Gregory W. Falls
Sherman & Howard L.L.C.
201 East Washington Street, Suite 800
Phoenix, Arizona 85004-2327
Telephone: (602) 240-3000
Fax: (602) 240-6600
Arizona Bar No. 011206
GFalls@ShermanHoward.com

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- __-_____ **Petition to Amend Rules 32(c) and (d), Rules of the Supreme Court**

Pursuant to Rule 28, Rules of the Supreme Court, Gregory W. Falls, individually and on behalf of the Goldwater Institute, respectfully petitions this Court to adopt amendments to Rules 32(c) and (d), Rules of the Supreme Court ("Rule 32"), governing membership in the State Bar of Arizona ("State Bar" or "Bar"), as proposed herein. The intent of the proposed amendments is to maintain the current mandatory membership requirement for all lawyers but (1) eliminate mandatory membership dues for non-regulatory functions and (2) allow voluntary contributions for all non-regulatory functions. A redlined draft of amended Rule 32, as proposed herein, is included in the Appendix of supporting documents at

pages 1-21. A clean draft of amended Rule 32, as proposed herein, is included in the Appendix at pages 22-42.

I. Background and Purpose of the Proposed Rule Amendments.

This Petition seeks amendment of Rule 32 for the purpose of splitting the functions of the State Bar of Arizona into two distinct subsets. The first would be a mandatory membership organization ("Mandatory Bar"). The second would be a purely voluntary membership organization ("Voluntary Bar"). The proposed amendments in the text of Rule 32 are minor. Petitioner acknowledges that the resulting changes in the State Bar, however, could be significant, depending on how the State Bar reacts to them.

A. Reasons for Change.

Arizona is a "right to work state." Lawyers know this means individuals are free to organize and become members in unions or associations for the purpose of furthering their interests in the workplace, whether for the purpose of collective bargaining with employers, lobbying for changes in the law, associating with like-minded members, or otherwise advocating for change where groups may have clout greater than individuals alone. Ariz. Const. art. 25; A.R.S. §§ 23-1301 through 1307. Arizona law also provides for the licensing of a number of professions and occupations. *See e.g.* A.R.S. §§ 32-101 through 4502.

The "right to work" concept does not implicate any of these freedoms or

licensing requirements. Rather, it means that no person may be "denied the opportunity to obtain or retain employment because of nonmembership in a labor organization . . . ." A.R.S. §23-1302. There is a burdensome exception to this right to work for which this Petition is filed. It involves the practice of law. Other than under certain limited circumstances, such as admission *pro hac vice*, everyone seeking to engage in the practice of law in the State of Arizona must become a member of the union or association known as the State Bar. *See* Rule 32(c)(3), Rules of the Supreme Court. Membership is mandatory.

Mandatory bar membership was a fad of the last century, beginning in the 1920's with North Dakota. N.D. Cent. Code §27-12-02 (originally enacted as 1921 N.D. Laws, Ch. 25, §1). Arizona joined the fray under Legislative control in 1933, with the Supreme Court assuming joint control over the Bar in 1973 and sole control in 1985. History, State Bar of Arizona, www.azbar.org/aboutus/history (last visited January 9, 2017).

Not all states have mandatory bars. One recent count put the number of states mandating bar membership at thirty-two. *See In re Petition for a Rule Change to Create a Voluntary State Bar of Nebraska* ("*Voluntary State Bar of Nebraska*"), 286 Neb. 1018, 1022, 841 N.W.2d 167, 171 (2013). In other words, eighteen states have lawyers practicing law, representing the best interests of their clients, and otherwise engaging in the same activities as Arizona lawyers, all

without being mandatory members of a state bar association and without catastrophically damaging their states' legal systems.

Much like the rest of the population, lawyers are people. We have diverse beliefs and interests. We are members of all of the political parties, and many of us are members of no party. We are conservatives, liberals, and libertarians, among other things. Some of us believe in small government, others would prefer that government take a larger role. We have very diverse practices that rapidly are changing with the times. What some lawyers do defined as the practice of law looks nothing like the practice of law done by someone else. The fungible storefront lawyer found in most every city and town a century ago is largely a thing of the past.

One mandatory organization does not and cannot reasonably be expected to speak for all lawyers on all matters. Petitioner contends it is time for lawyer regulation to recognize this fact, change with the times, and move into the twenty-first century.

B. General Description of the Proposed Amendments.

Currently, all Arizona lawyers must become members of the State Bar and pay an annual membership fee. Rule 32(c)(3), Rules of the Supreme Court. That fee varies based on the special category in which the member belongs: Active members - $505; Active members admitted fewer than three years - $345; Inactive

members - $265; Retired members - $215; Judicial members - $340; In-house counsel - $379; In-house counsel admitted fewer than three years - $259. *See* Supreme Court Administrative Order No. 2016-52 at 2-3. This one membership, with the exception of voluntary section and certified specialist fees, covers everything from lawyer licensing and discipline to the panoply of other activities funded by the Bar, including lobbying.

Arguments over mandatory bar membership often focus on a demand for some form of regulation on one side and the demand for freedom of association on the other. This Petition proposes not to resolve such arguments, but rather to split bar membership in two pieces; one remaining mandatory, the other becoming voluntary.

C. The Mandatory Bar.

The intent of the amendments proposed by this Petition is to retain lawyer regulation in Arizona as it currently is. This means all lawyers would continue to be required to join a subset of the State Bar dedicated to traditional regulatory functions, such as admissions testing, character and fitness, specialty certification, minimum requirements for and oversight of continuing legal education, and discipline. All of these regulatory functions would remain under the oversight of the Supreme Court and would be funded by membership fees sufficient to pay for them, and the client protection fund, but nothing more. Use of the membership

fees would be verified annually by an independently audited report given to all members.

D. The Voluntary Bar.

A second subset of the State Bar would be responsible for all other non-regulatory activities in which the Bar currently is involved, or those in which it may choose to become involved in the future, including lobbying. Membership in this subset would be voluntary. Any lawyer may join, but no lawyer would be required to join as a condition of practicing law in Arizona. Petitioners propose no limitations on the services provided or the membership fee, either in amount or how it is used. These issues would be left to the discretion of the Voluntary Bar and its members. Only those who are members of the Voluntary Bar would be involved in its governance, and the Voluntary Bar would be free to offer its services to only its members, or at a reduced rate or enhanced level of service to members, or under such other conditions as it may deem appropriate.

E. Arguments for a Mandatory Integrated Bar.

Petitioner recognizes that the State Bar itself, although not all members would agree, is opposed to amendments that would change the current mandatory structure. The State Bar advocated against HB2221 during the 2016 legislative session, which called for a less nuanced version of what Petitioner proposes here. *See* Video of Public Statements of John F. Phelps, State Bar CEO/Executive

Director, House Judiciary Committee Hearing at 6:45 – 33:25 (February 10, 2016), http://azleg.granicus.com/MediaPlayer.php?view_id=13&clip_id=16726&meta_id=336301 (last visited January 9, 2017). Removing any part of lawyer regulation from the Supreme Court and placing it with the Legislature is, for many reasons, not a good idea. But many arguments made before the Legislature by the State Bar probably will be made here. Others apparently will agree. *See* Benefits of an Integrated State Bar, http://savethebar.com/benefits-of-the-bar/ (last visited January 5, 2017), a copy of which is included in the Appendix at pages 43-45.

Eliminating part of the "mandatory" from Bar membership should not have an undue adverse effect on the State Bar. The model proposed herein is based on the system adopted by the Supreme Court of Nebraska in 2013, and this Petition makes certain refinements to that model based on Nebraska's experience. Eighteen other states regulate lawyers to the apparent satisfaction of the public without any mandatory bar at all. *Voluntary State Bar of Nebraska*, 286 Neb. at 1022, 841 N.W.2d at 171. Arizona could do the same without infringing on lawyers' right of free association. The remaining mandatory subset of the State Bar would be sufficiently funded for all purposes directly related to lawyer regulation.

Some might argue that the State Bar offers a far greater range of more valuable services to its members than those offered in other states. This Petition

does not seek to prevent the State Bar from offering valuable services. The Nebraska Supreme Court recognized the value inherent in member services in response to a similar argument. "The Bar Association has, over the years, developed and administered many laudable and worthwhile programs which have served the legal profession well." *Voluntary State Bar of Nebraska*, 286 Neb. at 1036, 841 N.W.2d at 179. If the State Bar here is offering worthwhile programs its members find valuable and continues to do so, one would expect members to pay for them, even if they are not obligated to do so. "Many members of the Bar Association may well elect to pay the voluntary dues assessment—particularly if the Bar Association strictly adheres to the use of such funds for purposes clearly benefiting the bar as a whole and avoids entanglement in ideological or political issues or legislation." *Id.*

There are real world examples of voluntary bar associations, some of which do very well because of the value they provide to their members. Arizona has many voluntary county, city, and specialty bar associations, among others. One of the best known voluntary bar associations — mentioned in Rule 32 at (e)(9) — is the American Bar Association ("ABA"), an association which is very active in lobbying and other similar activities. The scope of the ABA need not be described here. It is well known for the many services it provides to its members. No lawyers are obligated to join. Many do so. Arizona lawyers should have the same

freedom of association with respect to the non-regulatory functions of the State Bar.

F. Arguments for a Voluntary Bar.

There should be no dispute that mandatory membership organizations of any kind burden the rights to free speech and free association guaranteed by the United States and Arizona Constitutions. *See Keller v. State Bar of Cal.* 496 U.S. 1, 8 (1990) (citing *Lathrop v. Donahue*, 367 U.S. 820, 842-43 (1961)). Much ink has been spilled litigating the constitutionality of mandatory bars associations. *See e.g.* Brief for Goldwater Institute as Amicus Curiae in Support of Petitioners, *Fredericks v. California Teachers Association*, 136 S. Ct. 1083 (2016) (No. 14-915), 2015 WL 905923 at 16-17. Undoubtedly, more will come if action to amend current rules is not taken now.

Many Arizona lawyers probably are not aware of the "opt-out rule," which currently is offered for some State Bar expenditures under Rule 32(c)(8), Rules of the Supreme Court. "[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." *Id.* Aside from the fact this procedure is unduly cumbersome and requires everyone, individually, to monitor all Bar expenditures and object to those directly applicable to lobbying activities with which they do not agree, the long term viability of the rule is doubtful. Since

Keller, the United States Supreme Court has indirectly questioned such a rule. "By authorizing a union to collect fees from nonmembers and permitting the use of an opt-out system for the collection of fees levied to cover nonchargeable expenses, our prior decisions approach, if they do not cross, the limit of what the First Amendment can tolerate." *Knox v. Serv. Employees Int'l. Union, Local 1000,* 132 S. Ct. 2277, 2291 (2012). "As we have recognized, the First Amendment does not permit a union to extract a loan from unwilling nonmembers even if the money is later paid back in full." *Id.*, 132 S. Ct. at 2292-93 (citing *Chicago Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475 U.S. 292 (1986) and *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Exp. & Station Employees*, 466 U.S. 435 (1984)).

As the Supreme Court stated: "[W]hat is the justification for putting the burden on the nonmember to opt out of making such a payment? . . . An opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." *Knox*, 132 S. Ct. at 2290. "Indeed, acceptance of the opt-out approach appears to have come about more as a historical accident than through the careful application of First Amendment principles." *Id.*

The Goldwater Institute has argued that

> Forcing attorneys to join the State Bar violates the rights of free speech and freedom of association guaranteed by

> the United States and Arizona Constitutions. . . . The U.S. Supreme Court noted three years ago that the mandatory dues that the State Bar now imposes are a form of 'compelled speech and association that imposes a "significant impingement on First Amendment rights." Such a burden can only be justified when it's necessary for regulating lawyers. But it isn't.

See Arizona Lawyers Shouldn't Be Misled: They Have Constitutional Rights, Too, http://goldwaterinstitute.org/en/work/topics/constitutional-rights/government-preferences/arizona-lawyers-shouldnt-be-misled-they-have-const/, (last visited January 9, 2017), a copy of which is included in the Appendix at pages 46-47.

But this Court need not resolve this dispute here. In fact, it can avoid the dispute altogether by granting this Petition, which does not challenge the constitutionality of mandatory bar associations. Instead, this Petition proposes a system that will avoid litigation in Arizona over the proper role of the State Bar by clearly limiting its mandatory function to regulation of the legal profession and leaving to the Bar's discretion the ability to offer any other services on a voluntary basis.

Faced with similarly diverse opinions and a "parade of horrors" predicted by both sides, the Nebraska Supreme Court stated:

> [W]e need not today decide the precise boundaries of First Amendment compelled-speech jurisprudence in 2013. The nature of the proceeding before this court, i.e., a petition for a rule change under the court's inherent authority, does not require us to resolve a case or controversy between two parties as would a proceeding

> under this court's appellate or original action jurisdiction. The present petition requires this court to assess the future and the structure of the mandatory bar in Nebraska at an administrative level and determine, based on trends in the law since 1937, how to best meet the needs of the judicial system, Nebraska attorneys, and the citizens of this state.

Voluntary State Bar of Nebraska, 286 Neb. at 1034, 841 N.W.2d at 177-78.

The court found compromise under a rule change similar to that proposed by this Petition. "And by drawing the line in this way, we will clearly avoid the morass of continuing litigation experienced in other jurisdictions." *Id.*, 286 Neb. at 1037, 841 N.W.2d at 179. Similar changes accomplished by Petitioner's proposed amendments to Rule 32 should accomplish the same objectives in Arizona.

II. Contents of the Proposed Rule Amendments

As previously stated herein, the proposed amendments in the text of Rule 32 are minor. The subsections to which amendments are proposed are set forth here in redline form. A redlined draft of all of amended Rule 32, as proposed herein, is included in the Appendix at pages 1-21. A clean draft of all of amended Rule 32, as proposed herein, is included in the Appendix at pages 22-42. The proposed amendments only are as follows:

(c) Membership.

. . . .

8. Computation of Fee. The annual membership fee shall be composed of an

amount for the ~~operation of the~~ REGULATORY activities of the State Bar and an amount for funding the Client Protection Fund, each of which amounts shall be stated and accounted for separately. Each active and inactive member, who is not exempt, shall pay the annual Fund assessment set by the Court, to the State Bar together with the annual membership fee, and the State Bar shall transfer the fund assessment to the trust established for the administration of the Client Protection Fund. ~~The State Bar shall conduct any lobbying activities in compliance with *Keller v. State Bar of California*, 496 U.S. 1 (1990). Additionally, 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.~~

9. Allocation of fee. Upon payment of the ANNUAL membership fee, each member shall receive a bar card issued by the board evidencing payment. EACH MEMBER SHALL ALSO RECEIVE AN INDEPENDENTLY AUDITED LIST OF EXPENDITURES THAT VERIFIES MANDATORY ASSESSMENTS WERE SPENT IN THE PRECEDING CALENDAR YEAR ONLY ON REGULATORY FUNCTIONS OR FOR THE FUNDING OF THE CLIENT PROTECTION FUND. All ANNUAL MEMBERSHIP fees shall be paid into the treasury of the state bar and~~, when so paid, shall become part of its funds,~~ SHALL BE USED ONLY TO FUND THE REGULATORY ACTIVITIES OF THE

STATE BAR, except that portion of the fees representing the amount for the funding of the Client Protection Fund shall be paid into the trust established for the administration of the Client Protection Fund.

. . . .

11. *VOLUNTARY CONTRIBUTIONS FOR LOBBYING AND OTHER NON-REGULATORY ACTIVITIES.* THE STATE BAR MAY ESTABLISH, COLLECT, AND USE VOLUNTARY CONTRIBUTIONS TO ANALYZE AND DISSEMINATE INFORMATION ON PROPOSED OR PENDING LEGISLATIVE PROPOSALS AND FOR ANY OTHER NON-REGULATORY ACTIVITY INTENDED TO IMPROVE THE QUALITY OF LEGAL SERVICES TO THE PUBLIC AND PROMOTE THE PURPOSES OF THE STATE BAR AS SET FORTH HEREIN.

. . . .

(d) Powers of Board. The State Bar shall be governed by the Board of Governors, which shall have the powers and duties prescribed by this Court. The board shall:

. . . .

7. Prepare an annual statement showing receipts and expenditures of the State Bar for the twelve preceding months. The statement shall be promptly certified by the secretary-treasurer and a certified public accountant, and transmitted to the

Chief Justice of this Court AND TO EACH ACTIVE MEMBER.

. . . .

11. APPOINT A SUBCOMMITTEE OF ACTIVE MEMBERS WHO HAVE PAID ANY VOLUNTARY CONTRIBUTION COLLECTED PURSUANT TO THESE RULES TO ADMINISTER SUCH VOLUNTARY CONTRIBUTIONS.

III. Conclusion.

For the foregoing reasons, Petitioner hereby requests this Court adopt amendments to Rules 32(c) and (d), Rules of the Supreme Court, as proposed herein.

RESPECTFULLY SUBMITTED: January 10, 2017.

By *\/s/ Gregory W. Falls*

Gregory W. Falls
Sherman & Howard L.L.C.
201 East Washington Street, Suite 800
Phoenix, Arizona 85004-2327