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8 **IN THE SUPREME COURT**

9 **STATE OF ARIZONA**

10 AMENDED PETITION TO AMEND  
11 RULE 23, ARIZONA RULES OF CIVIL  
12 PROCEDURE

Supreme Court No. R-15-0007

**Reply to Comments to Amended  
Petition to Amend Rule 23 of the  
Arizona Rules of Civil Procedure**

13 Pursuant to Rule 28 of the Arizona Rules of the Supreme Court, the Arizona  
14 Foundation for Legal Services & Education (“Arizona Bar Foundation” or “Foundation”)  
15 submits this Reply to comments submitted in response to the Foundation’s amended  
16 petition to amend Rule 23 of the Arizona Rules of Civil Procedure filed on February 25,  
17 2015.<sup>1</sup> The amended petition would allow for any residual class action funds to be  
18 distributed to the Arizona Bar Foundation to administer in support of projects promoting  
19 access to the justice system and the delivery of legal services for low-income residents of  
20 Arizona or such related projects as directed by the court.

21 The comment period ended on May 20, 2015. All the comments submitted,  
22 including the comment by the State Bar of Arizona, were in full support of the amended  
23 petition, except for the comment submitted by the Maricopa County Attorney. The  
24 Maricopa County Attorney objects to the amended petition because he argues that “[o]ur  
25 rules should not single out any one entity as a suggested recipient for residual funds.”  
26 While acknowledging that the Foundation is a “worthy beneficiary of such funds,” the  
27 Maricopa County Attorney claims “[t]here is no logical reason to single out [the Bar

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<sup>1</sup> The initial Petition was filed on January 8, 2015.

1 Foundation] by name in the rules.” With all due respect to the Maricopa County  
2 Attorney, as explained in the initial and amended petitions and below, the Arizona Bar  
3 Foundation does stand in a unique position in our judicial system as the entity designated  
4 to administer various court-related funds to provide access to justice and access to legal  
5 services for low-income Arizonans. In further support of the amended petition, the  
6 Arizona Bar Foundation replies as follows:

7 **I. The Arizona Bar Foundation Has a Recognized and Unique Role in Ensuring**  
8 **Access to Justice in Arizona**

9 The State Bar established the Arizona Bar Foundation as a 501(c)(3) organization  
10 with a primary mission to promote access to justice. The Foundation’s historic role with  
11 the Court places it in a substantially different position than that of other non-profit  
12 charities or organizations. The Court has relied upon and entrusted the Foundation to  
13 administer Court directed funds according to the Arizona Supreme Court Rules. This  
14 unique role is evident by the following rules:

15 **A. Arizona Supreme Court Rule 43 – Trust Accounts:**

16 Rule 43 establishes the process to deposit, hold and disburse funds belonging to  
17 clients in trust accounts. The client funds are placed into pooled interest bearing or  
18 dividend earning trust accounts referred to as Interest on Lawyers’ Trust Accounts  
19 (“IOLTA”). The IOLTA funds “accrue for the benefit of the Arizona Foundation for  
20 Legal Services and Education.” Rule 43(f)(1)(A). Rule 43(f)(6) specifically describes  
21 the manner in which the Foundation may use the IOLTA funds. The Foundation shall  
22 use the interest or dividends solely to:

- 23 A. support programs designed to assist in the delivery of  
24 legal services to the poor and law-related education  
25 programs designed to teach young people, educators  
26 and other adults about the law, the legal process and  
27 the legal system;  
28 B. fund studies or programs designed to improve the  
administration of justice;  
C. maintain a reasonable reserve; and  
D. pay the actual costs of administering this rule and the  
activities set forth above.

1 As fully explained in the initial petition, the purpose of the IOLTA program is to  
2 create access to legal services and access to justice by aggregating small amounts of  
3 interest on deposits that would not be sufficient to generate net earnings to their owners.  
4 These funds are distributed to legal services programs that provide representation to those  
5 persons who otherwise would have limited or no access to the judicial system. This is the  
6 same premise underlying all class actions, to provide access to the judicial system for  
7 those who would otherwise not have access. The parallel between use of class action  
8 remedies and the IOLTA program directly supports the distribution of residual funds to  
9 the Foundation.

10 **B. Arizona Supreme Court Rule 38 – Admission *Pro Hac Vice*:**

11 Rule 38 establishes the procedure for an attorney who is not a member of the State  
12 Bar of Arizona to appear as counsel “*pro hac vice*,” meaning for this particular case.  
13 There is a non-refundable application fee. Rule 38(a)(3)(A) provides that:

14 Fifteen percent of the non-refundable application fee paid  
15 pursuant to this section shall be deposited into a civil legal  
16 services fund to be distributed by the Arizona Foundation for  
17 Legal Services and Education entirely to approved legal  
18 services organizations, as that term is defined in subparagraph  
19 (f) of this rule.

20 The distribution of a portion of *pro hac vice* application fees to the Foundation is another  
21 example of the Court’s recognition of the unique role played by the Foundation in our  
22 judicial system in ensuring access to legal services for low-income Arizonans. The  
23 designation of the fees to the Foundation in Rule 38 serves the same function as the  
24 amended petition, to direct funds to legal services program to address the large unmet  
25 legal needs of low-income Arizonans.

26 **C. Rule 42, Arizona Rules of Professional Conduct, ER 6.1, Voluntary Pro  
27 Bono Publico Service:**

28 Ethical Rule 6.1 states that an attorney should render public interest service. The  
Rule provides activities that satisfy this aspirational service. Specifically, Ethical Rule  
6.1(a)(2) identifies the following example:

1 Providing services at no fee or at a substantially reduced fee  
2 in connection with law-related education sponsored by the  
3 Arizona Bar Foundation or activities for improving the law,  
4 the legal system or the legal profession.

4 Ethical Rule 6.1(d) recognizes that:

5 The efforts of individual lawyers are not enough to meet the  
6 needs of the poor. The profession and government have  
7 instituted programs to provide direct delivery of legal services  
8 to the poor. The direct support of such programs is an  
9 alternative expression of support to provide law in the public  
10 interest, and a lawyer is encouraged to provide financial  
11 support for organizations that provide legal services to  
12 persons of limited means or to the Arizona Bar Foundation  
13 for the direct delivery of legal services to the poor.

12 The 2003 Comment to the ethical rule, paragraph 3, explains that the provision of  
13 free legal services to those unable to pay for services is the responsibility of individual  
14 attorneys and the legal profession in general. The Comment acknowledges that in  
15 response to the need, programs such as legal aid offices have been developed and  
16 “[e]very lawyer should support all proper efforts to meet this unmet need for legal  
17 services.” *Id.*

18 Thus, this ethical rule provides another example of the Foundation identified as an  
19 appropriate entity for the administration of funds for the provision of legal services to the  
20 poor. The amended petition’s purpose is the same, to provide a rule that identifies the  
21 Foundation as the administrator of residual funds to address the large unmet legal needs  
22 of low-income Arizonans.

23 In addition, the preamble to Rule 42 of the Arizona Rules of Professional Conduct,  
24 Section 6, Arizona Rules of the Supreme Court, urges attorneys to work to seek “access  
25 to the legal system” and the “administration of justice.” The preamble acknowledges the  
26 “deficiencies in the administration of justice” and that many cannot afford legal  
27 assistance and encourages all lawyers to “use civil influence to ensure equal access to  
28 our system of justice for all those who because of economic or social barriers cannot

1 afford or secure adequate legal counsel.” *Id.* The amended petition does just that.

2       Having been given the responsibility to administer the funds identified above, the  
3 Foundation has performed its tasks admirably. Over the last thirty years, the Foundation  
4 has established an unblemished and proven track record. Through 2014, the Foundation  
5 has administered IOLTA funds totaling **\$43,812,161**. The *pro hac vice* rule has been in  
6 place since 2009 and the Foundation through 2014, has distributed \$456,316 to support  
7 approved legal aid agencies. The amounts the Foundation received in donations for  
8 distribution to legal services programs each year continues to grow and reached its  
9 highest amount in 2014 at \$38,000.

10       The Foundation’s history and unique place in the provision of legal services and  
11 access to justice in Arizona certainly distinguishes it from other non-profit organizations.  
12 Ultimately, it is the Foundation as administrator of the residual funds that the amended  
13 petition allows. Following the above rules, the amended petition will allow for the  
14 distribution of residual funds to the Foundation to further distribute in support of projects  
15 promoting access to the justice system and the delivery of legal services for low-income  
16 residents of Arizona or such related projects as directed by the court.

17       Finally, as noted in the initial petition, the petition bolsters the Court’s Access to  
18 Justice Commission’s work to “promot[e] access to justice for individuals who cannot  
19 afford legal counsel. . . .” The amended petition is in the mainstream of our efforts to  
20 provide access to justice.

21 **II. An 18<sup>th</sup> State Has Amended Its Civil Rules to Provide for the Disbursement of**  
22 **Residual Class Action Funds to Legal Services Programs**

23       Since the filing of the amended petition, another state, Oregon, has passed a law  
24 concerning the disbursement of residual class action funds. Oregon’s Rules of Civil  
25 Procedure, Rule 32(o)(1), requires:

26               At least 50 percent of the amount not paid to class members  
27               be paid or delivered to the Oregon State Bar for the funding  
28               of legal services provided through the Legal Services  
                  Program established under ORS 9.572;

1 <https://olis.leg.state.or.us/liz/2015RIdownloads/MeasureDocument/HB2700>.

2 Oregon joined 17 other states in enacting by rule or statute a provision that either  
3 mandates or allows for the distribution of residual funds to bar foundations and/or legal  
4 services programs. This represents over one-third of all states. These states have  
5 recognized and advanced the analogy of class action cases and the work of legal services  
6 programs. The rules and statutory changes in other states further support the unique  
7 position of the Foundation in the Court's access to justice efforts.

8 Finally, it is significant that at least eight of the states mandate disbursement to  
9 legal services organizations. *See, e.g.,* Connecticut, Indiana, Kentucky, Montana,  
10 Oregon, Pennsylvania, South Dakota and Washington. The Foundation's amended  
11 petition is a more modest proposal. Under the proposed rule, residual funds may be, but  
12 are not required to be, distributed to the Foundation to administer pursuant to Rule 23.  
13 The opportunity presented by the amended petition of another way to increase access to  
14 legal services and access to justice in Arizona should be approved.

15 **Conclusion**

16 For all the above reasons as well as those stated in the initial and amended  
17 petitions, the Arizona Foundation for Legal Services & Education respectfully requests  
18 that the Court amend Rule 23 of the Arizona Rules of Civil Procedure to specifically  
19 allow that residual funds in class action cases may be distributed to the Arizona Bar  
20 Foundation to administer in support of projects promoting access to the justice system  
21 and the delivery of legal services for low-income residents of Arizona or such related  
22 projects as directed by the court.

23 RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June 2015.

24 Arizona Foundation for Legal Services & Education

25 By /s/Thomas J. Giallanza  
26 Thomas J. Giallanza  
27 Past President and Current Board Member  
28 of Arizona Bar Foundation

1 Electronic copy filed with the Clerk  
2 of the Supreme Court of Arizona this  
3 30<sup>th</sup> day of June 2015

4 By: /s/Thomas J. Giallanza

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