

1 **Daniel Jurkowitz, President**
2 **Pima County Bar Association**
3 177 N. Church Avenue, Suite 101
4 Tucson, AZ 85701
5 (520) 623-8258
6 admin@pimacountybar.org

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

10 In the Matter of:

Supreme Court No. R-17-0050

11
12 **PETITION R-17-0050 TO FURTHER**
13 **AMEND ARIZONA RULES OF CIVIL**
14 **PROCEDURE TO MODIFY RULE 11**
15 **AND ADD RULE 26(b)(2)(D)**

COMMENT OF THE PIMA COUNTY
BAR ASSOCIATION

16 Pursuant to Ariz. R. Sup. Ct. 28(D), the Pima County Bar Association (“PCBA”) 17
18 opposes the Petition’s proposed amendments to Ariz. R. Civ. P. 11 and 26(b). The 19
20 PCBA has reviewed the May 21, 2018 State Bar of Arizona’s Comment to the Petition 21
22 and joins in it in its entirety. The PCBA reiterates that groups have repeatedly 23
24 proposed adding Rule 26(b)(2)(D) and changing Rule 11 to make discretionary 25
26 sanctions for Rule 11 violations mandatory. Repeatedly, the Supreme Court of 27
28 Arizona has rejected them: the last time being less than a year ago on August 31, 2017.

29 **Rule 11 Sanctions Should Remain Discretionary**

30 The PCBA provided a detailed opposition to mandatory Rule 11 sanctions in its 31
32 May 15, 2015 Comment to Petition R-15-0004 and in its December 29, 2015 Petition 33
34 R-15-0043. Consistently, the PCBA has supported the use of the word “may” rather 35
36 than “shall” or “must” in Rule 11. The PCBA continues to maintain the positions 37
38 described in the 2015 Comment and Petition. The R-17-0050 Petitioners suggest that 39
40 the absence of a PCBA (or other) comment last year, opposing the Court’s Committee 41
42

1 on Civil Justice Reform recommendations for mandatory Rule 11 sanctions,
2 represented a decrease or change in the opposition to mandatory sanctions. The PCBA
3 strongly opposes this assumption. In fact, the multiple times in which this Court has
4 refused to adopt mandatory Rule 11 sanctions in the last three years speaks to the
5 ongoing support for discretionary sanctions.

6 The current Petitioners propose that the Rules changes in R-17-0050 will reduce
7 the time and costs involved in resolving litigation in Arizona courts. However, the
8 Petitioners cannot point to any studies or developments over the past 13 years or more
9 which demonstrate that mandatory rather than discretionary Rule 11 sanctions
10 decreases costs or decreases the time it takes the public to resolve litigation. There is
11 also no evidence that a shift to mandatory sanctions will curb the filing of baseless
12 lawsuits. Petitioners cite to a 1991 Federal Judicial Center study that surveyed judges
13 about mandatory sanctions, when mandatory sanctions were in effect. Although the
14 majority of judges polled felt that there was no need to change the mandatory sanction
15 rule, the views of federal judges on mandatory sanctions in the 1990s is irrelevant to
16 whether there should be a return to mandatory sanctions in 2018.

17 The PCBA believes that mandatory sanctions may actually *increase* costs and
18 satellite litigation by encouraging Rule 11 Motions to pressure opposing parties, even
19 though the likelihood of a violation finding is remote. Further, if there is a true Rule 11
20 violation, the PCBA trusts that judges can leverage sanctions when appropriate to deter
21 the repetition of Rule 11 violations. Finally, the PCBA opposes a change that will
22 move Rule 11 farther away from the Federal Rule 11 language. There is no
23 substantially justifiable reason to make this type of an exception to the general goal of
24 making practice in Arizona more consistent between the State and Federal courts. The
25

1 change would encourage forum shopping, which is exactly what the Court wanted to
2 prevent when it directed that Arizona’s State Rules be modified for consistency
3 between the State and Federal court (unless there was a well-reasoned intended
4 variation).

5 Concerning the Petitioners’ suggested changes to other language in Rule 11,
6 including “colorable” instead of “nonfrivolous” and the addition of “well grounded in
7 fact” and “having evidentiary support,” the PCBA joins in and adopts the comments
8 the State Bar of Arizona made in opposition to the changes, and will not repeat the
9 arguments here.

10 **Rule 26(b)(2)(D) Proposed Modifications Should Not be Adopted**

11 Concerning the Petitioners’ suggested addition of Rule 26(b)(2)(D), the PCBA
12 adopts the arguments in the Arizona State Bar’s Comment to the Petition in opposition
13 to the proposed changes, and will not reiterate the arguments here.

14 **Conclusion**

15 For the foregoing reasons, the PCBA respectfully submits that the Court should
16 not adopt the proposed modifications to Rules 11 and 26, as proposed in Petition R-17-
17 0050.

18 DATED: May 24, 2018

19 By: /s/ Daniel Jurkowitz
20 /s/ Heather L. Bohnke
21 /s/ Andrew Sterling
22 Daniel Jurkowitz, PCBA President
23 Heather L. Bohnke & Andrew Sterling,
24 Co-Chairs – PCBA Rules Committee

23 Electronic copy filed
24 With the Clerk of the Supreme
25 Court of Arizona this ____
26 day of May, 2018.

25 By: Heather L. Bohnke