



WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455) | Fax 414-727-6385 | www.will-law.org

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Sent Electronically

Roberta F. Howell
Partner
Foley & Lardner LLP
rhowell@foley.com
Care of Larry Martin
Executive Director
State Bar of Wisconsin

Re: The State Bar of Wisconsin's Plan to Make DEI CLE Mandatory.

Dear Attorney Roberta F. Howell:

We, the Wisconsin Institute for Law & Liberty, Inc., write to oppose the State Bar of Wisconsin's efforts to mandate Diversity, Equity, and Inclusion (DEI) Continuing Legal Education (CLE). The Bar's CLE Committee is scheduled to meet on January 23, 2024, and this letter is sent ahead of that meeting to inform the Bar that we will forcefully oppose any further efforts to implement DEI CLE. These efforts will be combated in the court of public opinion and, if necessary, the court of law.

At bottom, DEI CLE would create many problems. DEI trainings generally reflect a far-left partisan ideology, which would supplant equal protection under the law with equal outcome. *See In re Diversity, Equity, Inclusion, & Access Training for Continuing Legal Educ. (First DEI Rule Petition)*, No. 22-01, ¶5 (Wis. July 13, 2023) (Rebecca Grassl Bradley, J., concurring); *see also Price v. Valvoline, LLC*, 88 F.4th 1062, 1068 (5th Cir. 2023) (Ho, J., concurring in the judgment) ("Cases like this reflect the growing concern that diversity has increasingly become a code word for discrimination."). The Bar's own DEI trainings have advocated for illegal race-based affirmative action and attacked the notion that the United States Constitution should be interpreted in a "colorblind" manner. Jeff M. Brown, *Diversity Counsel Program: 'There's a Space for You Here,' Inside Track* (Dec. 7, 2023), <https://www.wisbar.org/NewsPublications/InsideTrack/Pages/Article.aspx?Volume=15&Issue=23&ArticleID=30151>. Contrary to these DEI trainings, the United States Supreme Court has repeatedly held that no one should be judged based on his or her race, sex, or other immutable characteristics. *E.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., (SFFA)*, 600 U.S. 181, 223–24 (2023). Additionally, DEI CLE would foster a hostile work environment because such trainings would inevitably endorse a polar opposite view: as one district court recently summarized, DEI trainings often "discusse[s] racial issues in essentialist

and deterministic terms—ascribing negative traits . . . as flowing inevitably from . . . race” *De Piero v. Pennsylvania State Univ.*, No. 23-2281, slip op., at 14 (E.D. Penn. Jan. 11, 2024), <https://storage.courtlistener.com/recap/gov.uscourts.paed.610617/gov.uscourts.paed.610617.31.0.pdf>.

The time has come for the Bar’s “virtue signal[ing]” to end. *See First DEI Petition*, No. 22-01, ¶37. Attorneys already have hundreds of options if they desire to voluntarily pursue CLE on DEI subject matter. *Id.*, ¶34. The Bar used to sell an expensive on-demand CLE training called “Allyship – The Power of Diversity & Inclusion in Your Practice AMC 2022.” *Id.*, ¶15. Among other ridiculousness, this DEI training taught attorneys to view nearly everything through a race-centric worldview: for example, the instructor said that “23andMe” and “ancestry.com”—websites that help people learn about their ancestry—are “a white people thing.” *Id.*, ¶16. The Bar will make a lot of money if it succeeds in getting DEI CLE mandated; however, the Bar will not improve the quality of legal services. *Id.*, ¶37. Perhaps for this very reason, about half of Bar members “strongly disagree” with mandating DEI CLE—a point the Bar’s leaders have refused to address. *Letter from Kevin Connelly, Attorney, to Justice Rebecca Grassl Bradley* (July 20, 2023), <https://www.wicourts.gov/scrules/docs/2201-connelly2.pdf>, *revised*, <https://www.wicourts.gov/scrules/docs/2201-connellyrevised.pdf>. The time has come for the Bar to stop wading into controversy.

I. DEI CLE would be inconsistent with basic constitutional principles and create a hostile work environment.

For several reasons, the Bar should cease its efforts, but most importantly, DEI CLE would be inconsistent with basic constitutional principles (e.g., colorblindness) and create a hostile work environment. State and federal employment law, such as Title VII, prohibit employers from fostering an environment of hostility or offensiveness toward a particular race or sex. *See Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 673 (7th Cir. 1993). DEI trainings can create liability because they tend to systematically place “[t]he badge of inequality” upon whatever arbitrarily-defined group happens to be disfavored. *See Moore v. United States Dep’t of Agric.*, 993 F.2d 1222, 1224 (5th Cir. 1993). As the Seventh Circuit has explained, “courts take a realistic view of the circumstances” and recognize that business leaders are “under pressure” from “diversity” initiatives to engage in discrimination. *Preston v. Wisconsin Health Fund*, 397 F.3d 539, 542 (7th Cir. 2005); *see also Price*, 88 F.4th at 1068 (“Courts have long worried that diversity efforts can lead to discrimination in the workplace.”). In some cases, “diversity” has become the “rationale of convenience to support racially discriminatory . . . programs.” *Price*, 88 F.4th at 1068 (quoted source omitted). More specifically, the curriculum preached in most DEI trainings harasses and stereotypes individuals on the basis of various immutable characteristics, including race—in the words of one scholar, their curriculums start from the premise that “human beings are defined by their skin

color, sex, and sexual preferences.” Heather Mac Donald, *The Diversity Delusion: How Race and Gender Pandering Corrupt the University and Undermine Our Culture 2* (2018). Harassment and stereotyping threaten “the dignity of persons.” *Powers v. Ohio*, 499 U.S. 400, 402 (1991). Everyone must be treated as an “individual[],” rather than a mere “component[] of a racial . . . [or] sexual . . . class.” *SFFA*, 600 U.S. at 223; *see also United States v. Virginia*, 518 U.S. 515, 516 (1996) (explaining “full citizenship” presupposes an “equal opportunity to aspire, achieve, participate in and contribute to society based on . . . individual talents and capacities”).

The Bar’s DEI trainings are illustrative. As discussed in a legal action filed against several officers of the Bar, the Bar recently held a “Diversity Counsel Program,” at which a “race-centric worldview” was promoted. <https://will-law.org/wp-content/uploads/2023/12/1-2023-12-19-Verfied-Complaint.pdf>. One speaker, a circuit court judge, complained about having to look at portraits of “white men” in the courthouse at which she worked. Brown, *Diversity Counsel Program*. Another speaker instructed employers to violate the law by making hiring decisions based on skin color and sexual orientation. *Id.* (explaining a speaker said the audience should ask themselves: “How many board members of color do we have? How many board members who identify as LGTBQIA+ do we have?”). A third speaker attacked the very notion that the United States Constitution should be interpreted in a colorblind manner. *Id.* (“The notion of a colorblind [C]onstitution, propounded by . . . [the] dissent in *Plessy v. Ferguson* . . . is a non-sequitur . . .”).

In another Bar DEI training, which was actually approved for CLE credit, the instructor taught the audience about “nigrescence,” which he defined as “to return to the state of black.” *First DEI Petition*, No. 22-01, ¶17. The instructor, a black DEI consultant with no legal experience, first attacked 23andMe and ancestry.com and then held up “a clear cup of water” and said to imagine it was filled with “pure black paint.” *Id.* He then said to imagine that someone added white paint, such that the paint inside the cup was no longer “pure black.” *Id.* He told the audience:

So in a chemistry lab, I would seal this and put it in one of those machines, and it would spin it super fast. . . . The process of pulling the white out is called nigresing. I would be returning this to the state of black. . . . Can people do that? . . . I’m going to ask you, can I nigrese?

Id. The instructor next explained his personal background, which he said made him “no longer pure black.” *Id.* He emphasized that he “present[s]” as black but in reality, he was raised by “white foster families.” *Id.*

In critiquing this DEI training, Justice Rebecca Grassl Bradley explained that the instructor’s “rhetoric promotes an ‘us verse them’ mindset pervading DEI[]. The chemistry metaphor paints a stark line between [b]lack and [w]hite—hardly a ‘safe’ lecture for an individual who is both.” *Id.* She continued, explaining, “DEI[] upends the founding principle of pluribus unum, dividing people into racial categories and

silencing defenders of pluralism.” *Id.*; see also *SFFA*, 600 U.S. at 278 (Thomas, J., concurring) (explaining the disputed DEI talking point that black people “are all inexorably trapped in a fundamentally racist society, with the original sin of slavery and the historical subjugation of black Americans still determining our lives today”).

Legal actions are being commenced across the nation to combat DEI trainings analogous to those the Bar would like to see expanded in Wisconsin. See generally Emily Cousins, *I Was Just White-Shamed: Employee Sues over Fallout from Diversity Training*, ALM | LAW.COM (Jan. 5, 2024) (summarizing a legal action filed by a public school teacher who was forced to attend a “white-bashing” DEI training), <https://www.law.com/ctlawtribune/2024/01/05/i-was-just-white-shamed-employee-sues-over-fallout-from-diversity-training/>; Jody Godoy & Disha Raychaudhuri, *Some Companies Alter Diversity Policies After Conservatives’ Lawsuit Threat*, Reuters (Dec. 18, 2023) (explaining companies are modifying DEI trainings because they “constitute illegal discrimination and a breach of the directors’ duties to investors” and shareholders have threatened to sue), <https://www.reuters.com/business/some-companies-alter-diversity-policies-after-conservatives-lawsuit-threat-2023-12-18/>.

Just over a week ago, the Eastern District of Pennsylvania ruled in one such legal action. *De Piero*, No. 23-2281. The Honorable Wendy Beetlestone, who was appointed by a Democrat, explained that the plaintiff, a white man, was a university professor. *Id.* at 1. His department regularly held discussions about “white privilege,” “white supremacy,” “antiracism,” and similar DEI topics. *Id.* at 3, 5. Much like the Bar’s recent Diversity Counsel Program, these DEI trainings “attacked . . . colorblindness . . .” *Id.* at 3. One such training was even titled, “The Myth of the Colorblind Writing Classroom: White Instructors Confront White Privilege in Their Classroom.” *Id.* at 5. The plaintiff alleged that these trainings “demean[ed]” him and other white faculty “on the basis of race,” thereby creating a hostile work environment. *Id.* at 13. As Judge Beetlestone summarized, the plaintiff claimed he had been forced “to attend conferences and trainings that discussed racial issues in essentialist and deterministic terms—ascribing negative traits to white people . . . as flowing inevitably from their race . . .” *Id.* at 14. The judge concluded that the plaintiff had stated a claim for hostile work environment based on race. *Id.* at 16.

In summary, the Bar will create liability—if not for itself, then for others—by its continued promotion of DEI initiatives. Whatever motives may be behind these efforts, the Bar cannot expect to reduce bigotry by teaching bigotry. *Cf. SFFA*, 600 U.S. at 206 (majority op.) (“Eliminating racial discrimination means eliminating all of it.”). Not only will the Bar fail to reduce bigotry, but it will create hostile work environments for many of its members.¹

¹ The Bar’s leadership, and potentially its members, may be personally liable for any mismanagement because the Bar is an unincorporated association. Notably, the Bar is not registered with the Wisconsin Department of Financial Institutions. See *Search Corporate Records*, Wis. DFI,

II. The Bar's efforts are about virtue signaling, not problem solving.

Besides issues of liability, the Bar should save itself from further embarrassment by immediately ceasing its efforts to mandate DEI CLE. The Bar has already lost a lot of credibility by pushing DEI initiatives.

The Bar's efforts date back years, and its two-step plan is now well known: first, persuade the Wisconsin Supreme Court to adopt a rule authorizing voluntary DEI CLE, and second, use that new rule as precedent to make DEI CLE mandatory. *First DEI Rule Petition*, No. 22-01, ¶¶29–30. The plan's origins appear to trace back to at least May 2020, when a police officer in Minneapolis, Minnesota killed a man. *Id.*, ¶24. The man was black, and, in the aftermath, the Bar endorsed the Black Lives Matter movement, which has, among other things, called to defund the police and expel Republican members of Congress for purportedly being “white supremacist[s].” *Id.*, ¶¶26–28. Around this time, the Bar also started a so-called Racial Justice Task Force, a stated goal of which was to “advance[e] a proposal that allows . . . Bar members to earn CLE credit for attending . . . training related to bias and DEI[] and [to] encourage[e] all members to take such training, including by advancing a petition to make such CLE mandatory” *Id.*, ¶29 (quoting *Racial Justice Task Force Report and Recommendations: Creating a More Diverse and Equitable Legal System* 4 (2021), <https://www.wisbar.org/SiteCollectionDocuments/News/Racial%20Justice%20Task%20Force%20Report-Approved.pdf>). The Task Force came up with the plan: file two rule petitions in sequence, first asking for voluntary DEI CLE, then asking for it to be mandated. *Id.* (quoting *Racial Task Force Report*, at 7).

The Board of Governors acted on these recommendations in June 2021. *Id.*, ¶30. The meeting minutes remove any doubt about the Bar's ultimate goal:

Past President Kastner moved to amend the agenda to add as a discussion item the topic of mandatory diversity, equity, and inclusion (DEI) CLE and place it on the agenda

She said she added this discussion item to the agenda to give leadership an opportunity to discuss the various things that the Bar plans to do to make sure that we garner support for a proposal for mandatory DEI CLE as well as explain the strategy behind the decisions being made.

<https://www.wdfl.org/apps/corpsearch/search.aspx>. Ironically, the Illinois State Bar Association has an expired registration. *Illinois State Bar Association*, Wis. DFI, <https://www.wdfl.org/apps/corpsearch/Details.aspx?entityID=I021922&hash=839398768&searchFunctionID=a1fd49be-1b27-4038-90c6-1982468c5768&type=Simple&q=state+bar>. While sometimes the Bar claims it is a state agency, its status as such is disputable. For example, the Bar is registered as a private entity for state lobbying, not as a state agency. See <https://lobbying.wi.gov/Who/PrincipalInformation/2023REG/Information/9661?tab=Profile>.

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Mandatory CLE on Diversity, Inclusion and Bias Discussion.

Past President Kastner prefaced the discussion by saying the State Bar leadership was committed to figuring out the best way to make sure that all diversity, equity and inclusion (DEI) training was approved for CLE first and then figure out the best way to make it mandatory. She asked governors to consider the importance of laying sufficient groundwork before submitting a proposal for mandatory DEI CLE, because without doing the groundwork, the petition would fail. She felt there was sufficient groundwork and support for DEI to be included as CLE and with that victory, work could continue toward mandatory DEI CLE. . . .

President-elect Daniels stated that she made the motion at the Executive Committee meeting to move forward with a petition requesting that members attending DEI courses receive credits that would be counted as credits towards their CLE requirement because she believed this needed to be the first step in the process of making DEI mandatory CLE

Atty. Yang . . . said . . . he was asking that a governor consider making an amendment to the main motion that would ensure that a vote on DEI CLE was only a strategic step toward the main goal of mandatory DEI CLE and that there would be a report related to this issue at every Board meeting.

President-elect Daniels moved to amend the main motion to add that the president-elect be directed to form a task force that will study and collect data and information in support and draft language for diversity, equity and inclusion credits to be mandatory for all members of the . . . Bar . . . and the task force shall report quarterly to the Board. . . . The motion to amend the main motion passed

The main motion as amended read as follows: Direct the . . . Bar CLE Committee to prepare a petition to the . . . Court to come back to the Board of Governors for approval that will allow DEI CLE to be approved for credit Further, the president-elect be directed to form a task force that will study and collect data and information in support and draft language for diversity, equity and inclusion credits to be mandatory for all members

Minutes: Board of Governors Virtual Meeting, at 2, 6–7 (June 9, 2021).

The Bar began to implement the plan in 2022 by filing a rule petition with the Wisconsin Supreme Court, in which the Bar disingenuously purported that it wanted

to give attorneys more CLE options by having the Court authorize voluntary DEI CLE. *See generally First DEI Rule Petition*, No. 22-01. The Bar did not inform the Court of its ultimate goal: mandatory DEI CLE, which would restrict attorneys' academic freedom. *Id.*, ¶31. Incredibly, the Bar took this more-options argument so far as to suggest that attorneys should be able to complete "all or nearly all" required CLE by attending DEI training. *Id.* Yet, the whole time, the Bar really wanted to limit attorney freedom by having the Court mandate that attorneys attend such training. *Id.*

The Bar also did not cite any empirical evidence that bias, assuming it exists within the legal profession, can be reduced through one-off DEI CLE trainings. *Id.*, ¶36. When the Bar submitted the rule petition, it did not cite any social science research in its supporting memorandum—or address a mound of social science research indicating DEI training does not work. Memo. Supp., *First DEI CLE Petition*, <https://www.wicourts.gov/supreme/docs/2201memo.pdf>. To the extent someone holds, e.g., racist views, the very notion that those views can be changed by a few hours of training belies common sense—especially when that training normally consists of a lecture by someone with no serious background in psychology or neuroscience. Attorney Kevin Connelly, in his recent letter to the Bar, noted studies that have found DEI training "counterproductive." We will not repeat his thorough analysis but simply note that the CLE Committee cannot legitimately ignore his concerns, which we share.

Thankfully, in July 2023, the Court rejected the rule petition as meritless, without even holding a public hearing, and Justice Rebecca Grassl Bradley wrote a thorough concurring opinion, which exposed the Bar's plan. *Id.*, ¶3.

Afterward, Attorney Connelly, acting as a whistleblower, forwarded an email he acquired to the Court, in which a Bar leader had stated, during the pendency of the rule petition: "As the co-chair for the task force on mandatory DEI[] CLE's, we are waiting to hear back on this petition to make them credit worthy before we submit a petition to make them mandatory. Hopefully a strong show of support for credit worthiness will help with the petition for making them mandatory." *Letter from Connelly*. Troublingly, Attorney Connelly also informed the Court that he had obtained "secondhand" the results of a survey that showed about half of Bar members "strongly disagree" with mandating DEI CLE. *Id.* Not only did the Bar not share this survey with the Court, but it had refused to turn over the survey results to Attorney Connelly, even though he is compelled to be a dues paying member of the Bar. *Id.*

The Court's order should have ended this plan; however, the Bar's President, almost as soon as the order issued, directed the Bar's CLE Committee to reconsider the matter. *Minutes: Board of Governors Meeting* (Sept. 2023). The Board of Governor's 2023 September meeting minutes document that the President directed the Committee "to take a deep dive on the topic He asked that the [C]ommittee come back to the Board with a recommendation as to next steps related to this issue."

Id. Unfortunately, the Board did not post its September meeting minutes on the Bar’s website until just a few weeks ago—a delay of about four months. The Board met in December; however, the December meeting minutes remain unposted. This lack of transparency is unacceptable.

The way in which the Bar has conducted itself in regards to DEI CLE is unbecoming and calls into question why attorneys are forced to associate with and financially support the Bar. The Bar must do better.

We will not allow the Bar to destroy the “political independence of Wisconsin lawyers,” as one United States Supreme Court justice long ago predicted the Bar would. *See Lathrop v. Donohue*, 367 U.S. 820, 874 (1961) (Black, J., dissenting). As noted in one article, DEI CLE “is . . . a means to harass and drive from the profession all dissenters, by requiring many participants to sit through what they will undoubtedly consider hostile propaganda.” David Randall, *Wokeness Is Creeping into Continuing Legal Education*, James G. Martin Ctr. (Feb. 17, 2023), <https://www.jamesgmartin.center/2023/02/wokeness-is-creeping-into-continuing-legal-education/>. If the Bar continues down this path, we will fight it every step of the way.

Sincerely,

/s/ Rick Esenberg (WI Bar No. 1005622)

/s/ Daniel P. Lennington (WI Bar No. 1088694)

/s/ Skylar Croy (WI Bar No. 1117831)

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