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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:

**PETITION TO ABROGATE RULE  
68, ARIZONA RULES OF CIVIL  
PROCEDURE**

Supreme Court No. R-19-

**PETITION**

Pursuant to Rule 28, Ariz. R. Sup. Ct., the State Bar of Arizona (“State Bar”) petitions this Court to abrogate Arizona Rules of Civil Procedure 68 (“Rule 68”).

Rule 68 allows parties to make offers of judgment, and imposes sanctions if the final judgment obtained is not as favorable as the offer. The State Bar has concluded that Rule 68 leads to unjust results because (a) sanctions are imposed even when an offeree reasonably rejects an offer; and (b) the sanctions amount is unrelated to the reasonableness of the offeree’s rejection. For example, if a defendant makes a \$1 offer, the plaintiff reasonably rejects the offer because she has significant damages and a reasonable chance of succeeding on liability, but then loses at trial, the plaintiff will be subject to sanctions that could total in the tens or even hundreds of thousands

1 of dollars, dependent on the vagaries of such things as how many experts the  
2 defendant used. Simply put, at its core, even if Rule 68 might help lead to some  
3 settlements, it does so by imposing indiscriminate sanctions regardless of the  
4 reasonableness of the offer, its rejection, or any other circumstances of the case. Such  
5 a system is inimical to the principle of increasing access to justice in our courts.  
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8 The State Bar studied possible amendments to Rule 68, but ultimately  
9 concluded that abrogation is preferable. Settlement and the manner to encourage it  
10 is not something that lends itself to a one-size-fits-all rule of sanctions. Regardless  
11 of how well the rule might be modified to moderate arbitrary results, the potential  
12 for unjust results remains. In addition, the Rule's utility is limited in light of existing,  
13 more effective tools to encourage settlement.  
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15 A redline of the proposed changes (including conforming changes in other  
16 rules that reference Rule 68) is attached as Appendix A. Appendix B is a clean  
17 version of the proposed changes.  
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20 **I. BACKGROUND.**

21 Rule 68 was originally modeled on its federal counterpart, but on January 1,  
22 2008, Rule 68 was extensively amended. These amendments were designed to  
23 address a number of problems with the prior version of the rule, including trying to  
24 account for various unique circumstances that might arise in given cases (e.g.,  
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1 situations involving multiple offerors or offerees). The amended version was  
2 substantially different than federal Rule 68, as is the current version containing  
3 amendments made effective as of January 1, 2017. Among other differences,  
4 Arizona's Rule 68 addresses Arizona-specific issues, such as compulsory arbitration  
5 under Rules 72 to 77. It also addresses the timing of offers, whether offers may be  
6 made by or to multiple parties, and how objections to offers of judgment may be  
7 made.  
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10 The specific problems with Rule 68 that led to the State Bar's examination of  
11 the rule do not relate to these details. Rather, the problems stem from the State Bar's  
12 belief that (a) Rule 68 can lead to unjust results by imposing disproportionately harsh  
13 sanctions on litigants; (b) Rule 68 does not encourage reasonable settlement  
14 behavior, but instead encourages settlement through threat of sanctions regardless of  
15 the reasonableness of a litigant's behavior; and (c) other means exist that more  
16 effectively and fairly foster settlement.  
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19 **II. RULE 68 SANCTIONS ARE IMPOSED WITHOUT REGARD**  
20 **TO THE REASONABLENESS OF THE OFFER OR OF A**  
21 **PARTY'S REJECTION THEREOF.**

22 Under Rule 68, an offeree who falls *one dollar short* of the offer made to it  
23 must pay the full amount of sanctions set forth in the rule. Rule 68(g) ("A party who  
24 rejects an offer, but does not obtain a more favorable judgment, must pay as a  
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1 sanction ...."); *Stafford v. Burns*, 241 Ariz. 474, 485, ¶ 42 (App. 2017) (“If the  
2 defendant/offeree underestimates his exposure and the plaintiff/offeree obtains a  
3 more favorable judgment—even by a single dollar—the offeror stands liable for  
4 costs and expert witness fees”). The “sanctions imposed by Rule 68(g) are both  
5 mandatory and punitive.” *Stafford*, 241 Ariz. at 485, ¶ 41.  
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8 That is, trial courts have no discretion to decline to award sanctions when  
9 required by Rule 68(g), or to reduce the amount of sanctions set forth in Rule  
10 68(g)(1), regardless of the circumstances. *Id.* at 485, ¶ 43 (“[W]e decline to impose  
11 a requirement that offers of judgment be deemed reasonable before sanctions are  
12 imposed under Rule 68(g).”).  
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14 The State Bar believes that this result – even though required by the text of  
15 Rule 68 – can lead to arbitrary and unjust results.  
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17 One example of this unjustness occurs when a defendant makes a one-dollar  
18 offer of judgment. Under the current version of Rule 68, a plaintiff who rejects an  
19 offer of judgment for one dollar is liable for the full amount of Rule 68(g) sanctions  
20 if there is a subsequent defense verdict on liability. A plaintiff with at least a  
21 reasonable chance of success at trial should not be penalized for rejecting a *one dollar*  
22 offer. Put differently, a plaintiff should not be penalized in the same manner and in  
23 the same amount for rejecting a one dollar offer as for rejecting a one-million dollar  
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1 offer. (This example also illustrates the arbitrary nature of the sanctions amount,  
2 discussed below.)

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4 The State Bar considered whether this potential for unjust results could be  
5 addressed by amending Rule 68 to impose a reasonableness requirement on offers  
6 of judgment. The State Bar concluded, however, that incorporating a subjective  
7 requirement that an offer of judgment be “reasonable” would be unworkable. Such  
8 a standard would require trial courts to make a merits-based evaluation of the  
9 specific circumstances of each case, which would be difficult and time-consuming.  
10 It also would introduce uncertainty, requiring offerors and offerees to predict the  
11 outcome of that subjective evaluation in deciding whether to make or accept an offer  
12 of judgment.  
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15 In sum, the fact that Rule 68(g) sanctions can be imposed regardless of the  
16 difference between the offer and the judgment, and regardless of the reasonableness  
17 of the offer, weigh heavily in favor of abrogation.  
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20 **III. THE AMOUNT OF RULE 68(g) SANCTIONS IS NOT**  
21 **PROPORTIONAL TO ANY FACTORS RELATED TO THE**  
22 **REASONABLENESS OF THE PARTIES’ ACTIONS, OR TO**  
23 **ENCOURAGING SETTLEMENT.**

24 Rule 68(g)(1) imposes sanctions in the following amount:

25 (A) the offeror’s reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred after the offer date; and

1 (B) prejudgment interest on unliquidated claims accruing from the offer  
2 date.

3 This sanction amount is calculated without respect to factors that might  
4 encourage reasonable settlement offers, such as the difference between the offer and  
5 the ultimate verdict. As noted above, a plaintiff who rejects a one-dollar offer has  
6 the same sanction imposed as a plaintiff who rejects a million-dollar offer.  
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8 By contrast, the Rule 68(g)(1) sanction amount varies dramatically depending  
9 on whether a case relies heavily on experts, or whether it involves large amounts of  
10 unliquidated damages or taxable costs. This makes little sense. The amount of a  
11 sanction imposed on a party who rejects a million dollar offer and receives nothing  
12 at trial should not depend on how many experts the defense hired, or whether the  
13 plaintiff was suing for liquidated or unliquidated damages.  
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16 The State Bar examined alternatives to try to make Rule 68 sanctions more  
17 proportional to the reasonableness of the offeree's rejection of an offer. *Cf.* Ariz. R.  
18 Civ. P. 77(h) (imposing sanctions only if the ultimate judgment exceeds the  
19 arbitration award by 23%). Ultimately, the State Bar concluded that achieving such  
20 proportionality would be difficult and uncertain – as well as unnecessary, in light of  
21 other existing means to encourage settlement.  
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1 It is difficult to craft a one-size-fits-all rule for punitively sanctioning  
2 settlement behavior without creating a serious risk of unintended injustices in the  
3 circumstances of some cases. The State Bar believes that the Rules should foster  
4 justice, and Rule 68 as applied often does not achieve that goal. Additionally, Rule  
5 68 impedes access to justice because it threatens unjust and disproportionate  
6 sanctions against parties who make reasonable, but ultimately incorrect, predictions  
7 as to the outcomes of their claims.  
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10 Finally, Rule 68 can be very complicated to apply in practice, requiring a  
11 comparison of an offer of judgment to the ultimate verdict, but by determining the  
12 amount of costs (and, if applicable, attorneys' fees) incurred *at the time of the offer*,  
13 calculating the offer net of fees and costs, and then comparing the verdict net of fees  
14 and costs. *Hales v. Humana, Inc.*, 186 Ariz. 375, 378 (App. 1996) ("Rule 68(d)  
15 requires an 'apples to apples' comparison between the judgment and the offer, in  
16 that the judgment, excluding any fees or costs, is to be measured against the portion  
17 of the offer representing damages."). Such complexity adds an additional level of  
18 uncertainty to an already punitive and arbitrary rule.  
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#### 22 **IV. WIDESPREAD USE OF MEDIATION AND SETTLEMENT** 23 **CONFERENCES LESSENS THE NEED FOR RULE 68.**

24 As the Court knows, Superior Court case management orders almost always  
25 require the parties to engage in some form of alternative dispute resolution before

1 trial – either private mediation, or a settlement conference with a judicial officer.  
2 This has not always been the case, but has been fostered by rule changes and a  
3 change in litigation culture over the last approximately twenty years. *See, e.g.*, Rule  
4 16(c)(3)(I) (requiring parties to state their position on ADR); Rule 16(d)(14) (court  
5 may address ADR in scheduling conference); Rule 16(j) (court may order parties to  
6 participate in ADR); Rule 84, Forms 11(a), 11(b), 12(a), 12(b), 13(a) & 13(b)  
7 (scheduling order forms each address ADR).  
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10 The almost universal requirement for pretrial alternative dispute resolution  
11 has substantially reduced the need for additional mechanisms – such as Rule 68 – to  
12 encourage settlement.  
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14 Accordingly, the State Bar believes that the benefit to retaining an amended  
15 version of Rule 68 – much less the existing version – is insufficient to outweigh the  
16 substantial problems experienced with Rule 68, and the substantial difficulty in  
17 trying to craft the rule to fit every case in a just manner.  
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1 **CONCLUSION**

2 For the above reasons, the State Bar of Arizona respectfully requests  
3 abrogation of Rule 68 in its entirety.  
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5 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of January, 2019.  
6

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11 Electronic copy filed with the  
12 Clerk of the Supreme Court of Arizona  
13 this 10<sup>th</sup> day of January, 2019.

14 by: *R. Segal*  
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