dismissal of the document, or dismissal of the count or counts that violate" Rule 11,  
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1 “unless the court” makes “findings of fact, supported by clear and convincing  
2 evidence, that show a manifest injustice would result.” This proposal unduly limits  
3 the Superior Court’s broad discretion in proposed Rule 11(c) to impose  
4 “appropriate” sanctions, which reflects by rule the wide discretion traditionally  
5 afforded courts in the exercise of their inherent authority. The proposal also forces  
6 the Superior Court, if it does not find the above-quoted sanctions appropriate, to  
7 make time-consuming findings fulfilling a high standard that the Superior Court  
8 should not have to make. Finally, as a matter of drafting, the State Bar does not  
9 believe the phrase “dismissal of the document” is sufficiently clear to provide  
10 guidance to the Superior Court.  
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14 Third, the Chamber Comment’s proposed revision of Rule 11(c) would effect  
15 a change in substantive law that the State Bar recommends against. That proposed  
16 revision concludes with the statement that “[o]n appeal, the court’s findings [of fact]  
17 are reviewed *de novo*,” which would effect a change in the general rule that findings  
18 of fact are reviewed for abuse of discretion, while legal conclusions are reviewed *de*  
19 *novo*. Additionally, the State Bar does not believe that a proposed standard of  
20 review, a matter for the Court of Appeals, can properly be housed in the Arizona  
21 Rules of Civil Procedure.  
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1           Fourth, the Chamber Comment’s proposed Rule 11(b)(5) is not necessary.  
2 The Petition maintains the core of Rule 11, which requires that signing a document  
3 certifies that contentions have evidentiary support or will likely have support (Rule  
4 11(b)(3)), and that denials are warranted or are reasonably based on a belief or lack  
5 of information (Rule 11(b)(4)). Those elements of the core of Rule 11 require  
6 reasonable pre-signing investigation of matters averred. The Chamber Comment’s  
7 insertion of a requirement that if a signer inquire into facts if the signer believed  
8 representations onto which they signed were false or insufficient (the Chamber  
9 Comment’s proposed Rule 11(b)(5)) merely restates the provisions of Rules 11(b)(3)  
10 and (4). That is, under Rule 11(b)(3), the signer already had to find an evidentiary  
11 basis for the contentions, which presupposes investigation into evidentiary facts.  
12 And under Rule 11(b)(4), the same is true as to denials, except that Rule 11(b)(4)  
13 also imports a requirement of reasonability into a signer’s denial of factual  
14 contentions where evidence is lacking. There is also the chance that by writing into  
15 Rule 11(b)(5) the contemplation of filings resting on false averrals, the proposed  
16 Rule might have the unintended consequences of giving safe harbor to lawyers  
17 pleading falsely but claiming they conducted a procedurally appropriate  
18 “reasonable” investigation. The parts of Rule 11 that the proposed Rule 11(b)(5)  
19 would fix are, with respect, not believed by the State Bar to be broken.  
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1           Fifth, the State Bar respectfully suggests that the Chamber Comment's  
2 proposed Rule 11(e), while aiming at the laudable goal of sound verifications, is  
3 likewise not necessary. The Petition's proposed Rule 11(e) retains the requirement  
4 that verifications may be made by persons with knowledge. There is no problem in  
5 practice necessitating a further requirement of "independent reasonable inquiry into"  
6 the facts if they are known to the affiant. The Comment's additional language would  
7 invite dispute by litigants who could contend that a verification, though made on  
8 personal knowledge, was not made after an "independent reasonable inquiry." This  
9 verbiage, though well-intended, could promote satellite litigation over the adequacy  
10 of investigation into facts that present law would indicate were supported with  
11 sufficient evidence to be considered by the Superior Court.  
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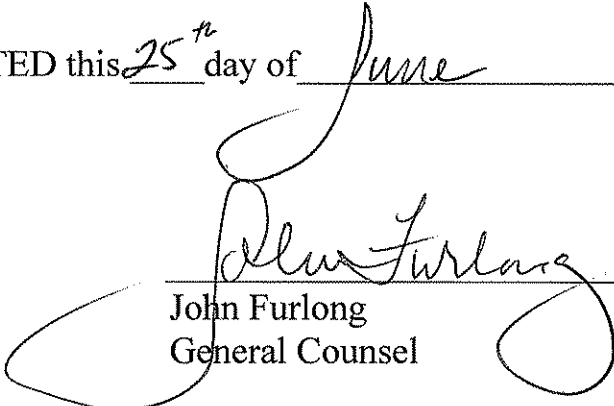
15           Sixth, as with the PCBA Comment, the State Bar respectfully suggests that  
16 the Chamber Comment, coming at the end of the comment period with a complex  
17 redline, essentially amounts to a Petition that the public and stakeholders have not  
18 had a full opportunity to consider. This is well-illustrated by its incorporation of the  
19 Task Force's in-process draft of Rule 11, because that work product is contemplated  
20 to end up (in some form) in a Petition that will be subject to a full public comment  
21 period. Its adoption now, or the adoption of the entire complex redline attached to  
22 this Comment, would be without the benefit of public comments. Thus, if the entire  
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1 Comment were well-taken, the State Bar respectfully suggests an appropriate  
2 response would be to direct that it be resubmitted as a Petition by January 2016,  
3 rather than adopting it at this time.  
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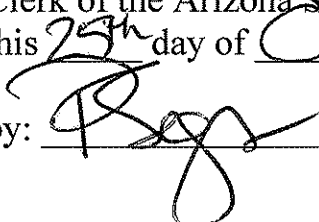
5 **CONCLUSION**

6 For the foregoing reasons, the State Bar respectfully renews its request that  
7 this Court amend Rule 11, Ariz. R. Civ. P., consistent with Petition 15-0004.  
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9 RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of June, 2015.

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13   
14 John Furlong  
15 General Counsel

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17 Electronic copy filed with the  
18 Clerk of the Arizona Supreme Court  
19 this 25<sup>th</sup> day of June, 2015.

20 by:   
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