

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

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

9 In the Matter of:

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

Supreme Court No. R-21-

13 **STATE BAR OF ARIZONA**
14 **PETITION**

15 Pursuant to Rule 28(a) of the Arizona Rules of Supreme Court, the State Bar
16 of Arizona (the “State Bar”) hereby petitions the Court to amend Arizona Rule of
17 Civil Procedure 68 (“Rule 68”). The proposed amendment would (i) alter the
18 calculation of the sanction imposed by the rule by making the sanction proportionate
19 to the difference between the amount offered and the judgment; (ii) disallow any
20 sanction if the action seeks solely injunctive relief; and (iii) allow the court to reduce
21 or eliminate a sanction only if the court finds the sanction to be manifestly unjust.

22 There has been substantial discussion among the bench and the bar about
23 whether Rule 68, which has been amended substantially over the years, should be
24 further amended or even abrogated. In January 2019, the State Bar petitioned to
25

1 abrogate the rule, and the Goldwater Institute petitioned to amend it. Various
2 interested parties responded, some in support and some in opposition. In August
3 2019, the Supreme Court denied both petitions. Shortly thereafter, Chief Justice
4 Brutinel asked the State Bar to consider recommending various options short of
5 abrogation. That request is the genesis of this Petition.

7 **I. BACKGROUND.**

8 **A. Sanctions Under Rule 68.**

9
10 Rule 68 allows parties to make offers of judgment and imposes a mandatory
11 sanction if the final judgment obtained by the offeree is not as favorable to the
12 offeree as was the offer. Under Rule 68(g), a party who rejects an offer of judgment
13 but does not later obtain a judgment more favorable than the offer, must pay as a
14 sanction all of the following: (i) the offeror's post-offer reasonable expert witness
15 fees, (ii) double the offeror's post-offer taxable costs, and (iii) prejudgment interest
16 on unliquidated claims accruing from the offer date.

17
18 **B. History of Rule 68.**

19
20 Before 1990, Rule 68 was virtually identical to its federal counterpart. The
21 offer could be made only by a defendant and, if the offer was more than what a
22 plaintiff ultimately recovered, the plaintiff owed the offering defendant any taxable
23 costs that the defendant incurred after the offer was made. In 1990, this Court
24 amended the rule by making it “bilateral,” i.e., any party—and not just a defendant—
25

1 could serve an offer of judgment, and by increasing the sanction to “double-costs.”
2 In 1992, the Court further amended the rule to add as sanctions post-offer reasonable
3 expert witness fees and post-offer prejudgment interest on unliquidated claims. The
4 rule remained the same until 2007, when the Court made a number of other
5 amendments. The sanctions portion of the rule, however, remained the same.
6

7 Since then, apart from restyling the rule in 2017 and making a minor
8 amendment to clarify the rule’s use in arbitration matters, the rule has stayed the
9 same. The rule now provides that, if “a party rejects an offer, but does not obtain a
10 more favorable judgment,” that party must pay as a sanction: (i) offeror’s
11 “reasonable expert witness fees” incurred after the offer; (ii) double taxable costs
12 incurred after the offer; and (iii) prejudgment interest on unliquidated claims
13 accruing after the offer date. Ariz. R. Civ. P. 68(g)(1). The sanctions are mandatory;
14 a court has no discretion to reduce the sanction amount or choose not to award one
15 or more of the sanctions.
16
17

18 **C. Recent Submissions to this Court Regarding Rule 68.**

19 In January 2019, after years of study, the State Bar petitioned this Court to
20 abrogate Rule 68. The State Bar believed that the rule should be abrogated because
21 (a) it can lead to unjust results by imposing disproportionately harsh sanctions on
22 litigants; (b) it does not encourage reasonable settlement behavior, but instead
23 encourages settlement through threat of sanctions regardless of the reasonableness
24
25

1 of a litigant’s position; and (c) other means exist that more effectively and fairly
2 foster settlement. The State Bar explained that it had considered alternatives short
3 of abrogation but believed that, on balance, abrogation was the best alternative. In
4 response, two supporting Comments were filed, one of which, by the Goldwater
5 Institute, consistent with its petition, proposed amending the rule to disallow
6 sanctions if the action seeks solely declaratory relief, injunctive relief or nominal
7 damages, and to allow a court, in other cases, to decline to award sanctions against
8 the party who sought to vindicate an important public policy. In addition, eight
9 opposing Comments were filed. The State Bar responded to the arguments in all of
10 the Comments, continuing to urge that the rule be abrogated.

11
12
13
14 In August 2019, this Court denied the State Bar’s petition and that of the
15 Goldwater Institute. Shortly thereafter, Chief Justice Brutinel wrote to the State
16 Bar’s Civil Practice and Procedure Committee, referring to the Supreme Court’s
17 denial, stating that the “Court does not favor the rule’s elimination, but we hope that
18 the Civil Practice and Procedure Committee will continue to evaluate approaches for
19 how we can improve the rule.” The letter specifically encouraged the Committee to
20 consider:
21

- 22 • ways to make the rule’s sanctions more proportionate to the
23 unreasonableness of an offeree's rejection of an offer or to the
24 difference between the offer and a lawsuit's final outcome;

- 1 • making sanctions discretionary or giving courts discretion to reduce or
2 otherwise tailor a sanction if it finds the sanction excessive;
- 3 • whether Rule 68 should apply in a case seeking only injunctive or
4 declaratory relief; and
- 5 • whether a different standard should apply in assessing a sanction if the
6 defendant is a governmental entity and the lawsuit is challenging the
7 legality of a governmental action or its failure to act.

7 **II. RULE 68 HAS MANY FLAWS.**

8 As the State Bar understands it, the paramount purpose of Rule 68 is to
9 encourage settlement. However, as detailed in the State Bar’s 2019 Petition, the
10 State Bar believes that this benefit is outweighed by two principal deficiencies in the
11 rule: that it can lead to unjust results by imposing disproportionately harsh sanctions
12 on litigants and that it does not encourage reasonable settlement behavior but instead
13 encourages settlement through threat of sanctions regardless of the reasonableness
14 of a litigant’s position.
15
16

17 Before addressing these specifics, there should be an understanding as to how,
18 at least in theory, a sanctions-driven regime can bring litigants to settlement.
19 Leaving aside considerations of fairness or equity for a moment, such a regime
20 should have two settlement drivers. First, there must be sufficient downside to
21 rejecting an offer that the offeree should consider it seriously. Put another way, the
22 regime must have “teeth.” Second, to determine whether and to what extent these
23 teeth exist in the context of considering an offer, the amount of the sanction should
24
25

1 be reasonably foreseeable, or predictable, at the time of the offer. Rule 68 often fails
2 both of these tests and can operate unfairly as well.

3
4 **A. In Many Cases, Rule 68 Provides Little Incentive for the Offeree
to Accept the Offer.**

5 Rule 68 sanctions have three post-offer components: (i) reasonable expert
6 witness fees; (ii) double taxable costs; and (iii) prejudgment interest on unliquidated
7 claims. Of the three, taxable costs are, typically, relatively small. In addition, many
8 cases do not involve expert witnesses or unliquidated claims. In these actions,
9 therefore, Rule 68 is relatively toothless because it does not provide any serious
10 downside incentive to rejecting an offer. (Ironically, in these actions the rule *does*
11 satisfy the predictability test but only because it is clear to all that the rejection of an
12 offer will involve, at worst to the offeree, a minimal sanction.)

13
14
15 The problem arises from the arbitrary nature of at least two of the three Rule
16 68 sanctions components: expert witness fees and prejudgment interest. In the State
17 Bar's view, if there is to be a sanctions regime that drives settlement, the calculation
18 of the sanction should not rest upon components that might be completely absent in
19 some cases or, worse yet (as elaborated on below), present in abundance in others.
20 Instead, there should be a more uniform application that produces a similar
21 settlement incentive in all cases, regardless of happenstance such as whether expert
22 witnesses or prejudgment interest is involved in the action.
23
24
25

1 **B. In Other Cases, Rule 68 Can Be Arbitrary and Unfairly Punish an**
2 **Offeree for Rejecting an Offer.**

3 The uneven applicability of Rule 68 is best demonstrated by those actions in
4 which it has “teeth” because reasonable post-offer expert witness fees and/or
5 prejudgment interest are relatively large (to the extent that they can be estimated at
6 the time of the offer). For example, if a defendant makes a one-dollar offer of
7 judgment, especially in an action where the post-offer expert fees are large compared
8 to the amount in controversy, Rule 68’s teeth are big because the plaintiff who rejects
9 such an offer is liable for the full amount of Rule 68(g) sanctions if there is a later
10 defense verdict on liability. There is no principled reason why the teeth should be
11 big in this type of action and virtually nonexistent in others just because one action
12 involves expert witnesses and the other does not.

13 Moreover, and just as importantly, the State Bar believes that a plaintiff with
14 at least a reasonable chance of success at trial should not be penalized for rejecting a
15 low offer. Put differently, a plaintiff should not be penalized in the same manner and
16 in the same amount for rejecting a one dollar offer as for rejecting a one million-
17 dollar offer.

18 This example illustrates the arbitrary nature of the sanctions amount. Under
19 Rule 68, sanctions are all or nothing: an offeree who falls *one dollar short* of the
20 rejected offer made to it must pay the full amount of sanctions set forth in the rule.
21
22
23
24
25

1 Rule 68(g) (“A party who rejects an offer, but does not obtain a more favorable
2 judgment, must pay as a sanction”); *Stafford v. Burns*, 241 Ariz. 474, 485, ¶ 42
3 (App. 2017) (“If the defendant/offeree underestimates his exposure and the
4 plaintiff/offeree obtains a more favorable judgment—even by a single dollar—the
5 offeror stands liable for costs and expert witness fees.”). The “sanctions imposed by
6 Rule 68(g) are both mandatory and punitive.” *Stafford*, 241 Ariz. at 485, ¶41. In
7 these instances, Rule 68 unfairly drives a plaintiff to settle because the specter of an
8 enormous sanction can overwhelm even the disappointment of a one-dollar
9 judgment in plaintiff’s favor.

12 **C. In Many Cases, Rule 68 Has Little Predictability or Certainty.**

13 In addition to being uneven in application, Rule 68 has another major defect:
14 in those actions where it might have teeth, it is often difficult for the offeree to
15 estimate, at the time the offer is made, what the magnitude of the sanction will be.
16 Ideally, a party evaluating a settlement offer knows the downside risk of rejecting it.
17 However, especially where a Rule 68 offer is made early in a case that might involve
18 experts, the offeree may have no way of knowing, let alone reasonably estimating,
19 what the adversary’s expert witness fees may be at the end of the action. Even
20 determining the number of experts may be guesswork at an early-offer stage, let
21 alone trying to figure out how much they will bill, a calculation that will depend on
22 such unknowns as whether and at what length they will be deposed and whether the
23
24
25

1 action will proceed to trial. So much *terra incognita*, at least in these situations,
2 works against the process of the offeree rationally considering its options.

3
4 **III. THE BEST WAY TO MINIMIZE RULE 68'S DEFICIENCIES IS TO**
5 **MAKE THE SANCTION PROPORTIONATE TO THE**
6 **DIFFERENCE BETWEEN THE OFFER AND THE SUBSEQUENT**
7 **JUDGMENT, GIVE THE COURT DISCRETION TO REDUCE OR**
8 **ELIMINATE THE SANCTION IF THE SANCTION WOULD BE**
9 **MANIFESTLY UNJUST, AND ELIMINATE THE SANCTION IN**
10 **PURELY INJUNCTIVE RELIEF CASES.**

11 The State Bar believes that Rule 68 will better foster settlement if the sanction
12 amount calculation is amended to be based on the mathematical difference between
13 the offer and the ultimate judgment or, as the Chief Justice's letter put it, "to the
14 difference between the offer and a lawsuit's final outcome." In doing so, again as put
15 by the Chief Justice, the sanction will be "more proportionate to the
16 unreasonableness of an offeree's rejection of an offer," thus mitigating much of the
17 unfairness in the present rule.

18 Accordingly, the State Bar proposes that the current sanction calculation of
19 post-offer double taxable costs, reasonable expert fees and prejudgment interest on
20 unliquidated claims be replaced by "twenty percent of the difference between the
21 amount of the offer and the amount of the final judgment." This will have many
22 salutary effects, as detailed below:

23 *Consistency.* By jettisoning costs, expert fees, and prejudgment interest as
24 sanctions components, Rule 68 will apply equally in all cases, and sanctions will not
25

1 rest on the sum of these arbitrary factors.

2 *Better predictability.* In most cases, the offeree will be better able to calculate
3 the downside of rejecting an offer. While the judgment amount will, of course, be
4 unknown at the time of the offer, in most cases the party will be better able to attach
5 a reasonable range to it than it would to its adversary's expert fees.

6 *Mitigating manifestly unjust results.* By basing the sanction on *the difference*
7 between the offer and the eventual judgment, potentially unfair results will be
8 mitigated. For example, under current Rule 68, if, in an action involving substantial
9 expert fees, the defendant makes a one-dollar offer, plaintiff rejects, there is a
10 defense verdict and the three sanctions components amount to \$200,000, plaintiff is
11 automatically sanctioned \$200,000. However, under the proposed amendment, the
12 sanctions amount will be twenty cents, which represents twenty percent of the
13 difference between the one-dollar offer and the defense verdict. One intended effect
14 of this amendment is to effectively end this one-dollar offer practice.

15 *Promoting reasonable settlement negotiations.* Another intended effect of the
16 proposed amendment is to induce the offeror to make an offer more favorable to the
17 adverse party, which will promote reasonable settlement negotiations.

18 *Defendant's Offer.* To take an example, under the proposed amendment, if the
19 defendant makes a \$20,000 offer, then the plaintiff must weigh the chances of getting
20
21
22
23
24
25

1 a judgment better than \$20,000 against the readily-calculable sanction of not getting
2 one. That sanction would be \$4,000 if there is a defense verdict (twenty percent of
3 the difference between \$20,000 and zero), and would be \$2,000 if there is a
4 plaintiff's judgment in the amount of \$10,000 (twenty percent of the difference
5 between \$20,000 and \$10,000). The higher the defendant's offer (i.e., the more
6 favorable it is to the plaintiff), the larger the sanction if the plaintiff does not obtain
7 a more favorable judgment. Taking this example, a defense offer of \$40,000 rather
8 than \$20,000 not only adds \$20,000 to plaintiff's upside should plaintiff accept but
9 also creates \$4,000 in additional downside to plaintiff (twenty percent of the
10 difference between \$40,000 and \$20,000) should plaintiff decline.

13 *Plaintiff's Offer.* The same factors apply to a plaintiff's offer. If the plaintiff
14 makes an offer to be awarded \$1 million, then the defendant must weigh the chances
15 of having a judgment of less than \$1 million entered against it against the readily-
16 calculable sanction if the judgment is greater than \$1 million. That sanction would
17 be \$40,000 if there is, say, a \$1.2 million judgment (twenty percent of the difference
18 between \$1.2 million and \$1 million). The lower the plaintiff's offer (i.e., the more
19 favorable it is to the defendant), the larger the sanction if the defendant does not
20 obtain a more favorable judgment. Taking the previous example, a plaintiff's offer
21 of \$500,000 in its favor rather than \$1 million not only removes \$500,000 of
22 downside risk to defendant should defendant accept but also creates \$100,000 in
23
24
25

1 additional downside to defendant (twenty percent of the difference of between \$1
2 million and \$500,000) should defendant decline.

3 *Incentives for both sides.* In all cases, the parties will be operating with mutual
4 downside and upside in making/considering an offer, unlike under current Rule 68,
5 where the defendant-offeror can face little downside and substantial upside while
6 the plaintiff-offeree faces the opposite, which are artificial and unfair dynamics that
7 exist only within the confines of Rule 68. Further, there will be incentive for a party
8 to make an offer more favorable than otherwise to its adversary.
9

10 *Easier to calculate and more efficient use of judicial resources.* Rule 68 can
11 be very complicated to apply in practice, but the amendment will eliminate the need
12 for determination of what post-offer expert witness fees were reasonable, as well as
13 submissions regarding the calculations of these fees, post-offer interest, and costs.
14

15 In considering what the proportionality calculation should be, the State Bar
16 believes twenty per cent of the difference between offer and eventual judgment
17 strikes the best balance between having Rule 68 foster settlement by presenting real
18 downside risk to an offeree if an offeror makes a good faith offer, while not making
19 Rule 68 draconian. Even so, and in light of the Chief Justice’s request that we
20 consider “making sanctions discretionary or giving courts discretion to reduce or
21 otherwise tailor a sanction if it finds the sanction excessive,” the State Bar also
22 recommends that Rule 68 be further amended to add: “A court may reduce or
23
24
25

1 eliminate a sanction otherwise required by this rule only if it finds the sanction to be
2 manifestly unjust.” Given the proposed proportionality amendment, the State Bar
3 believes that this safeguard provision would apply only in the most extraordinary
4 cases.
5

6 Per the Chief Justice’s letter, the State Bar considered an alternative
7 discretionary option in lieu of proportionality, which would have retained the current
8 Rule 68 sanctions calculation but added the following:
9

10 ***Disallowance or reduction of sanction.*** The court may disallow or
11 reduce a sanction if the court finds that the sanction would cause an
12 unjust result. In making that decision, the court may consider the
13 following factors, among other things: (i) the apparent merit or lack of
14 merit of the claim(s) or defense(s); (ii) the extent to which the action
15 involved close questions of law or fact; (iii) the difference between the
16 amount awarded in the final judgment, on the one hand, and the offer
amount, the amount in controversy, and the sanction calculated under
Rule 68(g)(1), on the other hand; (iv) whether the offeror had
unreasonably refused to furnish information relevant to evaluate the
offer’s reasonableness; (v) whether the action presented issues of far-
reaching importance to nonparties; (vi) whether the action sought
mostly injunctive relief; and (vii) whether the award would cause
substantial economic harm to the sanctioned party.

17 In the end, a substantial majority of the State Bar Civil Practice and Procedure
18 Committee rejected this approach, concluding that proportionality better fostered
19 settlement, was fairer, more predictable, and would use fewer judicial resources.
20

21 Finally, per the Chief Justice’s letter, the State Bar also considered whether
22 Rule 68 should apply in cases seeking only injunctive or declaratory relief and
23 whether a different standard should apply in assessing a sanction if the defendant is
24 a governmental entity and the lawsuit is challenging the legality of a governmental
25

1 action or its failure to act. We also considered whether Rule 68 should be amended
2 to carve out Tier 1 cases. The State Bar concluded that, with one exception, Rule 68,
3 as amended to impose a proportional sanction, should apply to all of these actions.
4 The exception was for actions purely for injunctive relief, since the sanction there
5 would be very difficult to calculate. Therefore, the State Bar petitions to further
6 amend Rule 68 to provide: “A court may not assess a sanction under this rule if the
7 action seeks solely injunctive relief.”
8
9

10 CONCLUSION

11 For the above reasons, the State Bar of Arizona respectfully requests that Rule
12 68 be amended to (i) alter the calculation of the sanction imposed by the Rule by
13 making the sanction proportionate to the difference between the amount offered and
14 the judgment, (ii) disallow any sanction if the action seeks solely injunctive relief,
15 and (iii) allow the court to reduce or eliminate a sanction only if the court finds the
16 sanction to be manifestly unjust. A redline of the proposed changes is attached as
17 Appendix A. Appendix B is a clean version of the proposed changes. Appendix C is
18 a proposed comment to the changes.
19
20

21 RESPECTFULLY SUBMITTED this 8th day of January 2021.
22

23 */s/ Lisa M. Panahi*

24

Lisa M. Panahi
25 General Counsel

1 Electronic copy filed with the
2 Clerk of the Supreme Court of Arizona
3 this 8th day of January 2021.

4 by: /s/ Patricia Sequín
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25