



June 11, 2015

Task Force on the Review of the Role and
Governance Structure of the State Bar of Arizona
Hon. Rebecca White Berch, Chair

via email

Re: Draft Report of the Task Force

Dear Justice Berch and fellow Task Force members,

The Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona was formed to report recommendations to the Arizona Supreme Court for changes to the State Bar of Arizona's mission(s) and governance. Ariz. Sup. Ct. Admin. Order No. 2014-79. The Task Force has now begun to formalize its recommendations for reforms in advance of the September 1, 2015 due date for its report. As a member of this Task Force, I write to elucidate my views on the Task Force's draft report and to explain how and why my views differ as to the majority recommendations thus far advanced by this Task Force.

Summary

The reforms recommended by the majority of the Task Force are superficial; they do nothing to change the status quo of the Arizona State Bar, which is in need of reform. The majority's recommended reforms are:

1. Stylistic changes to Rule 32 to clarify that the primary mission of the State Bar of Arizona is to protect and serve the public;
2. Maintaining the integrated bar association and all its powers;
3. Reducing the size of the governing board of the State Bar and tweaking the manner in which the board is populated;
4. Adding certain qualifications, term limits and removal procedures for board members;
5. Changing the officer track of the board;

6. Changing the board's name and imposing an oath on members to "emphasize the fiduciary role of the board."

While these reforms are (mostly) fine as far as they go, they do not go nearly far enough.

These proposed reforms are insufficient because the Task Force majority has recommended keeping in place the integrated—or mandatory—State Bar and its governing board which consists mostly of lawyers. But integrated bar associations controlled by lawyers are dangerous. Such associations have an inherent conflict of interest because they are both a regulator of and "trade association" for lawyers. This conflict is exacerbated when lawyers elect a controlling number of other lawyers to represent them in their own regulatory board. This system inherently threatens capture of the regulatory board by lawyers at the expense of the public, as the U.S. Supreme Court has just recently warned. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015). Integrated bars also threaten the First Amendment rights of attorney members. *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990). Given that many states regulate lawyers to protect the public without an integrated bar, and in light of the inherent threats attendant to integrated bar associations controlled by lawyers, the continuation of the State Bar of Arizona as an integrated bar cannot be justified.

The continuation of the State Bar in its current form—an integrated bar under the governance of a lawyer-elected board—is particularly unwarranted because the current form of the "integrated" bar does nothing to protect the public. This is because the part of the State Bar that is controlled by the Board of Governors has—as a result of the Arizona Supreme Court having taken them away—very few, if any, public-protection regulatory responsibilities. The core public-protection functions one normally associates with a state bar are instead in the hands of independent committees and boards created by the Arizona Supreme Court and professional staff that, while part of the State Bar, are not actually under the control of the Board of Governors. This leaves the Board of Governors and the portion of the State Bar remaining under its control to serve only as a mandatory "trade association" for lawyers—a de facto public agency that advocates for protectionism and other positions while forcing lawyers to be a part of that expressive association. This "halfway" arrangement—in which the Board-controlled portion of the State Bar has few of the regulatory powers normally associated with an integrated bar, but is not yet a non-integrated bar—is preferable to an integrated bar in which a lawyer-controlled board has a full portfolio of regulatory powers. But as explained below, the State Bar in its current form still threatens the public interest, as well as the First Amendment rights of "members" of the State Bar.

Given these threats and the reality of the current status of the Board of Governors and the State Bar, the Arizona Supreme Court should adopt the following reforms rather than the Task Force's tepid recommendations:

1. Abolish the "integrated" State Bar in order to formally separate the regulatory and trade association functions the Supreme Court has already tried to separate in practice, rid the trade association of its veneer of state sanction and support, and protect lawyers' First Amendment rights.

2. Recognize the Arizona State Bar as a purely regulatory agency, tasked only with protecting the public, to oversee and implement the regulation of lawyers and the practice of law. Because the Court has already stripped the Board of Governors of any power over the professional staff at the State Bar responsible for these functions, this is not a substantive change so much as recognition of current practice.
3. Abolish the Board of Governors (or “Board of Trustees” as the Task Force has recommended it be called) of the State Bar and instead rely only on professional staff to assist the Court in the regulation of the practice of law and of lawyers. Again, this is not a substantive change so much as recognition of current practice.
4. If the Court believes that a governing board is necessary to assist it in the regulation of the practice of law and of lawyers (and whether or not the State Bar remains an integrated bar association), the Court should appoint—lawyers should not elect—a small board that better represents the public, not lawyers. Lawyers should not have the power to elect and control their own regulators. No other economic interest group in Arizona has this power, nor should they.

As explained more fully below, these more substantive reforms are necessary to address the many interrelated problems that define the Arizona State Bar, a mandatory-membership organization tasked by law to represent both lawyers and the public, two groups that have fundamentally different interests. Section I sets out the defined powers and governance of the integrated State Bar and criticizes the conflicts inherent in the State Bar’s missions and governance structure. Section II briefly recounts the State Bar’s history of protectionist actions aimed at furthering the interests of lawyers to the detriment of the public. Section III explains that abolishing the integrated bar controlled by lawyers will not adversely affect protection of the public because the Supreme Court has already largely taken the core public-protection functions normally associated with a state bar from the Board of Governors’ oversight and placed those functions in the hands of independent groups and professional staff. Section IV argues that, in light of the Supreme Court’s stripping of public-protection functions from the integrated State Bar, what is left of the integrated State Bar is not worth the cost. Section V explains how the mandatory association of the integrated bar threatens the First Amendment rights of “members” of the State Bar. Section VI argues that it is necessary to formally abolish and replace the integrated state bar with a regulatory-only state bar to best protect the public and indeed that this action simply finishes the job the Arizona Supreme Court has already started. Finally, Section VII criticizes the recommendations for weak reforms thus far advanced by the Task Force’s majority report.

I. Arizona’s Integrated State Bar, Its Powers, Governance, and Conflict of Interest

“A man cannot serve two masters.” This ancient maxim is most familiar to lawyers in the context of conflicts of interest and our ethical rules. But the State Bar of Arizona is by design beholden to two masters: lawyers and the public. This section explains this conflict of interest in light of the State Bar’s power and its current governance structure. Section A takes on the scope of the State Bar’s regulatory powers under Arizona Supreme Court Rules. Section B discusses the State Bar as an “integrated” bar association, a body that combines regulatory

powers with “trade association” interests. Section C demonstrates how the governance of the State Bar is controlled by lawyers. Finally, Section D briefly criticizes integrated bar associations in light of public choice theory and the recent U.S. Supreme Court decision in *Dental Examiners*.

A. The State Bar’s Regulatory Powers

The State Bar is established by the Arizona Supreme Court and tasked with assisting in the regulation of the practice of law. Ariz. R. Sup. Ct. 32. The State Bar itself claims it “regulates approximately 18,000 active attorneys.” *About Us*, State Bar of Ariz., <http://www.azbar.org/AboutUs> (June 2, 2015) [<http://perma.cc/NZ5C-6N64>]. Among the regulatory powers the State Bar exercises, it:

- Prosecutes lawyer disciplinary and disability matters. *See* Ariz. R. Sup. Ct. 46-69.
- Prosecutes the unauthorized practice of law. Ariz. R. Sup. Ct. 31(a)(2)(B), 46(b), 75-79.
- Mandates compliance with “client trust account” requirements. Ariz. R. Sup. Ct. 43.
- Created and maintains the “Client Protection Fund.” Ariz. R. Sup. Ct. 32(d)(8).
- Implements and administers mandatory continuing legal education for attorneys. Ariz. R. Sup. Ct. 32(d)(10) & 45.
- Declares rules and regulations not inconsistent with the Supreme Court’s Rules. Ariz. R. Sup. Ct. 32(d)(4).
- Fixes and collects certain fees. Ariz. R. Sup. Ct. 32(d)(1).

Theoretically, these regulatory powers are meant to protect the public from lawyers. *See Lawyer Regulation*, State Bar of Ariz., <http://www.azbar.org/LawyerRegulation> (June 2, 2015) [<http://perma.cc/9H5G-AXEE>] (setting forth the purposes of lawyer discipline proceedings); *Client Protection Fund*, State Bar of Ariz., <http://www.azbar.org/legalhelpandeducation/clientprotectionfund> (June 2, 2015) [<http://perma.cc/9MBT-9P4C>] (setting forth the purpose of the Client Protection Fund). But protecting the public is not the State Bar’s only mission. The State Bar also serves as the “trade association” for Arizona lawyers because it is an “integrated” or “mandatory” bar association.

An integrated bar association creates an inherent conflict because lawyers, as an interest group, and the public often have different interests, as described in part B below. No organization should be both a regulator and a trade association. In Arizona, granted, our Supreme Court has already taken steps to alleviate this conflict by not granting certain powers to the State Bar and stripping many of the above-listed regulatory powers from the integrated bar, overseeing them directly through separate professional staff at the State Bar, as described in Section III. But this means that what is left of the State Bar under the oversight of the Board of

Governors serves primarily the trade association mission, which gives official sanction to an organization that is mostly concerned with the interests of lawyers, not the public interest.

B. The State Bar as Integrated Bar Association and Trade Association

The Arizona State Bar is what is known as an “integrated” or “unified” bar association, a polite way of saying “mandatory.” An “integrated bar association” is one in which membership is mandated in order to practice law. Black’s Law Dictionary 177 (10th ed. 2014). This is the equivalent of requiring not just a license to practice law, *but also* requiring a license holder to be a member of an association. See Ariz. R. Sup. Ct. 32(a) (“[A]ll persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this court.”).

As has been described throughout this Task Force’s meetings, the integrated nature of the State Bar of Arizona means it has two purposes: One, as described above, it serves as a regulator of lawyers and the practice of law, and two, it also serves as a “trade association” for lawyers. Cf. May 8, 2015 Task Force Draft Report at 10 (“[T]he [State Bar] does not exist *solely* to serve the interest of its professional members.” (emphasis added)). Or, as the State Bar president-elect put it, “although the [State Bar’s] role is to safeguard the interests of the public, it is also the voice of Arizona’s attorneys.” Feb. 19, 2015 Task Force Meeting Minutes at 1, <http://www.azcourts.gov/Portals/74/GOV/2015/04232015/MeetingPktPOST.pdf>. In truth, given the Supreme Court’s stripping of regulatory powers from the State Bar and/or the Board of Governors’ oversight described in Section III, Arizona’s integrated bar serves mostly as the officially-sanctioned voice of Arizona’s attorneys, as described in Sections II and IV.¹

It is not necessary to have a bar with both regulatory and trade-association powers. At last count, at least 18 states² regulate the practice of law and lawyers without an integrated bar.³ In these states, a purely regulatory agency, often working under the authority of the state supreme court, sets standards for and admits applicants to the bar and runs the disciplinary system to enforce ethical rules. In Colorado, for example, the supreme court’s Board of Law Examiners admits applicants to the practice of law. *Board of Law Examiners*, Colo. Supreme Court, https://www.coloradosupremecourt.com/ble/ble_home.htm (June 2, 2015) [<http://perma.cc/5A22-3YX8>]. The supreme court’s Attorney Regulation Counsel investigates and enforces the ethical rules, *Attorney Regulation Counsel*, Colo. Supreme Court, <https://www.coloradosupremecourt.com/Regulation/Regulation.asp> (June 2, 2015)

¹ A voice, ironically, that actually threatens the individual rights of Arizona’s attorneys, as described in Section V.

² Arkansas, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Tennessee, and Vermont.

³ Granted, this leaves a majority of states with an “integrated” bar. But there are varying scopes of authority for these “integrated” bars. For example, after recent reforms, California’s integrated bar is “about as close to a pure regulatory bar as there is in the country” and the bar’s “discussions now are driven by what is in the best interests of the people of California rather than what is in the interests of the attorneys.” Aug. 22, 2014 Task Force Meeting Minutes at 6, <http://www.azcourts.gov/Portals/74/GOV/09192014/1Draft.minutes%20082214.pdf> (testimony of Joseph Dunn, then executive director of the State Bar of California). By contrast, as set forth in Sections III and IV, *infra*, Arizona’s integrated bar is the opposite; it has been largely stripped of its public-protection regulatory powers and exists almost exclusively as a trade association for lawyers.

[<http://perma.cc/3WY7-QZRC>], and unauthorized practice of law regulations, *Unauthorized Practice of Law in Colorado*, Colo. Supreme Court, <https://www.coloradosupremecourt.com/Regulation/UPL.htm> (June 2, 2015) [<http://perma.cc/JL24-TGBM>]. The supreme court also has a client protection fund. *Attorneys' Fund for Client Protection*, Colo. Supreme Court, https://www.coloradosupremecourt.com/Regulation/Attorney_Fund.htm (June 2, 2015) [<http://perma.cc/W4NS-GZEW>]. There is a Colorado Bar Association, but it is a purely voluntary organization that lacks any regulatory power. *CBA Fact Sheet*, Colo. Bar Ass'n, <http://www.cobar.org/page.cfm/ID/20413/> (June 2, 2015) [<http://perma.cc/9BUK-ZEHD>].

No other Arizona regulatory body is organized like the State Bar. The Arizona Medical Board, for example, is tasked with “protect[ing] the public from unlawful, incompetent, unqualified, impaired or unprofessional practitioners of allopathic medicine,” *i.e.*, medical doctors. A.R.S. § 32-1403(A). Although all Arizona doctors are licensed by the Medical Board and subject to its jurisdiction, there is no mandatory association aspect to medical practice in Arizona. Doctors in Arizona are not required to be members of any organization to practice; they just need to have medical licenses. *See* A.R.S. § 32-1422. There is a “trade association” for Arizona doctors: the Arizona Medical Association (ArMA). But ArMA is a purely voluntary membership organization that exercises no regulatory powers. *Ariz. Med. Ass'n*, <https://azmed.org> (June 2, 2015) [<http://perma.cc/7C4T-7T8H>].

Not only is it not necessary to have an integrated bar association, it is not advisable. The two purposes of Arizona’s State Bar—both regulator and trade association—are in fundamental conflict with each other. Unfortunately, this inherent tension is only exacerbated by the governance structure of the State Bar, which mandates that lawyers elect the controlling number of the State Bar’s governing board. Again, I grant that some of this tension has been alleviated by the Supreme Court’s stripping of regulatory powers from the Board of Governors’ oversight. But a big problem remains: The integrated bar exists as a *de facto* public agency whose Board, controlled by lawyers, spends its time taking stances that harm the public interest with the veneer of state sanction and support. This simply highlights the anachronistic and uniquely dangerous nature of Arizona’s integrated bar.

C. The Integrated Bar Is Controlled by Lawyers

Governance of the Arizona State Bar is very clearly controlled by lawyers. “Membership” in the Bar is limited to (and demanded of) lawyers. No members of the public are, or can be, members of the Bar. Only the members of the Bar are entitled to vote for the Board of Governors of the Bar. Currently, there are 26 voting members of the Board (30 overall). Nineteen of these voting members are elected attorney members; that is, they are lawyers elected to the Board exclusively by other lawyers. Three voting members are “at-large” members appointed by the Supreme Court and may be lawyers or not. The remaining four voting members are “public members” appointed by the rest of the Board. Thus does the Board of Governors consist “primarily [of] lawyers elected by Bar members.” *About Us*, State Bar of Ariz., *supra*.⁴

⁴ Again for sake of comparison, Arizona doctors do not elect members of the Medical Board; all members are appointed by the governor. A.R.S. § 32-1402(A).

But even the “public members” arguably represent lawyers. It is only these four “non-lawyers who are appointed to represent the public.” *Id.* Because these “public” members are appointed by the Board which consists primarily of lawyer-elected members, lawyers—not the public—control which “public” members serve on the Board. This creates a clear risk that lawyers can select “public members” not for their representation of the public, but rather their allegiance to lawyers.

Were the State Bar a private, voluntary association, this would be all well and good. Voluntary associations may organize themselves largely as they please. But the State Bar is not a voluntary organization; it is a part of the government. It is established by the Arizona Supreme Court and tasked with assisting in the regulation of the practice of law. Ariz. R. Sup. Ct. 32. It claims regulatory powers. *About Us*, State Bar of Ariz., *supra*. Because the State Bar is exercising regulatory power, it is exercising state power.⁵ State power is to be exercised for the benefit of the public, not for the benefit of a small interest group such as lawyers.

The governance structure of the State Bar creates a “constituency problem.” Lawyers who are elected to the State Bar by their peers will tend to view themselves as representing lawyer constituents, not the public that never voted for them and never could vote against them. This common sense observation is borne out in the materials this Task Force has reviewed, including the 2011 Report and Recommendations of the State Bar of California Governance in the Public Interest Task Force (the “California Bar Report”), <http://www.azcourts.gov/Portals/74/GOV/08222014/CABarTFReport2011.pdf>. The California task force, like this Task Force, was charged with reviewing the duties and governance of the state’s integrated state bar. The minority group of the California task force expressly recognized the constituency problem caused by elected lawyer members of their state bar. California Bar Report at 48-49. Notably, that minority consisted, with just one exception, entirely of non-lawyers. All the lawyers on that task force, again with the one exception, made excuses for why the constituency problem was not important, *id.* at 42, but also, contradictorily, argued that it was important for lawyers to view themselves as constituents of the bar, *id.* at 29.⁶

The Arizona State Bar’s constituency problem is amply demonstrated by the letter the State Bar president-elect wrote to this Task Force and his subsequent comments at this Task

⁵ It should be noted here that the State Bar claims it “is not a state agency.” *About Us*, State Bar of Ariz., *supra*. But it claims regulatory power under Supreme Court rules, *id.*, and it is unconstitutional to delegate regulatory power to a private party. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (delegations of regulatory power to private parties are impermissible); *Parrack v. City of Phoenix*, 86 Ariz. 88, 91, 340 P.2d 997, 998 (Ariz. 1959) (same); *Industrial Comm’n v. C & D Pipeline*, 125 Ariz. 64, 66, 607 P.2d 383, 385 (Ariz. App. 1979) (same). Accordingly, the State Bar must be a government entity, otherwise it would be unconstitutionally exercising regulatory powers. Indeed, the U.S. Supreme Court has already recognized that the State Bar of Arizona is a state agency. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (noting that the Arizona State Bar acts as an agent of the Arizona Supreme Court—a part of the State—when it exercise regulatory powers).

⁶ The very process the California task force employed to study its bar association demonstrated the constituency bias for lawyers. The California task force repeatedly sought input and comment on the bar’s duties and governance from lawyers, but almost never from the public. See California Bar Report at 21-28 (recounting dozens of contacts and outreach efforts with lawyers, but only two public meetings). One-sided comment, just like election by only one interest group, can hardly encourage faith that any regulatory body, including a state bar, truly has the best interests of the public as a whole in mind.

Force's February meeting. See Feb. 19, 2015 Task Force Meeting Minutes at 1, <http://www.azcourts.gov/Portals/74/GOV/2015/04232015/MeetingPktPOST.pdf>. The president-elect's letter focuses entirely on the issue of representation of "members" by the State Bar. The president-elect repeatedly notes that this Task Force's (rather mild) recommendations will lead to "membership" having a diminished role in the governance of the State Bar. And the president-elect further complains that if the State Bar's governing board is no longer elected by lawyers, lawyers will no longer enjoy "the privilege of self-regulation."

Ultimately, as the president-elect's letter demonstrates, the State Bar's constituency problem means that only lawyers, not the public, have any real influence at the State Bar:

While Bar membership surveys show that a small but significant minority of the membership of the State Bar currently has an unfavorable view of the Bar, many of those who are unsatisfied take solace in the fact that they can go to their largely elected Board or to their elected representative and address their complaints. Each time they do, there is at least an implied (though sometimes direct) threat that if the Board or Board member does not satisfactorily deal with the issue, they will seek to elect a new Board or Board members at the next Board elections.

But when the public is unsatisfied with the State Bar's actions, the public has no such recourse.

Even the lawyers on California task force had to admit that "[i]n all unified bar states, it is necessary to strike a balance between regulatory activities and non-regulatory [i.e., trade association] activities." California Bar Report at 46. Here in Arizona, the president-elect's and the majority of this Task Force's recommendation to leave "members" with control over the "integrated" State Bar ignores, as did those California lawyers, the reality that such "balance" is not possible when an interest group—such as lawyers—has an outsized role in the governance of a regulatory body. And in Arizona, the "balance" of Arizona's integrated bar is almost entirely on the trade association side because the Supreme Court has largely removed the public-protection powers from the Board of Governors; those powers now reside in the hands of separate volunteer committees and professional staff that do not report to the lawyer-controlled governing board of the State Bar.

D. The State Bar, Public Choice Theory, and *Dental Examiners*

It is good that the Supreme Court has largely stripped the integrated bar of regulatory powers. When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, we should expect that group to use its power in the service of its own private interests and those of its friends, rather than legitimate governmental interests. One does not need a Ph.D. in economics—or even a particularly keen insight into human nature—to understand this. Nevertheless, economists and others in the field of research known as "public choice economics" have repeatedly proven that regulation frequently reflects the dominant influence of politically powerful interest groups, not the interests of voters, consumers, or would-be competitors. *E.g.* James C. Cooper, Paul A. Pautler & Todd J. Zywicki, *Theory and Practice of Competition Advocacy at the FTC*, 72 Antitrust L.J. 1091, 1100 (2005) ("The interest group most able to translate its demand for a policy preference into political

pressure is the one most likely to achieve its desired outcome.”); Richard A. Posner, *Economic Analysis of Law* § 19.3 at 534-36 (6th ed. 2003) (governmental policies—particularly economic policies—often do not reflect the interests of the public and instead generally reflect the comparative advantage of special interests to organize and exert influence relative to the public).

Two important concepts elucidated by public choice theory are “rent-seeking” and “regulatory capture.” Rent-seeking is the term used to describe the expected phenomenon of an economic interest group seeking advantage through government regulation. Classic examples of rent-seeking include tariffs, subsidies, discriminatory taxes, and regulations that prevent competition with the interest group, such as occupational licensing. Regulatory capture is the term used to describe the common scenario in which an economic interest group controls a regulatory agency, such that the regulatory agency advances the commercial or special concerns of interest groups that dominate the industry or sector it is charged with regulating, rather than pursues the public interest.

The problem of government regulation for private gain has been confronted in many fields but is clearly explained in the very recent U.S. Supreme Court decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015). The North Carolina State Board of Dental Examiners is the regulatory agency established to regulate the practice of dentistry in North Carolina. The clear majority of the members of this board (six of eight) are elected to office exclusively by North Carolina dentists. *Id.* at 1108. In exercising its regulatory power, the board began to prosecute nondentists offering teeth whitening services in North Carolina. These teeth whiteners were offering over-the-counter teeth whitening kits—which are available to the public in any drug store—in various salon, spa, and even mall kiosk settings. There was no threat to the public health or safety from these teeth whitening services, and no difference between these services and the over-the-counter teeth whitening kits available for sale elsewhere. Nevertheless, the board began to shut down these teeth whiteners.

What can explain the board’s efforts? The U.S. Supreme Court explained it succinctly:

In the 1990’s, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board’s 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Id. at 1108.

Ultimately, the board’s actions against nondentist teeth whiteners “had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.” *Id.* Thus, dentists used the power granted to them through the board to prevent competition with dentists at

the expense of consumers, a classic case of regulatory capture and rent-seeking.⁷ This led the Federal Trade Commission to sue the board for anti-competitive practices.⁸

The Supreme Court held that the board's structure meant it could be sued for antitrust violations. As the Court explained,

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

Id. at 1111. Further, “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose [a] risk of self-dealing This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” *Id.* at 1114.⁹

The *Dental Examiners* decision directly implicates the reforms necessary to protect the public from an integrated bar. Like the Dental Examiners Board, an integrated bar is in a position to foster anticompetitive regulations and actions for the benefit of lawyers, not the public. See also *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”). An integrated bar, like the Dental Examiners Board, is clearly controlled by market participants elected exclusively by other market participants. Indeed, left with a full contingent of regulatory powers, an integrated bar is inherently *more* dangerous than the Dental Examiners Board because an integrated bar is also the trade association for lawyers, see Feb. 19, 2015 Task Force Meeting Minutes at 1 (“although the [State Bar’s] role is to safeguard the interests of the public, it is also the voice of Arizona’s attorneys”), an inherent conflict of interest that not even the Dental Examiners Board labored under.

Unfortunately, the history of the Arizona State Bar is littered with examples of its engaging in anticompetitive practices similar to those engaged in by the North Carolina Dental

⁷ The dissent also recognized that the board’s actions were meant only to benefit dentists, not the public. *Dental Exam’rs*, 135 S. Ct. at 1117 (Alito, J., dissenting) (“Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.”).

⁸ The FTC has recognized regulatory capture and rent-seeking in other industries, such as funeral directors. See *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218-19 (5th Cir. 2013) (brief history of FTC “Funeral Rule,” promulgated to combat unfair and deceptive practices of funeral providers because FTC “could not rely on state funeral licensing boards to curb such practices because the state boards were ‘dominated by funeral directors’”).

⁹ Thus, to escape antitrust liability, the Court required the board to identify “clearly articulated” state policy to displace competition and also “active supervision” by an electorally or politically-accountable officer or subdivision of the state. *Dental Exam’rs*, 135 S. Ct. at 1110. The board could not do so.

Examiners Board and condemned by the U.S. Supreme Court. This history more than justifies the steps the Supreme Court has already taken to strip the integrated bar of its regulatory powers and the further steps necessary to finish the task the Supreme Court has started.

II. The State Bar's History of Protectionist Actions

Arizona's State Bar has behaved exactly as public choice economics would predict: It has served to protect the interests of lawyers to the detriment of the public.¹⁰ To be sure, the State Bar often adopts the rhetoric of protection of the public when taking anticompetitive stances, but there is no reason the public can or should put its faith in the Bar's claims.¹¹ Indeed, the Arizona Constitution has been shaped in part by the public's negative reaction to the Bar's obvious anti-public, lawyer-protectionist activities. Part A describes the State Bar's anticompetitive actions against Arizona realtors. Part B describes similar actions against document preparers. Part C describes the State Bar's opposition to out-of-state lawyers. Part D discusses "access to justice" and demonstrates how these instances of anticompetitive behavior are attributable to the self-interest of lawyers and threaten the public's interest.

A. The State Bar vs. Realtors

The classic example of the State Bar's self-serving was directed against real estate agents and resulted in the addition of a new article to our Constitution to limit the Bar's power. By the early 1960s, relations between Arizona lawyers and real estate agents were in a state of "deterioration" because of competition between the two groups for the business of preparing documents incident to real estate sales, leases, and other transactions. Merton E. Marks, *The Lawyers and the Realtors: Arizona's Experience*, 49 A.B.A. J. 139 (Feb. 1963). The State Bar, concerned with "increasing lawyers' incomes" and (or perhaps more accurately, by) "stopping the unauthorized practice of law," *id.*, brought a lawsuit to prevent real estate agents from preparing documents the agents had long prepared.¹² This was the beginning of what ultimately

¹⁰ So as to not unduly pick on the Arizona State Bar, but also to demonstrate the predictability of its misbehavior, it should be noted that bar associations across the country are engaging in anticompetitive behavior, leading to many calls for reform. *The Wall Street Journal*, for example, recently noted that the "booming innovation currently going on in the market for legal services" is being thwarted by bar associations across the country. Tom Gordon, *Hell Hath No Fury Like a Lawyer Scorned*, Wall St. J. (Jan. 28, 2015), <http://www.wsj.com/articles/tom-gordon-hell-hath-no-fury-like-a-lawyer-scorned-1422489433>.

¹¹ See Edwardo Porter, *Job Licenses in Spotlight as Uber Rises*, N.Y. Times (Jan. 27, 2015), <http://www.nytimes.com/2015/01/28/business/economy/ubers-success-casts-doubt-on-many-job-licenses.html> ("Professional organizations that push for licenses can't say, 'We want to erect a fence around our occupation,' so they say it is to protect public health and safety," said Dick M. Carpenter II, research director at the Institute for Justice. "It is an assertion with zero evidence.").

¹² The Arizona State Bar was not the only bar to do so. As explained in Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers" – The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 Cal. W. L. Rev. 65 (2009), the "organized bar" first focused on curbing the unauthorized practice of law in the 1920s and, at that time, its main strategy was to lobby state legislatures to enact definitions of the practice of law. This legislative campaign, however, was not successful, in part owing to the lobbying efforts of other interest groups, such as title companies and realtors. Very few state legislatures enacted a definition of the practice of law, and the legislative efforts waned. Thereafter, when the legal profession's income fell dramatically during the Great Depression, the organized bar renewed its regulatory efforts. Although the regulatory push was made to increase lawyer income, the rallying cry offered in public was not, of course,

became *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 90 Ariz. 76 (1961), supplemented by 91 Ariz. 293 (1962), in which the Arizona Supreme Court held that title company employees merely filling in the blanks on standard form contracts for the purchase of real estate were engaged in the unauthorized practice of law and had to stop.

The State Bar's action—and the Arizona Supreme Court's decision—was great for lawyers, but not for the public. The public squarely rejected both the Bar and the Court and swiftly moved to limit lawyer power. In 1962, Article 26 to the Arizona Constitution was proposed and adopted by the public. Article 26—which remains in effect today—expressly protects real estate brokers' and salesmen's drafting and completion of common real-estate documents from State Bar prosecution. "Although neither attorneys nor real estate brokers seem to be held in particularly high public esteem, the latter clearly won this test in the court of public opinion because the vote on the amendment was better than three to one in favor." John D. Leshy, *The Arizona State Constitution* 405-06 (Oxford Univ. Press 2011); see also Jonathan Rose, *Unauthorized Practice of Law in Arizona: A Legal and Political Problem that Won't Go Away*, 34 Ariz. St. L.J. 585, 588 (2002) ("Although the Court in *Arizona Title* noted the puritan hostility to lawyers, perhaps they did not anticipate that Arizona's populist tradition persisted and that anti-lawyer sentiments were also strong in Arizona. Despite, or perhaps because of, the strong opposition of the Arizona Bar, the Arizona voters approved the proposition by an overwhelming four to one margin.").

B. The State Bar vs. Document Preparers

The State Bar's effort to regulate document preparers out of existence is a similar, more recent, example of self-serving anticompetitive regulatory action.

After Arizona did away with statutory restrictions on the unauthorized practice of law in the mid-1980s, entrepreneurs recognized a large, unmet demand for basic, low-cost legal services and created the document preparation industry in Arizona. In 2002, the State Bar petitioned to amend the Arizona Supreme Court's rules in part to define the unauthorized practice of law in a manner that would have shut down the entire document preparation industry. Petition to Amend Rule 31 and to Add Rules 32, 76-80, Ariz. R. Sup. Ct., Rule 28 Petition No. R-02-0017.¹³ As it did against real-estate agents, the State Bar argued a "public interest" in shutting down its competition. Specifically, the State Bar claimed that "[i]n 2001, alone, the State Bar of Arizona received four hundred complaints, alleging that 'non-lawyers' were practicing law in Arizona. Arizona consumers have lost homes, financial resources, and their

"increased lawyer income." It was, as it remains today, "improving the integrity of the bar and protecting the public from unqualified practitioners." *Id.* at 68. Knowing the reception they had received in the legislatures, the organized bar changed tactics and focused on arguing that only the courts could regulate the practice of law, filing hundreds of lawsuits across the country against individuals and corporations allegedly engaged in the unauthorized practice of law. As a result, many state bars became self-regulating "to serve protectionist interests of a private trade group—the bar—which had the cooperation of judiciary due to their shared membership in the legal profession." *Id.* at 71.

¹³ A fuller telling of the politics of the repeal of the statutory restrictions on the unauthorized practice of law and nearly twenty years of conflict preceding this petition for rule change is provided by Prof. Jonathan Rose in *Unauthorized Practice of Law in Arizona*, 34 Ariz. St. L.J. at 590-95.

right to pursue a legal action as a result of non-lawyers engaging in the unauthorized practice of law.” *Id.* at 3.

The State Bar’s claims were not true, however. The Institute for Justice conducted a contemporaneous review of those (fewer than 400) “complaints.” This review indicated that 123 of these “complaints” were nothing more than copies of advertisements, 26 of the complaints were against licensed attorneys, only 11 complaints were actually filed by a consumer against a document preparer, and not a single complaint alleged a loss of a house or demonstrated with any degree of reliability that the right to pursue a legal action was lost. Institute for Justice Comment on State Bar’s Petition R-02-0017 at 6-7.

Not only were very few of these “complaints” filed by consumers, but many, many more were filed by Arizona lawyers or other State Bar-related individuals, a fact that should surprise no one. At least 74 of the complaints were made by lawyers (nearly seven times the number of consumer complaints), another 10 were made by the State Bar’s unauthorized practice of law counsel and her husband, and 14 more were made by State Bar personnel or their spouses. *Id.*

The effort to gin up complaints was part of a larger State Bar effort against document preparers. In earlier years the then State Bar president had solicited Bar members “who knew of the past ‘horror stories involving inept, incompetent or dishonest document preparers’ to write and call members of the [legislature] and to have their support staff, family members, friends, and the victims do so as well” in order to support regulations against document preparers. Rose, *Unauthorized Practice of Law in Arizona*, 34 Ariz. St. L.J. at 593. And the State Bar had, in 1999, “hired a full time lawyer ‘to warn the public that paralegals are bad news[.]’” *Id.* at 594.

Again, the public and publically accountable entities had to counteract the State Bar’s anticompetitive efforts. There was an outcry by the public when people realized what the State Bar was attempting. See, e.g., *Let Paralegals Do Their Jobs*, E. Valley Tribune, May 9, 2002; see also Rose, *Unauthorized Practice of Law in Arizona*, 34 Ariz. St. L.J. at 592-95. Ultimately, the Arizona Supreme Court appointed an ad hoc working group—which, unlike the State Bar, included lawyers and document preparers—to explore options available to allow document preparers to continue their practice. The State Bar was forced to amend its petition to permit some document preparers. See Amendment to Petition No. R-02-0017.

C. The State Bar vs. Out-of-State Lawyers

In addition to opposing competition from non-lawyers, the State Bar has opposed competition from out-of-state lawyers, particularly with regard to “admission by motion.” Admission by motion allows lawyers practicing outside of Arizona to practice in Arizona without sitting for the bar exam if they have sufficient experience. This, many Arizona lawyers objected, would lead to increased competition. Thus, admission by motion was ultimately adopted only after years of effort and over the objections of the State Bar.

In 2001, a task force appointed by the Arizona Supreme Court recommended that the Board of Governors adopt a number of proposals by ABA’s Commission on Multijurisdictional Practice, including admission by motion. In 2002, the Board of Governors responded to the ABA by “express[ing] no view” on admission by motion. Nevertheless, in 2002, the ABA

approved a model rule on admission by motion, and the Conference of Chief Justices recommended adoption of the rule. The task force again asked the Board of Governors to support the ABA's proposals and to petition the Arizona Supreme Court for adoption of all necessary rule changes, but the Board of Governors voted to approve all of the recommendations *except* for admission by motion in 2003.

A rule petition to permit admission by motion was not filed until 2006, and only then by a private lawyer, not the State Bar. Petition to Revise Rule for Admission to the State Bar of Arizona, Petition No. R-06-0017, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/11011502584758.DOC. In the debate that followed, lawyers argued about their own pecuniary interest in allowing admission by motion or not. See Tim Eigo, *Sea to Sea: Admission on Motion Comes to Arizona*, Ariz. Att'y, Dec. 2008, at 14, http://www.myazbar.org/AZAttorney/PDF_Articles/1208mjp2.pdf ("AZAT: Why did you file the petition in favor of admission on motion for Arizona? BURR: There are several reasons behind it, but the biggest one is money. I know people are concerned that other firms are going to come in, but we're losing money.").

Though there is no evidence the public was asked for its views, the State Bar surveyed its members about the petition. Of the nearly 2,200 active State Bar members who responded to the survey, 60% opposed admission on motion. Comment of the State Bar Opposing Petition to Revise Rule for Admission to the State Bar of Arizona, Petition No. R-06-0017 at 2, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/16554566971.pdf. The Board of Governors of the State Bar thereafter voted 17-3 to oppose the petition. *Id.* at 1.

The reasons the State Bar gave for opposing the petition included expressly protectionist ones:

The proposed rule change would make most lawyers in the Nation eligible for unlimited admission to practice law in Arizona, without being tested on their knowledge of Arizona law, rules or practice. As a Sunbelt state with the fastest-growing population in the Nation, Arizona will become the perfect target for expansion by out-of-state firms, including those with substantial advertising budgets, regardless of whether they have any substantial Arizona practice, reside here, or know Arizona law.

Proponents of this change argue that eliminating Arizona's bar exam requirement will benefit Arizona lawyers by making them eligible for admission on motion to other states. Our Sunbelt neighbors, however – California, New Mexico and Nevada – do not permit admission on motion. Thus, this proposal will simply not enlarge or improve the practice of most Arizona lawyers.

Id. at 2.

The comments offered by lawyers about the petition were similarly focused on whether the proposed rule was good for lawyers or bad for lawyers. Very little debate about the public good from potential increased competition, such as lower legal costs or more consumer options, was had. See generally *R-06-0017 Revision*, Ariz. Court Rules Forum, <http://azdnn.dnnmax.com/AZSupremeCourtMain/AZCourtRulesMain/CourtRulesForumMain/>

CourtRulesForum/tabid/91/forumid/7/postid/204/view/topic/Default.aspx. And recent debate about expansion of admission by motion has similarly focused on lawyer interests, not the public interest. See Opposition of Attorney Regulation Advisory Committee to Petition to Amend Rule 34(f)(1)(A), Rules of the Supreme Court, Petition No. R-12-0005 at 1, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1619374145571.pdf (objecting to expansion of waiver because of a feared “one-way influx of attorneys into Arizona without allowing mobility of Arizona attorneys”); Comment of the State Bar of Arizona on Petition to Amend Rule 38(h)(1)(A), Ariz. R. Sup. Ct., Petition No. R-12-0005, http://azdnn.dnnmax.com/Portals/0/NTForums_Attach/1521314573729.pdf (supporting petition based on portability benefits to lawyers, but noting concern that lawyer portability could be harmed).

D. The State Bar vs. Access to Justice

These examples highlight a particular blind spot of state bars that has come into recent focus: the public interest in lower-cost alternatives to lawyers. The Arizona State Bar proclaims that “access to justice” is one of its goals. *Mission, Vision, and Core Values*, State Bar of Ariz., <http://www.azbar.org/aboutus/mission,vision,andcorevalues> (June 2, 2015) [<http://perma.cc/TZM6-2PNK>]. But in practice, this slogan has meant access to a lawyer, preferably one in Arizona. As its prior treatment of real estate agents and document preparers demonstrates, public access to non-lawyers who are in a position to help consumers for lower costs has been fought by the State Bar.

Demanding lawyer training in order to provide any legal service harms not just entrepreneurs but also consumers. *The Boston Globe*, quoting one legal expert, reported that “there are states where as many as ‘98 percent of people facing eviction or debt collection show up in court without a lawyer—without any legal help. That’s stunning. And it’s indefensible.” Leon Neyfakh, *How Requiring Too Much Training Hurts Workers and Consumers Alike*, Bos. Globe (Jan. 11, 2015), <http://www.bostonglobe.com/ideas/2015/01/11/how-requiring-too-much-training-hurts-workers-and-consumers-alike/oAXFzNY37P9V9sy9W3WuJM/story.html>. A 2013 study by legal-service provider LegalShield found that the average annual expenditure for legal services by small businesses is \$7,600 and, as a result, 60% of small businesses go without assistance in facing serious legal problems. Tom Gordon, *Hell Hath No Fury Like a Lawyer Scorned*, Wall St. J. (Jan. 28, 2015), <http://www.wsj.com/articles/tom-gordon-hell-hath-no-fury-like-a-lawyer-scorned-1422489433>. Common experience similarly shows that many Arizonans are unable to afford to retain an attorney to assist them in a variety of legal settings.

Would members of the public really be worse off if they could turn to people other than lawyers for assistance? *The Boston Globe* editorial board thought not, and called on Massachusetts to identify the areas in which non-lawyers could practice. Editorial, *Mass. Must Be Creative in Helping Poor Residents with Civil Cases*, Bos. Globe (Jan. 22, 2015), <http://www.bostonglobe.com/opinion/editorials/2015/01/21/mass-must-creative-helping-poor-residents-with-civil-cases/vwu5QEfPItSYMfQxTUyIAO/story.html>. Other commentators have called for abandoning the bar exam as a prerequisite to offering legal services because it does not protect consumers but “merely creates an artificial barrier that keeps many people from competing in the market for legal services.” George Leef, *True Or False: We Need The Bar Exam To Ensure Lawyer Competence*, Forbes (Apr. 22, 2015), <http://www.forbes.com/sites/georgeleef/>

[2015/04/22/true-or-false-we-need-the-bar-exam-to-ensure-lawyer-competence/](#). Similarly, authors with the Brookings Institution have argued that numerous regulations on the practice of law implemented and maintained by lawyers create significant social costs, hamper innovation, misallocate the nation's labor resources, and create socially perverse incentives that cannot be economically justified. Clifford Winston, Robert Crandall, and Vikram Maheshri, *First Thing We Do, Let's Deregulate All the Lawyers* (Brookings Institution Press 2011).

Rigid insistence that only lawyers can “practice law” is not borne out by facts. A 2013 study found that more than two-thirds of lawyers in charge of state agencies responsible for enforcing unauthorized-practice laws could not even name a situation during the past year where an unauthorized-practice issue had caused serious public harm. Deborah L. Rhode & Lucy Buford Ricca, *Protecting the Profession or the Public? Rethinking Unauthorized-Practice Enforcement*, 82 Fordham L. Rev. 2587, 2595 (2014). Not surprisingly, the study also found that the most common source of referrals for enforcement action was attorneys, *id.* at 2591-92, who stand to profit from restricting competition. The study concluded that “unauthorized-practice law needs to increase its focus on the public rather than the profession's interest and that judicial decisions and enforcement practices need to adjust accordingly.” *Id.* at 2588.

Given the State Bar of Arizona's “two masters,” its governing structure, its history, examples like *North Carolina State Board of Dental Examiners*, and common sense, the public is justified in believing the State Bar incapable of unbiased consideration of the costs and benefits of proposals that would expand “access to justice,” even if not expanding “access to lawyers.” Even assuming that lawyers provide the highest level of legal service, consumers may need or desire, or, indeed, may only be able to afford, a “lower” level of legal service. “Access to justice” no more requires access to lawyers than “access to transportation” demands access to BMWs. Some people can only afford a Ford and not a BMW. Some people prefer a Ford to a BMW. Consumers deserve lower-cost options in the legal field just as they do in the transportation field. We would immediately reject the notion that only BMW could decide what transportation options the public was allowed. So too should we reject the notion that only lawyers may decide what legal-assistance options the public is allowed.

III. Because the Supreme Court Has Taken Away Core Public-Protection Functions from the Board of Governors, the Elimination of Arizona's Integrated Bar Will Not Adversely Affect Protection of the Public

The examples above demonstrate that the integrated State Bar has really been looking out for the economic interests of lawyers. This is bad, and it needs to stop. Stopping the integrated bar's abuses will not cause collateral damage to the core public-protection functions of the State Bar because, as noted above, the Arizona Supreme Court has already removed most of those functions from the oversight of the lawyer-elected Board of Governors.

The functions of the State Bar that serve to protect the public are today handled either by separate committees or other groups at the Supreme Court or professional staff at the State Bar free from the control of the Board of Governors:

- Judging the qualifications of applicants and admission to the Bar is not handled by the State Bar. Rather, these functions are handled by professional staff and separate volunteer committees housed at the Court itself. Ariz. R. Sup. Ct. 33.
- Prosecution of lawyer disciplinary matters is handled as if the State Bar were a purely regulatory body. The Court has established a professional disciplinary prosecution department that, though physically housed in the State Bar's offices, is not overseen by the State Bar's Board of Governors. As the current State Bar president-elect has explained, "the Board is no longer directly involved in individual cases of attorney discipline. Still, the Board does ultimately oversee the budget of the disciplinary department."
- Adjudication of disciplinary matters is no longer handled by the State Bar. The Court has created a permanent, separate disciplinary judge and hearing panels to adjudicate disciplinary matters. The chief justice, not the State Bar, is responsible for the disciplinary judge and hearing panels. Ariz. R. Sup. Ct. 51 & 52.
- Prosecution of the unlicensed practice of law is handled as the prosecution of lawyer discipline is handled. Ariz. R. Sup. Ct. 31(a)(2)(B), 46(b), 77(b).
- Adjudication of the unlicensed practice is handled by the same disciplinary judge and hearing panels that hear lawyer discipline prosecutions or by the Superior Court. Ariz. R. Sup. Ct. 75(a), 79(a).
- Although the State Bar created a Client Protection Fund at the direction of the Supreme Court, the Fund itself is, and always has been, "an entity separate from the State Bar," governed and administered by a separate Board of Trustees and funded separately from the State Bar. Supreme Court of Arizona, Client Protection Fund 2013 Annual Report 2-3, 9, http://www.azbar.org/media/752431/2013_cpf_annual_report_final.pdf [<http://perma.cc/K7RS-KH7T>].
- The State Bar has no role in the regulation of non-lawyer legal-related professionals, including, among others, certified document preparers. *E.g.*, Ariz. R. Sup. Ct. 31(d)(24-25, 30). These professionals are instead regulated by the Court itself. *Certification & Licensing*, Arizona Supreme Court, Certification and Licensing Div., <https://www.azcourts.gov/cld/Home.aspx> (June 2, 2015) [<http://perma.cc/CX5E-YLHF>].

Even the majority of the Task Force recognizes that "[a]ttorney admissions and disciplin[e] are primarily functions of the Supreme Court, and to a lesser degree, of the SBA's professional staff, which reports to the SBA's director rather than to the board." May 8, 2015 Task Force Draft Report at 13.

Taken together, these powers represent the core of the State Bar's public-protection function: the power to determine who may be a lawyer in Arizona; the prosecution and adjudication of lawyers whose actions threaten the public; the maintenance of a client protection

fund; and the regulation, prosecution, and adjudication of non-lawyers working in legal-related fields. When compared to the remainder of the State Bar's powers and functions—discussed below—it is apparent that these powers represent the core of the public-protection regulatory function the State Bar claims. Indeed, the powers denied to the Board of Governors (and thus, to the part of the State Bar over which it has oversight) by our Supreme Court mirror almost exactly the powers that regulatory agencies in non-integrated bar association states exercise, such as in Colorado. See Section I.B. *supra*.

The Task Force has not suggested giving authority over these core functions back to the renamed Board of Trustees. This is good. For the reasons set forth above, the integrated State Bar controlled by lawyers should not have these powers. But for the purposes of the most important thing the State Bar does—public protection—the current arrangement essentially makes the State Bar not an integrated bar association, but rather a regulatory-only body. Indeed, from a public-protection perspective, de-unifying the State Bar and abolishing the Board of Governors would hardly be noticed. This raises the question of what public good the State Bar and Board of Governors, as they actually function today, are serving.

IV. What is Left of The Integrated State Bar Is Not Worth the Cost

The integrated bar is not a good in and of itself; a mandatory bar must be justified by its benefit to the public. The Supreme Court has stripped the core public-protection powers from the integrated State Bar's Board of Governors and continues to run them separately or through the State Bar's professional staff as a regulatory-only agency. Given this, what marginal benefit—to the public, not to lawyers—exists from the integrated State Bar's continued existence? None at all for the most part. Not much at best. And probably not anything that justifies the costs.¹⁴

Based on the State Bar's most recent numbers, it spent substantial amounts on functions—tellingly deemed “discretionary”—of dubious utility to the public. Jan. 14, 2015 Task Force Meeting Packet at 37-42, <http://www.azcourts.gov/Portals/74/GOV/2015/01142015/MeetingPacketPost.pdf>. These functions are where the costs of the “trade association” aspects of the State Bar—providing services to members, rather than protecting the public—come into focus:

¹⁴ The State Bar itself has estimated that, of the \$460 in annual dues an active member must pay, “\$350 . . . are used for mandatory functions.” *Dues Increase FAQ*, State Bar of Ariz., <http://www.azbar.org/aboutus/leadership/boardofgovernors/importantissues/duesincreaseeffective2015/duesincreasefaq> (June 2, 2015) [<http://perma.cc/5FMH-LRLX>]. These “mandatory functions” are mostly, though not entirely, what this letter considers the core of the Bar's public-protection mission, including lawyer regulation and unauthorized practice of law prosecution, see Task Force Meeting Packet Jan 14, 2015 at 37-42, <http://www.azcourts.gov/Portals/74/GOV/2015/01142015/MeetingPacketPost.pdf>, and the costs of other core functions, such as conducting admissions and the client protection fund, are funded separately from State Bar dues. “The remaining \$110 [of an active member's annual dues] is used for various discretionary programs . . .” *Dues Increase FAQ*, *supra*. These “discretionary functions,” as explained below, are the State Bar's trade association “member services” that are not closely related to public protection.

- \$683,974 on 28 sections;¹⁵
- \$683,738 on the resource call center;¹⁶
- \$354,812 on member and public relations;
- \$308,846 on 28 standing committees;
- \$188,278 on Bar publications for members;
- \$175,433 on mental health assistance for members;
- \$144,616 on government relations (lobbying and outreach);
- \$140,433 on voluntary fee arbitration for lawyers¹⁷ and their clients;
- \$130,460 on a directory of members;
- \$105,349 on “member benefits,” *i.e.*, paying for member discounts.¹⁸

Other services to members may be indirectly related to legitimate public benefits and thus less objectionable than the above expenditures. However, it is not clear that these services are cost-effective, marginally beneficial, impossible to provide through a regulatory-only agency, or incapable of being replicated through a voluntary association:

- \$259,782 on the ethics hotline and training;
- \$80,000 on “FastCase” free legal research.¹⁹

¹⁵ These sections are “organized around specific areas of law and practice. Sections sponsor conferences, section educational programs, publish newsletters and consumer brochures, monitor legislation, as well as make recommendations to the State Bar Board of Governors.” *Sections*, State Bar of Ariz., <http://www.azbar.org/sectionsandcommittees/sections> (June 2, 2015) [<http://perma.cc/Y6XP-E7CZ>]. Only 39% of Bar members participate in these sections. Jan. 14, 2015 Task Force Meeting Packet at 41. These sections, *e.g.*, *World Peace Through Law*, State Bar of Ariz., <http://www.azbar.org/sectionsandcommittees/sections/worldpeacethroughlaw> (June 2, 2015) [<http://perma.cc/CNM9-6NTP>], are the sorts of activities that, if actually useful, lawyers can participate in—and pay for—on their own, without requiring all lawyers (and thus the public) to subsidize them.

¹⁶ Although some issues the resource call center handles may deal with public protection issues, it is apparent that much of what the resource call center relates to is member career and practice development. Career and Practice Resource Center, State Bar of Ariz., <http://www.azbar.org/professionaldevelopment/careerandpracticeresourcecenter> (June 2, 2015) [<http://perma.cc/SN76-QZKC>].

¹⁷ But apparently only for 0.2% of lawyers. Jan. 14, 2015 Task Force Meeting Packet at 42.

¹⁸ See *Member Discounts*, State Bar of Ariz., <http://www.azbar.org/membership/memberdiscounts> (June 2, 2015) [<http://perma.cc/L5Q7-XNHP>].

¹⁹ This service is used by about 19% of members. It is defended on the grounds that it helps lawyers abide by their ethical requirement to provide competent representation. But the majority of client complaints about lawyers involve lack of communication, not lack of competence. And lawyers seem to get in more frequent trouble for client

Regardless, the questions to be answered about all these services remain the same: First, does the public benefit from these costly member services?²⁰ Not at all for most of these services, and indirectly, if at all, for the remainder. Moreover, the marginal benefit of these services to the public cannot be great. Second, are any of these “benefits” to the public justified by the costs, which are also ultimately borne by the public? Again, common sense suggests not.

There is no justification for the continuation of Arizona’s integrated state bar, which exists only to provide services to members—services that have no or minimal demonstrable public benefit while also resulting in greater licensing costs. But not only is there no real public benefit to the continuation of the integrated bar, the continuation of the integrated bar actually threatens the First Amendment rights of “member lawyers.”

V. The Mandatory Association Threatens “Member” Rights

The “integrated” nature of the State Bar also threatens members’ First Amendment rights. Integrated bar associations “implicate the First Amendment freedom of association, which includes the freedom to choose not to associate, and the First Amendment freedom of speech, which also includes the freedom to remain silent or to avoid subsidizing group speech with which a person disagrees.” *Kingstad v. State Bar of Wis.*, 622 F.3d 708, 712-13 (7th Cir. 2010). The starting point for any discussion of an integrated bar and the First Amendment is *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990), in which the U.S. Supreme Court held that California’s integrated bar could use members’ dues only for regulating the legal profession or improving the quality of legal services, not for political or ideological activities.

Keller, however, is not the last word on the subject. In *Keller*, the Court admitted that “[p]recisely where the line falls between” permissible and impermissible activities “will not always be easy to discern.” *Id.* at 15. Thus, courts continue to wrestle with the *Keller* standard. *E.g.*, *Kingstad*, *supra*. (disagreement as to whether a public-relations campaign designed to improve the image of lawyers and the legal profession violated *Keller*). Moreover, the Supreme Court continues to have to address mandatory association in other contexts. *E.g.*, *Harris v. Quinn*, 134 S. Ct. 2618, 2623 (2014) (involving union dues and home healthcare workers). Thus, there is an inherent and ongoing potential for First Amendment violations any time an “integrated” bar acts in its “trade association” role.

Throughout the Task Force’s meetings, the executive director of the State Bar has explained the various ways in which the State Bar attempts to keep itself compliant with the

account problems than for a lack of competence. Perhaps the State Bar should provide lawyers with secretaries and accountants instead?

²⁰ Not every State Bar program costs money. The *Arizona Attorney* magazine makes money, approximately \$10,000 for the last year in which figures are available. Jan. 14, 2015 Task Force Meeting Packet at 39. CLE classes are a cash cow for the State Bar, resulting in a \$203,879 profit in the most recent year. *Id.* Of course, that the State Bar (1) mandates CLE (though evidence that MCLE actually results in better lawyering is notably absent, Deborah L. Rhode and Lucy Buford Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?* 22(2) ABA The Professional Lawyer 2 (2014)), (2) provides CLE (and makes a sizeable profit from it), and (3) regulates the sufficiency of CLE obtained from sources other than the State Bar (through post hoc audits of lawyers’ MCLE training) is another conflict of interest.

Keller decision. I am in no position to dispute his description at this time, and it seems reasonably clear that the Arizona State Bar has been better behaved than was the California State Bar in prompting the *Keller* case. Nevertheless, the fact remains that a mandatory bar will always present the risk of *Keller* violations. Even these many years later, state bar associations continue to run afoul of *Keller*. See *Fleck v. McDonald*, No. 1:15-cv-00013 (D.N.D. filed Feb. 3, 2015) (State Bar Association of North Dakota alleged to have contributed \$50,000 of member fees and made other contributions to a ballot question regarding judicial assumptions and the determination of parental rights); *Lautenbaugh v. Neb. State Bar Ass’n*, No. 4:12-cv-03214 (D. Neb. dismissed Sept. 26, 2014) (*Keller* lawsuit in which the state bar stipulated to preliminary injunctive relief and which resulted in settlement and restrictive rules on the use of member fees, as set out in *In re A Rule Change to Create a Voluntary State Bar of Nebraska*, 841 N.W.2d 167 (Neb. 2013)).

Moreover, by its own admission, the State Bar continues to spend its members’ dues on lobbying, electioneering, and other political speech, most prominently about the continued existence of the integrated bar itself and merit selection of judges. The State Bar lobbied against a recent legislative proposal to end Arizona’s integrated bar association and adopt a regulatory-only bar run by the Supreme Court, an idea this State Bar member argues for here. *HB2629 Attorney Licensing*, State Bar of Ariz., <http://www.azbar.org/aboutus/leadership/boardofgovernors/importantissues/hb2629attorneylicensing> (June 2, 2015) [<http://perma.cc/H9VD-XTK3>]. Further, the State Bar maintains a webpage extolling the virtues of Arizona’s “merit selection” system, Arizona Plan, <http://www.thearizonaplan.org> (June 2, 2015) [<http://perma.cc/VDT5-X4N2>], and has taken a variety of public positions with regard to merit selection with which its own members disagree, e.g., AZ Secretary of State General Election Guide 2012 - Proposition 115 Pro/Con Arguments 24-31 (including comments from the State Bar itself that conflict with a variety of positions taken by numerous lawyers on the merit selection system and proposed changes). Whether these activities fall within *Keller* or the numerous cases expounding on *Keller* since then or not—and there is reason to believe not, see *Keller*, 496 U.S. at 14 (the integrated bar is justified only to the extent its activities are “germane” to “regulating the legal profession and improving the quality of legal services”)—the State Bar is undoubtedly taking political positions that some of its members disagree with and using those members’ mandatory fees to do so.

Given that the Supreme Court has already reclaimed the major public-protection powers from the State Bar, and the remaining activities of the State Bar have little, if anything, to do with protecting the public, the threats to “member” rights posed by the integrated bar structure greatly outweigh the purported benefits of an integrated bar. These potential First Amendment problems simply add to the reasons—inherent conflict of interest, threat of regulatory capture, and unjustifiably heightened costs—why the State Bar as an integrated bar association controlled by lawyers must be abolished.

VI. The Supreme Court Should Formally Abolish and Replace the Integrated State Bar With a Regulatory-Only State Bar to Best Protect the Public

Given all the above, the State Bar as it currently exists should be abolished and replaced with a purely regulatory agency—the new State Bar of Arizona. The Supreme Court has already

started to separate the trade association and regulatory functions of the State Bar by limiting public-protection regulatory powers to the Supreme Court's own committees and divisions and/or professional staff at the State Bar who do not report to the lawyer-elected State Bar Board of Governors. Recognizing the State Bar as a purely regulatory agency will simply complete the reforms the Court has already begun. Formally separating these functions by abolishing the integrated bar is necessary because no regulatory agency should also be a "trade association" for the industry it regulates. Such an arrangement is a recipe for regulatory capture at the expense of the public because the regulatory and trade association functions of a bar cannot be "balanced," as the lawyers on the California task force believed, and the threat from having "two masters" cannot be ignored. *Dental Examiners*, 135 S. Ct. at 1111 ("Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability."). Further, because the Supreme Court has already started down the path of separating the trade association and regulatory functions of the State Bar, ending the integrated bar would have little practical effect on the core public-protection powers of the State Bar.

Abolishing the integrated state bar will benefit the public and lawyers in other ways as well. It will remove the veneer of official sanction for the State Bar's various anticompetitive stances taken in its trade association function. It will also reduce those costs attendant to bar membership that go solely to the trade association functions. Further, it will also protect the First Amendment rights of lawyers because no one should be forced to be a member of a trade association just to practice one's craft,²¹ especially where that trade association cannot claim any "public protection" justification.

Relatedly, the Court should abolish the elected Board of Governors (or Board of Trustees as the Task Force has recommended it be called) in its entirety and instead rely on professional staff to carry out the regulation of lawyers and the practice of law. This is, in large measure, what the Court has already done for purposes of lawyer regulation and unauthorized practice prosecution, so this proposal simply completes the reforms already undertaken by the Court. If necessary to assist it in the regulation of the practice of law, the Court should appoint, not elect, a small Board of Trustees that better represents the public, not lawyers. Lawyers electing lawyers simply perpetuates the State Bar's constituency problem. Ensuring that lawyers cannot control the activities of the agency that regulates the practice of law helps head off the potential for anticompetitive acts and antitrust liability illustrated by the *Dental Examiners* case. Further, ridding the Board of the constituency problem should reduce the urge to use any remaining trade association interest in a manner that benefits lawyers at the expense of the public. Small, appointed, and not "integrated" boards are sufficient to regulate other occupations in Arizona—like medical doctors—and there is no reason to believe lawyers must be given special treatment.

²¹ As many critics of the State Bar have pointed out, forcing lawyers to be a member of the trade association part of the State Bar is akin to the government forcing workers in any other occupation to be a member of a trade union, which is contrary to Arizona law. This analogy cannot be rejected out of hand, as the majority of the Task Force attempts, May 8, 2015 Task Force Draft Report at 10, inasmuch as the unanimous Supreme Court in *Keller* recognized it: "There is . . . a substantial analogy between the relationship of the [integrated California] State Bar and its members, on the one hand, and the relationship of employee unions and their members, on the other." *Keller*, 496 U.S. at 12.

The problems observed here are hinted at in this Task Force's majority recommendations. But the majority—made up primarily of lawyers, indeed of lawyers who have served in State Bar leadership for many years—is far too comfortable with the status quo. The Task Force's majority recommendations would not meaningfully reform the State Bar.

VII. The Task Force Majority Recommendations Are Not Meaningful Reforms

If adopted, the Task Force's current majority recommendations would be an improvement to the current system, but would not go far enough to enact the kinds of reforms of the State Bar that are needed.

Most critically, the majority's recommendation that the State Bar remain a mandatory association fails to address the real objections to such a system or the numerous steps the Supreme Court has already taken to minimize the integrated bar. May 8, 2015 Task Force Draft Report at 9-11. The majority does not grapple with—or even mention—the inherent conflict between the regulatory and trade association functions of an integrated bar. The majority attempts to justify the integrated bar by reference to a limited number of functions the State Bar serves. *Id.* at 10. But the majority does not explain why these functions are not available to a regulatory-only bar, as they are in Colorado. Similarly, the majority does not address whether the State Bar is already serving as a regulatory-only bar in regard to its core public-protection functions, despite recognizing that many of these are already “primarily functions of the Supreme Court, and to a lesser degree, of the SBA's professional staff, which reports to the SBA's director rather than to the board.” *Id.* at 13. Nor does the majority address the numerous bar functions which clearly lack any public benefit justification, the unjustified increased licensing costs caused by the integrated State Bar, or the inherent threats to members' First Amendment rights. Many other states function perfectly well without a mandatory bar and its attendant shortcomings; Arizona should join their ranks.

The Task Force does recognize that the primary mission of the State Bar should be to protect and serve the public. *Id.* at 9. Accordingly, the Task Force admits that “the Bar's goal of protecting the public requires its board to include a significant proportion of public non-lawyer members.” *Id.* at 12. This seems like a good start, especially considering the *Dental Examiners* decision.

But the actual recommendations of the majority of the Task Force undercut the goal of having a significant, much less meaningful, proportion of public non-lawyer members on the board. The majority's various recommendations guarantee public non-lawyer members only 20% to 33% of the board. *Id.* at 15-18. By comparison, so-called “Option Z” (formerly “Option 1”), which is the preferred option of a majority of the Task Force, see Apr. 23, 2015 Task Force Meeting Minutes at 6, mandates that 11 of 18 (61%) members—clearly a controlling share of the board—be elected lawyers, May 8, 2015 Task Force Draft Report at 17. Depending on who is appointed as an “at-large” member under this option, lawyers could hold 14 of 18 of the membership slots (78%) of the board. Under the other options, the proportions may not be any

better: As many as 12 of 15 members (80%) under Option X, and 12 of 18 members (66%) under Option Y, could be lawyers. *Id.* at 16-17.²²

Just as the majority wants to maintain a board that underrepresents the public, it also wants to maintain some measure of the constituency problem. Every option offered by the majority keeps in place elected board members to represent lawyers in the State Bar; anywhere between 33% and 61% of the Board. This may reduce, but will still retain, lawyer constituencies. *Id.* at 16-18. Indeed, the majority's preferred Option Z—which keeps 61% of the board as elected attorney members—is the most problematic for those concerned about the constituency problem. As the majority admits, “[t]he proposed Option Z configuration would . . . maintain the character of the board as one with a majority elected by attorneys.” *Id.* at 18. The majority also admits that “[e]lections might still produce constituencies,” but then speculates that “with a smaller board, perhaps to a lesser degree.” *Id.* The public should not take any comfort in this rank speculation.

As of this writing, the Task Force has still not resolved the manner in which “public” members—who are supposed to “represent the public”—are put on the board. *See* Apr. 23, 2015 Task Force Meeting Minutes at 6. Under the current rules, public members are appointed by the board, which is dominated by elected lawyers, which increases the threat that the public members' constituency will be the board and not the public. Today, two of the majority's three options for populating the board maintain a problematic role for elected attorney members to influence the identity of the public members through nomination for appointment by the Court; the third is silent as to this potential problem. May 8, 2015 Task Force Draft Report at 16-18. Though “nomination” of public members by elected lawyers is better than outright “appointment,” it is not an adequate fix. And this half-measure is particularly baffling because elected attorney members do not nominate the “at-large” members for appointment by the Court. Especially in light of *Dental Examiners* and the State Bar's own history, this issue should be definitively resolved in favor of truly independent public members.

To the Task Force's credit, it recommends that any member of the board—including public members—can be an officer of the State Bar. *Id.* at 22. Because the only proper role of the State Bar is to protect the public, not to represent lawyers, this change is both logical and welcome.

The remainder of the Task Force's recommendations—dealing with oaths and titles, term limits, removal, and officer tracks—are fine but not important enough to discuss here. These recommendations reflect the unfortunate tendency of lawyers to focus on procedure rather than substance when confronted with a problem. *See* Joseph L. Hoffmann, *Is Innocence Sufficient? An Essay on the U.S. Supreme Court's Continuing Problems with Federal Habeas Corpus and the Death Penalty*, 68 Ind. L.J. 817, 822 (1993) (“[T]he Court has done what most lawyers tend to do—it has tried to find procedural solutions for a substantive problem. One of the basic traits

²² Admittedly, under Options X and Y, the Supreme Court could theoretically appoint enough non-lawyer “at large” members of the board to balance lawyer and non-lawyer members. May 8, 2015 Task Force Draft Report at 16-17. Though neither Option X nor Y is an ideal, or even good enough, reform, the theoretical possibility of lawyers not having control of the board makes them both markedly better than Option Z.

of most lawyers is an extremely strong belief in the value of procedures. Lawyers and judges tend to believe (or at least tend to pretend to believe) that, at least in theory, if a procedure can be improved enough, then the results produced by that procedure will necessarily be right.”). The problems with the State Bar will not be fixed by procedural tweaks (though these tweaks do not hurt). The more fundamental substantive reforms the Supreme Court has already enacted and that I have suggested above are the ones necessary to address the conflict of interest, regulatory capture, officially-sanctioned trade association, and First Amendment problems inherent in the current assigned duties and governance structure of the State Bar.

The Task Force has recognized the core “public choice” problem with the State Bar: the self-interest of lawyers. But, in the absence of good public-protection reasons for doing so, it has suggested half-measures to address that problem. The Court should implement more robust reforms than those recommended by the Task Force to complete the reforms the Court has already enacted to protect the public from the State Bar.

Conclusion

“The first thing we do, let’s kill all the lawyers.” William Shakespeare, The Second Part of King Henry the Sixth, act 4, sc. 2. This, one of Shakespeare’s most famous lines, is spoken by Dick the Butcher, the otherwise forgettable henchman of rebel leader Jack Cade. Scholars have since debated the line’s meaning in its historical context. Some argue that Shakespeare’s point was to portray lawyers as the guardians of the rule of law who stand in the way of the lawless mob. Others argue Shakespeare was noting a resentment of the proliferation of lawyers among commoners, who couldn’t afford lawyers and believed lawyers were aligned with the powerful corrupt elite.

At our best, we lawyers are the guardians of the rule of law. But the powers, dual loyalties, and governance structure of the State Bar of Arizona puts lawyers in the position of the powerful elite, able to corrupt the power of the government to our benefit. It does not need to be this way to protect the public, as the Arizona Supreme Court has already tacitly recognized in reclaiming the core public-protection functions from the State Bar and the experience of at least 18 other states demonstrates. The Task Force’s majority recommendations are a step in the right direction of reforming the State Bar, but those recommendations do not go far enough to protect the public from *us*.

Sincerely,



Paul Avelar
Attorney
Institute for Justice