Lisa M. Panahi, Bar No. 023421
General Counsel
State Bar of Arizona
4201 N. 24th Street, Suite 100
Phoenix, AZ 85016-6288
(602) 340-7236

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-19-0015
PETITION TO ABROGATE RULE 68, ARIZONA RULES OF CIVIL PROCEDURE	**REPLY OF THE STATE BAR OF ARIZONA**

Pursuant to Rule 28, Rules of the Arizona Supreme Court, the State Bar of Arizona ("State Bar") hereby replies to the comments made to its Petition R-19-0015 ("Comment(s)"), which seeks to abrogate Rule 68, Arizona Rules of Civil Procedure ("Rule 68").

I. INTRODUCTION

The Petition generated considerable debate, with two supporting Comments (the Goldwater Institute, and Peter Akmajian of the law firm of Schmidt, Sethi & Akmajian), and eight opposing Comments.

The supporting Comments reinforce the fundamental premise of the Petition: That "the rules should not promote injustice" or sanction a party for

"reasonable behavior," nor should they operate in a manner that is coercive and antithetical to the Court's mission of providing access to justice. *See* Akmajian Comment; Goldwater Comment at 4, 5 (noting that "the coercive effect of Rule 68 is more pronounced in cases with plaintiffs of limited financial means").

Importantly, however, even the opposing Comments demonstrate that the Petition's fundamental premise is correct. Many of the commenters opposing the Petition admit that Rule 68 can lead to unfair, arbitrary and sometimes ruinous sanctions, but they argue the threat of such sanctions can and often does force parties to evaluate their claims and defenses carefully and ultimately reach settlement. The State Bar agrees that in practice, the threat of Rule 68 sanctions may sometimes push parties to settle cases. But the courts should never threaten or inflict *in*justice – justice must be the paramount concern in the design of court rules. In sum, the courts should not be in the business of using threats of injustice to discourage parties from exercising their right to seek redress in the courts, including their constitutional right to a jury trial.

If a rule were proposed that said the court would flip a coin and sanction the losing party, it would never be adopted. But that is substantively what Rule 68 does now – it subjects even those with meritorious claims or defenses to sanctions that can be entirely unrelated to the merits based on the unpredictable nature of

trials. The risk of a result less favorable than anticipated is one that a party can rationally assess. But when the court wittingly compounds that risk by sanctioning a party (sometimes to the tune of hundreds of thousands of dollars) who falls short of an anticipated result by even one dollar, it makes a statement: The justice system is a dangerous place, and the court will make it more dangerous in order to discourage trials. This is inconsistent with the mission of the Supreme Court, and the practice should end forthwith.

The State Bar also notes that the Goldwater Institute filed Petition R-19-0001 to amend Rule 68 to allow trial courts discretion to deny otherwise mandatory sanctions, if the party rejecting the offer is pursuing a claim in the public interest for a sufficiently large group of beneficiaries. The Goldwater Institute argued that it was unfair to punish parties seeking to advance important public policy provisions.

Notably, none of those who commented in opposition to Petition R-19-0015 referenced the Goldwater Institute's Petition R-19-0001, much less dispute that its Petition did in fact demonstrate that Rule 68 had led to unjust sanctions. The State Bar filed the only comment to Petition R-19-0001. The State Bar agreed with the Goldwater Institute that Rule 68 did lead to injustice but opposed the Petition because it did not go far enough to prevent injustice.

Finally, the State Bar is mindful that the number and representation of interests reflected in the opposing Comments show that there is considerable division within the Arizona legal community on whether Rule 68 should be abolished. This division was reflected in the deliberations of the State Bar and its Civil Practice & Procedure Committee in considering this reply and, as a result, the State Bar has included a section in this Reply presenting the rationale of those who felt that in light of the opposition, the Petition should be withdrawn for further study. Those views are summarized in Section III, below.

II. THE COURT SHOULD ADOPT THE PETITION'S PROPOSAL TO ABROGATE RULE 68

The State Bar expresses its appreciation for all the Comments to Petition R-19-0015. Those Comments were carefully considered, and the State Bar attempts to address them in a serious and detailed fashion below. Because the opposing Comments shared common arguments and themes, rather than responding separately to each opposing Comment, the State Bar's reply is grouped by argument.

A. The State Bar Considered Alternatives To Abrogation In A Years-Long Process

Some of the commenters suggested that the State Bar reached its position without sufficient consideration. The Bar has been working on this issue for at least

three years, starting in early 2016. At that time, judicial members of the Bar's Civil Practice & Procedure Committee expressed a number of concerns about the operation of Rule 68 in practice, including confusion as to how to calculate "double" taxable costs under Rule 68(g), how to interpret ambiguous offers, whether an offer can be conditioned on satisfying medical liens, and how to calculate whether an offer was more favorable than the ultimate judgment. A subcommittee was formed to study the Rule and propose amendments to address the practical problems identified by the bench and practitioners.

But as the subcommittee's work progressed, it heard from judges both on the Committee and other judges who provided input, that they were sometimes compelled by Rule 68 to enter large, sometimes six-figure, sanctions awards. These awards were even entered against parties who had meritorious claims – parties who went to trial and *won*. In other words, people whose claims had proven merit were nonetheless punished for not having taken a private settlement offer.

The subcommittee did not immediately support abrogating Rule 68. Instead, various alternatives were considered, including making Rule 68 sanctions proportional to the difference between the offer and judgment, and making sanctions discretionary instead of mandatory. The subcommittee consulted with

plaintiffs' attorneys, defense attorneys, and members of the bench during this process, including consideration of alternatives as well as abrogation.

The subcommittee, the Civil Practice & Procedure Committee, and ultimately the State Bar in this Petition concluded that abrogating Rule 68 was preferable to trying to amend the rule, because *the more just the rule became, the less effective it became.* A rule that must be unjust to be effective is a rule no court should embrace.

As discussed below, the State Bar does not support a rule whose effectiveness – according to its own defenders – requires the threat of unfair results to achieve settlement of cases.

B. The State Bar Does Not Believe That The Threat Of Unfair, "Mandatory And Punitive Sanctions" Is Appropriate, Even If Used To Foster Settlement

In 2017, the Arizona Court of Appeals rejected an argument that on offer of judgment must be "at least arguably reasonable compared with a lawsuit's probable damages to warrant imposition of sanctions under Rule 68." *Stafford v. Burns,* 241 Ariz. 474, 484, ¶ 39 (App. 2017) (internal punctuation omitted). Instead, the court held that "sanctions imposed by Rule 68(g) are both mandatory and punitive." *Id.* at 485, ¶ 41. The Court of Appeals' opinion was a correct

application of the rule as written, but it highlighted the fundamental unfairness that is the lifeblood of the rule.

Most, but not all, of the opposing Comments do not seriously dispute that Rule 68 sanctions can lead to unjust results in particular cases.[1] *E.g.,* Kelly Jo Comment at 3-4. But those comments justify the threat of such results as necessary to ensure that Rule 68 is effective, reasoning that Rule 68 sanctions must have "teeth" to "incentivize" settlement. *E.g.,* Arizona Association of Defense Counsel ("AADC") Comment at 4; Thomas C. Hall Comment at ¶ 3. *Accord* Lloyd Andrews Comment at ¶ 3 ("Rule 68 makes the parties realize they have skin in the game.").

The State Bar agrees that a rule with "teeth" might very well "incentivize" settlement, and as the AADC suggests, that empirical evidence could very well confirm this conclusion. But that does not make Rule 68 sanctions just or reasonable. The rules should not threaten injustice to coerce parties to settle. Such a policy is the antithesis of permitting access to justice.

[1] The AADC argues that Rule 68 sanctions are ***always*** fair, because they are assessed against a party who could have settled on more favorable terms than received after trial. AADC Comment at 5. As discussed below, the State Bar respectfully disagrees.

Many of the commenters also argued that Rule 68 sanctions are not unfair because they can be used by plaintiffs and defendants alike. *E.g.,* Pima County Bar Association Comment ("PCBA") at ("[T]hat sword [of Rule 68 sanctions] … cuts both ways."). Again, this misses the point: unfair sanctions are inappropriate regardless of which parties may utilize them.

One of the examples in Petition R-19-0015 to demonstrate unfairness of Rule 68 was the one-dollar offer of judgment. In that scenario, a party defending a claim serves a one-dollar offer of judgment, and if successful in that defense, obtains the full amount of Rule 68 sanctions. The commenters had varying reactions to this scenario:

1. It occurred infrequently, and infrequent abuses do not justify abandoning Rule 68 in its entirety (Petersen Comment at ¶ 1; Hall Comment at ¶ 1);
2. It can be addressed by requiring offers to be reasonable, or by granting trial court discretion to decline to enter sanctions; and/or,
3. A one-dollar offer to settle a case on which no recovery is ultimately obtained is "*necessarily* reasonable." AADC Comment at 6 (emphasis in original).

On point (1), the fact that Rule 68 permits sanctions to be imposed for rejecting a one-dollar offer on a meritorious claim alone establishes that the Rule can – and does – lead to unjust results. And while commenters argued that one-

dollar offers are "very, very rare," Hall Comment at ¶ 1, at least one supporting Comment from an experienced civil litigator noted that "[t]here are many $1 offers of judgment." Akmajian Comment. Given that there is nothing to stop parties from making one-dollar offers of judgment, it is very likely that such practices will increase.

Points (2) and (3) are addressed below in separate sections.

C. An Unfavorable Litigation Result Does Not Automatically Prove That The Unsuccessful Litigant's Claims Or Defenses Lacked Merit

As noted above, many of the opposing commenters acknowledge that parties who reasonably reject offers can nonetheless be sanctioned under Rule 68. These Comments recognize that there is indeed a "risk … of Rule 68 sanctions for a meritorious claim or defense." Kelly Jo Comment at 4. *Accord* PCBA Comment at 2 ("the State Bar isn't wrong that this is perhaps a harsh result for the plaintiff" but "the risk of a harsh result . . . or the risk that counsel on either side take unfair advantage of the rules, are omnipresent in litigation and at every stage.").

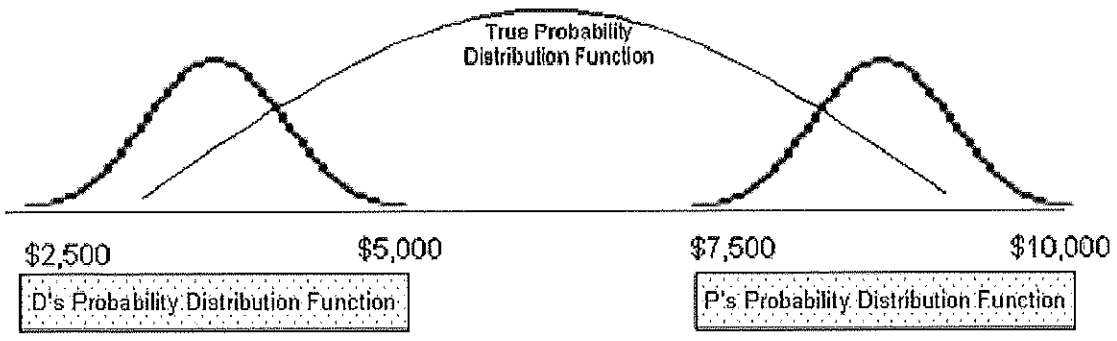
But at least two commenters argue that an unsuccessful party's position "by definition" lacks merit because the party lost at trial. PCBA Comment at 2 ("If a factfinder renders a defense verdict, the plaintiff's lawsuit is arguably unmeritorious by definition."); AADC Comment at 6 (agreeing with the Pima Bar

comment and asserting that "an offer that the offeree failed to beat at trial is necessarily reasonable—it was better than the ultimate verdict"). This argument is based on a false premise: in truth, even a party who *wins* at trial can face sanctions. And such parties have a meritorious claim "by definition."

Moreover, this argument assumes that each lawsuit has a certain and knowable result that can be predicted with complete accuracy, and that each factfinder's decision is always exactly correct. Nothing in the legal system suggests that disputes always have one absolutely correct and predictable answer. Rather, the best one can do is to predict a range of potential outcomes.

One of the studies cited in the AADC Comment makes this exact assumption, recognizing that not only is a lawsuit's outcome best represented by a "probability distribution function," but that each party has their own, different calculations as to the probability of success of their respective claims and defenses:

Figure 8
Plaintiff and Defendant's Perception of Dispute without Offer-of-Judgment Rule



The inherently probabilistic nature of dispute resolution means that there is no "right" answer, and certainly no answer that can be predicted so accurately that a party who falls ***one dollar short*** of the ultimate result should be punished with "sanctions" that would be the same as if the party missed by a million dollars. Using the logic of the AADC and the PCBA, a plaintiff who has an 80% chance of success on a $1 million claim will nonetheless – at least 20% of the time – *by definition* have a non-meritorious claim and should accept a very small offer to avoid wasting judicial resources.

The AADC argues (at 6) that "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," reasoning that a party should always settle unless it is confident that it can receive much more at trial than is offered. This suggestion is contrary to allowing parties access to justice to resolve their good-faith disputes. The State Bar does not believe that parties who have meritorious claims should be punished with sanctions if they fail to accurately predict to the penny the likely result at trial. To the extent that expenses should be shifted to unsuccessful parties, such issues should be decided by the Legislature as it has done in many different types of cases.

D. Rule 68's Arbitrary and Punitive Sanctions Distinguish It From Statutory Cost-Shifting Provisions

Commenters opposed to Petition R-19-0015 have noted that parties already face cost-shifting provisions, including an award of costs in A.R.S. § 12-341 and an award of attorneys' fees in contract cases in A.R.S. § 12-341.01 to a prevailing party. *E.g.,* AADC Comment at 4, n.7 (costs) & 6 (fees); Kelly Jo Comment at 3. But Rule 68 differs fundamentally from these and other cost-shifting provisions adopted by the Arizona legislature.[2] None of the statutes are irrational – they allocate risk to the unsuccessful party. This stands in marked contrast to Rule 68, where the power to determine the successful party is taken from the court and left to a high-stakes gamble forced by the parties.

E. The Amount of The Rule 68 Sanction Remains Arbitrary

The opposing Comments do not argue that the amount of Rule 68 sanctions is proportional to either the reasonableness of the rejected offer, or the

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[2] Other Arizona statutes also shift costs such as attorneys' fees in particular cases. See, e.g., A.R.S. § 12-1103(B) (quiet title actions); § 12-348 (actions against public entities in certain cases); § 12-752(D) (strategic lawsuits against public participation); § 12-1130 (condemnation cases) § 12-2411 (provisional remedies); § 32- (Prompt Pay Act violations); § 33-420 (false liens); § 33-998 (mechanics' lien foreclosure); § 33-1408 (landlord-tenant disputes). Arizona statutes also provide for shifting of expert fees in certain cases. See, e.g., A.R.S. § 12-752(D) (strategic lawsuits against public participation); § 12-1130(D) (condemnation cases).

reasonableness of the decision to reject the offer at issue. Rather, they argue that the amount of sanctions is justified as a cost-shifting measure. *See, e.g.,* AADC Comment at 6 (although referring to Rule 68 awards as "sanctions," asserting that these sanctions are not "punishment" but instead "are a rational means of allocating the cost of financial waste to the party who occasioned it"). But as the commenters acknowledge, Rule 68 does not shift a large portion of costs, namely attorneys' fees. *See, e.g., id.* at 6; Petersen Comment.

This disparity is justified as a compromise, AADC Comment at 6 ("an appropriate middle ground"), or as a shortcoming that could be remedied by increasing the amount of sanctions to include attorneys' fees. *See, e.g.,* Petersen Comment.

Only one commenter provides a rationale for the calculation of the amount of Rule 68 sanctions. This commenter, Kelly Jo, argues that personal injury plaintiffs – who typically retain counsel on a contingency basis and therefore do not pay hourly attorneys' fees – are dissuaded from filing suit unless they can recover their expert witness fees. Kelly Jo Comment at 2.

But as other supporting commenters point out, the access-to-justice issue often cuts in the other direction under Rule 68: "Yes, plaintiffs can use the offer of judgment rule too, but the effect on monied defendants is nothing like the

financial disaster plaintiff's face." Akmajian Comment. In short, this argument does not justify retaining Rule 68 in light of the injustice it causes in many other cases. To the extent parties may abuse retention of experts to needlessly increase litigation costs, such practices can be addressed with more narrowly-tailored rules or by legislative change to expand the categories of recoverable costs for the successful party in litigation.

F. The State Bar Does Not Argue That Rule 68 Is Obsolete, But Instead Asserts That The Justification – If Any – For Unfair, Mandatory, And Punitive Sanctions Is Lessened Because Of The Rise In The Use Of ADR In Superior Court

Some of the Comments opposing Petition R-19-0015 suggest that the State Bar believes that Rule 68 is "obsolete" in light of other mechanisms to achieve settlement. *See, e.g.,* Comments from Kelly Jo (at 6), Lloyd J. Andrews (at ¶ 3). This is not correct. Rule 68 was as unjust the day it was written as it is today, and the end of the practice is long-overdue.

The State Bar noted that the existence and widespread use of other mechanisms to foster settlement lessens the need for an offer-of-judgment rule. This is relevant because arguments for Rule 68 might be stronger if it were the only means to encourage parties to settle cases. But because other tools exist to foster settlement, the State Bar believes that doubts as to the inherently unfair nature of Rule 68 should be resolved in favor of abrogation.

G. A "Reasonableness" Requirement Would be Unworkable

Some commenters argued that the unfairness of Rule 68 sanctions could be ameliorated by giving trial court judge's discretion to decide whether to impose such sanctions and if so, in what amount.[3] *See, e.g.,* Maricopa County Attorneys' Office Comment at 2; Robert L. Greer Comment at ¶ 2. Others offer a similar suggestion, namely that the trial court be empowered to deny sanctions if a rejected offer was not "reasonable" under the circumstances of the case. *See, e.g.,* Kelly Jo Comment at 4.

As explained in Petition R-19-0015, the State Bar believes that determining reasonableness of offers or reasonableness of rejections of offers is inherently unworkable. This is not a matter of, as some have suggested, "no more difficult than determining attorneys' fees and could take into account similar factors to those identified in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 570 (1985)." Kelly Jo Comment at 4. The analysis would require evaluating the state of the case ***as of the time the offer was made and rejected***, being careful to separate out events that occurred and information that was discovered after the time to

[3] The AADC affirmatively rejects this suggestion, agreeing with the PCBA that "an offer that the offeree failed to beat at trial is *necessarily* reasonable—it was better than the ultimate verdict." AADC Comment at 6 (emphasis in original). As discussed above, the State Bar disagrees.

accept the offer had expired and determining what a reasonable party would have done at that particular time with the then-available information. *See also* Akmajian Comment (it will be "too complicated and unworkable").

The State Bar notes that it is a complex exercise just to make the Rule 68 comparison itself between the offer and the ultimate result, because the amount of taxable costs as of the date of the offer must be taken into account. *See, e.g., Hales v. Humana of Arizona,* 186 Ariz. 375, 378 (App. 1996). Trying to decide the reasonableness of a party's offers or rejections would be far more complex, and would also inject a large amount of uncertainty into deciding whether to accept an offer of judgment. Conversely, if Rule 68 requires the fear of a disproportionately large sanction to property "incentivize" settlement, then introducing any discretion would according to some commenters sharply diminish the usefulness of the rule.

Accordingly, the State Bar believes that introducing concepts of discretion and reasonableness – especially untethered to any statutory authority or guidance for particular cases – would result in complexity and uncertainty that would not be sufficiently offset by other potential benefits.

H. Other State's Offer-Of-Judgment Rules Do Not Support Retaining Arizona's Rule 68

The AADC argues that most states have offer-of-judgment rules, and that the trend is to increase, not decrease, the use of such rules. This is true, but

incomplete. As the Goldwater Institute notes, (1) Arizona's Rule 68 imposes perhaps the harshest sanctions in the United States and (2) many if not most of the cost-shifting provisions in other states are enacted by statute, not by rule.

The AADC cites a study in support of the effectiveness of offer-of-judgment rules, A. Yoon & T. Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*. As discussed above, the State Bar does not dispute that it is possible and even likely that Rule 68 increases the likelihood of settling cases, but instead argues that it is not appropriate to achieve that goal by imposing unjust, mandatory, and punitive sanctions. Notably, the perceived benefit in one such study was quite modest – only saving insurers about $1,200 in attorneys' fees, and that finding was very heavily qualified.

III. SOME MEMBERS OF THE STATE BAR HAVE CONCERNS ABOUT ABROGATING RULE 68 AND FAVOR WITHDRAWING THE PETITION OR EVALUATING OTHER ALTERNATIVES

As noted above, there was considerable debate within the State Bar and its Civil Practice & Procedure Committee concerning whether the Petition should be withdrawn or reconsidered in light of the opposition. This portion of the Reply presents the arguments advanced in favor of the State Bar withdrawing the Petition for further review and study of the potential for reforming Rule 68. The State Bar

wants the Court to be aware that it believes a significant segment of the Bar may share the views set forth below with respect to the Petition.[4]

First, those favoring withdrawal of the Petition noted that the State Bar exists to represent the interests of members of the State Bar as stakeholders and to improve the practice of law for the public and for those stakeholders at the same time. These members felt that the weight of the opposing Comments, including from prominent stakeholders such as the Maricopa County Attorney's Office, the AADC, and the PCBA, weighed heavily in favor of withdrawing the Petition. Those favoring withdrawal noted that the Rule 28 comment process is in place to allow dialogue, conversation, and reconsideration where appropriate.

Second, those favoring withdrawal of the Petition felt that the arguments against the Petition were sound and concerning. They noted that the opposing Comments support the conclusion that many practitioners, on both the plaintiff and

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[4] Illustrating the division, the State Bar's Civil Practice & Procedure Committee took four votes on the issues before a consensus was reached: (a) the first vote recommending withdrawing the Petition for further study in light of the opposing comments, lost by one vote (12 in favor; 13 opposed); (b) the second vote, to reply in support of the Petition, but also suggest that if the Court decided not to abrogate Rule 68 entirely, it should consider forming a task force to further study the rule, lost by 2 votes (11 in favor; 13 opposed); and (c) a third vote to simply file a reply supporting the Petition failed by 2 votes (10 in favor, 12 opposed). The only vote that passed (by 21 votes) was a vote to file this Reply in support of the Petition, but which also informs the Court that there was substantial division of views.

defense side, continue to rely on Rule 68 a practical and effective tool in fostering settlement. It was also noted that opposing Comments identified as a benefit of Rule 68 that it encourages serious dialogue with one's own client and among parties to promote settlement.

Third, those favoring withdrawal expressed concern about whether the Petition was adequately vetted in light of the strong opposition received. The perspective of those favoring withdrawal of the Petition and recommitting this project for further study reflected input from a Maricopa County Superior Court civil judge, who in turn provided comment that judicial officers were keenly interested in this subject, and that some were not aware of the proposal to abrogate Rule 68 and had ideas to share about it.

Finally, those who favored withdrawing the Petition noted that the opposing Comments had presented a number of alternatives to abrogation that merit further consideration. One alternative considered by the subcommittee of the Civil Practice & Procedure Committee that recommended abrogating Rule 68 was an innovative solution to the problem of the $1 offer of judgment that many in the general Committee favored. Under it, Rule 68 sanctions would be limited to ten percent of the difference between the amount of the offer and the amount of the final judgment. This would eliminate any incentive to make a $1 offer of judgment

a sanction for a plaintiff who rejects a $1 offer then loses at trial would only be $0.10 (ten cents). While this proposal was ultimately rejected by the State Bar in favor of its Petition seeking abrogation, those favoring withdrawal of the Petition believe that this option, along with others as proposed in the opposing Comments – such as giving judges discretion in awarding Rule 68 sanctions – warrant further study in light of the strong opposition to the Petition.

CONCLUSION

The State Bar recommended abrogating Rule 68 in Petition R-19-0015 because it unfairly punished parties for making reasonable litigation decisions, thereby improperly impeding access to justice. The opposing Comments confirmed the State Bar's conclusion that for Rule 68 to be effective in encouraging settlement of cases, parties must fear Rule 68 will impose unjust, mandatory, and punitive sanctions. The State Bar cannot support a rule whose effectiveness requires injustice.

The State Bar understands that many practitioners oppose abrogating Rule 68 because they have successfully utilized the Rule to resolve cases, even while recognizing the harsh and unfair results that may sometimes obtain. Others oppose abrogation because they believe that parties who do not accurately predict the outcome of their claims and defenses should be punished with large sanctions.

The State Bar does not question the depth or the sincerity of this opposition. But the fact that some or even many practitioners and parties may benefit from the unjust nature of Rule 68 sanctions does not make those sanctions any more just.

The State Bar also understands that, in light of the varying points of view expressed in the comments to this Petition, further study of the impact of abrogation may be warranted. If the Court agrees that further study is warranted, the State Bar respectfully recommends that the Court establish a task force to study this rule. Rule 68 is unjust and should be abrogated.

RESPECTFULLY SUBMITTED this 29th day of May, 2019.

Lisa Panahi

Lisa M. Panahi
General Counsel

Electronic copy filed with the
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this 29th day of May, 2019.

by: _____