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 Amended Petition to Amend Ariz. R. Sup. Ct., Rule 32**

In the context of a changing legal services environment, Bar membership growth, and attendant demands placed on the State Bar, Supreme Court Administrative Order No. 2014-79 charged a Task Force with reviewing the mission and governance structure of the State Bar of Arizona (SBA). The express purpose was to ensure the Bar's mission and governance structure continued "to best serve the public interest." But notwithstanding its mandate and its time and effort, the Task Force Report and recommendations failed to comprehensively face the fundamental Constitutional issues of the integrated bar. It neglected a "germaneness" analysis to determine whether or not each of the SBA's programs, services and activities is germane to the purpose for which conditioning the

practice of law on coerced membership is justified under *Keller v. State Bar of California*, 496 U.S. 1, 14 (1990). It missed an opportunity to better evaluate whether its current structure is positioned "to best serve the public interest" by also failing to deliver an analysis backed by a detailed inventory of all SBA programs, services and activities. It failed to produce an accounting of funds, both in dollar amount and source, including administrative and personnel support allocations for each, which are used to finance each of its specific undertakings.

The Task Force was also sufficiently inattentive to continuing member complaints about the SBA's non-transparency. And regardless of the SBA's objectively unsupported *Keller*-purity claims, the Report left out an evaluation about the constitutional soundness of providing dissenting members with an "opt-in-opt-out" option.

The paucity of comments.

It is scarcely surprising that during the first comment period ending April 1, 2016 only nine comments were posted on the Court's Rules Forum website.[1]

[1] Parenthetically, the AZ Rules Forum Website is neither easy to use nor user-friendly. Furthermore, access is not well publicized or well known to the public or to lawyers. Compare the Utah Supreme Court at http://www.utcourts.gov/utc/rules-comment/ where commenting on proposed rules amendments is fast and easy. Account creation and login registration are not required. To submit a comment to the Utah Court, a visitor types in their comment in the "Comment" field and types their name and email address in the designated fields. Comments are saved to a buffer for review before publication. By contrast, the AZ Rules Forum requires a pre-registration account and subsequent delayed approval. Thereafter, to post comments, a login and password are required. Meanwhile, advances in online tools, including social media, suggest better ways to not only encourage public engagement but to screen for spam and offensive remarks without unnecessarily frustrating use. Barriers intentional or not, translate into fewer comments. In my own recent experience, I have had to register twice and create new passwords each time to post comments. And then after posting my comments, I have had to follow up with support staff because of registration and posting problems. Obviously, I am motivated and persistent. But I wonder how many would-be commenters not so similarly motivated deem the effort *'not worth the candle.'* According to an

Speaking candidly, the Mission and Governance Task Force largely operated under-the-radar during its term. Although announcements, meeting packets and meeting minutes were made available on the Arizona Supreme Court's Task Force website during August 2014 and July 2015, apart from that scant attention, its work went mostly unnoticed. The Task Force was not widely publicized during the course of its work either to the general public or to members of the State Bar of Arizona (SBA).[2] Indeed, it was not until mid-August 2015, just about two weeks shy of its September 1, 2015 final report due date, that a short-on-specifics blast email was sent to SBA members to announce the Task Force's website information. This was followed by a general public announcement via the unheralded local PBS public affairs program "Arizona Horizon."

No news or feature articles enumerating its work-in-progress appeared in *Arizona Attorney* magazine or were there any interim blast email updates *detailing* its work to Bar members. Indeed, given such low visibility, it is understandable

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Arizona Attorney November 2006 story announcing, *"The New Court Rules E-Forum,"* comments and submissions are screened and moderated by Supreme Court staff attorneys not on their merits but "for duplication, irrelevancy, spam, harassment, profanity, obscenity or other inappropriate content." I know of at least one colleague whose comments were recently rejected. No matter how inconceivable such a rejection is to me, hopefully it wasn't for committing any of the foregoing offenses, especially the undefined sin of "irrelevancy."

[2] The SBA as an inexplicable general practice does not broadcast widespread advance notice let alone highlight the Supreme Court Rules Petitions it files. It would seem axiomatic to do so to preserve members' due process rights especially when SBA proposals adversely implicate the interests of members by exposing them to potentially greater regulatory scrutiny and disciplinary liability. Unfortunately, the SBA is more likely to transmit blast emails about long term care insurance discounts or other affinity offers than it is to notice members on important proposed rule changes. The most recent instances of insufficient notice were petitions imposing new requirements for succession planning (R-15-0023) and a *Petition to Amend the Oath of Admission to the Bar & Lawyer's Creed of Professionalism* (R-16-0029). Presumably and not by dint of acquiescence but by lack of awareness, the former garnered but two comments and the latter, only one. Admittedly, albeit well after the fact, the SBA does occasionally publish announcements in its *Arizona Attorney* bar magazine about its approved petitions. And invariably, the SBA *always* offers related continuing legal education programs.

that save for Task Force members and the occasional Court or SBA employee, the meetings were not attended by many lawyers or the general public. Further compounding the Task Force's unfortunate inconspicuousness was the decision not to hold any public hearings.

Unlike similar Court-entrusted inquiries undertaken, for example, by California and Michigan, where public hearings were held by state bar reform task forces in those jurisdictions, neither the Arizona Supreme Court under Rule 28 (E) nor the State Bar of Arizona opted to hold any public hearings to elicit additional perspectives from the very members of the public whose protection the Task Force was charged with assuring under Arizona Supreme Court Administrative Order No. 2014-79.

This was lamentable. At least to this observer, the Task Force's work warranted the broadest dissemination possible given its purported in-depth review of the SBA's mission and governance and the problems associated with the inextricable intertwining of the SBA's role as concurrent self-regulator and professional trade association. And this is not to shortchange what had been hoped would also be the Task Force's anticipated further examination into the continuing burdens placed on lawyer First Amendment rights by compulsory SBA membership, particularly in light of emerging U.S. Supreme Court Constitutional jurisprudence.

That more notice was merited is further evidenced by the predictable hue and cry that has erupted from current governing board members and outlying rural district lawyers over the Task Force decision to reduce the size and composition of the SBA's governing board.

Size and composition of the governing board.

On this latter point, it is hard to fathom objections to a smaller SBA governing board. Respectfully to colleagues upset about the prospects of a smaller board or of fewer officers under an Option Z or a modified-Z, these objections are immaterial. They emanate from a long-held misapprehension by lawyers in this state that the SBA is their professional trade association dispensing out benefits and focusing on their needs even while at the same time supposedly functioning as their regulatory entity that protects the public.

Indeed, from the recent remarks of three incumbent members running for 2016 reelection to the SBA Board of Governors, it's obvious this misapprehension is not exclusive to the membership-at-large. Incumbency, experience and institutional knowledge aren't barriers apparently to the laudable but misplaced notion that board members "represent" their respective geographic districts. And going even further that mere pledges to represent supposed constituents, one

longtime incumbent went as far proclaiming in her "Candidate Statement," that "The State Bar needs to find ways to make our lives as lawyers more rewarding."[3]

So to disabuse Arizona lawyers and evidently, even some members of the governing board, I therefore continue to applaud the Task Force Report recommendation that the SBA rename its "Board of Governors" to the "Board of Trustees" thereby underscoring the board's fiduciary role not to the members who elected them -- but to the public. Consequently, since the SBA is not governed as a representative democracy, it should not matter whether members may elect governors from their respective districts.

In fact, as Task Force Member Paul Avelar argued in his dissenting letter, the Board of Governors ought to be abolished altogether and the SBA reformed solely as a purely regulatory agency. And as Mr. Avelar alternately opined if the Court deemed a governing board necessary, it should be an appointed board firmly under its active, continuing supervision. And to go one more step to further ensure a truly pronounced public protection mandate, the SBA under no circumstances should be controlled by market participants elected exclusively by other market participants.[4] This is consistent with last year's Supreme Court ruling that

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[3] See *"2016 Board of Governors Candidates' Statements,"* especially those of current board members Hector Figueroa, Patrick Greene, and Dee-Dee Samet, last accessed June 9, 2016 at http://www.azbar.org/aboutus/leadership/boardofgovernors/2016electioncandidates/2016boardofgovernorscandidatesstatements/

[4] Following a critical state bar audit, California lawmakers advanced a proposal to restructure the State Bar of California's governing board. This month the California Assembly passed AB2878 by a 75-0 vote. If enacted, the legislation would reduce the number of professional lawyers on the bar's governing board and give non-attorneys

financially interested market actors who actively participate and substantively control the economic restraint before it is imposed on the market are not entitled to antitrust immunity. *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

In addition, past history demonstrates the futility of faith placed in the SBA's supposed effective advocacy of lawyer interests. Proving that SBA Board Members do not necessarily act in the best interests of their purported constituents, the Board in 2014 passed an indefensible 13% annual dues increase along with a 33% hike in member delinquency and practice fees.

And corroborating how lawyers and the public invariably have conflicting interests, the Bar's access to justice initiatives promoting a proliferation of nonlawyer legal services keep running up against the legal profession's enduring protectionist proclivities. In sum, lawyers err if they believe that board members are elected to look out for their interests. Whether elected or appointed, the governors are not accountable to the members for the exercise of their power.

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majority control. The bill also establishes a commission to study the possibility of removing the bar's ability to self-regulate attorneys. See "*California Assembly passes bill requiring state bar to relinquish control of its board to nonlawyers"* last accessed June 9, 2016 at *ABA Journal* at http://www.abajournal.com/news/article/california_assembly_passes_bill_requiring_state_bar_to_reliquish_control_of

The only other salutary benefit worth remarking from the Task Force recommendation about *Fiduciary Responsibilities of the Board* is that it serves to usefully indict the existing state of affairs.

> "To emphasize the fiduciary character of the board, the Task Force recommends changing the name of the SBA's "Board of Governors" to the "Board of Trustees." The Task Force intends this recommendation to be more than a mere name change. It is a recommendation intended to create a different perception of the role of the board and its members. The board governs the organization known as the State Bar of Arizona, but it does much more. The board also acts in ways that protect and serve the public and the rule of law. In taking action, board members should set aside personal interests and the interests of the members in their districts and practice areas, and do what is right for the organization and best for the general public. The word "trustees" more accurately describes the nature of the fiduciary duties of board members than the term "governors."[5]

In sum, the proposed cure amounts to an ineffectual placebo. It will not save the SBA's irreconcilable conflict of interest in claiming to protect and serve the public by regulating its lawyers while at the same time serving as a "trade association" promoting the Arizona legal profession's common interests.

Therefore putting aside any proposed restyled phraseology, the unvarnished irreconcilable truth is that the conflict of interest cannot be semantically cloaked. It will always undercut any 'new' Mission that concomitantly "serves and protects the public and enhances the legal profession."

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[5] *Report of the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona*, September 1, 2015, p. 29 at http://www.azcourts.gov/cscommittees/Task-Force-to-Review-the-State-Bars-Role-and-Governance, last accessed June 9, 2016.

If the SBA truly intends to protect the public, it must not be distracted from its regulatory responsibilities by running a trade association. It is time to stop tinkering around the edges and papering over this conflict of interest. It is not enough, then, to change the name of the governing board from "governors" to "trustees" or to condition board service on a new orientation introduction to address their duties as fiduciaries of the public not as guardians bound to the interests of the SBA members that elected them. True reform will come about only when the regulatory and trade association functions are completely separated.[6]

As a final aside on proposed term limits, I urge finality. Volunteer public service on the governing board ought to be commended and celebrated. But it must also have an end. Even Elvis left the building. Therefore, three consecutive terms amounting to nine years of service is plenty. There is no need of a fourth term even after a three year rule-imposed respite.

The integrated bar.

With respect to the threshold question of maintaining an integrated bar association, that is, conditioning the practice of law on compelled membership and

[6] This regulatory and non-regulatory bifurcation is precisely what HB 2221 tried to accomplish over the Bar's fierce lobbying opposition during the last Arizona Legislative Session. And it is what in the context of California's continuing Bar organizational dysfunction and two critical state auditor reports, two members of the California Bar's Board of Trustees proposed and which the State Assembly just considered. See "Proposal for De-Unification/Reform of the California State Bar," along with a wealth of related materials available at the State Bar of California "Governance in the Public Interest" website at http://www.calbar.ca.gov/AboutUs/BoardofTrustees/GovernanceinthePublicInterestTaskForce.aspx and http://www.calbar.ca.gov/Portals/0/documents/bog/governance/State%20Bar%20Trustee%20Dennis%20Mangers%20-%20Proposal%20for%20Deunification%20of%20State%20Bar%20-%20April%204,%202016.pdf last accessed June 9, 2016.

funding, the Task Force predictably reaffirmed its abiding deference to the status quo. This was foreseeable due to its less than impartial composition.

The Task Force ostensibly tasked "to review the Bar's mission and governance structure to ensure that they continue to best serve the public interest" was mostly made up by lawyers. To be precise, more than 2/3rds of the Task Force members were lawyers -- not members of the public. And these were not just any lawyers but particularly interested stakeholders, including five former bar presidents; former lawyer and public SBA governing board members; former state bar committee members; the SBA Executive Director as advisor; and even a past SBA lobbyist. As a colleague recently quipped, "Asking this group to opine on the future of the State Bar is like asking the Windsor family for its views on the monarchy."

In the interest of balance, I therefore re-urge the Court to revisit the mission and governance structure and this time, to give full-throated voice to proponents for a voluntary bar. By reconsidering the issue in a more disinterested and equitable way, at the very least one can hope for the adoption of improved lawyer First Amendment protections incorporating emerging U.S. Supreme Court jurisprudence under *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277, 2285 (2012). *Knox* articulated that mandatory dues cannot be "used for political, ideological, and other purposes not germane" to the organization's mandatory purpose.

And at best, a reexamination of those constitutional concerns may prompt the conclusion that compulsory SBA membership is unnecessary to further the compelling government interest of regulating the practice of law when less restrictive means are available. After all, eighteen states effectively regulate the practice of law without mandating bar association membership. See *In re Petition for a Rule Change to Create a Voluntary State Bar of Neb.*, 841 N.W.2d 167, 170-71 (2013).

Germaneness analysis and opt-out.

In her amended petition, the Petitioner proposes amending Rule 32(c)(8), "Membership/Computation of Fee" to give members on their annual fee statements, the option of opting out of paying that portion of the SBA annual fee "allocated to the State Bar's lobbying activities." The amendment goes to on further state that "The executive director shall calculate that portion, and shall include on the fee statement the dollar amount of the annual fee reduction if the member opts not to pay that portion."

While this is a noteworthy development meriting attention, it falls well short of a half-remedy. Moreover, with all due respect, the characterization of the Bar's attempts "diligently to be "*Keller* pure" -- that is, to not engage in political speech unrelated to the administration of justice" fails to fully encapsulate the SBA's constitutional obligations under *Keller v. State Bar of Cal*., 496 U.S. 1, 14 (1990).

I am at pains to differ with the Petitioner and much esteemed former chief justice, but in *Keller*, the U.S. Supreme Court chose not to adopt the California Supreme Court's reasoning that most of the California Bar's activities complained of by Eddie Keller et al. were within the California Bar's statutory authority of aiding "in all matter pertaining to the advancement of the science of jurisprudence or to the improvement of **the administration of justice**." [emphasis added] The fact is the U.S. Supreme Court disagreed with the California Supreme Court's reasoning that most of the activities supported by the compulsory dues of objecting members had been permissible under that statutory standard. *Keller* at 13-15.

In an unambiguous declaration of its intent to narrow the scope of permissible activity in the context of a First Amendment challenge, the nation's high court instead adopted "the guiding standard for determining permissible Bar expenditures relating to political or ideological activities is whether the challenged expenditures are necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services." *Keller* at 3.

Therefore, whether Arizona's mandatory bar dues are constitutionally permissible ought not to be determined by a reference to a subjective standard of *Keller*-purity, i.e., not engaging "in political speech unrelated to the administration of justice." Rather the line has to be drawn independently and objectively and not by its consummate status quo stakeholder.

Constitutional permissibility must be assessed by examining the extent the SBA's activities are "germane" to allowable purposes. 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)

To be properly chargeable under *Keller* and in order to survive constitutional challenge, an activity must:

(1) be germane to the practice of law;

(2) be justified by the government's vital policy interest in regulating the legal profession or improving the quality of legal services available to the people of the State; and

(3) must not add significantly to the burdening of free speech that is inherent in the allowance of an integrated bar association.

Popejoy v. New Mexico Board of Bar Commissioners, 887 F. Supp. 1422 (1991).

As stated in my earlier comment, the Task Force did not satisfactorily study these constitutional parameters as set forth in Article XIII of the SBA's Bylaws. It did not adequately evaluate whether this Bylaw succeeds or fails to fully comply with the First Amendment. Specifically, the Task Force did not completely examine whether Section 13.01 of the SBA's Bylaws contains a "germaneness"

analysis and whether or not it too narrowly interprets the use of mandatory dues as only within the realm of political or ideological expenditures.

But even for the sake of argument that Section 13.01 is granted status as the *sine qua non* that defines the political or ideological limits, the Bylaw nevertheless fails to fully incorporate what objectively constitutes those political or ideological activities. Beyond the act of lobbying, which is attempting to influence decisions made by officials in government, the scope has to be much more expansive. A diligent review is necessary done not in the abstract but via a careful examination of all the Bar's programs, services and activities. For example, the "germaneness" inquiry must follow the principle that "germaneness" requires a simple, direct connection between the program, service or activity and the SBA's core purposes.

For this reason, SBA expenditures and attendant administrative support have to be carefully vetted, including for example, those expenditures that do not directly benefit SBA members in general but instead benefit only local voluntary bar associations, particularly those minority and specialty bars that engage in lobbying at the Arizona Legislature and in other political and ideological activities. The itemization of activities therefore needs to consider the totality of bar relations related to promoting the interests of such special interest lawyers.

It must further encompass public relations and advocacy activities that support merit selection along with the SBA's administrative and financial support

of social programs having ideological content as well as political advocacy. This necessarily should include Bar leadership training as well as lobbying and expenses paid of the Board of Governors and other administrative expenses for carrying out the Bar's political and ideological activities not just the expense reimbursements and funds paid to outside contracted lobbyists. Finally, a fee calculation must quantify for deduction the actual work hours expended lobbying and giving lawmaking advice to Arizona government officials by the SBA's executive employees.[7]

Little wonder that dissenting members are left asking how long have they been funding non-chargeable programs and activities? It's fair to argue: for a long time. According to a "Bar Community" item in the January 2001 *Arizona Attorney*, the SBA's January 4, 2001 premier of the State Bar's half-day workshop for freshmen legislators, "Law School for Legislators," featured among its faculty topics the highly politicized subject of tort reform.

The test then is not simply to assess the political or the ideological. To pass constitutional muster, the SBA must perform a "germaneness" analysis to validate that the SBA's spending as to each of its programs, services, and activities is

[7] "How much of your time at the State Bar is dedicated to politics?" And SBA Chief Communications Officer Rick DeBruhl replied, "I'm going to say 25 percent." See Gary Grado, *Rick DeBruhl: From State Bar advocate to pit row reporter*, *Arizona Capitol Times*, May 13, 2016, available at http://azcapitoltimes.com/news/2016/05/13/rick-debruhl-from-state-bar-advocate-to-pit-row-reporter/

germane to the purpose for which compelled association is justified under *Keller*. And to ensure that members are only compelled to foot the bill for this narrow subset of expenditures, mandatory associations must institute the safeguards "carefully tailored to minimize the infringement" of members' First Amendment rights. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, at 303 (1986).

Hudson and *Keller* established that carefully tailored safeguards start with: (a) notice to members, including an adequate explanation of the basis for the dues and calculations of all non-germane activities, verified by an independent auditor; (b) a reasonably prompt decision by an impartial decision maker if a member objects to the way his or her mandatory dues are being spent; and (c) an escrow for the amounts reasonably in dispute while such objections are pending. *Keller*, 496 U.S. at 16; *Hudson*, 475 U.S. at 310. These carefully tailored safeguards are meant to both ensure that members' mandatory dues are used only for germane expenditures and to help provide a member recourse to protect her constitutional rights. *Hudson* at 302-3, 307 n.20.

For these reasons and ahead of adopting any changes to Rule 32(c) (8), I urge the Court to order the SBA to look well beyond compulsory dues allocable only to "lobbying expenses." The SBA must undertake and deliver a public report of a "germaneness" analysis of <u>all</u> its programs, services and activities to assure

constitutional compliance under *Keller*. Such a report should incorporate such sufficient detail to enable an objective determination of whether the compulsory funded programs, services and activities are justified by the state's interest in protecting the public through lawyer regulation and improving the quality of legal services.

Are the fees imposed in a manner that does not add to the burden of on First Amendment rights inherent in mandatory membership? Without a complete analysis that adequately accounts for expenditures in terms of time, staff support and overhead to determine what is germane and thereby, chargeable vs. non-chargeable, how can any opt-out fee calculation be reasonably ascertained? Furthermore, without a Court order, what guarantees do members have that the SBA will maintain the necessary controls and satisfactory recordkeeping to assure that expenditures are being properly attributed to activities not properly chargeable under *Keller*?

Unconstitutionality of opt-out.

First Amendment rights are either positive in that one may speak freely or negative in that one may refrain from speaking or refrain from subsidizing others' speech. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) holding that school children could not be required to salute the American flag and also *Riley v. National Federation of the Blind*, 487 U.S. 781, 796-97 (1988) that

the First Amendment guarantees freedom of speech necessarily comprising the decision of both what to say and what not to say.

In *Hudson* and *Keller,* the U.S. Supreme Court outlined certain required procedures to protect the First Amendment rights of lawyers compelled to join bar associations. More recently in *Knox*, the Supreme Court held that affirmative consent, i.e., "opt-in," is required for the use of compulsory dues for non-chargeable activities. The Court held that permitting unions "to use opt-out rather than opt-in schemes when annual dues are billed . . . substantially impinge[s] upon the First Amendment rights of [dues-payers]." The Court also said requiring dues-payers to opt-out of paying the non-chargeable portion of their dues—as opposed to exempting them from making such payments unless they opt in—represented "a remarkable boon" to the association profiting from those dues. *Knox* at 2290.

Knox itself only involved a special assessment but the Court reaffirmed that all "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest." *Id*. at 2291.

Additionally, the opt-out procedures proposed by the Petitioner that shift the burden onto lawyers pose a great risk to First Amendment rights in light of the SBA's power to regulate the practice of law and threaten a lawyer's license and livelihood. Therefore, putting the burden on a lawyer to inform the bar in order to

protect his First Amendment rights that he does not wish to fund its non-germane activities puts that lawyer at odds with his regulator. These considerations led the Supreme Court to hold in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) that it violates a compelled member's right of privacy to force him to disclose the specific causes he opposes, because that "may subject him to public hostility and might dissuade him from exercising the right to withhold support because of fear of exposure of his beliefs and of the consequences of this exposure." 431 U.S. at 241 n. 42 (internal quotations and citations omitted). An "opt-out" scheme that forces a lawyer to actively affirm that he does not wish to fund the bar's non-germane activities creates the same risk of reprisal and is equally unconstitutional.

In *Knox*, the Court recognized that the opt-out rule inherently "put[s] the burden on the nonmember," thereby "creat[ing] a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they do not agree." 132 S. Ct. at 2290. The Court called this "an anomaly" in First Amendment law, *id*., because courts "'do not presume acquiescence in the loss of fundamental rights.'" *Id.* Yet opt-out procedures create a presumption of acquiescence in the loss of fundamental rights.

Knox observed that this contradiction had been overlooked due to "historical accident" rather than "careful application of First Amendment

principles." *Id*. *Hudson* and *Keller* The Court further noted how "In later cases such as *Abood* and *Hudson*, we assumed without any focused analysis that the dicta from [*Street*, 367 U.S. 740] had authorized the opt-out requirement as a constitutional matter." *Id*.

The Arizona Supreme Court should therefore consider ensuring the SBA in fact adopts carefully tailored safeguards to limit the infringement of members' First Amendment rights, which is just what *Hudson* and *Keller* require. *Hudson*, 475 U.S. at 303; *Keller*, 496 U.S. at 16. But I urge the Court not adopt an "opt-out" rule because it would undermine those safeguards.

To be clear, *Knox* did not overrule *Keller* but what it did do was make clear that only an *affirmative consent* requirement will create a sufficient barrier between compelled dues and voluntary funds to satisfy the careful tailoring requirement. For these reasons, an "opt-in" program for dissenting members is warranted instead of the proposed "opt-out."

Transparency.

Doubtless in response to recent unsuccessful legislative efforts to bring about overdue SBA transparency by subjecting it to public records laws, the Petitioner proposes a new Rule 32 (m) concerning public meetings and records. But regardless of the genesis, the recognition of the need for transparency -- mandated by rule and not aspiration -- is welcome news indeed.

Unfortunately, whether such a daunting proposition is satisfactorily and fully realized will remain to be seen. This concern is heightened by the Bar's expressed apprehension about the specifics of proposed policy language that "the State Bar will conduct meetings and maintain records pursuant to public access policies adopted by the Supreme Court."

The Bar's reaction, however, is not unexpected. Notwithstanding its spurious claims to the contrary, the SBA has a history of non-transparency. For this reason, to succeed at transparency, the Bar will need to pay more than lip service to transform its culture. After all, the SBA is the same institution that just two years ago in brazen disregard of disclosure and member due process proposed a CPI escalator to automatically step up Bar dues by tying subsequent increases to the cost-of-living index. The implicit intent was for Bar leadership to rid itself once and for all of member objections over succeeding dues increases.

Further underscoring its non-transparency, as already noted regarding the need of a detailed "germaneness" analysis, save for the largely ineffectual perspective afforded by an annual consolidated financial statement, the Bar does not provide members any semblance of a detailed accounting about how it spends their money. Accordingly, the Bar's annual financial statement is as helpful to pinpointing a destination as is a non-pilot's examination of aerial terrain from 35,000 feet.

Hence, acceptance of Petitioner's transparency recommendation is not without misgivings. However, these are tempered by the assurance that in the absence of strong open meeting and public records mandates imposed on the SBA, the Arizona Legislature will reliably step into the breach by providing an arguably preferable alternative to solve the SBA's intransigent transparency problems. In that instance, the legislative solution is simple. Treat the SBA like every other state regulator by subjecting it to Arizona Public Records Law.

The Bar will undoubtedly favor a slightly askew -- not an open kimono. It may argue for limitations on transparency by virtue of its delegated regulatory or disciplinary functions, i.e., when it acts as an arm of the Court in regulating the practice of law. *Hoover v. Ronwin*, 466 U.S. 558 (1984) and *O'Connor v. State of Nevada*, 686 F.2d 749 (9th Cir. 1982). In such regards it may contend that any new Court-ordered public access parameters should restrict the Bar's adherence solely to regulatory functions and then only as a subset of SCR 123[8]. The SBA might prefer public access treatment under SCR 123. But in the context of challenges to

[8] The Court is on record that Arizona Public Records Law does not apply to it since it has its own public access rules. This view is not dissimilar to that of state supreme courts in Washington and Nevada who in their own rather expansive interpretations of state constitutional provisions have similarly declared state public records laws are off-limits when it comes to their respective judiciaries. In *City of Federal Way v. David Koenig*, 167 Wn.2d 341(Washington 2009), the Washington Supreme Court held the state public records act does not apply to the judiciary and judicial records. And in Nevada in *Civil Rights for Seniors v. Admin. Office of the Courts*, 129 Nev. Adv. Op. 80 (Nevada 2013), the Nevada Supreme Court held that considering the judiciary's authority to manage its own affairs, it would limit the scope of the public's access to the records maintained by the Administration of the Courts (AOC).

its spending on non-regulatory and non-chargeable activities, the Bar's link to the Court should be too attenuated for that.

Instead, I urge the Court to impose broad and robust transparency measures, especially in light of foregoing lapses in "germaneness" analysis and the need for enhanced lawyer First Amendment protections.

Still there is always another option. To avoid the thorny issues outlined above, including new oversight mandates to incorporate regular and painstaking "germaneness" reviews and improved adherence to new accounting rules for determining chargeable and non-chargeable activities, the Court could decide to simply deintegrate the SBA.

Respectfully submitted this 10th day of June 2016

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