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

12 In the Matter of:  
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14 **PETITION TO AMEND RULE 11,**  
15 **ARIZONA RULES OF CIVIL**  
16 **PROCEDURE**

17 Supreme Court No. R-15-0043  
18  
19 **COMMENT OF**  
20 **THE STATE BAR OF ARIZONA**

21 The State Bar of Arizona supports Petition R-15-0043 (“the PCBA Petition”),  
22 which proposes amending Rule 11 of Arizona Rules of Civil Procedure so that  
23 sanctions would be permissive but not mandatory where a court finds a violation of  
24 Rule 11.  
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27 **Background**

28 In January 2015, the State Bar submitted Petition R-15-0004, proposing a  
29 number of changes to Rule 11 of the Arizona Rules of Civil Procedure, including a  
30 meet-and-confer requirement before motions, requiring a separate writing before the  
31 motion evidencing the issues in dispute, requiring Rule 11 motions to be filed as

1 stand-alone motions, and changing the word “shall” in proposed Ariz. R. Civ. P.  
2 11(c)(1) to “must,” to make clear that a court finding a violation of Rule 11 must  
3 impose sanctions when it does so.  
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5 The Pima County Bar Association (“PCBA”) commented on the Petition to  
6 support all of its proposed modifications other than the change from “shall” to  
7 “must.” As to that change, Pima County commented, it would prefer a change from  
8 “shall” to “may,” leaving imposition of sanctions to the sound discretion of the trial  
9 court, for a variety of reasons. The State Bar replied in support of Petition R-15-  
10 0004, and suggested that if any stakeholder wanted to change “shall” to “may,” that  
11 would be better done by a Petition than by a comment on a Petition.  
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14 Since that time, the Supreme Court has carried over Petition R-15-0004, so  
15 that it could be considered concurrently with the work of the Task Force on the  
16 Arizona Rules of Civil Procedure. And the Task Force’s Petition to amend the  
17 entirety of the Arizona Rules of Civil Procedure, R-16-0010, incorporates a Rule 11  
18 that is almost identical to that in Petition R-15-0004, in particular in changing “shall”  
19 to “must.”  
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21 With that activity as prologue, on December 29, 2015 the PCBA filed Petition  
22 R-15-0043, proposing to modify Rule 11 in the same manner as Petition R-15-0004,  
23 other than changing “shall” to “may.”  
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1 Analysis

2 Upon further review, the State Bar agrees with the wisdom of the PCBA's  
3 proposal. As a preliminary matter, the State Bar notes that its Board of Governors  
4 considered the same proposal when it met concerning what was eventually filed as  
5 Petition R-15-0004, and nearly suggested at that time the very change the PCBA  
6 later suggested by its comment on that Petition, and in Petition R-15-0043. There  
7 are many reasons the State Bar is now persuaded that this approach is correct.  
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10 First, there is insufficient justification for departing from the permissive  
11 sanctions framework that has been part of Arizona jurisprudence and the Federal  
12 Rule counterpart for approximately 25 years. The 1993 Federal Rule 11  
13 amendments, including the permissive sanctions approach, have served as an  
14 appropriate and effective tool to deter inappropriate conduct, and there is neither  
15 empirical nor anecdotal evidence that suggests the permissive sanctions approach is  
16 ineffective. The purpose of Rule 11 is to shape conduct, not to compensate, and the  
17 CPPC believes that the proposed "may" language vests the court with appropriate  
18 authority and power to achieve the rules ends without invading the decision-making  
19 role of the judge.  
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22 Second, the State Bar disfavors prospectively tying the hands of judges and  
23 mandating a one-size-fits-all approach to judging. While sanctions are generally  
24 imposed under the current "shall" standard, and would generally be imposed under  
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1 a “may” standard, there will be times when a judge will have particular reason not  
2 to impose sanctions.

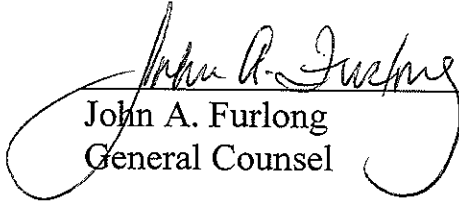
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4 Third, there is even more reason to adhere to the permissive federal model,  
5 given the direction of the Supreme Court to the Task Force on the Arizona Rules of  
6 Civil Procedure to conform the Arizona Rules of Civil Procedure to the Federal  
7 Rules of Civil Procedure unless there is a specific intention to vary from the Federal  
8 Rules. See Supreme Court Administrative Order 2014-116. The Task Force’s  
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10 Petition brings Arizona’s Rules of Civil Procedure into further harmony with the  
11 Federal Rules of Civil Procedure from which they were derived, and the PCBA  
12 proposal would further that end.

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14 Fourth, the proposed Rule 11 found in Petition R-15-0004 and R-16-0010  
15 both have what amounts to a safe harbor provision, as they allow the party charged  
16 with violating Rule 11 opportunities to cure its behavior after oral notice in a meet-  
17 and-confer and written notice that is intended for later provision to the court. Federal  
18 Rule 11 pairs the safe harbor with a permission to sanction. Arizona’s Rule 11,  
19 which would now have the equivalent of a safe harbor, should do the same, as safe  
20 harbor provisions work hand-in-glove to permit parties to shape their conduct  
21 without the threat of mandatory sanctions looming over them.  
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1 **CONCLUSION**

2 For the reasons stated above, the State Bar supports Petition R-15-0043 and  
3 respectfully requests that the Supreme Court approve the Petition.  
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5 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of May, 2016.

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7   
8 John A. Furlong  
9 General Counsel

10 Electronic copy filed with the  
11 Clerk of the Arizona Supreme Court  
12 this 12<sup>th</sup> day of May, 2016.

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