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BEFORE THE ARIZONA SUPREME COURT

PETITION TO AMEND RULES
32(c), 45 AND 64(f), ARIZONA
RULES OF THE SUPREME COURT

Supreme Court No. R-05-0034

COMMENT OF INTERESTED
PARTY RE: PETITION TO
AMEND RULES 32(c), 45 AND
64(f), ARIZONA RULES OF
THE SUPREME COURT

Pursuant to Rule 28(D) of the rules of the Arizona Supreme Court, Steven A. Keller, a non-resident member of the State Bar of Arizona and an interested party,^{1/} hereby submits his comments regarding the proposed rules changes sought in the Petition to Amend Rules 32(c), 45, and 64(f), Arizona Rules of the Supreme Court, submitted by Petitioner State Bar of Arizona on December 7, 2005, in this matter ("the Petition"). For reasons stated below, this Court should reject the portions of the proposed rules changes that modify the reactivation requirements for inactive members as unreasonable and arbitrary. The Court should also reject the rules changes because active members in good standing of the State Bar of Arizona who reside and have their primary practice out-of-state were not permitted to vote for the members of the Board of Governors that submitted the proposed rules changes to this Court for approval, thereby impermissibly denying the

^{1/} Mr. Keller elected to become inactive as of the current calendar year, but at all times previously was an active member in good standing of the State Bar, including the time period during which the Board of Governors considered and recommended the proposed rule changes now being challenged.

1 undersigned, and all other out-of-state active bar members, their right of
2 representation in this mandatory state bar.

3
4 THE PROPOSED REACTIVATION CHANGES
5 ARE UNREASONABLE, UNNECESSARY, AND ARBITRARY

6 The Arizona Supreme Court exercises plenary supervisory authority over
7 the practice of law in Arizona and over the State Bar. Sup. Ct. Rule 31. In the
8 exercise of this authority, a supervisory court is charged with ensuring that the
9 rules of the state bar are “consistent with ‘the principles of right and justice’” and
10 are not arbitrary, irrational, or unnecessary. *Frasier v. Heebe*, 482 U.S. 641, 645-
11 46 (1987) (citations omitted). The undersigned submits that the reactivation rules
12 changes are unreasonable, unnecessary, and arbitrary, and should be rejected on
13 that basis.

14 The Petition asks that the rules be changed to make it more difficult and
15 costly to reactivate from inactive status. Specifically, inactive members would
16 have to complete 30 hours of CLE for previous years plus 15 for the current year,
17 rather than the present 15 hour requirement in order to reactivate. According to
18 the State Bar website, inactive members would also have to pay not only the full
19 current year's active membership dues, but also active dues for the preceding two
20 years.²

21 A little background will illustrate how this proposed rules change is
22 arbitrary, unnecessary, and even punitive. The undersigned graduated from
23 Arizona State University College of Law in 1982 and became an active member of
24 the State Bar that year. The undersigned has been an active member in good
25 standing ever since that time, including the time spent in public service as a lawyer
26 for the U.S. Department of Justice in Washington, D.C., where the undersigned
27 currently practices. The undersigned was active in the Environmental Section of

28 ² This new reactivation dues requirement does not appear in the proposed rules. It appears that this change will be made independent of the changes proposed in the Petition.

1 the State Bar while practicing in Arizona, and ran for the Board of Governors in
2 1996. The undersigned has every intention of returning to Arizona when he leaves
3 his current position, but insofar as he became a member of the D.C. Bar this past
4 year, the undersigned decided in January 2006 to switch to inactive status in
5 Arizona until his return to practice in Arizona.

6 The effect, if not the intent, of the proposed changes would be to punish
7 those attorneys who decide to go inactive by making it excessively costly, not to
8 mention time-consuming, to reactivate. A person such as the undersigned would
9 have to pay the cost of 30 additional hours of CLE, which would be substantial in
10 and of itself, not to mention the lost income resulting from the 30 additional hours
11 required to be spent on CLE. In addition, reactivating members would also owe
12 the active dues amounts for the previous two years, less the inactive fees already
13 paid. The combined impact of these reactivation requirements would be
14 unnecessarily burdensome for most practitioners.

15 By way of example, at current dues rates, the additional dues that would be
16 owed under the proposed changes is \$390. Assuming a very conservative \$100/hr.
17 in lost fees caused by the additional 30 hour MCLE 'catch-up' requirement, the
18 reactivating practitioner would lose an additional \$3,000. Finally, again using a
19 very conservative assumption that MCLE would cost \$100 per three hours of
20 credit, the reactivating practitioner would owe an additional \$1,000. Therefore,
21 the estimated additional cost of reactivating under the proposed MCLE and dues
22 requirements would be about \$4,400, a significant additional burden. It is difficult
23 to see any rational justification whatsoever for such treatment of inactive
24 members, a large number of whom, like the undersigned, chose to be inactive
25 because they are practicing in another region of the country but plan to return to
26 practice in Arizona.

27 The only justification articulated in the Petition for this particular rules
28 change is that it "will close a loophole that allowed members to jump from active

1 to inactive status to avoid annual MCLE requirements." Assuming for present
2 purposes that this is indeed a problem, the proposed changes are clearly not
3 necessary to achieve the stated purpose. All that would be necessary would be to
4 specify that the requirement of fulfilling MCLE hours and dues payments for the
5 previous two years would apply only to members who changed from active to
6 inactive status within the previous two years, allowing longer term inactive
7 members to activate without these onerous requirements. In that way, members
8 would not be able to circumvent the annual MCLE requirements by switching
9 their status back and forth, and most true inactive members would not be penalized
10 for reactivating.

11 After the undersigned submitted a letter of protest to the president of the
12 State Bar several months ago, pointing out that the proposed new retroactive two
13 year MCLE 'catch-up' requirement was not necessary in order to achieve the
14 objective stated in the Petition, the State Bar posted on its website some new
15 justifications for the proposed retroactive MCLE and dues requirements. See
16 Attachment A. The State Bar now contends that the new retroactive MCLE
17 requirement was proposed for purposes of client protection and public confidence
18 in the legal profession. Attachment A, Q&A #3. This new post-hoc justification
19 simply does not withstand scrutiny.

20 A rule that requires inactive members of the State Bar, many of whom are
21 active members and practitioners in other state bars, to take an additional 30 hours
22 of MCLE in order to reactivate "to protect clients and public confidence in the
23 profession," but does not impose a similar requirement on new applicants for
24 active membership in the State Bar, including active members from the many other
25 jurisdictions that have no MCLE requirements and law school graduates who have
26 no practical legal experience at all, is not rational or fair to current inactive
27 member of the Bar. This stated goal of the proposed MCLE changes can be easily
28 and equitably achieved by having it apply only to those inactive members who

1 have not been engaged in the practice of law during the previous two years.
2 However, the proposed MCLE changes in their present form are unreasonable and
3 illogical.

4 The State Bar also now contends on its website that the two-year back-
5 assessment of full active dues was appropriate because inactive members “benefit
6 from the programs and services which have been funded, at least in part, by dues
7 paid by active members while the reactivating were inactive or retired.”
8 Attachment A, Q&A #3. This explanation ignores the fact that inactive members
9 pay more than 50% of the active member dues each year they are inactive,
10 currently \$265/year. No rational explanation is offered for requiring members
11 who in fact have virtually no membership privileges other than securing a ‘place-
12 holder’ for return to active status (they are prohibited from practicing law in
13 Arizona and are stripped of the right to actively participate in most State Bar
14 activities) to, in effect, pay the same annual dues owed by active members during
15 two years of their inactive status.

16 As it is, the inactive fee is \$265 per year, an amount that is higher than the
17 annual fee for active members of most state bars (including the undersigned’s
18 active membership in the D.C. Bar), and is significantly higher than the inactive
19 dues charged by virtually every other state bar in the country. For example, the
20 annual dues for inactive members of the California bar is \$115. Furthermore, the
21 State Bar admits that “[m]uch of [the inactive members’] dues support lawyer
22 regulation, which continues to ensure the public’s trust and confidence in the
23 profession and the State Bar.” Attachment A, Q&A #8. As such, there appears to
24 be no rational or legitimate reason to require inactive members to pay two years of
25 active membership dues during inactive status in order to reactivate to active
26 status.

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1 THE DECISION BY THE BOARD OF GOVERNORS
2 TO FILE THE PETITION WAS MADE WITHOUT REPRESENTATION
3 OR PARTICIPATION OF THE OUT OF STATE ACTIVE MEMBERS
4 AND IS THEREFORE UNLAWFUL AND INVALID

5 The decision of the Board of Governors to request the changes set forth in
6 the Petition was made without allowing active members who reside out-of-state to
7 participate in this decision. Under the current rules, only active members who
8 reside in or have their principal place of business within Arizona have the right to
9 elect members of the Board of Governors. Out of state active members are denied
10 voting rights, and they are the group most likely to be affected by the proposed
11 changes, as one of the primary reasons active members of the State Bar become
12 inactive is because of temporary relocation to another state, as the State Bar itself
13 acknowledges. Attachment A, Q&A #9.

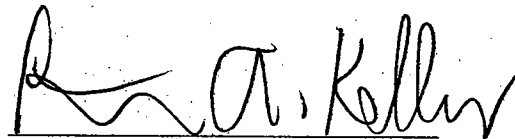
14 The numerous court decisions addressing the legality of mandatory bar
15 membership and dues have predicated their approval on, among other things, a
16 presumption that the obligation to pay annual dues is accompanied by the right to
17 be represented on the governing council that decides how those dues are to be
18 used. *See e.g. Lathrop v. Donohue*, 367 U.S. 820, 844 (1961) (mandatory state bar
19 dues can permissibly be used to support state bar interests “to be voiced through
20 [the members’] own democratically chosen representatives comprising the board
21 of governors of the State Bar,” citing the Wisconsin Supreme Court).
22 Furthermore, only non-resident active State Bar members are denied the right to
23 vote for the board of governors. Discrimination by a state bar against a member
24 group on the basis of non-resident status is permissible only “where its reasons are
25 substantial, and the difference in treatment bears a close or substantial relation to
26 those reasons.” *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 288
27 (1985). *See also Frazier v. Heebe*, 482 U.S. at 646-47 (discrimination by bar
28 against non-residents ruled impermissible as arbitrary, unnecessary and irrational).

1 As the non-resident active members of the State Bar were not represented on the
2 Board of Governors that decided to recommend the rules changes proposed in the
3 Petition, the Petition should be denied in its entirety.

4 CONCLUSION

5 The proposed MCLE and dues rules changes proposed in the Petition, as
6 relating to reactivation from inactive status, should not be approved, as they are
7 unreasonable, unnecessary, and arbitrary. The Petition itself should be denied in
8 its entirety because it was submitted without representation or approval of non-
9 resident active State Bar members.

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11 Respectfully submitted this 20th day of May, 2006.

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16 STEVEN A. KELLER, State Bar #7426

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May, 2006, I caused to be served a true and correct copy of the foregoing via first class mail addressed to the following:

ROBERT B. VAN WYCK
Chief Counsel for Petitioner
State Bar of Arizona
4201 North 24th Street, Suite 200
Phoenix, AZ 85016-6288
(602) 252-4804

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BEFORE THE ARIZONA SUPREME COURT

PETITION TO AMEND RULES
32(c), 45 AND 64(f), ARIZONA
RULES OF THE SUPREME COURT

Supreme Court No. R-05-0034

ATTACHMENT A

COMMENT OF INTERESTED
PARTY STEVEN A. KELLER
RE: PETITION TO AMEND
RULES 32(c), 45 AND 64(f),
ARIZONA RULES OF THE
SUPREME COURT

Attached hereto is Attachment A to the Comment of Interested Party Steven A. Keller, submitted this day, regarding the proposed rules changes sought in the Petition to Amend Rules 32(c), 45, and 64(f), Arizona Rules of the Supreme Court, filed by Petitioner State Bar of Arizona on December 7, 2005, in this matter.

Respectfully submitted this 22nd day of May, 2006.



STEVEN A. KELLER, State Bar #7426


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Dear Colleague:

As you know, the State Board of Governors filed a petition with the Arizona Supreme court in December. The petition seeks to reduce dues for retired members; to increase the MCLE and dues requirements for inactive and retired members who return to active status; and to eliminate the existing exemption from dues and MCLE now automatically available to all members over age 70.

When the Board requested feedback, we heard from many of you. Opinions vary widely. Some members support the petition; others do not; some support certain aspects of the petition but not others; some simply have questions. The purpose of this letter is to respond to some of the questions and to let you know where the process stands.

The Board's original petition is still pending with the Supreme Court. The deadline for comments to the Supreme Court is May 22. At the Board's mid-June Board meeting, after reviewing all member input and any comments filed with the Court, the Board will determine whether to suggest any changes or refinements to the original proposal. The Board's reply will be filed with the Supreme Court on June 30.

In the meantime, a Board subcommittee, chaired by Secretary/Treasurer Ray Hanna, has reviewed the input that the Bar has received thus far, and has written answers to the most frequently asked questions. These questions and answers are below. They are not intended to be comprehensive, but should help to clear up some confusion. We have also included links to the Bar's petition and the quick read chart, for your convenience.

On behalf of the Board of Governors, thank you for input on this proposal. The Board values your opinions and comments and will consider them fully at its June meeting.

Sincerely,

Helen Perry Grimwood
President, State Bar of Arizona

[Petition:](#)[Quick-read chart:](#)

Question and Answers

Regarding the State Bar's Dues and MCLE Petition

Q1. Why doesn't this proposal "grandfather" those who have already reached age 70 from paying dues?

A: The Board believed that it was unfair for active members to be relieved from paying dues, simply based on their age. Additionally, after thoroughly researching the practice of exempting lawyers age 70 and over from paying dues, the Bar discovered that there was no Supreme Court rule or Administrative Order that allowed for this exemption. Under the existing rules, there is a separate membership category for retired members. The Board's proposal reduces the dues for retired members.

Q2. Why doesn't this proposal "grandfather" active members who have already reached age 70 from the MCLE requirement?

A: The Board believed that all active lawyers need to stay up-to-date in their practice by continuously participating

ATTACHMENT A

in legal education. This is essential for client protection and public confidence in the legal profession.

Q3. What is the rationale for requiring inactive and retired members to back-pay dues and make-up MCLE in order to reactivate?

A:The Board believed that MCLE for those re-entering active practice is important to client protection and public confidence in the legal profession. Additionally, this proposal will make it impossible for active lawyers to transfer in and out of active status at the end of each year to avoid Mandatory Continuing Legal Education requirements.

The Board also believed that lawyers who reactivate from "inactive" or "retired" status should pay some back dues. These members benefit from the programs and services which have been funded, at least in part, by dues paid by active members while the reactivating members were inactive or retired. It seemed appropriate to require some back payment of dues upon reactivation to reduce this partial indirect subsidy.

Q4. If some lawyers are transferring out of active status to avoid MCLE requirements why not penalize just those people rather than making a new rule for everyone?

A:The requirements are not a penalty, but an effort to ensure that all lawyers returning to "active" status are up-to-date on current law.

Q5. What is the rationale for requiring a greater back dues payment for "retired" lawyers who wish to reactivate?

A: The Board believed that "retired" status is intended for lawyers who do not intend to return to practice. The higher fee set by the Board to return from "retired" to "active" status is designed to encourage lawyers who are likely to reactivate to select "inactive" rather than "retired" status.

Q6. Is it true that I need to know two years in advance before I want to go "active" so I can start taking MCLE again?

A:No. A lawyer who wants to reactivate can complete the required number of MCLE hours in a relatively short period of time. The rule would simply ensure that practitioners who have not been practicing are up-to-date on the law in their areas of practice.

Q7. If approved, when will the MCLE proposals take effect?

A: The proposal to repeal the exemption from MCLE requirements for active lawyers age 70 and over would take effect July 1, 2007. All other provisions would take effect January 1, 2007.

Q8. Why are the dues different for inactive and retired statuses?

A: The difference in dues for "inactive" and "retired" members recognizes the intended difference of the categories. Lawyers who become "inactive" pay higher dues than retired members, but they also secure a place-holder to return to active practice. Much of their dues support lawyer regulation, which continues to ensure the public's trust and confidence in the profession and the State Bar. Lawyers who choose "retired" status wish to maintain contact with the Bar but do not intend to return to practice.

Q9. Why not merge the inactive and retired membership and treat them the same?

A: The "inactive" and "retired" membership categories serve different purposes and are designed for lawyers at very different stages of their careers. The "inactive" category is designed for individuals who are in the midst of their careers but who, for reasons such as a temporary relocation to another state or a temporary engagement outside the profession, wish or need to place their active license to practice law effectively on hold for a period. The "retired" category is intended for individuals who are at or near the end of their careers but who wish to maintain some contact with, and receive some services from, the Bar. Merging the two categories would make the Bar unable to accommodate the needs and desires of individuals in these very different situations.

Q10. Why are Arizona's dues higher than many other states?

A: While it is tempting to compare Bar dues with other states, it is difficult to make accurate comparisons. Some Bars are responsible for a lawyer discipline system, while others are not. Bars also have a variety of different requirements and provide very different types and levels of services to their members. The Board actively monitors State Bar budgets and is confident that the organization is fiscally conservative and responsible.

Q11. Has a study been done to determine if CLE is effective in protecting the public?

A: The Arizona Supreme Court created the MCLE rules in 1989. The Board supports these requirements as a necessary and responsible requirement of the legal profession. The Bar has not performed any related studies. Virtually every profession has some form of continuing education requirement, many of them more onerous than the current MCLE requirements.

Q12. Would the Bar consider a dues category for part-time lawyers?

A: Creation of such a category of membership would present at least two challenges. The first would be to settle upon a definition of what constituted "part-time" practice with which most members could agree and which was fair to all those who might consider themselves to be engaged in the practice of law on less than a full-time basis. The second would be to develop a program for supervising and monitoring such a category that did not impose undue burden upon Bar staff and undue cost for other membership categories. No proposal that adequately addresses these and other issues has ever been considered by the Board.

Q13. Are these changes being proposed just to generate revenue for the Bar?

A: The original intent of the dues/MCLE study began with the proposal to reduce dues for "retired" members. Further study revealed a wide variety of issues that needed to be addressed. These proposed changes did not originate with a desire to raise money. The Bar is fiscally sound.

Q14. How many discipline cases are there involving lawyers age 70 and over?

A: Over the last five years, there were about 160 discipline cases involving lawyers age 70 and over.

Q15. Will this plan prevent inactive and retired lawyers from doing pro bono work?

A: The current proposal states "retired" lawyers may provide volunteer legal services to approved legal services organizations as defined in Rule 38(e). Otherwise, "inactive" and "retired" members may not practice law.

Q16. Can lawyers who are active military members be exempt from the proposed retroactive requirements for MCLE and dues?

A: Some exemptions exist for lawyers serving in the military. Those exemptions are made on a case-by-case basis, with appropriate proof of military service. Contact our Membership Records Department at (602) 340-7239 for more information.

Q17. Can lawyers receive CLE from the State Bar at reduced cost based on hardship?

A: Under some circumstances, yes. Please call the State Bar CLE Department if you need help with the cost of CLE.