THE EQUAL PROTECTION PROJECT
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May 12, 2023

Via Email (dsaunders@courts.ri.gov)

Debra Saunders
Clerk of the Supreme Court
Rhode Island Supreme Court
Licht Judicial Complex
250 Benefit Street
Providence, RI 02903

Re: Proposed Amendments to Article IV, Rule 3 of the Supreme Court Rules on Mandatory Continuing Legal Education

Dear Ms. Saunders,

I have been a member in good standing of the Bar of the State of Rhode Island since 1994. I submit this memorandum individually and in my capacity as President of the Rhode Island-based Legal Insurrection Foundation (LIF) and its Equal Protection Project (EPP)(EqualProtect.org),[1] in opposition to proposed amendments to Article IV, Rule 3 of the Supreme Court Rules on Mandatory Continuing Legal Education (MCLE).

In an Order dated April 14, 2023, the Court invited "[a]ny member of the bar interested in offering comment [to] do so in writing by submitting a memorandum containing their comment

[1] I am also a Clinical Professor of Law at Cornell University Law School, but this letter is not submitted in that capacity or on behalf of the law school.

to the Clerk on or before Friday, May 12, 2023."[2] I submit these comments because adding *mandatory* Diversity, Equity, and Inclusion (DEI) programing to the MCLE requirement is not justified given the highly politicized nature of DEI and could create the appearance that the Court is imposing an ideological litmus test on the Bar on a subject that is ill-defined and hotly disputed.

I do not oppose Bar members being able *voluntarily* to take DEI programming that otherwise qualifies for MCLE credit. There already are many such programs available voluntarily.[3] This mandatory versus voluntary distinction is critical in my view given the public debate around DEI.

Background on DEI Problems and Controversies

LIF is a Rhode Island tax-exempt charitable corporation that promotes and educates the public, among other things, on the protection of constitutional rights. LIF has three main projects – the Legal Insurrection (legalinsurrection.com) politics and law website founded in 2008; CriticalRace.org, launched in February 2021 to document Critical Race Theory and its variants, such as DEI, in academia; and EPP, launched in February 2023, which is devoted to the fair treatment of all persons without regard to race or ethnicity, and the guiding principle that there is no "good" form of racism, and that the remedy for racism never is more racism.

EPP's guiding principle reflects both federal and state law. The Fourteenth Amendment mandates that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV § 1. Title VI of the Civil Rights Act of 1964 mandates that "[n]o person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

The United States Supreme Court has long recognized this law. As far back as *Plessy v. Ferguson*, Justice Harlan's famous dissent stated that "[o]ur Constitution is color-blind." 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In more modern times, the Court abolished racial school segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954), overturning *Plessy*, and since then has required all "government actor[s] subject to the Constitution [to] justify any racial classification subjecting [a] person to unequal treatment under the strictest of judicial scrutiny." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). This is because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people." *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 309 (2013) (quoting *Rice v. Cayetano,* 528 U.S. 495, 517 (2000)).

The law of Rhode Island and this Court's rulings mirror federal law. See, e.g., Rhode Island Const. art. I, § 2 (1988); 28 R.I. Gen. Laws § 28-5-2, et seq.; 28 R.I. Gen. Laws § 28-5-

[2]https://www.courts.ri.gov/Courts/SupremeCourt/SupremeMiscOrders/Supreme_Court_Order_Seeking_Public_Comment_on_Amendts_toArt_IV_Rule%203_(MCLE).pdf
[3] https://ribar.inreachce.com/SearchResults?searchType=1&category=5748f044-befa-4fd8-bf5f-3bbd38142453

7(1)(i): *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992)("[T]he constitutional amendment that became art. 1, sec. 2, was passed to bring Rhode Island equal-protection law on par with federal equal-protection law").

DEI itself is an ideological viewpoint which measures racial equality based on group outcomes, rather than individual treatment. Proponents of DEI often don't recognize that DEI is an ideological group-identity choice. But it is. Our viewpoint is that as long as each individual is treated fairly without regard to race (or other protected attributes) then group outcomes don't matter. By adopting the DEI approach to mandatory CLE training, the Court would be adopting one side of an ideological battle, and a side we suggest is not consistent with Rhode Island or federal equal protection law.

The DEI identity group ideology as practiced and as documented by LIF, inevitably does not live up to these non-discrimination principles because it promotes group identity outcomes over individual treatment, frequently seeking to normalize discrimination in the name of "equity." Ibram X. Kendi's book, *How to be an Antiracist* (New York, One World 2019), a seminal work shared widely throughout higher education and corporate DEI programming, reflects this identity group outcome approach. The philosophy, which has become DEI dogma, argues that "[t]he language of color-blindness . . . is a mask to hide racism," *id.* at 9, and endorses overt racial discrimination as a remedy: "The only remedy to racist discrimination is antiracist discrimination. The only remedy to past discrimination is present discrimination. The only remedy to present discrimination is future discrimination." *Id.* at 19.

While Kendi's approach is foundational for DEI programming, it is contrary to the law. "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007). The problem is that Kendi's approach has gained favor, first in academia and now elsewhere in DEI programming.

We have documented at CriticalRace.org and at EPP how deeply Kendi's discriminatory approach is embedded in DEI programs. For example, recently EPP discovered an Early-Stage Business Boot Camp held at Missouri State University open only to "BIPOC" and females. White males were excluded. After the EPP sent a letter of complaint to the Attorney General of the State of Missouri outlining the discriminatory nature of the program and how it violated both Missouri and United States law, Missouri State decided to open the program to business owners of races and genders.[4] Right here in Rhode Island, we have challenged in a complaint now at the EEOC a Providence Public School District loan forgiveness program for new and recently hired teachers that is open only to non-whites.[5] These are just some examples of how DEI frequently results in racial discrimination in the name of equity.

[4] https://heartlandernews.com/2023/04/20/missouri-state-university-says-its-no-white-males-allowed-business-boot-camp-was-a-one-off-not-good-enough-says-watchdog/

[5] https://legalinsurrection.com/2022/11/black-community-activists-support-legal-insurrections-challenge-to-providence-schools-anti-white-hiring-incentives/

There also is substantial doubt that DEI programming achieves its stated goals, or improves race relations or equality. See, e.g., Jesse Singal, *What if Diversity Training Does More Harm Than Good* (NY Times, Jan. 17, 2023)[6]; Zulekha Nathoo, *Why Ineffective Diversity Training Won't Go Away* (BBC, June 16, 2021)[7]; Dobbin and Kalev, Why Doesn't Diversity Training Work? (Anthropology Now, Sept. 2018).[8]

It is because of the frequent discriminatory impact of DEI, and its counterproductive outcomes, that opposition to DEI has arisen as DEI programs spread in the aftermath of George Floyd's death in late May 2020. According to the UCLA Forward Project's anti-CRT Mapping Project, for the period January 1, 2021, through December 31, 2022, 563 anti-CRT measures have emerged from state and/or local authorities in every U.S. state besides Delaware. Kyle Reinhard, *CRT Forward Releases New Report on Anti-CRT Measures and Trends*, UCLA School of Law CRT Forward Project (Apr. 6, 2023)[9]. The Court also can take judicial notice that DEI has become a hotly contested political issue, splitting largely along Democrat (for) and Republican (against) lines.

The Proposed Amendment

I have no doubt that the proposed amendment put forth by the Court is well-intentioned and seeks to promote the same principle of non-discrimination that EPP seeks to protect. But as shown above, it is not so simple. Moreover, the wording of the proposed amendment leaves it susceptible to the same problems that have accompanied DEI elsewhere. The amendments define DEI as follows:

> "Diversity, equity, and inclusion (DEI)" shall include programs that recognize the diversity of society and teach attorneys to effectively serve and have regard for this multi-lingual, multicultural, multi-racial, multi-religious, and multi-gender society while **focusing on equity** by highlighting equal opportunity and **outcomes for all** and achieving equal justice under the law, regardless of being a protected class or status.

Equity is defined as follows:

> "Equity" is the **guarantee of** fair treatment, access, opportunity, and **advancement for all**, while at the same time striving to identify and eliminate barriers that have prevented the full participation of marginalized groups.

MCLE Article IV, Rule 3, Appendix A (emphasis added).

[6] https://www.nytimes.com/2023/01/17/opinion/dei-trainings-effective.html
[7] https://www.bbc.com/worklife/article/20210614-why-ineffective-diversity-training-wont-go-away
[8] https://scholar.harvard.edu/files/dobbin/files/an2018.pdf
[9] *available* at https://crtforward.law.ucla.edu/new-crt-forward-report-highlights-trends-in-2021-2022-anti-crt-measures/.

The highlighted language reflects that attorneys will be trained on "equal outcomes for all" and "the guarantee of advancement for all," which reflects the group-identity ideology that has caused so many problems with DEI programs. The result will predictably lead not only to group stereotyping, but also discriminatory "equity" conduct in the legal profession.

These definitions also are similar to definitions many Rhode Island educational institutions and social justice organizations use to advance discriminatory equity actions. For example, Brown University defines "equity" as "[s]uccessfully creating structures and systems that ***disrupt*** existing and potential barriers that may disproportionately impact historically ***marginalized*** groups to ensure that all members of a community can thrive." Brown University, *Pathways to Diversity and Inclusion: An Action Plan for Brown University* (DIAP) Phase II April 2021.[10] And the social justice organizations that embody these more radical definitions and "disrupt" barriers to help marginalized groups include, *e.g.*, The Fang Collective. This organization "leads direct action campaigns while supporting movement capacity and growth to create a more just world" by "Shut[ting] Down I.C.E." and ending bail for criminals, among other activities.[11] DEI programming thus carries with it a political agenda, not just theory.

Worst of all, the philosophy of DEI leaves little room for opposition because it defines opposition as itself racist by definition. DEI frequently devolves into 'Kaftkatrapping,' where denial of the accusation is used as proof of the accusation. As Ibram Kendi says, a racist is "[o]ne who is supporting a racist policy through racist actions *or inaction* or *expressing a racist idea*." Kendi at 13 (emphasis added). So in this DEI paradigm, speaking up in opposition to the proposed DEI MCLE programming would be deemed racist, and even attempting to remain neutral would be racist. Under Kendi's framework, "there is no neutrality in the racism struggle" because "[t]he claim of 'not racist' neutrality is a mask for racism." *Id.* at 9.

This view that mere inaction brands one a racist puts at risk core First Amendment principles. "The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Important free speech organizations have expressed concerns about DEI generally, including mandatory DEI statements and training as part of employment. For example, the Foundation for Individual Rights and Expression (FIRE) has noted that "ideologically motivated DEI statement policies can too easily function as litmus tests for adherence to prevailing ideological views on DEI, penalize faculty for holding dissenting opinions on matters of public

[10] *available at* https://diap.brown.edu/sites/default/files/2021-03/Brown%20DIAP%20Phase%20II_April%202021.pdf (emphasis added).
[11] *See* https://thefangcollective.org/.

concern, and 'cast a pall of orthodoxy' over the campus."[12] "Under these circumstances, the last thing universities need is yet another tool for ensuring faculty or students embrace a preordained consensus on issues of social and political significance."[13] *See also* Daniel M. Ortner, *In the Name of Diversity: Why Mandatory Diversity Statements Violate the First Amendment and Reduce Intellectual Diversity in Academia*, 70 Cath. U. L. Rev. 515, 516-17 (2021) ("Universities have begun requiring faculty members to declare fealty to a particular worldview and approach towards matters of diversity. Campus diversity bureaucrats appear to miss the irony that these statements are being deployed in the name of diversity.")[14]; Neil Hardin, *The Dangers of Compelled Speech*, Alliance Defending Freedom, Oct. 31, 2022 ("Compelling people to speak messages against their most deeply held beliefs undermines the common good. A free society depends on ordinary citizens having the freedom of belief as well as the freedom to choose what you say and what you don't say.").[15]

Debate on hotly contested issues is a fundamental skill that attorneys should cultivate and honor in the profession. But such robust debate about DEI, including opposition to current discrimination to remedy past discrimination, is likely to have one falsely branded a "racist." Penalizing or demonizing those who disagree as a core philosophy associated with DEI programming is inconsistent with the purpose of MCLE. As *Barnette* said, we should not "prescribe what shall be orthodox" and "force citizens to confess by word or act their faith therein." 319 U.S. at 642. Rules that force an individual "to declare a belief" and "to utter what is not in his mind" serve to "strangle the free mind at its source." *Id.* at 631, 634, 637.

It also is noteworthy that only 11 states have mandated DEI training to date.[16] More importantly, pushback has begun against mandatory diversity CLE requirements, as it has in other fields. For example, in an amendment to a rule regulating the Florida Bar, the Florida Supreme Court rejected a recently adopted rule mandating a minimum number of "diverse" panelists for all Florida CLE training sessions:

> "[T]he Court understands the objectives underlying the policy at issue here. Nonetheless, certain means are out of bounds. Quotas based on characteristics like the ones in this policy are antithetical to basic American principles of nondiscrimination. *Cf. Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) ('To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . . .'); *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (numerical goal or quota 'must be rejected' as 'facially invalid'). It is essential that The Florida Bar withhold its approval from continuing legal education programs that are tainted by such discrimination.

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[12] See FIRE Statement on the Use of Diversity, Equity, and Inclusion Criteria in Faculty Hiring and Evaluation, *available at* https://www.thefire.org/research-learn/fire-statement-use-diversity-equity-and-inclusion-criteria-faculty-hiring-and (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

[13] *Id.*

[14] Daniel Ortner is an attorney with the Pacific Legal Foundation, which is "a public interest law firm that fights for individual liberty, including freedom of speech." *Id.*

[15] *See* https://adflegal.org/article/dangers-compelled-speech.

[16] *See* David Randall, Wokeness is Creeping into Continuing Legal Education, *available at* https://www.jamesgmartin.center/2023/02/wokeness-is-creeping-into-continuing-legal-education/.

Amendment to Rule Regulating the Florida Bar 6-10.3 (Florida April 15, 2021).[17] In response to the Florida Supreme Court's Rule Amendment, the American Bar Association deleted the minimum diverse CLE panel member quota requirement, making the makeup of CLE instructor panels aspirational, rather than mandatory.[18]

Conclusion

As reflected above, there are many good arguments against mandating DEI coursework as part of the MCLE requirement to maintain membership in the Rhode Island Bar. A strong case can be made that DEI is an ineffective group-identity ideology that frequently normalizes discrimination in the name of equity, leading to substantial pushback and political debate. The Court should not mandate that attorneys take a DEI program to retain their Bar membership. We suggest that whatever benefits DEI allegedly holds can be achieved by *voluntary* study, not *mandatory* CLE coursework. For the foregoing reasons, I oppose the proposed Amendment.

Respectfully Submitted,

/William A. Jacobson/

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(RI Bar No. 5104)

[17] *available at* https://supremecourt.flcourts.gov/content/download/732072/opinion/sc21-284.pdf.
[18] *See* https://www.americanbar.org/content/dam/aba/administrative/news/2022/04/diversity-equity-and-inclusion-cle-policy.*pdf*.