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8 ARIZONA SUPREME COURT

10 IN RE:

R-19-0015

11
12 PETITION TO ABROGATE RULE
13 68, ARIZONA RULES OF CIVIL
14 PROCEDURE

MARICOPA COUNTY ATTORNEY'S
RESPONSE TO PETITION TO ABROGATE
RULE 68, ARIZ. R. CIV. P.

15 The Maricopa County Attorney hereby responds to the Petition to Abrogate Rule
16 68 of the *Arizona Rules of Civil Procedure (Ariz.R.Civ.P)*, and respectfully requests
17 this Court either deny the petition in total, because the current rule holds accountable
18 both Plaintiffs and Defendants who would otherwise overreach or use tactics to
19 needlessly run up costs of litigation. Abrogating the rule would take away an effective
20 tool requiring parties to take a realistic look at their cases (both as to liability and value),
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1 and when appropriate, accept or reject a judgment knowing the potential risks moving
2 forward.
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4 Respectfully submitted this 1st day of May, 2019.

5 WILLIAM G. MONTGOMERY
6 MARICOPA COUNTY ATTORNEY

7 By 
8 MICHAEL R. MCVEY
9 CHIEF DEPUTY (ACTING)

10 **I. INTRODUCTION**

11 Petitioner requests the Supreme Court abandon Rule 68, Ariz.R.Civ.P.. In
12 support of its position, Petitioner asserts that the rule can be unduly harsh because (1)
13 the potential for sanctions may be unreasonable, excessive and unrelated to the
14 reasonableness of an offeree's rejection; and (2) the rule does not encourage reasonable
15 settlement behavior. However, the rule requires the offeror and the offeree to make an
16 honest and thorough evaluation of their case; the offeror must do so in order to submit
17 an Offer, and the offeree must do so in order to evaluate whether to accept or reject the
18 Offer. Recognizing there can be issues of equity in some instances, the Maricopa
19 County Attorney suggests that, rather than abandon Rule 68, the Arizona Supreme
20 Court should consider inserting language which would give judges discretion to
21 evaluate the circumstances of each case, and if equitable, allow the judge to lessen the
22 sanction that would otherwise be awarded under the current rule.
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1 **II. DISCUSSION**

2 **A. Rule 68 promotes reasonable and effective case evaluation as well**
3 **reasonable settlements.**

4 Rule 68 does not promote harsh sanctions or otherwise force a litigant to settle
5 when they do not otherwise want to settle their case. Rather, the rule operates to require
6 both plaintiffs and defendants to take a careful look at their cases, and to fully and
7 reasonably evaluate both liability and damages. It is only after this case assessment is
8 completed that an offer of judgment, or meaningful response thereto can be made. It is
9 the evaluation of the case-specific facts that will assist litigants in deciding how best to
10 proceed with an Offer of Judgment. Adding a penalty where a party does not exceed
11 an offer by a particular percentage is not likely to assist a litigant in realistically
12 evaluating their case.
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16 Petitioner suggests that the current rule should be abrogated because a litigant
17 may be unfairly exposed to sanctions by rejecting a \$1 offer of judgment. However,
18 the amount of the offer, whether \$1 or \$100,000, reflects the offeror's evaluation of the
19 case value, and conveys to his/her opponent a belief in the strength of their case. A
20 nominal Offer of Judgment amount does not mean, and should not be construed to
21 mean, that a litigant is being unreasonable. Indeed, an unreasonable litigant may be
22 called to answer a petition for Rule 11 sanctions if an offer is submitted in bad faith.
23 Litigants should be allowed to process their cases as they determine to be consistent
24 with the evidence. By filing an Offer of Judgment, whether nominal or substantial, an
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1 offeror places an offeree on notice that they have evaluated the strength of the case,
2 and the offeree should do the same, or he/she may be required to compensate the offeror
3 for additional costs and fees incurred if the offeree unreasonably passes on the
4 opportunity to settle the case. The existing Rule 68 recognizes that there is a mechanism
5 for a prevailing party to recover costs and fees that they would not otherwise have
6 incurred if the opposing party had accepted the Offer of Judgment. The Maricopa
7 County Attorney suggests that the Offer of Judgment rule is a useful litigation tool that
8 should not be abrogated.
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12 Additionally, an Offer of Judgment presents the parties with an opportunity to
13 open the lines of communication about evidentiary issues, case value and settlement
14 prospects. An Offer of Judgment filed by a defendant, even for a nominal amount,
15 necessarily encourages the opposing party to take a hard look at their case, to evaluate
16 whether their theory of liability is sound, and to determine whether the damages are
17 sufficient to present the case to a jury. If the answer to either question is negative, the
18 offer is the mechanism that will encourage the parties to begin settlement discussions.
19 Conversely, if the plaintiff makes a substantial Offer of Judgment, perhaps for
20 \$1,000,000, the defendant will be forced to assess whether they have undervalued the
21 case, whether they have overlooked significant facts or evidence, and whether the law
22 is more favorable to their opponent than previously considered. By answering these
23 questions affirmatively, a defendant will be encouraged to step up settlement
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1 negotiations. The Offer of Judgment is an effective tool that can be used in settlement
2 discussions.

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4 **B. Proportionality in sanctions should be considered in lieu of abrogation.**

5 The Petitioner has indicated that allowing some form of a “subjective
6 requirement [into Rule 68] that an offer of judgment be ‘reasonable’ would be
7 unworkable” because it would be difficult and time consuming. It is unclear why
8 allowing a judge to determine the amount of expert fees and costs to award under some
9 revised version of Rule 68 would be unreasonable. Judges often make these types of
10 subjective determinations, whether it is awarding fees under some statutory provision,
11 or in determining if other types of sanctions might be appropriate in a given matter.
12 Allowing a reasonableness requirement would allow a trial judge to evaluate the
13 circumstances of the offer and determine whether the amount of proposed sanctions is
14 proportional. For example, when awarding sanctions, it may be beneficial to allow a
15 trial judge to consider the fact that the eventual judgment fell “one dollar short” of the
16 offer. Instead of requiring that all expert fees and double taxable costs be paid, a more
17 equitable revision of the existing Rule would afford the trial judge discretion to award
18 some or all expert witness fees and “no more than double the taxable costs.” Though
19 this does inject some uncertainty into an award of sanctions, it also allows the parties
20 to use offers of judgment as a strategic and important settlement tool during litigation.
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27 Additionally, with the recent changes to the *Arizona Rules of Civil Procedure*
28 where proportionality in disclosure and discovery are emphasized, the Court should not

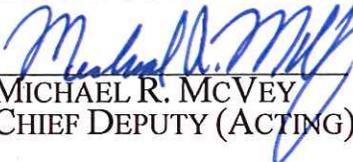
1 abrogate Rule 68 until it has determined whether and how the rule revisions impact
2 Offer of Judgment sanctions. For example, the limits on discovery and depositions in
3 each tier could reduce the potential taxable costs that could be awarded against an
4 unsuccessful offeree. In a Tier 1, case only five hours of fact depositions are
5 presumptively allowed, and only 120 days are allowed to complete discovery. *See*
6 Rules 26.2(f)(1), *Ariz.R.Civ.P.* Because the rule revisions are new and no cases under
7 the tiered system have likely been tried to verdict yet, the tiered system will ultimately
8 promote more efficient litigation with less taxable costs, thereby reducing the amount
9 of sanctions an unsuccessful offeree may face.

13 III. CONCLUSION

14 Rule 68, *Ariz.R.Civ.P.* is another litigation tool that is not only available to the
15 defense bar, but to the Plaintiffs. The purpose of submitting an offer of judgment is to
16 require all parties to properly evaluate the case. It can also protect parties, and prevent
17 costs and fees from being needlessly expended. This is a tool that should remain
18 available. If the Court is to consider changes to the rule, then amendments which would
19 permit the Court to use its discretion in awarding sanctions would be far preferable to
20 abrogating the rule.

24 Respectfully submitted this 1st of May, 2019.

25 WILLIAM G. MONTGOMERY
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