

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:

**PETITION TO AMEND  
RULE 45(a) 2 OF THE  
ARIZONA SUPREME COURT**

Supreme Court No. R-16-0042

**Comment Opposing Petition to  
Amend Ariz. R. Sup. Ct., Rule 45(a)  
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Per Rule 28(D), Rules of the Supreme Court, the undersigned submits this Comment opposed to the above-mentioned petition for the reasons stated herein.

**I. ABA MODEL RULE 8.4(G) REANIMATED.**

Four years ago, the Central Arizona National Lawyers Guild unsuccessfully petitioned for the adoption of ABA Model Rule 8.4(g).<sup>1</sup> The proposed rule would have made it “professional misconduct” for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination” based

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<sup>1</sup> Remarkably, the SBA did not file a comment concerning the Guild’s petition even though it has long nurtured interest in amending ER 8.4. In 2010, for example, the SBA filed a rule change petition, subsequently withdrawn, at R-1000031 “asking the Court to relocate most of the language currently in ER 8.4, comment [3], into the rule itself and to add the phrase “gender expression” to the enumerated classifications. In 2013, the SBA again unsuccessfully petitioned for an ER 8.4 amendment at R-13-0019 asking the Court to “strike a balance between lawyers' individual freedom and ensuring fair, impartial and non-discriminatory administration of justice.”

on “race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.” ABA Model Rule 8.4(g) was deemed tantamount to a “lawyer speech code.”<sup>2</sup> It would have controlled what lawyers can say under threat of disciplinary sanction.

With this latest petition, the SBA revives its longstanding interest in changing ER 8.4. Embracing the goals of the Guild’s failed 2017 petition, the SBA this time seeks to *proscribe* not members’ speech and conduct but to *prescribe* their thoughts and beliefs. Under threat of summary suspension<sup>3</sup> members must submit to *details-to-follow training* “in diversity and inclusion in the legal system” and in “the elimination of bias.”

If approved, the petition would force the social-political wokeness<sup>4</sup> of current State Bar leaders<sup>5</sup> on members. Rather than diversity of thought, the proposal would chill the expression of disfavored viewpoints in favor of SBA-

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<sup>2</sup> Constitutional scholars have gone on record against the proposed ABA Model Rule 8.4(g), for example, UCLA Law Professor Eugene Volokh at Federalist Society at <https://www.youtube.com/watch?v=AfpdWmlOXbA> and South Texas College of Law Professor Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 Cath. U. L. Rev. 629 (2019) accessed April 28, 2021 at <https://scholarship.law.edu/lawreview/vol68/iss4/7>. Also see *Model Rule 8.4(g) and the First Amendment: Trust the Disciplinary Committees*, Josh Blackman’s Blog, November 21, 2016, accessed April 27, 2021 at <http://joshblackman.com/blog/2016/11/21/model-rule-8-4g-and-the-first-amendment-trust-the-disciplinary-committees/>.

<sup>3</sup> ARIZ. R. SUP. CT. 45(d) “Failure to file the affidavit by December 15 may result in a motion for summary suspension pursuant to section (i) of this rule.”

<sup>4</sup> “Self righteousness masquerading as enlightenment, Urban Dictionary accessed April 19, 2021 at <https://www.urbandictionary.com/define.php?term=wokeness>.

<sup>5</sup> See, for instance, Dennis M. Fitzgibbons, *Social Justice and Bias Changes Coming*, President’s Message, Arizona Attorney, April 2021.

approved, ideologically-conforming group think.<sup>6</sup> A review of the resolutions<sup>7</sup> and strategic vision<sup>8</sup> driving this initiative leave the unmistakable impression, especially on politically-conservative members, that the implicit educational goal will be promoting the State Bar’s left-leaning worldview and its progressive values.

Whether or not they agree, members can expect indoctrination with the State Bar’s set of political and ideological ideas as yet one more condition of their license. From there it’s a short step from posturing as a wokeness thought-leader “providing educational opportunities” to behaving like the thought-police “to ensure that Arizona attorneys do not unwittingly fall short of the standards of conduct set forth in this Rule.”<sup>9</sup>

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<sup>6</sup> But see *West Virginia State Board of Education v. Barnette*, 319 U.S.624 (1943). “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to me. We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

<sup>7</sup> See *Resolution of the State Bar of Arizona to Establish the Task Force on Social Justice, Bias, and Inclusion* dated July 24, 2020, “Whereas, the mission of the State Bar of Arizona is guided by a core value and commitment to diversity and ensuring that the legal profession and justice system reflect the community it serves in all of its social, economic, and geographical diversity;”

<sup>8</sup> See 2015-2020 and 2020-2023 State Bar of Arizona Strategic Plans, the latter available at <https://azbar.org/about-us/mission-vision-core-values/strategic-plan/> and last accessed April 19, 2021.

<sup>9</sup> SBA Petition at p. 4.

SBA leadership cites a compulsion to act by “the events of last summer.”<sup>10</sup>

But this isn't to take issue with that compulsion. Nor is it to argue the comparative merits of a right, middle, or left-of-center political vision. The point is instead to ask why the SBA --- without a mandate from membership<sup>11</sup> --- has opted to unilaterally follow the lead of special interest stakeholders<sup>12</sup> to wade into highly-charged, politically-divisive<sup>13</sup> waters.<sup>14</sup>

Short of litigation, what practical recourse will members have should they deem the politically-correct curriculum overtly hostile to their core personal beliefs concerning church, family, race or sex? Will CLE attendees be forced to self-

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<sup>10</sup> Fitzgibbons, *supra*, note 6.

<sup>11</sup> How many Arizona lawyers are clamoring for the SBA to form their social, political or religious beliefs? How many are yearning for an hour of compelled consciousness-raising group therapy?

<sup>12</sup> It's no accident not long after this Court denied the 2017 ER 8.4(g) amendment, the genesis for the SBA's ER 8.4 revival was a “working group” from one of its programs “looking to ABA Model Rule 8.4(g)” to recommend mandatory diversity and inclusion education for Arizona lawyers. See SBA Petition at pp. 1-2.

<sup>13</sup> Leah Asmelash, *Idaho moves to ban critical race theory instruction in all public schools, including universities*, CNN, April 28, 2021 accessed April 28, 2021 at <https://www.cnn.com/2021/04/27/us/critical-race-theory-idaho-bill-trnd/index.html>.

<sup>14</sup> For a very recent local instance of how impassioned this issue is see Taylor Seely, *School district reviews equity statement amid controversy*, Arizona Republic, April 21, 2021, accessed April 22, 2021, at <https://www.azcentral.com/story/news/local/southwest-valley-education/2021/04/14/litchfield-schools-shaken-by-culture-war-reviewing-equity-statement/4829795001/> describing the Litchfield Park School District Board decision to “review and potentially revise or scrap an equity statement it approved last December that outlines the district's commitment to improving equitable treatment and outcomes for students of color. The statement, along with targeted district goals to improve equitable academic success, was at the center of a cantankerous three-hour school board meeting where more than 100 parents either lambasted or applauded the district's equity and inclusion efforts.”

cancel disagreements with course content lest bias, sexism, and bigotry be imputed to them for advancing alternative viewpoints?<sup>15</sup>

Unlike voluntary, interest group bar associations or even the ABA for that matter, the SBA is a mandatory bar. It has the operative obligation to refrain from using compulsory dues to finance political and ideological activities with which members disagree.<sup>16</sup> A series of recent lawsuits brought in several states<sup>17</sup> make this very point, including, for instance, the recently remanded *Crowe v. Oregon Bar Association*.<sup>18</sup>

The possibility, then, of member repercussion is substantial. Expect it to happen here as soon as Arizona's habitually inattentive members belatedly discover a newly-enacted, below-the-radar obligation pushed through by a mandatory bar with a spiraling penchant for burdening and disrupting their legal

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<sup>15</sup> See *Greenberg v. Haggerty* (E.D. Pa. 2020) where the U.S. District Court for the Eastern District of Pennsylvania found that because of the chilling effect on the plaintiff's speech, he had sufficient injury-in-fact standing to bring a pre-enforcement challenge of ER 8.4(g). The Court also granted preliminary injunction relief. The Pennsylvania Bar withdrew its appeal, agreeing to rewrite the rule.

<sup>16</sup> *Keller v. State Bar of California*, 496 U.S. 1 (1990).

<sup>17</sup> Amanda Pampuro, *Utah Lawyer Calls State Bar Membership Unconstitutional*, Courthouse News Service, April 13, 2021, lawsuit filed by Amy Pomeroy against the Utah State Bar "claiming it spent mandatory dues on political and ideological speech she disagrees with in violation of her First and 14th Amendment rights."

<sup>18</sup> *Oregon Bar Faces Renewed Claim Over Anti-Racist Statements*, US Law Week, Bloomberg Law, February 26, 2021 accessed April 25, 2021 at <https://news.bloomberglaw.com/us-law-week/oregon-bar-faces-revived-claim-over-anti-racist-statements> and Debra Cassens Weiss, *9th Circuit revives Oregon lawyers' freedom-of-association challenge to mandatory bar membership*, ABA Journal, March 1, 2021, accessed April 25, 2021 at <https://www.abajournal.com/news/article/9th-circuit-revives-oregon-lawyers-freedom-of-association-challenge-to-mandatory-bar-membership>.

practices.<sup>19</sup> If similar proposals in other states<sup>20</sup> are any indicator, at least half of Arizona’s lawyers will likely object to a forced annual hour of ambiguously-defined diversity, inclusion, and bias elimination orthodoxy.

Moreover, members with different socio-political viewpoints will be reluctant to accept SBA claims of permissible constitutionality, spending, or advocacy. These will hinge on assertions that they promote “the administration of justice.”<sup>21</sup> This oft-favored justification is already invoked in the instant matter to defend the SBA’s stepping outside the core function of “support[ing] member competency and continuing professional development”<sup>22</sup> through CLE.

Every new impingement on lawyers’ rights is justified by the oft-repeated Justice Cardozo mantra memorialized by *In re Rouss*,<sup>23</sup> that “[m]embership in the

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<sup>19</sup> Andy Blye, *Potentially 'earth-shattering' changes for Arizona law firm ownership are now in effect*, Phoenix Business Journal, February 18, 2021, accessed April 25, 2021 at <https://www.bizjournals.com/phoenix/news/2021/02/18/arizona-law-firm-ownership-changes-in-effect.html>.

<sup>20</sup> *Position on the MCLE Board Suggested Amendment to APR 11 ethics requirements*, Suggested Amendment – Collected Feedback – Washington, accessed April 25, 2021 at [https://www.wsba.org/docs/default-source/legal-community/committees/mcle-board/6-public-comments--as-of-8-4.pdf?sfvrsn=7fa308f1\\_12](https://www.wsba.org/docs/default-source/legal-community/committees/mcle-board/6-public-comments--as-of-8-4.pdf?sfvrsn=7fa308f1_12).

<sup>21</sup> See SBA Petition at p. 2 and “About Us, Mission, Vision & Core Values, Important Issues,” last accessed April 19, 2021 at <https://azbar.org/about-us/mission-vision-core-values/important-issues/> Whether proscribing conduct “prejudicial to the administration of justice” or “promoting the administration of justice,” the SBA has long relied on the ‘catch-all’ “administration of justice” as both a sword to discipline lawyers and a shield to justify its broad excursions beyond *Keller v. California*’s allowable expenditures. 496 U.S. 1, 9-17 (1990).

<sup>22</sup> See State Bar of Arizona 2021-2023, Strategic Priority 1, accessed April 19, 2021 at <https://azbar.org/about-us/mission-vision-core-values/strategic-plan/> Also see “Our Five-Year Vision 2025-2019, Goal 1 Competency, “Provide Arizona attorneys with the knowledge and tools to develop and enhance the skills necessary to meet the needs of their clients and to promote the administration of justice.”

<sup>23</sup> *In re Rouss*, 221 N.Y. 81, 116 N.E. 782. (1917).

bar is a privilege burdened with conditions.” Unfortunately, under that catch-all rubric a mandatory bar’s mission-creeping, autocratic overreach is virtually unconstrained.

Associate U.S. Supreme Court Justice Hugo Black’s dissent in *Lathrop v. Donahue*,<sup>24</sup> is an overlooked counterweight to the ‘membership privilege’ catchall:

I do not believe that the practice of law is a 'privilege' which empowers Government to deny lawyers their constitutional rights. The mere fact that a lawyer has important responsibilities in society does not require or even permit the State to deprive him of those protections of freedom set out in the Bill of Rights for the precise purpose of insuring the independence of the individual against the Government and those acting for the Government. What I said in the Cohen case is, in my judgment, equally applicable here:

'\* \* \* (O)ne of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.'

## **II. THE REMEDY TO EVERY SOCIETAL PROBLEM IS NOT MORE CLE.<sup>25</sup>**

Finally, as with all CLE, there is no proof<sup>26</sup> this latest normative, prescriptive passive-learning exercise will even meet its educative objectives<sup>27</sup> ---

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<sup>24</sup> *Lathrop*, 367 U.S. 820, at 876 (Black, dissenting)

<sup>25</sup> The ABA, an increasingly irrelevant organization “unsustainably” losing members nonetheless persists in proscriptively recommending policy mandates for what it perceives as lawyer curatives for social ills, e.g., lawyer wellness, substance abuse, mental health and diversity, See [https://www.americanbar.org/groups/lawyer\\_assistance/policy/](https://www.americanbar.org/groups/lawyer_assistance/policy/) accessed April 28, 2021.

let alone work to change hearts and minds. The same predominant thinking that avoids empirical evidence of the efficacy of CLE now advocates for diversity and inclusion education without a scintilla of verifiable basis in support.

“*Workforce Management* estimates that companies spend a combined \$8 billion on diversity and inclusion training annually, while *Human Resources Management Journal* reports that diversity and inclusion consultants earn a combined \$400 million to \$600 million annually in consulting fees alone.”<sup>28</sup>

Research repeatedly highlights the inefficacy of such training, finding “very little evidence that diversity training affected the behavior of men or white employees overall—the two groups who typically hold the most power in organizations and are often the primary targets of these interventions.”<sup>29</sup> And unconscious or implicit bias training, typically an embedded aspect of diversity and inclusion training, is itself wanting<sup>30</sup> in proof of effectiveness.<sup>31</sup> Indeed, according to contemporary

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<sup>26</sup> Despite the published initiative to “Explore the impact and efficacy of CLE on the competency of lawyers,” enshrined in the SBA’s 2015-2019 Strategic Plan, Goal 1, Competency, 1A, the SBA has never done so. Mandatory CLE has been in place since 1989.

<sup>27</sup> Also see James Mitchell, *The Joke’s on Us*, *MCLE*, Arizona Attorney, August/September 1999, last accessed April 19, 2021 at <https://www.myazbar.org/AZAttorney/Archives/Aug-Sept99/mcle-con.pdf> and *Why Reform of MCLE Was DOA*, Arizona Attorney, February 2001, accessed at April 19, 2019 at [https://www.myazbar.org/AZAttorney/PDF\\_Articles/AZAT0201-MCLE.pdf](https://www.myazbar.org/AZAttorney/PDF_Articles/AZAT0201-MCLE.pdf).

<sup>28</sup> Updated Budgets 2020 – Diversity Best Practices at [https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/diversity\\_primer\\_chapter\\_07.pdf](https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/import/embedded/anchors/files/diversity_primer_chapter_07.pdf)

<sup>29</sup> Edward Chang, *Does Diversity Training Work the Way It’s Supposed To?*, Harvard Business Review, July 9, 2019, accessed April 29, 2021 at <https://hbr.org/2019/07/does-diversity-training-work-the-way-its-supposed-to#>.

<sup>30</sup> Tiffany L. Green and Nao Hagiwara, *The Problem With Implicit Bias Training*, *Scientific American*, August 28, 2020, “But while implicit bias trainings are multiplying, few rigorous evaluations of these programs exist. There are exceptions; some implicit bias interventions have been

social psychologist and implicit association test creator Dr. Anthony Greenwald, “I see most implicit bias training as window dressing that looks good both internally to an organization and externally, as if you’re concerned and trying to do something. But it can be deployed [without actually achieving anything](#),<sup>32</sup> which makes it in fact counterproductive. After 10 years of doing this stuff and nobody reporting data, I think the logical conclusion is that if it was working, we would have heard about it.”<sup>33</sup>

### III. PRIOR PROPOSED ER 8.4 (G) OBJECTIONS APPLY.

Many of the same objections to the last ER 8.4(g) amendment effort apply with equal force here. For example, the proposed rule may potentially interfere with an attorneys' right to express their own conscience on moral issues important

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conducted empirically among [health care professionals](#) and [college students](#). These interventions have been proven to lower scores on the Implicit Association Test (IAT), the most commonly used implicit measure of prejudice and stereotyping. But to date, none of these interventions has been shown to result in permanent, long-term reductions of implicit bias scores or, more importantly, sustained and meaningful [changes in behavior](#) (i.e., narrowing of racial/ethnic clinical treatment disparities). Even worse, there is consistent evidence that bias training done the “wrong way” (think lukewarm diversity training) can actually have the opposite impact, [inducing anger and frustration](#) among white employees.”

<sup>31</sup> Dr. Kristen Liesch, *Don't Do Unconscious Bias Training*, last accessed April 28, 2021 at <https://www.tidalequality.com/blog/dont-do-unconscious-bias-training> criticizing training that fails to feature what does work such as “**voluntary participation**, goal-setting and problem-setting, and a focus on the system.” [Emphasis added].

<sup>32</sup> Alexandra Kalev, Frank Dobbin, Erin Kelly, Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies, *American Sociological Review*, August 1, 2006, accessed April 29, 2021 at <https://doi.org/10.1177%2F000312240607100404>

<sup>33</sup> Betsey Mason, *Curbing implicit bias: what works and what doesn't*, *Q & A Psychologist Anthony Greenwald*, Knowable Magazine, June 4, 2020, accessed April 29, 2021, at <https://knowablemagazine.org/article/mind/2020/how-to-curb-implicit-bias>.

to them.<sup>34</sup> In promoting an agenda of political orthodoxy, the rule may discriminate disfavored viewpoints and suppress politically incorrect speech while protecting politically correct speech. Or dare we hope content neutrality will be baked into diversity?

Moreover, like before there are “vagueness, overbreadth, and chilling protected speech under the First Amendment”<sup>35</sup> problems. The petitioner even admits “Regulations will have to be modified to determine qualifying diversity and inclusion training.” The details will be left to bedevil members later --- when there’s little oversight and the only practical accountability is a fee objection in exchange for a nickel-ninety-eight pro-rata refund.

There is also no need for a new rule. In addition to other applicable professional conduct rules, ER 8.4 even now addresses discrimination. Indeed, the petition notes that violations of Arizona lawyers’ existing obligations under ER 8.4(d) and its comment are already sanctionable.<sup>36</sup> It is presently “professional

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<sup>34</sup> Not long ago this Court held that “an individual has autonomy over his or her speech and thus may not be forced to speak a message he or she does not wish to say.” The same principle should hold true for an individual’s autonomy to be free from compelled listening. *Brush & Nib Studios, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019).

<sup>35</sup> Ronald D. Rotunda and John S. Dzienkowski, *Legal Ethics: The Lawyer’s Deskbook on Professional Responsibility*, ed. April 2017, §8.4-2(j) Racist, Sexist, and Politically Incorrect Speech” & 8.4-2(j)-2, The New Rule 8.4 and the Free Speech Problems It May Raise” in § 8.4-2 Categories of Disciplinable Conduct.”

<sup>36</sup> ER 8.4(d), in place since 1983, has under its 2003 amended comment long contained anti-bias language, “[3] A lawyer who in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. This does not preclude legitimate advocacy when race,

misconduct” for a lawyer in representing a client to knowingly manifest bias or prejudice “based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status.”

Furthermore, as with the ABA Model Rule 8.4(g) proposal, there is no empirical data offered to support a rule change. In the course of representing clients, how many Arizona lawyers have been disciplined for violating the existing rule against biased or prejudicial conduct directed at the aforementioned protected categories? Is there any evidence beyond idealized conjecture that an amendment is necessary in response to related demonstrated ethics failures of Arizona lawyers?<sup>37</sup>

#### **IV. REFORM BEGINS AT HOME.**

Racial bias and *protected category* discrimination exist as they always have. But before looking elsewhere, reform – like charity – begins at home. The state legal establishment has for many years paid ample lip service to diversity, inclusion, and to integrating the legal profession. But biased admissions programs, unequal selection processes, and workplace exclusion persist. The legal profession

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sex, religion, national origin, disability, age, sexual orientation, gender identity or socioeconomic status, or other similar factors, are issues in the proceeding. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.”<sup>37</sup> To support the supposed benefits of an integrated bar association, this writer heard former Arizona Bar CEO John Phelps publicly assert the Bar’s ability to respond to discrete up ticks in types of lawyer discipline cases through corresponding programmatic CLE responses. In addition, under Goal 3, Professionalism, of the SBA’s 2015-2019 Strategic Plan, the Bar declares it would “continue to identify trends and coordinate the educational and communication efforts to improve the profession.”

remains as non-diverse as ever.<sup>38</sup> According to an October 21, 2020 Arizona Republic<sup>39</sup> news story:

*Maricopa County Superior Court judges and commissioners appear to be the whitest group of all, according to a review of data provided through public records requests.*

- *84% of the prosecutors in the Maricopa County Attorney's Office identify as white. Of 360 total, the office has three Native American, six Black, 14 Asian and 30 Hispanic attorneys.*
- *80% of the county's public defenders identify as white.*
- *68% of the elected justices in Maricopa County justice courts, which handle misdemeanors, evictions and small claims, identify as white.*
- *89% of Superior Court judges and 86% of Superior Court commissioners identify as white. Of 98 judges, four identify as Hispanic, three as Black, three as Asian and one as Native American. Superior Court is where felony criminal cases are heard.*
- *81% of state Court of Appeals judges and 71% of state Supreme Court justices identify as white.*

*The county is 45.5% people of color, according to July 2019 [U.S. Census Bureau](#) population estimates.*

These county statistics reflect the nation's broader systemic failures. According to the latest U.S. Bureau of Labor Statistics, *Occupation by Race and Ethnicity, 2021* (2020 data)<sup>40</sup> of the percent of total employed lawyers, Black or African American lawyers represent 6.8%; Asian lawyers represent 5.2%; and Hispanic or Latino lawyers represent 5.8%.

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<sup>38</sup> Lauren Castle, *Judges, attorneys overwhelmingly white in justice system for Maricopa County*, Arizona Republic, October 21, 2020 also cited by Fitzgibbons, *supra*. accessed April 26, 2021 at <https://www.azcentral.com/story/news/local/arizona/2020/10/21/maricopa-county-legal-system-demographics-overwhelmingly-white/5909033002/>

<sup>39</sup> *Id.*

<sup>40</sup> Labor Force Statistics from the Current Population Survey, U.S. Bureau of Labor Statistics, accessed April 26, 2021 at <https://www.bls.gov/cps/cpsaat11.htm>

## V. TALKING THE TALK AND CRAWLING THE WALK.

As a corporate employer, the SBA's employee diversity efforts are no better. Per the SBA's most recently provided EEO-1<sup>41</sup> Reports obtained by the undersigned via a public records request,<sup>42</sup> the State Bar has ample ground to cover to improve its own minority hiring and retention practices. The most recent EEO-1 report disclosed by the SBA is from 2018, see Appendix. The employment data is compiled by "EEO Job Classification." At the *Executive/Senior Level Officials and Managers* level, there is one "Hispanic or Latino" female reported. The remaining 8 employees are White. At the level below this senior management level, which is the *First/Mid Level Officials and Managers*, out of 11 employees, one "Hispanic or Latino" female and one Black female are reported. Of the 27 employees listed at the *Professionals* level, there are one male and one female under "Hispanic or Latino" and one Black male and one female listed under the category, "Two or More Races." The single employees in the respective categories of *Technician* and *Sales Workers* are both White. The highest concentration of minority hires is unsurprisingly, in the *Administrative Support* category. Of those 52 administrative

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<sup>41</sup> "The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees to submit demographic workforce data, including data by race/ethnicity, sex and job categories." See EEO-1 Component 1 Data Collection, U.S. Equal Employment Opportunity Commission, accessed April 26, 2021 at <https://www.eeoc.gov/employers/eo-1-data-collection>.

<sup>42</sup> Due to COVID-19 delays, the 2019 and 2020 EEO-1 SBA Reports were unavailable to the undersigned requestor. However, the EEO has announced that as of April 27, 2021, eligible employees may now submit two years of data by the new July 19, 2021 deadline. See "EEO Data Collection" at <https://www.eeoc.gov/employers/eo-data-collections>.

support employees, three male and thirteen female employees are recorded under “Hispanic or Latino.” Also listed are one Black male and one Asian male along with two Black females, one Asian female, and one “Two or More Races” employee.

While there’s been plenty of aspirational talk, the State Bar as a governing board has been hardly an exemplar. Calls for improved diversity and inclusion in the state’s legal profession have emanated from bar presidents for more than a generation but with little to show for it. Indeed, the so-called “commitment” to diversity has been a signature feature of SBA leaders.<sup>43</sup>

And for all that talk, the current SBA Board of Governors remains predominantly White with only two minority male and two minority female members on the 29 member board. Across its 88-year history, of its 88 past State Bar presidents, three were Asian and one was Hispanic.<sup>44</sup>

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<sup>43</sup> Twenty years ago, the new SBA President expanded on the notion of gender and ethnic diversity broadly defining the word speaking of “geographic diversity” and “focus on public lawyers and corporate law departments” and other practitioners not considered often enough. *See Core Values Nick Wallwork Assumes the State Bar Presidency*, Arizona Attorney, July/August 2001. Also see, for further examples, Pamela Treadwell-Rubin, *A Blessing of “Firsts,”* President’s Message, Arizona Attorney, January 2004; Helen Perry Grimwood, *Taking Action To Be Leaders*, President’s Message, Arizona Attorney, September 2005; Raymond A. Hanna, *Diverse Streams of Talent*, President’s Message, Arizona Attorney, November 2009; Amelia Craig Cramer, *Diversity and Inclusion*, President’s Message, Arizona Attorney, January 2013; Lisa Loo, *Investing in Future Leaders*, President’s Message, Arizona Attorney, October 2016 and on and on . . . .

<sup>44</sup> *Past Presidents*, State Bar of Arizona, last accessed April 28, 2021 at <https://www.azbar.org/about-us/leadership/past-presidents/>

Fifteen years ago at an SBA May 2006 meeting, the board “voted to recommit to the “Statement of Goals” program adopted by the Board of Governors **in June 1992** [emphasis added] to encourage the hiring, promotion and retention of women and minority lawyers in the legal profession.”<sup>45</sup> At the same meeting, the board approved the appointment of a “Diversity Task Force to follow up on the other recommendations of the Committee on Minorities and Women in the Law. It also endorsed a diversity pipeline program.<sup>46</sup> In 2008, the SBA even created a “Diversity Department” and hired a Diversity Director, I. Godwin Otu.<sup>47</sup>

## **VI. DO AS I SAY, NOT AS I DO.**

Rather than admit its own generational failures or tackle the harder problem of insufficiently integrating its workplace and governance, the SBA offers up the weak tea remedy of mandatory diversity and inclusion CLE. Having foundered at achieving meaningful minority representation within its own ranks, the SBA turns to anti-bias and diversity signaling and moral grandstanding.

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<sup>45</sup> *Board of Governors May Meeting Review*, Bar Community, Arizona Attorney, September 2006.

<sup>46</sup> Speaking of ‘pipelines,’ almost 20 years ago the late Stanford Law Professor Deborah Rhode declared, “In short, the pipeline leaks, and if we wait for time to correct the problem, we will be waiting a very long time.” Rhode, Deborah L. (2002) "Gender and the Profession: The No-Problem Problem," *Hofstra Law Review*: Vol. 30: Iss. 3, Article 16, last accessed April 26, 2021 at <https://scholarlycommons.law.hofstra.edu/hlr/vol30/iss3/16/> Professor Rhode was prescient but too optimistic. The pipeline doesn’t just leak. It has a block valve.

<sup>47</sup> Tim Eigo, *Inclusion’s Progress, Catching Up With the Bar’s Diversity Director*, Arizona Attorney, June 2010. Otu retired the following July 2011.

Instead of using the levers within its own control to improve hiring, retention, and promote meaningful, measurable workplace and organizational diversity, it redefines the word away from traditional race, gender, and ethnicity.

For example, a lever the SBA could use to effect substantive change is the one promoted by Dr. Anthony Greenwald, “discretion elimination.” It is a tool to apply “when people are making decisions that involve subjective judgment about a person.

“When those decisions are made with discretion, they are likely to result in unintended disparities. But when those decisions are made based on predetermined, objective criteria that are rigorously applied, they are much less likely to produce disparities.”<sup>48</sup>

## **VII. THE NEW DIVERSITY.**

The SBA Strategic Plan, for example, defines diversity as characteristics which are not immutable but fungible and universal. Its July 24, 2020 “Resolution of the State Bar of Arizona to Establish the Task Force on Social Justice, Bias and Inclusion”<sup>49</sup> proclaims that its mission was “guided by a core value and commitment to diversity and ensuring that the legal profession and the justice system reflect the community it serves in all of its social, economic, and geographical diversity.” In other words anyone can possess diversity as defined by

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<sup>48</sup> Greenwald, *supra* at note 32.

<sup>49</sup> The SBA created an earlier diversity task force almost 15 years ago to little effect.

the SBA. SBA Diversity is an attorney who practices in a rural setting. It is an attorney who practices as a sole practitioner or in a small firm. It is an attorney who specializes in a specific area of law. It is an attorney in the public sector. It is an attorney who was educated out of the state. Diversity to the SBA is anyone and everyone.<sup>50</sup> This is a facile cop-out.

Moreover, with respect to the instant matter, it remains unclear and undefined as to which diversity and what kind of inclusion will be taught? Will it be traditional Title VII protected category diversity? Or will it be so-called ‘social diversity,’ the aforementioned new politically-correct diversity definition?

### **VIII. IMPLEMENTATION PROBLEMS LOOM.**

The SBA is aware that, if approved, its proposal will require changes to what programmatic content qualifies for diversity and inclusion training. But to avoid problems on implementation, these must be fully vetted as part of a comprehensive proposal. This is not the case. The cart isn’t merely in front of the horse; the driver is wearing the horse’s blinders.

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<sup>50</sup>Also see Michael Martinez, *My Turn: A Supreme Court without color cannot be diverse Political correctness says the Supreme Court can be considered diverse without any minority justices. It can't*, Arizona Republic, Mar. 15, 2016, “The deception of the new diversity is it dilutes the experiences of historically identifiable and oppressed groups into common generic experience as justification for employment discrimination.” <https://www.azcentral.com/story/opinion/op-ed/2016/03/15/supreme-court-nominees-diversity/81789402/>.

Since the start of mandatory continuing legal education, the Arizona Bar has maintained the following position<sup>51</sup>:

The State Bar of Arizona does not approve or accredit providers or programs. Rule 45, Ariz. R. Sup. Ct. and the accompanying MCLE Regulations are predicated on the assumption that attorneys can evaluate CLE activities offered based on the guidelines set forth in the Regulations, and report their activities by affidavit. The standards are very broad and many providers and sponsors routinely meet these standards.

To ensure its diversity, inclusion, and bias elimination aspirations and to maintain its asserted “Keller-pure”<sup>52</sup> stance, is the SBA now signaling a sea change in its CLE responsibilities? Will it be resurrecting a previously-rejected proposal to implement a CLE content provider-certification regime? If so, where are the details? How much additional overhead and staff time will be required? What are the fiscal impacts, including the foreseeable adverse effects on mandatory dues?

And what of course content? What assurances are there it will be viewpoint neutral? The test for viewpoint discrimination is “whether — within the relevant subject category — the government has singled out a subset of messages for disfavor based on the views expressed.”<sup>53</sup> Will diversity and inclusion courses that

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<sup>51</sup> See “General MCLE FAQs” accessed April 18, 2021 at <https://www.azbar.org/licensing-compliance/mcle/mcle-faqs/>.

<sup>52</sup> “As directed by the court, the State Bar of Arizona uses what is called a “Keller-Pure” approach regarding lobbying and political issues. Our Bar gives every issue a Keller analysis before the organization takes a position. If it is determined that the issue would not pass the Keller standard, the State Bar of Arizona’s bylaws do not allow it to take a position or use staff time on behalf of a proposal.” See “Lobbying Expense Refund,” accessed April 18, 2021 at <https://www.azbar.org/about-us/government-relations/lobbying-expense-refund/>.

<sup>53</sup> *Matal v. Tam* 137 S. Ct. 1744, 1766 (2017).

debate tenets such as implicit bias, critical race theory, gender rights, same sex marriage, religious liberty, or immigration policy, be rejected for qualifying credit? Will CLE credit be denied for courses that engage in racial or gender stereotyping? And what steps will the SBA take to eliminate concerns about viewpoint discrimination? More to the crux, why even go there?<sup>54</sup>

## IX. CONCLUSION.

The State Bar of Arizona has long chosen its own path in adopting model rules promulgated and proposed by the ABA.<sup>55</sup> The petition already “differs from the ABA Model MCLE Rule in two material ways.”<sup>56</sup> But instead of tinkering with mere cosmetic changes in a futile effort to hide its fundamental failings, this performative gesture should be denied.

Respectfully submitted this 3rd day of May 2021.

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

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<sup>54</sup> To ignore the politics is to willfully deny reality. See Allan Smith and Sahil Kapur, *Republicans are crusading against ‘woke,’* NBC News, May 2, 2021, at

<https://www.nbcnews.com/politics/congress/republicans-are-crusading-against-woke-n1264811>

<sup>55</sup> *Charts Comparing Professional Conduct Rules as Adopted by Jurisdictions to ABA Model Rules*, last accessed April 29, 2021 at

[https://www.americanbar.org/groups/professional\\_responsibility/policy/charts/](https://www.americanbar.org/groups/professional_responsibility/policy/charts/).

<sup>56</sup> SBA Petition, p. 5.

# APPENDIX

co= BD59567  
u= BD59567

**EQUAL EMPLOYMENT OPPORTUNITY**  
**2018 EMPLOYER INFORMATION REPORT**  
**SINGLE ESTABLISHMENT REPORT - TYPE 1**

**SECTION B - COMPANY IDENTIFICATION**

1. STATE BAR OF ARIZONA  
4201 N. 24TH STREET SUITE 100  
  
PHOENIX, AZ 85016

2.a. STATE BAR OF ARIZONA  
4201 N. 24TH STREET SUITE 100  
  
PHOENIX, AZ 85016  
MARICOPA COUNTY  
c. Y

**SECTION C - TEST FOR FILING REQUIREMENT**

1-Y 2-N 3-N DUNS NO.: EIN :866000294

**SECTION E - ESTABLISHMENT INFORMATION**

NAICS: 541199 All Other Legal Services

**SECTION D - EMPLOYMENT DATA**

JOB CATEGORIES	HISPANIC OR LATINO		NOT-HISPANIC OR LATINO											OVERALL TOTALS	
	MALE	FEMALE	***** MALE *****						***** FEMALE *****						
			WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE	TWO OR MORE RACES	WHITE	BLACK OR AFRICAN AMERICAN	NATIVE HAWAIIAN OR PACIFIC ISLANDER	ASIAN	AMERICAN INDIAN OR ALASKAN NATIVE		TWO OR MORE RACES
EXECUTIVE/SR OFFICIALS & MGRS	0	1	2	0	0	0	0	0	6	0	0	0	0	0	9
FIRST/MID OFFICIALS & MGRS	0	1	2	0	0	0	0	0	7	1	0	0	0	0	11
PROFESSIONALS	1	1	15	1	0	0	0	0	8	0	0	0	0	1	27
TECHNICIANS	0	0	1	0	0	0	0	0	0	0	0	0	0	0	1
SALES WORKERS	0	0	0	0	0	0	0	0	1	0	0	0	0	0	1
ADMINISTRATIVE SUPPORT	3	13	4	1	0	1	0	0	26	2	0	1	0	1	52
CRAFT WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OPERATIVES	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LABORERS & HELPERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SERVICE WORKERS	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
TOTAL	4	16	24	2	0	1	0	0	48	3	0	1	0	2	101
PREVIOUS REPORT TOTAL	5	16	24	2	0	2	0	0	49	3	0	0	0	2	103

**SECTION F - REMARKS**

DATES OF PAYROLL PERIOD: 12/02/2018 THRU 12/15/2018

**SECTION G - CERTIFICATION**

CERTIFYING OFFICIAL: JOEL ENGLAND  
EEO-1 REPORT CONTACT PERSON: debra krutz  
EMAIL: debrakrutz@cox.net

TITLE: ceo/ed  
TITLE: HR Consultant  
TELEPHONE NO: 6022524804

CERTIFIED DATE[EST]: 05/28/2019 12:09 PM