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**IN THE SUPREME COURT  
STATE OF ARIZONA**

In the Matter of:

PETITION TO AMEND RULES 32(c)  
and (d), RULES OF THE SUPREME  
COURT

Supreme Court No. R-17-0022

**Reply in Support of Petition to  
Amend Rules 32(c) and (d), Rules of  
the Supreme Court**

“Bureaucracy is ever desirous of spreading its influence and its power. You cannot extend the mastery of the government over the daily working life of a people without at the same time making it the master of the people's souls and thoughts.” Herbert Hoover, Speech in New York (Oct. 22, 1928), in A Documentary History of the United States 355 (R. Heffner & A. Heffner, eds., 9th ed. 2013). *See also* Cyril Northcote Parkinson, *Parkinson's Law*, THE ECONOMIST (Nov. 19, 1955)<sup>1</sup> (in the field of public administration, growth is inevitable irrespective of the amount of work to be done).

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<sup>1</sup> <http://www.economist.com/node/14116121>.

In 1902, annual Arizona State Bar dues were only \$5.00, having been raised that year from \$1.00.<sup>2</sup> In inflation adjusted dollars, that would have been \$135.16 in 2016.<sup>3</sup> As the State Bar has expanded into many areas, so have the mandatory financial obligations imposed on all lawyer members. Once a small organization dedicated to its core function, lawyer regulation, the State Bar has now become something much more extensive. Some find that to be a good thing. Many others do not.

The purpose of the Petition at issue here was not to call for a judgment on the appropriate size of the State Bar or the activities in which it may engage. The purpose of the Petition was to maintain necessary lawyer regulation as it currently exists, give the State Bar freedom to do whatever else it wants—at whatever cost members voluntarily were willing to bear—yet preserve for Arizona lawyers their freedom to associate, or not, with the many functions of the State Bar unrelated to lawyer regulation. In addition to such an arrangement being the right thing to do, Petitioner believes it is time for proactive change before litigants or the Arizona Legislature force change upon us.

**A. Only the State Bar opposed the Petition**

Petitioner is aware of seven comments in response to the Petition, six in

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<sup>2</sup> See History, State Bar of Arizona, <http://www.azbar.org/aboutus/history> (last visited June 16, 2017).

<sup>3</sup> See Inflation Calculator, <http://www.in2013dollars.com/1902-dollars-in-2016?amount=5> (last visited June 16, 2017).

favor and one in opposition. As anticipated, the one comment in opposition to the Petition was filed by the State Bar (“State Bar Comment”). In other words, Petitioner and the six Arizona lawyers who favor the Petition paid for the State Bar’s arguments in opposition to their wishes. All other Arizona lawyers also paid, whether they agree with the State Bar’s opposition or not. The membership was not polled. The “public” was not polled. The State Bar Board of Governors decided it wanted to keep Arizona lawyers, along with the funds they provide, under its full control and responded accordingly.

**B. The Role and Governance Task Force.**

The State Bar Comment leaves one with the impression this Court established the Role and Governance Task Force (“Task Force”) for the purpose of deciding one issue: Should State Bar membership be mandatory across the board or voluntary? This does not appear to have been the motivating reason for the Task Force. The Court’s order stated:

Given the changes that have occurred in the legal services environment, the growth in Bar membership, and the demands placed on the State Bar, it is time to review the Bar’s mission and governance structure to ensure that they continue to best serve the public interest.

*See* Administrative Order No. 2014-79. The order identified the following tasks:

The Task Force shall examine the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona, and will make recommendations to the Court for changes, if needed, including but not

limited to these areas:

- a) Does the mission of the State Bar need to be clarified or modified?
- b) Is the governance structure adequate to efficiently and effectively govern and carry out the duties of the Board?
- c) Are Supreme Court Rules in the following areas related to Board structure and governance duties adequate to best serve the Board's primary mission of protecting the public?
  - i. Qualifications for membership on the Board of Governors;
  - ii. Appointment, election and removal of members of the Board of Governors;
  - iii. Term limits for members of the Board of Governors;
  - iv. Election process;
  - v. Board of Governors size and composition; and
  - vi. State Bar leadership structure and composition.

*Id.* The Court did not ask the question raised by the Petition: Should the State Bar continue to be a mandatory integrated bar for all purposes? Only one of the several assigned tasks, “[d]oes the mission of the State Bar need to be clarified or modified,” arguably raised the issue. Everything else was about leadership structure and governance.

One would expect a task force on structure and governance of any organization to be populated with current and former insiders, those likely to have

the most experience and information necessary to adequately address the issues raised. The Task Force appears to have been consistent with this expectation. Many State Bar leaders were involved. While this may be a good thing for structure and governance issues, insiders may be conflicted over whether to abolish mandatory membership entirely, or something much less, as proposed in the Petition.

Based on their report, it appears the Task Force considered only the “abolishing the organization” option. The scant three plus pages of the report on the issue argue why a mandatory integrated bar is preferable over a purely voluntary one. *See Report of the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona (September 1, 2015) (“Report”)* at 6-9. If a hybrid option such as that suggested in the Petition was discussed, it did not make it into the Report. One member, however, did file a vigorous 25-page dissent in opposition to the Task Force’s mandatory integrated bar conclusion. *See Letter from Paul Avelar to the Task Force (June 11, 2015), Report at Appendix J, pp. 89-113.* Mr. Avelar obviously considered the issue in much greater detail.

**C. Notice and an opportunity to be heard.**

According to the State Bar, the Report was made “readily accessible to interested stakeholders, who were given the opportunity to comment on the findings in the Report.” State Bar Comment at 3. Who are the “interested

stakeholders?” Would that not include everyone currently required to join the mandatory integrated bar? Petitioner does not recall a notice that a Supreme Court task force was considering whether parts of the State Bar other than lawyer regulation should remain mandatory, or whether they could be moved into a voluntary organization. One would expect such notice and links to the draft and final Report be given to all Arizona lawyers, as interested stakeholders.

While this is admittedly anecdotal evidence, lawyers in Petitioner’s office were not aware of the Task Force. What the task force did in private and then published on the Internet does not preclude this Court from considering the Petition.

**D. The State Bar’s view of its mission is misguided.**

The State Bar contends its purpose is to “protect the public.” State Bar Comment at 3. This makes sense. If protecting the public means the testing, licensing, and disciplining of Arizona lawyers, all of this is covered by lawyer regulation, which would remain mandatory under the Petition. According to the Task Force, however, “[a]pproximately one-half of the [State Bar]’s budget is devoted to attorney regulation.” This means the other half of the budget must “protect the public” in some other way.

The State Bar Comment states that Rule 32 “do[es] not require the State Bar to heed the political or ideological dispositions of our members or to speak as a voice for our members.” State Bar Comment at 5. In other words, we will charge

them fees because we can, but we do not need to listen to them or speak for them. Any accountability provided by electing the Board of Governors is shown to be nothing more than an illusion. This is a textbook example of taxation without representation. In today's world, many organizations will have members who do not agree politically or ideologically. That is the very nature of democracy. But an organization that disclaims any obligation to consider what its members want is in need of change.

The State Bar Comment does not explain why Arizona lawyers and judges, but no other Arizona constituency, is responsible for the part of protecting the public that is not covered under lawyer regulation. Other professions, such as medicine, contracting, real estate sales, and barbering require mandatory licensing, and a governing organization regulates the members and charges them licensing fees. But only the State Bar spends a mere 50% of its budget on direct regulation, forcing all Arizona lawyers and judges to pay for excessive "services" whether they use them or not. Why? The State Bar Comment does not clearly say, or clearly distinguish between regulation and member services.

The misguided nature of the State Bar's perceived mission is illustrated well in the fees paid by inactive and retired Arizona lawyers. Both categories need little or no traditional lawyer regulation. They are not practicing law. They are inactive or retired. The State Bar's necessary lawyer regulation function relative to both

categories involves little more than keeping their names on a list. Yet, inactive members pay \$265 in dues per year, and retired members pay \$215. That is an expensive list. These costs likely would decline if mandatory membership became focused on only lawyer regulation. That would be fair and right. Inactive and retired people are near the bottom of any reasonable list of Arizonans prioritized in order of who should pay for lawyers' and judges' extra-curricular activities.

The State Bar Comment cites statistics that Nebraska experienced a decline in bar revenues after membership became voluntary, other than for lawyer regulation. *See* State Bar Comment at 7-9. Nebraska lawyers also pay far less than Arizona lawyers in mandatory membership fees, and there is no reason to believe they are more ethical than we are or less in need of regulation. “The lawyers in Nebraska now pay a mandatory fee of \$98 directly to the Nebraska Supreme Court for regulation. And dues to the Nebraska State Bar Association are now voluntary.” Liz Neeley, Exec. Dir., Neb. St. Bar Assoc., Remarks before California Governance in the Public Interest Task Force (April 25, 2016) (transcript available in The State Bar of California, *White Paper, The Functions, Authority & Structure of the State Bar of California* (May 12, 2016), Appendix F at 14).

It makes sense that if you charge people for something they do not think they want or need, or if you charge too much, some of them might stop paying if

they are given that option. Almost anyone wrongfully compelled to do something may stop doing it if you let them. This fact is no excuse to continue compelling them.

Clearly not a fan of Nebraska's voluntary bar, Nebraska State Bar

Association Executive Director Neely's comments to the California Bar are telling:

I guess in a nutshell, what I'd like to say is the beauty of a mandatory bar association is that it can look outside itself. It can serve its membership, but it can also serve the public and it can serve the court system. Voluntary bar associations for their own survival must be inward looking. They must focus primarily on the value to their membership so that dues revenue will continue to come in and service to the courts and the public becomes secondary. I think it's unrealistic to think that you can take a revenue reduction like this and maintain the same level of service and functions. In making cuts, voluntary bar associations will look at all they currently do and ask themselves which of these provides value to our membership? How can we strengthen our value proposition?

*Id.*

The "beauty" of forced membership in any organization, is that management has no need to worry about member demands because the members have no choice but to belong. That does not justify compulsion. Petitioner asks, what is wrong with giving the state bar some incentive to provide value to its members? Eighteen other states have voluntary bars. Many of them, including but not limited to New York, Delaware, Maryland, Illinois, and moving west, Kansas and Colorado, have

practicing lawyers with fine reputations. Arizona could join them without harming the state, its reputation, or the public.

**E. The State Bar is not “*Keller* pure.”**

The State Bar contends that it “does not use membership dues to fund activities of a political or ideological nature that are not reasonably related to the State Bar’s core functions,” and that “a member may still object to and receive a refund of the annual fee allocable to those activities.” State Bar Comment at 10. What activities? Where are they explained? What is the reasonably prompt opportunity to object to them? Who is the decision-maker? Petitioner’s recent dues statement contained none of this information.

The State Bar dismisses out of hand Petitioner’s case citations regarding union loans and union members because “the State Bar is not a union and does not function as a union.” State Bar Comment at 10. The *Keller* court rejected this tautology. Reversing and remanding, Chief Justice Rehnquist quoted from the California Supreme Court’s dissenting opinion as follows:

[C]ontrary to the majority’s assumption, the State Bar would not have to perform the three-step *Ellis* analysis prior to each instance in which it seeks to advise the Legislature or the courts of its views on a matter. Instead, according to *Hudson*, “the constitutional requirements for the [association’s] collection of ... fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such

challenges are pending.” Since the bar already is statutorily required to submit detailed budgets to the Legislature prior to obtaining approval for setting members’ annual dues, the argument that the constitutionally mandated procedure would create “an extraordinary burden” for the bar is unpersuasive.

While such a procedure would likely result in some additional administrative burden to the bar and perhaps prove at times to be somewhat inconvenient, such additional burden or inconvenience is hardly sufficient to justify contravention of the constitutional mandate. It is noteworthy that unions representing government employees have developed, and have operated successfully within the parameters of *Abood* procedures for over a decade.

*Keller v. State Bar of California*, 496 U.S. 1, 16-17 (1990) (quoting *Keller v. State Bar*, 47 Cal. 3d 1152, 1192, 767 P.2d 1020, 1046 (1989) (Kaufman, J., concurring and dissenting)) (citations and footnote omitted). The Court had no problem applying analogous union case law to a bar association.

Supreme Court Rule 32(c)(8) states in part that “a member who objects to particular State Bar lobbying activities may request a refund of the portion of the annual fee allocable to those activities at the end of the membership year.”

Petitioner has no personal experience with this rule and knows only anecdotally that other lawyers have said “it does not work.” The process appears to be very onerous. *See* State Bar Bylaws, Article XIII.<sup>4</sup> The absurdity of expecting more than 24,000 Arizona lawyers to know everything the State Bar does on a regular

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<sup>4</sup> [http://www.azbar.org/media/922524/bylaws\\_sba\\_final\\_approved\\_oct2013\\_-\\_keller\\_section.pdf](http://www.azbar.org/media/922524/bylaws_sba_final_approved_oct2013_-_keller_section.pdf)

basis, and then individually decide whether to opt out of paying for something, taking a risk the State Bar will require individual arbitration proceedings over a few dollars, should be obvious.

**F. Conclusion.**

Petitioner reiterates his January 10, 2017 request that this Court adopt amendments to Rules 32(c) and (d), Rules of the Supreme Court, as proposed in the Petition.

RESPECTFULLY SUBMITTED: June 21, 2017.

By */s/ Gregory W. Falls* \_\_\_\_\_

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