Mauricio R. Hernandez (#020181)
mo@lawmrh.com
P.O. Box 7347
Goodyear, AZ 85338
Telephone: (623) 363-2649

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of:	Supreme Court No. R-16-0013
PETITION TO AMEND ARIZ. R. SUP. CT., RULE 32	**Comment to Pending Petition to Amend Ariz. R. Sup. Ct., Rule 32**

The Petition to Amend Rule 32 concerning the role and governance structure of the State Bar of Arizona (SBA) unsurprisingly fails to acknowledge the disaffection of a significant segment of members with the SBA. Notwithstanding the Petition's conclusionary assertions that the public and Bar "recognize the SBA as a valuable asset of this State," the reality is that members in good standing have contemporaneously prompted their legislative representatives to address the SBA's ongoing First Amendment infringements and nontransparency problems. These issues emanate not just from members but from Arizona consumers. So no matter the outcome of this year's legislative session and the Task Force's inability to perceive problems or any "crisis or event" with the current system, efforts to redress these concerns will assuredly continue.

With respect to the SBA Mission and Governance Task Force, its task to sharpen the SBA's mission and efficiency unfortunately overlooked the aforementioned constitutional and nontransparency concerns when its recommendations were made. But given its predisposed genesis, it's hard to fathom what recommendations other than superficial reforms and an abiding deference to the status quo could be expected from a Task Force disproportionately represented by interested stakeholders, i.e., five former bar presidents; current or past governing board members; the SBA Executive Director as advisor; and even an SBA lobbyist? That there was even *one* dissenting view is, candidly, the only surprise.

With respect to First Amendment concerns, it is well settled that Arizona's mandatory bar and attendant dues are constitutionally permissible only to the extent the Bar's activities are "germane" to allowable purposes. *Keller v. State Bar of Cal*., 496 U.S. 1, 14 (1990). The allowable purposes are regulating the legal profession to improve the quality of legal services or as the nation's highest court recently expounded, "activities connected with proposing ethical codes and disciplining bar members," *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014) (citing *Keller*, 496 U.S. at 14)

Moreover, under *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2285 (2012), mandatory dues cannot be "used for political, ideological, and other purposes not

germane" to the organization's mandatory purpose. The Task Force did not satisfactorily study the constitutional parameters of Article XIII of the SBA's Bylaws and how it fails to fully comply with the First Amendment. Specifically, the Task Force did not completely examine how Section 13.01 of the SBA's Bylaws too narrowly interprets the use of mandatory dues as solely involving non-germane expenditures that are also political or ideological. By doing so, the SBA extends too far the boundaries of constitutional permissibility in order to justify its continuing use of member dues to fund activities of a non-political or ideological nature without limitation.

Furthermore, in permitting the use of mandatory dues for non-germane activities that are not political or ideological, the SBA ignores the "germaneness" requirement in *Keller* and as a consequence infringes on the First Amendment rights of members. Moreover, under Section 13.01, (F), the SBA contends it is authorized to use member dues for any expenditure "reasonably related" to "any other activity authorized by law." But without a "germaneness" analysis, this is an incomplete reading of *Keller*. The SBA is not allowed to fund *any* activity or expenditure that is not germane to the regulation of the legal profession.

As to the Task Force Report itself, rather than repeat the well-researched and comprehensive conflict of interest, First Amendment, and cost arguments articulated by dissenting Task Force Member Paul Avelar in his June 11, 2015

letter, I incorporate them by reference. In sum, I agree wholeheartedly and in fact endorse Mr. Avelar's dissenting views to:

1) Abolish the mandatory State Bar in order to separate the regulatory and trade association functions;

2) Recognize the SBA as a purely regulatory agency;

3) Set aside the SBA governing board and instead rely on professional staff to assist the Court in lawyer regulation;

4) Appoint rather than elect governing board members should the Court deem a governing board necessary.

As for the Petition's recommended stylistic changes and reduction in the size of the governing board, this is frankly much ado about little. A smaller board is eminently more efficient. So if there is to be a governing board, by all means let it be a smaller one. As for term limits, these are long overdue. A limitation of three terms of three years each is nigh a near decade's sufficiency to plumb the depths of institutional knowledge. Indeed, at the other extreme there are currently board members not far from approaching 20 years of governing board service.

As concerns elections, rectifying the disenfranchisement of active out-of-state members seems a much belated recognition. Absent from the discussion, however, are the legions of retired and inactive members who wrongly subsidize active members with little to show for their needlessly high dues payments. In the

case of inactive members, their current $265 annual dues payments match what *active* members pay in other mandatory jurisdictions such as Florida. With respect to retired attorneys, unless they terminate their dues obligations by resigning in good standing or alternatively, by dying, their current $215 annual payment obligations remain evergreen.

But more substantively, if the underlying purpose of having members elect governors from their respective districts was intended to simulate a representative democracy, then it's nigh time members were disabused of that misconception. For this reason, I applaud the Task Force recommendation in its Report that the SBA rename its "Board of Governors" to the "Board of Trustees" to underscore the board's fiduciary role not to the members who elected them -- but to the public. This is a long-awaited admission of refreshing candor i.e., the SBA is not now nor has it ever been a representative democracy of government by the members through their elected representatives.

The truth of the matter is that board members, whether elected or appointed, are not accountable to the members for the exercise of their power. This again exposes the SBA's irreconcilable conflict of interest when it purports to protect and serve the public by regulating lawyers while at the same time, it serves as a "trade association" promoting the Arizona legal profession's common interests. These two

purposes conflict because lawyers and the public will invariably have different interests.

What, then, is the point of elections in light of the board's fiduciary responsibilities to the public? Besides, when all is said and done, without attendant principles of accountability and transparency, the will of the members ultimately has no meaning.

Respectfully submitted this 31st day of March 2016

By /s/ Mauricio R. Hernandez
Mauricio R. Hernandez (#020181)