

Report of the Task Force  
on the  
**Review of the Role and Governance Structure**  
**of the State Bar of Arizona**

September 1, 2015



ADVANCING JUSTICE TOGETHER | 2014-2019

**Members of the “Mission and Governance” Task Force**

**Chair:**

**Hon. Rebecca White Berch**, Arizona Supreme Court

**Members:**

**Paul Avelar**, Institute for Justice, Arizona Office

**Betsey Bayless**, President Emeritus, Maricopa Integrated Health Systems

**Bennie Click**, Chief of Police, City of Dallas (ret.)

**Lattie Coor, Ph.D.**, Chairman and CEO, Center for the Future of Arizona

**Amelia Craig Cramer**, Chief Deputy, Pima County Attorney’s Office

**Whitney Cunningham**, Aspey Watkins & Diesel, PLLC

**Christine Hall, Ph.D.**, HAPPIJOBS

**Chris Herstam**, Lewis Roca Rothgerber

**Joseph Kanefield**, Ballard Spahr, LLP

**Edward Novak**, Polsinelli PC

**Gerald Richard**, Gerald Richard Consulting, LLC

**Jose de Jesus Rivera**, Haralson Miller Pitt Feldman & McAnally PLC

**Martin Shultz**, Brownstein Hyatt Farber Schreck

**Hon. Sarah Simmons**, Superior Court in Pima County

**Grant Woods**, Grant Woods Law

**State Bar of Arizona Staff Consultant:**

**John Phelps**, Executive Director

**AOC Staff:**

Theresa Barrett, Mark Meltzer, Sabrina Nash, Nickolas Olm

Table of Contents Page

<b>Members of the Task Force</b>	<b>1</b>
<b>Table of Content</b>	<b>2</b>
<b>Part I: Executive Summary</b>	<b>5</b>
<b>Summary of Task Force Recommendations</b>	<b>6</b>
<b>Part II: The State Bar of Arizona</b>	<b>8</b>
<b>Part III: Mission of the State Bar of Arizona</b>	<b>10</b>
A. Rule 32(a)	10
B. An integrated bar	10
<b>Part IV: Governance of the State Bar of Arizona</b>	<b>14</b>
A. General description of the current board	14
B. Election of board members currently	14
C. Appointment of board members currently	15
D. <i>North Carolina State Board of Dental Examiners v. FTC</i>	16
E. Advantages and disadvantages of the board's current size	17
F. Workgroup suggestions	19
G. Task Force options for the board's composition	20
H. Voting by active, out-of-state members	23
I. Ex officio board members, advisors and liaisons	23
J. Terms of board members	25
K. Qualifications of board members	25
L. Removal of board members	26
M. Officers of the board	26
N. Fiduciary responsibilities of the board	27
<b>Part V: Board of Legal Specialization</b>	<b>29</b>
<b>Part VI: Implementation of Task Force Recommendations</b>	<b>30</b>
<b>Part VII: Conclusion</b>	<b>31</b>

## Appendices

A. Administrative Order No. 2014-79	32
B. Recent changes to Supreme Court Rule 32	35
C. Article by Daniel Suhr, "Right-Sizing Bar Association Governance" (2012)	36
D. Demographic and "per governor" tables	45
E. Summary table of Task Force revisions to Supreme Court Rule 32	47
F. Proposed revisions to Supreme Court Rule 32: clean version	52
G. Implementation tables	61
H. Proposed revisions to Supreme Court Rule 32: comparison version	65
I. Proposed Rule 40 regarding the Board of Legal Specialization	91
J. June 11, 2015 dissenting letter from Mr. Avelar	92

## **Part I: Executive Summary**

Arizona Supreme Court Administrative Order No. 2014-79 (see Appendix A) established the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona (the “Mission and Governance Task Force,” or “Task Force”). The Order directed the Task Force to review the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona (“SBA”) and to make recommendations concerning the SBA’s mission and governance.

The members of this Task Force have distinguished credentials and a wealth of governance experience. Its members include five former presidents of the SBA. Other Task Force members have served on the SBA’s governing board, some in leadership positions. Task Force members also include a former Arizona Secretary of State and a former Arizona Attorney General, former Arizona gubernatorial chiefs of staff, a past-president of Arizona State University, and leaders of public and private organizations.

The Supreme Court oversees the SBA. Times change, and the entry of A.O. 2014-79 recognizes that what might have been appropriate for the bar’s mission and governance decades ago may not be optimal today. This review was not occasioned by perceived problems with the current system, but rather in an attempt to follow best practices. After considerable study and discussion of the SBA’s mission and current governance structure and rules, the Task Force makes recommendations that sharpen the focus of the bar’s mission and provide for more efficient bar governance. These recommendations also take into consideration the 2015 opinion of the United States Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*, which concerns oversight of a profession by a governmental entity.

Most of the recommendations in this report require amendments to Supreme Court Rule 32, which provides for the “Organization of the State Bar of Arizona.” Task Force recommendations that also require amendments to certain SBA by-laws are not included with this report.

The recommendations summarized below, and further explained in the following pages of this report, acknowledge that the SBA’s past and current governors, officers, volunteers, and staff perform worthwhile work with integrity and dedication. Task Force members are grateful for all that these people have done and for the work that they continue to do.

The recommendations in this report represent the views of a majority of Task Force members. A member has submitted a dissenting view, which is included in Appendix J.

## Summary of Task Force Recommendations

1. **Rule 32:** *The Task Force recommends amending Supreme Court Rule 32 to clarify that the primary mission of the State Bar of Arizona is to protect and serve the public and, secondarily, to serve its members. The Task Force also recommends restyling and reorganizing sections of Rule 32 for clarity and readability. Appendix F shows the provisions of Supreme Court Rule 32 as proposed by this report.*
2. **Integrated bar:** *The Task Force recommends that the State Bar of Arizona continue to be integrated and supervised by the Arizona Supreme Court and that membership in the integrated bar be a requirement for practicing law in this state.*
3. **Composition of the board:** *The Task Force supports the current system under which some members of the governing board are elected by attorneys and other board members are appointed.*

*However, the Task Force recommends reducing the board's size (currently 30 members) to either 15 or 18 members. To accomplish this reduction, the Task Force recommends eliminating ex-officio board members, discontinuing a board seat dedicated to the president of the Young Lawyers Section, and establishing fewer electoral districts.*

*A smaller board can be composed in various ways by using different proportions of elected and appointed members. The Task Force presents three options for composing the governing board. One of the suggested options features a board on which the majority of members would be elected by attorneys. The other two options propose a board on which a majority of members would be appointed by the Arizona Supreme Court.*

*To preserve continuity of the board's leadership and its institutional knowledge, the Task Force recommends that board members serve staggered terms. Implementation of the governance recommendations in this report would achieve equal and predictable election and appointment cycles. These recommendations include implementation tables, shown in Appendix G, for each of the three suggested governance options.*

4. **Qualifications, term limits, and removal of board members:** *The Task Force recommends adding a requirement that attorneys who serve on the board, whether as elected or appointed members, have a clean disciplinary record during a five-year period preceding their board service.*

*Elected board members should have a term limit. Board members should serve no more than three consecutive three-year terms, and should then sit-out a full term before seeking reelection to additional terms. The Task Force recommends that Rule 32 also include a process for removing a board member for good cause.*

5. **Officers:** *The leadership track of the board should consist of three officers -- a president, a president-elect, and a secretary-treasurer -- rather than the current five officers. Appointed as well as elected board members should be eligible to hold office.*
6. **Fiduciary duties:** *To emphasize the fiduciary role of the board, the Task Force recommends changing the name of the SBA's "Board of Governors" to the "Board of Trustees." As a condition of serving on the board, board members should participate in an orientation that specifically addresses their fiduciary duties.*
7. **Board of Legal Specialization:** *In response to North Carolina State Board of Dental Examiners v. FTC, the Task Force proposes rule amendments that would provide Supreme Court supervision over the State Bar's Board of Legal Specialization.*

## Part II: The State Bar of Arizona

**A voluntary bar.** The Arizona Bar Association was Arizona's first organized bar. It was formed in 1895, just 24 years after establishment of the territorial Supreme Court. Membership in the Arizona Bar Association was voluntary.

**An integrated bar.** The State Bar Act, passed in 1933, established the State Bar of Arizona. Under the Act, those engaged in the practice of law in Arizona were required to be SBA members. At that time, Arizona had approximately 650 attorneys and two dozen judges, only a third of whom had been members of the previous voluntary bar organization.

**Supreme Court rules.** The Supreme Court adopted court rules governing the SBA and the practice of law in 1973. Those rules maintained the SBA as an integrated bar and mandated that attorneys be members as a requirement of practicing law in Arizona. The Supreme Court and the Legislature exercised joint oversight over the practice of law until the "sunset" of the State Bar Act in 1983. Thereafter, and continuing to the present, the Arizona Supreme Court has exclusively regulated the practice of law in Arizona.<sup>1</sup> Supreme Court Rule 31(a)(1) specifically provides:

Any person or entity engaged in the practice of law or unauthorized practice of law in this state, as defined by these rules, is subject to this court's jurisdiction.

**The current State Bar.** The State Bar of Arizona now has more than 17,500 active members and an additional 5,000 members who are judges, retired or inactive members, or in-house counsel.

The SBA currently has about 100 employees, more than \$12 million in assets, and an annual budget exceeding \$14 million. Approximately one-half of the SBA's budget is devoted to attorney regulation. In 2013, the discipline system fielded almost 3,500 inquiries and handled more than 700 formal attorney misconduct investigations,

<sup>1</sup> "This court has long recognized that under article III of the Constitution 'the practice of law is a matter exclusively within the authority of the Judiciary. The determination of who shall practice law in Arizona and under what condition is a function placed by the state constitution in this court.' *In re Smith*, 189 Ariz. 144, 146, 939 P.2d 422, 424 (1997) (quoting *Hunt v. Maricopa County Employees Merit Sys. Commission*, 127 Ariz. 259, 261-62, 619 P.2d 1036, 1038-39 (1980) (citations omitted)). The court's authority over the practice of law is also based on the creation of an integrated judicial department and the revisory jurisdiction of this court as provided in article VI, sections 1 and 5(4) of the Arizona Constitution." *In re Creasy* 198 Ariz. 539, 12 P.3d 214 (2000).

resulting in 136 sanctions and 300 cases of diversion and member assistance. The SBA that year also addressed nearly 100 complaints against non-lawyers concerning the unauthorized practice of law.

The SBA offers widely used member services, such as the following, that are designed to ensure professionalism and competence on the part of its attorney members and assist with the Bar's primary responsibility of protecting the public: (1) The "ethics hotline" fields about 2,500 calls annually (or about 10 calls each business day). (2) A continuing legal education department presents nearly 200 seminars every year, about one-fourth of which concern ethics. (3) Nearly 2,000 SBA members attend the bar's annual convention, which features dozens of education sessions. (4) SBA sections regarding particular areas of the law serve more than 2,000 members and conduct about 160 programs annually. (5) More than two dozen SBA committees deal with specific substantive matters of law, such as court rules and jury instructions, or with broader issues like the mentoring of new attorneys and law office technology. (6) A law office assistance program helps lawyers improve law office management skills, and a trust account hotline responds to hundreds of inquiries each year regarding trust account management. (7) SBA publications include a directory, which helps the public and other lawyers locate licensed Arizona attorneys. (8) A monthly magazine, the *Arizona Attorney*, educates attorneys about recent court rulings, discipline actions, and key topics affecting the practice of law.

The SBA conducts other activities that also directly benefit the public. Every year, the SBA receives approximately 100 claims for reimbursement from the Client Protection Fund, which holds funds in trust from an annual assessment on SBA members. Those funds go to pay about \$300,000 annually to claimants whose attorneys caused them financial harm. Moreover, the SBA's conservatorship program assures that clients receive their files when their attorneys die, disappear, or become disabled without having a succession plan in place. The SBA also offers, without charge, a voluntary arbitration program to expeditiously resolve fee disputes between clients and their counsel. In addition, the SBA sponsors Law Day legal clinics, provides legal services to veterans and active duty service men and women, organizes programs benefitting the homeless, and provides a "diversity pipeline" that introduces high school and elementary students to law careers.

In summary, the programs described above protect the public by educating attorneys and by making them more capable, competent, and professional. These programs also serve the public interest by providing remedies for individuals who have been harmed by their counsel and by increasing the public's access to legal services and our justice system.

### Part III: Mission of the State Bar of Arizona

A. **Rule 32(a).** Supreme Court Rule 32(a)(1) establishes the organization known as the State Bar of Arizona. This rule also details the mission of the SBA in a cumbersome, 266-word sentence.

In addition to being difficult to read, the Task Force believes the current Rule 32(a) fails to identify and express the SBA's core mission. Task Force members unanimously believe that the SBA's primary mission is to protect and serve the public. Activities undertaken by the SBA require the board to ask the predicate question, "Does this activity in some way protect or serve the public?" The SBA's functions derive from affirmative answers to that question. The SBA has responsibilities to improve the legal profession, to promote attorney competency, to enhance the administration of justice, and to assure that everyone, regardless of income, has access to the legal system, all of which derive from the bar's fundamental mission of protecting and serving the public.

Current Rule 32(a)(1) would make considerably more sense if the rule began with a statement that the SBA's core mission is protecting and serving the public. The other substantive elements of the rule become more focused and meaningful when preceded by a straightforward acknowledgement of that purpose. The Task Force therefore recommends amending Rule 32(a) to clearly express the SBA's core mission.<sup>2</sup> The Task Force also recommends restyling and reorganizing Rule 32(a) to make it easier to read and understand.<sup>3</sup>

B. **An integrated bar.** Attorneys understand that an "integrated" state bar (also referred to as a "unified" or a "mandatory" bar) is one a person must join in order to practice law in that state. Less understood are the reasons for having an integrated bar. Simply put, the bar is integrated with, and an integral part of, the Supreme Court. The functions of an integrated bar relate to, and assist in, the administration of the

<sup>2</sup> The SBA has adopted a concise mission statement that includes in its first eight words an emphasis on this core mission:

**The State Bar of Arizona serves the public** and enhances the legal profession by promoting the competency, ethics, and professionalism of its members and enhancing the administration of and access to justice.

<sup>3</sup> The proposed restyling of Rule 32(a) makes changes to paragraph 1 of the current rule, entitled "establishment of state bar," but omits in its entirety paragraph 2 of this rule, which is entitled "precedence of rules." The Task Force believes that paragraph 2 should either be deleted from the rule as unnecessary or moved to the rules concerning admission to the bar.

judicial branch of government. See *Bridegroom vs. State Bar*, 27 Ariz. App. 47, 550 P.2d 1089 (1976).

An integrated bar benefits not only the Court and the bar, but the public as well. The Court has adopted ethical rules for the protection of the public, and the bar's regulatory function assists the Court in enforcing those rules. But what is equally important is that the bar works proactively to assure that its attorney members comply with the rules. The bar educates its members on professionalism and ethics and provides an ethics hotline so that attorneys may receive advice on specific ethics questions. It assists attorneys with trust account regulations and law office management. It promotes the competence of its members by establishing sections in specific areas of practice and by educating members in substantive matters of law. The bar is not required to provide these services to fulfill its regulatory function, yet these services promote attorney competence, and they therefore play an important role in consumer protection and serving the public interest.

A review of current Supreme Court Rule 32(a) confirms the bar's functions and duties. The rule directs the SBA to "advance the administration of justice," to "aid the courts in carrying on the administration of justice," to foster "high ideals of integrity, learning, and competence" and to encourage "practices that will advance and improve the honor and dignity of the legal profession." The SBA's convention, committees, and sections, as well as other programs, further these objectives. While the members of the legal profession benefit from these programs, those activities also serve the broader needs of society.

The above-mentioned concepts in Rule 32(a) have a direct link with the Arizona Rules of Professional Conduct, the Supreme Court's ethics rules that every attorney must follow. The preamble to those rules recognizes that "a lawyer... [is] a public citizen having special responsibility for the quality of justice." The preamble continues,

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession . . . . In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

The SBA's responsibilities set forth in Rule 32 go hand-in-hand with lawyers' duties under the ethical rules. The bar is the organization that effectuates those duties for its members. An integrated bar has intrinsic value. It includes a vision that lawyers

do not practice in isolation. Rather, every individual attorney has a relationship with the bar and the judicial system and is a partner in fulfilling the worthy objectives described above.

The integrated bar provides an essential connection between its members, the courts, and the community. A voluntary bar operates independently of the Supreme Court, and without court supervision. It lacks a critical connection with the court. By contrast, an integrated bar is interdependent with the court; they function as the hand and the glove. For example, the SBA was instrumental in proposing recent changes to the attorney discipline system to make it more efficient and fair, which the Court adopted. An integrated bar brings technical expertise and real-world experience in the practice of law to the governance and regulation of attorneys. It is a catalyst for an effective system of justice, and a keystone in the rule of law.

Arizona has had an integrated bar since the SBA was established in 1933, but recent legislative efforts have attempted to change this arrangement. In 2013, a bill was introduced to make membership in the State Bar of Arizona optional. That bill quickly died, but HB 2629, introduced in the First Regular Session of 2015, had a similar objective, and unlike the 2013 bill, HB 2629 advanced out of a House committee. HB 2629 eventually failed, but the full House vote that defeated the bill was a close one.

These recent bills perceive the SBA as a union or a labor organization with mandatory membership, and contrary to Arizona's constitutional declaration that Arizona is a right-to-work state.<sup>4</sup> These bills misconstrue the nature, purpose, and function of the SBA. Labor organizations exist primarily to bargain with employers for their members' benefit, for such things as compensation, working conditions, vacations, hours, leave time, overtime, and pensions. But the SBA does not bargain with law firms or the public for any of these employment-related benefits. Rather, the SBA serves the

<sup>4</sup> See the Arizona Constitution, Article 25. Nonetheless, the United States Supreme Court has upheld the validity of integrated state bar associations. *See, e.g., Keller v. State Bar of California*, 496 U.S. 1 (1990) ("We agree that lawyers admitted to practice in the State may be required to join and pay dues to the State Bar, but disagree as to the scope of permissible dues-financed activities in which the State Bar may engage."). With a few specified exceptions, dues-financed political or ideological activities are expressly prohibited by Article XIII of the SBA's by-laws. The SBA's by-laws also provide a process for challenging speech or activities perceived to be impermissible. The process involves arbitration and, if a challenge is upheld, it requires a refund of improperly spent bar dues. By comparison, a voluntary bar, one in which membership is not required to practice law, is free to engage in political and ideological activities.

public by upholding and enforcing attorneys' responsibilities to the public and advancing our system of justice. It is sui generis, a unique thing, and comparisons with other professional boards or vocational unions attempt to liken apples to carrots.

The most common complaint from attorneys about a mandatory bar is that they pay for services that may not benefit them individually or that they may not use.<sup>5</sup> It is true that an Arizona attorney does not need to utilize any non-regulatory bar services; those services are optional. That is, attorneys can forego reading the monthly magazine or decline to attend SBA continuing legal education programs or the annual bar convention (although the foregoing services are self-supporting and do not require the expenditure of dues). But other services – such as the client protection fund, the member assistance and law office management programs, and the conservatorship program – require the financial support of every attorney to be effective. The duty to protect the public is not owed just by the attorneys who become disabled, who mismanage a law office, or who cheat a client. All attorneys bear a responsibility to protect the public. An integrated bar assures that every attorney – not just half or even ninety percent of attorneys, but every attorney – shares the cost of that responsibility. These invaluable services will cease to exist with the demise of the integrated bar because no voluntary bar in Arizona offers them.

Most states have integrated bars. A minority of states use other models, which Task Force members have discussed. Arizona has had an integrated bar for more than eighty years. Although like any institution the SBA can be improved, the Task Force believes the integrated model well serves the courts, attorneys, and people of Arizona. The Task Force therefore recommends that the SBA continue to be an integrated bar association.

<sup>5</sup> States that have voluntary bar associations by and large do not have lower overall bar dues. They charge both a mandatory regulatory assessment and separate voluntary bar dues, which together often exceed the annual membership fee in the State Bar of Arizona. An integrated bar benefits from economies of scale (for example, in human resources, technology, office expenses, and rent) that might require duplication if there were separate regulatory and voluntary entities.

#### **Part IV: Governance of the State Bar of Arizona**

**A. General description of the current board.** The SBA is a non-profit corporation governed by a volunteer board. SBA governance provisions are found in the SBA by-laws and in Supreme Court Rules 32(d) [“powers of board”], 32(e) [“composition of board”], 32(f) [“officers of the State Bar”], and 32(g) [“annual meeting”].

In summary, a 30 member Board of Governors currently governs the SBA. The board is composed of 26 voting members, specifically, nineteen elected attorney members, four public members appointed by the SBA board, and three at-large members appointed by the Arizona Supreme Court. In addition, the board includes several non-voting ex officio members, including the deans of Arizona’s three law schools.

The Task Force’s discussions regarding current bar governance included the following topics: (1) whether the board is the proper size or too large to be effective; (2) whether board members are elected from disproportionately-sized districts; (3) whether elections result in disproportional representation; (4) the irregularity of election cycles; (5) whether public members are underrepresented on the board; and (6) whether it is appropriate for public members to be appointed by the board on which they will serve.

**B. Election of board members currently.** Active Arizona attorneys elect board members from eight geographic districts that are aligned by counties. The geographic districts, and the number of board members elected from each district, are as follows:

District #	District area	# of board members
1	Mohave, Navajo, Coconino, Apache	1
2	Yavapai	1
3	Gila, Graham, Greenlee	1
4	Cochise	1
5	Pima, Santa Cruz	3
6	Maricopa	9
7	La Paz, Yuma	1
8	Pinal	1

Elected board members serve three-year terms. The current rules provide for elections in two years of a three-year cycle. In one year of the cycle, board members are elected from Districts 1, 3, 4, 5, and 7 (a total of seven members); in a second year, members are elected from Districts 2, 6, and 8 (a total of eleven members.) No board elections occur in the third year of the cycle unless a special election is needed to fill a vacant seat.

In addition, the president of the Young Lawyers Section (“YLS”) serves on the board as a nineteenth voting member. A new YLS president is elected every year, and accordingly, the YLS president serves a one-year term on the SBA board.

**C. Appointment of board members currently.** “Public” and “at-large” members are appointed to the board.

*Public members:* Supreme Court Rule 32(e)(2) authorizes the SBA board to appoint four “public” members. These members may not be members of the bar or have any financial interest in the practice of law. Each public member serves a three-year term and may be reappointed for one additional term.

*At-large members:* Supreme Court Rule 32(e)(2) authorizes the Court to appoint three “at large” members. At-large members are appointed to serve three-year terms, and have no term limit. At-large members need not be attorneys. The Court’s at-large appointees traditionally provide expertise or help ensure diversity on the board.

With regard to appointed board members:

- A minority of Task Force members expressed the view that no attorneys – by either appointment or election -- should serve on the board (i.e., that the regulated should not serve as regulators.) Those who hold this view would require that the board be composed entirely of appointed public members. However, the majority of Task Force members disagree with this view. The majority believes that view places undue focus on the board’s regulatory function and ignores the board’s numerous non-regulatory activities that benefit the public.

The Task Force notes that virtually all of Arizona’s other professional boards include members from their respective occupations. Among these professional boards are the State Boards of Accountancy, Appraisal, Behavioral Health Examiners, Chiropractic Examiners, Dental Examiners, Homeopathic and Integrated Medical Examiners, the Arizona Medical Board, and the State Boards of Naturopathic Physicians, Nursing, Dispensing Opticians, Optometry, Osteopaths, Pharmacy, Physicians Assistants, Podiatry, Psychologists, Technical Registration, and Veterinarians.

The majority of the Task Force believes that attorneys are necessary members of the board of the State Bar of Arizona because, like members of other professional boards, they understand the needs of the profession and they have the requisite technical expertise.

- Task Force members nonetheless agree that the Bar’s goal of protecting the public requires the SBA’s board to include a significant proportion of public non-lawyer members. There is also consensus that public board members should have diverse backgrounds and particular skills that will be of benefit to the board.

***D. North Carolina State Board of Dental Examiners v. FTC.*** On February 25, 2015, during the term of this Task Force, the United States Supreme Court decided *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. \_\_\_\_\_. In that case, the North Carolina Dental Board, which was composed almost entirely of dentists, sent cease-and-desist letters to people not licensed as dentists who were performing teeth whitening services at lower cost than services provided by dentists. The Court held that a state regulatory board composed of regulated members who are active market participants, and which lacks adequate state supervision, was not immune from anti-trust claims for denying others an opportunity to participate in the marketplace. The Court said, “If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity ... is to be invoked.” Bar associations and other regulatory agencies nationwide are concerned about the implications of the decision. The SBA immediately established a task force to determine the effect of this opinion on its operations and programs.

The Supreme Court’s Task Force considered whether the *North Carolina State Board of Dental Examiners* opinion required that the State Bar’s governing board be composed primarily of non-attorneys. Most members of the Task Force believe, however, that the proposed SBA board configurations and other recommendations of this Task Force comply with the *North Carolina State Board of Dental Examiners* opinion. In terms of supervision, the State Bar board has a duty to abide by Supreme Court rules, and the Supreme Court oversees the governing board under its rule-making authority. An associate justice customarily serves as a Supreme Court liaison at board meetings, and the Director of the Administrative Office of the Courts has served as an at-large board member for the past several years. In addition, the SBA board president serves as a permanent member of the Arizona Judicial Council, and a number of state court judges, who are supervised by the Supreme Court, serve on SBA committees. The SBA keeps the Supreme Court up-to-date on current issues, and it often seeks Court input, formally as well as informally, on matters of concern. There is therefore meaningful interaction between the Court and the bar, with ongoing Court supervision of the bar and its governing board.

In addition, the regulatory functions relating to attorney admissions and discipline are already subject to Supreme Court oversight. The board makes recommendations to the Court for appointments on two Supreme Court committees that concern admissions: the Committee on Examinations and the Committee on Character and Fitness. The board

also oversees the collection of bar dues, and it approves a budget for the bar's professional staff, which screens and prosecutes disciplinary matters. However, attorney admissions and discipline are primarily functions of the Supreme Court, and only to a lesser degree of the SBA's professional staff, which reports to the SBA's executive director rather than to the board.

The *North Carolina State Board of Dental Examiners* opinion concluded as follows:

[T]he inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

574 U.S. at \_\_\_; slip op. at 17-18.

The Court's rule-making authority, including its power over rules concerning State Bar governance, provides additional and "realistic assurance" that the bar will not engage in anti-competitive conduct. And a majority of Task Force members believe that the Arizona Supreme Court currently provides an appropriate level of active supervision of the bar. But to further improve supervision, the recommendations in this report include:

- The appointment of "public" board members by the Arizona Supreme Court, rather than by the SBA's board (see Part IV, Section G)
- An increase in the proportion of members who serve on the board by virtue of Supreme Court appointment, rather than by election (see Part IV, Section G)
- A process for Supreme Court review of a finding of good cause for removal of a board member (see Part IV, Section L)
- Adoption of a new Supreme Court rule concerning the Board of Legal Specialization (see Part V)

**E. Advantages and disadvantages of the board's current size.** The Task Force considered professional literature regarding best practices for the governance of non-profit organizations, including a 2012 *Hastings Law Journal* article by Daniel Suhr entitled "Right-Sizing Bar Association Governance." (See Appendix B.) Mr. Suhr reported a finding by the ABA's Division of Bar Services that the average unified state bar board had 34 members. Mr. Suhr recommended smaller governing boards:

The move to small boards is based on empirical research comparing the different organizational and interpersonal dynamics on large boards versus small boards. Large boards tend to run on parliamentary procedure ...

where speakers are called on and identified, rather than the conversational style possible on a small board. This conversational style allows for consensus to emerge more organically, after a full and vigorous discussion, whereas decisions on big boards are almost always made by a formal vote after a stilted and often shortened discussion. Moreover, large boards allow for free-rider members who may attend a few meetings but who do not contribute to the actual governance of the organization: in the memorable phrase of William O. Douglas, “directors who do not direct.” (Suhr article, Appendix B, at pages 5-6)

With particular regard to bar associations, Mr. Suhr added:

When it comes to the size and composition of the board, the easy path is always to go bigger, to ensure that every type of firm and area of practice, every geographic region and stage of career, every section and division and county, is represented. But representation of diverse constituencies is out of step with current best practices. A focus on diversity stems from a belief that the main purpose of the board is to provide a forum for diverse perspectives and to pass resolutions through a representative assembly. But a more accurate understanding of the board’s role recognizes that its primary responsibility is to govern – often to govern a large organization with tens or hundreds of thousands of members, millions of dollars, and scores of staff. The counsel of the governance literature, which lawyers have helped produce, is clear: resist the temptation to go bigger, and instead move towards a smaller “working” board. (Suhr article, Appendix B, at page 7)

Other literature affirms this message. The Task Force had extensive discussions about the size and composition of the SBA board. It concluded that the size of the SBA’s current board has both advantages and disadvantages.

*Advantages:*

- A large board enhances the likelihood that more geographic areas of the state are represented, and representation may enhance “buy-in” from the membership.
- A large board may enhance ethnic, gender, area-of-practice, size-of-firm, and other types of diversity on the board.
- A bigger board provides a larger pool from which to groom and select qualified members as officers.

*Disadvantages:*

- The board's size of 30 members makes it unwieldy. Meetings run long and are less efficient, the agenda may include items that do not appropriately relate to the board's high-level function, and individual members may participate less on a larger board than they would on a smaller one.
- Elections in the second year of the SBA's election cycle can result in eleven new members joining the board at one time, including as many as nine new members from Maricopa County. This can disrupt the board's continuity, and inhibit a smooth transfer of institutional knowledge.
- The current election districts do not provide proportional representation and in fact contribute to disproportionate representation. Maricopa and Pima Counties have 91 percent of the active lawyers in Arizona, yet the thirteen remaining counties, with 9 percent of the state's attorneys, have one-third of the elected seats on the board. (See Appendix D.) There are more than 11,000 active lawyers in District 6 (Maricopa County), and there is currently, per capita, one board member for every **1200** Maricopa lawyers in this district. On the other hand, District 3 (comprising Gila, Graham, and Greenlee Counties) has one board member for about **72** attorneys. District 4, Cochise County, has one board member for about **102** attorneys. (See the current "per governor" tables at the second page of Appendix D.)
- Elections by district have reportedly led to constituencies, where elected members see themselves as "representatives" who vote based on the direction of members in their district who elected them or special interest groups, rather than voting in the best interests of the public and the entire profession.

**F. Workgroup suggestions.** At one point during its review of bar governance, the Chair divided the Task Force into three workgroups and asked each group to recommend its preferred board configuration. There are, of course, many possible board configurations, and the three workgroups put forth significantly different proposals. However, each workgroup suggested that:

- The optimal size of the board would be from fifteen to eighteen elected and appointed members;
- The board should be composed to represent the public's interest first, and secondarily the interests of the attorney members;

- A greater proportion of appointed board members (although not necessarily a majority of the board) could mitigate perceptions that elected board members are answerable to constituencies; and
- The Court's appointment of "public" members, upon nomination by the board -- rather than the board's direct appointment of public members -- could further enhance the Court's supervision of the SBA.

**G. Recommended Task Force options for the board's composition.** After considerable discussion, the Task Force agreed to recommend three options for configuring the board: Option X, Option Y, and Option Z. Each option has these two features:

- Every "member," whether elected or appointed, would have voting rights. There would no longer be non-voting "ex officio" members on the board.
- Each of the three recommended options is based on a number divisible by 3. Divisibility by 3 facilitates staggered terms and regular election cycles over the course of three years, which harmonizes with members' 3-year terms.

**Option X:** The hallmark of Option X is a reduction in the size of the board to 15 elected and appointed members. Option X has the following configuration:

- 6 elected attorney members. One workgroup proposed "statewide" election of attorney members for all three options; however, a majority of bar members are in Maricopa County, and a statewide election could result in a board composed of only Maricopa County lawyers. The members' preferred alternative was elections by district. For Option X, this alternative features four districts. It proposes the election of three board members from Maricopa County, one from Pima County, one from the counties of Division One of the Court of Appeals (excluding Maricopa), and one from the Division Two counties (excluding Pima).
- 9 members appointed by the Arizona Supreme Court. Three of these nine appointed members would be "public" members -- that is, non-attorneys -- who would be nominated by the SBA's governing board. However, unlike the current rule regarding public members, the Court, rather than the board, would actually appoint the public members. The board's nomination of public members would facilitate the Court's appointment of non-attorneys with special expertise, such as finance, human resources, or business management, whose knowledge might be of particular value to the board. Notwithstanding the

board’s nomination of public members, a majority of Task Force members agreed that the Court may decline to appoint any board nominee and may appoint as a public trustee a person not nominated by the board.

The other six Court-appointed members could be attorneys or non-attorneys, comparable to “at-large” members under the current rule. If the Court’s appointments were made after the election of board members, the Court could fill any gaps in the board’s balance and diversity (including geographic diversity) that elections did not achieve.

**Option Y:** This option features a board with 18 elected and appointed members. An 18-member board, compared to one with 15 members, could enhance the board’s diversity through greater geographic, firm-type, socioeconomic, and other backgrounds that might enhance and balance the board.

Option Y would divide the 18 board members into three equal groups, as follows:

- 6 elected attorney members. Members of the State Bar would elect these members from four districts, as described in Option X.
- 12 members appointed by the Arizona Supreme Court. Six of these twelve members would be non-lawyers nominated by the SBA’s governing board. A greater number of public members might further promote the SBA’s mission to protect the public. The remaining six appointed members would be “at-large,” and could be attorneys or non-attorneys, as described in Option X.

**Option Z:** Option Z is based on a presumption that although the current board is too large, it has a generally appropriate balance of elected and appointed members. Option Z downsizes the board to 18 elected and appointed members, and it reconfigures the current eight election districts into five districts, but it nevertheless maintains the status quo more than the other two options. Option Z features:

- 11 attorney members elected from 5 districts:

<b>Maricopa County District</b>	6 members
<b>West District</b> (Yavapai, Yuma, and La Paz Counties)	1 member
<b>North District</b> (Mohave, Coconino Navajo, and Apache Counties)	1 member
<b>Pima County District</b>	2 members
<b>Southeast District</b> (Pinal, Gila, Graham, Santa Cruz, Cochise, and Greenlee Counties)	1 member

- 7 members appointed by the Supreme Court:  
 Non-lawyers nominated by the SBA board      4 members (“public”)  
 Lawyers or non-lawyers                              3 members (“at-large”)

This configuration preserves proportions that currently exist because:

- Maricopa would be reduced from nine members to six, *a one-third reduction*.
- Pima would be reduced from three members to two, *a one-third reduction*.
- Division One counties (Apache, Coconino, Mohave, Navajo, La Paz, Yuma, and Yavapai) would be reduced from three members to two, *a one-third reduction*.
- Division Two counties (Cochise, Gila, Graham, Greenlee, Pinal, and Santa Cruz – the latter of which is currently in District 5 with Pima County) would be reduced from three members to one. Although this is *a two-thirds reduction*, it mathematically provides a more accurate alignment with the relative number of attorneys in this district. The “per board member” table for Option Z (see Appendix D) shows that even with only one board member in the Southeast District, this person would be elected by fewer attorneys than a board member elected from any other district.
- There would be no reduction from the current number (7) of appointed board members. But because of the reduction in the number of elected board members, the percentage and proportion of appointed board members in Option Z *would actually increase* from the current 27 percent (i.e., 7 of 26 voting members) to 39 percent (7 of 18 voting members.) The four board seats reserved for public members constitute about 15 per cent of the current board, but the four public members would be 22 percent of Option Z’s board.

The proposed Option Z configuration would nevertheless maintain the character of the board as one with a majority elected by attorneys. Elections might still produce constituencies, but with a smaller board, possibly to a lesser degree.<sup>6</sup>

<sup>6</sup> The notion that elected board members actually represent the views of a majority of attorneys in their districts is called into question by the small percentage of attorneys who actually vote in SBA elections. Recent SBA election turnouts show that in 2014, the turnout in Maricopa County was 35 per cent; in 2012 it was 27 percent; and in 2011 it was 21 per cent. Pima/Santa Cruz had a 36 percent turnout in 2010, but only a 13 percent turnout in 2013. Cochise County had a 55 percent turnout in 2010, but it fell to 21 percent in 2013. In a special 2015 election, attorneys in District 8 elected a board member with 30 votes out of a total of 42 votes cast.

The notion of constituencies has also spawned a perception that urban board members are insensitive to the needs of rural members. No evidence was produced to demonstrate the accuracy of the perception, but the perception nonetheless exists. Option Z appreciates the need for participation by rural members in bar governance and the desirability of the board having perspectives of attorneys who do not practice in large urban areas. Options X and Y would elect two rural members, but Option Z would accommodate three elected rural members. Those three rural members would constitute about one-sixth (17 percent) of Option Z's board – and about one-fourth (27 percent) of Option Z's elected board members – although the thirteen rural counties have only 9 percent of the total number of attorneys statewide. While this affords rural counties more seats than their statewide proportion of population or bar membership, it more closely preserves the proportionate number of board seats those counties currently have.<sup>7</sup>

Task Force members did not formally vote on which of these three options they preferred. However, the Court – with input from the SBA and the public – should consider which option best serves the residents of Arizona and the members of its legal community, and which best harmonizes with *North Carolina State Board of Dental Examiners v. FTC*.

**H. Voting by active, out-of-state members.** The election provisions of current Rule 32 allow active attorneys to vote in the district in which they have their principal place of business. Those provisions effectively disenfranchise about fourteen percent of the active SBA members who reside or work out-of-state and so do not have a place of business in any of the rule-defined districts. The Task Force agreed that Rule 32 should authorize these active, out-of-state members to vote in the SBA's governance elections.

The Task Force considered creation of a separate “statewide” Arizona district in which these out-of-state members could vote, and other possible remedies. Ultimately, it decided that members should be allowed to vote in the Arizona district in which they worked or resided before moving out-of-state. Out-of-state members who never worked or resided in Arizona should be permitted to vote in the most populous district, which currently, and for all three options, is the Maricopa County District.

**I. Ex officio board members, advisors and liaisons.** There are several individuals who are referred to as “ex officio” board members. Ex officio members serve on the board by virtue of holding an office or a position.

<sup>7</sup> Indeed, if proportionate representation was the primary goal of Option Z, Maricopa County attorneys would choose at least eight of the eleven elected board members rather than only six.

***Immediate past president.*** The immediate past president has the status of an ex-officio member of the Board of Governors under Section 8.02 of the SBA's by-laws, rather than by authority of any Supreme Court rule. Members of the Task Force agreed that the immediate past president provides the board with valuable guidance, advice, and institutional knowledge as the board transitions to new leadership, and that the past president should continue to serve in that role. However, the position should be established by court rule rather than by-laws. Also, references to the immediate past president as a "board member" are inaccurate because he or she does not vote.

The Task Force therefore recommends an amendment to Rule 32 to specify that the immediate past president serves as a non-voting "advisor" to the board for one year.

***Young Lawyers Section.*** The Young Lawyers Section ("YLS") president is characterized as an "elected" member of the board under current Rule 32. A "young lawyer" is one who has been admitted to the bar for five years or less or is 37 years of age or younger. YLS members who have been admitted for fewer than five years are ineligible to stand for election as a "regular" board member.

Although established by Rule 32, the YLS board member might more aptly be described as "ex officio." The YLS president's seat on the board does not have the characteristics of other elected members' seats because the person is elected by his or her constituents to a YLS section office, and service on the SBA board is but a side-result of that election. Unlike other board members, the YLS president serves a one-year rather than a three-year term on the board. And the YLS president has less practice experience than is required for regular board members. Although more than 4,200 members, or about one-fourth of the SBA's active members, qualify as young lawyers, other groups of attorneys, such as the Arizona Women Lawyers Association or Los Abogados Hispanic Bar Association, also have large memberships, yet they have no seats on the board.

The Task Force recommends that the president of this group no longer serve on the board. However, the YLS president, like officers or representatives of other specialty and local bar associations, should always be honored guests at SBA board meetings.

***Law school deans.*** The deans of Arizona's three law schools are commonly referred to as "ex officio" members of the board. Their status is established by board policy. Although a few have provided valuable comments, neither Supreme Court rules nor the SBA by-laws authorize membership of the deans on the governing board.

The rationale for having the deans as ex officio members is that after they attend board meetings, they will discuss issues with one another, and convey to their faculties and students important information they acquired during board meetings. Yet as far as can be determined, the deans rarely exchange views with each other or share the board's discussions with law school faculties or students. Moreover, the students at their law

schools, and at least some of their faculty, are not SBA members. A few members of the Task Force favored maintaining at least one dean as a board member, but the majority voted otherwise.

The deans as well should always be honored guests at board meetings, but the Task Force recommends discontinuing the deans as members of the governing board.

*Associate justice.* The Supreme Court has regularly assigned an associate justice to serve as a liaison between the SBA's board and the Court. The Supreme Court regulates the bar and it has a deep interest in bar governance. And it can be useful for the board to have the first-hand input of a Supreme Court justice. The Task Force acknowledges the benefits of the associate justice in facilitating communication between the SBA and the Court. The associate justice is occasionally referred to as an "ex officio" member of the board, but the associate justice attends meetings as a matter of Supreme Court policy rather than pursuant to Court rule or SBA by-laws.

The Task Force recommends that an associate justice continue to serve as a non-voting "liaison" to the board rather than as a board member.

**J. Terms of elected board members.** Elected members have no limit on their length of service. Some elected board members have served for two decades. This dedication is admirable, but it deprives the board of fresh ideas and energy from new members, and it inhibits the development of the next generation of bar leadership. Most integrated bars in other states impose limits on the number of terms a board member can serve or on the total years of a board member's service.

The Task Force recommends that all elected board members have a limit of three terms of three years each, for a total of nine years of service. An elected board member may not be a candidate for a fourth term until three years have passed after the ninth year of service. The Task Force recommends that this limitation become effective on the implementation date; therefore, it would not count a member's board service prior to that date. It also would not count a member's service on the board if the member is appointed to complete a partial term.

If a board member who is otherwise term-limited is the "president-elect" or president, the Task Force recommends that this not preclude the person from continuing to serve on the board until completion of their term as president. Upon completing the term as president, a new board member will be elected or appointed for the remaining partial term.

**K. Qualifications of board members.** Supreme Court Rule 32(e)(3) currently requires elected members to "have been admitted by the Arizona Supreme Court for not less than five (5) years." The Task Force believes this is fair and appropriate, and

recommends maintaining this requirement. But the Rule does not mention a clean attorney discipline record as bearing on qualifications; it only requires that attorney board members be “active [SBA] members in good standing” when elected. The Task Force believes an absence of formal bar discipline should be a qualification for an attorney’s membership on the board.

The Task Force therefore recommends adding to Rule 32(e) a requirement that attorney members of the board have no formal disciplinary history during a five-year period preceding service on the board. It further recommends that an attorney board member who is the subject of a formal disciplinary complaint be recused from serving on the board pending disposition of the complaint.

**L. Removal of board members.** Supreme Court Rule 32(f) provides that “an *officer* may be removed from his office by the vote of two-thirds or more of the members of the board of governors cast in favor of his removal at a meeting called for such purpose.” Rule 32(f) does not specify the grounds for removal of an officer, but Section 8.04 of the by-laws provides that the board may remove an officer “whenever in its judgment and discretion, the best interests of the State Bar shall be served thereby.” There is no corresponding provision in Rule 32 that permits removal of a board member. The Task Force proposes amendments to Rule 32 that would allow removal of a board member for good cause by a two-thirds vote of the board.

“Good cause” requires the board to consider the nature and circumstances of a board member’s conduct, and whether that conduct undermines board meetings or compromises the integrity or reputation of the board. For example, good cause might include the commission of a felony or a crime involving moral turpitude, the imposition of a formal discipline sanction (including a sanction that results in suspension or disbarment), repeatedly ignoring the duties of a board member, or disorderly activity during board meetings. Expressing unpopular views does not constitute good cause. The proposed amendments would provide a removed board member the opportunity to seek review of the board’s finding of good cause by filing a petition for review with the Arizona Supreme Court.

**M. Officers of the board.** Supreme Court Rule 32(f)(1) currently provides for five board officers -- a president, a president-elect, two vice presidents, and a secretary/treasurer. Each serves a one-year term in office, and customarily these officers move up the “succession ladder” to the office of president. Moving up the ladder to the office of president requires not only a five-year commitment to the officer track, but also a commitment to serving on the board to gain experience before entering that track. In other words, and because of the lengthy succession ladder, an SBA president often has a decade or more of board service.

The Task Force believes that five officers are unnecessary and that the officer succession ladder is too long. The president, president-elect, and secretary/treasurer positions have well-defined duties under the SBA's by-laws. Although the two vice-presidents are both members of the Scope and Operations Committee (the equivalent of an "executive" committee), Section 8.02 of the by-laws vaguely provides that the first vice-president "perform such duties as are assigned to him or her by the President." Section 8.02 also provides that the second vice-president serves as a member of the Strategic Planning Committee and as an ex-officio member of the Continuing Legal Education Committee (neither committee is established by the by-laws) but otherwise the second vice-president also performs "all duties assigned to him or her by the President."

The Task Force recommends that the board elect three officers: a president, a president-elect, and a secretary/treasurer. These are the essential offices. Each office should be held for a one-year term. The officer succession track would be, in essence, two years: one year as president-elect, and another as president. The person would also serve a third year as "advisor" to the board. The rule would not provide for automatic succession of the secretary-treasurer to the position of president-elect. The proposed rule would permit election of an appointed trustee, including a non-attorney, to an officer position, although the Task Force expects this would be a rare circumstances.

Although no president has served more than a single term in the more than 80 years of the SBA's existence, a rule amendment should specify that a board member may not be elected to a second term for any office that the member has held during nine, or fewer, years of consecutive service on the board.

In addition, the Task Force recommends that the selection of the president-elect be thoughtful and deliberate. Self-nominations may not elicit the best candidates for president-elect. The Task Force recommends that a nominating committee chaired by the immediate past president, with the assistance of several other board members appointed by the president, lead a process to recruit and vet the best candidates months in advance of the annual meeting.

**N. Fiduciary responsibilities of the board.** Members of the board have fiduciary duties, and yet some members appear to vote solely based on promises made to constituents or what they perceive their constituents want. A board member's fiduciary obligations are not to those who elected or who appointed the member, but to the public, the profession, and the organization as a whole.

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.”<sup>8</sup>

The Task Force recommends that the board draft a new oath for all future board members that includes a pledge to abide by their fiduciary responsibilities. It also recommends that fiduciary duties be explained during the orientation of new board members. The Task Force notes the importance of educating not just public members, but all board members, on principles of board governance.

The Task Force hopes that these recommendations will dispel the influence of constituencies, emphasize the fiduciary responsibilities of board members, and provide board members broader and more appropriate perspectives of their duties as members of the board.

<sup>8</sup> Note, however, that the Arizona Constitution contains two references to the SBA’s “board of governors.” One reference is in Art. 6, § 36, which requires that “board of governors of the state bar of Arizona [sic]” nominate five attorney members to the Commission on Appellate Court Appointments. Art. 6, § 41, contains a similar provision regarding the Commission on Trial Court Appointments. The Task Force proposes to address this in amended Rule 32(b)(1), which provides the following definition: “‘Board’ means Board of Trustees of the State Bar of Arizona, formerly known as the Board of Governors of the State Bar of Arizona.”

This suggested name change also presents a drafting challenge with regard to Rule 32(d)(8). That rule authorizes the Board of Governors to appoint a Board of Trustees for the Client Protection Fund. The Task Force’s proposed revision of Rule 32(d)(8) attempts to remove any ambiguity because of references to two sets of “trustees.” Moreover, the Task Force has been informed that the SBA may re-examine the Client Protection Fund’s structure in the near future, which would provide a further opportunity to remove ambiguities resulting from duplicate use of the word “trustees.”

## **Part V. Board of Legal Specialization**

The State Bar's Board of Legal Specialization ("BLS") administers a program for certifying attorneys as specialists in particular fields of law. Although this Task Force was not specifically directed to review particular SBA programs, *North Carolina State Board of Dental Examiners* prompted the Task Force to take note of the BLS. Some may conclude that the BLS presents a situation of market participants regulating entry into a competitive market process on behalf of the state. Accordingly, the Task Force inquired whether the BLS program provides sufficient Supreme Court oversight and supervision.

Among the Task Force concerns is that no specific Supreme Court rule directly establishes or authorizes the existence of the BLS. Rather, the existence of the BLS is acknowledged in Supreme Court Rule 42, ER 7.4(a) ("A lawyer shall not state or imply that the lawyer is a specialist except as follows: ... (3) a lawyer certified by the Arizona Board of Legal Specialization or by a national entity that has standards for certification substantially the same as those established by the board may state the area or areas of specialization in which the lawyer is certified.") ER 7.4(b) includes a similar reference to the BLS. The current practice allows the SBA board, not the Court, to designate specialty areas of practice. The members of the BLS are appointed by the SBA president with the approval of the board. An attorney dissatisfied with a decision of the BLS may appeal to the board, and three members of the board are designated by the president to hear the appeal. The rules and regulations of the BLS specify that it is "created by and subject to the continuing jurisdiction of the Board of Governors."

In response to concerns that adequate Supreme Court oversight is lacking, the Task Force proposes an amendment to Rule 32(d), the powers of the SBA board. This amendment would provide the Court's authorization for the SBA board to "administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 40." Proposed Rule 40 is contained in Appendix I. Rule 40 would establish Supreme Court supervision of the BLS in the follow ways:

- It would require the Court to appoint members of the BLS
- It would require Court approval of BLS rules, which would include rules concerning the designated practice areas of specialization and the qualifications for specialization
- It would provide an attorney aggrieved by a decision of the BLS the opportunity to seek judicial review

## **Part VI. Implementation of Task Force Recommendations**

Task Force recommendations concerning the SBA's mission and the fiduciary responsibilities of board members can be implemented upon adoption of the proposed amendments to Supreme Court Rule 32, as could proposed Rule 40.

Recommendations concerning the composition of the board should be implemented over time. The Task Force believes that no term of any currently elected or appointed board member or officer should be disrupted by the proposed changes. The Task Force recommends that the governance changes be implemented over three years. Appendix G contains an implementation proposal for each of the three suggested options for a newly composed board. Although implemented over three years, most of the governance changes would occur during the first year of implementation.

After the third year of implementation, one-third of the board members would come up for re-election or re-appointment every three years. The elections would become regular (i.e., every year of a three-year election cycle rather than two of every three years, as currently) and equal (the same number of elections and appointments would occur each year.)

The reduction in the number of officers should be implemented concurrently with the first year of the board that is elected and appointed under the proposed amendments to Rule 32.

If the Court adopts revisions to the governance provisions of Rule 32, the SBA should adopt conforming changes to its bylaws. This is a subject that would need to be addressed by the SBA's board.

## **Part VII. Conclusion**

The Task Force believes the recommendations in this report will have the following effects:

1. Clarify that the primary mission of the bar is to protect and serve the public.
2. Support efforts to maintain the SBA as an integrated bar association.
3. Reduce the size of the board, and make it more efficient and focused.
4. Increase proportionately the public's voice on the governing board.
5. Mitigate the effect of constituencies on elected board members.
6. Make turnover of elected and appointed board members more regular and predictable.
7. Make governance more understandable to SBA members, thereby increasing member interest in the bar and turnout at SBA elections.
8. Make individual board members more accountable and more aware of their fiduciary responsibilities.

The members of the Task Force are grateful for this opportunity to serve the Arizona Supreme Court, the State Bar of Arizona, and the citizens of Arizona, by advancing justice together.

**Appendix A: A.O. 2014-79**

IN THE SUPREME COURT OF THE STATE OF ARIZONA

---

In the Matter of: )  
 )  
TASK FORCE ON THE REVIEW OF ) Administrative Order  
THE ROLE AND GOVERNANCE ) No. 2014 - 79  
STRUCTURE OF THE STATE )  
BAR OF ARIZONA )  
\_\_\_\_\_ )

The Arizona Supreme Court regulates the practice of law in Arizona. Under the Rules of the Arizona Supreme Court, the State Bar of Arizona is created as an integrated bar, generally requiring lawyers to be members of the State Bar of Arizona as a condition for practicing law within the State. The integrated State Bar is intended to regulate the legal profession to protect the public. Given the changes that have occurred in the legal services environment, the growth in Bar membership, and the demands placed on the State Bar, it is time to review the Bar’s mission and governance structure to ensure that they continue to best serve the public interest.

Therefore, pursuant to Article VI, Section 3, of the Arizona Constitution,

IT IS ORDERED establishing the Task Force on the Review of the Role and Governance Structure of the State Bar of Arizona, as follows:

1. **Purpose.** The Task Force shall examine the Rules of the Supreme Court on the mission and governance structure of the State Bar of Arizona, and will make recommendations to the Court for changes, if needed, including but not limited to these areas:
  - a) Does the mission of the State Bar need to be clarified or modified?
  - b) Is the governance structure adequate to efficiently and effectively govern and carry out the duties of the Board?
  - c) Are Supreme Court Rules in the following areas related to Board structure and governance duties adequate to best serve the Board’s primary mission of protecting the public?

- i. Qualifications for membership on the Board of Governors;
- ii. Appointment, election and removal of members of the Board of Governors;
- iii. Term limits for members of the Board of Governors;
- iv. Election process;
- v. Board of Governors size and composition; and
- vi. State Bar leadership structure and composition.

2. **Membership.** The membership is attached as Appendix A. The Chief Justice may appoint additional members as needed or desired.

3. **Meetings:** The Task Force shall meet as necessary, and meetings may be scheduled, cancelled, or moved at the direction of the Task Force Chair. All meetings shall comply with the public meeting policy of the Arizona Judicial Branch, Arizona Code of Judicial Administration § 1-202. Meetings may include the conduct of public hearings to acquire input from members of the public and the Bar.

4. **Task Force Findings and Recommendations.** The Task Force shall file findings and recommendations with the Supreme Court of Arizona, to include any proposed rule changes, by September 1, 2015.

5. **Administrative Support.** The Administrative Office of the Courts shall provide administrative support and staff for the Task Force. The State Bar of Arizona will provide additional support as required, particularly in the areas of communication with the public and members of the Bar, and administrative support related to public hearings.

Dated this 29th day of July, 2014.

---

SCOTT BALES  
Chief Justice

Attachment: Appendix A

**Appendix A**

**TASK FORCE ON THE REVIEW OF THE ROLE AND STRUCTURE OF THE STATE  
BAR OF ARIZONA**

*Chair*

**Justice Rebecca White Berch**  
Arizona Supreme Court

*Members*

**Paul Avelar**

**Ben Click**

**Lattie Coor**

**Amelia Craig Cramer**

**Whitney Cunningham**

**Christine Hall**

**Chris Herstam**

**Joseph Kanefield**

**Ed Novak**

**Gerald Richard**

**José Rivera**

**Marty Schultz**

**Hon. Sarah Simmons**

**Grant Woods**

*Staff Consultant*

**John Phelps**

## Appendix B: Recent changes to Supreme Court Rule 32

During the past 15 years, rule petitions have resulted in the following changes to Rule 32:

- R-02-0017 separated the SBA's governance provisions, formerly contained in Supreme Court Rule 31, into a new Supreme Court Rule 32. These amendments to Rule 32 maintained Rule 31's prior system of electing District 1, 3, 4, 5, and 7 board members in even years, and District 2, 6, and 8 board members in odd years. Under the rule as it existed in 2002, public members on the board were limited to serving no more than 2 terms, for a total of 4 years.
- R-02-0048 amended Rule 32(e) to provide for 3-year rather than 2-year terms for elected, public, and at-large members. It added an eligibility requirement that elected members be admitted to practice in Arizona for 5 years. It also allowed for electronic voting in board elections.
- R-03-0001 amended Rule 32(f) to provide that the first vice president whose term expires at the annual meeting would automatically become the president-elect.

# HASTINGS LAW JOURNAL

## VOIR DIRE



### Right-Sizing Bar Association Governance

Daniel R. Suhr\*

[M]ost nonprofit organizations would benefit from a thorough review of their board structure and operations. The chief aim of such a review would be for the organization to determine the optimal size, composition, and operating procedures that would assist the board in fulfilling its oversight duties. The review should address several key questions—first, for example, is the size of the board conducive to effective oversight?

-ABA Coordinating Committee on Nonprofit Governance, 2005<sup>1</sup>

#### ii. Introduction

The State Bar of California is the largest bar association in the nation, with 232,000 members, a staff of nearly 600, and a \$62 million budget.<sup>2</sup> A unified bar, and thus an agency of the State of California,<sup>3</sup> it is currently governed by a board of 23 directors, with 6 public members and 17 attorney members appointed by the governor and legislative leadership.<sup>4</sup>

In September 2010, the governor and state legislature commissioned a task force to study governance reform for the State Bar.<sup>5</sup> Over the

---

\* LL.M., Georgetown University; J.D., B.A., Marquette University. The Author appreciates comments from Professor John Olson, Jud Campbell, Alex Gesch, and Matt Glover. The views expressed here are those of the Author alone and do not reflect any position of his current or former employers. He may be reached via email at [daniel@danielsuhr.com](mailto:daniel@danielsuhr.com).

1. ABA Coordinating Comm. on Nonprofit Governance, *Guide to Nonprofit Corporate Governance in the Wake of Sarbanes-Oxley* 21 (2005).

2. *The State Bar of California: What Does It Do? How Does It Work?*, St. B. Cal., <http://www.calbar.ca.gov/AboutUs/StateBarOverview.aspx> (last visited Jan. 10, 2012).

3. See Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 *Yale L. & Pol'y Rev.* 193, 197 (1996) (explaining that a unified bar association is one where state or court rule requires membership in order for a lawyer to practice in the state).

4. *Board of Governors*, St. B. Cal., <http://www.calbar.ca.gov/AboutUs/BoardofGovernors.aspx> (last visited Jan. 10, 2012).

5. State Bar of Cal., *Report and Recommendations of the State Bar of California*

course of the next eight months, the task force collected commentary from the bench, bar, professoriate, and public. The task force looked at “the size of the governing board, the composition and terms of its members, the selection process for Board members and the President, the qualifications of Board members, transparency of Board meetings, and the overall fundamental purpose of the State Bar in making public protection the governing board’s highest priority.”<sup>6</sup> In the end, it issued a 77-page report: The majority opinion recommended reconfiguring the governing board’s membership, though maintaining its size at 23, while the minority suggested shrinking it to 15 members.<sup>7</sup> In response, in June 2011 the California Senate Judiciary Committee chair introduced legislation with a 19-member compromise.<sup>8</sup>

This Essay evaluates both the task force’s report and bar association governance nationally in light of best practices for corporate and nonprofit governance. It focuses on one discrete issue: the optimal size for a bar association board. The verdict of academic and practitioner opinion is clear: for understandable reasons, smaller boards make for better boards. Yet it is also clear that most bar associations currently operate with bloated, inefficient boards. California should pursue a smaller governing board, and other bar associations, particularly those with significant staff and budgets, should undertake similar self-studies.

## I. Bar Governance and the California Report

As the California task force considered the optimal size and structure for a bar association board, it evaluated the structures of other state bars. Data collected by the ABA’s Division of Bar Services indicate that the average unified state bar’s board has 34 members; voluntary state bars average 60 members.<sup>9</sup> The largest board is New York with 260 members; the smallest is Idaho with 5 members. Large voluntary metropolitan bar associations have similarly large boards.<sup>10</sup>

In addition to state and local bar associations, there are a number of national bar associations. The ABA itself has 38 members on its board of governors, which meets quarterly to govern the \$200 million organization.<sup>11</sup>

---

Governance in the Public Interest Task Force 1 (2011).

6. *Id.* at 1–2.

7. *Id.* at 3–4.

8. Kate Moser, *Senate OKs Compromise on Bar Governance*, Recorder (June 2, 2011), <http://www.law.com/jsp/ca/PubArticleCA.jsp?id=1202496004478>.

9. ABA Div. for Bar Servs., 2010 State and Local Bar Dues, Fees & Member Benefits Survey 4–6 (2011). Incidentally, bar associations historically had smaller boards. Glenn R. Winters, *Bar Association Organization and Activities 13 (1954)* (stating that at the time, bar association governing boards generally had 5 to 15 members).

10. The Los Angeles County Bar Association, which with 27,000 members is the biggest local bar in the U.S., has a governing board of 38 members that meets monthly to supervise its \$13 million budget and 93 staff members. ABA Div. for Bar Servs., *supra* note 9, at 7. The New York City Bar Association, with 24,000 members, has a budget of \$13 million, has 118 employees, and is supervised by a board of 22. *Id.*

11. Ernst & Young LLP, *ABA Consolidated Financial Statements, Details of Consolidation, and Other Information 34* (2011), available at <http://www.americanbar.org/content/dam/aba/>

The ABA has 16 “affiliated organizations,” which are traditional bar associations based on shared personal attributes, such as ethnic heritage, or specialized areas of practice.<sup>12</sup> Among these organizations, the largest governing board has 111 members and the smallest has 10; they average 33 officers and directors.<sup>13</sup>

Due to their size and importance, two other organizations warrant particular mention. The American Association for Justice, representing the plaintiffs’ bar, has 187 members on its board of governors, which meets quarterly.<sup>14</sup> The Defense Research Institute, which represents the defense bar, has 45 officers and directors.<sup>15</sup>

The foregoing survey shows that bar associations almost universally have large governing boards: the 70 state and national bars included in this Essay’s survey average around 40 officers and directors. These boards are asked to govern significant organizations, with multimillion dollar budgets, scores of staff, and programming in numerous areas.<sup>16</sup> How do these figures compare with best practices for corporate and nonprofit governance?

## II. Why Academics and Organizations Agree

Over the past two decades, the for-profit and nonprofit worlds have been rocked by scandals at major institutions: Enron, WorldCom, the Red Cross, American University, and the Smithsonian Institution, just to name a few. At all of these organizations, boards of directors or trustees failed to exercise sufficient oversight while management ran amuck, resulting in tremendous damage.<sup>17</sup> In the wake of these controversies and

---

administrative/aba/aba\_financials/2010auditfinstatements.authcheckdam.pdf (reporting that the ABA’s revenues for FY 2010 were approximately \$205 million); *Board of Governors General Information*, ABA, <http://www.americanbar.org/groups/leadership/governors.html> (last visited Jan. 10, 2012).

12. *Affiliated and Related Organizations*, ABA, [http://www.americanbar.org/utility/about\\_the\\_aba/affiliated\\_related\\_organizations.html](http://www.americanbar.org/utility/about_the_aba/affiliated_related_organizations.html) (last visited Jan. 10, 2012).

13. These figures come from computations made by the Author and are based on data he compiled about the 16 affiliated organizations.

14. *AAJ Board of Governors*, Am. Ass’n for Just., <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/2282.htm> (last visited Jan. 10, 2012).

15. *Board of Directors*, Def. Res. Inst., <http://www.dri.org/About/Leadership/DRI-BD> (last visited Jan. 10, 2012).

16. See generally ABA Div. for Bar Servs., 2009 Bar Activities Inventory (2009); Johnstone, *supra* note 3 (examining the organization and policies of bar associations). The average unified bar has a budget of \$13.5 million and a staff of 84. The average voluntary state bar has a budget of \$6 million and a staff of 37. ABA Div. for Bar Servs., *supra*, at 7–8.

17. See generally *The American Red Cross Governance Reform: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. (2007) (statement of Rep. Tom Lantos, Chairman, H. Comm. on Foreign Affairs); Brian L. Carpenter, Nat’l Charter Sch. Inst., *The Smithsonian Governance Debacle: Ten Lessons Charter School Boards Can Learn at Someone Else’s Expense* (2007); Reed Abelson, *Enron’s Collapse: The Directors; One Enron Inquiry Suggests Board Played Important Role*, N.Y. Times, Jan. 19, 2002, at C1; *Senator Threatens Legislative Action Against American U.’s Board*, Chron. Higher Educ. (May 17, 2006), <http://chronicle.com/article/Senator-Threatens-Legislative/37046>; Dick Thornburgh, Counsel, K&L Gates, and Court-Appointed Examiner in the WorldCom Bankruptcy Proceedings, *A Crisis in Corporate Governance? The WorldCom Experience*, Address Before the Executive Forum at the California Institute of Technology (Mar. 22, 2004).

the legislation they engendered (particularly Sarbanes-Oxley<sup>18</sup>), academics have undertaken significant studies on organizational governance. These studies have sought best practices to ensure engaged, active boards that take their fiduciary duties seriously and perform their monitoring and management functions well.<sup>19</sup>

The conclusion of those studies, as far as this Essay's particular topic is concerned, is almost uniform: the ideal board has "between 10(ish) and 15 (or so)" members.<sup>20</sup> Unfortunately, "very few, if any, nonprofit organizations fit this pattern. Indeed, many have boards that are several times larger than any model of good governance would suggest. And, in fact, some—certainly more than a few—have boards that are so large as effectively to be unmanageable."<sup>21</sup>

In recent years, several major national nonprofit organizations have reformed their governing boards to better reflect these nonprofit best practices. For instance, in 2006 the Nature Conservancy reduced its board of directors from 40 members to 18.<sup>22</sup> The Conservancy hired Ira Millstein, Associate Dean at the Yale School of Management, as its counsel.<sup>23</sup> He reported that "a 40-member Board could not govern effectively, no matter how qualified the members were; there were simply too many of them to operate as a modern, hands-on board."<sup>24</sup> The United Way of America reduced its board by approximately half, from 50 members to 26.<sup>25</sup> The American Red Cross is in the process of cutting its board from 50 members to no more than 20.<sup>26</sup>

The Red Cross, in coming to this decision, commissioned an authoritative report that surveyed the field of nonprofit governance regarding board size.<sup>27</sup> That report quotes Dean Millstein: "Generally, the non-profit sector, like the commercial sector, has come to recognize that smaller boards—which meet more frequently and have standing committees focused on particular issues relevant to the organization—

---

18. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, & 29 U.S.C.).

19. See *infra* notes 20, 21, 25, 29, 32, and accompanying text.

20. Daniel L. Kurtz, *The Sarbanes-Oxley Act of 2002: Lessons for Nonprofits?*, in *Nonprofit Organizations Law 2003: Coping with the New Environment Post 9/11 & Sarbanes-Oxley 79*, 120 (PLI Tax Law & Estate Planning, Course Handbook Ser. No. J0-009A, 2003).

21. *Id.* Though there is near uniform agreement on this point, there are still a few dissenters. Some argue that there is no ideal board size for nonprofits because organizations are so different. See Panel on the Nonprofit Sector, *Strengthening Transparency, Governance, Accountability of Charitable Organizations 77* (2005); see also BoardSource, *Report on the Size, Composition, and Structure of the Board of Regents 41–42* (2008). A few reports explicitly defend large board sizes. See, e.g., Francie Ostrower, *Urban Inst., Nonprofit Governance in the United States 17* (2007).

22. *The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing Before the S. Comm. on Finance*, 109th Cong. 235 (2005) (statement of Ira M. Millstein, former chair of The Nature Conservancy's Governance Advisory Panel).

23. *Id.* at 231–32.

24. *Id.* at 233.

25. Am. Red Cross, *Governance for the 21st Century 44–45* (2006).

26. *Id.* at 55; *Governance*, Am. Red Cross, <http://www.redcross.org/governance/> (last visited Jan. 10, 2012) ("[B]y 2012, Board membership will range from 12 to 20 . . .").

27. Am. Red Cross, *supra* note 25, at i.

are more effective than overly large boards.”<sup>28</sup> The report surveyed several expert sources recommending that nonprofit boards range from 3 to 15 members.<sup>29</sup> The report also looked at the trends in the for-profit sector and concluded that “[b]est governance practices in the for-profit context favor smaller boards” of approximately 9 to 12 members.<sup>30</sup>

The legal profession has produced several reports of its own that also recommend smaller boards for corporate and nonprofit organizations. Reflecting the “current recommendations for smaller, more effective ‘working’ boards,”<sup>31</sup> 5 different ABA publications recommend boards of directors ranging from 7 to 15 members.<sup>32</sup> Similarly, the American Law Institute’s draft *Principles of the Law of Nonprofit Organizations* looked at recommendations from other board surveys: S&P 500 companies (10.7 directors); the Society of Corporate Secretaries and Governance Professionals (9 for manufacturing companies, 11 for financial companies, and 10 for service companies); and hospitals and health systems (13 for nonprofit acute care hospitals, 7 for government hospitals, and 15 for community hospitals and hospital systems).<sup>33</sup>

This move to small boards is based on empirical research comparing the different organizational and interpersonal dynamics on large boards versus small boards. Large boards tend to run on parliamentary procedure (particularly when the board comprises a group of lawyers!) where speakers are called on and identified, rather than the conversational style possible on a small board. This conversational style allows for consensus to emerge more organically, after a full and vigorous discussion, whereas decisions on big boards are almost always made by a formal vote after a stilted and often shortened discussion.<sup>34</sup> Moreover, large boards allow for free-rider members who may attend a few meetings but who do not contribute to the actual governance of the organization: in the memorable

---

28. *Id.* at 43.

29. *Id.* at 42–46 (collecting six studies). The report also cited the 2004 Nonprofit Governance Index. *Id.* at 44 n.217. The updated 2010 Index found that the average nonprofit board of directors has 16 members, and said that 15 to 22 members was the “sweet spot” for nonprofit board size.

BoardSource, Nonprofit Governance Index 2010, at 18–19 (2010).

30. Am. Red Cross, *supra* note 25, at 45.

31. ABA Coordinating Comm. on Nonprofit Governance, *supra* note 1, at 21.

32. *Id.* at 20 (suggesting 9 to 12 directors); ABA Corporate Laws Comm., Corporate Director’s Guidebook 42 (6th ed. 2011) (suggesting 7 to 11 directors); Gregory V. Varallo et al., Fundamentals of Corporate Governance 14 (2d ed. 2009) (citing a study recommending 8 to 9 directors); William G. Bowen, *Inside the Boardroom: A Reprise*, in Nonprofit Governance and Management 3, 5 (Victor Futter ed., 2002) (suggesting 10 to 15 directors); Martin Lipton & Jay W. Lorsch, *A Modest Proposal for Improved Corporate Governance*, 48 Bus. Law. 59, 67 (1992) (recommending boards of 8 or 9, and not more than 10); see Sanjai Bhagat & Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 Bus. Law. 921, 941 (1999) (reviewing literature arguing for small board size without delivering an independent conclusion).

33. Am. Law Inst., Principles of the Law of Nonprofit Organizations § 320 cmt. g(3), at 118 (Discussion Draft, 2006) (discussing a study of the board size and composition of S&P 500 companies); *id.* § 320 n.17 (same).

34. See Varallo et al., *supra* note 32, at 14; Kurtz, *supra* note 20, at 120–121; Lipton & Lorsch, *supra* note 32, at 65.

phrase of William O. Douglas, “directors who do not direct.”<sup>35</sup> By contrast, everyone on a small board needs to contribute for the board to complete its work.<sup>36</sup> Additionally, members of a small board have the opportunity to get to know one another, which fosters a sense of cohesion and collegiality. On a large board of 50 members, it is almost impossible to achieve this level of interpersonal intimacy among all the directors. Knowing one another as individuals helps directors operate more effectively as members of the board “team.”<sup>37</sup> Finally, disengaged and unwieldy boards simply transfer power to the CEO and other staff, who manage the organization without effective oversight.<sup>38</sup> On a smaller board, however, the CEO must work with engaged directors who hold him or her accountable through regular meetings in which the directors can make prompt decisions based on good information.<sup>39</sup> In short, these small-board dynamics increase the productivity and cohesion of the board, making it more efficient, effective, and collegial.

### III. The Future of Bar Governance Nationally and in California

The blue-ribbon Panel on the Nonprofit Sector makes the same recommendation as the ABA study quoted in the epigraph of this Essay: “Every charitable organization, as a matter of recommended practice, should review its board size periodically to determine the most appropriate size to ensure effective governance and to meet the organization’s goals and objectives.”<sup>40</sup> The first step for all bar

---

35. In the relevant passage, Douglas discusses Horace Samuel, *Shareholders’ Money* 119–120 (1933): “Mr. Samuel observes that many of the directorates are ‘grossly swollen’, numbering from twenty to thirty-five. He concludes that barely ‘50 per cent really pull their weight’ at meetings . . .” William O. Douglas, *Directors Who Do Not Direct*, 47 Harv. L. Rev. 1305, 1320 (1934); see BoardSource, *supra* note 29, at 19 (“In larger boards, individual shortcomings may be more easily overlooked and performance issues such as spotty attendance may appear to have less of an impact. As board size goes up, attendance goes down. 90% of small boards have average attendance of 75%–100%, compared to 73% of large boards. Only 29% of large boards are prepared ‘to a great extent’ for meetings, compared to 39% for small and medium boards. 47% of large boards have meetings that allow adequate time ‘to a great extent’ to ask questions, compared to 55% and 58% respectively for medium and small boards.”).

36. See Bowen, *supra* note 32, at 5; Katherine O’Regan & Sharon M. Oster, *Does the Structure and Composition of the Board Matter? The Case of Nonprofit Organizations*, 21 J.L. Econ. & Org. 205, 208 (2005).

37. Lipton & Lorsch, *supra* note 32, at 65. For a discussion of boards as “teams,” see Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 Vand. L. Rev. 1 (2002).

38. Lumen N. Mulligan, *What’s Good for the Goose Is Not Good for the Gander: Sarbanes-Oxley-Style Nonprofit Reforms*, 105 Mich. L. Rev. 1981, 1987 (2007) (citing O’Regan & Oster, *supra* note 36, at 216–19).

39. Kurtz, *supra* note 20, at 120; see Judith L. Miller, *The Board as a Monitor of Organizational Activity: The Applicability of Agency Theory to Nonprofit Boards*, 12 Nonprofit Mgmt. & Leadership 429, 439–42 (2002). This problem may be particularly pronounced in the bar association context, when the bar association president typically serves only a one-year term at the helm of the organization. See Johnstone, *supra* note 3, at 231 (discussing the limitations of the one-year term for presidents).

40. Panel on the Nonprofit Sector, *supra* note 21, at 75; see ABA Comm. on Nonprofit Corps., *Guidebook for Directors of Nonprofit Corporations* 233–34 (George W. Overton & Jeannie Carmedelle Frey eds., 2d ed. 2002) (recommending this sort of self-study on an automatic basis, every

associations, then—integrated and voluntary; national, state, and local; geographic, practice specialty, and shared heritage—is to undertake a self-study, as California has done.

When it comes to the size and composition of the board, the easy path is always to go bigger, to ensure that every type of firm and area of practice, every geographic region and stage of career, every section and division and county, is represented.<sup>41</sup> But representation of diverse constituencies is out of step with current best practices.<sup>42</sup> A focus on diversity stems from a belief that the main purpose of the board is to provide a forum for diverse perspectives and to pass resolutions through a representative assembly. But a more accurate understanding of the board's role recognizes that its primary responsibility is to govern—often to govern a large organization with tens or hundreds of thousands of members, millions of dollars, and scores of staff.<sup>43</sup> The counsel of the governance literature, which lawyers have helped produce, is clear: resist the temptation to go bigger, and instead move towards a smaller, “working” board.

Many boards deal with the problems inherent in a large board by transferring the actual power to govern to a smaller “executive committee” of the board.<sup>44</sup> The discussion draft for the ALI's *Principles of the Law of Nonprofit Organizations* cautions against such a move, recognizing it as a Band-Aid.<sup>45</sup> A better alternative would be to

---

3 to 5 years).

41. See, e.g., N.Y. State Bar Ass'n Special Comm. on Ass'n Governance, Report and Recommendations to the Executive Committee on Matters of Association Governance 7 (2003) (“We believe that the Association would benefit from expanding the size of the Executive Committee [from 24] to 30 members. This expansion would be designed to promote more diversity in its broadest sense as well as provide additional, meaningful opportunities for more members to serve the Association.”); *Board of Trustees Report, July 16, 2010*, N.J. St. B. Ass'n, <http://www.njsba.com/about/njsba-reports/board-of-trustee-reports/july-16-2010.html> (last visited Jan. 10, 2012) (“[T]he Board of Trustees approved a measure to add seven seats to the body, bringing it to 51 members. . . . The proposal aims to foster diversity on the Board and give a larger voice to members of its sections and committees in governance and policy decisions by adding five at-large seats and two more representatives of State Bar sections and committees.”).

42. See Bowen, *supra* note 32, at 6 (“The case for diversity should not be construed in this way. If individuals believe that they are on a board to represent a defined group, or a particular point of view, they will not be what Quakers call ‘weighty’ members.”); Lipton & Lorsch, *supra* note 32, at 68 (“Some may argue that boards of this size will limit the range of viewpoints and ignore the need of our society for diversity in the boardroom. Our rejoinder is that five or six independent directors, who are carefully selected, should provide the breadth of perspective and diversity required.”). The other reason that nonprofits often have large boards is for fundraising—either to include key supporters on the board directly, or to have a large number of ambassadors for the organization who can go out and raise money. See Bowen, *supra* note 32, at 4. But for unified bar associations, there is no real need to fundraise because the association has guaranteed income in the form of member dues, as every lawyer who wishes to practice in the state must join the association. Cf. Johnstone, *supra* note 3, at 197 (“Most bar association income comes from annual dues.”). And for voluntary bars, this purpose can just as easily be accomplished by a membership or sponsorship committee that is not part of the governing board.

43. See Grant Thornton, LLP, Report on the Corporate Governance of the Utah State Board of Commissioners 7 (2007) (identifying governance as the primary purpose of the Utah State Bar Board of Commissioners).

44. See Am. Law Inst., *supra* note 33, § 320 cmt. g(3).

45. *Id.*

complement a small board of directors with an advisory board or policy board that represents the profession and develops the state bar's position on legal and legislative issues while the board of directors actually manages the organization.<sup>46</sup>

A few bar associations have taken steps to reform their leadership structure. In 1998, the Orange County Bar Association ("OCBA") undertook a strategic planning review that specifically asked whether the board's size was an "impediment to individual board member participation or an impediment to quick and decisive decisions."<sup>47</sup> OCBA decided to reduce its governing board from 39 to 25 members.<sup>48</sup> According to the president who pushed for the change:

Our size, we believe, is the single biggest contributor to the lack of efficiency and meaningful participation of the board, and the single greatest impediment to our creating a more thriving and vibrant Board of Directors. . . . Our size is simply too large to have meaningful discussions and debate of policy.<sup>49</sup>

In 2004, The Minnesota State Bar Association reformed its entire governance structure, merging four layers into two: a 128-member Assembly that meets quarterly and a 15-member Council that meets more regularly.<sup>50</sup> Similarly, an ABA news report notes that after a significant reform by the Law Society of Manitoba, which halved its governing board and changed its responsibilities,

[the Society's CEO] cites dramatic improvement and says the success of the new plan is measurable. The board operates in a way that is "more timely, better, and cheaper," he says. And since the reorganization six years ago, the society has saved so much money it has had the unusual luxury of *lowering* its dues every year.<sup>51</sup>

These examples illustrate the possibilities for reform. While numerous other major nonprofit organizations have undertaken fundamental governance reform, only a few bar associations have joined them and aligned their governance with best practices for nonprofits.

### iii. Conclusion

Major institutions in American society have been rocked by scandal in the past decade. Many of these fiascos stemmed from a failure of governance by the board of directors, which had ultimate responsibility for each organization. Either because of legislation (Sarbanes-Oxley) or

---

46. See ABA Coordinating Comm. on Nonprofit Governance, *supra* note 1, at 21.

47. *Strategic Plan*, Orange County B. Ass'n, <http://www.ocbar.org/About/StrategicPlan.aspx> (last visited Jan. 10, 2012).

48. Raymond T. Elligett, Jr., *Restructuring Governance of Your Bar Association*, Conf. Call, Fall 2005.

49. Kimberly Smith, *The Reorganized Bar: An Inside Look at Change*, B. Leader, Sept./Oct. 2004, at 10, 12, available at [http://www.americanbar.org/publications/bar\\_leader\\_home/bar\\_leader\\_archive/2901.html](http://www.americanbar.org/publications/bar_leader_home/bar_leader_archive/2901.html).

50. *Id.* at 12–13; see *Assembly Meetings/Minutes*, Minn. St. B. Ass'n, <http://www2.mnbar.org/governance/assembly/meetings.asp> (last visited Jan. 10, 2012); *Organizational Structure*, Minn. St. B. Ass'n, <http://www2.mnbar.org/governance/CommonFiles/OrgChart.pdf> (last visited Jan. 10, 2012).

51. Smith, *supra* note 49, at 11.

pressure from shareholders and stakeholders, institutions ranging from the American Red Cross to American University have undertaken governance reforms to ensure effective management and oversight. Often these reforms included fundamental structural change, such as much smaller, working boards of directors.

Governance experts agree that boards should be small. These scholarly recommendations are confirmed by the experiences of many large nonprofit organizations and for-profit corporations. They are shared by several publications from different sections and committees of the ABA and American Law Institute. Yet these recommendations remain unimplemented in the vast majority of bar associations.

Thus far, no bar association has suffered the kind of scandal that has affected other sectors. However, many bars operate with ill-structured, hands-off boards that almost necessarily delegate significant power to management. These boards are unwieldy, ineffective, and out of step with best practices for corporate and nonprofit governance. This problem stems from a fundamental misunderstanding about the role and goal of the board. Contrary to the assumptions that lead to bloated boards, the role of a bar association's board is not to be a representative legislative assembly, but rather to be the governing body atop a significant organization with thousands of members, millions of dollars, and scores of staff. When bar leaders consider their role in that light, they may start to take their own advice and move to smaller, more effective boards that play a vital role in the organization's operations and strategic direction. Bar associations should follow California's lead by undertaking self-study evaluations. And the conclusion of those studies should be a course of action similar to that taken by Minnesota: a smaller board of directors that actually governs, and a larger representative assembly to speak for the profession on legal and legislative issues.

---

Preferred citation for this Essay:

Daniel R. Suhr, *Right-Sizing Bar Association Governance*, 2012 *Hastings L.J. Voir Dire* 1.

**Appendix D: Demographic and “per board member” tables**

**(1) Demographic table**

**Arizona population and the number of active SBA members, by county**

County	Population (2014 U.S. census est.)	% of statewide population	Active SBA members (July 2014)	% of in-state active attorneys	% of total active attorneys
<b>Apache</b>	71,828	1.0	31	0.2	0.2
<b>Cochise</b>	127,448	1.9	102	0.7	0.6
<b>Coconino</b>	137,682	2.0	240	1.6	1.3
<b>Gila</b>	53,119	0.8	45	0.3	0.3
<b>Graham</b>	37,957	0.6	24	0.2	0.1
<b>Greenlee</b>	9,346	0.1	3	0.1	0.1
<b>La Paz</b>	20,231	0.3	22	0.1	0.1
<b>Maricopa</b>	4,087,191	60.7	11,581	75.9	65.1
<b>Mohave</b>	203,361	3.0	143	0.9	0.8
<b>Navajo</b>	108,101	1.6	80	0.5	0.4
<b>Pima</b>	1,004,516	14.9	2,320	15.2	13.0
<b>Pinal</b>	401,918	6.0	204	1.3	1.1
<b>Santa Cruz</b>	46,695	0.7	49	0.3	0.3
<b>Yavapai</b>	218,844	3.3	274	1.8	1.5
<b>Yuma</b>	203,247	3.0	142	0.9	0.8
<b>Subtotal (in-state)</b>	--	--	15,260 (in-state)	--	85.8
<b>Subtotal (out-of-state)</b>	--	--	2,533 (out-of-state)	--	14.2
<b>Total</b>	6,731,484	100%	17,793	100%	100%

**Court of Appeals, Division One (except Maricopa):**

- Population: 963,294 [14.3%]
- Active attorneys: 932 [6.1% of in-state active, 5.2% of total active]

**Court of Appeals, Division Two (except Pima):**

- Population: 676,483 [10.0%]
- Active attorneys: 427 [2.8% of in-state active, 2.4% of total active]

=====

**(2) “Per board member” tables**

The following tables show the number of people and attorneys “represented” by one elected board member in the district. The population and attorneys shown in these “per board member” tables is a fraction of a district’s total, as shown in the demographic table above, if a district has more than one board member.

**The board’s current composition with eight election districts, and 18 elected governors, has one elected governor for every:**

District	Counties	Population	Attorneys	# of board members
1	Mohave, Navajo, Coconino, Apache	520,972	494	1 governor
2	Yavapai	218,844	274	1 governor
3	Gila, Graham, Greenlee	100,422	72	1 governor
4	Cochise	127,488	102	1 governor
5	Pima, Santa Cruz	350,403	790	3 governors
6	Maricopa	454,132	1,287	9 governors
7	La Paz, Yuma	223,478	164	1 governor
8	Pinal	401,918	204	1 governor

**Option X and Y proposals with a single “statewide” election district, and six elected trustees, would have one elected trustee for every:**

District	Counties	Population	Attorneys	# of board members
Statewide	All	1,121,914	2,543	6 trustees

**Option X and Y proposals with four election districts, and six elected trustees, would have one trustee for every:**

District	Counties	Population	Attorneys	# of board members
Div. One (except Maricopa)	Mohave, Navajo, Coconino, Apache, Yavapai, La Paz, Yuma	963,294	932	1 trustee
Div. Two (except Pima)	Gila, Graham, Greenlee, Cochise, Santa Cruz, Pinal	676,483	427	1 trustee
Maricopa	Maricopa	1,362,397	3,860	3 trustees
Pima	Pima	1,004,516	2,320	1 trustee

**Option Z proposal with five election districts, and eleven elected trustees, would have one elected trustee for every:**

District	Counties	Population	Attorneys	# of board members
North	Mohave, Navajo, Coconino, Apache	520,972	494	1 trustee
West	Yavapai, La Paz, Yuma	442,322	438	1 trustee
Southeast	Gila, Graham, Greenlee, Cochise, Santa Cruz, Pinal	676,483	427	1 trustee
Maricopa	Maricopa	681,199	1,930	6 trustees
Pima	Pima	502,258	1,160	2 trustees

**Appendix E: Summary Table of Task Force Revisions to Supreme Court Rule 32**

Unless otherwise noted, the following recommendations are for the Arizona Supreme Court.

Rec # Report Pg.	Recommendation	Rule 32	Provision
<b>Part III: Mission</b>			
#1 Pg. 9	The Arizona Supreme Court should amend Rule 32(a) to clarify that the SBA's primary mission is to protect and serve the public.	32(a)(2)	"The primary mission of the State Bar of Arizona is to protect and serve the public. This mission includes responsibilities to improve the legal profession, and to advance the rule of law and the administration of justice."
#2 Pg. 9	Restyle and organize Rule 32(a).	32(a)	All
#3 Pgs. 9-12	The SBA should continue as an integrated bar association.	32(a)(2)	"Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules."
<b>Part IV: Governance</b>			
#4 Pgs. 14, 16	The board should have a greater proportion of appointed board members.	32(e)	See recommendations #7, 8, and 9 below.
#5 Pgs. 16, 19	The ASC should appoint public members who are nominated by the board.	32(e)(3)(A)	"Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court."
#6 Pg. 19	Adopt a 3-year election and appointment cycle.	32(e)(1)	"The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year."

Rec # Report Pg.	Recommendation	Rule 32	Provision
#7 Pg. 19	<b>Option X:</b> 15 member board with 6 elected members from 4 districts and 9 appointed members (3 public + 6 at-large).	32(e)	"The board is composed of <u>six elected trustees and nine appointed trustees</u> , as provided by this Rule." [Etc.]
#8 Pg. 20	<b>Option Y:</b> 18 member board with 6 elected members from 4 districts and 12 appointed members (6 public + 6 at-large).	32(e)	"The board is composed of <u>six elected trustees and twelve appointed trustees</u> , as provided by this Rule." [Etc.]
#9 Pg. 20	<b>Option Z:</b> 18 member board with 11 elected members from 5 districts and 7 appointed members (4 public + 3 at-large).	32(e)	"The board is composed of <u>eleven elected trustees and seven appointed trustees</u> , as provided by this Rule." [Etc.]
#10 Pg. 22	Allow active out-of-state members of the SBA to vote in SBA board elections.	32(e)(2)(D)	"Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if none, in the Maricopa County District. "
#11 Pgs. 22-23	The immediate past president should serve a 1-year term as an advisor to the board.	32(f)(4)	"The immediate past president of the board will serve a one-year term as an advisor to the board."
#12 Pg. 23	Discontinue the board seat of the Young Lawyers Section president.	Not included	Not included in Rule 32.
#13 Pgs. 24-25	Discontinue the ex officio board membership of the law school deans.	Not included	Not included in Rule 32.
#14 Pg. 24	Continue service of an associate justice as a liaison to the board.	Unwritten policy	Not included in Rule 32.
#15 Pg. 24	All elected board members have a limit of 3 terms of 3 years each, and may not be a candidate for a fourth term until 3 years have passed after the ninth year.	32(e)(2)(F)	"An elected trustee may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service."

Rec # Report Pg.	Recommendation	Rule 32	Provision
#16 Pgs. 24- 25	An attorney member of the board must have a clean disciplinary history for 5 years preceding board service.	32(e)(2)(B)	"Each elected trustee must have been an active State Bar member, and have had no record of formal discipline, for five years prior to election to the board."
#17 Pg. 25	An attorney member of the board who is the subject of a formal disciplinary complaint must be recused from serving on the board pending disposition of the complaint.	Add to SBA by- laws	Not included in Rule 32.
#18 Pg. 25	A board member may be removed for good cause by a two-thirds vote of the board.	32(e)(5)	"A trustee of the board may be removed for good cause by a vote of two-thirds or more of the trustees cast in favor of removal. Good cause for removal exists if a trustee undermines board meetings or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a formal discipline sanction, repeatedly ignoring the duties of a trustee, or disorderly activity during a board meeting. A board trustee so removed may, within thirty days of the board's action, file a petition pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination of good cause. The Supreme Court will expedite consideration of the petition."

Rec # Report Pg.	Recommendation	Rule 32	Provision
#19 Pgs. 25- 26	The board should elect 3 officers: a president, president-elect, and secretary-treasurer. An appointed member may serve as an officer.	32(f)(1)	“The board will elect its officers. The officers are a president, a president-elect, and a secretary-treasurer. An elected or appointed trustee may serve as an officer.”
#20 Pg. 26	Each office should be held for a one-year term.	32(f)(2)(C)	“Each officer will serve a one-year term.”
#21 Pg. 26	A member may not be elected to a particular office to a second term for any office that the member has held during nine or fewer years of consecutive board service.	32(f)(2)(D)	“An officer may not be elected to a second term for any office that the trustee has held during the preceding nine or fewer consecutive years of service on the board.”
#22 Pg. 24	<p>If a board member who is otherwise term-limited is the “president-elect” or president that this not preclude the person from continuing to serve on the board until completion of their term as president. Upon completing the term as president, a new board member will be elected or appointed for the remaining partial term.</p> <p>If automatic succession extends the person’s term of service on the board beyond the time otherwise provided by Rule 32, then upon completion of the term as president, a special election will be held in the person’s district to elect, or in the case of an appointed member the Court will appoint, a new board member for the remaining partial term.</p>	32(f)(2)(E)	“The term of an trustee chosen as president or president-elect automatically extends until completion of a term as president, if his or her term as a trustee expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new trustee for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or appointment of a successor trustee shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).”

Rec # Report Pg.	Recommendation	Rule 32	Provision
#23 Pg. 26	The immediate past president should lead a committee to recruit and vet the best candidates for officer positions.	32(f)(4)	"The board advisor, with the assistance of two or more trustees chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect and secretary-treasurer."
#24 Pgs. 26-27	Change the name from board of governors to board of trustees.	32(b)(1)  and 32(e)	"'Board' means Board of Trustees of the State Bar of Arizona."  "The governing board of the State Bar of Arizona is a board of trustees."
#25 Pg. 27	Provide an oath for all board members upon assuming board duties.	32(e)(4)	"Upon commencing service, each trustee, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a trustee."
#26 Pg. 27	Include fiduciary responsibilities in the orientation of board members.	Not included	--
#27 Pg. 19	Notwithstanding the board's nomination of public members, the Court may decline to appoint any board nominee and may appoint as a public trustee a person not nominated by the board.	32(e)(3)(A)	"The Court may decline to appoint any board nominee; and may appoint as a public trustee a person who was not nominated by the board."

## Appendix F: Revisions to Supreme Court Rule 32

### Clean version of proposed Rule 32:

#### **Rule 32. Organization of the State Bar of Arizona**

(a) **State Bar of Arizona.** The Supreme Court of Arizona maintains under its direction and control a corporate organization known as the State Bar of Arizona.

(1) **Practice of law.** Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules.

(2) **Mission.** The primary mission of the State Bar of Arizona is to protect and serve the public. This mission includes responsibilities to improve the legal profession and to advance the rule of law and the administration of justice. To accomplish its mission, this Court empowers the State Bar of Arizona, under the Court's supervision, the authority to

(A) Organize and promote activities that best fulfill the responsibilities of the legal profession and its individual members to the public;

(B) Promote access to justice for those who live, work, and do business in this state;

(C) Aid the courts in the administration of justice;

(D) Assist this Court with the regulation and discipline of persons engaged in the practice of law; foster on the part of those engaged in the practice of law ideals of integrity, learning, competence, public service, and high standards of conduct; serve the professional needs of its members; and encourage practices that best uphold the honor and dignity of the legal profession;

(E) Conduct educational programs regarding substantive law, best practices, procedure, and ethics; provide forums for the discussion of subjects pertaining to the administration of justice, the practice of law, and the science of jurisprudence; and report its recommendations to this Court concerning these subjects.

(b) **Definitions.** Unless the context otherwise requires, the following definitions shall apply to the interpretation of these rules relating to admission, discipline, disability and reinstatement of lawyers:

(1) “Board” means Board of Trustees of the State Bar of Arizona, formerly known as the Board of Governors of the State Bar of Arizona.

(2) through (8) [no change]

➤ *Except:*

Recommend capitalizing the “b” in “State Bar.”

(c) **Membership.** [No change]

➤ *Except:*

Recommend capitalizing the “s” and the “b” in “State Bar” consistently.

Recommend changing “Board of Governors” in section (c)(7) to  
“Board of Trustees”

(d) **Powers of Board.** The State Bar shall be governed by a Board of Trustees, which shall have the powers and duties prescribed by this Court. The board shall:

(1) Fix and collect, as provided in these rules, fees approved by the Supreme Court, which shall be paid into the treasury of the State Bar.

(2) Promote and aid in the advancement of the science of jurisprudence, the education of lawyers, and the improvement of the administration of justice.

(3) Approve budgets and make appropriations and disbursements from funds of the State Bar to pay necessary expenses for carrying out its functions.

(4) Formulate and declare rules and regulations not inconsistent with Supreme Court Rules that are necessary or expedient to enforce these rules, and by rule fix the time and place of State Bar meetings and the manner of calling special meetings, and determine what number shall constitute a quorum of the State Bar.

(5) Appoint a Chief Executive Office/Executive Director to manage the State Bar’s day-to-day operations.

(6) Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.

(7) Prepare an annual statement showing receipts and expenditures of the State Bar for the twelve preceding months. The statement shall be promptly certified by the secretary-treasurer and a certified public accountant, and transmitted to the Chief Justice of this Court.

(8) Create and maintain the Client Protection Fund, as required by this Court and authorized by the membership of the State Bar on April 9, 1960, said fund to exist

and be maintained as a separate entity from the State Bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a separate board of trustees appointed by the State Bar Board of Trustees in accordance with the terms of the trust. The trustees of the Client Protection Fund shall govern and administer the Fund pursuant to the provisions of the trust, and in accordance with other procedural rules as may be approved by the State Bar Board of Trustees.

(9) Implement and administer mandatory continuing legal education in accordance with Rule 45.

(10) Administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 40.

- **Immediately below is SECTION (e), OPTION X (see subsequent pages for Option Y and Option Z). Underlining in Section (e) highlights differences in the three options.**

**(e) Composition of the Board.** The governing board of the State Bar of Arizona is a board of trustees. The board is composed of six elected trustees and nine appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** Each elected trustee must be an active member of the State Bar of Arizona throughout the elected term. Each elected trustee must have been an active State Bar member, and have had no record of formal discipline, for five years prior to election to the board.

**(C) Nominations.** Nominations for elected trustees shall be by petition signed by at least five active State Bar members. Each candidate named in a petition and

all members signing a petition must have their main offices in the district in which the candidate seeks to be elected.

**(D) Elections.** Election of trustees must be by ballot. Active and judicial members are entitled to vote for the elected trustee or trustees in the district in which a member has his or her principal place of business, as shown in the records of the State Bar. Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if none, in the Maricopa County District. The State Bar must send ballots electronically to each member entitled to vote, at the address shown in the records of the State Bar, at least two weeks prior to the date of canvassing the ballots. Members must return their ballots through electronic voting means, and the State Bar will announce the results at the ensuing annual meeting. The State Bar's by-laws will direct other details of the election process.

**(E) Terms of service.** Elected trustees serve a three-year term. An elected trustee serves on the board until a successor is elected and takes office at the annual meeting. If the board receives notice that an elected trustee's principal place of business has moved from the district in which the trustee was elected, or that the trustee has died, become disabled, or is otherwise unable to serve, that trustee's seat is deemed vacant, and the other elected and appointed trustees will chose a successor by a majority vote.

**(F) Term limits.** An elected trustee may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service. Election or appointment to a partial term of less than three years will not be included in a calculation of a member's term limit.

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as "appointed trustees," to serve on the board.

**(A) Public trustees.** Three trustees of the board are designated as "public" trustees. The public trustees must not be members of the State Bar and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. The Court may reappoint a public trustee for one additional term of three years. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a

public member to a term of less than three years will not be included in a calculation of the member's term limit.

**(B) At-large trustees.** Six trustees on the board are designated as "at-large" trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

**(4) Oath of trustees.** Upon commencing service, each trustee, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a trustee.

**(5) Removal of a trustee.** A trustee of the board may be removed for good cause by a vote of two-thirds or more of the trustees cast in favor of removal. Good cause for removal exists if a trustee undermines board meetings, or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a formal discipline sanction, repeatedly ignoring the duties of a trustee, or disorderly activity during a board meeting. A board trustee so removed may, within thirty days of the board's action, file a petition pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination of good cause. The Supreme Court will expedite consideration of the petition.

**(6) Recusal of an attorney trustee.** An attorney board member who is the subject of a formal disciplinary complaint must recuse him or herself from serving on the board pending disposition of the complaint.

**(f) Officers of the State Bar.**

**(1) Officers.** The board will elect its officers. The officers are a president, a president-elect, and a secretary-treasurer. An elected or appointed trustee may serve as an officer.

**(2) Terms of office.**

**(A) President.** The term of the president will expire at the conclusion of the annual meeting. The president-elect whose term expired at the same annual meeting will then automatically become, and assume the duties of, president at that time.

- (B) President-elect and secretary-treasurer.** The board must elect a new president-elect and a new secretary-treasurer at each annual meeting. Those newly elected officers will assume their respective offices at the conclusion of the annual meeting at which they are elected, and they will continue to hold their offices until the conclusion of the subsequent annual meeting at which their successors are elected.
- (C) Length of term.** Each officer will serve a one-year term.
- (D) Successive terms.** A trustee may not be elected to a second term for any office that the trustee has held during the preceding nine or fewer consecutive years of service on the board.
- (E) Limitations.** The term of an trustee chosen as president or president-elect automatically extends until completion of a term as president if his or her term as a trustee expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new trustee for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or appointment of a successor trustee shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).
- (3) Duties of officers.** The president will preside at all meetings of the State Bar and of the board of trustees, and if absent or unable to act, the president-elect will preside. Additional duties of the president, president-elect, and secretary-treasurer may be prescribed by the board or set forth in the State Bar by-laws.
- (4) Board advisor.** The immediate past president of the board will serve a one-year term as an advisor to the board. The advisor may participate in board discussions but has no vote at board meetings. The board advisor, with the assistance of two or more trustees chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect and secretary-treasurer.
- (5) Removal from office.** An officer may be removed from office, with or without good cause, by a vote of two-thirds or more of the members of the board of trustees cast in favor of removal.
- (6) Vacancy in office.** A vacancy in any office before expiration of a term may be filled by the board of trustees at a meeting called for that purpose.

- (g) Annual meeting [No change]
- (h) Administration of rules [No change]
- (i) Filings made [No change]
- (j) Formal Requirements of Filings [No change]
- (k) Payment of Fees and Costs [No change]
- (l) Expenses of Administration and Enforcement [No change]

➤ SECTION (e)(1-3), OPTION Y:

**(e) Composition of the Board.** The State Bar of Arizona is governed by a board of trustees. The board is composed of six elected trustees and twelve appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule, or their proxies as provided by the State Bar's by-laws, are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** [No change from Option X]

**(C) Nominations.** [No change from Option X]

**(D) Elections.** [No change from Option X]

**(E) Terms of service.** [No change from Option X]

**(F) Term limits.** [No change from Option X]

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Six trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

**(B) At-large trustees.** Six trustees on the board are designated as “at-large” trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

➤ **SECTION (e)(1-3), OPTION Z:**

**(e) Composition of the Board of Trustees.** The State Bar of Arizona is governed by a board of trustees. The board is composed of eleven elected trustees and seven appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule, or their proxies as provided by the State Bar’s by-laws, are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from five districts, as follows:

- i. Maricopa County District: six trustees;
- ii. West District (Yavapai, Yuma, and La Paz Counties): one trustee;
- iii. North District (Mohave, Coconino, Navajo, and Apache Counties): one trustee;
- iv. Pima County District: two trustees; and

- v. Southeast District: Pinal, Gila, Graham, Santa Cruz, Cochise, and Greenlee Counties): one trustee.

**(B) Qualifications.** [No change from Option X]

**(C) Nominations.** [No change from Option X]

**(D) Elections.** [No change from Option X]

**(E) Terms of service.** [No change from Option X]

**(F) Term limits.** [No change from Option X]

- (3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Four trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

**(B) At-large trustees.** Three trustees on the board are designated as “at-large” trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

## **Appendix G: Implementation Tables**

### **Current composition of the SBA governing board:**

District #	District area	# of board members
1	Mohave, Navajo, Coconino, Apache	1
2	Yavapai	1
3	Gila, Graham, Greenlee	1
4	Cochise	1
5	Pima, Santa Cruz	3
6	Maricopa	9
7	La Paz, Yuma	1
8	Pinal	1
YLS pres.	Elected by YLS	1
IPP	Ex officio member (non-voting)	1
Public	Appointed by the SBA	4
At-large	Appointed by the ASC	3
LSD	Law school dean liaisons (non-voting)	3
AJ	Associate justice liaison (non-voting)	--

### **Current board by status:**

19	Elected board members, including YLS president
4	Public members
3	At-large members
4	Ex officio members
30	Total size of the board

## IMPLEMENTATION OF OPTION X

### 2019:

District	District area	# of board members
Division 1	Elect 1 trustee to a 1-year term	1
Division 2	Elect 1 trustee to a 2-year term	1
Maricopa	Elect 1 trustee to a 1-year term, 1 trustee to a 2-year terms, and 1 trustee to a 3-year term	3
Pima	Elect 1 trustee to a 3-year term	1
ASC public	Appoint 1 trustee to a 1-year term, 1 trustee to a 2-year term, and 1 trustee to a 3-year term	3
ASC at-large	Appoint 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms	6
YLS pres.	Discontinued	0
LSD	Discontinued	0
IPP	"Advisor" (non-voting - not a trustee)	0
AJ	"Liaison" (non-voting - not a trustee)	0

**2019 total board size is 6 elected + 9 appointed = 15 trustees**

### 2020:

Trustees who in 2019 were elected or appointed to 1-year terms may request re-election or re-appointment to 3-year terms

### 2021:

Trustees who in 2019 were elected or appointed to 2-year terms may request re-election or re-appointment to 3-year terms

### 2022:

Trustees who in 2019 were elected or appointed to 3-year terms may request re-election or re-appointment to 3-year terms

The Court's Implementation Order should provide that term limits specified in Rule 32(e)(2)(F) for elected members, and in Rule 32(e)(3)(A) for public members, become effective on the implementation date and do not include a member's board service before that date. The Order should further provide that a member elected or appointed to a one- or two-year term during the phase-in period remains eligible to serve the number of full terms provided by those rules.

## IMPLEMENTATION OF OPTION Y

### 2019:

District	District area	# of board members
Division 1	Elect 1 trustee to a 1-year term	1
Division 2	Elect 1 trustee to a 2-year term	1
Maricopa	Elect 1 trustee to a 1-year term, 1 trustee to a 2-year terms, and 1 trustee to a 3-year term	3
Pima	Elect 1 trustee to a 3-year term	1
ASC public	Appoint 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms	6
ASC at-large	Appoint 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms	6
YLS pres.	Discontinued	0
LSD	Discontinued	0
IPP	"Advisor" (non-voting - not a trustee)	0
AJ	"Liaison" (non-voting - not a trustee)	0

**2019 total board size is 6 elected + 12 appointed = 18 trustees**

### 2020:

Trustees who in 2019 were elected or appointed to 1-year terms may request re-election or re-appointment to 3-year terms

### 2021:

Trustees who in 2019 were elected or appointed to 2-year terms may request re-election or re-appointment to 3-year terms

### 2022:

Trustees who in 2019 were elected or appointed to 3-year terms may request re-election or re-appointment to 3-year terms

The Court's Implementation Order should provide that term limits specified in Rule 32(e)(2)(F) for elected members, and in Rule 32(e)(3)(A) for public members, become effective on the implementation date and do not include a member's board service before that date. The Order should further provide that a member elected or appointed to a one- or two-year term during the phase-in period remains eligible to serve the number of full terms provided by those rules.

## IMPLEMENTATION OF OPTION Z

### 2019:

District	District area	# of board members
West	Elect 1 trustee to a 1-year term (Yavapai, La Paz, Yuma)	1
North	Elect 1 trustee to a 2-year term (Mohave, Navajo, Coconino, Apache)	1
Southeast	Elect 1 trustee to a 3-year term (Gila, Graham, Greenlee, Cochise, Santa Cruz, Pinal)	1
Maricopa	Elect 2 trustees to 1-year terms, 2 trustees to 2-year terms, and 2 trustees to 3-year terms	6
Pima	Elect 1 trustee to a 1-year term and 1 trustee to a 2-year term	2
ASC public	Appoint 1 trustees to a 1-year term, 1 trustee to a 2-year term, and 2 trustees to 3-year terms	4
ASC at-large	Appoint 1 trustee to a 1-year term, 1 trustee to a 2-year term, and 1 trustee to a 3-year term	3
YLS pres.	Discontinued	0
LSD	Discontinued	0
IPP	"Advisor" (non-voting - not a trustee)	0
AJ	"Liaison" (non-voting - not a trustee)	0

**2019 total board size is 11 elected + 7 appointed = 18 trustees**

### 2020:

Trustees who in 2019 were elected or appointed to 1-year terms may request re-election or re-appointment to 3-year terms

### 2021:

Trustees who in 2019 were elected or appointed to 2-year terms may request re-election or re-appointment to 3-year terms

### 2022:

Trustees who in 2019 were elected or appointed to 3-year terms may request re-election or re-appointment to 3-year terms

The Court's Implementation Order should provide that term limits specified in Rule 32(e)(2)(F) for elected members, and in Rule 32(e)(3)(A) for public members, become effective on the implementation date and do not include a member's board service before that date. The Order should further provide that a member elected or appointed to a one- or two-year term during the phase-in period remains eligible to serve the number of full terms provided by those rules.

**Appendix H: Supreme Court Rule 32 – comparison version**

Current Rule 32	Proposed Rule 32 (clean version)
<p><b>Rule 32. Organization of State Bar of Arizona</b></p> <p><b>(a) Organization</b></p> <p>1. <i>Establishment of state bar.</i> In order to advance the administration of justice according to law, to aid the courts in carrying on the administration of justice; to provide for the regulation and discipline of persons engaged in the practice of law; to foster and maintain on the part of those engaged in the practice of law high ideals of integrity, learning, competence and public service, and high standards of conduct; to provide a forum for the discussion of subjects pertaining to the practice of law, the science of jurisprudence, and law reform; to carry on a continuing program of legal research in technical fields of substantive law, practice and procedure, and to make reports and recommendations thereon; to encourage practices that will advance and improve the honor and dignity of the legal profession; and to the end that the responsibility of the legal profession and the individual members thereof may be more effectively and efficiently discharged in the public interest, and acting within the powers vested in it by the constitution of this state and its inherent power over members of the legal profession as officers of the court, the Supreme Court of Arizona does hereby perpetuate, create and continue under the direction and control of this court an organization known as the State Bar of Arizona, such organization which may be</p>	<p><b>Rule 32. Organization of the State Bar of Arizona</b></p> <p><b>(a) State Bar of Arizona.</b> The Supreme Court of Arizona maintains under its direction and control a corporate organization known as the State Bar of Arizona.</p> <p><b>(1) Practice of law.</b> Every person licensed by this Court to engage in the practice of law must be a member of the State Bar of Arizona in accordance with these rules.</p> <p><b>(2) Mission.</b> The primary mission of the State Bar of Arizona is to protect and serve the public. This mission includes responsibilities to improve the legal profession and to advance the rule of law and the administration of justice. To accomplish its mission, this Court empowers the State Bar of Arizona, under the Court’s supervision, the authority to</p> <p style="padding-left: 40px;">(A) Organize and promote activities that best fulfill the responsibilities of the legal profession and its individual members to the public;</p> <p style="padding-left: 40px;">(B) Promote access to justice for those who live, work, and do business in this state;</p>

a non-profit corporation under Chapter 5 of Title 10 of the Arizona Revised Statutes, and all persons now or hereafter licensed in this state to engage in the practice of law shall be members of the State Bar of Arizona in accordance with the rules of this court. The State Bar of Arizona may sue and be sued, may enter into contracts and acquire, hold, encumber, dispose of and deal in and with real and personal property, and promote and further the aims as set forth herein and hereinafter in these rules.

2. *Precedence of rules.* The qualifications of attorneys at law for admission to practice before the courts of this state, the duties, obligations and certain of the grounds for discipline of members, and the method of establishing such grounds, subject to the right of this court to discipline a member when it is satisfied that such member is not mentally or morally qualified to practice law even though none of the specific grounds for discipline set forth in these rules exist, shall be as prescribed in these rules pertaining to admission and discipline of attorneys.

**(b) Definitions.** Unless the context otherwise requires, the following definitions shall apply to the interpretation of these rules relating to admission, discipline, disability and reinstatement of lawyers:

1. "Board" means Board of Governors of the State Bar of Arizona.

2. "Court" means Supreme Court of Arizona.

(C) Aid the courts in the administration of justice;

(D) Assist this Court with the regulation and discipline of persons engaged in the practice of law; foster on the part of those engaged in the practice of law ideals of integrity, learning, competence, public service, and high standards of conduct; serve the professional needs of its members; and encourage practices that best uphold the honor and dignity of the legal profession;

(E) Conduct educational programs regarding substantive law, best practices, procedure, and ethics; provide forums for the discussion of subjects pertaining to the administration of justice, the practice of law, and the science of jurisprudence; and report its recommendations to this Court concerning these subjects.

**(b) Definitions.** Unless the context otherwise requires, the following definitions shall apply to the interpretation of these rules relating to admission, discipline, disability and reinstatement of lawyers:

**(1)** "Board" means Board of Trustees of the State Bar of Arizona, formerly known as the Board of Governors of the State Bar of Arizona.



judicial. Disbarred or resigned persons are not members of the bar.

2. *Active Members.* Every person licensed to practice law in this state is an active member except for persons who are inactive, retired, suspended, or judicial members.

3. *Admission and Fees.* All persons admitted to practice in accordance with the rules of this court shall, by that fact, become active members of the state bar. Upon admission to the state bar, the applicant shall pay a fee as required by the supreme court, which shall include the annual membership fee for active members of the state bar. If an applicant is admitted to the state bar on or after July 1 in any year, the annual membership fee payable upon admission shall be reduced by one half. Upon admission to the state bar, an applicant shall also, in open court, take and subscribe an oath to support the constitution of the United States and the constitution and laws of the State of Arizona in the form provided by the supreme court. All members shall provide to the state bar office a current street address, e-mail address, telephone number, any other post office address the member may use, and the name of the bar of any other jurisdiction to which the member may be admitted. Any change in this information shall be reported to the state bar within thirty days of its effective date. The state bar office shall forward to the court, on a quarterly basis, a current list of membership of the bar.

4. *Inactive Members.* Inactive members shall be those who have, as provided in these rules, been transferred to inactive

“Board of Governors” in section (c)(7) to “Board of Trustees”

status. An active member who is not engaged in practice in Arizona may be transferred to inactive status upon written request to the executive director. Inactive members shall not practice law in Arizona, or hold office in the State Bar or vote in State Bar elections. On application and payment of the membership fee and any delinquent fees that may be due under Rule 45(d), they may become active members. Inactive members shall have such other privileges, not inconsistent with these rules, as the Board may provide. Incapacitated members may be transferred to disability inactive status and returned to active status as provided in these rules.

5. *Retired Members.* Retired members shall be those who have, as provided in these rules, been transferred to retired status. An active, inactive or judicial member who is not engaged in active practice in any state, district, or territory of the United States may be transferred to retired status upon written request to the executive director. Retired members shall not hold State Bar office or vote in State Bar elections. Retired members shall not practice law in any state, district, or territory of the United States. Retired members may provide volunteer legal services to approved legal services organizations as defined in Rule 38(e) of these rules, except that retired members need not have engaged in the active practice of law within the last five years as required in Rule 38(e)(2)(B)(1) or Rule 38(e)(3) (A). Retired members may return to active status subject to the requirements imposed on inactive members who return to active status, as set forth in subsection (c)(4) of this rule. Retired members shall

have other privileges, not inconsistent with these rules, as the Board may provide. Incapacitated members may be transferred to disability inactive status and return to active status as provided in these rules.

6. *Judicial Members.* Judicial members shall be justices of the Supreme Court of Arizona, judges of the Court of Appeals and Superior Court of Arizona and of the United States District Court for the District of Arizona. Judicial membership status shall likewise be accorded to members of the state bar who are full-time commissioners, city or municipal court judges, judges pro tempore or justices of the peace in the state of Arizona not engaged in the practice of law, or justices or judges of other courts of record of the United States or of the several states. Judicial members shall hold such classification only so long as they hold the offices or occupations entitling them to such membership. Judicial members shall be entitled to vote but shall not be entitled to hold office. Judicial members shall have such privileges, not inconsistent with the rules of this court, as the board provides. A judicial member who retires or resigns from the bench shall become an active member subject to all provisions of these rules.

7. *Membership Fees.* An annual membership fee for active members, inactive members, retired members and judicial members shall be established by the board with the consent of this court and shall be payable on or before February 1 of each year. No annual fee shall be established for, or assessed to, active members who have been admitted to

practice in Arizona before January 1, 2009, and have attained the age of 70 before that date. The annual fee shall be waived for members on disability inactive status pursuant to Rule 63. Upon application, the Board of Governors may waive the dues of any other member for reasons of personal hardship.

8. *Computation of fee.* The annual membership fee shall be composed of an amount for the operation of the activities of the state bar and an amount for funding the Client Protection Fund, each of which amounts shall be stated and accounted for separately. Each active and inactive member, who is not exempt, shall pay the annual Fund assessment set by the court, to the state bar together with the annual membership fee, and the state bar shall transfer the fund assessment to the trust established for the administration of the Client Protection Fund.

9. *Allocation of fee.* Upon payment of the membership fee, each member shall receive a bar card issued by the board evidencing payment. All fees shall be paid into the treasury of the state bar and, when so paid, shall become part of its funds, except that portion of the fees representing the amount for the funding of the Client Protection Fund shall be paid into the trust established for the administration of the Client Protection Fund.

10. *Delinquent Fees.* A fee not paid by the time it becomes due shall be deemed delinquent. An annual delinquency fee for active members, inactive members, retired members and judicial members shall be established by the board with the consent of this court and shall be paid in addition

to the annual membership fee if such fee is not paid on or before February 1. A member who fails to pay a fee within two months after written notice of delinquency shall be summarily suspended by the board from membership to the state bar, upon motion of the state bar pursuant to Rule 62, but may be reinstated in accordance with these rules.

11. *Resignation.*

A. Members in good standing who wish to resign from membership in the state bar may do so, and such resignation shall become effective when filed in the office of the state bar, accepted by the board, and approved by this court. After the resignation is approved by this court, such person's status shall be changed to "resigned in good standing."

B. Such resignation shall not be a bar to institution of subsequent discipline proceedings for any conduct of the resigned person occurring prior to the resignation. In the event such resigned person thereafter is disbarred, suspended or reprimanded, the resigned person's status shall be changed from "resigned in good standing" to that of a person so disciplined. Such resignation shall not be accepted if there is a disciplinary charge or complaint pending against the member.

C. Resigned persons in good standing may be reinstated to membership in the same manner as members summarily suspended under Rule 62 of these rules. Reinstatement of resigned persons shall be governed by the procedures set forth in Rule 64(f) and shall require:

i. payment of fees, assessments, and administrative costs the resigned person would have been required to pay;

ii. proof of completion of any hours of continuing legal education activity the resigned person would have been required to take, had the applicant remained a member; and

iii. proof that the resigned person possesses the character and fitness to resume practicing law in this jurisdiction.

D. A member wishing to resign shall apply on a form approved by the board and shall furnish such information as is required upon such form and shall make such allegations, under oath, as are required on such form.

*12. Insurance Disclosure.*

A. Each active member of the State Bar of Arizona shall certify to the State Bar on the annual dues statement or in such other form as may be prescribed by the State Bar on or before February 1 of each year: (1) whether the lawyer is engaged in the private practice of law; and (2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance. Each active member who reports being covered by professional liability insurance shall notify the State Bar of Arizona in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason. A lawyer who acquires insurance after filing the annual dues statement or such other prescribed disclosure document with the State Bar of Arizona may advise the Bar as to the change of this status in coverage.

B. The State Bar of Arizona shall make the information submitted by active members pursuant to this rule available to the public on its website as soon as practicable after receiving the information.

C. Any active member of the State Bar of Arizona who fails to comply with this rule in a timely fashion may, on motion of the State Bar pursuant to Rule 62, be summarily suspended from the practice of law until such time as the lawyer complies. Supplying false information in complying with the requirements of this rule shall subject the lawyer to appropriate disciplinary action.

**(d) Powers of Board.** The state bar shall be governed by the Board of Governors, which shall have the powers and duties prescribed by this court. The board shall:

1. Fix and collect, as provided in these rules, fees approved by the supreme court, which shall be paid into the treasury of the state bar.

2. Promote and aid in the advancement of the science of jurisprudence and improvement of the administration of justice.

3. Make appropriations and disbursements from funds of the state bar to pay necessary expenses for carrying out its functions.

4. Formulate and declare rules and regulations not inconsistent with these rules, necessary or expedient to enforce these rules and by rule fix the time and place of annual meetings of the state bar and the manner of calling special meetings thereof, and determine what number shall constitute a quorum of the state bar.

5. Appoint such committees, officers and employees it deems necessary or proper and prescribe their duties. Compensation

**(d) Powers of Board.** The State Bar shall be governed by a Board of Trustees, which shall have the powers and duties prescribed by this Court. The board shall:

**(1)** Fix and collect, as provided in these rules, fees approved by the Supreme Court, which shall be paid into the treasury of the State Bar.

**(2)** Promote and aid in the advancement of the science of jurisprudence, the education of lawyers, and the improvement of the administration of justice.

**(3)** Approve budgets and make appropriations and disbursements from funds of the State Bar to pay necessary expenses for carrying out its functions.

**(4)** Formulate and declare rules and regulations not inconsistent with Supreme Court Rules that are necessary or expedient to enforce these rules, and by rule fix the time and place of State Bar meetings and the manner of calling special meetings, and determine what number shall constitute a quorum of the State Bar.

<p>of employees shall be as determined by the board.</p> <p>6. Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.</p> <p>7. Prepare an annual statement showing receipts and expenditures of the state bar for the twelve preceding months. The statement shall be promptly certified by the treasurer and a certified public accountant, and transmitted to the chief justice of this court.</p> <p>8. Create and maintain the Client Protection Fund, as required by this court and authorized by the membership of the state bar April 9, 1960, said fund to exist and be maintained as a separate entity from the state bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a Board of Trustees appointed by the Board of Governors in accordance with the terms of the trust and the trustees shall govern and administer the Fund pursuant to the provisions of the trust as amended from time to time by the board and in accordance with such other procedural rules as may be approved by the Board of Governors.</p> <p>9. Have the power to form a non-profit corporation under Chapter 5 of Title 10 of the Arizona Revised Statutes upon a majority vote of the Board of Governors.</p>	<p>(5) Appoint a Chief Executive Office/Executive Director to manage the State Bar's day-to-day operations.</p> <p>(6) Appoint from time to time one or more executive committees composed of members of the board and vest in the executive committees any powers and duties granted to the board as the board may determine.</p> <p>(7) Prepare an annual statement showing receipts and expenditures of the State Bar for the twelve preceding months. The statement shall be promptly certified by the secretary-treasurer and a certified public accountant, and transmitted to the Chief Justice of this Court.</p> <p>(8) Create and maintain the Client Protection Fund, as required by this Court and authorized by the membership of the State Bar on April 9, 1960, said fund to exist and be maintained as a separate entity from the State Bar in the form of the Declaration of Trust established January 7, 1961, as subsequently amended and as it may be further amended from time to time by the board. The trust shall be governed by a separate board of trustees appointed by the State Bar Board of Trustees in accordance with the terms of the trust. The trustees of the Client Protection Fund shall govern and administer the Fund pursuant to the provisions of the trust, and in accordance with other procedural rules as may be</p>
--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

10. Implement and administer mandatory continuing legal education in accordance with Rule 45.

**(e) Composition of Board.**

1. For the purposes of these rules the state is divided into eight bar districts, numbered one through eight as follows:

A. Mohave, Navajo, Coconino and Apache counties shall be district 1.

B. Yavapai county shall be district 2.

C. Gila, Graham and Greenlee counties shall be district 3.

D. Cochise county shall be district 4.

E. Pima and Santa Cruz counties shall be district 5.

F. Maricopa county shall be district 6.

G. La Paz and Yuma counties shall be district 7.

H. Pinal county shall be district 8.

2. There shall be a Board of Governors of the state bar which shall consist of twenty-six (26) members, all authorized to vote. Four (4) members of the Board of Governors shall be designated as “public

approved by the State Bar Board of Trustees.

**(9)** Implement and administer mandatory continuing legal education in accordance with Rule 45.

**(10)** Administer a Board of Legal Specialization to certify specialists in specified areas of practice in accordance with Rule 40.

➤ **Immediately below is SECTION (e), OPTION X (see subsequent pages for Option Y and Option Z). Underlining in Section (e) highlights differences in the three options.**

**(e) Composition of the Board.** The governing board of the State Bar of Arizona is a board of trustees. The board is composed of six elected trustees and nine appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

member." The public members shall not be members of the state bar, and shall not have, other than as consumers, a financial interest in the practice of law. Public members shall be appointed by the Board of Governors for terms of three (3) years. No more than two (2) public members may be from the same district. Public members may be reappointed for one additional term of three (3) years. No individual may serve more than six (6) years as a public member of the Board of Governors. There shall be three (3) at-large members on the Board of Governors appointed by the Supreme Court for terms of three (3) years. Nineteen (19) members of the Board of Governors shall be active members in good standing of the state bar designated as "elected members" and elected as follows:

- A. From Bar District 1, one member.
- B. From Bar District 2, one member.
- C. From Bar District 3, one member.
- D. From Bar District 4, one member.
- E. From Bar District 5, three members.
- F. From Bar District 6, nine members.
- G. From Bar District 7, one member.
- H. From Bar District 8, one member.
- I. From the Young Lawyers Section of the state bar, its President.

3. Beginning with the 2004 annual meeting, and every three (3) years thereafter, the Governors shall be elected from Bar Districts 1, 3, 4, 5 and 7 for terms of three (3) years. Beginning with the 2005 annual meeting and every three (3) years thereafter, the Governors shall be elected from Bar Districts 2, 6 and 8 for terms of three (3) years. Nominations for Governors shall be by petition signed by at least five (5) active members, and each candidate named in a petition and all members signing such petition shall have

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** Each elected trustee must be an active member of the State Bar of Arizona throughout the elected term. Each elected trustee must have been an active State Bar member, and have had no record of formal discipline, for five years prior to election to the board.

**(C) Nominations.** Nominations for elected trustees shall be by petition signed by at least five active State Bar members. Each candidate named in a petition and all members signing a petition must have their main offices in the district in which the candidate seeks to be elected.

**(D) Elections.** Election of trustees must be by ballot. Active and judicial members are entitled to vote for the elected trustee or trustees in the district in which a member has his or her principal place of business, as shown in the records of the State Bar. Active out-of-state members may vote in the district of their most recent Arizona residence or place of business or, if

their principal place of business in the district the candidate is nominated to represent. Only members who have been admitted to practice before the Arizona Supreme Court for not less than five (5) years are eligible to be elected members of the Board of Governors. The election shall be by ballot. The ballots shall be mailed to those entitled to vote at least thirty (30) days prior to the date of canvassing the ballots, shall be returned by mail or through electronic voting means and shall be canvassed at the ensuing annual meeting. In other respects the election shall be as the Board of Governors by rule directs. Only active and judicial members shall be entitled to vote for the Governor or Governors of the Bar District in which such active and judicial members respectively have their principal place of business.

4. The President of the Young Lawyers Section shall be elected by a mail ballot to all members of the Section, such ballot announcing to all members of the Section that the President of the Young Lawyers Section will hold a voting position on the Board of Governors. The election of the President of the Young Lawyers Section shall be on a yearly basis and shall be completed within ninety days of the annual meeting.

5. Elected members of the board of governors shall hold office until their successors are elected and qualified. Should a member of the Board move his or her principal place of business from the district he or she represents, his or her seat shall be declared vacant. A vacancy among the elected members of the Board of Governors shall be filled by the remaining members of the Board. A vacancy in a public member position shall

none, in the Maricopa County District. The State Bar must send ballots electronically to each member entitled to vote, at the address shown in the records of the State Bar, at least two weeks prior to the date of canvassing the ballots. Members must return their ballots through electronic voting means, and the State Bar will announce the results at the ensuing annual meeting. The State Bar's by-laws will direct other details of the election process.

**(E) Terms of service.** Elected trustees serve a three-year term. An elected trustee serves on the board until a successor is elected and takes office at the annual meeting. If the board receives notice that an elected trustee's principal place of business has moved from the district in which the trustee was elected, or that the trustee has died, become disabled, or is otherwise unable to serve, that trustee's seat is deemed vacant, and the other elected and appointed trustees will choose a successor by a majority vote.

**(F) Term limits.** An elected trustee may serve three consecutive terms, but may not be a candidate for a fourth term until three years have passed after the person's last year of service. Election or appointment to a partial term of less than three years will not be included in a calculation of a member's term limit.

be filled by the Board of Governors. A vacancy in an at-large member position shall be filled by the Supreme Court.

**(3) Appointed trustees.** The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.

**(A) Public trustees.** Three trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. The Court may reappoint a public trustee for one additional term of three years. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member’s term limit.

**(B) At-large trustees.** Six trustees on the board are designated as “at-large” trustees. At-large trustees, who may be former

elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

**(4) Oath of trustees.** Upon commencing service, each trustee, whether elected or appointed, must take an oath to faithfully and impartially discharge the duties of a trustee.

**(5) Removal of a trustee.** A trustee of the board may be removed for good cause by a vote of two-thirds or more of the trustees cast in favor of removal. Good cause for removal exists if a trustee undermines board meetings, or compromises the integrity of the board. Expression of unpopular views does not constitute good cause. Good cause also may include, but is not limited to, conviction of a felony or a crime involving moral turpitude, imposition of a formal discipline sanction, repeatedly ignoring the duties of a trustee, or disorderly activity during a board meeting. A board trustee so removed may, within thirty days of the board's action, file a petition pursuant to Rule 23 of the Arizona Rules of Civil Appellate Procedure requesting that the Supreme Court review the board's determination

<p><b>(f) Officers of the State Bar.</b></p> <p>1. The officers of the state bar shall be a president, a president-elect, two vice-presidents, and a secretary/treasurer.</p> <p>2. The term for the office of president shall expire at the conclusion of the annual meeting, and the president-elect whose term expired at the same annual meeting shall automatically become the president and assume the duties of such office. The first vice-president, whose term expired at the same annual meeting, shall automatically become the president-elect and assume the duties of such office.</p> <p>3. The first and second vice-presidents and secretary/treasurer shall be elected from its membership by the board at the annual meetings. Such newly elected officers shall assume the duties of their respective offices at the conclusion of the annual meeting at which they are elected.</p>	<p>of good cause. The Supreme Court will expedite consideration of the petition.</p> <p><b>(6) Recusal of an attorney trustee.</b> An attorney board member who is the subject of a formal disciplinary complaint must recuse him- or herself from serving on the board pending disposition of the complaint.</p> <p><b>(f) Officers of the State Bar.</b></p> <p><b>(1) Officers.</b> The board will elect its officers. The officers are a president, a president-elect, and a secretary-treasurer. An elected or appointed trustee may serve as an officer.</p> <p><b>(2) Terms of office.</b></p> <p><b>(A) President.</b> The term of the president will expire at the conclusion of the annual meeting. The president-elect whose term expired at the same annual meeting will then automatically become, and assume the duties of, president at that time.</p> <p><b>(B) President-elect and secretary-treasurer.</b> The board must elect a new president-elect and a new secretary-treasurer at each</p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

4. The officers of the state bar shall continue in office until their successors are elected and qualified.
5. An officer may be removed from his office by the vote of two-thirds or more of the members of the board of governors cast in favor of his removal at a meeting called for such purpose.
6. A vacancy in any office caused other than by expiration of a term may be filled by the board of governors at a meeting called for such purpose.
7. The president shall preside at all meetings of the state bar and the board, and if absent or unable to act, the president-elect or one of the vice-presidents shall preside. Additional duties of the president, president-elect, vice-presidents and the secretary/treasurer may be prescribed by the board.
8. No public member shall hold office.

annual meeting. Those newly elected officers will assume their respective offices at the conclusion of the annual meeting at which they are elected, and they will continue to hold their offices until the conclusion of the subsequent annual meeting at which their successors are elected.

**(C) Length of term.** Each officer will serve a one-year term.

**(D) Successive terms.** A trustee may not be elected to a second term for any office that the trustee has held during the preceding nine or fewer consecutive years of service on the board.

**(E) Limitations.** The term of an trustee chosen as president or president-elect automatically extends until completion of a term as president if his or her term as a trustee expires in the interim without their reelection or reappointment to the board, or if the term is limited under Rule 32(e)(2)(F). In either of these events, there shall not be an election or appointment of a new trustee for the seat held by the president or president-elect until the person has completed his or her term as president, and then the election or

appointment of a successor trustee shall be for a partial term that otherwise remains in the regular three-year cycle under Rule 32(e)(1).

**(3) Duties of officers.** The president will preside at all meetings of the State Bar and of the board of trustees, and if absent or unable to act, the president-elect will preside. Additional duties of the president, president-elect, and secretary-treasurer may be prescribed by the board or set forth in the State Bar by-laws.

**(4) Board advisor.** The immediate past president of the board will serve a one-year term as an advisor to the board. The advisor may participate in board discussions but has no vote at board meetings. The board advisor, with the assistance of two or more trustees chosen by the president, will lead a committee to recruit, recommend, and nominate candidates for the offices of president-elect and secretary-treasurer.

**(5) Removal from office.** An officer may be removed from office, with or without good cause, by a vote of two-thirds or more of the members of the board of trustees cast in favor of removal.

<p><b>(g) Annual meeting.</b> Annual meetings of the state bar shall be held at times and places designated by the board. At the annual meeting reports of the proceedings of the board since the last annual meeting, reports of other officers and committees and recommendations of the board shall be received. Matters of interest pertaining to the state bar and the administration of justice may be considered and acted upon. Special meetings of the state bar may be held at such times and places as provided by the board.</p> <p><b>(h) Administration of rules.</b> Examination and admission of members shall be administered by the committee on examinations and the committee on character and fitness, as provided in these rules. Discipline, disability, and reinstatement matters shall be administered by the disciplinary commission, as provided in these rules. All matters not otherwise specifically provided for shall be administered by the board.</p> <p><b>(i) Filings made.</b> Papers required to be filed with the state bar under these rules shall be filed at the office of the state bar in Phoenix, except as is otherwise set forth in these rules.</p>	<p><b>(6) Vacancy in office.</b> A vacancy in any office before expiration of a term may be filled by the board of trustees at a meeting called for that purpose.</p> <p><b>(g) Annual meeting [No change]</b></p> <p><b>(h) Administration of rules [No change]</b></p> <p><b>(i) Filings made [No change]</b></p>
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

<p><b>(j) Formal Requirements of Filings.</b> All verbatim records and all copies of recommendations, documents, papers, pleadings, reports and records required or permitted by any provision of these rules relating to admission, discipline, disability, and reinstatement may be either typewritten, electronically prepared, or copied by a process that is clear, legible, or audible. An original is not required.</p>	<p><b>(j) Formal Requirements of Filings [No change]</b></p>
<p><b>(k) Payment of Fees and Costs.</b> The payment of all fees, costs, and expenses required under the provisions of these rules relating to membership, mandatory continuing legal education, discipline, disability, and reinstatement shall be made to the treasurer of the state bar. The payment of all fees, costs and expenses required under the provisions of these rules relating to application for admission to the practice of law, examinations and admission shall be made to the finance office of the administrative office of the courts.</p>	<p><b>(k) Payment of Fees and Costs [No change]</b></p>
<p><b>(l) Expenses of Administration and Enforcement.</b> The state bar shall pay all expenses incident to the administration and enforcement of these rules relating to membership, mandatory continuing legal education, discipline, disability, and reinstatement of lawyers, except that costs and expenses shall be taxed against a respondent lawyer or applicant for readmission, as provided in these rules. The administrative office of the courts shall pay all expenses incident to administration and enforcement of these rules relating to application for admission to the practice of law, examinations and admission.</p>	<p><b>(l) Expenses of Administration and Enforcement [No change]</b></p>

➤ **SECTION (e)(1-3), OPTION Y:**

**(e) Composition of the Board.** The State Bar of Arizona is governed by a board of trustees. The board is composed of six elected trustees and twelve appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from four districts, as follows:

- i. Maricopa County District: three members
- ii. Pima County District: one member
- iii. Division One District (excluding Maricopa County): one member
- iv. Division Two District (excluding Pima County): one member

**(B) Qualifications.** [No change from Option X]

**(C) Nominations.** [No change from Option X]

	<p><b>(D) Elections.</b> [No change from Option X]</p> <p><b>(E) Terms of service.</b> [No change from Option X]</p> <p><b>(F) Term limits.</b> [No change from Option X]</p> <p><b>(3) Appointed trustees.</b> The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.</p> <p><b>(A) Public trustees.</b> Six trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included</p>
--	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

in a calculation of the member's term limit.

**(B) At-large trustees.** Six trustees on the board are designated as "at-large" trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

➤ **SECTION (e)(1-3), OPTION Z:**

**(e) Composition of the Board of Trustees.** The State Bar of Arizona is governed by a board of trustees. The board is composed of eleven elected trustees and seven appointed trustees, as provided by this Rule. Only trustees elected or appointed under this Rule are empowered to vote at board meetings.

**(1) Implementation.** The State Bar shall implement this Rule in a manner that provides for the election and appointment of approximately one-third of the board every year.

**(2) Elected trustees.**

**(A) Districts.** Trustees are elected from five districts, as follows:

- i. Maricopa County District: six trustees;

	<ul style="list-style-type: none"> <li>ii. West District (Yavapai, Yuma, and La Paz Counties): one trustee;</li> <li>iii. North District (Mohave, Coconino, Navajo, and Apache Counties): one trustee;</li> <li>iv. Pima County District: two trustees; and</li> <li>v. Southeast District: Pinal, Gila, Graham, Santa Cruz, Cochise, and Greenlee Counties): one trustee.</li> </ul> <p><b>(B) Qualifications.</b> [No change from Option X]</p> <p><b>(C) Nominations.</b> [No change from Option X]</p> <p><b>(D) Elections.</b> [No change from Option X]</p> <p><b>(E) Terms of service.</b> [No change from Option X]</p> <p><b>(F) Term limits.</b> [No change from Option X]</p> <p><b>(3) Appointed trustees.</b> The Supreme Court will appoint public and at-large trustees, collectively referred to as “appointed trustees,” to serve on the board.</p> <p><b>(A) Public trustees.</b> Four trustees of the board are designated as “public” trustees. The public trustees must not be members of the State Bar, and must not have, other than as consumers, a financial interest in the</p>
--	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

practice of law. Public trustees are nominated by the board and appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Court may decline to appoint any board nominee, and may appoint as a public trustee a person who was not nominated by the board. No more than two public trustees may be from the same district. No individual may serve more than two terms as a public trustee. The Court may fill a vacancy in an uncompleted term of a public trustee, but appointment of a public member to a term of less than three years will not be included in a calculation of the member's term limit.

**(B) At-large trustees.** Three trustees on the board are designated as "at-large" trustees. At-large trustees, who may be former elected or public trustees, are appointed by the Supreme Court for terms of three years and begin board service at a time designated by the Court. The Supreme Court may appoint at-large trustees to successive terms. The Court may fill a vacancy in an uncompleted term of an at-large trustee.

## Appendix I: Proposed Rule 40 regarding the Board of Legal Specialization

### **Rule 40. Legal Specialization**

- a. **Purpose.** A legal specialization program will identify to the public and members of the bar those attorneys who have demonstrated a high degree of competence in a specific field of law. Identifying attorneys in this fashion will increase the quality of legal services and will allow members of the public to more closely match their needs with attorneys who have specialized in a field of law.
- b. **Board.** The State Bar of Arizona will administer an attorney specialization program through a Board of Legal Specialization (“BLS”).
- c. **Board members.** The Board of Legal Specialization will consist of thirteen members, as follows: eight practicing attorneys, four of whom are not specialists and four of whom are certified specialists; one representative from an accredited law school in Arizona; and four members of the public. Members of the BLS and a BLS chair will be nominated by Board of Trustees and appointed by the Supreme Court. BLS Board members will serve four-year terms, with a limit of two terms. The BLS Board chair will serve a two-year term and may be appointed to a second term.
- d. **Board rules.** The Board of Trustees must establish rules of procedure, assuring due process to all applicants, for the Board of Legal Specialization. Those rules may designate, among other things, practice areas of specialization and objective qualifications for specialization in a particular practice area. Those rules, and any amendments to those rules, must be submitted to and approved by the Supreme Court.
- e. **Limitations.** No BLS Board rule may limit the right of a specialist to practice in other fields of law or limit the right of a specialist to associate with attorneys who are not specialists. Further, no rule may require an attorney to be a specialist before practicing in any particular field.
- f. **Review.** The rules of the BLS must provide a procedure for review of an adverse decision for any attorney who is aggrieved by a Board decision. The rules may provide that the review procedure begins within the State Bar of Arizona, but when the State Bar’s review process becomes final, the rules must provide an aggrieved attorney a right to seek judicial review pursuant to the Arizona Rules of Procedure for Special Actions.



June 11, 2015

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

*via email*

**Re: Draft Report of the Task Force**

Dear Justice Berch and fellow Task Force members,

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

**Summary**

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

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

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

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

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

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

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

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

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

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

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

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

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

#### **A. The State Bar’s Regulatory Powers**

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

### **C. The Integrated Bar Is Controlled by Lawyers**

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

---

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

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

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

The governance structure of the State Bar creates a “constituency problem.” Lawyers who are elected to the State Bar by their peers will tend to view themselves as representing lawyer constituents, not the public that never voted for them and never could vote against them. This common sense observation is borne out in the materials this Task Force has reviewed, including the 2011 Report and Recommendations of the State Bar of California Governance in the Public Interest Task Force (the “California Bar Report”), <http://www.azcourts.gov/Portals/74/GOV/08222014/CABarTFReport2011.pdf>. The California task force, like this Task Force, was charged with reviewing the duties and governance of the state’s integrated state bar. The minority group of the California task force expressly recognized the constituency problem caused by elected lawyer members of their state bar. California Bar Report at 48-49. Notably, that minority consisted, with just one exception, entirely of non-lawyers. All the lawyers on that task force, again with the one exception, made excuses for why the constituency problem was not important, *id.* at 42, but also, contradictorily, argued that it was important for lawyers to view themselves as constituents of the bar, *id.* at 29.<sup>6</sup>

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.* at 1108.

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

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

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

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

*Id.* at 1111. Further, “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose [a] risk of self-dealing . . . . This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” *Id.* at 1114.<sup>9</sup>

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

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

---

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

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

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

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

## **II. The State Bar's History of Protectionist Actions**

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

### **A. The State Bar vs. Realtors**

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

---

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

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

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

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

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

## **B. The State Bar vs. Document Preparers**

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

After Arizona did away with statutory restrictions on the unauthorized practice of law in the mid-1980s, entrepreneurs recognized a large, unmet demand for basic, low-cost legal services and created the document preparation industry in Arizona. In 2002, the State Bar petitioned to amend the Arizona Supreme Court's rules in part to define the unauthorized practice of law in a manner that would have shut down the entire document preparation industry. Petition to Amend Rule 31 and to Add Rules 32, 76-80, Ariz. R. Sup. Ct., Rule 28 Petition No. R-02-0017.<sup>13</sup> As it did against real-estate agents, the State Bar argued a "public interest" in shutting down its competition. Specifically, the State Bar claimed that "[i]n 2001, alone, the State Bar of Arizona received four hundred complaints, alleging that 'non-lawyers' were practicing law in Arizona. Arizona consumers have lost homes, financial resources, and their

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Id.* at 2.

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

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

#### **D. The State Bar vs. Access to Justice**

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

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

Would members of the public really be worse off if they could turn to people other than lawyers for assistance? *The Boston Globe* editorial board thought not, and called on Massachusetts to identify the areas in which non-lawyers could practice. Editorial, *Mass. Must Be Creative in Helping Poor Residents with Civil Cases*, *Bos. Globe* (Jan. 22, 2015), <http://www.bostonglobe.com/opinion/editorials/2015/01/21/mass-must-creative-helping-poor-residents-with-civil-cases/vwu5QEfPItSYMFQxTUyIAO/story.html>. Other commentators have called for abandoning the bar exam as a prerequisite to offering legal services because it does not protect consumers but “merely creates an artificial barrier that keeps many people from competing in the market for legal services.” George Leef, *True Or False: We Need The Bar Exam To Ensure Lawyer Competence*, *Forbes* (Apr. 22, 2015), <http://www.forbes.com/sites/georgeleef/>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

- \$683,974 on 28 sections;<sup>15</sup>
- \$683,738 on the resource call center;<sup>16</sup>
- \$354,812 on member and public relations;
- \$308,846 on 28 standing committees;
- \$188,278 on Bar publications for members;
- \$175,433 on mental health assistance for members;
- \$144,616 on government relations (lobbying and outreach);
- \$140,433 on voluntary fee arbitration for lawyers<sup>17</sup> and their clients;
- \$130,460 on a directory of members;
- \$105,349 on “member benefits,” *i.e.*, paying for member discounts.<sup>18</sup>

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

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

---

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

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

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

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

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

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

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

## V. The Mandatory Association Threatens “Member” Rights

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

## **VII. The Task Force Majority Recommendations Are Not Meaningful Reforms**

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

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

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

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

better: As many as 12 of 15 members (80%) under Option X, and 12 of 18 members (66%) under Option Y, could be lawyers. *Id.* at 16-17.<sup>22</sup>

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

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

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

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

---

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

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

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

### **Conclusion**

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

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

Sincerely,

Paul Avelar  
Attorney  
Institute for Justice