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

9 In the Matter of:

Supreme Court No. R-19-0001

10 **PETITION TO AMEND RULE**  
11 **68(g) OF THE ARIZONA RULES**  
12 **OF CIVIL PROCEDURE**

**COMMENT OF THE**  
**STATE BAR OF ARIZONA**

13 Pursuant to Rule 28(D) of the Arizona Rules of Supreme Court, the State Bar  
14 of Arizona (the “State Bar”) hereby submits the following as its Comment to the  
15 above-captioned Petition.

16 For the reasons set forth in the State Bar’s Petition R-19-0015, the State Bar  
17 agrees with the Scharf-Norton Center for Constitutional Litigation at the Goldwater  
18 Institute (the “Petitioner”) that Rule 68 of the Arizona Rules of Civil Procedure  
19 (“Rule 68”) can and does lead to unjust results. Adoption of the State Bar’s Petition  
20 abrogating Rule 68 in its entirety would resolve all of the problems identified by the  
21 Petitioner in its Petition R-19-0001.  
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1           The State Bar disagrees, however, with the specific rule amendments  
2 proposed in Petition R-19-0001. Those proposed amendments would only apply to  
3 a small number of civil actions, even though the unfairness caused by Rule 68  
4 extends over a large body of civil cases, not just the public interest cases addressed  
5 in Petition R-19-0001.  
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7           For example, the proposed amendments do not cure the arbitrary amount of  
8 the sanction provided in current Rule 68, which is calculated by reference to taxable  
9 costs and expert witness fees. As the State Bar noted in its Petition, this amount is  
10 unrelated to the reasonableness of the offer, the amount in controversy, or the  
11 difference between the award and the final judgment.  
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13           Instead, the proposed amendments in R-19-0001 would allow the court to  
14 exercise discretion as to whether to impose sanctions in certain types of cases. The  
15 State Bar believes that discretion in imposing Rule 68 sanctions is inherently  
16 unworkable, either as to some or as to all types of cases. For example, the proposed  
17 amendments would allow a court discretion not to impose Rule 68 sanctions if the  
18 court found that a party “sought to vindicate an important public policy.” It is easy  
19 to imagine sharp and ultimately irreconcilable differences of opinion as to what  
20 constitutes “an important public policy,” rendering a sanctions award essentially  
21 unpredictable.  
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1 The State Bar suggests that the Petitioner’s attempt to fix Rule 68 confirms  
2 Rule 68 is both (a) unjust in practice and (b) beyond repair.

3 The State Bar therefore asks the Court to adopt its Petition R-19-0015, and  
4 deny Petition R-19-0001 as moot once Rule 68 is abrogated.  
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6 **I. THE STATE BAR AGREES WITH THE PETITIONER THAT**  
7 **RULE 68 LEADS TO HARSH AND UNFAIR RESULTS.**

8 The Petitioner states that Rule 68 “unwisely, and in some cases unjustly,  
9 penalizes plaintiffs who properly invoke the courts’ jurisdiction to promote the  
10 public interest.” Petition R-19-0001 at 1. The State Bar agrees.  
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12 The Petitioner cites *Stuart v. Lane*, 2017 WL 3765499 (Ariz. App. Aug. 31,  
13 2017) as an example of a party who was unjustly penalized for bringing a non-  
14 frivolous lawsuit with respect to a public interest matter. The State Bar does not  
15 disagree that many would view the Rule 68 sanctions in *Stuart* as unjust.  
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18 The State Bar does disagree, however, with the implication that Rule 68  
19 sanctions are only unfair when levied in public interest litigation. Many of the  
20 arguments made by the Petitioner apply to all types of litigation. For example, the  
21 Petitioner asserts, “Frivolous, unreasonable, and baseless litigation should be  
22 deterred, but plaintiffs should not be deterred from bringing non-frivolous,  
23 reasonable, and potentially meritorious public-interest lawsuits, even if they  
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1 ultimately do not prevail.” Petition R-19-0001 at 6. The State Bar agrees and  
2 suggests that this statement is equally true with respect to all “non-frivolous,  
3 reasonable, and potentially meritorious” lawsuits, not just public-interest lawsuits,  
4 such that Rule 68 should be abrogated in its entirety.  
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6 The Petitioner asserts that Rule 68 was only intended to address private  
7 lawsuits seeking money damages. E.g., Petition R-19-0001 at 2 & 6. But nothing  
8 in the history of Rule 68 suggests that it was intended for any subset of cases, either  
9 as between public or private parties, or monetary versus non-monetary relief.  
10 Instead, it was and remains a rule of general application, allowing public and  
11 private parties (both plaintiffs and defendants)<sup>1</sup> to serve offers of judgment.  
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14 The State Bar agrees that Rule 68’s imposition of “mandatory and punitive”  
15 sanctions<sup>2</sup> in any action where sanctions are triggered – regardless of the  
16 reasonableness of the parties’ positions, the merits of their claims, or the interests  
17 they seek to advance – is a strong reason to abrogate the rule. As discussed below,  
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22 <sup>1</sup> Petition R-19-0001 appears to have confused the state and federal versions of Rule  
23 68 with respect to who can make an offer of judgment, incorrectly stating (at page  
24 11) that the federal version of Rule 68 permits either side to serve an offer of  
25 judgment when in fact only a “party defending against a claim” may do so under  
Fed. R. Civ. P. 68.

<sup>2</sup> *Stafford v. Burns*, 241 Ariz. 474, 485, ¶ 41 (App. 2017).

1 however, the State Bar believes that it is unwise to try to create a new set of rules  
2 for a subset of cases, or to introduce an element of discretion to Rule 68 sanctions.  
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4 **II. THE STATE BAR BELIEVES THAT CREATING AN**  
5 **EXCEPTION TO RULE 68 FOR “PUBLIC INTEREST”**  
6 **PLAINTIFFS IS UNWORKABLE IN PRACTICE AND MAY**  
7 **REPRESENT A CHANGE TO SUBSTANTIVE LAW, NOT**  
8 **PROCEDURE.**

9 The Petitioner seeks to amend Rule 68 to create a discretionary exception<sup>3</sup>  
10 to the otherwise mandatory imposition of sanctions in certain circumstances,  
11 specifically:

12 A court may, in the interests of justice, decline to award  
13 sanctions against a party who, in good faith, sought to  
14 vindicate an important public policy which would benefit  
15 a large number of people, if the case was not frivolous,  
16 unreasonable, or without foundation.

17 Petition R-19-0001 at Appendix A, at 4 (proposed Rule 68(g)(5)).

18 The State Bar believes that this exception would not be workable. A trial  
19 court would have little guidance to determine what constituted “an important  
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23 <sup>3</sup> The Petition also suggests an amendment to exclude actions seeking “only  
24 declaratory relief, injunctive relief, or nominal damages.” Narrowing the scope of  
25 Rule 68 would not address the unfair and unjust results in cases seeking for monetary  
damages.

1 public policy” or a sufficiently “large number of people” to avoid mandatory Rule  
2 68 sanctions that would otherwise apply.  
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4         The State Bar addressed a similar suggestion with respect to Rule 68, namely  
5 to add a requirement that an offer be “reasonable.” As the State Bar explained in  
6 its Petition R-19-0015, deciding such things as the “reasonableness” of an offer  
7 “would require trial courts to make a merits-based evaluation of the specific  
8 circumstances of each case, which would be difficult and time-consuming.” The  
9 State Bar also noted that adding an element of discretion to Rule 68 would  
10 introduce uncertainty because offerors and offerees would have to predict the  
11 outcome of the subjective, after-the-fact determination of the reasonableness of the  
12 offer.  
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15         Under the Petitioner’s proposed language, offerors and offerees would have  
16 to evaluate whether at the end of the case, the trial court would decide that the  
17 unsuccessful offeree was attempting to vindicate “an important public policy” that  
18 would benefit a sufficiently large number of people. It is hard to imagine that any  
19 such prediction could be made with any certainty, especially given the after-the-  
20 fact timing of this determination, which will only arise when the offeree *fails* to  
21 prevail.  
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1 This lack of predictability is illustrated by *Stuart*, relied on in the Petition.  
2 Petitioner characterized the *Stuart* case as seeking “judicial review of a city’s  
3 decision to subsidize a golf course.” Petition R-19-0001 at 3. But the Court of  
4 Appeals in *Stuart* held that the transactions at issue did *not* violate the Arizona  
5 Constitution’s Anti-Subsidy Clause. *Stuart*, 2017 WL 3765499 at ¶ 33. That is –  
6 the court found that the City of Scottsdale had *not* decided to subsidize a golf  
7 course. Under the Petitioner’s proposed amendments to Rule 68, a court might well  
8 rely on its no-subsidy finding to hold *Stuart*’s challenge did *not* seek to vindicate  
9 an important public policy. In other words, the proposal advanced in Petition R-  
10 19-0001 would not necessarily have cured the unfairness in *Stuart*, which the  
11 Petition identifies as a prime example of the type of case that its proposed  
12 amendments are intended to address.

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16 The proposed language also may also require courts to make what may be  
17 viewed as political decisions as to what types of issues would constitute an  
18 “important public policy.” Analogously, the *Stuart* opinion held that the  
19 determination of what constitutes a “public purpose” “is assigned to the political  
20 branches of government.” *Stuart*, 2017 WL 3765499 at ¶ 32.  
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23 To the extent the Petitioner believes that Rule 68 sanctions should be  
24 decided based on public policy, the State Bar notes that the authorities cited in  
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1 support of that position rely on public policy as articulated by the legislature. For  
2 example, the Petitioner cites *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412,  
3 418 (1978) as distinguishing between civil rights plaintiffs and civil rights  
4 defendants with respect to awarding attorneys' fees. Petition R-19-0001 at 4. But  
5 in *Christiansburg Garment*, the courts were carrying out the express intention of  
6 Congress to promote the vigorous enforcement of federal civil rights laws. *Id.* at  
7 422.  
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10 Accordingly, if Rule 68 is not abolished as the State Bar has requested, it  
11 may be more appropriate for public interest groups to seek legislative exemptions  
12 to Rule 68 based on policy considerations, rather than to amend Rule 68 to allow  
13 policy-based discretionary exemptions to be created by the courts. That is – to the  
14 extent it is appropriate for certain litigants and/or claims to be favored by Rule 68,  
15 such determination should be made by the Legislature, not by the Rules.  
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### 18 CONCLUSION

19 For the reasons set forth in R-19-0015, the State Bar recommends abrogation  
20 of Rule 68 in its entirety. Abrogation would solve all of the issues identified by the  
21 Petitioner, and avoid all of the problems inherent with creating discretionary  
22 standards that may also require courts to make political decisions as to what  
23 constitutes an “important public policy.”  
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