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State Bar of Arizona No. 017387

IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of PETITION TO AMEND RULE 45(a)2 of the Arizona Rules of the Supreme Court	Supreme Court No. R-21-0016 **Comment in Opposition to Petition to Amend Rule 45(a)2 of the Arizona Rules of the Supreme Court**

Pursuant to Rule 28, Arizona Rules of the Supreme Court, the undersigned respectfully submits this comment for the Court's consideration.

I write to oppose the amendment in its present amorphous form. It lacks factual support for its premises, even a minimally defined plan for its application, and any provision for assessment of its impact.

It's a weak tool for a tough task. Biases die hard. Elimination of unjust bias is an ongoing mission, perhaps one never to be accomplished fully. We all should make—and we all deserve—our best efforts in that battle.

It is not surprising that this proposal falls so far short. Choosing constructive strategies to reduce bias is difficult. Signaling our virtue is easy but not enough; making actual decisions is hard and often divisive. People of goodwill may disagree with equally well-intentioned friends and colleagues.

A timely example: President Biden and the American Bar Association both strongly favor expanded diversity among federal judges. However, the new administration will not consider the ABA's judicial nomination vetting because of their differing opinions on the importance of diversity in identifying qualified candidates.[1] Who's right? We cannot wish away similar strategic differences with happy talk about how the proposed amendment "can only help" us do better.[2]

The Petition fails to make clear just what shortcomings among lawyers it seeks to correct. It does not even guess how widespread or harmful those faults are. Public survey data indicate that eighty-one percent of Americans with graduate education already profess to believe in the benefits of ethnic and national origin diversity.[3] That learned cohort presumably includes every member of the State Bar of Arizona. For opposition to inclusion, America is pretty much down to

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[1] Charlie Savage, *White House Won't Restore Bar Association's Role in Vetting Judges*, N.Y. TIMES, Feb. 6, 2021, at A13.

[2] State Bar Petition [hereinafter "Petition"], at 4.

[3] Hannah Fingerhut, *Most Americans express positive views of country's growing racial and ethnic diversity*, Pew Research Center, June 14, 2018 (online at https://pewrsr.ch/2LQQxaK).

unabashed bigots, irredeemable Luddites and the guy in the old Kingston Trio song who doesn't like *anybody* very much.[4] Given such a high percentage of unforced agreement with the Bar's position, one wonders what a supplemental "education" requirement for all active members would accomplish, at least in the diversity category surveyed.

Even among the most highly educated and well-motivated, though, reasonable differences emerge. Most of us would feel deeply ashamed of maliciously using words that wound other people. Yet academe is torn by use of such words in an intended constructive sense. One of the country's leading law professors, Eugene Volokh of the University of California at Los Angeles, quoted a racial epithet in class while explaining a court opinion in which the epithet was used.[5] His dean, a friend and respected colleague, considered even that use of the word to be incendiary. The dean publicly apologized for Volokh's action. Volokh did not apologize for what he considers essential qualities of precision and clarity in teaching. Who's right?

(The dean would have been powerless to punish Volokh because of academic freedom and First Amendment protection for speech at a public university. It is

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[4] Sheldon Harnick, THE MERRY MINUET (1949) ("Italians hate the Yugoslavs, South Africans hate the Dutch. And I don't like anybody very much.")

[5] Disclosure: the author of this comment has done and would do the same thing when teaching a college course on news media-related law.

perhaps worth noting here that a mandatory state bar association directed by a state supreme court also stands as a state actor in disputes over speech.[6])

The undersigned urges anyone contemplating this Petition to read Volokh's article on the controversy[7] and a report on the opposing view held by another distinguished law scholar, Geoffrey Stone of the University of Chicago.[8] Observe that even this comment's footnotes 7 and 8 reflect the clash on this question.

For a practically perfect illustration of the conflict, consider an exchange between lawyers in the O.J. Simpson murder trial. A white police officer witness for the prosecution, Mark Fuhrman, had been accused of racism that might have influenced his treatment of the black defendant. During pre-trial proceedings, a black prosecutor, Christopher Darden, sought to prevent the introduction of what he called "the N-word" used often by Fuhrman. Darden said the word was so vile that he would not utter it. He feared that it would traumatize the jurors (eight of whom were black) and prejudice them against Fuhrman's testimony.

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[6] *See, e.g.,* Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ("The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process." *Id*. at 361).

[7] Eugene Volokh, *UCLA Dean Apologizes for My Having Accurately Quoted the Word "Nigger" in Discussing a Case*, Reason, The Volokh Conspiracy, Apr. 14, 2020 (online at https://bit.ly/3u0Ombh).

[8] Colleen Flaherty, *A Free Speech Purist Opts Not to Use the N-word*, INSIDE HIGHER EDUC., Mar. 8, 2019 (online at https://bit.ly/3b3WDCJ).

Defense counsel Johnnie Cochran, Jr. protested. Cochran, black himself, argued that Darden insulted the jury by saying "that African-Americans who've lived under oppression for 200-plus years in this country cannot work in the mainstream. African-Americans live with offensive words, offensive looks, offensive treatment every day of their lives. And yet they still believe in this country."[9] Who's right? (Trial judge Lance Ito ruled that two of forty-one tape recordings of Fuhrman's racist language could be admitted. Was the judge right?)

In such a sensitive area, aspiration alone cannot justify the vague proposal offered here. We need relevant knowledge about issues that appear to have prompted this request to impose yet another mandate. I ask the Arizona Supreme Court to include in its consideration these questions:

- Approximately how many Arizona attorneys now violate—even unwittingly—the existing applicable rule of professional conduct as it concerns bias? How do we know?
- To what extent is the small representation of some groups in law caused or abetted by biased actions or attitudes of higher-up lawyers? The Petition cites a 2019 report to support the assertion that "structural and cultural hurdles in law firms result in dramatic underrepresentation of women and

[9] Kenneth B. Noble, *Issue of Racism Erupts in Simpson Trial*, N.Y. Times, Jan. 14, 1995, at A7 (viewed online at https://nyti.ms/3uc74wW).

minorities in the equity partnership ranks."[10] This is not a finding of fact. It is clearly-labeled "Commentary & Analysis" by the law placement organization's executive director.[11] Such an inference may ultimately be proved correct. For now it is little more than a feeling, despite the same executive's acknowledgement of small but "steady gains" in diversity.

- Does research support the Petition's premise that compelled presence of all active members at Bar-approved enlightenment training would be appropriate? Would it be more prudent and effective to use such events as part of the discipline process for lawyers found to have violated the applicable rule?
- Since pursuit of social goals sometimes lurches from teaching to preaching, will the contemplated programs maintain viewpoint neutrality on topics of legitimate debate? Will they distinguish instruction from indoctrination? Will freedom of speech be honored even if some speech criticizes positions promoted by the Bar or advanced by the program facilitators?[12]

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[10] Petition, at 5, (citing National Association for Law Placement 2019 Report on Diversity [hereinafter "NALP Report"]. Online at https://www.nalp.org/uploads/2019_DiversityReport.pdf).

[12] The State Bar's social justice task force, *infra* note 14, has noted that contemplated Bar-sponsored events must be *Keller*-compliant. Keller v. State Bar of California, 496 U.S. 1 (1990).

- Two practical administrative matters. First, will the proposed hour of compliance credit be free-standing or included in three-hour programs that many lawyers typically use to meet their MCLE ethics requirement at one sitting, a benefit touted by the State Bar to sell participation at CLE by the Sea and the annual convention? The Petition emphasizes that this proposal would not increase the total MCLE burden, but the difficulty of squeezing the annual hour into existing CLE formats and schedules might cause that very result.[13] Second, can the State Bar assure members that this hour will be free of charge for the first year or provided for a minimal cost of ten dollars, as recommended by the Task Force on Social Justice, Bias and Inclusion?[14]
- How would we assess the amendment's effectiveness, not merely in the number of MCLE compliance hours delivered, but in actual impact on diversity and inclusion?

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[13] The Bar claims that requiring a yearly compliance hour would "minimize the burden" of finding specialty credits. Petition, at 5. However, the Bar proposal would triple the amount of diversity material required by the ABA Model Rule invoked to justify a new mandate. *Id.* at 3. The concept of minimization seems elusive here.

[14] Task Force Report on Social Justice, Bias and Inclusion Report, Dec. 4, 2020 [hereinafter "Task Force Report"] (viewed online at https://www.azbar.org/media/8d8c1480048a3de/sjtf_report.pdf) at A2.

The Petition offers no clue. The State Bar in effect asks the Court to affirm the goal of expanded diversity now and let the Bar figure out later how to employ compulsory CLE to that end.[15] Surely the Court's consideration would be informed better if those steps were transposed. Predicting outcomes is premature when we don't understand the process. No teacher would seriously assert that we'll make the grade if we haven't even seen a syllabus.

This proposal demands a little lawyerly skepticism for another reason. We don't know whether or not *any* mandated CLE educates, let alone meets this apparent new purpose of winning hearts and modifying mindsets. In thirty-two years, neither the Court nor the State Bar has conducted a documented rigorous review of our mandate's efficacy.[16]

America's most-cited scholar on law profession ethics, the late Deborah Rhode of Stanford Law School, concluded after comprehensive study that mandated CLE

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[15] "[T]he State Bar is aware that if this proposed amendment is approved by this Court, the MCLE Regulations will have to be modified to determine qualifying diversity and inclusion training." Petition, at 6.

[16] Former Chief Justice Rebecca White Berch, speaking of a report on State Bar governance, said that as with "… every other Court program, the Court requires a periodic review." Online at http://www.azcourts.gov/cscommittees/Task-Force-to-Review-the-State-Bars-Role-and-Governance, Sept. 1, 2015 (video since deleted; Justice Berch's comment copied from the undersigned's notes).

does little or no good for most lawyers.[17] Rhode clerked for Justice Thurgood Marshall. For decades, she championed fights against bias in our profession and beyond. I cannot presume to know how such a dedicated advocate of inclusion would have viewed this proposal, but she did find that most CLE as presently administered lacks the qualities essential to effective education.[18]

In any event, we should not dismissively consign the complex goal of bias reduction to such an intellectual dead zone. Improving diversity and inclusion deserves better than a vaguely-imagined mandatory hour of unspecified content hurriedly crammed into a so-called "education" scheme that remains oddly immune to regulatory scrutiny.

Nothing in this comment aims to discourage State Bar efforts to improve diversity and inclusion. The task force on social justice issues submitted an extensive report and recommendations to the Board of Governors; the Board approved the report in January 2021.[19] Although one recommendation led to the opaque mandate requested by Petitioner,[20] much of the report appears to be carefully drawn. It recognizes the importance of thorough research before taking

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[17] Deborah L. Rhode and Lucy Ricca, *Revisiting MCLE: Is Compulsory Passive Learning Building Better Lawyers?*, 22(2) PROF. LAW. (2014). (Online at https://bit.ly/3aYc7Z8).

[18] *Id.* at 8.

[19] Task Force Report, *supra* note 14.

[20] *Id.* at A2.

new actions. With a strong diversity commitment of this Court and the State Bar already clearly evidenced, the Court need not rush to impose an inchoate addition to the MCLE burden.

I therefore ask the Court to deny this Petition. In my view, a new submission should be considered only when Petitioner articulates a fact-based demonstration of need for this particular amendment, a detailed plan for implementing it, and a standard by which to measure its effectiveness.

Respectfully submitted on this 15th day of February, 2021.

/s/ James C. Mitchell

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Clerk of the Arizona Supreme Court
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/s/ James C. Mitchell