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IN THE SUPREME COURT
STATE OF ARIZONA

IN THE MATTER OF PETITION TO AMEND ARIZONA SUPREME COURT RULE 45	Supreme Court No. R-14-0028 **RESPONSE TO COMMENT OF THE STATE BAR OF ARIZONA**

Petitioner thanks the State Bar of Arizona for its confidently succinct comment. Cicero would admire the comment's brevity, if not the two implausible claims made therein. Those require examination.

The State Bar's Assertions.

1. The Bar incorrectly implies that its "member surveys" constitute proof of value in MCLE activities.

The State Bar argues that it regularly surveys CLE attendees, and "those surveys consistently reflect that participants receive value from attending the programs." This is a remarkable conclusion. The so-called survey subjects consist entirely of self-selected responders whose expertise on quality education has not even been inquired about, let alone ascertained.

Self-selection carries more baggage than the Sky Harbor luggage carousels. Briefly stated, "In most instances, self-selection will lead to biased data, as the respondents who choose to participate will not well represent the entire target population." Paul J. Lavrakis, ENCYCLOPEDIA OF SURVEY RESEARCH METHODS 808 (2008).

Since the State Bar comment provides no specific survey results, this Court and other interested parties must guess. Petitioner believes that the State Bar may be referring to the work of a task force formed ostensibly to study MCLE in 2010. The task force's charge was ambitious and admirable: "Conduct a comprehensive review of Mandatory Continuing Legal Education (MCLE) to determine its effects on the legal profession, and provide its findings and recommendations to the Supreme Court of Arizona."

The task force, honoring MCLE adherents' long tradition of avoiding analysis, punted. It demonstrated an instinct for the capillaries of the MCLE problem, carefully avoiding the heart of it. It emerged from its labors with two puny recommendations, one to carry forward specialist credit hours and another to think about changing the MCLE compliance period to coincide with the membership fee deadline. MCLE Task Force Report, Executive Summary, Sept. 2011, at 3.

That hardly constitutes a comprehensive review, even by the abysmally undemanding standards used to rationalize MCLE. The task force conclusions appear to have been based entirely on survey responses from 1458 of the State

Bar's approximately 17,000 members. Petitioner respectfully asks the Court to dismiss this small self-selected, self-serving sample as worthless.

(In case member surveys carry some weight, however, note that another recent State Bar query shows MCLE to be among members' biggest complaints. ARIZ. ATTY., Nov. 2014, at 23.)

The State Bar also may rely on attendee evaluation forms submitted at the end of most CLE programs. Although the Bar comment provides no statistical information on these responses, Petitioner imagines from his own experience that most are favorable. After all, the lawyers who present these programs are nice people whose efforts help us slog toward that magic fifteen hours of compliance credit. That is the value received. But in the happy free-at-last moments immediately after a seminar's end, do those respondents truly understand what they have learned and how that alleged knowledge might protect the public? Probably not. As the original petition on this matter indicated, "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).

2. The Bar incorrectly suggests that lawyers have meaningful choices with respect to MCLE.

The State Bar's comment asserts that "Lawyers are able to discern on their own whether a particular CLE seminar provides them with relevant and effective instruction." This heartwarming trust in member judgment—if sincere—would show a welcome realization by the State Bar, which only last year tried to impose needless and costly precertification of CLE programs. Way back then, apparently, members were unfit to identify relevance and effectiveness.

But what breathtaking chutzpah for the Lord High Executioners of MCLE enforcement to claim that lawyers have meaningful choices. We *must* choose something that "may qualify" under the Bar's cramped regulations, whether we want it or need it or not. We cannot choose our mode or amount of learning; the very existence of Rule 45 posits that we are not capable of doing so.

Consider MCLE's silliest limitation: we can't even choose to earn credit for reading to improve our knowledge. MCLE Regulation 101(l) ("Self-study... does not include reading.") We get credit for enduring somnolent seminars or pre-recorded material, but not for reading. This counterproductive regulation denies recognition of the way attorneys *actually* learn voluntarily every day. Although reading doesn't slake the State Bar's thirst for revenue, it provides outstanding education. "Typically, when you read, you have more time to think. Reading gives you a unique pause button for comprehension and insight. By and large, with oral

language—when you watch a film or listen to a tape—you don't press pause." Maryanne Wolf, Tufts University Center for Language and Reading Research, *quoted in* Lauren Duzbow, *Watch This. No. Read It!*, OPRAH MAGAZINE, June 2008.

It's not good enough for MCLE credit, though. The State Bar's aversion to reading recalls Henny Youngman's gag, "I read about the evils of drinking, so I gave up reading." He was joking. We really gave it up. Lawyers are not allowed to claim education value from the best education method in the history of the world, tailored by them to their known professional needs. So much for "choice."

The State Bar's non-assertions.

Petitioner observes that the State Bar's comment contains not a scintilla of credible proof that MCLE provides any of the benefits claimed for it. Not a single citation. No studies by educators. No proof of public protection or improved competence from any authoritative source.

Indeed, the rare court that has actually investigated this largely unexamined nostrum has been underwhelmed. Consider this exchange before the Michigan Supreme Court:

> MR. LENGA [Michigan State Bar President]: Now I'm not a band wagon kind of guy but I think it takes a giant leap to ignore the supreme courts, and these are not bar associations, but to ignore the supreme courts of 40 states who have come to the conclusion that there is value to minimum continuing legal education requirements.
> JUSTICE YOUNG: I would be much more persuaded if there was any evidence that it had more value than chicken soup.
> Michigan Supreme Court, public hearing, May 27, 1999 (transcript viewed online at http://1.usa.gov/1xBGhbA, May 19, 2015).

Michigan tried MCLE in 1990, rescinded it in 1994, and declined to resurrect it in 1999, following further investigation and the hearing excerpted above. Cheri A. Harris, *MCLE: The Perils, Pitfalls and Promise of Regulation*, 40 VAL. U. L. REV. 359, 372, 383 (2006).

Perhaps most damning is the absence of supporting evidence from other state bar associations and vendors. Imagine that. Even those who reap millions of dollars annually from imitation education can't show what good it does.

Given the State Bar's inability or unwillingness to respond meaningfully, Petitioner again asks this Court to approve the modest proposed amendment to Rule 45. It would not end MCLE. The joyful sound of ka-ching still will ring through the State Bar palace halls, uninterrupted, three-million times a year. The amendment simply would declare that our leaders now eschew purposeful avoidance of the truth.

Respectfully submitted this 19th day of May, 2015.

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