

1 **PIMA COUNTY BAR ASSOCIATION**  
2 177 North Church Avenue  
3 Tucson, Arizona 85701  
4 520-623-8258  
5 James W. Rappaport, SBN 031699  
6 *Rules Committee Chair*

7 **IN THE SUPREME COURT**  
8 **STATE OF ARIZONA**

10 In the matter of:	Supreme Court No. R-19-00015
11 <b>PETITION TO ABROGATE RULE 68,</b>	<b>PROPOSED COMMENT OF THE</b>
12 <b>ARIZONA RULES OF CIVIL</b>	<b>PIMA COUNTY BAR ASSOCIATION</b>
13 <b>PROCEDURE</b>	<b>ON THE PETITION TO ABROGATE</b>
14	<b>RULE 68, ARIZONA RULES OF</b>
15	<b>CIVIL PROCEDURE</b>

16 Pursuant to Rule 28, Ariz. R. Sup. Ct., the Pima County Bar Association  
17 respectfully submits the following comment on Petition R-19, filed by the State Bar of  
18 Arizona. The State Bar contends that Rule 68, Ariz. R. Civ. P. (“Rule 68”), is too  
19 draconian—too blunt an instrument to do justice to plaintiffs. As their petition sets forth,  
20 Rule 68 both unfairly penalizes plaintiffs who reasonably reject an offer of judgment and  
21 provides for a sanction that bears no relation to the reasonableness of that rejection. In  
22 short, Rule 68 is depicted as a Sword of Damocles hanging over the heads of legitimately  
23 aggrieved plaintiffs. Respectfully, that sword—like any other weapon in the trial lawyer’s  
24 arsenal—cuts both ways. Just as it has the potential to chill litigation, so too does it  
25 provide a reasonable means to screen unmeritorious lawsuits where other rules fail.

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1 availability of comparative fault. Rule 68 is simply a means of balancing an already-tilted  
2 playing field.

3 Not only does Rule 68 present symmetrical risks for plaintiffs and defendants  
4 alike—as both sides may tender offers of judgment—but also, the risk of a harsh result is  
5 part and parcel of any litigation. Indeed, as trial lawyers, risk is our business—the risk of  
6 a harsh result, for example, or the risk that counsel on either side take unfair advantage of  
7 the rules, are omnipresent in litigation and at every stage. To contend that a particular  
8 rule or practice should be abolished because it is susceptible to abuse is not logical, as  
9 that criticism could justly be leveled against virtually every rule and every tactical choice  
10 a trial attorney makes—including the choice to file a lawsuit in the first place. What  
11 ensures the fairness of Rule 68 offers of judgment is precisely what ensures that  
12 plaintiffs’ attorneys file only those lawsuits that are meritorious: Good faith. In this way,  
13 a Rule 68 offer of judgment is no different from a motion to dismiss or for summary  
14 judgment, or indeed the choice to file a lawsuit altogether.

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16 **II. Mediation and settlement do not supplant the need for Rule 68.**

17 Finally, the State Bar contends that, because judges have been pushing harder for  
18 settlement and mediation—and in many cases requiring it—Rule 68 is largely  
19 superfluous. Respectfully, this conclusion does not follow. While it is hard to argue with  
20 the premise that many judges strongly encourage settlement and mediation or that more  
21 and more cases are settling before trial, Rule 68 provides a robust incentive for parties on  
22 both sides to earnestly engage with one another as opposed to bringing entrenched clients  
23 to the bargaining table, as both plaintiffs and defendants are vulnerable to potential Rule  
24 68 sanctions. The State Bar’s claim that these sanctions can be unduly harsh or arbitrary  
25 only buttresses this argument: Because both sides bear the risk of Rule 68 sanctions, both

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1 have an equal and identical incentive both to settle and, barring settlement, to tender  
2 offers of judgment judiciously lest one be hoisted by their own petard.

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4 **III. Not only is Rule 68 a valuable tool for both sides in litigation, but**  
5 **also—and just as importantly—it furthers the administration of justice**  
6 **in our civil system.**

7 Rule 68's import isn't limited to its utility as a trial stratagem. To be sure, it helps  
8 achieve some measure of balance between plaintiffs and defendants, but it also furthers  
9 exactly what the civil rules are designed for: The just, speedy, and inexpensive  
10 determination of every action and proceeding. Ariz. R. Civ. P. 1. First, Rule 68 is an  
11 effective way of managing client expectations. An unrealistic plaintiff on the receiving  
12 end of a Rule 68 offer of judgment, for example, is much more easily dislodged from her  
13 position than she otherwise would be. The same is true for a recalcitrant defendant who  
14 resists settlement at every turn yet has to confront the possibility of Rule 68 sanctions.

15 Second, Rule 68 provides an incentive for parties to work their cases and shepherd  
16 them through discovery and disposition. One fights inertia in all things. Nowhere is this  
17 more true than for a trial lawyer who has more cases than he has time for—not a rarity  
18 among either the plaintiff's or defense bar. A Rule 68 offer of judgment is a reality check  
19 for many lawyers that forces them not only to assess the value of their cases and how to  
20 approach discovery and settlement negotiations, but also to be proactive in working their  
21 cases so they can meaningfully communicate the offer to the client and respond to it.

22 These benefits go both ways: Who among either the plaintiff's or defense bar  
23 hasn't had a case with an entrenched client—or indeed with an entrenched lawyer? Who  
24 hasn't had a case in which both sides let a lawsuit languish in discovery while deadlines  
25 come and go? Rule 68 serves both lawyers and clients by providing a powerful incentive  
26 to sincerely evaluate one's case and do the work necessary to move it toward a resolution.

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1 **CONCLUSION**

2       The Sword of Damocles cuts both ways: Rule 68 offers of judgment are available  
3 to both plaintiffs and defendants, and the risk of harsh or arbitrary sanctions applies  
4 equally to plaintiffs and defendants. Far from being a cudgel for unsuspecting and  
5 meritorious plaintiffs, Rule 68 provides a much-needed counterweight in our Civil Rules  
6 that overwhelmingly favor giving plaintiffs their day in court. Furthermore, Rule 68 has  
7 the benefits of helping clients manage their expectations and lawyers honestly evaluate  
8 and work their cases.

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10               RESPECTFULLY SUBMITTED April 19, 2019.

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**PIMA COUNTY BAR ASSOCIATION**

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By 

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James W. Rappaport  
*Rules Committee Chair*

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By 

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Michael Aaron  
*President*

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