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FILED

Clerk of the Supreme Court
Attention: Deputy Clerk-Rules
P.O. Box 1688
Madison, WI 53701-1688
Clerk@wicourts.gov

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CLERK OF SUPREME COURT
OF WISCONSIN

Re: Comments opposing Rule Petition 24-04.

Dear Chief Justice & Justices of the Wisconsin Supreme Court:

On behalf of the Wisconsin Institute for Law & Liberty, Inc. (WILL), we write to oppose Rule Petition 24-04. The State Bar of Wisconsin seeks to create a new Continuing Legal Education (CLE) category for so-called “cultural competency and reduction of bias training,” commonly known as Diversity, Equity, and Inclusion (DEI) training. The proposed rule would allow attorneys to use up to six hours of DEI training toward their biannual 30-hour CLE requirement.

This Court should deny the petition. The Bar has not presented evidence that DEI CLE will improve the legal profession.

At a minimum, this Court should clarify phrases in the proposed rule, including “reduction of bias” and “within the legal system.” Without further elaboration, these phrases will cause issues for the Board of Bar Examiners.

Alternatively, WILL proposes that this Court reduce the required CLE hours during each reporting period from 30 to 24. An attorney can then use the six hours in whatever way he or she thinks is best. If DEI training is valuable, attorneys will so recognize and use the extra six hours accordingly.

I. DEI training does not work, so this Court should deny the petition.

This Court should deny the petition. As a preliminary matter, this Court does not create a rule—or even allow a rule to continue to exist—just because it might address a purported problem, even if many other states have similar rules (which is essentially the Bar’s argument—other states do it, so Wisconsin should too). For example, this Court is closing the Business Court Pilot Project

even though some evidence indicates it has been helpful and even though similar projects exist in over half of the states. *See generally* Letter from WILL, to the Wisconsin Supreme Court, *Support for the Business Court Pilot Project* (Sept. 9, 2024), https://www.wicourts.gov/supreme/docs/1605_croycomments.pdf.

DEI training has not been proven effective even in fields where it has long been standard practice. *E.g.*, Nao Hagiwara et al., *The Nature and Validity of Implicit Bias Training for Health Care Providers and Trainees: A Systemic Review*, 10 *Sci. Advances* 1, 6 (2024) (“Does implicit bias training work? Should health care educational institutions and organizations as well as the government continue to spend their efforts on it? Our conclusion based on the findings from the current systematic review is it is premature to answer these questions. There is little scientific evidence to support that implicit bias training improves the quality of patient care . . .”). In fact, mandatory DEI training has been shown to increase bias. Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, *Harv. Bus. Rev.* (2016) (“As social scientists have found, people often rebel against rules to assert their autonomy. Try to coerce me to do X, Y, or Z, and I’ll do the opposite just to prove that I’m my own person. In analyzing three decades’ worth of data from more than 800 U.S. firms and interviewing hundreds of line managers and executives at length, we’ve seen that companies get better results when they ease up on the control tactics.”), <https://hbr.org/2016/07/why-diversity-programs-fail>. The Bar has not presented any evidence that DEI training will improve the legal profession.

DEI training often lacks quality control, which may explain why it has not been proven effective. Notably absent from anything submitted by the Bar is exemplary course materials, such as a model syllabus. It also does not explain how the Board of Bar Examiners will evaluate whether a particular DEI training is creditworthy. Will the Board of Bar Examiners need to hire a DEI “expert”? Notably, the Board of Bar Examiners is not institutionally positioned to judge whether a DEI training meets any particular standard, and just about anyone can get a DEI credential. *See* *Am I Racist?* (Daily Wire Studios & Digital Astronaut 2024) (chronicling political commentator Matt Walsh’s journey as he became a certified DEI expert).

The Bar indicates that DEI CLE may be similar to DEI training that has been provided by the University of Wisconsin Law School; however, it does not discuss the scandal at the law school earlier this year. Students were forced to attend a DEI training, answer the following survey questions, and fill out the worksheet below. It was weird, to say the least. *See generally* M.D. Kittle, ‘*Re-Orientation*’ *Asks UW Law Students to Share Racial Slurs and Confess ‘How*

Deep Racism Goes in My Life, Federalist (Jan. 23, 2024), <https://thefederalist.com/2024/01/23/re-orientation-asks-uw-law-students-to-share-racial-slurs-and-confess-how-deep-racism-goes-in-my-life/>.

 **Mentimeter**

What words, phrases, stereotypes, slurs, words of bias, etc. do we know for Black folks?

Short answers are recommended. You have 200 characters left.

200

You can submit multiple responses



TELL THE TRUTH
Pick two to answer for yourself

1. A racist belief I am struggling with
2. A time I said/behaved in a racist way
3. My interactions with BIPOC have honestly been ...
4. I feel ... talking about race because
5. I learned ... about race/racism
6. I see how deep racism goes in my life when ...
7. I am afraid of ... with race

NOTES & INTERVENTIONS

I am personally responsible for addressing the racism that comes from me, my loved ones, and my community.

I'll use ...

I'll use ...

My next step ...

INTERPERSONAL -ISM INTERVENTIONS
Created by Joseph Oteng - @dijoteng

Goal is to empower people to be active anti-rs. We are obligated to say and do something EVERY SINGLE TIME we are confronted with -isms, prejudice, bias, violence, etc. We are impacted. We must intervene in some way.

ANTI-RACISM INTERVENTION STEPS

1. Notice the Incident
Prejudiced words, attitudes, or behaviors.
2. Name the Problem
That language or action was racist.
3. Assume Personal Responsibility
It's not right. I must address it.
4. Choose an Intervention Strategy
Gauge safety - will intervene directly, indirectly, or from a distance.
5. Take Action
Addressed the harm and its impact.

Adapted from Lough University Student Office, Racialism Interventions

ANTI-RACISM INTERVENTIONS	DIRECT ADDRESS THE AGGRESSOR	INDIRECT ADDRESS THE TARGET OF HARM	DISTANCED ADDRESS THE HARM
	<ul style="list-style-type: none"> Gauge your safety, approach aggressor <p>ACTION</p> <ul style="list-style-type: none"> Get between the aggressor & target Jump in to the conversation <p>SAY</p> <ul style="list-style-type: none"> What you said/rd was racist Your racist language or behavior is unacceptable Also, you need to stop 	<ul style="list-style-type: none"> Scope out the situation, approach target w/ empathy <p>ACTION</p> <ul style="list-style-type: none"> Move closer to target Ask to take and/or touch Report incident <p>SAY</p> <ul style="list-style-type: none"> That was racist. That's not okay Are you okay? How can I best care for you? What do you need to feel safe or supported here? What steps/struc can we take from that? 	<ul style="list-style-type: none"> Pay attention & share the impact on you personally, harm impact <p>ACTION</p> <ul style="list-style-type: none"> Ask questions Share how you were harmed by the incident Design your own healing/remedies <p>SAY</p> <ul style="list-style-type: none"> I am hurt by what was said or done What do you mean by that? How/where did you learn that? Tell me about that opinion/action Take action/reach target/undermines against group

II. At a minimum, this Court should clarify phrases in the proposed rule.

The lack of clarity in the proposed rule is also deeply troubling. See generally *In re Diversity, Equity, Inclusion, & Access Training for Continuing Legal Educ.*, No. 22-01, ¶20 (Wis. July 13, 2023) (Rebecca Grassl Bradley, J., concurring) (overviewing the extraordinary rejection of a CLE addressing

“transgender issues” from a “Roman Catholic perspective” in Minnesota). If the proposed rule were adopted, a host of new CLEs may be offered that have not been anticipated. Does a six-hour Bible study improve “cultural competency”? What about a watch party for a film by political commentator Matt Walsh, such as *Am I Racist?* or *What Is a Woman?*

The phrase “reduction of bias” should be clearly defined to emphasize that reducing bias includes eliminating stereotypes, such as the stereotype that all individuals within certain racial groups are disadvantaged or marginalized or that other racial group members have privileges or benefits because of their race. Stereotyping was addressed directly by the United States Supreme Court just last year. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 220 (2023) (criticizing as unconstitutional the “pernicious stereotype that ‘a black student can usually bring something that a white person cannot offer’”).

Similarly, the phrase “within the legal system,” without further elaboration, is likely to create issues for the Board of Bar Examiners. In a CLE about the First Amendment, the *legal* part of *legal* education is self-explanatory. The same cannot be said for most DEI trainings. This Court should clarify that a training must be expressly made for attorneys and taught by someone who has legal expertise.

III. This Court should reduce the required CLE hours from 30 to 24.

Alternatively, this Court should reduce the required CLE hours from 30 to 24. No evidence indicates that CLE, of any kind, improves the legal profession. Rima Sirota, *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, 36 Notre Dame J.L., Ethics & Pub. Pol’y 1, 2 (2022) (“[N]o evidence-based reason has emerged to support the conclusion that CLE bears *any* relationship—much less a causal one—to better lawyering.”); David D. Schein, *Mandatory Continuing Legal Education: Productive or Just PR?*, 33 Notre Dame J.L., Ethics & Pub. Pol’y 301, 312, 315, 318 (2020) (“MCLE has had no impact on the number of attorneys who have been disciplined by their respective state bars. . . . [T]here is significant anecdotal evidence that MCLE has no impact on reducing malpractice claims. . . . If MCLE was designed to improve the image of attorneys with the public, this objective has not been met.”).

Indeed, many attorneys feel that the opportunity cost associated with mandatory CLE is problematic. Indeed, the justices of this Court are seemingly cognizant of this cost, having exempted themselves from Continuing Judicial

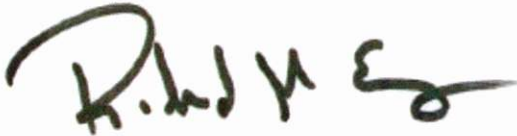
Education. SCR 32.001. For context, four states and the District of Columbia do not mandate CLE. *See States with No MCLE Requirements*, Defender Servs. Off. (last visited Oct. 4, 2024), <https://www.fd.org/cle-information-center/states-no-mcle-requirements>.

Thirty hours is enough time for an attorney to handle an OWI case, most misdemeanor cases, or two probation or parole violations. Nicholas M. Pace et al., *National Public Defense Workload Study*, RAND (July 27, 2023), https://www.rand.org/pubs/research_reports/RRA2559-1.html#:~:text=Key%20Findings&text=High%2D%20and%20low%2Dseverity%20misdemeanor,22.3%20and%2013.8%20hours%2C%20respectively. At a time when some counties in Wisconsin do not have a single private bar attorney, this Court should be trying to maximize attorney efficiency. Steven Walters, *Attorney Shortage Worst in Wisconsin's Northern Counties*, Isthmus (June 24, 2024), <https://isthmus.com/news/news/attorney-shortage-worst-in-wisconsins-northern-counties/>.

While this Court may be hesitant to eliminate mandatory CLE entirely, it should considering reducing the 30-hour requirement to 24. If an attorney wants to use the six hours of extra time that he or she gets back to do DEI training, great. If an attorney would rather do something else, fine. As the Bar says, “attorneys are in the best position to determine the education necessary to be competent in their own field.” Bar’s Memo at 7. Reducing the number of hours achieves the Bar’s stated goal of maximizing attorney choice/freedom while allowing this Court to collect data on whether mandatory CLE is beneficial.

This Court should deny the petition. Alternatively, it should reduce the number of required CLE hours.

Respectfully,



Rick Esenberg
President & General Counsel



Danial Lennington
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Skylar Croy
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