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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 **COMMENT OF THE ARIZONA ASSOCIATION OF DEFENSE COUNSEL ON THE PETITION TO ABROGATE RULE 68, ARIZONA RULES OF CIVIL PROCEDURE**

The Arizona Association of Defense Counsel submits this comment in opposition to Petition R-19, filed by the State Bar of Arizona, which seeks to abrogate Rule 68 of the Arizona Rules of Civil Procedure. Rule 68, Arizona's offer of judgment provision, has been repeatedly recognized by Arizona courts as a means to encourage the critical public policy goals of expeditious resolution of cases and avoiding the burden and expense of protracted litigation. In one form or another, an offer of judgment provision exists in nearly every jurisdiction in the country. Other States have been adding, not removing, such provisions.

Studies have shown widespread support for amending Federal Rule 68 to *increase* its use, though attempts at amendment have not advanced. However, Arizona's Rule 68 already has been amended in various ways to respond to criticisms leveled at the federal rule—for example, by making it available to both plaintiffs and defendants and by including expert

witness fees in the amount of sanctions to make offers more meaningful. As such, Arizona's rule can be considered a model Rule 68. The State Bar has not presented any data showing the rule is ineffective or unwanted, or to support its claim of "substantial problems experienced with Rule 68." Pet. at 8. Nor has the State Bar proposed any further amendment.

The State Bar's call to abrogate Rule 68 appears largely fueled by concerns about a single hypothetical scenario—the sanctioning of a losing plaintiff who reasonably rejected a $1 offer of judgment. Yet, the State Bar has presented nothing to show that this particular scenario, to the extent it ever occurs, is so unfair and so widespread as to justify junking Rule 68 entirely. The State Bar also denigrates the opponent's expert fees as a "vagary" that should not be a basis for Rule 68 sanctions. But expert fees are a direct measure of the burden and expense that an opponent seeks to avoid by making a Rule 68 offer and tying the sanction to expert fees that were unnecessarily incurred by the prevailing part as a result of the rejection of the offer is entirely appropriate. Moreover, expert fees can be significant enough to incentivize acceptance of offers of judgment without going so far as to shift attorney fees.

The State Bar does not present any studies regarding the utilization of Rule 68, the effectiveness or Rule 68, or practitioners' or the judiciary's attitudes toward it. And there is no evidentiary support for the anecdotal claim that Rule 68 is no longer necessary in light of alternative dispute resolution procedures. For the reasons more fully discussed below, the State Bar's call to abrogate Rule 68 is unsupported, represents a minority position contrary to almost every jurisdiction in the country, and should be rejected.

I. The State Bar seeks to abrogate a settlement tool long-employed in Arizona and across the country.

Numerous decisions of the court of appeals acknowledge the important purpose of Rule 68 to promote settlement and avoid the burden of protracted litigation.[1] Many States have an offer of judgment rule modeled after Federal Rule 68, which dates back to the inception of the Federal Rules. Many others, like Arizona, have offer of judgment rules that have been crafted

[1] *See, e.g.*, *Arellano v. Primerica Life Ins. Co., Co.*, 235 Ariz. 371, 381 (App. 2014); *Levy v. Alfaro*, 215 Ariz. 443, 445 (App. 2007).

in an attempt to improve upon the Federal Rule in important ways. Currently, only five States entirely lack any type of meaningful offer of judgment mechanism at all, and that number has shrunk from eight States fifteen years ago.[2] Accordingly, the State Bar's Petition to Abrogate Arizona's Rule 68 would move Arizona away from recent national trends to an extreme minority position.

II. Arizona's Rule 68 has many features that address criticisms levied at the underutilized Federal Rule 68.

Arizona's Rule 68 can be considered a model offer of judgment rule in the many respects in which it differs from its federal counterpart. Federal Rule 68 has been on the books essentially unchanged since adoption in 1938.[3] But since the 1980s, there has been an on-again-off-again discussion about proposed modifications to Rule 68, largely centered upon its perceived *under*utilization.[4] Two principle reasons for this underutilization have been identified: one, the federal rule only permits offers from defendants; and two, the offers are seldom heeded because federal sanctions are too mild.[5] With respect to the second point, sanctions in federal court tend to be inadequate because they include only "costs" from the time of the offer, which generally never amount to much, except in certain federal statutory claims where the United States Supreme Court has interpreted "costs" to include attorney fees.[6]

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[2] In 2004, the American College of Trial Lawyers created a state survey of offer of judgment provisions, finding that eight states lacked such provisions. *See* American College of Trial Lawyers, "Survey of State Offer of Judgment Provisions," Oct. 2004. Since that time, offer of judgment provisions have been adopted in three of those states: Colorado, Georgia, and Maryland (medical malpractice cases only).

[3] William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience ("Rule 68 Offers")*, 39 N.M.L. Rev. 349, 351–52 (Spring 2009).

[4] *Id.* at 352.

[5] *Id.*; Roy D. Simon, *The Riddle of Rule 68*, 54 *Geo. Wash. L. R.* 1, 7–8 (1985).

[6] *See Marek v. Chesny*, 473 U.S. 1 (1985). However, Arizona has chosen not to follow *Marek* in determining that attorney's fees are not "costs." *Boltz & Odegaard v. Hohn*, 148 Ariz. 361, 365 & n.1 (App. 1985).

These issues have been addressed, however, in Arizona, where both plaintiffs and defendants can make offers of judgment and where sanctions have been increased. Under Arizona's Rule 68, sanctions include *double* taxable costs because a prevailing party is already entitled to taxable costs.[7] Sanctions also include prejudgment interest on *unliquidated* claims because such interest is already "a matter of right in an action on a contract or in tort."[8] Finally, in Arizona, sanctions include the opponent's reasonable expert witness fees from the time of the offer, which "was proposed in response to the Arizona Supreme Court's call for 'consideration of further amendments to make the offer of judgment procedure an even more effective vehicle for the settlement of claims.'"[9]

Offer of judgment rules have been the subject of serious scholarly research and study in recent years. Those studies support the effectiveness of Arizona's Rule 68 in its current form and its continued use. For example, in 2006, Professors Albert Yoon and Tom Baker published results of their empirical study finding that New Jersey's offer of judgment rule, which has more teeth than the federal rule, produced shorter periods of litigation and reduced attorney's fees in a manner that was substantial and statistically significant.[10] Further, in 2007 and 2009, Professors Harold Lewis and Thomas Eaton published an extensive two-part report in the Federal Rules Decisions reporter, in which they discussed the history of Federal Rule 68 and practitioner surveys that found wide-spread support for various proposed changes to increase its utility, including making offers bilateral and increasing sanctions.[11] Also in 2009,

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[7] A.R.S. § 12-341.

[8] *Metzler*, 235 Ariz. at 144 ¶ 11 (quoting *State v. Taylor*, 223 Ariz. 486, 488 ¶ 6 (App. 2010)).

[9] *Levy v. Alfaro*, 215 Ariz. 443, 445 (App. 2007) (quoting Ariz. R. Civ. P. 68, 1992 State Bar Committee Notes).

[10] Albert Yoon, Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 Vand. L. Rev. 155, 191 (2006).

[11] Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (June 1, 2007); Lewis & Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551 (Jan. 1, 2009).

Federal Magistrate Judge William P. Lynch authored his proposal of changes to Federal Rule 68—including allowing plaintiffs to make offers and increasing sanctions—spurred by his own survey of New Mexico lawyers, who expressed increased satisfaction with New Mexico's own offer-of-judgement rule after it underwent revisions consistent with Arizona's Rule 68.[12]

III. The State Bar has failed to support its petition to abrogate.

In contrast to the aforementioned research that supports Arizona's Rule 68, the State Bar has not produced any study, statistics, or real-world examples of "problems" with the administration of Rule 68 to support its proposal to abrogate the rule entirely. Instead, the State Bar provides only anecdotal, *ad hoc* conclusions that "Rule 68 leads to unjust results" and that "abrogation is preferable" to any possible amendments. Pet. at 2. The Court should not go along with rewriting the Arizona Rules of Civil Procedure to adopt an extreme minority position on such scant authority.

A. The State Bar's criticisms on the imposition of sanctions are unfounded.

The State Bar points to two considerations that it believes "weigh heavily in favor of abrogation" of Rule 68: (1) sanctions can be imposed "regardless of the difference between the offer and the judgment" and (2) sanctions can be imposed "regardless of the reasonableness of the offer." Pet. at 5. Neither is sufficient grounds for abrogating the Rule.

In connection with the first consideration, the State Bar seems particularly concerned that "an offeree who falls ***one dollar short*** of the offer made to it must pay the full amount of sanctions." Pet. at 3 (emphasis in original). But that criticism seems to miss the point of the offer of judgment rule. The rule is not about testing a party's ability to predict with perfect accuracy a trial verdict. Rather, the rule is about incentivizing a party to resolve a case when it is not confident of doing markedly better at trial. A party who refuses an offer and then fails to beat that number at trial by a single dollar is exactly who should pay a sanction, because that party could have resolved the case by offer of judgment for essentially the same amount, without expending the resources of the other side and the court to conduct a trial. The State

[12] Lynch, *Rule 68 Offers*, 39 N.M.L. Rev. at 350.

Bar appears to misperceive offers of judgment sanctions as punishments for losing. They are not. Rather, they are a rational means of allocating the cost of financial waste to the party who occasioned it. Money spent preparing and trying a case only to reach essentially the same (or a worse) result than could have been achieved weeks, months, or years beforehand constitutes a clear waste of both financial and judicial resources. It is fair to make the party who occasioned such waste to bear it, in place of the party who offered to avoid it.

Regarding the second consideration, the State Bar expresses concern about the prospect of one-dollar offers of judgment, and notes that imposing a subjective, reasonableness requirement into the offer rule may well be unworkable and would invite unnecessary collateral litigation. Pet. at 5. But it is not clear why a reasonableness requirement is necessary in the first place. As pointed out by the Pima County Bar Association in its response to the Petition, an offer that the offeree failed to beat at trial is *necessarily* reasonable—it was better than the ultimate verdict. Moreover, the State Bar ignores the fact that an offer of judgment, even the hypothetical one-dollar offer, may incentivize the recipient to make its own offer of judgment or settlement counter-offer that leads to a "reasonable" settlement.

B. The State Bar's criticisms on the amount of sanctions are unfounded.

The State Bar's Petition asserts that it "makes little sense" to tie sanctions for failing to beat an offer of judgment to expert witness fees, double taxable costs, or the prejudgment interest on unliquidated claims. Pet. at 6. However, as explained above, the most prominent historical problem with Federal Rule 68 has been that the taxable-cost sanction is inadequate to influence behavior. Meanwhile, proposals to shift attorney fees have been criticized as excessive or otherwise unworkable. Arizona's approach represents an appropriate middle ground—increasing exposure without going so far as to include a shift in attorney fees (which, incidentally, is done in contract actions under A.R.S. § 12-341.01).

Moreover, the amount of reasonable expert fees, taxable costs, and the size of unliquidated claims subject to prejudgment interest are not unconnected to the purposes of Rule 68 or the amount of the sanction. The amount of reasonable expert fees, taxable costs, and the size of the unliquidated claims themselves are not arbitrary; rather, they are markers

of the burden and expense, generally, of prosecuting particular claims or defenses. And it is this very burden and expense that Rule 68 seeks to lessen, by requiring an offeree to assess not only its willingness to incur its own expert fees and other expenses to prosecute its claims or defenses, but also its willingness to risk being liable going forward for the *opponent's* fees and expenses in the event an offer of judgment is not accepted. Accordingly, tying the amount of the sanction to the amount of expert fees, taxable costs, and lost interest unnecessarily inflicted on the adversary makes perfect sense, and is entirely appropriate.

Relatedly, there are intrinsic and extrinsic checks on the amount of sanctions that may ultimately result. Parties have intrinsic motivation to refrain from unnecessary and wasteful litigation spending. Even if success were guaranteed, a party would still need to front the money to pay for litigation in the short term. But success is never guaranteed, and litigation always involves risk of loss. The mere possibility of cost or fee shifting is not enough to incentivize spendthrift litigation tactics. If the party loses at trial, he or she will be stuck with those costs. And even if the party does prevail, there is no assurance that it will be able, ultimately, to collect on the judgment.

But even if a party had the financial wherewithal and desire to bankroll unnecessary and excessive litigation costs, extrinsic checks in the Arizona Rules of Civil Procedure operate to limit costs and fees. Arizona recently adopted tiered discovery, which places limits on some costly aspects of litigation, such as by expressly limiting the number of depositions in a case. And Rule 68 itself is a backstop for the largest potential portion of a Rule 68 sanction: expert fees. Under Rule 68, expert fees are subject to the court's reasonableness determination. A court need not endorse a party's unilateral decision to engage in unreasonable behavior—such as retaining duplicative or unnecessary experts; requesting wasteful or unreasonable expert work; or retaining experts who charge fees that far exceed market rates given their expertise and the work they perform. Thus, a party who allows expert and other costs to spiral unnecessarily always does so at its own risk as the trial court may deem them to be unreasonable and unrecoverable.

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C. The adequacy of alternative dispute resolution.

Finally, the State Bar argues, without any evidence that the widespread use of mediation and settlement conferences makes Rule 68 dispensable. The State Bar's Petition suggests that Rule 68 is some sort of unwelcome cousin to alternative dispute resolution, but Rule 68 is a very different thing. As opposed to merely facilitating settlement negotiations, as does a mediation or settlement conference, Rule 68 actually *incentivizes* settlement. It does so, as this Court has explained, by permitting "the successful offeror to obtain monies to which she would otherwise not be legally entitled."[13] Mediation and settlement conferences are valuable only if the parties are motivated to settle. Access to these opportunities for settlement are important, but cannot, on their own, move the needle for parties with entrenched positions and limited desire to compromise. The prospect of gain or risk of loss may provide a nudge to overcome these hurdles.

The State Bar also does not acknowledge the role of Rule 68 sanctions in post-trial and appellate settlement negotiations. A significant cost judgment is a valuable bargaining chip post-trial. Parties can agree to waive or reduce a Rule 68 cost award in return for waiver of appeal. In the absence of Rule 68 sanctions, parties have fewer tools to negotiate after trial. Parties can only offer to compromise a judgment that has already been rendered to buy finality. Rule 68 awards, however, relate to sunk costs that a party has already expended, provide something of value that does not interfere with the amount of the verdict, and offer a sum-certain upon which to begin negotiations.

The State Bar presents no support for its statement that "pretrial alternative dispute resolution has substantially reduced the need for additional mechanisms—such as Rule 68—to encourage settlement" or its "belief" that hypothetical problems with Rule 68 outweigh any benefit to retaining it. Pet. at 8. To the contrary, Arizona is not the lone jurisdiction that requires pretrial mediation or settlement conferences; many other state and federal jurisdictions require alternative dispute resolution *and* provide for offers of judgment to further

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[13] *Metzler v. BCI Coca-Cola Bottling Co. of Los Angeles*, 235 Ariz. 141, 144 ¶ 12 (2014).

incentive settlement. Given the importance to litigants and the judiciary of lessening the burdens of protracted litigation and the accompanying waste of financial and judicial resources, this Court should not simply take the State Bar's word for it that Rule 68 is no longer needed.

Conclusions

Offer of judgment provisions exist in nearly every jurisdiction in the country, and Arizona's version, in Rule 68 of the Arizona Rules of Civil Procedure, embodies many features that have been endorsed repeatedly as desirable amendments to the counterpart federal rule. The State Bar's criticisms of Rule 68 are lacking in evidentiary support and do not withstand simple scrutiny. The Arizona Association of Defense Counsel respectfully urges this Court to deny the State Bar's Petition to abrogate Rule 68.

RESPECTFULLY SUBMITTED this 1st day of May, 2019.

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