

LEGAL ACTION OF WISCONSIN

Providing free legal services to low-income Wisconsin clients since 1968 • Proporcionando servicios legales gratuitos a clientes de bajos ingresos en Wisconsin desde 1968

October 7, 2024

Clerk of Supreme Court
Attention: Deputy Clerk – Rules
PO Box 1688
Madison, WI 53701-1688

RECEIVED

OCT 07 2024

CLERK OF SUPREME COURT
OF WISCONSIN

Via e-mail to clerk@wicourts.gov and hand-delivered to Clerk's office

RE: Rule Petition 24-04

Dear Honorable Justices,

Legal Action of Wisconsin, Inc., writes in support of the State Bar of Wisconsin's petition 24-04, which would create a new category of continuing legal education credit in Cultural Competency and Reduction of Bias. Unlike the State Bar, however, we propose this CLE credit type be mandatory for all Wisconsin attorneys. We believe the Court should adopt a modified version of the proposed rule, allowing lawyers to attend a maximum of six hours of CLE credit of the 30-hour credit requirement on the subjects of cultural competency and bias reduction, but mandate one hour of CLE credit per reporting period.

Legal Action is a non-profit law firm that provides free legal representation to low-income people in Wisconsin's lower 39 counties. We are the state's largest civil legal aid firm, and our mission is to deliver exceptional civil legal services and structural change advocacy, free of cost, to those most in need. In 2023, we worked on 11,616 cases, serving 24,403 people. Our work encompasses many practice areas including landlord-tenant law, family law, public benefits, consumer protection, tax law, municipal court tickets, mortgage foreclosure, and more. We serve clients across a spectrum of backgrounds, races, ethnicities, genders, sexual orientations, ages, religions, abilities, languages, education levels, communication styles, and geographic locations. We work in urban, suburban, and rural communities, as well as in homeless shelters, domestic violence shelters, prisons, community colleges, and neighborhoods. We are committed to providing inclusive legal services that respect the diversity of the communities we represent. We aim to identify and eliminate barriers that prevent the full success or participation of some groups. This includes recognizing and working to dismantle systems of oppression which cause inequality, like racism, sexism, classism, ableism, ageism, and homophobia.

As part of our mission, and as part of our obligation as licensed attorneys, we urge the Court to adopt a modified version of the rule proposed, mandating one hour of CLE credit in cultural competency and the reduction of bias. This would align Wisconsin's CLE rules with the American Bar Association's Model Rule for Minimum Continuing Legal Education and Comments, which recommends one mandatory hour of CLE credits "to address diversity and inclusion in the legal system to all persons regardless of race, ethnicity, religion, national origin,

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gender, sexual orientation, gender identity, or disabilities, and programs regarding the elimination of bias.”¹

The importance of training in cultural competency and the reduction of bias

We do not submit this comment as an academic exercise. At Legal Action, we have seen firsthand how our clients have faced bias in the legal system. We have represented survivors of domestic violence who are afraid to report abuse because of gender-based stereotypes and preconceived notions about how victims should present and act. We have represented LGBTQ clients who must argue that their identity does not disqualify them from parenting their own children. We have represented elderly people whose complaints of economic abuse are dismissed as confusion on the part of the client. We have represented neurodiverse clients who have difficulty testifying in court because they struggle to read nonverbal communication cues. We have represented clients in communities of color who have faced stereotypes on the individual level as well as the reverberating effects of centuries of systemic oppression such as discriminatory zoning laws, mass incarceration, and the removal of their children.

These experiences are not unique to Legal Action. Our legal system is imperfect. It produces disparate outcomes for people based on race², gender³, income⁴, disability⁵, and other aspects of identity⁶. Often, an intersection of these identities influence someone’s experience in

¹ American Bar Association, Model Rule for Minimum Continuing Education, Resolution 106 (2017), https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2017/2017_hod_midyear_106.pdf.

² Wisconsin Profile, PRISON POLICY INITIATIVE, (2024), <https://www.prisonpolicy.org/profiles/WI.html>.

³ Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. Penn. L. Rev 399 (2023) (explaining how women who have survived domestic violence improperly have their experiences dismissed by the legal system based on a failure to understand the effects of trauma and how their credibility is, as well as how their credibility is unjustly discounted based on inaccurate interpretations of their courtroom demeanor and negative cultural stereotypes); Peter Hepburn, Renee Louis & Matthew Desmond, *Racial and Gender Disparities Among Evicted Americans*, Sociological Science (2020), <https://sociologicalscience.com/articles-v7-27-649/> (showing data that women – especially Black and Latinx women – face higher eviction rates than men).

⁴ Detaining the Poor, PRISON POLICY INITIATIVE, (2016), <https://www.prisonpolicy.org/reports/incomejails.html>; *City of Grants Pass, Oregon v. Johnson*, 630 U.S. ____ (2024) (Sotomayor, J., dissenting).

⁵ Qudsiya Naqui, *Advancing Equal Access to Justice for Americans with Disabilities: Moving Towards Closing the Justice Gap on the 33rd Anniversary of the ADA* (2023), <https://www.justice.gov/atj/bl-og/advancing-equal-access-justice-americans-disabilities-moving-towards-closing-justice-gap#:~:text=From%20court%20technology%20platforms%20that,legal%20processes%20where%20most%20people%20> (citing data showing people with disabilities face numerous barriers to equal access to justice including legal barriers, information and communication barriers, physical barriers, and economic barriers); ABA Commission on Disability Rights, *Implicit Biases & People with Disabilities*, AMERICAN BAR ASSOCIATION, (Oct. 2, 2024), https://www.americanbar.org/groups/diversity/disabilityrights/resources/implicit_bias/.

⁶ E.g., Sarah Stedman, *Then They Came for Us: Access to Justice Harm and Opportunity for Our Transgender and Nonbinary Youth*, 26 SCHOLAR: ST. MARY’S L. REV & SOC. JUST. 1 (2023) (explaining how transgender and nonbinary

the legal system. Additionally, our colleagues at Legal Action and in the broader legal community have faced discrimination and been subject to biases in their workplaces and in interactions with other members of the bar.⁷ Lawyers who identify as Black, Indigenous, or persons of color, as women, as having a disability, as LGBTQIA+, or the intersection of any of these, experience hostility and discrimination in the workplace and in the legal system⁸. They are also disproportionately excluded from opportunities to access the work, the resources, and the relationships they require to succeed; as such, they have significantly higher attrition rates than other groups.⁹

Our ethical rules recognize these inequities, reminding us to “be mindful of deficiencies in the administration of justice.”¹⁰ However, our ethical obligation does not stop at mere awareness. As lawyers, we have a “special responsibility for the quality of justice.”¹¹ We are called to “seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”¹²

adolescents may avoid accessing services and addressing their needs due to fear of encountering discrimination and bias in the legal system).

⁷ Kristy D’Angelo-Corker, *Don’t Call Me Sweetheart! Why the ABA’s New Rule Addressing Harassment and Discrimination is so Important for Women Working in the Legal Profession Today*, 23 LEWIS & CLARK L. REV. 263 (2019); ABA Commission on Racial and Ethnic Diversity in the Profession, *2022 ABA Model Diversity Survey Reports*, AMERICAN BAR ASSOCIATION (2023), https://www.americanbar.org/content/dam/aba/administrative/racial_ethnic_diversity/2022-aba-report-2023.pdf; Peter Blanck, et. al., *Diversity and Inclusion in the American Legal Profession: First Phase Findings From a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 23 U. D. C. L. REV. 1 (2020), <https://www.americanbar.org/content/dam/aba/administrative/commission-disability-rights/bbi-survey-accessible.pdf>; Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear “You Don’t Look Like a Lawyer,”* HARV. BUS. REV. (2019), <https://perma.cc/X562-2TM7>; American Bar Association Commission on Women in the Profession & National Native American Bar Association *Excluded & Alone: Examining the experiences of Native American Women in the Law and a Path Towards Equity*, (2023), AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/administrative/women/2023/native-women-report-2023.pdf>; Todd A. Collins, Tao L. Dumas, & Laura P. Moyer, *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorneys*, 98 SOC. SCI. QUARTERLY 1642 (2017); ABA Commission on Women in the Profession, *Visible Invisibility: Women of Color in Law Firms*, AMERICAN BAR ASSOCIATION (2006), <https://www.americanbar.org/content/dam/aba/administrative/women/visibleinvisibility.pdf>; ABA Commission on Women in the Profession, *This Talk Isn’t Cheap*, AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/content/dam/aba/administrative/women/thistalkisntcheapreport10_23_update_final.pdf; Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 THE COLO. LAW. 45 (2016), <https://kathleennaltyconsulting.com/wp-content/uploads/2016/05/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf>; Robert L. Nelson et. al., *Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workplace*, 44 L. & SOC. INQUIRY 1051 (2019).

⁸ *Id.*

⁹ *Id.*

¹⁰ Wis. Rules of Prof’l Conduct Preamble (6).

¹¹ *Id.* at (1).

¹² *Id.* at (6).

Thus, improving our cultural competency skills and confronting our implicit biases are vital to fulfilling our professional responsibilities. Supreme Court Rule 20:1.1, for example, mandates attorneys “provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoughtfulness and preparation reasonably necessary for the representation.”¹³ Additionally, Supreme Court Rule 20:1.4 requires an attorney “reasonably consult with the client about the means by which the client's objectives are to be accomplished;” “keep the client reasonably informed about the status of the matter;” and “promptly comply with reasonable requests by the client for information.” The ABA comment to SCR 20:1.4 clarifies “client[s] should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued[.]”¹⁴ . Our clients’ cultural identities and other characteristics undoubtedly affect the way they experience the attorney-client relationship and the legal system. It impacts their expectations of their attorney and of the representation, how they communicate, how they identify their objectives, how they process information, and how they make decisions throughout the course of the representation.¹⁵ Likewise, our various cultural identities and biases affect the way we view our clients and our work. “When lawyers are unaware of how culture influences their clients’ behavior or their clients’ values, they risk substituting their own judgment for that of their clients and failing to pursue their clients’ true objectives.”¹⁶

Mandatory vs. voluntary credit

Our request to the Court to make one hour of CLE credit mandatory rather than voluntary is based upon the ubiquitousness of culture and implicit biases. Culture is, by definition, “a community’s shared set of norms, practices, beliefs, values, traditions, customs, history, and means of expression that affect (among other things) how we analyze, judge, and interpret information, behavior, and perceptions about behavior.”¹⁷ Every person is a part of multiple cultures and is influenced by those cultures in how they see the world and the decisions they make.¹⁸ “Culture is like the air we breathe – it is largely invisible and yet we are dependent on it for our own well-being.”¹⁹

¹³ Wis. Rules of Prof’l Conduct SCR 20:1.1.

¹⁴ Wis. Rules of Prof’l Conduct SCR 20:1.4, ABA Comment (5).

¹⁵ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 41-42 (2001) (explaining that “[w]hen lawyers and clients come from different cultures, several aspects of the attorney-client interaction may be implicated. The capacity to form trusting relationships, to evaluate credibility, to develop client-centered case strategies and solutions, to gather information and to attribute the intended meaning from behavior and expressions are all affected by cultural experiences.”).

¹⁶ Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L & SOC. CHANGE 367, 373 (2017).

¹⁷ ABA Implicit Bias Toolbox: Glossary (Oct. 2, 2024), AMERICAN BAR ASSOCIATION, <https://americanbar.org/groups/litigation/about/diversity/task-force-implicit-bias/glossary/>

¹⁸ Bryant, *supra* note 15, at 40.

¹⁹ *Id.*

Similarly, we all have biases. Biases are a natural consequence of the way our brains function:

The human brain excels at processing information, and it wants to process information as quickly as possible. It therefore develops schemas. Schemas are sets of mental constructs for relationships. They create generalizations and expectations about categories of objects, places, events, activities, and most importantly, people. Schemas are mental shortcuts; they are automatic and reflexive - or what some researchers call “unconscious cognition.” People use schemas in order to make sense of and navigate the incredible volume of sensory data and input encountered on a day-to-day basis.²⁰

There is significant support for the idea that implicit biases exist and affect human behavior, in our society at large and in lawyers and the legal system specifically.²¹ Evidence also shows us that we are often unware of our own implicit biases.²² In fact, people who believe themselves to be unbiased may be more susceptible to the effects of unconscious bias.²³

Thus, cultural competence is relevant to *all* attorneys and a fundamental part of fulfilling our professional responsibilities, no matter our area of practice. Moreover, cognitive science tells us that we are largely ignorant of our implicit biases, so how can we be in a position to say it is irrelevant to engage in further learning about them? The State Bar’s rationale for seeking a permissive CLE is grounded in a survey showing a majority of the attorneys in Wisconsin who responded do not support making DEIA credits mandatory. Again, whether we want to learn about cultural competency and implicit biases is largely immaterial. We are obliged to do so in order to fulfill our professional responsibilities.

In its petition, that State Bar asserts:

²⁰Latonia Haney Keith, *Visible Invisibility: Feedback Bias in the Legal Profession*, 23 J. GENDER, RACE & JUST. 315, 327 (2020).

²¹ E.g., Nicole E. Negowetti, *Navigating the Pitfalls of Implicit Bias: A Cognitive Science Primer for Civil Litigators*, 4 S. MARY’S J. LEGAL MAL & ETHICS 278 (2014); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias in the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012); L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in the Public Defender Triage*, 122 YALE L.J. 2626 (2013); Ian Weinstein, *Don’t Believe Everything You Think: Cognitive Bias in Legal Decision Making*, 9 CLINICAL L. REV. 783 (2003); Chopp, *supra* note 16; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 778 (2001) (concluding “[j]udges it seems, are human. Like the rest of us, their judgment is affected by cognitive illusions that can produce systemic errors in judgment.”).

²² Bryant, *supra* note 15 at 40.

²³ Joseph R. Betancourt, *Cross-Cultural Medical Education: Conceptual Approaches and Frameworks for Evaluation*, 78 ACAD. MED. 560, 562 (2003), Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1173-74 (2012)

Learning about the biases that hamper an attorney's ability to fairly assess another individual in both the legal and employment setting and in the delivery of legal services, working to understand the effects of bias in negatively impacting the delivery of legal services, recognizing when it is happening, and finding ways to reduce it, are all *an integral part* to upholding [the Attorney's Oath] (emphasis added).

If such learning is indeed integral for all attorneys, it follows that it should be necessary for all attorneys. The purpose of our oath isn't to provide us with optional responsibilities, if we want them. It is a mandate. We don't get to say whether cultural competence and the reduction of our biases are relevant to our practice. We've already committed to seeking greater equity in the legal system. A mandatory CLE credit in these subjects is a step toward honoring that commitment.

The Court's response to Rule Petition 22-01

A similar proposed rule came before this Court in 2022, in Rule Petition 22-01 "In the Matter of Diversity, Equity, Inclusion, and Access Training for Continuing Legal Education." The Court denied the petition after a closed administrative conference. In her concurrence, Justice Rebecca Grassl Bradley, joined in full by Justice Roggensack, and in part by Chief Justice Ziegler, engaged in a lengthy criticism about DEIA courses and those who support them. This current Rule Petition may prompt a similar response and thus we write here in anticipation of those arguments.

Justice Bradley's concurrence accused DEIA initiatives of "presuppos[ing] the existence of certain 'universal values,' which are not actually universally shared." This proposed Rule Petition does no such thing. Insofar as it implicates "universal values," it is doing nothing more than recognizing the values we have all already agreed to as Wisconsin attorneys.

The concurring opinion took particular issue with the possibility of a mandatory DEIA credit, stating it would "impose group think on attorneys" and require that Wisconsin-licensed attorneys "subscribe[] to an illiberal political ideology." The ubiquity of culture and the existence of cultural differences are not opinions or viewpoints. They are quite simply facts. The corresponding need to learn about implicit biases is also not a political ideology. As described at length above, it is a part of our ethical duty. This is not and does not have to be a political issue. All attorneys in Wisconsin – regardless of where they fall on the political spectrum – have a multicultural identity and must participate in cross-cultural communication in their practice of law.

Acknowledging cultural differences and confronting biases may be uncomfortable for some of us. It will likely be uncomfortable for all of us. Discomfort is part of growth and learning beyond preconceived notions. Unfortunately, this discomfort can prompt other negative reactions: defensiveness, anger, denial, projection, and minimalization are common responses to DEIA-related initiatives.²⁴ These reactions, however, are counterproductive to our shared goal of

²⁴ See Robin DiAngelo, *White Fragility*, 3 INT'L J. CRITICAL PEDAGOGY 54 (2011).

a more just, equitable, and accessible legal system because they prevent us from engaging in the work necessary to achieve this goal. Perhaps it would help us to conceive of our own biases under Dr. Beverly Daniel Tatum's analogy of cultural prejudices as smog:

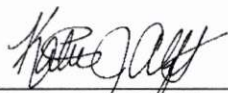
Sometimes it is so thick it is visible, other times it is less apparent, but always, day in and day out, we are breathing it in. None of us would introduce ourselves as "smog breathers" (and most of us don't want to be described as prejudiced), but if we live in a smoggy place, how can we avoid breathing the air?²⁵

Dr. Tatum concludes her analogy: [t]o say that it is not our fault does not relieve us of responsibility, however. We may not have polluted the air, but we need to take responsibility, along with others, for cleaning it up.²⁶

Failing to educate ourselves about cultural competency and bias violates our ethical duties and harms our clients, our colleagues, our systems of justice, and ultimately the integrity of our profession. For these reasons, Legal Action of Wisconsin, Inc. supports the petition's recommendation to create this new category of CLEs but asks the Court to amend the proposed rule and require one hour of the credit be mandatory.

Sincerely,

LEGAL ACTION OF WISCONSIN, INC.



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²⁵ Beverly Daniel Tatum, *Why Are All The Black Kids Sitting Together in the Cafeteria?: And Other Conversations About Race* 86 (3rd ed. 2017).

²⁶ *Id.*