

December 10, 2022

Chief Justice Annette Kingsland Ziegler  
Justice Ann Walsh Bradley  
Justice Patience D. Roggensack  
Justice Rebecca G. Bradley  
Justice Rebecca F. Dallet  
Justice Brian Hagedorn  
Justice Jill. J. Karofsky  
Deputy Clerk-Rules  
16 East, State Capitol  
P.O. Box 1688  
Madison, WI 53701-1688

**Re: Pending rule petition 22-01, In the Matter of Diversity, Equity, Inclusion, and Access Training for Continuing Legal Education Credits**

Dear Chief Justice and Justices:

Upon learning from a credible source that the State Bar is likely to petition for mandatory DEIA training if the present petition for voluntary DEDIA credit is approved, and noticing that after the petition was filed the State Bar recently has offered DEIA presentations that included political concepts, I decided to submit this position paper now. I had intended to submit this in opposition to a petition for mandatory training in the future but the issues are ripe now for this Court's consideration of the pending petition.

**THE PETITION FOR DEIA TRAINING  
SHOULD BE DENIED AS EMPIRICALLY UNFOUNDED**

Petitioner Past President Cheryl F. Daniels' petition is based upon inexpert speculation that Wisconsin lawyers might need remedial training for cognitive bias or cultural deficiencies to serve the interests of social justice. Lacking empirical evidence to support her request that this Court recognize her proposed novel kind of CLE course, and lacking objective criteria for the subject matter that can be presented at such courses or the qualifications of trainers, the petition should be denied.

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## **I. Petitioner has no evidence Wisconsin lawyers are causing racial injustice.**

Since this proposal would be costly to us, cumulatively millions of dollars over the ensuing years if this is made mandatory and perpetual (e.g. about 25,000 members paying for a one-hour seminar, say \$100, every two years), some proffer of specific facts showing the justification and expected value for this proposal is not too much to ask.

Petitioner Daniels, however, fails to offer any empirical research or evidence one would expect to see, if it existed, such as survey results, observational studies, increased discrimination lawsuits or OLR complaints, that would expose some statewide racial injustice being caused by Wisconsin lawyers. I have a civil law practice in rural Wisconsin and have not had any complaints about me or my office concerning racial justice issues. What is Petitioner's evidence that attorneys with practices like mine are biased in our employment settings or in the delivery of legal services?

The absence of such evidence highlights the persuasive factual inference that defeats Petitioner's subjective point of view: if we assume that all humans have some degree of implicit racial bias,<sup>1</sup> such a bias is not determinative of discriminatory *behavior* by everyone in *all* work settings. Indeed, this inference comports with the science. Empirical studies have shown that a racial bias score on the famous Implicit Association Test is *not* predictive of discriminatory behavior.<sup>2</sup> A bias can be inert. It might be true that a big city judge can exhibit implicit bias when making high volume bail decisions that result in disparate outcomes, but it is a generalization fallacy to draw a broad inference from that small, unique, sample that the entire legal profession must be manifesting racial bias in all work environments across the state.

It is behavior that matters. No unwanted behavior, no remedy needed.

## **II. DEI training courses are a proven failure by any relevant metric.**

If some statewide social justice problem did exist in our state or local legal systems that is directly attributable to Wisconsin lawyers, a mandatory one-hour DEI course won't solve the problem if that is what the State Bar ultimately requests. The overwhelming empirical research about such interventions concludes they are ineffective and can make things worse.

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<sup>1</sup> I'll refer to it as implicit bias which is also called unconscious bias or unintentional bias.

<sup>2</sup> "Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job" *New York Magazine – The Cut*, January 2017; "The World is Relying on a Flawed Psychological Test to Fight Racism" *Quartz*, 2017.

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Musa al-Gharbi, a sociologist at Columbia University, studied dozens of empirical research reports regarding diversity training and they all point in the same direction: “When scientists set about to investigate whether the programs actually changed *behaviors*, i.e. do they reduce expressions of bias, do they reduce discrimination, do they foster greater collaboration across groups, do they help with retaining employees from historically marginalized or underrepresented groups, do they increase productivity or reduce conflicts in the workplace — for all of these *behavioral* metrics, the metrics that actually *matter*, not only is the training ineffective, it is often counterproductive.”<sup>3</sup> All the relevant empirical research he reviewed is cited in his paper for everyone to read.

Three decades of data from over 800 companies were analyzed by sociologists in “Why Diversity Programs Fail” *Harvard Business Review*<sup>4</sup> and the authors concluded “Trainers tell us that people often respond to compulsory courses with anger and resistance—and many participants actually report more animosity toward other groups afterward.” As for race bias training in particular, the authors state “Strategies for controlling bias—which drive most diversity efforts—have failed spectacularly...” In fact, this kind of, “force-feeding” (mandatory training) can activate a bias rather than stamp it out.

### **III. Implicit bias training is not effective in changing behavior.**

In her Petition, Petitioner Daniels claims that this new kind of DEIA training would include “topics designed to educate attorneys on the recognition and reduction of bias.” Section 1. She cites no science in her supporting memorandum or who would be qualified to teach this. Instead she states “numerous other states” are doing this and the ABA recommends it.

Here is what William T. L. Cox, PhD of the Stereotyping and Bias Research (SABR) Lab at University of Wisconsin – Madison emailed to me:

I don’t know what specific training your bar association is considering, but research shows consistently that when laypeople make “bias trainings”, they aren’t evidence-based and they don’t get rigorously scientifically tested. When researchers try to come in and evaluate such trainings, evidence consistently shows that at best, they do nothing (and thus are a waste of time and money), and very often, they actually make bias and diversity-related problems worse. If the training your group is considering

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<sup>3</sup> “Diversity is Important. Diversity-Related Training is Terrible” *Heterodox Academy* 2020 at the website: <http://musaalgharbi.com2020/9/16>.

<sup>4</sup> “Why Diversity Programs Fail” *Harvard Business Review*, magazine issue July-August 2016.

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specifically advertises itself as an “implicit bias training,” I’d wager it falls into the latter category, of making things worse.<sup>5</sup>

A 2019 meta-analysis on implicit cognitive biases (race and other types of bias) was published which concluded that some approaches can positively affect implicit measures of bias in the short term but “We found little evidence that changes in implicit measures translated into change in explicit measures and behavior...” Page 545.”<sup>6</sup> The analysis examined 492 studies involving 87,419 participants, and twelve styles of procedures, single sessions as well as longitudinal designs.

In other words, a bias reduction program might be successful in improving a subject’s post-test bias score on a laboratory test but that means nothing in the real world because such training fails to reduce or eliminate unwanted behavior.

Several years ago there were meta-analyses that debunked the famous implicit bias test which should never be used as predictive of a person’s behavior.<sup>7</sup> Introduced in 1998, the Implicit Association Test (IAT) heralded a computer screen-based test that could quickly discover whether someone harbors a black/white racial bias they did not know they had. If a bias is detected, you are likely discriminating against people without even knowing it—so the DEI trainers had you believe. It became the star attraction for diversity programs.

Over the ensuing two decades, however, psychometric data was systematically collected on test results which demonstrated that it fails as a useful psychological instrument: (1) Reliability: does it replicate with statistical accuracy? No. Same person testing-retesting has a high likelihood of different results. (2) Validity: does a positive score predict discriminatory behavior? No. In fact, some studies even indicated that a high score for some test-takers appeared to not be measuring implicit racial bias at all, but something else. The creators of the test conceded that evidence is lacking for the test to be used to predict racially discriminatory behavior. The test should never be used as a diagnostic tool though it still has merit in academic lab experiments.

A perusal of some of the science articles on implicit bias shows it is a complex cognitive psychology construct that is unsettled and emerging, not something suitable for an unqualified diversity trainer especially if such a trainer is a lawyer. For example, see “Six

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<sup>5</sup> Dr. Cox claims he has developed a way to reduce unintentional bias but it is not a one-hour training; it is a voluntary long-term program with a cognitive science expert. “Developing Scientifically Validated Bias and Diversity Trainings that Work” January 2022 (available at his website).

<sup>6</sup> “A Meta-Analysis of Procedures to Change Implicit Measures” *Journal of Personality and Social Psychology: Attitudes and Social Cognition*, American Psychological Association 2019 Vol. 117, NO 3.

<sup>7</sup> “Psychology’s Favorite Tool for Measuring Racism Isn’t Up to the Job” *New York Magazine – The Cut*, January 2017; “The World is Relying on a Flawed Psychological Test to Fight Racism” *Quartz*, 2017.

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Lessons for a Cogent Science of Implicit Bias and Its Criticism” *Perspectives on Psychological Science*, by Bertram Gawronski, University of Texas at Austin.

#### **IV. DEI trainers often teach identity-group politics.**

Though ineffective, implicit bias courses remain popular because the concept offers a simplified worldview of complex social problems and relieves its adherents from investigating all possible causes of disparities. Embracing a single politically appealing variable animates activism and moral righteousness (‘There’s the enemy!’) whereas tedious multivariate investigation might reveal other causes that would dilute the call to action.

“The problem is that implicit measures, and the IAT in particular, became a critical part of a political narrative about why disparities between social groups exist in the United States... Thus, claims about implicit measures became, to a certain extent, political claims, not just scientific claims.” Psychology researcher Patrick Forscher, University of Wisconsin-Madison.<sup>8</sup>

This is the thin edge of the wedge for DEIA trainers to expand well beyond bias issues to spread the tenets of the popular identity-group ideology that grew out of writings by legal scholars like Dereck Bell, Kimberlé Crenshaw, Richard Delgado, and popular authors like bell hooks, Ibram Kendi and Robin DiAngelo. (No cognitive scientists among them.) Their cynical worldview sees culture and history through a dehumanizing lens that judges everyone based on the color of their skin, and other immutable characteristics, and divides us into a privileged oppressor group or a marginalized group, all engaged in a zero-sum power struggle (tribalism)—a complete rejection of Martin Luther King’s dream of a colorblind society (pluralism).

We see the tactics of this illiberal strain of social justice everywhere, the policing of language, deplatforming speakers, compelled speech, and the attempted indoctrination with fictive concepts like microaggressions, whiteness and white privilege (telling people to ‘be less white’ and ‘check your privilege’), cultural appropriation, lived experience, decolonize, intersectionalism, etc.

“It forces us to spend endless amounts of time listening to nonsense presented as wisdom, and pretend to like it.” Black public intellectual and Columbia University linguistics professor John McWhorter in *Woke Racism - How a New Religion Has Betrayed Black America*, page 6, 2021.

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<sup>8</sup> “Psychology’s Favorite Tool for Measuring Racism Isn’t Up to the Job” January 2017 *New York Magazine – The Cut*

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Such concepts are already creeping into State Bar presentations. For example, I am a member of the Elder Law Section and in the fall of 2022, the Elder Law section sponsored a diversity training entitled "The Culturally Intelligent Lawyer: A Primer" presented by lawyers and the description stated "At the conclusion of the CLE attendees will be able to identify the various forms of privilege they possess, be able to recognize unconscious biases they hold and will be armed with the tools to combat those biases." It stated they will apply for CLE credits. WISLAP had volunteer training in November 2022 which included a presentation on implicit bias and "micro-aggressions." I did not attend either event so I cannot say what else was presented.

I should not be deemed in need of training because I reject a regressive and racist political orthodoxy that judges people based upon the color of their skin if this is what Petitioner Daniels and the State Bar of Wisconsin are now embracing.

"I am absolutely convinced that a future generation is going to look back on this time and say this is another very bad time" said former ACLU president Nadine Strossen on how liberal values like free speech are under attack from woke-type pressures.

#### **V. Conclusion**

Petitioner's proposal is vague and ambiguous, lacks empirical research support, and will inevitably lead to the objectionable teaching of divisive political dogma under the guise of continuing legal education. The petition should be denied.

Respectfully,  
Electronically signed  
Kevin M. Connelly

cc: State Bar of Wisconsin: Past President Cheryl F. Daniels, President Margaret W. Hickey, President Elect Dean R. Dietrich

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