James C. Mitchell
State Bar of Arizona No. 17387
1098 W. Shoal Creek Lane
Oro Valley, AZ 85737
mitchell@email.arizona.edu
phone 520-308-4820

IN THE SUPREME COURT
STATE OF ARIZONA

PETITION TO AMEND ARIZONA SUPREME COURT RULE 45	Supreme Court No. _____ **Petition to amend Arizona Supreme Court Rule 45**

Pursuant to Rule 28, Ariz. R. Sup. Ct., Petitioner respectfully urges this Court to amend Rule 45, Ariz. R. Sup. Ct. [hereinafter Rule 45], by requiring a statement on all State Bar of Arizona advertising for continuing legal education products and services. The statement would align claims for mandated CLE with available evidence of its value, acknowledging that CLE as practiced has little or no verifiable impact on attorney competence or public protection. The full wording of the proposed amendment appears in Appendix A.

This amendment is needed to create transparency in a significant program of law practice regulation. It would protect the public and lawyers themselves from deception by unproven claims of value in a mandated scheme of so-called

continuing legal education, and protect the State Bar from potentially making or embracing false claims of value in products and services that it provides for money.

Jurisdiction.

This Court, rather than the State Bar of Arizona Board of Governors, has jurisdiction for two reasons. First, this petition requests an amendment to Rule 45. Only this Court can order such a rule change. The amendment would impose a requirement on the State Bar in its administration of Rule 45. Only this Court can order such a requirement. The petition does not seek modification of the State Bar's own MCLE regulations.

Second, the State Bar has an irreconcilable conflict of interest in MCLE matters. The State Bar collects millions of dollars annually in CLE fees and convention revenue, much of it generated by the mandate of Rule 45. Petitioner does not suggest that mere millions would fog the State Bar's ethical mirror, but perceived or even imagined self-interest might diminish the credibility of any State Bar action on this subject.

An opaque centerpiece of regulation.

Arizona lawyers have been subject to Rule 45 since 1989. Then and now, the most frequently asserted reasons for mandatory CLE are public protection and maintaining and improving attorney competence. Petitioner readily agrees that those goals are fundamental to law practice in Arizona and are legitimate concerns of our State Bar.

Strangely, given the high standards supposedly sought, nobody has attempted systematically to evaluate Rule 45's effectiveness. For 25 years, the Bar has administered a scheme that forces the active membership to forfeit hundreds of thousands of hours and millions of dollars—*de facto* dues—annually for no demonstrated good result. We simply don't know whether or not our time and money have bought education, let alone education commensurate with cost. Are we attorneys more competent than we would be without MCLE? Is the public better protected? We don't know. To imply that we do is disingenuous at best.

The State Bar, however, continues to make unsubstantiated claims for MCLE, often passing the buck to this Court. "The Bar and the Court concluded many years ago, and continue to support the same position, that continuing education is a bona fide aspect of ensuring high standards for continuing licensure as an attorney." State Bar response to rule change request R-10-0016, at 3, May 12, 2010.

This assertion merely recites the hopeful prediction of value made when MCLE was imposed. "Participation in CLE will expand the attorneys' knowledge of substantive law and procedures, will sharpen the attorneys' skills of enquiry…." ARIZ. B. J. Aug./Sept. 1986 at 12. "The learning process never ends for lawyers." State Bar of Arizona press release (1989) (quoted in Stuart Forsyth, *MCLE: Why Minimum CLE Is Mandatory*, ARIZ. ATTY., Aug./Sept. 1999 at 26).

Time stands still when the Bar defends the rule. Original aspiration, untested, masquerades as current value. Proof of performance remains forever unnecessary.

Now, even as we are called upon to employ evidence-based decision-making in the administration of justice for Arizona, MCLE blunders into its second quarter-century lacking hard evidence of success.

Observe this hilarious waffle by the Bar, responding to member questions about a 2005 MCLE proposal:

> "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." Member response to rule change request R-05-0034, app. A.

So the answer is "No," right? Thus unencumbered by knowledge, the Bar often provides a carefully selected bouquet of blurbs from evaluation sheets, those hurried scribbles handed in as lawyers grab their certificates of completion and storm the exits. Even if the anecdotal impressions accurately represent all participants at a given event, their value in the big picture is nil. Scholarly studies of CLE reveal no reliable evidence that a mandate promotes competence or public protection in a meaningful way. Lawyers may pick up some knowledge, but don't retain it and seldom apply it to their work. Donald S. Murphy and Thomas Schwen, *The Future: Transitioning from Training Lawyers to Improving Their Performance*, 40 VAL. U. L. REV. 521 (2006).

Such shortcomings were identified early in the MCLE era. As a commentator then noted, "Effective training is a process, and the one shot lectures and panels that are common in MCLE fall short." Paul A. Wolkin, *On Improving the Quality of Lawyering*, 50 ST. JOHN'S L. REV. 523, 529-30 (1976).

The most recent scholarship dramatically confirms the absence of proven value. Two distinguished professors and leaders of the Center on the Legal Profession at Stanford Law School studied the history of MCLE, the arguments pro and con, and relevant scholarly work. They concluded this year that "Mandatory CLE requires rethinking.... Almost never do CLE programs provide the kind of environment that experts find conducive to adult learning, which involves preparation, participation, evaluation, accountability, and opportunities to apply new information in a practice setting." Deborah L. Rhode and Lucy Buford Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?* 22 PROF. LAW. 2, 8-9 (ABA) (2014) (hereinafter Rhode).

Some courts, facing facts in real cases with high stakes for non-lawyers, have acknowledged the obvious. The California Supreme Court observed that many attorneys, "before the advent of the MCLE requirement, no doubt failed to complete 36 hours of legal education within a 36-month period; the eventual adoption of the regulations requiring such legal education cannot support an inference that those attorneys were therefore incompetent." People v. Ngo, 14 Cal. 4th 30 (1996) (criminal defendant claimed ineffective assistance of counsel because

his attorney was suspended for MCLE noncompliance at time of appeal). In Texas, the Court of Appeals similarly concluded that an attorney did not "suddenly become incompetent" merely because he failed to comply with the MCLE rule. Henson v. State, 915 S.W.2d 186, 194-95 (Tex. App. 1996).

On present evidence, then, MCLE does not make a bad attorney competent. It doesn't make a good one better. Fine lawyers don't become dunces by foregoing make-believe education; Gallant does not morph into Goofus just by skipping playschool. *See generally* HIGHLIGHTS FOR CHILDREN (1948-2014).

Advertising Unproven Benefits.

Petitioner understands that this request sounds like a plea to rescind Rule 45. While devoutly to be wished, that consummation is not this petition's purpose. As Professors Rhode and Ricca note, "Despite the weakness of the case for requirements, abolition would be politically difficult. In most states… mandatory CLE offers benefits to bar associations, not only in course fees but at bar conventions where CLE credit is available. It is also likely that terminating requirements would be seen as a public relations problem." Rhode, at 9.

Those considerations have long lurked in the background of MCLE debates. More than a decade ago, Petitioner called MCLE "the unseemly mating of cash cow and public relations bull." James C. Mitchell, *Colossal Cave-In: Why Reform of MCLE Was DOA*, ARIZ. ATTY., Feb. 2001, at 36. Although the description is whimsical, the truth in it reflects one genuine problem. CLE's education benefit is

fanciful but its generation of big bucks is real. This Court may consider it unwise now to cap the gusher of CLE money, much of which flows to the State Bar. The Bar publicly disavows revenue's importance in the MCLE debate, but its denial may engender just a teensy-weensy bit of skepticism. The Bar grossed $2,962,937 on CLE products, services and penalties last year. That's about 20 percent of the Bar's total support and revenue. State Bar of Arizona and Client Protection Fund Consolidated Financial Statements, Dec. 31, 2013 (total of reported CLE fees, late fees, and convention revenue; revenue percentage calculated by Petitioner).

As for public relations, though: not to worry. MCLE's public image is so infinitesimal that even the Kitt Peak telescopes couldn't find it. Does anyone seriously believe that public opinion of attorneys has improved because of MCLE? As always, people respect their own lawyers, but think the rest of us are scoundrels. Stuart M. Israel, *On Mandatory CLE, Tongue Piercing and Other Related Subjects*, STATE BAR MICH. LAB. AND EMP. LAW NOTES 4 (Spring 1999). If we want really good PR, we should trumpet the fact that lawyers keep current *voluntarily*, not at gunpoint. David A. Thomas, *Why Mandatory CLE is a Mistake*, 6 UTAH B. J. 14 (1993).

But until that joyous day when MCLE joins Smell-O-Vision films and Michael Dukasis's tank in Terrible Idea Heaven, Petitioner simply urges this Court to order a policy of honest disclosure in advertising. It should remain in effect as long as

the State Bar administers mandatory CLE. Such full disclosure comports with the high standards of our profession.

By styling mandatory CLE as "education" and having announced the asserted goal of improving competence, the State Bar gives the impression of offering systematic, relevant and effective instruction to that end. This is false because there is no demonstrated similarity between most CLE activity and even minimally rigorous education. *See* Rhode, *supra,* p. 5. There is no required relationship between a lawyer's Rule 45 obligation and his or her substantive responsibility. Lawyers need not even complete CLE units in their fields of practice. DUI defense lawyers can get all 15 compliance credits in animal law. Or they can attend five movie clip ethics programs, all likely featuring Al Pacino's scenery-chewing courtroom freak-out, and they're home free (if we call $645 or so in fees "free.")

The State Bar itself understands that MCLE encourages accumulating credit hours and nothing more; witness the "Last Chance" offerings at the end of each MCLE compliance period. One is reminded of the movie in which Robert Redford plays an army general who is court-martialed and sent to military prison. The warden asks, "What do you expect from your time [here]?" The general responds, "Nothing. I just want to do my time, and go home." THE LAST CASTLE (Dreamworks SKG 2001). Such is life at the end of an MCLE "education" year.

Of course, commercial speech law permits "puffing," exaggerated optimistic statements of value by salespersons, not to be taken as claims of fact. *See* David A.

Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006). Example: "Yes, sir, this 1983 Yugo is the greatest little car on the lot. You can't go wrong with this one." The State Bar loves puffing. Several fine pufferies are on display in ads for CLE by the Sea, which supposedly expired this year but quickly revived, like Cher after her latest lucrative farewell tour. A web ad promised "the finest legal practitioners in Arizona and beyond" will be on hand in 2015 to present material. State Bar website, http://bit.ly/1xJ7Qyc, visited Nov. 16, 2014. But the ad gave no clue who they are or who determined they are the finest. The Bar may not even have known when it made up the ad.

Attendees "will learn complex legal theories and rules," another brag promises. "You will learn" is a common come-on, although we have seen that the prophecy is not likely to be fulfilled. Then there's this unattributed whopper about education theory as applied near beaches, golf courses and a world-famous zoo: "Half-day programming is ideal for learning and knowledge retention..." Quick! Somebody alert the organizers of the Arizona College of Trial Advocacy. It appears to run all day for four days and much of a fifth. They're doing it wrong.

None of the Bar's hyperbole likely violates the prohibitions on false and misleading commercial speech in ARIZ. REV. STAT. § 44-1481(A)(1) (fraud-in-advertising statute bars omission of material facts) or our own ER 7.1 (material omission prohibited in communication concerning a lawyer's services). But should our State Bar really slither through the same loopholes that permit overselling

automotive clunkers? Should our State Bar, when advertising, omit material facts in a way that no ethical advertising lawyer may? Should the State Bar claim a right to withhold essential information about CLE's worth, namely the fact that none has been proven? Petitioner respectfully suggests that it should not. We're lawyers. We should do better. We should get out front with the truth.

Non-advertising speech.

Nothing in this Petition purports to prevent State Bar leaders or anyone else in a non-advertising setting from praising MCLE or bemoaning the foolishness of its critics.

Conclusion.

For the reasons started above, Petitioner urges this Court to adopt the proposed amendment to Rule 45.

Respectfully submitted this 24th day of November, 2014.

James C. Mitchell

Electronic copy filed with the Clerk of the
Supreme Court of Arizona on this
24th day of November 2014.

Electronic copy emailed to John A. Furlong, Esq.
General Counsel, State Bar of Arizona on this
24th day of November 2014.

APPENDIX A

(new language is underlined)

Rule 45. Mandatory Continuing Legal Education

(a) through **(k)** [No changes]

(l) Advertising. Any advertisement for a continuing legal education program, product or service offered by or in conjunction with the State Bar of Arizona shall contain the following disclaimer:

> "The State Bar of Arizona makes no representation that this program, product or service will improve any attorney's competence or protect the public. No evidence proves that mandatory continuing legal education provides such benefits. The State Bar seeks revenue from CLE programs, products and services."

The disclaimer shall appear conspicuously in capital letters in black type at least half the point size of the largest type in the advertisement, but in no event smaller than 12-point type.