ADM2020-01159

STATE OF TENNESSEE
OFFICE OF THE POST-CONVICTION DEFENDER
P.O. BOX 198068
NASHVILLE, TENNESSEE 37219-8068

Justyna G. Scalpone
Director

Phone: (615) 741-9331
Fax: (615) 741-9430

March 2, 2021

James M. Hivner, Clerk
RE: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Via email to: appellatecourclerk@tncourts.gov

Dear Mr. Hivner:

The Tennessee Office of the Post-Conviction Defender strongly supports the Nashville Bar Association's Petition to Modify Rule 21 of the Tennessee Supreme Court to include two hours of training in diversity, inclusion, equity, and the elimination of bias as part of the annual continual legal education requirement for attorneys licensed in Tennessee.

A rich body of social science research and scholarship exists on the topic of implicit and explicit bias. It is especially the implicit, or unconscious, bias based on increased automatic activation of stereotypes, that the training proposed by the Nashville Bar Association would assist in uncovering and reducing. Implicit bias is a psychological phenomenon that affects all of us. It impacts our decision-making and actions, often without us even realizing it, and increases the risk of making critical mistakes. Learning about the social science behind it, how to identify it, and what steps to take to reduce it, can only elevate our legal practice and improve our justice system.

Although there are many forms of bias, racial bias is one that is especially apparent in our society and legal system. Numerous studies have shown that attorneys, judges, and jurors are as prone to implicit racial bias as the rest of the population. Through our capital post-conviction and clemency practice, we are most familiar

with racial bias within the criminal justice system and how it can affect practically every stage of legal proceedings: investigation, arrest, detention, charging decisions, security measures taken in court, attorney-client relationships, voir dire, analysis of evidence and testimony, legal arguments, and ultimate decisions by jurors and judges with respect to guilt, as well as sentencing.

Indeed, the population statistics within the Tennessee's criminal justice system starkly illustrate its racial inequities. 52% of people on Tennessee's death row are Black, even though only 17% of Tennessee's population is Black. While in recent years the number of new death sentences has decreased, a staggering 78% of people sentenced to death in the last decade are Black. In addition, 54% of those serving life sentences in Tennessee's prisons are Black. Since 1995, the year that life with a possibility of parole became a mandatory minimum sentence of 51 years in prison, 77% of children tried as adults for first degree murder and sentenced to life have been Black.

As the Tennessee Supreme Court acknowledged in its official statement on June 25, 2020, racism still exists, and the judiciary has a moral and sworn duty to identify and eradicate it within the justice system in order to provide everyone equal protection of the law. The Court has already committed to identifying racial and ethnic bias within the legal structures, to educating judges on implicit bias, and to eliminating barriers to fairness and equal justice. Granting Nashville Bar Association's Petition to Modify Rule 21 is a natural next step in this effort.

By its nature, implicit bias does not lend itself to easy correction through our case specific judicial review process. Diversity, equity, inclusion, and bias elimination training will help all attorneys identify junctures in the legal proceedings that are being negatively impacted by racial and other types of bias, and that contribute to the inequities in our justice system. In their practice, attorneys will become better-equipped to address such issues when they encounter them. Understanding the nature of bias will also assist lawyers in identifying it in their own thinking processes and will improve decision-making skills. It will help with forming stronger client and peer relationships and in making hiring decisions that positively impact the bar and legal practice by making it more diverse.

It is a known fact that the legal profession is not racially diverse. Studies examining membership in law schools, law firms, the judiciary, and other legal organizations, show that people of color are vastly underrepresented within the legal ranks. They show gender diversity lacking as well, although to a lesser extent. Having the opportunity to examine in depth the reasons for these disparities and to evaluate how we as lawyers can address them, is crucial in making positive changes. Becoming an accurate reflection of society as a whole and expanding the variety of perspectives within our ranks can only help us serve all our clients better.

The training proposed by the Nashville Bar Association is but a small step to address the negative impacts of bias and lack of diversity within the justice system and the legal profession. It merely brings the rest of the Tennessee attorneys onto the path that the Tennessee Supreme Court has already embarked on. For those reasons, we support the Nashville Bar Association's Petition to Modify Tennessee Supreme Court Rule 21.

/s/ Justyna G. Scalpone
Justyna G. Scalpone, BPR # 30992
OFFICE OF THE POST-CONVICTION DEFENDER
P.O. Box 198068
Nashville, Tennessee 37219
Phone: (615) 741-9331

Yvonne K. Chapman
Attorney at Law

March 2, 2021

James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Transmitted via email to appellatecourtclerk@tncourts.gov

RE: Tenn. Sup. Ct. R. 21, section 3.01
No. ADM2020-01159

To the Honorable Justices of the Tennessee Supreme Court:

I write to oppose the proposal that suggests amending CLE rules to mandate that an attorney must attend a course in "diversity, inclusion, equity, and elimination of bias."

The premises under which Petitioner bases its petition includes the following (excerpts from page 2 of the petition):

> As lawyers, we must be mindful of deficiencies in the administration of justice and of the fact that individuals with low incomes and those who have suffered from systemic racism or gender-bias, for example, may not have equal access to justice. Within our profession, we also must strive to make the practice of law equitable to all those who engage in it.
>
> Rooting out systemic racism, gender bias, and all forms of discrimination within the judicial system requires active efforts by all of those involved, including the judiciary and attorneys. In order to dismantle structural racism, lawyers must engage in intentional learning and listening to understand history, the effects of implicit bias and privilege in the administration of justice, and the system oppression of people which undermines the very justice that our system is intended to protect.

Petitioner continues on page three of the petition:

> Tennessee can and should be a leader in adding mandatory diversity, inclusion, equity, and elimination of bias training for attorneys.

Based upon the Exhibits to the Petition, as well as the numerous comments filed in response, Tennessee lawyers *are* mindful of the history of race relations, discrimination, and inequality in our country and commitments to programs supporting equal justice within Tennessee legal communities *are* well established.

Access-to-justice programs are prevalent throughout the state. In fact, Tennessee lawyers generously provide pro bono legal services.

> "Performing pro bono service is becoming part of the legal culture in Tennessee and the ATJ Commission could not be more pleased," said Justice Connie Clark, who serves as the Supreme Court liaison to the ATJ Commission. "Every day Tennesseans struggle with issues like eviction, expungement, protective orders, employment discrimination, and more. Lawyers are in the unique position to provide assistance when there is nowhere else to turn. **Tennessee is consistently recognized on the national level as one of the top Access to Justice states.**" https://www.tncourts.gov/press/2020/02/26/pro-bono-reports-shows-highest-number-percentage-attorneys-reporting-pro-bono (retrieved 3/1/2021) (emphasis added).

Through pro bono services, Tennessee lawyers are leaders in addressing the social concerns set forth in the Petition. The percent of Tennessee attorneys that file pro bono reports, and the number of hours reported is remarkable, yet these numbers reflect only those who file a voluntary report. There are attorneys who choose not to report their pro bono activities, report only estimated hours, or perhaps report hours in other states in which they hold licenses.

Aside from pro bono services, other lawyers are involved with sociopolitical concerns, community needs, and the like; others simply represent clients in legal matters in which they find themselves for various reasons. Some of those legal matters include civil rights issues safeguarded by a plethora of existing civil rights laws as well as constitutional guarantees.

Also evident in the exhibits supporting the Petition and comments in response to the Petition is the fact that numerous organizations, corporations, bar association, and the like already offer CLE courses on issues of diversity, race relations, and bias.

Evidence establishes that Tennessee lawyers actively promote access to justice within the legal community.

Additionally, *there is **no** evidence (indeed Petitioner does not even make the argument) that Tennessee lawyers engage in systemic discriminatory behavior,* either affecting the administration of justice or within the profession against their colleagues.

There is no demonstrated need to amend the CLE Rules to mandate attendance in the courses requested by Petitioner. The premise of the Petition is not supported.

In any event, the Petition does not support the purpose for continuing legal education courses.

> (The) primary objective (of CLE activities) must be to enhance the participant's professional competence as an attorney. Sup. Ct. R. 21 §5.01(a).
>
> The activity must deal primarily with matters related to substantive law, the practice of law, professional responsibility or ethical obligations of attorneys. Sup. Ct. R. 21 §5.01(b).

Should the court mandate "bias elimination" courses, as expressed by other commenters, there is the expectation that anticipated programs will not be content neutral but will be politically divisive, discriminatory, and not unifying to the bar. It is common knowledge within our current culture that training which claims to be anti-racist or to promote social justice (critical race theory, for example), presents politically based liberal propaganda; prevalent viewpoints are stereotypically anti-white and anti-conservative. Such training is considered indoctrination; those who disagree with the premises of the curricula are shamed and humiliated for opposing the viewpoints presented. Dissenters face retaliation, including termination of employment, being "canceled by culture" or both.

There are concerns that sincerely held religious beliefs about human sexuality and other traditional beliefs will be ridiculed and condemned should "bias elimination" be the rule. [This writer encourages this Court to revisit similar arguments that were made in response to the 2017 petition to adopt an amendment to RPC 8.4g, which petition this Court denied.]

The Court must observe that several commenters expect retaliation for simply opposing this CLE amendment – a significant exclamation on the conceptions of so-called "bias elimination" training.

Supreme Court Rule 6.4 provides:

> Each applicant for admission (to the practice of law) shall take the following oath:
> I, _____, do solemnly swear or affirm that I will support the Constitution of the United States and the Constitution of the State of Tennessee. In the practice of my profession, I will conduct myself with honesty, fairness, integrity, and civility to the best of my skill and abilities, so help me God.
> (Parenthetical added)

Does this Court believe that Tennessee attorneys do not comprehend this oath? If so, the solution is NOT mandated "training" on cultural viewpoints and sociopolitical opinions, which are subject to change on a whim.

Rather, if the Court believes that Tennessee attorneys lack an understanding of our Constitutions, the solution is civic education about those foundational documents, in addition to the Declaration of Independence that proclaimed: "We hold these truths to be self-evident, that all men are created equal," and about the dream of Dr. Martin Luther King, Jr. that we will "live in a nation where (people) will not be judged by the color of their skin, but by the content of their character."

The Tennessee legal community already leads in access to justice and collegiality among legal professionals as evident in the diverse bar associations and legal organizations that exist statewide.

Let us continue our focus on legal education, including ethics and professionalism, not ideological training.

Thank you for the opportunity to comment.

Respectfully,

Yvonne K. Chapman
BPR #11909

TENNESSEE DISABILITY COALITION

March 4th, 2021

Appellate Court Clerk, State of Tennessee
James M. Hivner, Clerk
100 Supreme Court Building
410 Seventh Avenue North
Nashville, TN 37219-1407

Re: ADM2020-01159 Tennessee Supreme Court Rule 21, section 3.01(a)

Dear Appellate Clerk:

The Tennessee Disability Coalition (TDC) is a 501(c)3 nonprofit alliance of 40+ member organizations and individuals joined to promote the full and equal participation of people with disabilities in all aspects of life. With programs, public policy, and purpose the TDC collectively advocates for self-determination, independence, empowerment, and inclusion for people with disabilities in areas such as accessibility, education, healthcare, housing, and voting rights. From Alzheimer's to autism, to multiple sclerosis and higher education; our member organizations represent the interests of a wide-range of disability interests and unique perspectives. Founded in 1990, the TDC has over 30 years of experience with systems change, often interacting with attorneys and lawmakers at almost all levels of state and local government.

The Tennessee Disability Coalition offers these comments on ADM22020-01159 on behalf of our over 40-member organizations and the experiences of approximately 1.6 million individuals with disabilities and their families in Tennessee.

We strongly support ADM2020-01159 which proposes to change the state's mandatory 15 continuing legal educations credits to require "each attorney complete two hours of the required fifteen in diversity, inclusion, equity, and elimination of bias." With close to one in three Tennesseans meeting the federal standard of having a disability, it's imperative attorneys have a fundamental and recurring education of this continuously changing and burgeoning constituency. From healthcare, to housing, to employment, Tennesseans with disabilities are disproportionately impacted by the levers of government and the precedents set in the courts. It seems natural those tasked with pulling, enforcing, and defending those levers have a seat at the controls. Failing that, having some understanding of the challenges faced by our community is a positive first step, if also long overdue.

First, it's important to note the term "disability" is not a small subset, or fringe community of Tennesseans. Disability, in some form -- as surely as death and taxes -- will impact almost every human being at some point in their lives. Your mother may require a wheelchair after the chemotherapy she received for metastatic breast cancer renders her too

weak to walk. Your son or daughter may require an individualized education program for his or her dyslexia. From the highest halls of government, to the parking lot outside of it; from the richest among us, to the indigent; disability is as universal a reality as humanity itself.

Moreover, the data backs up the need for changes like ADM22020-01159.

1. A study from the Department of Disability and Human Development University of Illinois at Chicago (Harris, Gould, 2019) specifically found three things relevant to this amendment:

- Disability-based discrimination influenced by, and influences the view of, what people with disabilities are able to do. In other words, individuals with disabilities may only ascribe to a profession that includes, reflects, and respects us.
- People with disabilities experience discrimination through attitudinal and structural barriers to inclusion. Look no further than the millions of American's successfully working from home amidst the pandemic, when our community has previously been told such accommodations are not reasonable.
- People with disabilities respond to discrimination through a variety of ways, including legal action. However, many cases are not ruled in favor of people with disabilities. For example, in the employment sector, "...a review of EEOC claims from 1992-2011 found only 23.4% of cases are closed with merit, meaning that they affirmed disability discrimination, while 76.6% of cases are closed without merit, meaning in favor of the employer."

2. Leading professional services company Accenture (NYSE:ACN) published a report in October 2018 called "Getting to Equal: The Disability Inclusion Advantage." The report found inclusion is good for the bottom line.

- "Companies that stand out for their leadership in areas specific to disability employment and inclusion had, on average over a four-year period, ***28 percent higher revenue, double the net income and 30 percent higher economic profit margins*** than the other companies."
- "Cultural change can also help businesses empower existing employees with disabilities, as well as help employers draw from an untapped talent pool of more than 10.7 million persons with disabilities in the US alone."

3. Forward-looking clients understand bottom-line impact of DE&I initiatives, and are now seeking firms and attorneys that share their core values.

- According to HRDrive, In the last five years, companies have increased hiring executives with diversity and inclusion titles by 113%.
- Accordingly, many clients will be looking for firms that represent and reflect their core values.
- Several studies have shown companies with higher rates of diversity regularly out-perform companies with more homogenous demographics in several areas including profitability, productivity, creativity and innovation, and more.

On behalf of the Tennessee Disability Coalition, our members, and approximately 1.6 million Tennesseans with disabilities, we are grateful for the opportunity to provide comment to ADM2020-01159 Tennessee Supreme Court Rule 21, section 3.01(a).

Kind Regards,

Tom Jedlowski
Director of Communications & Technology
Tennessee Disability Coalition

WOOLF · McCLANE
WOOLF, McCLANE, BRIGHT, ALLEN & CARPENTER, PLLC
ATTORNEYS
900 Riverview Tower | 900 S. Gay Street | Knoxville, TN 37902-1810
Mailing Address: Post Office Box 900 | Knoxville, TN 37901-0900
Phone: (865) 215-1000 | Fax: (865) 215-1001
www.wmbac.com

DENNIS R. McCLANE
dmcclane@wmbac.com

March 3, 2021

BY ELECTRONIC MAIL

Mr. James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

Re: Supreme Court of Tennessee, In Re: Amendment of Rule 21, Rules of the Supreme Court, No. ADM 2020-01159

Dear Mr. Hivner:

I write to comment concerning the Petition of the Nashville Bar Association to Modify Rule 21 of the Rules of the Tennessee Supreme Court to Require Two Hours of Continuing Legal Education Annually in Diversity, Inclusion, Equity, and Elimination of Bias, asking that the Tennessee Supreme Court amend Rule 21 of the Rules of the Tennessee Supreme Court to require annual continuing education in diversity, inclusion, equity, and elimination of bias. I write individually, on my own behalf, not on behalf of my firm or any of its other members. Please provide these comments to the members of the Court. **I oppose the proposed amendment of Rule 21.**

I am not a member of the Petitioner Nashville Bar Association, but I am a member of the Knoxville Bar Association, and am quite disappointed that the board of that bar association, while raising concerns and questions about the proposed amendment, has submitted comments supporting the proposed amendment. In my opinion, the proposed amendment represents a political statement and goes far beyond reasonable regulation of the legal profession. Much like the earlier proposal to adopt a new Rule 8.4(g) purporting to address bias and harassment, it reflects social engineering unrelated to the practice of law.

The proposed amendment of Rule 21 seeks the adoption of a rule requiring lawyers, as a condition to continuing to practice their profession, to listen to someone trying to tell them how to think about such ill-defined terms as diversity, inclusion, equity, bias, systemic racism, gender bias, implicit bias, privilege, gender identity, inherent discrimination, cultural competence and the like. The proposed amendment seeks to inject politics and promotion of a social agenda into our continuing legal education requirements. In my view, that is not appropriate.

I hope our Supreme Court will reject the proposed amendment.

Thank you for your consideration.

Very truly yours,

Dennis R. McClane
BPR No. 4653

DRM:db

From: "K. Grace Stranch" <graces@bsjfirm.com>
To: <lisa.marsh@tncourts.gov>
Date: 3/3/2021 3:53 PM
Subject: TN Courts: Submit Comment on Proposed Rules

ADM2020-01159

Submitted on Wednesday, March 3, 2021 - 4:52pm
Submitted by anonymous user: [10.170.198.251]
Submitted values are:

Your Name: K. Grace Stranch
Your Address: 223 Rosa L Parks. Ave, Nashville, TN 37203
Your email address: graces@bsjfirm.com
Your Position or Organization: Associate Attorney
Rule Change: ADMN2020-01728 Supreme Court Rule 21
Docket number: No. ADM2020-01728
Your public comments: Systematic racism is entrenched in our society and our legal system is not immune. If we are going to create a more just and fair society, we must make space for education and action around diversity, inclusion, equity, and elimination of bias. Too often events centered around these topics have the same roster of participants. Mandating two hours of the annual required fifteen hours of CLE education will ensure all attorneys will at the very least be exposed to these ideas. This is a necessary step in the right direction. I work with many different non profits and legal organizations that uphold these values and I personally commit to helping plan at least 2 free or reduced cost CLEs that will meet these requirements.

The results of this submission may be viewed at:
https://www.tncourts.gov/node/602760/submission/38977

ADM2021-01159

March 2, 2021

James M. Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
Via e-mail: appellatecourtclerk@tncourts.gov

Re: Lawyers' Association for Women, Marion Griffin Chapter, Letter in Support of Nashville Bar Association's Petition to Modify Tennessee Supreme Court Rule 21 (Docket No. ADM2020-0115)

Dear Mr. Hivner and Justices of the Tennessee Supreme Court:

The executive board of the Lawyers' Association for Women, Marion Griffin Chapter ("LAW"), submits this letter in proud and unequivocal support of the Petition of the Nashville Bar Association ("NBA") to Modify Rule 21 of the Rules of the Tennessee Supreme Court to require attorneys to complete two (2) hours of continuing legal education ("CLE") annually in diversity, inclusion, equity, and elimination of bias.

LAW was formed on February 24, 1981, in Nashville, Tennessee to emphasize and address issues facing women within the legal profession. Among other core mission focuses, LAW strives to promote the efficient administration of justice and the constant improvement of the law, promote the participation of women and minority attorneys in the legal profession and on the bench, promote diversity in the workplace and within the legal profession, and to foster public dialogue about unjust societal discrimination and bias.

LAW has been and remains committed to identifying, discussing, addressing, and dismantling all forms of discrimination, including systemic racism. The proposed modification to Rule 21 supports LAW's mission. It is a small, but tangible, step toward eradicating discrimination and racism within the legal profession and justice system.

Racism and discrimination include bias, even unconscious or unintentional, often called "implicit bias." Implicit bias is grounded in a basic human tendency to divide the social world into groups of "us versus them." Because these biases manifest involuntarily, it is difficult to recognize them even as they continue to influence decisions made in every facet of society. Studies have shown that while more than 85 percent of all Americans consider themselves to be unprejudiced, researchers have concluded that the majority of people in the U.S. hold some degree of implicit racial bias. Moreover, implicit bias is not limited to race. It affects thoughts and behaviors about gender, age, people with disabilities, etc.

Although bias, discrimination, and racism permeate every facet of our lives, they are especially harmful in the legal profession and justice system. A 2019 study showed that while women comprise close to 51% of law school students and about 47% of law firm associates, women of color are about 24% of female associates and 14% of all law firm associates.[1] LGBTQI+ individuals of all genders are about 4% of all law firm associates, and persons with disabilities are less than 1% of all associates.[2] As they progress in their careers, the gap widens even further for women and other diverse attorneys in the struggle to gain partnership and leadership roles. Women are about 31% of non-equity law firm partners, with women of color comprising about 17% of the women non-equity partners and 5% of all non-equity partners.[3] Of all law firm equity partners, women make up about 19% in 2019.[4] The overwhelming majority of women equity partners are white, with women of color representing about 13% of female equity partners and about 3% of all equity partners.[5]

The lack of opportunities and progress for women, minorities, LGBTQI+, and people with disabilities in the legal profession can be attributed at least in part to bias and discrimination.[6] In one striking example, a study showed that law partners perceive black lawyers as having subpar writing skills in comparison to their white counterparts.[7] When law firms distributed a research memo from a hypothetical third-year litigation associate, with half stating the associate was black and the other half stating the associate was white, the partners on average found more grammar errors, technical writing errors, and factual errors in the "black" associate's memo. The "black" associate's memo averaged a 3.2 out of 5.0 rating, while the exact same memo averaged a 4.1 rating for the "white" associate.

As members of an organization for women in the legal profession, we understand that any additional requirement to practice law in the State of Tennessee can be particularly burdensome on women and other diverse lawyers. NBA is not advocating for an increase in the annual CLE credit hours, however; it is asking the Court to require CLE topics on diversity, inclusion, equity, and elimination of bias as part of the currently required fifteen (15) hours. The overwhelming benefits to women lawyers, diverse lawyers, and the legal profession would far outweigh any perceived difficulty in merely substituting two (2) hours in another area for two (2) hours of racism, diversity, inclusion, or equity training.

---

[1] Destiny Perry, *2019 Survey Report on the Promotion and Retention of Women in Law Firms*, WWW.NAWL.ORG, file:///C:/Users/IE02JCL/Downloads/2019%20NAWL%20Survey%20Report.pdf (last visited February 2, 2021). This includes Black, Asian/Pacific Islander, Hispanic/Latinx, Native American/American Indian, Middle Eastern/North African, and multiracial women.

[2] *Id.* These numbers may not be completely accurate. About 8% of responding firms explicitly indicated they do not collect data on LGBTQI+ individuals, and 27% indicated they do not collect data on persons with disabilities.

[3] *Id.* The same study showed that LGBTQI+ individuals of all genders are 2% of non-equity partners, and persons with disabilities are about 1% of non-equity partners.

[4] *Id.*

[5] *Id.* LBTQI+ individuals were about 2% of equity partners, and persons with disabilities were less than 1% of all equity partners.

[6] For a roundup of statistics and studies regarding bias and discrimination in the legal profession, see Bienias, Costales & Lynch, et al., *Implicit Bias in the Legal Profession*, Intellectual Property Owners Association, https://ipo.org/wp-content/uploads/2017/11/Implicit-Bias-White-Paper-2.pdf (last visited February 2, 2021).

[7] Dr. Arin N. Reeves, Written in Black & White: Exploring Confirmation Rias in Racialized Perceptions of Writing Skills (Nextions, Yellow Paper Series 2014-0414), https://www.ncada.org/resources/CLE/WW17/Materials/Wegner%20_%20Wilson--Confirmation%20Bias%20in%20Writing.pdf.

As shown by the current requirement in Rule 21 for attorneys to attend three (3) hours of ethics and professional training annually, the purpose of the CLE is not merely to gain knowledge and skills in specific practice areas. Tennessee Supreme Court Rule 21, Section 5.01(a) and (b), states that the primary objective of a CLE should be to "enhance the participant's professional competence as an attorney." This broad standard includes education on "substantive law, the practice of law, professional responsibility or ethical obligations of attorneys." Our duties and ethical obligations extend beyond specific practice areas to protecting and furthering the practice of law and the legal profession. Attorneys cannot denounce racism in the law and acts of racial injustice if they cannot recognize it. Studies show that education and training can help attorneys recognize their biases and effect how they act on them.[8]

From the Birmingham jail on April 16, 1963, Martin Luther King, Jr. wrote that the

> great stumbling block in the stride toward freedom is not the White Citizen's Council-er or the Ku Klux Klanner, but the white moderate who is more devoted to "order" than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, "I agree with you in the goal you seek, but I can't agree with your methods of direct action"; who paternalistically feels he can set the timetable for another man's freedom; who lives by the myth of time and who constantly advises [people] to wait until a "more convenient season."
>
> Shallow understanding from a people of goodwill is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection.

If we say we are against racism, we as lawyers cannot uphold our oath to conduct ourselves with "honesty, fairness, integrity and civility to the best of [our] skills and abilities" unless we actively seek to recognize, acknowledge, and dismantle the systemic discrimination and unfairness that continues to pervade in our society, the legal profession, and the justice system.

For those reasons, LAW respectfully asks the Tennessee Supreme Court to adopt the Petition of the NBA to Modify Rule 21 and require attorneys to complete two (2) hours of annual CLE in diversity, inclusion, equity, and elimination of bias. Please do not hesitate to contact LAW if you have any questions about this letter or if we can provide any other information to assist you in your consideration of this proposal.

---

[8] *See, e.g., You Can't Change What You Can't See: Interrupting Racial and Gender Bias in the Legal Profession*, American Bar Association Commission on Women in the Profession and Minority Corporate Counsel Association (2018), https://www.mcca.com/wp-content/uploads/2018/09/You-Cant-Change-What-You-Cant-See-Executive-Summary.pdf; Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 Colorado Lawyer 45 (May 2016), https://ncwba.org/wp-content/uploads/2016/11/Strategies-for-Confronting-Unconscious-Bias-The-Colorado-Lawyer-May-2016.pdf.

Respectfully submitted,

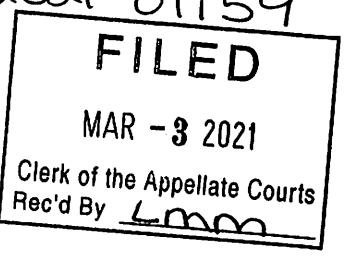
Sara Anne Quinn, Esq.
President

Melanie Gober Grand
Executive Director

Matthew Thornton
5400 Poplar Ave, Ste 100
Memphis, TN 38119

March 3, 2021

ADM2021-01159



Honorable James Hivner
Jim.Hivner@tncourts.gov

Re: Proposed Amendment to Rule 21

Dear Mr. Hivner:

This letter is to register my strong opposition to the requirement that two hours of our annual CLE focus on "diversity, inclusion, equity, and elimination of bias". I commend the excellent comment in similar opposition to the proposal submitted by Attorney Gregory C. Krog, Jr. earlier this week. In light of Mr. Krog's submission, which I support and adopt, I wanted to offer additional thoughts on the topic.

It is true that America's founding has slavery-stained hands. There are some today who argue that America, like Lady Macbeth, has been unable to remove the stain of racism despite vigorous scrubbing. I do not accept this as wholly true. While we are yet an imperfect people, with God's grace we have made much progress. America and its justice system, rooted in Judeo/Christian jurisprudence, produce a cornucopia of equality, diversity, and inclusivity which is the envy of the world.

Any thoughtful discussion of equality, diversity, and inclusivity should include a defense of <u>why</u> these concepts should be prioritized as societal values above others. Why should anyone care about these principles? And the only correct answer is "God's Love."

As Thomas Jefferson so eloquently stated in our Declaration of Independence, "all men are created equal, that they are endowed by their Creator with certain unalienable rights." This equality is not granted by man, nor are our rights given by man. Without a Creator, who in His love has imbued all humankind with innate dignity and worth, why must men be equal and treat each other with humility and respect? If the answer is the law alone, man-made and unrooted within the higher divine law, it is a feeble foundation indeed. Like grasping oil in the hand, temporal law is ineffectual to restrain human will.

The Bible has much to say about how we are to treat our human brothers and sisters. If everyone followed what Jesus taught were the two greatest commandments of the Jewish Torah, there would be no need for any other man-made laws. In Matthew 22:36-40 (English Standard Version-ESV), Jesus was asked: "Teacher, which is the great commandment in the Law?" 37 And he said to him, "You shall love the Lord your God with all your heart and with all your soul and with all your mind. 38 This is the great and first commandment. 39 And a second is like it: **You shall love your neighbor as yourself**. 40 On these two commandments depend all the Law and the Prophets."

In a similar account in the book of Luke, a man sought to have Jesus define who was his **neighbor**, that is, whom did God expect him to love as much as he loved himself. In Luke Chapter 10, verse 29 it starts,

But he, desiring to justify himself, said to Jesus, "And who is my neighbor?"
30Jesus replied, "A man was going down from Jerusalem to Jericho, and he fell
among robbers, who stripped him and beat him and departed, leaving him half
dead. 31Now by chance a priest was going down that road, and when he saw
him he passed by on the other side. 32So likewise a Levite, when he came to the
place and saw him, passed by on the other side. 33But a Samaritan, as he
journeyed, came to where he was, and when he saw him, he had compassion.
34He went to him and bound up his wounds, pouring on oil and wine. Then he
set him on his own animal and brought him to an inn and took care of him. 35And
the next day he took out two denarii and gave them to the innkeeper, saying,
'Take care of him, and whatever more you spend, I will repay you when I come
back.' 36Which of these three, do you think, proved to be a neighbor to the man
who fell among the robbers?" 37He said, "The one who showed him mercy." And
Jesus said to him, "You go, and do likewise."

In Jesus' day, the Samaritans were a mixed-race people group who were absolutely despised by their more ethnically pure neighbors. Yet Jesus elevates love of neighbor just below love of God. The lesson here is clear: Every person on earth is our neighbor and God expects us to love them as much as we love ourselves. There are no exceptions.

Note, too, the special condemnation of the "religious" men who passed by the Samaritan without helping him. The book of 1 John, Chapter 2, Verse 9 it teaches "Whoever says he is in the light and hates his brother is still in darkness." Later in Chapter 3, Verses 16-18 it highlights that true love for our neighbor requires action: "By this we know love, that he laid down his life for us, and we ought to lay down our lives for the brothers. 17 But if anyone has the world's goods and sees his brother in need, yet closes his heart against him, how does God's love abide in him? 18 Little children, let us not love in word or talk but in deed and in truth."

As if loving your neighbor as yourself weren't hard enough, Jesus gave his followers an even higher standard of love. In John Chapter 13, Verse 34 (English Standard Version-ESV), Jesus says: "A new commandment I give to you, that you love one another: just as I have loved you, you also are to love one another. 35 By this all people will know that you are my disciples, if you have love for one another." The love of God is the supreme example of sacrificial love. As our Creator, God placed humankind in a perfect environment where all their needs were easily met. When we rebelled against his authority over us, and we were separated in judgment from His fellowship, God did not leave us helpless and without a way to be redeemed. While we were yet shaking our fists in God's face, He orchestrated His sacrificial death in our place (our Paschal lamb as it were), and now offers that forgiveness to everyone in the world, regardless of gender or skin color, to restore the fellowship with God we once enjoyed.

As a Christian, I am fully committed to equality, diversity, and inclusivity in the biblical sense, while acknowledging I am imperfect in their manifestation in my life. Nevertheless, the proposed mandate for two hours of CLE training is counter-productive and will detract from its stated goal.

Matthew Thornton

No. ADM2020-1159

IN THE
SUPREME COURT OF TENNESSEE
AT NASHVILLE

ADM2020-01159

In Re:
AMENDMENT OF RULE 21, RULES OF THE
TENNESSEE SUPREME COURT

COMMENT IN OPPOSITION

The undersigned, in opposition to the Petition, respectfully states as follows:

1. The Petition should be denied. Like its 2017 companion seeking amendment of RPC 8.4(g), the present Petition invites the Court to impose upon the bar a philosophical and ideological litmus test under the guise of promoting good manners and access to justice. And it does so not on the basis of either the inherent demands of the judicial system, extant public policy, or broad social consensus, but in service of a narrow, although powerful, special interest.

2. The Petitioners invoke recent unrest over police misconduct against African Americans as a principal motivation for the proposed amendment. But neither the Petition itself nor the Petitioners' description of its aims, limits it to this end or this problem.

Indeed, the attached American Bar Association report predates those events by over four years. (*See* Pet. Ex. A.) The amendment proposed by the petition is very plainly not a mechanism for improving interactions between the judicial system and members of minority racial groups nor for ameliorating mutual suspicions and hostilities between African Americans and law enforcement. Those goals lie outside the ambit or capabilities of Rule 21.

3. Yet even if the Petition were capable of desirable service towards those ends, it is not narrowly tailored to them. The proposed amendment, likely in design and certainly in potential, entails endorsement of philosophical and ideological theses about human sexuality that many Tennesseans do not share and that bear no relation to the effective and ethical rendering of legal service.

4. Nor can the Petitioners plead agnosticism here: a key premise of the work by the ABA's 360 Commission, the ultimate source of the proposed amendment, was that traditional beliefs and attitudes about human sexuality were undesirable and should be rooted out of society, beginning with the bar. This topic was explored when the amendment to Rule 8.4(g) was proposed and need not be rehashed. The Commission's Rule 8.4(g) amendments proposed to achieve that end with the hard power of the disciplinary process. The current proposal looks towards the same goals with the soft power of the CLE process. Being nagged for two hours every year about one's retrograde religious and philosophical beliefs is certainly less of an imposition than being subject to an

ethics panel. But that does not mean codifying such a process a salutary use of the Court's authority.

5. While the Court has the undisputed power to formulate rules for the governance of the bar, the Petition, because of its tenuous connection to the practice of law as such, entails a substantive formulation of general public policy. This Court has recognized that "determination of this state's public policy is primarily the prerogative of the General Assembly." ***Hodge v. Craig***, 382 S.W.3d 325, 337 (Tenn. 2012). The Petition has its roots neither in public policy as articulated by the General Assembly nor in a common-law rule lying within the Court's enhanced policymaking prerogatives. *Cf.* ***id.*** at 337–38. Certainly absent an endorsement of the Petitioners' views by the General Assembly, the Court should, in the interests of interbranch comity if nothing else, decline to adopt them as the State's public policy.

6. Nor should the Court grant the Petition based on any perceived modesty in the theories and claims advanced on these topics by the current Petitioners and their supporters. Because the proposed amendment contains no internal standard by which to identify the "bias" to be "eliminat[ed]," it represents an open invitation. The last twenty years have made clear that today's consensus is the target of tomorrow's Twitter-mob ire. We know what "general" CLE might cover, because we can ascertain the content of the law. And we know what "ethics and professional" CLE might cover, because we know what the Rules of Professional Conduct say and can identify with reasonable certainty norms, customs, and

traditions of professional courtesy. But we have no idea what "bias-elimination" CLE might advocate in even the near future, because the Rules do not define "bias" and the concept is a moving target.

7. Yet even if confined, for the sake of argument, to some species of contemporary consensus, whether among society generally or even just among big-city lawyers, the Petition fails to demonstrate its own necessity. The Petitioners are long on rhetoric but short on data. Specifically, they make no effort to show that their proposal will actually yield what even they would regard as salutary results. Despite decades of use in government and business, there is scant empirical evidence that diversity training, especially compulsory diversity training, actually works. *See* Elizabeth Paluck & David Green, *Prejudice Reduction: What Works? A Review and Assessment of Research and Practice*, 60 Annu. Rev. Psych. 339, 361 (2009); *see also* Daniel Bergner, *'White Fragility' Is Everywhere. But Does Antiracism Training Work?*, New York Times Magazine (July 15, 2020), *available at* https://www.nytimes.com/2020/07/15/magazine/white-fragility-robin-diangelo.html. To the contrary, data suggest that such programs not only rarely yield measurable improvements in outcomes for underrepresented groups, but frequently backfire in various ways, such as by engendering resentment or reinforcing stereotypical views. *See* Justine Tinkler, *Sexual Harassment Training: Promises, Pitfalls, and Future Directions*, 46 ASA Footnotes No. 3, 8, 10

(2018); Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, Harvard Business Review, https://hbr.org/2016/07/why-diversity-programs-fail (July 2016). Thus, even granting the connection between the Petitioners' stated motivation and their proposal, the validity of all of their philosophical and sociological views, and the desirability of their explicit and implicit goals, the Petition does not demonstrate that it is an effective method of achieving those goals.

8. What the proposed amendments will prove effective at is imposing burdens on Tennessee attorneys. The CLE Commission has itself recently petitioned for amendments to Rule 21 based, in part, on the difficulty of fulfilling the annual education requirements encountered by attorneys living in rural parts of the State. *See* ***In re Pet. of the Tenn. Comm'n on Continuing Legal Educ.***, No. ADM2020-1728, App'x 4 (Tenn. Jan. 15, 2021). Adoption of the Petition's proposed amendment would exacerbate this problem. Attorneys who live and work in places like Overton, Greene, or Wayne County are just as much members of the bar of this Court and just as deserving of its consideration as attorneys who live in Nashville. They may in fact warrant more solicitude, because they are less fungible: cities like Nashville are lousy with attorneys, while places like Livingston and Greeneville may have far fewer not only in raw numbers but per capita. Small-town lawyers will not find it easy to fulfill a CLE requirement of attending lectures on big-city ideology.

9. The Court should keep its Rules above the fray in which the proposed amendment features. Nothing demonstrates that so well, perhaps, as the initial reaction of anyone—at least anyone young enough to still worry about future employment—with any awareness of current affairs who reads the Court's request for comment: "what will happen to me if I write a comment in opposition?" The prospect blacklists or social-media pressure against such individuals or their firms is not purely fanciful. How many attorneys have muzzled their misgivings about the Petition for precisely this reason? Apart from the ones to whom each of us has spoken, we will never know, because parties aligned with the Petitioners—whether the Petitioners support their efforts or their methodologies or not—have already created an environment of intimidation around the entire topic.

10. Finally, to the extent the proposed amendment embraces legitimate interests in the realm of professionalism, the Court and the bar have at their disposal other, better tools.

11. First, the Rules of Professional Conduct themselves already speak in relevant ways to the intersection between attorneys' personal beliefs or preconceptions and their interactions with both clients and adversaries. Rule 1.7(a)(2) notes the existence of a conflict where an attorney's "personal interest" poses a "significant risk" to the pursuit of a client's interests. While the Rules themselves do not define "personal interest," the American Law Institute and other commentators take the reasonable view that religious, philosophical, or political beliefs can qualify as such

"interests." *See, e.g.*, ***Restatement (Third) of the Law Governing Lawyers*** § 125A cmt. c (Am. L. Inst. 2000). The proposed amendment provides no guidance on whether or how its program would alleviate any conflict that would already exist in representation under RPC 1.7(a). But unless the lawyer's beliefs present a conflict in the context of the representation, the lawyer has an obligation of zealous advocacy under Rule 1.1. Indeed, all lawyers have represented certain clients who, for all sorts of reasons, they might not wish their children to become when they grow up, yet whose—shall we say—idiosyncrasies did not bear upon the purpose of, and thus did not impinge upon, the representation. For while RPC 1.2(b) sometimes doth protest too much (and was trotted out in that manner with reference to the 8.4(g) proposal), there is a great deal of truth in it: saint and sinner alike are entitled to, and receive, zealous, effective representation. From this practical perspective, then, the proposed amendment appears in large part to be a solution in search of a problem, a solution whose relationship to the existing Rules seems to have been little considered.

12. As with the dearth of empirical support for the intrinsic efficacy of the proposal, the lack of consideration of the relationship between the proposed amendment and the existing Rules evidences a lack of planning and intellectual rigor. Such foundational shortcomings suggest a concern with perception more than with actual accomplishment. Policy proposals rarely fare well when adopted simply to show having "done something."

13. Second, mere questions of decorum do not require an amendment to Rule 21. Rule 8.4(d) presently proscribes "conduct ... prejudicial to the administration of justice," which, at least in the view of the official comment, might take the form of manifesting bias or prejudice. *See* Tenn. S. Ct. R. 8, RPC 8.4(d), cmt. 3. And if the Court wishes to improve upon its bar's generally excellent record (by comparison, at least) of professional courtesy, the Court could always take a cue from the United States Patent and Trademark Office and adopt an explicit rule on this topic. *Cf.* 27 C.F.R. § 1.3.[1] A codification of the general expectation of common courtesy would be both more useful to the bench and bar and more closely tailored to any legitimate interests underlying the Petition. Good manners, of course, find themselves in the paradoxical situation of being both deeply rooted in our social and legal tradition and in short supply today.

14. Third, the interests at issue can already be addressed in E/P CLE courses. The Nashville Bar Association, as, surely, local bar associations across the state, sponsors numerous excellent CLE programs. It is certainly free to sponsor programs on topics encompassed by the proposed amendment. Given that the same association has received approval for an upcoming dual-credit

---

[1] "Applicants and their attorneys or agents are required to conduct their business with the United States Patent and Trademark Office with decorum and courtesy. Papers presented in violation of this requirement will be submitted to the Director and will not be entered."

course on improving one's LinkedIn profile,[2] it should encounter no difficulty providing courses on bias. Indeed, such offerings have been made by bar associations, including the Tennessee Bar Association, in the past and will undoubtedly appear again in the future, amendment or no amendment.

15. Thus, the Petition is not well-tailored to its most overtly stated goals, will impose burdensome compliance demands, entails inappropriate policymaking, and is unnecessary in the face of existing mechanisms. It should be denied and the fifteen-hour legal-education requirement left in its current twelve-and-three configuration.

Respectfully submitted,

s/ Paul J. Krog
Paul J. Krog (No. 29263)
155 Franklin Road
Suite 400
Brentwood, TN 37027
615-913-5130
pkrog@bulso.com

[2] Reference to this offering should not be taken as a criticism of the propriety of such professional-development courses or of that particular course. It merely exemplifies the great breadth of permissible offerings.

appellatecourtclerk - Comment to Proposed Rule 21, 3.01(a)

From: "Phillip Walker" <phillip_walker@bellsouth.net>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/3/2021 4:23 PM
Subject: Comment to Proposed Rule 21, 3.01(a)

Mr. Hivner:

ADM2021-01159

In my opinion, this proposed rule should not be adopted because it is unnecessary and, it has the effect of demeaning the bar by implying it is rife with bias and ignorance.

As a member of the Shelby County Bar, I practice with and before a widely diverse bench and bar that, in my observation and experience, treat each other with respect and professionalism.

This rule is also unnecessary because the Rules of Professional Conduct include sufficient guidance and direction to prevent misconduct the proposed rule seeks to prevent.

As officers of the court who are sworn to uphold the Constitution, it is the duty of all to also uphold the dignity of all mankind. In my opinion and experience, the proposed rule is unnecessary for the legal profession.

Sincerely,

Phillip R. Walker, PLLC
7556 Highway 70, Suite 101
Bartlett, Tennessee 38133
(901) 387-3000 Telephone
(901) 424-4038 Fax
WWW.PHILLIPRWALKER.COM

Richard E. Duerr, Jr.
Attorney at Law
1401 Yorkshire Drive
Memphis, Tennessee 38119
reduerr@aol.com
901-652-7224

March 3, 2021

James M. Hivner
Clerk, Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1409

Via Email
appellatecourtclerk@tncourts.gov

RE: Proposed Amendment to Supreme Court Rule 21 - § 3.01(a)
Docket No. AMD2020-01159

Dear Mr. Hivner:

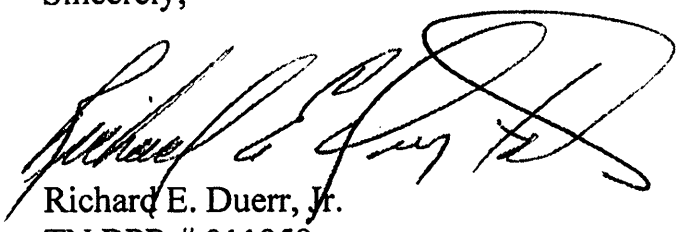
The purpose of this letter is to formally register my OPPOSITION to the proposed Rule amendment referenced above.

I have read the Comment in Opposition filed by Mr. Gregory C. Krog, Jr. (copy attached). I support Mr. Krog's Comment in Opposition, but I wish to add a few additional comments.

The proposed amendment to Supreme Court Rule 21, jumps straight from the today's headlines. It would require training in a variety of areas that are undefined and politically-charged. It offers no objective standards or criteria to determine what is appropriate and what is inappropriate. This lack of clarity and objectivity is, by its very nature, unfair in the most fundamental sense.

Thank you for your consideration.

Sincerely,



Richard E. Duerr, Jr.
TN BPR # 011958

Attachment:

Comment in Opposition to Proposed Amendment to Supreme Court Rule 21 - § 3.01(a)
by Gregory C. Krog, Jr.
Dated March 2, 2021

From: "K. Grace Stranch" <graces@bsjfirm.com>
To: <lisa.marsh@tncourts.gov>
Date: 3/3/2021 4:31 PM
Subject: TN Courts: Submit Comment on Proposed Rules

ADM2021-01159

Submitted on Wednesday, March 3, 2021 - 5:30pm
Submitted by anonymous user: [10.170.198.251]
Submitted values are:

Your Name: K. Grace Stranch
Your Address: 223 Rosa L Parks. Ave, Nashville, TN 37203
Your email address: graces@bsjfirm.com
Your Position or Organization: American Constitution Society Nashville and Knoxville Chapters
Rule Change: ADM2020-01159 Supreme Court Rule 21, Section 3.01(a)
Docket number: ADM2020-01159
Your public comments:
The American Constitution Society (ACS) Nashville and Knoxville Chapters fully support the Nashville Bar Association's petition requiring attorneys to complete two of the fifteen required continuing legal education hours in courses dedicated to diversity, inclusion, equity, and elimination of bias. ACS believes that the Constitution is "of the people, by the people, and for the people." We interpret the Constitution based on its text and against the backdrop of history and lived experience. Through our nationwide network of progressive lawyers, law students, judges, scholars and many others, we work to uphold the Constitution in the 21st Century by ensuring that the law protects our democracy, serves public interest, and improves people's lives. Diversity is key to achieving these ideals.
ACS welcomes and actively recruits a diverse membership from a wide range of communities, including people of different ethnic and racial backgrounds, physical abilities, sexual orientation, gender identity and expression, socioeconomic status, religious and spiritual values, and national origin. These members are critical to ACS's mission of building and leading a diverse legal community that dedicates itself to advancing and defending democracy, justice, equality, and liberty; to securing a government that serves the public interest; and to guarding against the abuse of law and the concentration of power. All those in the ACS family are called upon to actively and affirmatively participate in creating and promoting a more inclusive and diverse American Constitution Society. We believe this diversity is essential for a more just society and, as attorneys, we have the responsibility to lead by example. Requiring two hours of education on these important topics aligns with ACS's mission and is one step toward creating and fostering a more diverse and inclusive legal field. This past year, the Nashville and Knoxville Chapters worked together and challenged our members to participate in the ABA's 21 Day Equity Training. We plan on hosting more diversity and equity focused events and CLEs and will commit to hosting at a minimum enough for lawyers with Tennessee licenses to meet these new guidelines. For these reasons, the Nashville and Knoxville ACS Chapters fully support this initiative and look forward to the positive change it will inspire in our legal community.

The results of this submission may be viewed at:
https://www.tncourts.gov/node/602760/submission/38980

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENTS TO TENNESSEE SUPREME COURT RULE 21	)	**No. ADM2020-01159**

COMMENT OF THE TENNESSEE BAR ASSOCIATION IN RESPONSE TO THE PETITION FOR AMENDMENT OF TENN. S. CT. R. 21

The Tennessee Bar Association ("TBA") submits the following comment regarding the Nashville Bar Association's ("NBA") proposed amendment to Tenn. S. Ct. R. 21. After gathering information through a survey of licensed Tennessee attorneys, polling the TBA sections and committees, and months of extensive discussion and debate on this important issue, the TBA respectfully asks the Court to adopt the recommendation of the Tennessee Commission on Continuing Legal Education ("Commission") to amend Rule 21 to require one (1) hour of continuing legal education ("CLE") on professionalism, which will count as one (1) of the three (3) Dual credit hours required each year. The newly required one (1) hour of professionalism should include programming on pertinent social and professional topics, including, but not limited to, diversity and elimination of bias, mental health, substance abuse, sexual harassment, and congeniality among the bar.

BACKGROUND

On September 28, 2020, this Honorable Court published notice that the NBA filed a petition asking the Court to amend Tenn. Sup. Ct. R. 21 to require each attorney admitted to practice in the State of Tennessee to complete two hours, of the required fifteen hours of CLE in

each compliance year, in diversity, equity, elimination of bias and inclusion. At that time, the Court solicited written comments from judges, lawyers, bar associations, members of the public, and other interested parties concerning the proposed amendments. A deadline of December 30, 2020 was established.

The TBA gathered feedback on the proposal by surveying licensed Tennessee attorneys and asking the TBA sections, committees, and leadership for input. The TBA filed a motion on November 24, 2020, requesting a sixty-day extension of the deadline for written comments until March 3, 2021. On December 2, 2020, the Supreme Court granted the motion and extended the deadline for written comments until March 3, 2021.

TBA INFORMATION GATHERING AND ANALYSIS

Since its founding in 1881, the TBA has represented the entire spectrum of the Tennessee legal community, from plaintiff and defense attorneys to judges, government and legal services attorneys, corporate counsel, and sole practitioners. With over 10,000 members, the TBA is made up of attorneys who live and work across the entire state of Tennessee, as well as many licensed Tennessee attorneys who reside outside of Tennessee.

TBA SURVEY

Every three years, the TBA conducts a comprehensive survey to assess attorney needs and concerns. This year the TBA disseminated the survey to all Tennessee attorneys and attorneys licensed to practice in Tennessee, including those who reside out of state. For the first time, the survey included questions specifically related to diversity and inclusion, as well as attorney well-being. In response to the diversity questions, a majority of TBA members responded that they agreed or strongly agreed the TBA provides an environment for free and open expression of ideas, opinions, and beliefs. A majority also believed that TBA leadership should increase the pace of

adding people of color and women to leadership positions. A majority of members also agreed that TBA's leadership is committed to achieving diversity, equity, and inclusion in Tennessee's legal community. On the issue of attorney well-being, notably, more than nine in ten Tennessee lawyers reported experiencing work-related stress, and nearly four in ten said such stress interfered with their work. Forty-six percent of TBA members stated they are "likely" to utilize wellness CLE programs to address work-related stress.

Additionally, the survey specifically included a question about the NBA's proposal of requiring two mandatory CLE hours of diversity, equity, elimination of bias and inclusion training. Of the members and non-members surveyed, 32.7% supported the proposed requirement, and 48.9% did not. Over 18% of those surveyed were unsure or had no opinion. Opinions on the NBA proposal broke down differently by age, gender, and race. For example, 52% of those under the age of 35 supported the proposal, while about 28% of those over 50 supported it. NBA's proposal also received a larger percentage of support from women and racially diverse survey participants, with 83% of African-American and 47% of women supporting. A few respondents were in favor of one hour or some alternative that could include a one-time program or some inclusion of training with the ethics/professionalism hours rather than the two hours requested in the NBA's proposal.

TBA HOUSE OF DELEGATES

The TBA House of Delegates ("House"), comprised of sixty-one (61) elected attorneys representing thirty-one judicial districts across Tennessee, met on January 22, 2021, to discuss the NBA proposal. Immediate Past President of the NBA, Laura Baker, gave a presentation and took questions. Members of the House reviewed relevant information, including the NBA Petition, information regarding requirements in other states, and opinions from TBA sections. The House discussed concerns related to the necessity of mandatory CLE requirements, the importance of the

subject matter, and concerns about the amount of available CLE content on diversity, equity, and inclusion. Ultimately, the House voted to support the response filed by the Commission on Continuing Legal Education, which would require one (1) hour of mandatory CLE on professionalism that should count as one (1) of the three (3) Dual credit hours required each year. CLE programs on pertinent social and professional topics, including, but not limited to, diversity and elimination of bias, mental health, substance abuse, sexual harassment, and congeniality among the bar should be designated to satisfy the CLE requirement.

The TBA's bylaws provide that policy recommendations from the House go to the Board of Governors where the Board of Governors may approve, amend or reject those recommendations.

TBA BOARD OF GOVERNORS

The TBA Board of Governors ("Board") is comprised of twenty-seven (27) members, including the TBA officers, who govern the activities of, administer the business of, and act for the Association on all matters. The Board discussed the NBA Petition during a meeting on February 6, 2021. Former NBA President Laura Baker again gave a presentation and responded to questions. The Board reviewed relevant information including the NBA Petition, TBA survey statistics, comments filed in response to the NBA proposal, opinions from TBA sections, information regarding requirements from other states, and the recommendation of the House. The Board considered all of the feedback received and discussed several options.

After a long and vigorous discussion, the Board voted to approve the recommendation of the House, which would require one (1) hour of mandatory CLE on professionalism, including programming on pertinent social and professional topics, including, but not limited to, diversity and elimination of bias, mental health, substance abuse, sexual harassment, and congeniality

among the bar. In reaching this decision, the Board discussed the importance of these issues and how the TBA could contribute to positive and meaningful discourse through existing and future efforts in the Association.

TBA'S COMMITMENT TO DIVERSITY AND INCLUSION

The TBA's decision to approve an alternative to the NBA proposal is not evidence of a lack of concern or awareness of the unique and important challenges to the profession on specific issues of diversity, equity, and inclusion. The TBA realizes that it must serve as a leader on this very important issue and, therefore, must create additional opportunities for education and empowerment.

Over the past year, the TBA has drastically increased efforts related to encouraging diversity and inclusion, such as appointing a TBA Chief Diversity Officer and creating a Diversity Task Force, which will present several substantive recommendations to the Board for approval during its April meeting. The TBA will then work with its existing Sections and Committees to implement the recommendations approved by the Board. Additionally, the TBA has already heavily increased its CLE programming on Diversity, including implicit bias training, diversity roundtables, and leadership programming. In 2020-2021, the TBA offered eleven new CLEs focused on Diversity, Equity, Inclusion, and Implicit Bias. Additionally, the TBA has eleven new CLEs focused on these topics being released in the coming months. The TBA also included implicit bias programming in its CLE bundles during its end-of-the-year CLE campaign in which members and non-members took over 10,000 hours of CLE. As the largest CLE provider in Tennessee, the TBA is committed to producing more programming through its thirty-three sections to meet any requirements ultimately issued by the Supreme Court.

CONCLUSION

For these reasons, the TBA respectfully asks the Court to adopt the recommendation of the Commission to amend Rule 21 to require one (1) hour of continuing legal education ("CLE") on professionalism, which will count as one (1) of the three (3) Dual credit hours required each year. The newly required one (1) hour of professionalism should include programming on pertinent social and professional topics, including, but not limited to, diversity and elimination of bias, mental health, substance abuse, sexual harassment, and congeniality among the bar. A proposed draft of the amended Rule 21 is attached hereto as Exhibit A.

Respectfully submitted,

TENNESSEE BAR ASSOCIATION

By: Michelle Sellers

MICHELLE GREENWAY SELLERS (BPR No. 20769)
President, Tennessee Bar Association
Rainey, Kizer, Reviere & Bell PLC
105 S. Highland Avenue
Jackson, TN 38301
Tel: (731) 423-2414
msellers@raineykizer.com

By: /s/ by permission

EDWARD D. LANQUIST (BPR No. 13303)
General Counsel, Tennessee Bar Association
Patterson Intellectual Property Law, PC
1600 Division Street, Suite 500
Nashville, TN 37203
Tel: (615) 242-2400
edl@iplawgroup.com

By: /s/ by permission
JOYCELYN A. STEVENSON (BPR No. 21710)
Executive Director
Tennessee Bar Association
221 4th Avenue North, Suite 400
Nashville, TN 37219
Tel: (615) 383-7421
jstevenson@tnbar.org

By: /s/ by permission
BERKLEY SCHWARZ (033166)
Director of Public Policy & Government Affairs
Tennessee Bar Association
221 Fourth Avenue North, Suite 400
Nashville, TN 37219
Tel: (615) 383-7421
bschwarz@tnbar.org

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing has been served upon the individuals and organizations identified in Exhibit "B" by email, within seven (7) days of filing with the Court.

Michelle Sellers

Michelle Greenway Sellers

Section 3. Continuing Legal Education Requirement.

3.01. (a) Unless otherwise exempted, each attorney admitted to practice law in the State of Tennessee shall obtain by December 31st of that compliance year a minimum of fifteen (15) hours of continuing legal education. Of those fifteen hours, three (3) hours shall be approved for ethics/professionalism credit ("EP credit") and twelve (12) hours shall be approved for General credit.

(b) Of the three (3) hours required for EP credit, one (1) hour of professionalism credit is required. Topics for programs that satisfy the required professionalism credit include, but are not limited to, diversity and elimination of bias, mental health, substance abuse, sexual harassment, and congeniality among the bar.

(c) All EP credit shall be designated as "Dual" credit as defined in the Commission's regulations. Dual credit shall first be applied as EP credit and any remaining credit shall be applied as General credit.

(d) Each attorney, who is not exempt for this Rule, shall earn a minimum of seven (7) hours of Live CLE credit each compliance year and may count a maximum of eight (8) hours of Distance Learning credits toward each compliance year.

(e) An attorney who is eligible for an exemption must annually file a claim of exemption on or before March 31st. Applications received after the deadline are assessed late fees in accordance with the compliance timetable included with the Annual Report Statement.

(f) An attorney who has filed a previous claim of age exemption shall not be required to file an annual exemption statement.

"Exhibit B"

Dwight Aarons
National Bar Association, William Henry Hastie Chapter President
daarons@utk.edu

Michael Abelow
Nashville Bar Association President
mabelow@srvhlaw.com

Cathy Allshouse
Bradley County Bar Association President
callshouse@laet.org

Justin Angel
Twelfth Judicial District Bar Association President
judge.justin.angel@tncourts.gov

Ariel Anthony
National Bar Association, S.L. Hutchins Chapter President
ariel.anthony@huschblackwell.com

Nick Armes
Anderson County Bar President
narmes@las.org

Jeremy Ball
Jefferson County Bar Association President
jdball@tndagc.org

Mary Beard
Napier Looby Bar Association President
mary.beard@hospitallaborlaw.com

Barri Bernstein
Tennessee Bar Foundation
Executive Director
bb@tnbarfoundation.org

Clay Billingsley
Obion County Bar Association President
clay.billingsley@gmail.com

Mark Blakley
Scott County Bar Association President
mark.e.blakley@tn.gov

Doug Blaze
Interim Dean University of Tennessee School of Law
blaze@utk.edu

Ben Boston
Lawrence County Bar Association President
bboston@bhsdlaw.com

Kristin Brown
Bedford County Bar Association President
kristinbrownlaw@gmail.com

Melanie Cagle
Hickman County Bar Association President
melanie@mtcaglelaw.com

Jesse Campbell
Washington County Bar Association President
jcampbell17@my.asl.edu

Patrick Carter
Maury County Bar Association President
pcarter@mtlawgroup.net

Andy Clark
Paris-Henry County Bar Association President
aclark@clarkandcoxlaw.com

Jeff Coller
Campbell County Bar Association President
collerlaw@gmail.com

Curt Collins
Greene County Bar Association President
curt@collinsshipley.com

Daryl Colson
Overton County Bar Association President
dcolson@twlakes.net

Isaac Conner
Tennessee Alliance for Black Lawyers (TABL) President
iconner@mansonjohnsonlaw.com

Bratten Cook
Dekalb County Bar Association President
bcook@dtccom.net

Loretta Cravens
Tennessee Lawyers Association for Women (TLAW) President
loretta@cravenslegal.com

Creed Daniel
Grainger County Bar Association President
daniellawoffice@cs.com

Dan Daugherty
Sumner County Bar Association President
ddaugherty.law@gmail.com

Michael Davis
Morgan County Bar President
judgedavis.davis7@gmail.com

Dan Douglas
Lauderdale County Bar Association President
dan@dandouglaslaw.com

Heather Douglas
Tennessee Association of Defense Lawyers (TADL) President
hhardt@manierherod.com

Joanna Douglass
Lawyers Association for Women Anne Schneider Chapter President
joanna.douglass@tn.gov

David Eldridge
Tennessee Bar Foundation Chair
deldridge@eblaw.us

Kathryn Ellis
Blount County Bar President
kellis@laet.org

Sam Felker
Tennessee Stonewall Bar Association President
samfelker@bakerdonelson.com

Joseph Ford
Franklin County Bar Association President
joseph.ford@mcbeeandford.com

Shawn Fry
Putnam County Bar President
sfry@lawfry.com

Sandy Garrett
Board of Professional Responsibility Chief Counsel
sgarrett@tbpr.org

Peter Gee
Memphis Bar Association President
pgee@forthepeople.com

Ashley Gibson
Southeast TN Lawyers Association for Women (SETLAW) President
a.baxtergibson@gmail.com

Melanie Gober Grand
Lawyers Assoc. for Women Marion Griffin Chapter Executive Director
info@law-nashville.org

Al Gonzales
Dean Belmont University College of Law
alberto.gonzales@belmont.edu

Jonathan Griffith
Tennessee Trial Lawyers Association President
john@griffithinjurylaw.com

Chris Guthrie
Dean Vanderbilt University School of Law
chris.guthrie@vanderbilt.edu

Bill Harbison
Tennessee Board of Law Examiners President
bharbison@srvhlaw.com

Olen Haynes
Federal Bar Association Northeast Tennessee Chapter President
oghjr@hayneslawyers.com

James Haywood
Haywood County Bar Association President
jim@haywoodlaw.net

Michael Hill
Gibson County Bar Association President
mh_fch@bellsouth.net

Lynda Hood
Chattanooga Bar Association Executive Director
lhood@chattbar.org

Odell Horton
Board of Professional Responsibility Chair
ohorton@wyattfirm.com

Allison Jackson
East TN Lawyers Assoc. for Women President
ajackson@emlaw.com

Chris Javillonar
Tennessee Asian Pacific American Bar Association (TAPABA)
chris.javillonar@permobil.com

Robert Jolley
Monroe County Bar Association President
rjolley@jolleylaw.legal

Suzanne Keith
Tennessee Trial Lawyers Assoc. (TTLA) Executive Director
skeith@ttla.org

Bill Koch
Nashville School of Law Dean
bill.koch@NSL.law

Karol Lahrman
Tennessee Lawyers Association for Women (TLAW) Executive Director
Karol.Lahrman@tlaw.org

Megan Lane
Association for Women Attorneys (AWA) President
mlane@harrisshelton.com

Denise Lawrence
Tenn. Assoc. of Criminal Defense Lawyers (TACDL) Executive Director
dlawrence@tacdl.com

Eric Lehman
Montgomery County Bar Association President
eric@lehmanjohnsonfirm.com

Michelle Long
Administrative Office of the Courts (AOC) Deputy Director
michelle.long@tncourts.gov

Taylor Luther
Dickson County Bar Association President
taylorrluther@yahoo.com

Matt Lyon
Dean Lincoln Memorial University Duncan School of Law
matthew.lyon@lmunet.edu

Monica Mackie
Nashville Bar Association Executive Director
Monica.mackie@nashvillebar.org

Juli Mason
Roane County Bar President
Lawyerjuliloden@aol.com

Willis McKee
Coffee County Bar Association President
Willis.McKee@tn.gov

Mark Mesler
Tennessee Lawyers Fund for Client Protection Chair
mesler@bellsouth.net

Kirk Moore
CLE Commission Chair
kmoore@glasgowchism.com

Melissa Parsons
McMinn Meigs County Bar Association President
mparsons2042@gmail.com

Lisa Perlen
Tennessee Board of Law Examiners Executive Director
lisa.perlen@tncourts.gov

Peggy Pulley
Cheatham County Bar Association President
peggy@psplaw.net

Mario Ramos
Tenn. Assoc. of Spanish Speaking Attorneys (TASSA) President
mario@mrvisa.com

Caroline Sapp
Upper Cumberland YLD Association President
cesapp21@gmail.com

Matt Maddox
Carroll County Bar Association President
mattmaddox@bellsouth.net

Ian McCabe
Loudon County Bar Association President
mccabeip@gmail.com

Judy McKissack
Tennessee CLE Commission Executive Director
judy.mckissack@cletn.com

Jonathan Miley
Robertson County Bar Association President
Jonathan.miley@gmail.com

David Myers
Union County Bar Association President
davidmyers04@comcast.net

John Partin
Warren County Bar Association President
john.partin@tn.gov

Nathan Powers
Williamson County Bar President
npowers@crtitleinc.com

Shayla Purifoy Purifoy
National Bar Association, Ben Jones Chapter President
spurifoy@aol.com

Lia Rauber
Sevier County Bar Association President
tnlawlia@gmail.com

Katharine Schaffzin
Dean University of Memphis Cecil C. Humphreys School of Law
ktschffz@memphis.edu

Jeffrey Maddux
Chattanooga Bar President
jmaddux@chamblisslaw.com

Susan McGannon
Middle TN Lawyers' Association for Women (MTLAW) President
semcgannon@comcast.net

Catherine Mekis
Rutherford Cannon County Bar President
catherinemekis@gmail.com

Denny Mitchell
White County Bar Association President
mitchelllaw@benlomand.net

Julie Palmer
Dyer County Bar Association President
Julie@wtls.org

Beau Pemberton
Weakley County Bar Association President
beaupemberton@hotmail.com

Ann Pruitt
Tennessee Alliance for Legal Services (TALS) Executive Director
apruitt@tals.org

Sara Anne Quinn
Lawyer's Association for Women Marion Griffin Chapter President
SaraAnne.Quinn@butlersnow.com

Cheryl Rice
Knoxville Bar Association President
crice@emadlaw.com

Dudley Senter
Bristol Bar Association President
lds@senterlaw.com

J.K. Simms
Federal Bar Association Nashville Chapter President
jk@thompsonburton.com

David Stanifer
Claiborne County Bar Association President
staniferattys@yahoo.com

Deborah Tate
Administrative Offices of the Courts (AOC) Director
deborah.taylor.tate@tncourts.gov

Harriet Thompson
Hardeman County Bar Association President
harrietsthompsonatty@gmail.com

Nick Utter
Marshall County Bar Association President
nickutter@aol.com

John Lee Williams
Humphreys County Bar Association President
john.williams@porchpeeler.com

Rachel Witherington
Tipton County Bar Association President
rwitherington@lexverum.com

Amy Kathleen Skelton
Hawkins County Bar Association President
amy.kathleen.skelton@gmail.com

Carrie Stefaniak
Federal Bar Association Chattanooga Chapter President
carrie_stefaniak@tned.uscourts.gov

James Taylor
Rhea County Bar Association President
mtaylor@tndagc.org

Kelly Tollett
Cumberland County Bar Association President
kelly@fieldsandtollett.com

Brittany Vick
Cocke County Newport Bar President
brittany@wildvicklaw.com

Jared Williams
Kingsport Bar Association President
jaredawilliams7@gmail.com

Michael Working
Tennessee Association of Criminal Defense Lawyers President
workinglaw@gmail.com

Wayne Stambaugh
Hamblen County Bar Association President
wstambaugh@stambaughlaw.net

Austin Stokes
Jackson-Madison-Henderson County Bar Association
astokes@pgandr.com

Robert Thomas
National Bar Association, Ballard Taylor Chapter President
robert_thomas@fd.org

Maury Tower
Interim Executive Director Memphis Bar Association
maurytower@memphisbar.org

Marsha Watson
Knoxville Bar Association Executive Director
mwatson@knoxbar.org

Colleen Wilson
Federal Bar Assoc. Memphis/ Mid-South Chapter President
chitchwilson@fedex.com

Sonya Wright
Fifteenth Judicial District Bar President
sonya@smithwrightlaw.com

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE:
PETITION OF THE NASHVILLE BAR ASSOCIATION TO AMEND TENN. SUP. CT. R. 21 § 3.01(a)

Docket # ADM2020-01159

COMMENT IN OPPOSITION TO AMENDMENT OF SUPREME COURT RULE 21 § 3.01(a)

Pursuant to the Court's Orders of 28 September 2020 and 2 December 2020, the undersigned presents the following comment in opposition to the proposed amendment of Rule 21, Section 3.01(a) to require CLE training in "diversity, inclusion, equity, and elimination of bias."

I. INTRODUCTION

Tennessee Supreme Court Rule 21, Section 3.01(a) requires each attorney admitted to practice in the State of Tennessee to obtain fifteen hours of continuing legal education (or "CLE") each year. On August 28, 2020, the Nashville Bar Association ("NBA") petitioned this Court to modify Rule 21, section 3.01(a), to require each attorney to devote two of the required fifteen hours to courses in diversity, inclusion, equity, and elimination of bias.

The petition should be denied. Similarly to the petition urging adoption of ABA Rule 8.4(g) denied by the Court in 2018, the petition invites the Court to take a side--and dragoon the bar en masse to that side--in a contentious socio-political debate;[1] proposes a regimen of thought-policing; and attempts to smuggle factious special pleading into the Court's Rules under the guise of ostensibly neutral or even laudable principles. The effort is unconstitutional, unnecessary, undesirable, and

[1] *Cf.* Brian McCall, *Would Cicero Recognize America as a Commonwealth?*, IUS & IUSTITIUM, Feb. 17, 2021 https://iusetiustitium.com/would-cicero-recognize-america -as-a-commonwealth/#more-803 (noting "a complete breakdown of any consensus iuris or agreement on the fundamental principles of law and justice.").

unbecoming.

II. THE PROPOSED CLE REQUIREMENT RELIES ON SPECIOUS GROUNDS AND VIOLATES THE FOUNDING PRINCIPLES OF OUR COUNTRY AND STATE.

Preliminary Observations

A number of attorneys have submitted comments demonstrating the inherent unconstitutionality of the proposal, and a number of the same and other comments have focused on the proposal's roots in political motivations. Some commentators see these motivations as overt, others as shrouded in good intentions. I join in and endorse the comments by Anthony Berry, Stewart Crane, and Ward Huddleston, and the suggestion by attorney Richard Archie that at least two hours of constitutional law be required annually.

Background of the Petition

Like proposed Rule 8.4(g), the proposal contained in the present Petition grew out of the American Bar Association's August 2016 Diversity & Inclusion 360 Commission. The ABA President, summarized the commission's purpose in the introduction to the report's executive summary as causing our profession "to be fully inclusive of everyone without regard to race, national origin, ethnicity, sex, religion, age, disability, sexual orientation, gender identity, gender expression, marital status, or socioeconomic status."

These same sentiments lay behind Model Rule 8.4(g), which this Court wisely rejected when it was proposed just three years ago. Like its earlier cousin, the present Petition attempts to advance a partisan political agenda by redefining the basic and fundamental virtues essential to citizenship. The present effort, then, shares the philosophical shortcomings of the former. Many any of the adverse comments to that proposal, including my own, are directly applicable to this Petition.

A. The Petition's manipulation of language seeks to disguise the intentions of its proponents.

The Petition's advocates couch its proposal in the language of benignity and good intentions. The evidence, however, suggests the Petition is ***not*** well intentioned, at least not in the sense of being a neutral or wholesome effort at legitimate dialogue, regardless of any individual proponent's subjective motivation. It, along with the ABA executive report that inspired it, constitutes sophistry in the worst Platonic sense. Particularly pertinent to debates of this sort is the analysis of language and rational debate undertaken by German philosopher Josef Pieper in his 1974 essay, ***Abuse of Language, Abuse of Power***, (Ignatius Press, 1992)(trans. by Lothar Krauth)(1988 ed.). Pieper succinctly explains the meaning of sophistry in a way directly related to our inquiry. He also provides a useful framework to analyze how we think and manage dialogue in our profession, our politics, and our whole society. Legitimate dialogue in our profession and our entire Republic has been replaced by ad hominem attacks, verbal bludgeoning, and an utter disregard for truth, resulting in a public sphere poisonous beyond even Pieper's descriptions.

The petition attempts to persuade the Court to revise our understanding of virtue and the common good.

The petition misuses language in two ways. First, the entire ABA effort, arises from an intentional attempt to cloak an evil proposal in terms designed to justify it as good. Second, it depends on a mischaracterization and delegitimization not only of our system of laws and government, but fundamentally of the Western social and intellectual system from which they arise.[2]

---

[2] It is impossible in this comment to address, by more than this introductory reference, the history of the Hegelian and Marxist roots of the philosophical errors of the religious or quasi-religious fervor of critical race theory or gender identity theories. For a discussion of how Kierkegaard, Marx, and Nietzsche paved the way for these theories by their work demoting transcendent and eternal ideas to mere "values" and thus displaced understandings of thought

Describing the A.B.A.'s effort as evil admittedly may appear counterintuitive at first. Proponents of "diversity, inclusion and equity" contend that they seek good ends. How could any opposition to proposals directed towards such ends be anything but good? And many might willingly conclude that biases should be opposed and eliminated. But the disparity between the true virtues these terms evoke and the actual practices and contexts as used in the present Petition belies any benignity. In our day, efforts rooted in the Petition's terminology invariably seek to redefine basic truths or even deny their very existence.[3] Proposals such as this of "inclusion" and "diversity" do not include, and are not diverse. ***Cf., e.g., Rotunda, "The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, Heritage Foundation Legal Memorandum No. 191 (Oct. 6, 2016)** (available at http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf). Rather, the use of these terms masks an objectively recognizable intent to exclude dissenting views, or even ban and punish those holding them.

For it is abundantly clear that the goal of the new requirement is not a more vibrant intellectual marketplace, or a more wide-ranging understanding of political virtue. It simply proposes a different marketplace and a different virtue, an exclusive tent, not a bigger one. "Diversity," "inclusivity," and "[freedom from] bias" do not mean old ideas about, e.g., gender identity, *and* new ideas; they mean new ideas *instead of* old ideas. The observer here can echo

---

prevalent since Plato, a useful introduction can be found in Arendt, Hannah ***Between Past and Future*** (Penguin 1983), 29-40, and Barzun, Jacques, ***Darwin, Marx, Wagner*** (Little, Brown & Company 1941), 141-83.

[3] Those efforts increasingly take the form, described by C.S. Lewis in *The Abolition of Man*, of declining to debate various fundamental points that they cannot refute and instead simply denying the existence of the context in which those points have meaning. This undertaking, Lewis succinctly argued in that essay, ultimately undermines, rather than enhances, the human spirit.

George Bailey in It's a Wonderful Life: "Potter isn't selling! Potter's buying!" Here, the architects of the Petition's ideas stand in for Lionel Barrymore.

The founders specifically accounted for the inevitable dangers arising from different interest groups united in a polity. Rather than reshape our definition of private and public virtue under positivist concepts of self-conceptualized identity, our profession should relearn the admonitions of James Madison in Federalist 10. He defines a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." ***Federalist No. 10, THE FEDERALIST PAPERS*** (New American Library 1961), at 78. Preventing those factions from tearing asunder the framework of our government and society is a primary purpose of government. The petition's ill-defined principles offer no coherent critique of or any improvement on the Founders' solutions.

When the petition speaks of "equity," it means neither the jurisprudential concept found in Gibson's Suits in Chancery nor, more importantly, the "equality" due all citizens under the law and guaranteed in our Constitution. Between 1861 and 1865 our Republic purchased that equality on battlefields across the entire country, at the cost of over 600,000 lives. Lincoln, before the war, defined this equality as the entitlement "to all the natural rights enumerated in the Declaration of Independence –the right to life, liberty, and the pursuit of happiness . . . the right to eat the bread, without the leave of anybody else, which his own hand earns." **ABRAHAM LINCOLN, HIS SPEECHES AND WRITINGS**, (edited by Brasler, Da Capo Press 1990), at 445. Proposals of "equity" no longer include even Martin Luther King's formulation, not even sixty years ago, that a citizen should be judged by the content of his character, not the color of his skin. Creating special rights based on

various sub-categories of citizenship, which is what is effectively demanded, is simply contrary to the ideas of Madison, Lincoln and King, and inconsistent with our heritage, traditions, and Constitution. Madison, in ***Federalist No. 10***, articulated the essentially non-negotiable foundation distinguishing a free and self-governing republic from the mob rule that typifies "pure" democracy: "Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would at the same time be perfectly equalized and assimilated in their possessions, their opinions, and their passions." ***THE FEDERALIST PAPERS***, at 81. By equity the architects of the ideas in the petition mean precisely the utopian dream Madison's analysis refutes. The French Revolution, with its goal of perfect equalization of possessions, opinions, and passions, showed the dangers of such a pursuit, and subsequent history has only reinforced the lesson.

Nor does the Petition reflect any limiting principle with respect to "bias" that might confine that concept to situations in which individuals face a violation of actual human rights based on immutable characteristics. It is evident that the petition aims to employ Rule 21 on behalf of a viewpoint encompassing the entire waterfront of pet "progressive" aims, ranging from observations rooted in alleged racial disparities about which reasonable people might disagree to claims about human sexuality that are, at their core, fundamentally philosophical and religious.

Even apart from the institutional impediments to enlisting the judiciary in the reworking of public policy to this extent, the reworking itself is not desirable. The American experiment in freedom, with its resulting Constitutional order establishing a self-governing Republic, presupposes the existence of immutable truths and of an order anteceding the state and immune from its lawful reach. Our civic virtues and those immutable truths depend themselves on the presupposition that

truth exists and is knowable, that a distinction exists between right and wrong, between good and evil, and that the distinctive nature of humanity is its capacity to know and distinguish right from wrong and good from evil, accompanied by the free will to resist evil and do good, to love your neighbor as yourself. Our organic laws expressly state the immutable truths and implicitly recognize the presupposition:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

Declaration of Independence (https://www.archives.gov/founding-docs/declaration-transcript).

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S.C.S. Const. Preamble. [4]

Here we turn to Professor Pieper:

> Public discourse, the moment it becomes basically neutralized with regard to a strict standard of truth, stands by its nature ready to serve as an instrument in the hands of any ruler to pursue all kinds of power schemes. Public discourse itself, separated from the standard of truth, creates on its part, the more it prevails, an atmosphere of epidemic proneness and vulnerability to the reign of the tyrant.

Abuse of Language at 30-31. He goes on to explain:

> Yet propaganda in this sense by no means flows only from the official power structure of a dictatorship. It can be found wherever a powerful organization, an ideological clique, a special interest, or a pressure group uses the word as their

---

[4] Long ignored as a source of actual constitutional rights, attention to the preamble should be renewed as a source, like the Declaration, articulating a consensus about the common good, over and above any positivist majoritarianism. ***See, e.g.***, *Hammer, "Toward a New Jurisprudential Consensus: Common Good Originalism", Public Discourse* (Feb. 18, 2021)(https://www.thepublicdiscourse.com /2021/02/74146/).

> "weapon". And a threat, of course, can mean many things besides political persecution, especially all the forms and levels of defamation, or public ridicule, or reducing someone to a nonperson–all of which are accomplished by means of the word, even the word not spoken.
>
> * * *
>
> The abuse of political power is fundamentally connected with the sophistic abuse of the word, indeed, finds in it the fertile soil in which to hide and grow and get ready, so much so that the latent potential of the totalitarian poison can be easily ascertained, as it were, by observing the symptom of the public abuse of language. The degradation, too, of man through man, alarmingly evident in the acts of physical violence committed by all tyrannies (concentration camps, torture), has its beginning, certainly much less alarmingly, at that almost imperceptible moment when the word loses its dignity. The dignity of the word, to be sure, consists in this: through the word is accomplished what no other means can accomplish, namely, communication based on reality.

Id. at 32-33. The prescience of Pieper's analysis, though written in 1974, is evident in 2021 in the United States every day of the week from ubiquitous, instantaneous social media platforms in which demonization replaces criticism and fallacies substitute for reason. Thus his further comment also sheds light on our analysis:

> It is entirely possible that the true and authentic reality is being drowned out by the countless superficial information bits noisily and breathlessly presented in propaganda fashion. Consequently, one may be entirely knowledgeable about a thousand details and nevertheless, because of ignorance regarding the core of the matter, remain without basic insight . . . the place of authentic reality is taken over by a fictitious reality; my perception is indeed still directed toward an object, but now it is a pseudoreality, deceptively appearing as being real, so much so that it becomes almost impossible any more to discern the truth.

Id. at 33-34. Pieper goes on to offer a specific warning to those faced with such efforts:

> [O]pposition is required, for instance, against every partisan simplification, every ideological agitation, every blind emotionality, against seduction through well-turned yet empty slogans, against autocratic terminology with no room for dialogue, against personal insult as an element of style, (all the more despicable the more sophisticated it is), against the language of every evasive appeasement and false assurance . . . and not least against the jargon of the revolution, against categorical conformism and categorical non-conformism . . ..

Id. at 38-39.

Even a cursory look around strongly supports the conclusion that American society today experiences the weaponization of language by interest groups in the manner Pieper describes, and that the Petition travels in such company. Campaigns to "doxx"[5] and then render unemployable, deplatform,[6] "cancel," and generally demonize those regarded as heretics against any number of radically "progressive" tenets proceed every day. Just within the last two weeks Amazon.com memory-holed a 2019 book by a noted conservative commentator critiquing contemporary gender-identity theory. ***See*** Ryan T. Anderson, *When Amazon Erased My Book*, FIRST THINGS, https://www.firstthings.com/web-exclusives/2021/02/when-amazon-erased-my-book. Earlier this month, officials in the Episcopal Church in Washington, DC, engaged in the now-common apologizing ritual for the delict of inviting author and pastor Max Lucado-who himself was guilty of the delict of describing homosexual relations as sinful in a 2004 article-to speak. ***See*** David Paulsen, *Washington Bishop, National Cathedral Dean Apologize for 'Mistake' of letting Max*

---

[5] This neologism refers to the malicious online publication of private information about an individual.

[6] The contemporary "progressive" movement cannot exist without neologisms. This one describes means by which a person is prevented from participating in a public forum, by, for example, barring from social-media outlets, terminating cloud server access, or yanking publications from circulation.

Lucado Preach, ***Episcopal News Service*** *https://www.episcopalnewsservice.org/2021/02/10/washington-bishop-national-cathedral-dean-apologize-for-mistake-of-letting-max-lucado-preach/*. Or take the Boeing executive forced out last year because someone uncovered an opinion he expressed in 1987 about women in combat. ***See*** *Jenny Gross, Boeing Communications Chief Resigns Over 33-Year-Old Article*, NEW YORK TIMES, *https://www.nytimes.com/2020/07/08/business/boeing-resignation-niel-golightly.html*. Other examples are close at hand, and likely occur to the Court itself.

The most prominent example from our nation's actual jurisprudence, of course, is the manner in which normal rules governing free speech have been disregarded by our Supreme Court when the life of a preborn human is at stake. ***See, e.g., Hill v. Colorado***, 530 U.S. 703, 741, 120 S. Ct. 2480, 2503, 147 L.Ed.2d 597, 627 (2000)(Scalia, J. dissenting); ***Thornburgh v. American College of Obstetricians and Gynecologists***, 476 U.S. 747, 814, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986)(O'Connor, J. dissenting).

All of these efforts emanate from the same goals motivating the current Petition, which the proposed amendment would codify in Rule 21. The claims of benign intentions, then, not only ring hollow, but implicate precisely the kind of linguistic abuse described by Professor Pieper. Consider comments from jurisdictions where the requirements contained in the Petition have been adopted or placed under consideration:

> On the one hand, it is crucial for the legal profession to celebrate and encourage diversity at all levels, while, on the other, it must lead in combatting bias on the basis of race, gender, ethnicity, religion, sexual orientation or other differences.

See https://www.law.com/newyorklawjournal/2018/03/23/changes-to-state-cle-requirements-now-include-diversity-inclusion-and-elimination-of-bias/ (sic).

> "EDI CLE's are designed to educate as well as to promote healthy discussion and reflection. . . .An LGBTQ program might address such questions as, "What is the significance of identifying one's pronouns?" and "How should I address my staff/associate if I am not sure the proper pronoun to use?"

See Hernandez, "Leading the Way to a Diversity-Focused CLE Requirement", *Colorado Lawyer* (Dec. 2020). The purpose of the Washington rule amendment is described by the proponents in terms this Court should find chilling:

> Given the diversity of our community, it is important to understand the different lived experiences of others. Certain assumptions, attitudes, words, phrases and behaviors can harm others, negatively impact their mental and social well-being, and deny them their due economic wellness. Words can be confusing and change interactions if misused; they can also help persuade a judge or jury, sway negotiations, and determine how we meet our clients' needs. An individual's tone of voice, and non-verbal cues also impact how we interact with others. By understanding and identifying biases and interrupting their adverse impacts on others, the Washington licensed legal professionals can better understand their clients' needs and other points of view. It is a business imperative to understand bias. Being aware of our own bias and being sensitive to different perspectives can establish communication bridges. Through this communication, a licensed legal professional can become a credible source, build client relationships, and gain others' trust or convince another to see the other side of an argument.
> ***No one is without some sort of bias. Recognizing our own biases, whether they be positive or negative, implicit or explicit, is a continual process.*** Opponents' claims that such courses would shame or target a particular group are erroneous. *The equity requirement is not about shaming a particular group; any attempts to shame are counterproductive and a detour from achieving equitable outcomes. It is about understanding how one's bias can have adverse impact on the equitable practice of law.*

See https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=5823 (emphasis added).

Au contraire. These are not the comments of people who are happy for lawyers to retain and advocate for traditional philosophical or religious views on, e.g., human sexuality. The thesis that such views are not only wrong, but somehow actually harmful to others is fundamentally inconsistent with the premise that people who wish to continue holding those views (assuming they have the

temerity to do so) will themselves remain welcome, heard, and respected members of the bar. The claim by the Washington Mandatory Continuing Legal Education Board is classic doublespeak.[7]

These justifications in the above comments are, again, cloaked in precisely the kind of misleading language that Pieper condemns. Even if the Washington Board's justification were internally consistent it does not set forth a legal standard or even a factual basis, but rather a quasi-religious program of repentance, penance, and reform. "Forgive me, Your Honor, for I have sinned; it has been six months since my last bias-elimination CLE. In that period, I have eight times entertained the thought that human sexual identity is binary and immutable." The Petition asks the Court to adopt a metaphysical and socio-political vision and then enroll the bar as its catechumens. Nothing in the Nashville Bar's petition indicates that its understanding differs from previous jurisdictions that have adopted this requirement.

B. The Petition Represents Unnecessary and Counterproductive Special Pleading.

Rule 21 presently distinguishes between two types of credit: general and ethics and professionalism. Because, to the extent they legitimately bear upon the practice of law, the topics at the heart of the Petition would already qualify for "ethics and professionalism" credit, the proposal is unnecessary. By yoking the entire bar to an irksome requirement for the benefit of one special-interest group, the proposal will, far from promoting unity and the common good, generate resentment and encourage further factionalism and special pleading.

---

[7] Of course, like all good doublespeak, it has a kernel of truth to hold it up. Certainly all people, including judges and lawyers, approach the situations they encounter and make decisions within them based, in part, on a difficult-to-quantify array of past experiences and assumptions. Justice Cardozo noted this a century ago in his *The Nature of the Judicial Process*. The problem here is not the uncontroversial observation that people engage in decision-making this way, but the claim that experiences, assumptions, even if you will "biases" must be shoe-horned into conforming to a particular set of attitudes and yielding a particular set of outputs, neither of which results from (1) actual human experience, (2) the organic judgment of tradition, or even in many cases (3) an individual's preferred religious and philosophical convictions. That is, the proposal is not looking to improve Justice Cardozo's process, but to replace it.

The petition attempts to leverage the education of Tennessee attorneys to promote an agenda that is inconsistent with the Constitution and laws of the state. In particular, Tennessee has not adopted gender ideology in any of its forms as its state policy, and until the people amend its Constitution to do so, efforts to impose it by judicial fiat violate the judiciary's duty to uphold the law. And whose view of these controversial topics are to be approved by our CLE Commission? Society-wide eschatological and utopian goals are beyond the competence of government in general and the Courts in particular.

Pieper's admonition of strict adherence to the truth applies with particular force to a proposal to mandate the teaching of subjects as ill-defined as the ones the petition identifies. Apart from being so politically charged, each is also too ill-defined to mandate that attorneys be well-versed in its tenets. Diverse from what? Diverse according to whom? Inclusive of what? If the terms are merely codewords for a "progressive" agenda, they entail an improper and untoward invasion of attorneys' personal philosophical and religious convictions in a manner only tangentially related to core legal competencies. If they mean something else, they are too devoid of content to provide a useful guide.

In the latter instance, attorneys of all views should fear the imposition of a thought-policing regime that might someday come to be controlled by different thinkers. This is perhaps not the principal reason content-based government regulation of speech is so very obnoxious, but it is a significant danger of allowing such regulations. As Justice Scalia observed:

> The vice of content-based legislation -- what renders it deserving of the high standard of strict scrutiny -- is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes.

Hill v. Colorado, 530 U.S. 703, 743, 120 S. Ct. 2480, 2504, 147 L.Ed.2d 597, 628-29 (2000)(Scalia,

J. dissenting).

Attorneys are supposed to be learned and expert in the meaning of language, in the definitions of the words that define and shape the relationship of one person with another, and in making judgments about the facts that exist when persons seek to sustain or violate those relationships. This presupposes man's ability to know what is real. Every attorney, in turn, develops a specialized knowledge and understanding of the specific facts and circumstances governing the particular relationship in which he is called to advise a client. For example, in the landlord tenant context, experience with the specific kinds of disputes that disrupt that relationship help ensure that the attorney's advice and representation will achieve a just result. Neither "diversity" nor "inclusion" provides guidance here-experience in aircraft disasters, or offshore oil drilling, or the intricacies of software development patents provide few useful parallels to whether the landlord should expect the tenant not to allow his children to paint the walls with nail polish, or whether the tenant should expect the landlord to repair the hot water heater. On the other hand, neither do we expect a painter or a plumber to advise either party of the way the law allocates responsibility for the repair and its costs.

If diversity means merely that an attorney should be competent in a variety of fields, then graduation from law school and passing the bar is presumed to establish the necessary minimal level of competence. Our CLE requirements are designed to maintain that competence, but it has never been thought necessary to mandate two hours of tax every three years, one hour of probate or real estate annually, or even that every five years an attorney complete a general refresher in all new legal developments (though doubtlessly the Tennessee Law Institute's annual 15 hour seminar would benefit greatly from such a requirement). From this absence one can readily deduce the conclusion

that diversity means something entirely different, and more sinister.

C. The Petition Improperly Seeks to Enlist the Court's Authority on Behalf of the Momentarily Ascendant Side in a Contentious Policy Debate.

When these attempts in the United States focus on revising laws and legal obligations, they constitute nothing less than an attempt to institutionalize and excuse violations of the equal protection principles of the Fourteenth Amendment, and of the First Amendment rights of freedom of religion, speech, and association.

For only one example, an insistence on new pronouns, as espoused by the Colorado Bar article, is nothing less than a demand that the attorney, both professionally and as a citizen, participate in what he or she may view as a self-delusion, namely the falsehood that surgical and hormonal intervention can alter the reality that the two sexes are distinct and that anatomical distinctions result from genetically immutable characteristics. By recognizing various pronouns denying these truths the person must participate in this lie. He is forced to alter the manner of his speech and writing in a way his conscience rejects as a lie. Yet the petition's result is that a person who rejects these ideas ceases to be a virtuous citizen, much less a virtuous attorney.

Just as the Court rejected the ABA recommendation in 2018 when it refused to promulgate an attorney speech code by adopting A.B.A. Model Rule 8.4(g), so now it should refrain from adopting a rule designed to re-educate the opponents of that rule in the interests of accomplishing indirectly what could not be achieved directly. Disguising the effort does not render it less obnoxious.

III. PARTISAN ALLEGATIONS OF SYSTEMIC RACISM DO NOT JUSTIFY THE PETITION.

Claims of systemic racism do not advance the petition's cause. Much of Pieper's analysis also applies to reliance on misleading statistics, particularly those taken out of context.[8] No lawyer who has taken the oath, and implicitly renewed it every time he pays his annual bar fee, contends that either the color of a person's skin, his ethnicity or national origin, or her genetic heritage is a valid basis for offering him a job, selling her a house, serving him food at a lunch counter, providing her access to a restroom, admitting her to a school, lending him a book from the library, issuing him a professional license, or permitting her to sing, dance, or tell jokes on a stage or a screen. Fewer and fewer private individuals in our entire society any longer defend the use, or rather the misuse, of such immutable characteristics as a basis even for private and personal decisions.

These claims also deny the lived experience of ordinary people, certainly in Memphis. All nationalities, races and creeds live side by side, check on each other during ice storms and power outages, stop to help a motorist whose car quits on the side of the road, work and attend church together, and treat each other with dignity and respect. They live out that essential requirement for a just society: do unto others as you would have them do unto you. Racism, systemic or even widespread, is simply not evident from daily life.

Baseless character assassination of America and its traditions helps no one. The undeniable historical fact is that our legal system derives from Norse-Frenchmen and Anglo-Saxons applying French and Roman laws on a wet spot in Northern Europe, further modified by the Framers grafting

---

[8] By way of only one such example, the self-described Center for Excellence in Decision Making decries the proportion of African-American detainees in the Shelby County Jail as contrasted with the proportion of the population. What the Center omits is that the majority of the victims of the crimes resulting in a suspect's detention in Shelby County are themselves African-American. Additionally, it is worth noting that while most of the jail's population are pre-trial detainees, some are also persons serving short sentences or awaiting some type of post-trial proceeding. Lumping all of these together without acknowledging the complexity of the picture is symptomatic of the misleading use of statistics by the petition's proponents.

Enlightenment ideas onto the trunk of the Common law. Our ancestors struggled, suffered, sacrificed, and died to bring us Magna Carta, the Mayflower Compact, the Declaration of Independence, and a written Constitution. Condemnation of our entire civilization and its legal foundations as fundamentally or systematically racist neither helps us get better outcomes for anyone nor does anything else constructive. Apart from misrepresenting the actual personal beliefs and experience of the Founders in all their frailty and complexity, (i.e., Thomas Jefferson, who kept slaves but at the same time drafted the Northwest Ordinances forever barring the institution from the territories they established), the theories promoted by the petition ignore the enormous efforts that our society has made to codify the promise of equal rights in the Declaration and Constitution.[9]

---

[9] There is space only for a mere sampling, admittedly somewhat arbitrarily selected, of the most significant actual laws against which claims of "systemic" racism are leveled. At the federal level these include:

The Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.
The federal statutes enforcing the Fourteenth Amendment: 42 U.S.C §§ 1981-1996b.
The landmark Civil Rights Act of 1964, 78 Stat. 241, which ensured rights relating to voting, public facilities, education, public accommodation, employment (Title VII codified at 42 U.S.C. 2000e, et seq.); The Voting Rights Act, now codified at 52 U.S.C. § 10101.
The Fair Housing Act, 82 Stat. 81, codified at 42 U.S.C. § 3601, et seq.
The Equal Credit Opportunity Act 15 U.S.C. § 1691, et seq.
Federal contractor obligations that require every private company providing public services not only practice equal protection but document their compliance.

In addition to its own State Constitution, Article I, § 8,Tennessee has enacted numerous state laws prohibiting reliance on race, ethnicity, or national origin in private or public contexts:

Tenn. Code Ann. § 4-21-101 ("Provide for execution within Tennessee of the policies embodied in the federal Civil Rights Acts of 1964, 1968 and 1972, the Pregnancy Amendment of 1978 (42 U.S.C. § 2000e(k)), and the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.)");
Tenn. Code Ann. § 4-21-601 (public accommodations)
Tenn. Code Ann. § 4-21-601 (sales or leasing of real estate)
Tenn. Code Ann. § 4-21-604 (restrictive covenants in real estate)
Tenn. Code Ann. § 4-21-606 (housing and real estate lending and real estate brokerage)
Tenn. Code Ann. § 7-59-311 (Cable television access)
Tenn. Code Ann. § 7-82-106 (Utility Services)
Similarly, Tennessee has sought to cure ***past*** equal protection violations. Again, a mere sampling:
Tenn. Code Ann. §§ 4-26-101 to 107 (1977), establishing a Business Enterprise office within the Tennessee Department of Economic and Community Development. ***See*** Tenn. Code Ann. § 4-26-102(6)(B)("Impeded from normal entry into the economic mainstream because of past practices of discrimination based on race, religion, ethnic background, sex or service in the armed forces during the Vietnam war").
Emergency Communication Systems

Falsely labeling an entire nation as fundamentally racist at its roots also flatly ignores the historical facts: no country in the world has ever fought, bled, died, and sacrificed more for the cause of true human rights, and no country has ever offered its citizens a greater combination of opportunity and freedom than the United States.

These observations can hardly be thought novel, since for over fifty years our national, state, and local jurisprudence and constitutional and legislative enactments, including those referenced, have explicitly recognized that the Fourteenth Amendment equal protection clause really does mean what it states, (thereby recognizing a truth obscured far too long by ***Plessy***'s sophistry). The Court is well aware that the footnoted list of constitutional and statutory enactments is not even remotely exhaustive. It is, indeed, barely representative of the extent to which our society, federal, state, and local governments, and our public institutions and figures have sought to fulfill the inheritance bequeathed us by those who gave the "last full measure of devotion."[10]

Further, the invocations of race by the Petition and the various supporting comment articulate no principle that would limit its scope to good-faith discussions of improving outcomes or interactions between the justice system and racial minorities. ***Cf., e.g.,*** Marcus Cole, *"I am George*

> In appointing members to the board, the appointing authorities shall strive to ensure that the composition of the board represents:
>
> > (A) The diversity of persons in Tennessee by considering race, gender, age, and geographical and political interests;
>
> Tenn. Code Ann. § 7-86-302(b)(3)(A).
>
> Convention Center Municipal Boards
>
> > The chief executive officer of the municipality shall strive to ensure that the board is composed of directors who are diverse in professional background, educational background, ethnicity, race, gender, geographic residency, heritage, perspective and experience.
>
> Tenn. Code Ann. § 7-89-108(a)(4).

Space simply does not permit citation to the numerous court decisions applying Constitutional guarantees as prohibiting racial profiling in investigating crime, as provide taxpayer-paid attorneys for indigent defendants, regardless of race, prohibiting reliance on race in juror selection, etc.

[10] Amongst whom we should include not only those whose remains fill Civil War cemeteries but every man and woman who has died ever since then in pursuit of equal rights.

Floyd. Except, I can breathe. And I can do something." DeNicola Center for Ethics and Culture (June 5, 2020)(available at https://ethicscenter.nd.edu/news/ndls-dean-g-marcus-cole-i-am-george-floyd-except-i-can-breathe-and-i-can-do-something/)(pledging Notre Dame's law school to renewal of its mission to strive for equal rights). Rather, divisive and sweeping condemnation of institutions and society as 'systematically racist' merely undermines confidence in institutions that are badly needed to keep civil society knit together, including the legal profession the proponents envision as the vanguard of their crusade.

Accusing opponents of racism and misrepresenting the cause of undeniable tragedies is not a basis for dialogue. It is notable that among all of the examples offered in the petition's exhibits none mention the thirty-four law enforcement officers killed by gunfire in the line of duty from January to September of 2020, including three African-Americans, six Hispanic, one Hawaiian, and one Native American.[11] This, as much as any other fact, demonstrates that reliance on the George Floyd murder and the attendant media frenzy is a less a good faith effort at reform than an attempt to exploit such tragedies for partisan purposes.

Accordingly, it is perfectly fair to ask exactly which laws must be repealed or amended to eliminate "systemic racism"? How will educating attorneys in debatable theories of systemic racism rectify these alleged injustices? As the petition ignores these issues, the proposed CLE solution does not aim at the problem, even if racism were half as prevalent as claimed.

IV. CONCLUSION

The proponents bear the burden of showing that the legal profession needs reeducation.

---

[11] ***See*** https://www.odmp.org/search?cause=Gunfire&from=2020&to=2020&filter=nok9&o=25 (the Officer Down Memorial Page, which remembers deceased law enforcement officers and notes details of their sacrifice).

What should be the quantum of proof they must meet? Would proof other than that beyond a reasonable doubt be enough to convict the entire state bar? Additionally, for the government to impose mandatory reeducation of this sort, the proponents must satisfy the First Amendment's strict scrutiny test to show the government's need is compelling.

Dedication to the principles of the Declaration as embodied in the limited government structures and equal protection guarantees of the federal and state Constitutions provides the true key to a more just society. This requires, significantly for this inquiry, a realization of the limits of the powers of government, and a humility in demanding that an entire civilization adopt a radical philosophy of constant mutual condemnation and self-flagellation.

If the Nashville Bar Association wishes to offer classes espousing the ABA's theories, they can. Any attorney who wants to take such a class can. Mandating such classes obligates members of the bar to attend presentations inevitably riddled with biased and one-sided theological and philosophical viewpoints. That the Court should not, and must not, do. Respectfully, I urge the Court to deny the petition, and not force an attorney, as a condition of maintaining a law license, to be educated in speculative, disputed, politically-charged eschatological theories.

Respectfully submitted this 2d day of March, 2021,

Gregory C. Krog, Jr.
TN BOPR # 011029
The Law Office of Gregory C. Krog, Jr.
840 Valleybrook Drive
Memphis, TN 38120
901-683-9080
FAX: 901-685-2824
kroglaw@bellsouth.net

From: Chad Blair <cwesblair@protonmail.com>
Date: March 3, 2021 at 10:33:38 AM CST
To: Jim Hivner <Jim.Hivner@tncourts.gov>
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Wednesday, March 3, 2021 - 11:33am
Submitted by anonymous user: [10.170.198.251]
Submitted values are:

Your Name: Chad Blair
Your Address: 120 Essex Rd. Cookeville, TN 38506
Your email address: cwesblair@protonmail.com
Your Position or Organization: Attorney at Law
Rule Change: ADM2020-01159 Supreme Court Rule 21, Section 3.01(a)
Docket number: ADM2020-01159
Your public comments:
To the Honorable Justices of the Supreme Court of Tennessee:

I humbly implore this honorable Court to soundly reject the Nashville Bar Association's proposal to change Rule 21, Section 3.01(a) to require "diversity, inclusion, equity, and elimination of bias" as a component of the annual CLE. Among the prudent reasons for rejection, I emphasize the rationale articulated by the Christian Legal Society, Chattanooga Chapter in its comment of Feb. 1, 2021.

To briefly paraphrase that rationale, the premise of the proposal is not supported by facts. There is no evidence that Tennessee's legal system is infused with "systemic racism" and "gender bias." The proposed, mandatory courses would not be viewpoint-neutral and therefore, would violate Tennessee attorneys' rights of conscience under Article I, Section 3 of our Tennessee Constitution and the First Amendment of the U. S. Constitution. The Christian

Legal Society's description of the recent Greenberg v. Haggerty federal case from Pennsylvania is very analogous and instructive in this matter, I think.

I will only add that I urge this honorable Court not to amend Rule 21, Section 3.01(a) in any way that incorporates any part of the Nashville Bar's proposal; please let the rule remain as it is.

Very respectfully,
Chad W. Blair, JD

The results of this submission may be viewed at:
https://www.tncourts.gov/node/602760/submission/38967

appellatecourtclerk - Petition No. ADM 2020-01159 ; Proposed Amendment to Rule 21

From: "W. Andrew Fox" <andy@andrewfoxlaw.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 3/3/2021 9:21 PM
Subject: Petition No. ADM 2020-01159 ; Proposed Amendment to Rule 21

I oppose Petition No. ADM 2020-01159, seeking to modify Rule 21, Section 3.01(a) to require the attendance of certain CLEs. Below is a short essay describing two of the reasons, among many, for my opposition.

Critical Theory/Critical Race Theory: The Death of Empiricism

Petition No. ADM 2020-01159 is a call for the Tennessee Supreme Court to recognize, validate, and impose a neo-Marxist ideology known in general as Critical Theory, but when applied to race issues known as Critical Race Theory. This ideology simplistically reduces all of society to monolithic groups such as race or gender and then explain any difference in socioeconomic outcomes as a result of oppression inflicted by the dominant group.

Critical theory's roots arise out of the recalibration of Marxist thought, when the class-based worker revolution failed to materialize across most the world in the early 1900s. Marxist advocates such as Antonio Gramsci and those associated with the Frankfurt school theorized that the "economic base" of capitalism was held in place by "superstructures", which indoctrinated into passive acceptance of the economic base those who would otherwise revolt. These Marxist theorists could not simply accept that free-market economics and opportunity to succeed in a free society as practiced in the West led to the rise out of poverty for society as a whole and those who participated in this free-market society had no desire for "systemic change" of the economic variety. See, Edward L. Rubin, Jews, Truth, and Critical Race Theory, 93 NW.U.L.Rev. 525, 536-537 (1999). Ultimately this Marxist search for power and influence over the United States polity, the "march through the institutions" transmogrified class-based Marxism into the neo-Marxist claim of race group-based disparity which, according to the neo-Marxist such as those who filed this petition, must only be as a result of group oppression – from their perspective no other possible cause, nor should any other explanation be investigated or information suffered that would dispel this claim..

The authors of the Petition by the National Bar Association to require training in "diversity, inclusion, equity, and the elimination of bias" make a number of

unsubstantiated presuppositions to justify the claim that all attorneys need "bias elimination" training. They claim there is systemic racism and systemic gender bias. They do not make a claim of overt racism, but that the system itself is racist and is therefore in need of "systemic change". All of the claims made within this petition lack any citation to statistics demonstrating that there exists even a shred of evidence supporting their claims.

Just a cursory search of actual information easily refutes this various claims that the dominant group in the United States, white Christians, have organized society unconsciously, systemically, to oppress other groups not a part of the "dominant group." For example, in looking at the United States Census information from 2018, white Americans had a median household income of $65,777 that year, and a per capita income of $36,962. American Community Survey, Selected Population Profile in the United States, https://data.census.gov/cedsci/table. Asian Americans, however, who compose only about 6.5% of the US population, had a median household income of $86,407, and a per capita income of $38,709. Id. Some minorities have thrived in the United States. Other minorities have not. There is a problem with the critical race theorists' claim that American society is organized to oppress those in the nondominant group, if some segments of the nondominant group are actually in a superior socioeconomic status than the dominant group.

The claim of gender bias is also easily dispelled by looking at the actual statistics. For example, in law school, women currently outnumber men. In 2020, out of 114,520 law students, 61,949 were female (54.09%) and 52,339 were male (45.70%). https://www.enjuris.com/students/law-school-women-enrollment-2020.html. Interestingly, .2% were classified as "other."

In spite of statistics to the contrary, the petitioners will maintain their claim that the entire system is rigged against certain demographics. This is by design, because of a theory of knowledge used by neo-Marxists named "standpoint epistemology." Under the standpoint epistemology rubric, concepts like logic and objective fact are deemed to be inventions of the oppressive western civilization/White Christian "system" and, therefore of little value. Indeed any attempt by a member of the "oppressor group" to use logic or objective fact to refute the claims of critical race theorists is characterized as "white fragility." Rather than society being rigged against certain demographics, the system that is "rigged" is the paradigm created by the critical race theorists under which discourse can take place, because any criticism of the basis for their claims is dismissed out of hand as invalid. What only matters to them is the perceptions of those they claim are the part of the oppressed groups.

Jurisprudence heretofore has been based on empiricism, on the idea that legal positions must have factual underpinnings in order to prevail. Lawyers must present evidence on behalf of their clients to demonstrate what the truth is in a set of disputed narratives. But the framework that petitioners seek to foist upon law practitioners through indoctrination treats this concept as an anathema. Petitioners seek to engage in a dangerous erosion of the fundamentals of our profession.
Furthermore, requiring attorneys to attend these indoctrination sessions is analogous to requiring lawyers to attend a political rally or religious service. Critical Theory is an ideology, a belief system.

The dangerous and spurious proposal, Petition No. ADM 2020-01159, must be rejected

Regards,

W. Andrew Fox

W. Andrew Fox, BPR 017356
Gilbert & Fox Law Firm
625 S. Gay Street, Ste. 540
Knoxville, TN 37902
Phone: 865-525-8800
Telefax: 865-525-8200

Lisa Marsh - Fwd: TN Courts: Submit Comment on Proposed Rules

ADM2020-01159

From: Jim Hivner <jim.hivner@tncourts.gov>
To: Lisa Marsh; Kim Meador
Date: 3/3/2021 11:00 AM
Subject: Fwd: TN Courts: Submit Comment on Proposed Rules

See below comment for processing.

Jim

Sent from my iPhone

Begin forwarded message:

From: Anonymous <anonymouscomment2021@gmail.com>
Date: March 3, 2021 at 10:25:15 AM CST
To: Jim Hivner <Jim.Hivner@tncourts.gov>
Subject: TN Courts: Submit Comment on Proposed Rules

Submitted on Wednesday, March 3, 2021 - 11:25am
Submitted by anonymous user: [10.170.198.251]
Submitted values are:

Your Name: Anonymous
Your Address: Anonymous
Your email address: anonymouscomment2021@gmail.com
Your Position or Organization: Anonymous
Rule Change: ADM2020-01159 Supreme Court Rule 21, Section 3.01(a)
Docket number: ADM2020-01159
Your public comments:
To the Honorable Justices of the Tennessee Supreme Court:

I am writing to oppose the Nashville Bar Association's Petition seeking to Amend Rule 21, Section 3.01(a). I am also writing anonymously because the news is rife with examples of people being "cancelled" due to voicing opinions contrary to popular zeitgeist. I have a family to support and people who depend on me.

A good society recognizes each person's dignity and exists for the sake of each person it safeguards. At the same time, a person exists for the good of the society of which he or she is a part. When a part suffers, the whole suffers too, hence injustice against a part should not be tolerated. Among the historical realities our society must grapple with are (1) the tragic treatment of indigenous peoples, and (2) the institution of slavery, the effects of which have rippled even into this millennium. Because of our

history, we have struggled for over a century to make ourselves whole.

While I admire the Nashville Bar Association's earnest desire to right racial injustice, I oppose their proposal as a matter of prudence. Alexis de Tocqueville in his work, Democracy in America, discusses the lawyer's role in American society. The lawyer, a staunch adherent to tradition and precedent, acts as a societal check against the impulses of populism. Policies oriented towards the facilitation of proficient law practice sharpen a lawyer's ability and allows the lawyer to fortify himself or herself against popular movements when necessary.

In the spirit identified by de Tocqueville, I will say this, if the judiciary adopts the Nashville Bar Association's proposed rule, it will turn the continuing legal education requirements into a political battlefield in which faithful adherents to ideologies will attempt to force the reeducation of "non-believers". This would harm the original purpose of continuing legal education and the policy would ultimately cease educating attorneys about the practice of law. For this reason, the proposal should be denied.

Sincerely,

A Concerned Tennessee Attorney

The results of this submission may be viewed at:
https://www.tncourts.gov/node/602760/submission/38966

March 2, 2021

Mr. James M. Hiver, Clerk
RE: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Nashville Bar Association's Petition to Modify Tennessee Supreme Court Rule 21, Docket No. ADM2020-01159

Via Electronic Mail: Appellatecourtclerk@tncourts.gov

Honorable Justices:

I am writing to oppose the Nashville Bar Association's petition (hereinafter "petition") to modify Rule 21. In my view, this petition is without merit and is merely an attempt to import into Tennessee the divisive, corrosive, and partisan rhetoric which rages upon our country's national political landscape. Our Continuing Legal Education (CLE) system is not the appropriate forum to examine these matters. Nor should the Honorable Court force this confrontation upon Tennessee attorneys in captive audience, while compelling the expenditure of fees, time, and other precious resources, and most importantly without opportunity for dissenting discussion. For the following reasons, I object:

1. The proposed subject material falls short of the standards articulated with Tenn. S. Ct. R. 21 § 5.01(a)(b). As the Court is well aware, the rule reads, in pertinent part:

The following standards will govern the approval by the Commission of continuing legal education activities:

(a) The activity must have significant intellectual or practical content and its primary objective must be to enhance the participant's professional competence as an attorney.

(b) The activity must deal primarily with matters related to substantive law, the practice of law, professional responsibility or ethical obligations of attorneys.

Indeed, the petition offers no evidence that the proposed CLE requirement would, if adopted, enhance the professional competence of any attorney, nor would it deal primarily with any field of substantive law, the practice of law, nor the professional responsibility or ethical obligations of attorneys. Undeniably, the stated intentions of the petitioners are to "*dismantle structural racism*," to "*increase the pipeline for minority lawyers*," and to promote "*diversity, equity and inclusion*" (emphasis added).[1]

While perhaps laudable, these objectives are plainly beyond the scope of rule 5.01. The Court should reject the petition for this reason.

[1] Petition at page 2.

2. The Petitioners seek to use CLE to effect "far reaching" change within Tennessee beyond the practice of law. The Honorable Court should not lend its resources in support of such efforts.

Petitioners assert gender bias, systemic racism, and other forms of discrimination within the Tennessee legal system, but offer no evidence in support of their claims. From this unsupported platform, they imply such broad bias permeates Tennessee society, to some degree stemming from lawyers acting in extracurricular capacities such as positions involving schools, homeowners' associations, and boardrooms. Petitioners declare that changing demographics necessitate the relief they seek. Beyond reforming the Tennessee judiciary, the Petitioners seek to effect broad systemic change within Tennessee, stating "[t]hus the impact to the State of Tennessee of properly educating and training attorneys in the area of diversity, inclusion and equity, and the elimination of bias, are sure to be far reaching."[2]

The function, purpose, and authority of the Tennessee Supreme Court is undeniably broad. However, the neither the Tennessee Constitution, nor the court rules speak to the authority of the Court to unilaterally advance the unchallenged causes of partisans. For this reason, the Court should not offer its resources in support of such efforts.

3. **While often offensive, the contemplation and expression of bias are firmly within the protections of Constitutions of the United States and Tennessee. Therefore, the Honorable Court should exercise great restraint in matters which threaten or implicate these rights.**

So says the U.S. Supreme Court. In Matal V. Tam, 137 S. Ct. 1744 (2017), the court held:

> [the idea that the government may restrict] speech expressing ideas that offend ... strikes at the heart of the First Amendment. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[3]
>
> A law found to discriminate based on viewpoint is an "egregious form of content discrimination," which is "presumptively unconstitutional." [...] A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.[4]

I urge the Court to recognize that bias is often rooted in religious conviction, particularly where matters of gender, sexuality, and nationality are at issue. The right of conscious is affirmed within the Tennessee Constitution "that no human authority can, in any case

---

[2] Id.

[3] Matal V. Tam, 137 S. Ct. 1744, 1756 (2017), (Majority).

[4] Id. At 1766 (J. Kennedy, concurring).

whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship."[5]

Further, the Tennessee Constitution assures the right to free association, "[...] The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."[6]

In light of the Constitutional protections cited herein, and in contemplation of *Matal*, the Petitioner's assertions that the legal system of Tennessee is somehow strengthened by the suppression of bias cannot be held as axiomatic. Therefore, the Court should exercise great restraint in matters which threaten or implicate these rights.

Conclusion

The Petitioners' assertions, no matter how noble their intentions might initially appear, are not beyond legal challenge. The petition before the Court mounts an unsupported attack upon the character of all Tennessee attorneys. It then proposes to hijack the resources of the Tennessee Supreme Court to force upon all attorneys, in a captive forum, the indoctrination of the Petitioner's divisive notions for the purpose of enacting broad, sweeping change within Tennessee. Such actions, if realized, would amount to an end run around the rights acknowledged by the U.S. Supreme Court, the First Amendment to the Constitution of the United States, and the Tennessee Constitution. To give Petitioners access to the CLE forum from which they may project their unconstitutional rhetoric would be a substantial deviation from the stated intent and purpose of CLE in Tennessee.

For these reasons, I advise not.

Respectfully submitted,

/s/ David F. Graham
David F. Graham
BPR#034255
609 Brubeck Way
McDonough, GA 30252

[5] Tenn Const. art 1 § 3
[6] Tenn Const. art 1 § 19

BASS BERRY + SIMS

Michael Tackeff
michael.tackeff@bassberry.com
+1 (615) 742-7931

March 2, 2021

VIA EMAIL & U.S. MAIL

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: *Amendment of Rule 21*, No. ADM2020-01159

Michael Tackeff, Ashleigh Karnell, Margaret Dodson, Wesley Love, Danielle Irvine, and Allison Wiseman Acker respectfully submit this comment in support of the Nashville Bar Association's petition to change section 3.01(a) of Tennessee Supreme Court Rule 21 to require two hours of diversity, inclusion, equity, and elimination of bias training within the current continuing legal education ("CLE") requirements.

CLE is not every attorney's favorite activity. Many lawyers view CLE requirements as cumbersome, expensive, and unhelpful to their practice. But continuing to educate oneself is a condition of maintaining a law license. Just as physicians must keep themselves up to date on the latest medical technologies, so attorneys must continue the lifelong process of becoming fluent in the law. CLE acknowledges the basic reality that the law changes frequently. A self-regulating profession must impose restrictions on practitioners to ensure basic quality standards across the board.[1] CLE is, at bottom, about protecting the public. Discrimination, bias, and racial animus dishonor the law and the profession by allowing personal bias to invade a space that the law promises will remain fair and impartial. CLE is one strategy the guild uses to guarantee to consumers that practitioners will meet certain basic standards; bias and discrimination in the legal profession shatter that facade.

CLE is not a guarantee. An attorney behind on CLE will not automatically act carelessly. And an attorney who completes thirty hours of CLE per year will not be immune to mistakes or ethical quandaries. The CLE requirement exists to ensure that mistakes are made less frequently,

[1] Tenn. Sup. Ct. R. 8, RPC Preamble at § 12 ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.").

and that attorneys are on notice of what they must know.[2] Law firms, as incubators of new legal talent and repositories of grizzled wisdom, have a special duty to confront bias in the profession.[3]

As our country comes to grips with the fact that longstanding biases still hold sway among citizens, our Supreme Court has acknowledged that the legal system and the legal profession have often fallen short in fulfilling our promises to the public.[4] Attorneys are responsible for interpreting and applying the rules of the past. Negotiating these principles with new sets of facts is what we do. As custodians of this historical and legal inheritance, it is our responsibility to make the promise of equal treatment before the law a living, breathing reality.

An anti-bias requirement incorporated into the CLE rules is a small, concrete step in the direction of engaging in an honest discussion around inherent bias in the legal system.[5] The amendment would require no more effort on the part of attorneys than the current rules do: it would simply add a modest condition within the existing hour minimum. Other states are considering parallel efforts,[6] and similar requirements have been in place in other states for many years.

---

[2] Tenn. Sup. Ct. R. 8, RPC 1.1 at comment 8 ("To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.").

[3] *See, e.g.*, Tenn. Sup. Ct. R. 8, RPC 5.1 at comment 3 ("Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.").

[4] The Court explicitly acknowledged that education would be central to its efforts to root out racism and bias. *Tennessee Supreme Court Issues Statement on Commitment to Equal Justice*, https://tncourts.gov/press/2020/06/25/tennessee-supreme-court-issues-statement-commitment-equal-justice (June 25, 2020). The Court wrote: "To do our part, we have provided training to Tennessee judges on implicit bias, and we will continue to do so...Change is needed and only can happen through listening, as well as valuing and respecting a myriad of voices with different perspectives and views." *See also Tennessee Supreme Court Access to Justice Commission's 2018-2022 Strategic Plan 2020 Update* 3 ("The Tennessee Supreme Court tapped the ATJ Commission to lead the search for and advise the Court about how to accomplish change in areas of education and training, our judicial environment, and court policies and procedures that in any way lead to racial bias.").

[5] Nor is this the first time the Court has considered such a requirement. FINAL REPORT OF THE TENNESSEE SUPREME COURT COMMISSION ON RACIAL AND ETHNIC FAIRNESS 64 ¶ 17 (Feb. 1997) ("The Tennessee Supreme Court should require that continuing legal education include, within its ethics and professionalism requirements, racial and ethnic diversity training."), http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial__ethnic_fairness.pdf.

[6] The New Jersey Supreme Court recently solicited comments on—and approved—a related petition. *Notice to the Bar: Continuing Legal Education* (Oct. 20, 2020), https://www.njcourts.gov/notices/2020/n201021e.pdf?c=b8z.

Eliminating bias is a compelling and important objective for every attorney in our State.[7] As the United States Supreme Court has said, "[t]he duty to confront racial animus in the justice system is not the legislature's alone."[8] A simple way to act on this responsibility is to require that attorneys, at a bare minimum, *engage*, for two hours per year, with these issues. No attorney would be required to change her views: only to show up.

State Supreme Courts not only have the power to regulate CLE, but to disbar attorneys who fail to comply with the CLE rules.[9] These requirements do not exist in a vacuum. They dovetail with attorneys' concurrent duties of candor toward the tribunal and to improve the profession.[10] The purpose of CLE is to self-regulate, and diversity, inclusion, and elimination of bias training is consistent with those goals.[11]

---

[7] This interest applies with even more force to officers of the Court. Tenn. Sup. Ct. R. 8, RPC 8.4 at comment 3 ("A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice."). Federal law is similarly clear that the State holds a compelling interest in curbing discrimination against its citizens. *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("We are persuaded that Minnesota's compelling interest in eradicating discrimination against its female citizens justifies the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."); *see also* 42 U.S.C. §§ 12181(7)(F), 12182(a) (prohibiting discrimination on the basis of disability in the full and equal enjoyment of legal services).

[8] *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) (allowing the juror no-impeachment rule to give way where evidence of racial bias taints a verdict).

[9] *See, e.g., Flowers v. Bd. of Prof'l Responsibility*, 314 S.W.3d 882, 887 (Tenn. 2010) (suspension for failure to satisfy CLE requirements); *Hughes v. Bd. of Prof'l Responsibility*, 259 S.W.3d 631, 634 (Tenn. 2008) (same).

[10] *See, e.g., In re Gaines*, 838 So. 2d 1278, 1283 (La. 2003) ("Respondent's misrepresentation in connection with the reporting of his MCLE hours is also disturbing. Although respondent's initial misreporting of his hours may have been a result of a good faith mistake, he was advised of his error by the MCLE administrator and told not to do so again. Respondent chose to disregard this advice and misreport his hours a second time. *Such conduct falls far short of the high standards of honesty imposed on attorneys practicing in this state.*") (emphasis supplied); *In re Diggs*, 544 S.E.2d 628, 632 (S.C. 2001) ("In order for the CLE program to be successful, and provide the public with competent, educated attorneys, South Carolina attorneys must complete the required number of CLE hours. Diggs argues it is a common practice for attorneys to receive full CLE credit for seminars when they leave early. Diggs also claims attorneys receive CLE credit when they just pay the CLE registration fee, show up to sign the roll, and leave. *We emphasize that any attorney who provides false information on a notarized CLE compliance report commits a false swearing to a tribunal, which constitutes perjury.*") (emphasis supplied).

[11] *See, e.g., Warden v. State Bar*, 982 P.2d 154, 171–72 (Cal. 1999) (Kennard, J., dissenting as to an equal protection issue on exemptions for retired judges, law professors, and elected officials) ("Instruction in substantive law and legal procedure may reduce attorney mistakes in advising and representing clients. Instruction in legal ethics may prevent attorneys from harming their clients by unwitting ethical violations. Instruction in law office management may reduce mistakes caused by improper handling of client funds, inadvertently missed filing deadlines, and the like. *Instruction in eliminating bias from the legal profession may make attorneys more aware of such biases and assist in eliminating them.* Finally, instruction in preventing, detecting, and treating substance abuse and emotional distress may avoid attorney mistakes and malpractice resulting from substance abuse and stress-related problems.") (emphasis supplied).

As one California court eloquently stated in a case where an attorney challenged elimination of bias training as infringing on his free speech rights: "[T]he elimination of bias in representation and decision making, where improperly based on irrelevant personal characteristics, has long been a goal of the legal profession, and is germane and rationally related to the special nature of law practice and the consumer protection goals of the MCLE program."[12] Other states implementing similar changes have concluded they are warranted and helpful.

In 2004, a Minnesota attorney refused to comply with the elimination of bias CLE requirement in that state, claiming it violated his free speech rights.[13] But in the course of his disciplinary proceedings, the same attorney conceded:

(1) that eliminating bias in the legal profession would improve the quality of legal services in the state;
(2) that prejudice and bias exist in society;
(3) that those prejudices ought to be combated wherever possible; and
(4) that attorneys should ensure their conduct does not reflect bias or prejudice.[14]

The Court found these concessions telling, and held that the attorney had to comply with the rules.

---

[12] *Greenberg v. State Bar*, 78 Cal. App. 4th 39, 43 (Cal. Ct. App. 2000), *publication ordered* (Feb. 8, 2000). The *Greenberg* Court rejected the objecting attorneys' pejorative gloss on the new requirements: "While we recognize appellants' desire to avoid exposure to what they perceive to be a well-intentioned, but sometimes patronizing, condescending, and inept educational agenda, we also recognize that a majority of the members of our Supreme Court voted in *Warden* to impose the requirements of the State Bar's program of continuing legal education classes on the vast majority of California's practicing lawyers." *Id.* at 44. *Cf. also* Tenn. Sup. Ct. R. 7, § 8.01 ("The requisite commitment to serve the administration of justice in Tennessee subject to the duties and standards imposed on attorneys in this State shall be evidenced by a statement by each applicant for admission by examination, transferred UBE score, without examination, or temporary admission under section 10.06, that *the applicant agrees to abide by the duties and standards imposed from time to time on attorneys in this State.*") (emphasis supplied).

[13] *In re Rothenberg*, 676 N.W.2d 283, 285–86 (Minn. 2004) ("During his most recent three-year reporting period for continuing legal education credits, Rothenberg chose not to comply with Rule 9(A)(2) of the Rules of the Minnesota Board of Continuing Legal Education (RMBCLE). Rule 9(A)(2) requires lawyers to submit an affidavit showing that they have completed at least two hours of courses on the elimination of bias in the legal profession and in the practice of law. At a hearing before the Board of Continuing Legal Education, Rothenberg asserted that the elimination of bias requirement is unconstitutional.")

[14] *Rothenberg*, 676 N.W.2d at 290 ("Moreover, Rothenberg's statements at oral argument indicate that he agrees that eliminating bias in the legal profession and in the practice of law would improve the quality of legal services in Minnesota. Rothenberg concedes that there is prejudice and bias in society, that it ought to be combated at every turn, and that lawyers should ensure that their conduct does not hurt anyone and does not deny anyone's rights on the basis of bigotry, prejudice, or bias. We agree. Based on our review of the elimination of bias requirement, we conclude under the *Keller* analysis that this requirement is germane to the goals of regulating the legal profession and improving the quality of legal services in Minnesota.").

No attorney licensed to practice in any jurisdiction could seriously dispute any of these propositions. Such a position would be at odds with reality and the Rules of Professional Conduct.[15] These rules have worked in other states, and would work in ours too.[16]

Tennessee borders eight other states in the Union. Our attorneys carry their knowledge and experience across jurisdictions. This Court approved the use of the Uniform Bar Exam in recent years given the State's unique status. As our public sphere is beset by disease, political strife, and civil unrest, Tennessee's attorneys must be able to adapt to steady the course of our country. Requiring attorneys to incorporate elimination of bias training into their annual CLE is not make-work: it is part and parcel of the necessary reckoning we all must undertake to preserve the profession and leave our society a better, juster place than we found it.

Below, we offer thoughts on answers to common reactions we expect many attorneys will have to an additional requirement in the CLE rules; indeed, in discussing this comment with other attorneys, many of these issues were raised.

We submit this comment in the hopes that better days lie ahead for our country, for our colleagues, and for our clients.

Respectfully submitted,

Michael C. Tackeff (TN Bar #036953)
Ashleigh D. Karnell (TN Bar #036074)
Margaret V. Dodson (TN Bar #035115)
Allison Wiseman Acker (TN Bar #036501)
Wesley S. Love (TN Bar #036860)

---

[15] Tenn. Sup. Ct. R. 8, RPC 3.5 at comment 5 ("The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants."); Tenn. Sup. Ct. R. 8, RPC 8.4 at comment 3 ("A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice."); *see also In re Charges of Unprofessional Conduct Contained in Panel File 98-26*, 597 N.W.2d 563, 567–68 (Minn. 1999) ("When any individual engages in race-based misconduct it undermines the ideals of a society founded on the belief that all people are created equal. When the person who engages in this misconduct is an officer of the court, the misconduct is especially troubling. Left unchecked, such racially-biased actions as we have here not only undermine confidence in our system of justice, but also erode the very foundation upon which justice is based.") (public admonishment for race-based misconduct); *Toledo Bar Assn. v. Bell*, 676 N.E.2d 527, 529 (Ohio 1997) (suspension for use of racial slurs). The Court recently imposed a four-year suspension for a violation of Rule 8.4(d). *In Re: Winston Sitton*, No. M202000401SCBARBP, __ S.W.3d __, 2021 WL 228072, at *8 (Tenn. Jan. 22, 2021) ("We hold there is ample evidence to support the hearing panel's conclusion that Mr. Sitton violated RPC 8.4(a) and (d) and that he is subject to discipline.").

[16] One study found that Minnesota's bias CLE requirements indeed inspired some resentment; but others found the classes engaging and helpful. Tellingly, the evaluation scores were not statistically distinct from other CLE programs. Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 20–21 (2013) (emphasis supplied).

Crystal Danielle Dudding Irvine (TN Bar # 035192)
Bass, Berry & Sims, PLC
150 Third Avenue South
Suite 2800
Nashville, TN 37201

Common Questions & Answers

Why should I sit through training that doesn't apply to my practice?

First, many CLE offerings have no bearing on specific practitioners' everyday work. A securities attorney may find little of note in a family law CLE. But that is the point of CLE – if completed timely, there is always an offering that can be useful and relevant. Second, racial animus, diversity, and bias are relevant to every attorney in the United States. Our national Constitution once ensured that the enslavement of others was legally protected. That legacy is our responsibility. *Cf. Tomlinson v. Darnall*, 39 Tenn. 538, 542 (1859) ("It is of great importance to society that these police regulations, connected with the institution of slavery, should be firmly maintained. The well being and safety of both master and slave demand it. The institution and support of the nightwatch and patrol, on some plan, are indispensable to good order, and the subordination of slaves, and the best interests of their owners."). These difficult-to-read words were spoken by lawyers trained in the same common law tradition we embrace today. From under-handed remarks about race or gender to overt instances of animus, every attorney has a responsibility to make the legal profession fair and free of prejudice.

Won't this just anger attorneys who already have enough on their plates?

Perhaps, as would any other change to the CLE rules. But the same can be said of the original CLE rules, of mandatory IOLTA reporting, or the annual professional privilege tax. The rules governing lawyers are not designed to create hurdles: they exist to protect the public. Tenn. Sup. Ct. R. 8, RPC Preamble at § 12 ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.").

Do you really think that a CLE requirement is going to change anything?

Perhaps not in the sense of "ending bias forever." But by analogy, we think that a similar situation exists with the ethics CLE requirement. Most attorneys would likely agree that the ethics CLE requirement will not deter an attorney determined to defraud a client. In that sense, the ethics rules do not exist to convince a crooked attorney that his conduct is malfeasant. The rules exist to keep the issue of ethics in attorneys' minds, and to prevent needless mistakes (for example, the ability to spot problematic IOLTA use, or to realize that opposing counsel could have a conflict she did not perceive). This is the occasionally mundane core of legal practice: the ability to spot problems before they arise. The same logic applies to bias training.

How?

Elimination of bias training will not "cure" bias with a pill (nor is that possible). Instead, training keeps attorneys active about what they see and hear. Perhaps the effect would come in the form of

mentioning quietly to a colleague that he seems to consistently interrupt lawyers of color or women more often, or noticing that diversity actually produces better quality legal and client work. *Cf.* Tenn. Sup. Ct. R. 8, RPC 5.1 at comment 3 ("Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.").

If the Court implements this change, why wouldn't this Court require CLE hours for any number of other subjects, like spotting substance abuse? Why is this one so important?
That could be an advisable course from a policy perspective. But the question presented is whether *this* change is a good one. Our country has a special history of racial animus, and it is a collective responsibility to address that legacy. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("The duty to confront racial animus in the justice system is not the legislature's alone."). The past year has shaken our confidence in the strength of our society to self-correct. This is a small and warranted step in the right direction.

Isn't this just being overly politically correct?
According to Miriam-Webster, "politically correct" is defined as "conforming to a belief that language and practices which could offend political sensibilities (as in matters of sex or race) should be eliminated." In the pure definitional sense, then, it is the job of Tennessee attorneys, as officers of the Court, to behave with candor and respect in appearing before tribunals, negotiating with other attorneys and members of the public, and in advocating for their clients. For example, expressing gender bias or racial animus in any of those functions would be at odds with an attorney's duty to avoid conduct prejudicial to the administration of justice. Tenn. Sup. Ct. R. 8, RPC 8.4 at comment 3 ("A lawyer who, in the course of representing a client, knowingly manifests, by words or conduct, bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status violates paragraph (d) when such actions are prejudicial to the administration of justice."). In the more pejorative sense of the phrase "politically correct," where the term could be used denote and denigrate "overly sensitive" individuals, we challenge anyone to state that the past year has not shaken them in some way. We have been confined to our homes, deprived of our friends and families, and forced to discard illusions we held that our country had moved beyond prejudices that were once enshrined into law. If there is a time to take small steps in good faith to become better at recognizing bias, it is now.

BASS BERRY + SIMS

March 1, 2021

VIA EMAIL & U.S. MAIL

James M. Hivner, Clerk
Re: Tenn. Sup. Ct. R. 21, Section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: *Amendment of Rule 21*, No. ADM2020-01159

Bass, Berry & Sims, PLC, and Waller Lansden Dortch & Davis, LLP, respectfully submit this comment in support of the Nashville Bar Association's petition to change Section 3.01(a) of Tennessee Supreme Court Rule 21 to require diversity, inclusion, equity, and elimination of bias training within the current continuing legal education ("CLE") requirements.

As the most recent Model Rule for Minimum Continuing Legal Education states, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices in order to maintain confidence in the legal profession and the rule of law. A self-regulating profession must impose restrictions on practitioners to ensure basic quality standards across the board.[1] Discrimination, bias (implicit and explicit), and racial animus within the legal profession undermine public confidence in it and hamper the fair administration of justice.

The Tennessee Supreme Court has acknowledged that the legal system and the legal profession have often fallen short in fulfilling our promises to the public in this area.[2] The

[1] Tenn. Sup. Ct. R. 8, RPC Preamble at § 12 ("To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.").

[2] The Court explicitly acknowledged that education would be central to its efforts to root out racism and bias. *Tennessee Supreme Court Issues Statement on Commitment to Equal Justice*, https://tncourts.gov/press/2020/06/25/tennessee-supreme-court-issues-statement-commitment-equal-justice (June 25, 2020). The Court wrote: "To do our part, we have provided training to Tennessee judges on implicit bias, and we will continue to do so...Change is needed and only can happen through listening, as well as valuing and respecting a myriad of voices with different perspectives and views." *See also Tennessee Supreme Court Access to Justice Commission's 2018-2022 Strategic Plan 2020 Update* 3 ("The Tennessee Supreme Court tapped the ATJ Commission to lead the search for and advise the Court about how to accomplish change in areas of education and training, our judicial environment, and court policies and procedures that in any way lead to racial bias.").

proposed change to Section 3.01(a) will help train legal professionals to recognize and mitigate explicit and implicit bias against often-underrepresented populations in the legal profession and in the practice of law, including in court and when counseling clients who face these issues in their own entities. CLE training in this area will also help lawyers work toward a more diverse and self-aware profession by identifying best practices for increasing inclusion and mitigating bias, and by helping practitioners recognize and mitigate their own biases. Bias affects even the best of us in the profession. We are often not aware of our own biases and thus we may not opt into specialty training in this area. Mandatory training would help mitigate the impact of all discrimination and bias in the profession, but would be especially beneficial in addressing the insidious bias often activated without an individual's awareness.

Respectfully submitted,

Todd Rolapp, Esq. (TN Bar #018433)
Managing Partner
Bass, Berry & Sims, PLC
150 Third Avenue South
Suite 2800
Nashville, TN 37201

Matthew R. Burnstein, Esq. (TN Bar #018348)
Chair
Waller Lansden Dortch & Davis, LLP
511 Union Street
Suite 2700
Nashville, TN 37219

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT OF RULE 21,
RULES OF THE TENNESSEE SUPREME COURT

No. ADM2020-01159

Comment in Response to Petition of the Nashville Bar Association
to Modify Tennessee Supreme Court Rule 21, Section 3.01(a)
to Require Two (2) Hours of Mandatory Annual CLE
in "Diversity, Inclusion, Equity, and Elimination of Bias"

I thank the Tennessee Supreme Court for soliciting responses to the "Petition of the Nashville Bar Association to Modify Rule 21 of the Rules of the Tennessee Supreme Court to Require Two Hours of Continuing Legal Education Annually in Diversity, Inclusion, Equity, and Elimination of Bias" [hereinafter Petition]. I wish to express my opposition to the Petition and the relief sought therein, for the reasons set forth hereinbelow.

(1) Article I, Section 4 of the Tennessee Constitution states as follows: "That no political or religious test, other than an oath to support the Constitution of the United States and of this state, shall ever be required as a qualification to any office or public trust under this state."

It goes without saying that an attorney at law in the State of Tennessee, duly licensed by the Tennessee Supreme Court, holds an "office or public trust" that falls within the ambit of Article I, Section 4 of the Tennessee Constitution. As this Court noted in the case of *Schoolfield v. Tennessee Bar Ass'n*, 209 Tenn. (13 McCan.) 304, 353 S.W.2d 401 (Tenn. 1961), a person who is licensed to practice law in this State holds a pubic trust to do so. *Schoolfield*, 209 Tenn. at 314, 353 S.W.2d at 405 ("the defendant . . . has demonstrated qualities which make him an unfit person in whom to place the public trust of practicing law"). *See also id.* at 312, 353 S.W.2d at 404 ("The trust and confidence which must necessarily be reposed in an attorney requires him to maintain a high standard of moral character and a due appreciation of his duty to his profession, the courts and the public"); *see also Board of Prof. Responsibility v. Cowan*, 388 S.W.3d 264, 272 (Tenn. 2012) ("The license to practice law in this State is a continuing proclamation by the Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the Court ") (quoting Tenn. Sup. Ct. R. 9, § 3.1). *Cf. In re Bell*, No. M2010-01447-SC-R3-CJ, slip op. at 17 (Tenn. 2011) ("judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system") (citing Tenn. Sup. Ct. R. 10, Preamble).

Because an attorney duly licensed to practice law in the State of Tennessee is the holder of a public trust, licensure of an attorney is therefore subject to the protections of Article I, Section 4 of the Tennessee Constitution. Consequently, an attorney cannot be forced to surrender, on the basis of a "political test," the public trust held as a result of his or her licensure by this Court. A necessary corollary to this constitutional principle is that no branch of government may require a "political test" to maintain or keep that public trust – the license to practice law – without violating the Tennessee Constitution in so doing. To put it another way, a lawyer may not be forced to submit to certain political or ideological viewpoints in order to maintain his or her law license.

(2) The United States Supreme Court has also recognized that the First Amendment places limits on what a person may be compelled to listen to in order to maintain a law license. As the Supreme Court commented in *Keller v. State Bar of California*, 496 U.S. 1 (1990),

> In *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), the Court confronted the issue whether, consistent with the First Amendment, agency-shop dues of nonunion public employees could be used to support political and ideological causes of the union which were unrelated to collective-bargaining activities. We held that while the Constitution did not prohibit a union from spending "funds for the expression of political views . . . or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative," the Constitution did require that such expenditures be "financed from charges, dues, or assessments paid by employees who [did] not object to advancing those ideas and who [were] not coerced into doing so against their will by the threat of loss of governmental employment." *Id.*, at 235-236, 97 S.Ct., at 1799-1800. The Court noted that just as prohibitions on making contributions to organizations for political purposes implicate fundamental First Amendment concerns, *see Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), "compelled . . . contributions for political purposes works no less an infringement of . . . constitutional rights." *Abood, supra*, at 234, 97 S.Ct., at 1799. The Court acknowledged Thomas Jefferson's view that " 'to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " 431 U.S., at 234-235, n. 31, 97 S.Ct., at 1799-1800, n. 31 (quoting I. Brant, James Madison: The Nationalist 354 (1948)). While the decision in *Abood* was also predicated on the grounds that a public employee could not be compelled to relinquish First Amendment rights as a condition of public employment, *see* 431 U.S., at 234-236, 97 S.Ct., at 1799-1800, in the later case of *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Court made it clear that the principles of *Abood* apply equally to employees in the private sector. *See* 466 U.S., at 455-457, 104 S.Ct., at 1895-1897.

Keller, 496 U.S. at 9-10. And, just as "compelled contributions" of money "for the expression of political views . . . or toward the advancement of other ideological causes" against the will of an individual as a condition of employment violated the First Amendment to the United States Constitution (which is made applicable to the States by the Fourteenth Amendment to the U.S. Constitution), so too conditioning the acquisition or maintenance of an "office or public trust" upon the receipt of political views or "the advancement of other ideological causes" violates First Amendment protections.

(3) What the Tennessee and United States Constitutions, and the cases construing them, teach us is that persons such as lawyers – who hold a "public trust" in Tennessee – cannot be forced, compelled, or otherwise mandated to subject themselves to political or ideological viewpoints as a condition of obtaining or maintaining a license to practice law in the State of Tennessee. In the context of Tennessee Supreme Court Rule 21, that means a lawyer cannot be forced, compelled, or mandated to take courses of continuing legal education (CLE) that are expressly or implicitly political or ideological in nature. If a lawyer knowingly and voluntarily chooses to take CLE courses that are of a political or ideological nature, that is one thing; but to condition the successful completion of annual CLE requirements – which of course are a necessary predicate to continued licensure as an attorney at law – is something that violates Article I, Section 4 of the Tennessee Constitution as well as the First Amendment of the United States Constitution. To paraphrase Thomas Jefferson, to compel a lawyer to undergo political or ideological indoctrination under the guise of mandatory CLE requirements "is sinful and tyrannical."

(4) The proposal in the Petition by the Nashville Bar Association implicity, if not explicitly, calls for exposure to a certain political or ideological viewpoint in the mandatory training in diversity, inclusion, equity, and elimination of bias. There are multiple references in the Petition to "rooting out" or "dismantling" what the petitioners refer to as "systemic racism, gender bias, and all forms of discrimination . . . ." Petition, at 2. The Petition also refers to "implicit bias and privilege in the administration of justice, and the systemic oppression of people . . . ." Petition, at 2. The Petition states that "diversity, inclusion, equity, and the elimination of bias must be broadly construed to consider all forms of diversity and differences . . . ." Petition, at 2. The Petition goes on to speak in vague generalities about how "requiring continuing legal education in diversity, inclusion, equity, and elimination of bias not only will increase the availability of relevant and

impactful programs, but it will also promote better understanding and enhance competencies around implicit bias and the inherent value of inclusion and equity." Petition, at 2. Additionally, the Petition asserts that the proposed mandatory CLE training "necessarily requires acknowledging and learning about racism, gender bias, discrimination on the basis of gender identity and sexual orientation, and other forms of inherent discrimination . . . ." Petition, at 3.

This requested training is predicated on a view of society that I, for one, reject, and which is encapsulated in The 1619 Project, advocated in and by The New York Times. As the journalist Damon Linker has described it, this viewpoint

> is all about advancing a radical political agenda. The message it aims to convey is clear: The United States is and always has been, from its very origin, a racist country infected by a white supremacist ideology that has birthed and nurtured institutions and systems — from Congress to capitalism — that systematically disadvantage black Americans. Political actors of the present have a simple choice: They can either embrace (invariably left-liberal or socialist) policies that will begin the process of dismantling these pervasive forms of structural injustice — or they can oppose doing so and ensure that the injustices continue, with toxic racism remaining where it has been for the past four centuries, at the very center of American life.

D. Linker, "The *New York Times* surrenders to the left on race," The Week, Aug. 20, 2019. The language of the Petition expands the list of those who are "systematically disadvantaged" to include gender and sexual orientation; but at heart the argument that "systemic racism, gender bias, and all forms of discrimination" somehow permeate every aspect of our judicial system – and, indeed, our entire society – is a particular ideological, and therefore political, viewpoint. *See generally, e.g.*, C. Demaske, "Critical Race Theory" *in* The First Amendment Encyclopedia (available on the internet at https://www.mtsu.edu/first-amendment/article/1254/critical-race-theory). The reasons advanced by the Nashville Bar Association for imposing mandatory diversity training are clearly based upon the assumptions about our society and our legal system that form the basis of the ideologies underlying Critical Race Theory and The 1619 Project.

Forcing attorneys to submit to the tenets of those political and ideological viewpoints of Critical Race Theory, as well as the message of The 1619 Project that our system of justice in not only Tennessee but in the United States "is and always has been, from its very origin, a racist country infected by a white supremacist ideology that has birthed and nurtured institutions and systems," *see* Linker, *infra*, is in essence forcing attorneys to submit to a political "test" in order to achieve the annual CLE credits needed to keep one's law license current and thereby remain as an attorney in good standing in the State of Tennessee. This should not be countenanced by this Court, now or ever.

(5) To the extent that this Court believes that attorneys may wish, on a voluntary basis, to receive CLE credit for taking "continuing legal education in diversity, inclusion, equity, and elimination of bias," then this Court may wish to consider allowing one (1) of the three (3) mandated CLE hours in legal ethics to be in such an area. This is a tack that the state bars in such jurisdictions as South Carolina (*see* Section II(A)(2) of the CLE requirements of the South Carolina Bar, at https://www.sccourts.org/courtreg/Part4AppendixC.html), Florida (at https://www-media.floridabar.org/uploads/2020/07/Updated-BLSE-Polices-07-17-2020.pdf), and West Virginia (at https://wvbar.org/wp-content/uploads/2020/03/Rule-6-MCLE-West-Virginia-State-Bar-Governance-Revisions.pdf) have found successful. This would allow those attorneys in the Nashville Bar Association and elsewhere who believe that — as The 1619 Project and the adherents of Critical Race Theory suggest — the State of Tennessee "is and always has been, from its very origin, a racist [entity] infected by a white supremacist ideology that has birthed and nurtured institutions and systems," to satisfy their desire for diversity training while allowing the rest of us the freedom to not be exposed to a political theory and an ideological viewpoint with which we do not agree.

(6) Additionally, I suggest that imposing a mandatory diversity, equity, and inclusion CLE requirement for continuing to hold the public trust of practicing law in this State disadvantages those practicing attorneys who are solo practitioners or who practice law in small firms. To the extent that the Nashville Bar Association seeks to use the proposed mandatory CLE requirements to increase the hiring of minority lawyers in law firms across the State of Tennessee, this is something that is more applicable to the large firms having dozens of attorneys, or to corporations having in-house counsel, than it is to solo or small-firm practitioners who — for economical or philosophical reasons — do not have a large stable of practicing attorneys under their law firm's roof. To mandate CLE training that would likely be irrelevent to the hiring practices of solo and small-firm practitioners is simply an unnecessary and unwanted burden on these attorneys, such as myself.

For all of the reasons set forth hereinabove, I respectfully request that this Court **deny** the relief sought in the Petition.

Respectfully submitted this the 1st day of March, 2021.

GERALD L. GULLEY, JR., Esq.
(BOPR No. 013814)
706 Walnut Street, Suite 302
Knoxville, Tennessee 37902
(865) 934-0753 (telephone)
(865) 934-0755 (facsimile)
gulleylaw@vol.com (e-mail)

Friends and Colleagues,

We, the Board of the Southeast Tennessee Lawyers' Association for Women (SETLAW)[1], are writing in support of the Nashville Bar Association's petition to modify Tennessee Supreme Court Rule 21 to require completion of two hours of continuing legal education annually in diversity, inclusion, equity, and elimination of bias.

As attorneys, we are charged with improving "the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."[2] It is undeniable that all are not equally situated when faced with navigating the legal system. As advocates for our clients, it is our duty to provide them competent representation, which often requires recognition and awareness of their particular circumstances and the factors, such as bias, that may influence the outcome of their legal matters. Diversity and inclusion education will assist us in effectively representing our clients by offering tools for self-reflection and guidance on subjects that may otherwise be outside of our realms of experience. In a broad sense, diversity and inclusion education will better equip us to improve access to justice by educating us on the myriad barriers to justice that many individuals face.

Further, diversity and inclusion education is key to improving our work environments. Diversity and inclusion education will provide resources and teach skills for creating and implementing inclusive initiatives within our own profession. The aim of diversity and inclusion initiatives is to create atmospheres where all legal professionals can flourish, regardless of nationality, religion, race, ethnicity, gender, gender identity, sexual orientation, physical ability, or any other status. These initiatives combat discrimination and promote respect, opportunity, and community within our profession. When implemented in law firms and other legal workplaces, diversity and inclusion initiatives drive success by fostering innovation and creating safe work environments where all members feel valued, empowered, and engaged.

We commend the efforts of attorneys seeking to promote diversity and inclusion in our state, and support the proposed requirement to complete two hours of continuing legal education on these subjects annually.

Sincerely,

The Board of Southeast Tennessee
Lawyers' Association for Women

---

[1] This statement was drafted and approved by members of the SETLAW Board. Board members with judicial or other governmental positions did not participate in the issuance of this statement. The views or opinions expressed herein are not necessarily those of individual SETLAW members.

[2] TENN. S. CT. R. 8, RPC, Preamble: A Lawyer's Responsibility, at [7].

Lisa Marsh - Comment in Opposition to Amendment of SC Rule 21 § 3.01(a), Docket No. ADM2020-01159

From: Nina Whitehurst <nina@cumberlandlegacylaw.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 2/27/2021 12:02 PM
Subject: Comment in Opposition to Amendment of SC Rule 21 § 3.01(a), Docket No. ADM2020-01159

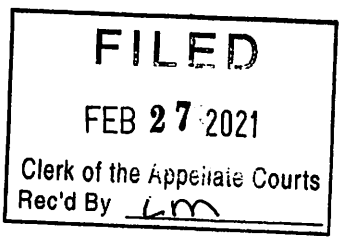
Ladies and Gentlemen:

This petition should be denied.

I join in and endorse the comments filed (or to be filed) by Anthony Berry, Stewart Crane, Ward Huddleston, and Gregory C. Krog, Jr. I do not feel compelled to recite my own reasoning, because these gentlemen have done such a good job already.

I also endorse the suggestion by attorney Richard Archie that at least two hours of constitutional law be required annually.

Best regards,



Nina

Nina Whitehurst, Esq.
Owner/Attorney
Cumberland Legacy Law
Business, Real Property and Estate Planning
"Planning for Peace of Mind and Wealth Preservation"
330 Ridgeline Drive
Crossville, TN 38571
Phone 931-250-8585
Fax 931-250-8583
nina@cumberlandlegacylaw.com
www.cumberlandlegacylaw.com
Licensed in AK, AZ, CA, CO, OR, TN

Lisa Marsh - NBA Petition on Diversity CLE Requirement

From: Kristi Arth <kristi.arth@belmont.edu>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 2/27/2021 5:48 PM
Subject: NBA Petition on Diversity CLE Requirement ADM2021-01159

Mr. Hivner,

I am writing to support the Nashville Bar Association's petition asking that all attorneys be required to devote two of the fifteen required CLE hours annually to topics related to diversity, inclusion, equity, and the elimination of bias. I believe that everyone benefits from living in a world that is more just. This requirement is one small but actionable step we can take as members of the bar, and we ought to do it. My comments in support of the NBA petition reflect my own personal views, and I write today as an individual, not a representative of my employer or any other entity.

Best,
Kristi Arth

Kristi W. Arth
Assistant Professor of Law | Director of Field Placements
Belmont University College of Law
1900 Belmont Blvd. | Nashville, TN 37212
kristi.arth@belmont.edu | (Direct) 615-460-6843 | (Fax) 615-460-6004 | Bio

Lisa Marsh - NBA petition re: CLE on diversity ADM2021-01159

From: Loren Mulraine <loren.mulraine@belmont.edu>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 2/25/2021 11:19 AM
Subject: NBA petition re: CLE on diversity
Cc: Tracey Carter <tracey.carter@belmont.edu>, Alberto Gonzales <alberto.gon...

I strongly support the Nashville Bar Association's petition asking that all attorneys be required to complete two of their 15 compulsory annual CLE hours on topics related to diversity, inclusion, equity, and the elimination of bias. This is a critical moment in our state and our nation. High profile events over the past few years have only served to shine a spotlight on a reality that has long existed in the shadows. We are seeing up close the damage that is wrought by operating as though our legal, corporate, and academic institutions provide fair opportunities and equal treatment for every member of our society. The role we play as attorneys provides us with a significantly greater degree of influence on our communities. Our impact will be immeasurably increased if the members of our bar are required to receive annual CLE in diversity, inclusion, equity, and the elimination of bias.

Loren E. Mulraine, Esq.
Professor of Law, Belmont University College of Law
Of Counsel, Bone McAllester Norton, PLLC

Loren E. Mulraine, J.D.
Professor of Law
Director of Music and Entertainment Law Studies

Belmont University - College of Law
1900 Belmont Blvd.
Nashville, TN 37212-3757
615.460.8265 (phone)
615.460.6004 (fax)
www.belmont.edu/law/
https://www.youtube.com/watch?v=Ox5aZItgxgg
https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1843784

http://lorenmulraine.com
https://twitter.com/LorenMulraine
https://www.youtube.com/channel/UCtKl8faUZQDeS1WQgIc4BMg?view_as=subscriber

ZALE DOWLEN

Attorney & Estate Planner

PO Box 335
Goodlettsville, Tennessee 37070-0335
(615) 497-0763
zale@dowlenlaw.com

February 24, 2021

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Avenue North
Nashville, Tennessee 37219-1407
appellatecourtclerk@tncourts.gov

Sent via Email only

RE: Case: ADM2020-01159
Issue: Rule 21, section 3.01(a) revision

Dear Supreme Court:

This initiative is wrapped in the cloak of the elimination of racial discrimination. Unfortunately, the proposed rule does not address racial issues at all. This proposed rule states: "...two (2) hours shall be for Bias Elimination ("BE" credit)..." What does that term "Bias Elimination" mean? We don't know, because the rule does not tell us.

- Does "BE" mean that the Continuing Legal Education (CLE) will pertain to race relations?
- Does it mean the CLE will be around male versus female issues?
- Does it mean that it is intended to "re-educate" those of us who adhere to Biblical standards?
- Does it mean teaching Critical Theory?

We do not know what "BE" means, because this rule does not bother to define the term it has created.

Tenn. Law License: 026816
Tenn. Life & Health License: 2486228

"Blessed are the peacemakers: for they shall be called the children of God."
Matthew 5:9 (GNV)

ZALE DOWLEN

Attorney & Estate Planner

PO Box 335
Goodlettsville, Tennessee 37070-0335
(615) 497-0763
zale@dowlenlaw.com

The Proposed Rule is too vague and can easily be used as a Trojan Horse for state coerced speech and conduct. Failure to be properly trained or even "re-educated" ends in an ethical violation and inability to practice law.

The Proposed Rule offers no clarity as to its actual objective. Furthermore, it offers no protection for religious speech, thought or practice. Hence, this Proposed Rule should be **DENIED**.

Sincerely,

Zale Dowlen, Esq

Tenn. Law License: 026816
Tenn. Life & Health License: 2486228

"Blessed are the peacemakers: for they shall be called the children of God."
Matthew 5:9 (GNV)

LIBERTY JUSTICE CENTER
208 S. Lasalle Street | Suite 1690 | Chicago, IL 60604 | 312-637-2280

February 22, 2021

James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Via electronic mail sent to appellatecourtclerk@tncourts.gov

RE: Proposed Revisions to Tenn. Sup. Ct. R. 21, Section 3.01, No. ADM2020-01159

Dear Mr. Hivner:

As an attorney admitted to the practice of law in Tennessee, I write today in opposition to proposed revisions to Rule 21, Section 3.01(a) of the Rules of the Tennessee Supreme Court, which would create a new requirement that all attorneys licensed in the state of Tennessee complete two hours of "Bias Elimination" training as part of their required fifteen hours of mandatory Continuing Legal Education. *See* Supreme Court of Nashville, Docket No. ADM2020-01159. The proposed revision would require that attorneys take part in viewpoint-discriminatory training as a condition of keeping their license, which is not an appropriate use of the Court's licensing authority and potentially constitutes a violation of the First Amendment.

In my capacity as a Senior Attorney with the Liberty Justice Center, I work every day to further our Constitution's guarantees of free expression and inquiry, as well as the values that inform these guarantees. Central to these is the principle "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." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Yet the prescription of political orthodoxy is precisely the intent of the proposed requirement that Tennessee attorneys earn mandatory "Bias Elimination credit[s]" as a condition of keeping their licenses. Regardless of whether one personally agrees with any or all of the proposed programming, it is inappropriate—and arguably unconstitutional—for the government to use its licensing authority in any manner that strays from the important principle of viewpoint neutrality.

Proponents of "diversity, inclusion, and equity" are employing a euphemism ("DIE") that obscures much more controversial ideas. While the petition presents itself under the guise of such unobjectionable terminology, other language in the proposal makes clear that this is not a request that CLE programs affirm the equal human dignity of all persons. Rather, it is part of a political and ideological project whose intent is precisely the opposite. Buzzwords like "systemic racism," "implicit bias," and "privilege," Petition at 2, are terms of art in this project.

Perhaps the most prominent DIE activist—who makes her living holding exactly the sort of trainings the petition asks this Court to require—has explained that Americans must "attain[] the racial knowledge" to combat "the dominant narratives of society" such as the "ideologies of

individualism and meritocracy" that "hold the racial hierarchy in place." She has also argued that "white women's tears" "are not natural; they are the result of the frameworks we are using to make sense of social relations" that "reinscrib[e] rather than ameliorat[e] racism," and that "'traditional' family values of the past are also racially problematic." Robin DiAngelo, *White Fragility* (2018). Another prominent leader of this new movement argues against the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), because "integrationists are, in the end, more harmful to *Black* bodies than segregationists are" (emphasis in original) and "[s]eparation is not always segregation." He also insists that, "Capitalism is essentially racist." Ibram X. Kendi, *How to Be an Antiracist* (2019). This is the sort of programming the petition asks this Court to make mandatory.

As a viewpoint discriminatory requirement, the proposed requirement for "Bias Elimination" credits would also run afoul of constitutional protections for speech and association. This past December, the Eastern District of Pennsylvania enjoined an attempt to incorporate this sort of ideological content into the Pennsylvania's Rules of Professional Conduct. Like the petition before this Court, the initiative was based on an ABA Model rule target at eliminating "bias." *See Greenberg v. Haggerty*, No. 20-3822, 2020 U.S. Dist. LEXIS 229731, at *47 (E.D. Pa. Dec. 7, 2020). While that opinion dealt with ethics rules, mandatory ideological training sessions can violate the First Amendment as well. *See Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1202 (8th Cir. 2001); *see also Morrison v. Bd. of Educ.*, 507 F.3d 494, 497 (6th Cir. 2007); *Citizens for a Responsible Curriculum v. Montgomery Cty. Pub. Sch.*, Civil Action No. AW-05-1194, 2005 U.S. Dist. LEXIS 8130, at *22 (D. Md. May 5, 2005).

These matters are currently the subject of extensive public debate, including within our most significant political institutions. *Compare* Executive Order 13,950, "Combating Race and Sex Stereotyping," 85 Fed. Reg. 60683 (Sep. 28, 2020) (banning Diversity and Inclusion trainings for the federal workforce because they are based on a "destructive ideology [that] is grounded in misrepresentations of our country's history and its role in the world") *with* Executive Order 13,985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," 86 Fed. Reg. 7009 (Jan. 25, 2020) (rescinding EO 13,950 because "advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies").

This Court need not, and should not, take a side in this political debate and certainly should not do so in the context of mandatory licensing requirements applicable to all attorneys in the state. This Court should remain viewpoint neutral in this politically charged debate by disapproving the proposed revision to Rule 21.

Respectfully Submitted,

Brian K. Kelsey
Senior Attorney
Liberty Justice Center
TN B.P.R. #022874

Lisa Marsh - Docket No. ADM2020-01159

From: MICHAEL MEADOR <MMEADOR301@ATT.NET>
To: <appellatecourtclerk@tncourts.gov>
Date: 2/5/2021 10:14 AM
Subject: Docket No. ADM2020-01159
Cc: Eric Lehman <eric@lehmanjohnsonfirm.com>

I am writing to express my opposition to The Nashville Bar Association's proposal to modify Supreme Court Rule 21 to require yearly mandatory continuing legal education on the subject of diversity, inclusion, equity, and elimination of bias.

To begin, I have no objection to the development of training that addresses different racial perspectives with an end goal of fostering improved relationships between people in the work place and society in general. I do feel that requiring racial training every year is over saturating the subject to the extent you run the risk of alienating participants.

I am completely opposed to any sort of mandatory training on the subject of inclusiveness, sensitivity, and elimination of bias as it pertains to an individual's sexual orientation. I personally consider any form of homosexual behavior to be a sin as expressed in The Bible, which particularly describes this type of activity as an abomination towards God. I will never accept any sexual relationship between any two human beings other than a male and a female who are married as being anything but immoral and sinful. I am personally aware of many attorneys who share my exact same beliefs. To require lawyers to be trained to be sensitive and inclusive of this type of activity suggests an end goal of promoting acceptance rather than fostering civility and mutual respect. Quite frankly, I wouldn't have any inclination to attend any classes or accept any teaching on respecting another persons right to be immoral and commit sin.

Professionally, I have no objection to representing any person of any particular race, creed, or sexual orientation to the best of my ability in the court system. Equal access to justice for everyone is what made the American jurisprudence system the best and most fair system ever developed in the history of civilization.

Prior to becoming an attorney, I had the privilege and honor to retire from the Kentucky State Police. I chose to become an attorney for the second chapter in my adult life and was fortunate to have had a fifteen year career as a lawyer. I am confident that I have always treated every person that I ever encountered with the dignity and respect that all humans are entitled to. This is a core principal of my Christian faith. Treating someone with respect and accepting their personal choices

as appropriate are not mutually inclusive concepts. Everyone is entitled to form their own opinions and no one has the ability to force another person to believe in something that they feel is immoral. Anything less serves to denigrate the values The Nashville Bar Association is attempting to protect. Familiarity will not breed acceptance, but it may foster contempt.

I believe the changes as currently proposed are unnecessary, divisive, and serve no legitimate legal purpose.

Respectfully,

Michael B. Meador

BPR # 024599

P.S. Please be aware that recently I was forced to place my law license on inactive status due to ongoing treatment for a serious medical condition. As I type this, I do not anticipate a return to the active practice of law. I still feel it is my both my professional and personal duty to comment on the proposed rule changes.

February 12, 2020

Via Email: Appellatecourtclerk@tncourts.gov
& U.S. Mail

James M. Hivner, Clerk
RE: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: S.L. Hutchins Bar Association's Letter in Support of the Nashville Bar Association's Petition to Modify Tennessee Supreme Court Rule 21
Docket No. ADM2020-01159

To the Honorable Justices of the Tennessee Supreme Court:

The S.L. Hutchins Chapter of the National Bar Association in Chattanooga, Tennessee joins the National Bar Association's Ben F. Jones Chapter, the Memphis Bar Association, and the many other professional organizations across Tennessee in strong support of the Nashville Bar Association's Petition to Modify Rule 21 of the Tennessee Supreme Court, requiring two (2) hours of continuing legal education ("CLE") annually in diversity, inclusion, equity, and the elimination of bias.

The S.L. Hutchins Chapter was founded to honor and preserve the legacy of Chattanooga attorney, Styles L. Hutchins. After overcoming numerous obstacles to become the first African-American admitted to the Georgia bar, Attorney Hutchins relocated to Chattanooga in 1881 hoping to find a city with more tolerant racial attitudes. In Chattanooga, Attorney Hutchins established a growing law practice, helped found the first African-American owned newspaper, and became the second African-American to serve in the Tennessee state legislature. Attorney Hutchins' nearly three-decade career in Chattanooga culminated with his appellate representation of Ed Johnson, where he filed a habeas corpus petition before the United States Supreme Court. Later, he successfully urged federal officials to file criminal contempt charges against the Hamilton County sheriff (and others) for failing to protect Mr. Johnson from a public lynching by a Chattanooga mob. Although he eventually secured justice for his clients, Attorney Hutchins was ultimately forced to leave Chattanooga due to death threats and intimidation.

Attorney Hutchins' story is a powerful and timely reminder of the complicated history of Tennessee's legal profession and the ongoing need to recognize historical racism, violence, discrimination, and inequality under the law. His legacy exemplifies a pervasive, but often overlooked, problem within our profession: unequal access to the law compounded by the lack

of diversity, inclusion, and equity in our legal profession for people of color, women, LGBTQ+, and others marginalized in our society. Although the practice of law is, and should remain, grounded in the values of fairness, equality, and access to justice, attorneys must also acknowledge that these principles have not been applied evenly. Moreover, lawyers must confront the significant gaps in knowledge about our state's past if we hope to move our profession towards a brighter future.

CLE programming is one of the most important tools to educate and empower attorneys committed to leadership in our profession. For decades, lawyers have maintained the option and discretion to proactively educate themselves on issues of diversity, inclusion, equity, and bias. Currently, the Tennessee Commission on Continuing Legal Education and the Tennessee Bar Association offer over a hundred courses covering these issues, many of which function as dual credit and satisfy ethics requirements. However, even while attorneys have been encouraged and incentivized over the years to take available CLE courses on these topics, participation has been relatively low and static. In our law firms and companies, lawyers must learn to identify discrimination, recognize bias, and prioritize inclusion and equality for others. The need, value, and "business case" for diversity, inclusion, equity, and bias has been demonstrated. Attorneys educated on these subjects make better decisions, build stronger work environments, and sustain credibility with clients and the public at large.

Recently, it has become clear that the trajectory of our country is moving towards a reckoning at the intersection of many divisive issues related to race, income inequality, criminal justice reform, workplace bias, gender, disability, and many others. Our country's commitment to tolerance and indivisibility is being tested, and lawyers must take a lead role in helping Tennessee move forward. For these reasons, the S.L. Hutchins Chapter of the National Bar Association urges the Court to modify Tenn. Sup. Ct. R. 21 and require all Tennessee attorneys to annually complete two (2) hours of continuing legal education focused on diversity, inclusion, equity, and the elimination of bias.

Respectfully submitted,

Ariel Anthony
Ariel Anthony (Feb 12, 2021 08:22 EST)

Ariel M. Anthony (TN Bar #034125)

Senior Associate
Husch Blackwell LLP
736 Georgia Ave. #300
Chattanooga, TN 37402
Phone: 423-266-5499
ariel.anthony@huschblackwell.com

Martin D. Trimiew
Martin D. Trimiew (Feb 12, 2021 08:23 EST)

Martin D. Trimiew (TN Bar #030379)

Assistant Vice President & Legal Counsel
Unum Group
1 Fountain Square
Chattanooga, TN 37402
Phone: 423-294-4409
mtrimiew@unum.com

HODGES DOUGHTY & CARSON
ATTORNEYS

EDWARD G. WHITE II
THOMAS H. DICKENSON
J. WILLIAM COLEY
T. KENAN SMITH
WAYNE A. KLINE
B. CHASE KIBLER
JOSHUA M. BALL
JOSHUA J. BOND
LISA J. HALL
DONALD J. FARINATO
MABERN E. WALL
BART C. WILLIAMS
LYNDSEY L. LEE
JAMES F. PARKER
COURTNEY P. WALKER

OF COUNSEL
J. MICHAEL HAYNES
ROY L. AARON
DEAN B. FARMER
ALBERT J. HARB

RETIRED
DOUGLAS L. DUTTON
WILLIAM F. ALLEY, JR
ROBERT R. CAMPBELL
JOHN W. WHEELER
DALTON L. TOWNSEND
DAVID N. WEDEKIND
JULIA S. HOWARD
HIRAM G. TIPTON

J.H. HODGES (1896-1983)
J.H. DOUGHTY (1903-1987)
RICHARD L. CARSON (1912-1980)
JOHN P. DAVIS, JR. (1923-1977)
JONATHAN H. BURNETT (1928-2015)
DAVID E. SMITH (1930-2016)

Direct: (865) 292-2227
E-mail: Aharb@hdclaw.com

FILED
FEB - 4 2021
Clerk of the Appellate Courts
Rec'd By

February 2, 2021

James M. Hivner, Clerk
RE: Tenn. Sup. Ct. R 21, Section 301
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: In re Amendment of Rule 21, Rules of the Tennessee Supreme Court
No. ADM2020-01159

Dear Mr. Hivner:

I am in receipt of the request for comments regarding the above Amendment to Rule 21. While I appreciate the Petition by the Nashville Bar Association, I believe that the Petition is misplaced. Requiring lawyers to obtain two hours of the required 15 CLE in diversity, inclusion, equity and elimination of bias injects into the legal education social issues which, if permitted, would open the floodgates to other proposed social issues becoming part of the CLE mandated hours. By way of example, advocates for child abuse, human trafficking, hunger and poverty, homelessness (and a myriad of other social issues) upon which responsible people can educate themselves, should not be part of the required CLE hours. I have no objection, and I think it is a better resolution for the Court, if it is inclined to take any action, to adopt a policy permitting CLE credit for those topics, should individuals choose to attend a course of that nature.

Should you have any questions or comments, please do not hesitate to call.

Cordially yours,

Hodges, Doughty & Carson, PLLC

Albert J. Harb

AJH/te

Q:\AJH\MISC\LTR - Hivner re Amendment of Rule 21 1.29.21.doc

ROGER E. NELL

ATTORNEY AT LAW

112 South Second Street
Clarksville, Tennessee 37040

February 5, 2021

Justices of the Tennessee Supreme Court
c/o James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, Tennessee 37219-1407
appellatecourtclerk@tncourts.gov

RE: Amendment of Rule 21, Rules of the Tennessee Supreme Court, No. ADM2020-01159

Your Honors:

I urge the Court to reject the proposal.

Lawyers ought to be aware of biases that individuals carry with them, of whatever nature, not just racial, not just biases held by white people but those held by other races as well, whether conscious or not. Lawyers should be able to identify and address biases in order to be effective advocates or to be better supervisors and leaders in their organizations. With that notion, I do not disagree. To those ends, there are many CLEs and other training available; but, that is not what this proposal suggests.

In sum, the proposal flows from an erroneous theory that American society, institutions, government, and law are built upon a foundation of and are constructed to perpetuate white supremacy. The proposal does not address individually held biases and it ignores all other stripe of bias. Some who express support for this proposal do so unwittingly. For a better explanation of what this proposal is about and what it attempts to do, I refer to the Beacon Center's letter.

The proposal would mandate non-legal education about the chimera of systemic racism. Continuing *legal* education is defined by the Court.

> The following standards will govern the approval by the Commission of continuing legal education activities: (a) The activity must have significant intellectual or practical content and its *primary objective* must be to enhance the participant's *professional competence as an attorney.* (b) The activity must deal *primarily* with matters related to *substantive law, the practice of law, professional responsibility or ethical obligations* of attorneys.

Tenn. S. Ct. R. 21 § 5.01(a)-(b) (emphasis added).

The proposal does not fit the Court's standard of what continuing *legal* education is. This proposal is unlike suggesting CLE for trial lawyers so they can address individual bias through voir dire, witness examination, and argument. It is different than suggesting CLE on State and federal workplace discrimination law for supervising and managing attorneys. In fact, the proponent does not assert that bias elimination fits the Court's definition of legal education, ignoring the quoted rule altogether.

The Court would have to modify § 5.01(a)-(b) so that such content would be creditable. Such a standard could not be one sided, though. The Court would have to ensure that the new standard would allow credit for opposing views. In crafting an appropriately balanced new standard, it would likely end up being so broad that all manner of other social issues would also qualify for CLE credit. The burden on the CLE Commission, then, would be to ensure that content and presenters for all of those additional, non-legal issues are fair, balanced, and present all viewpoints. That would be quite a task indeed.

Were the Court to make the proposed education mandatory, the Court would have to ensure that the courses present a balanced view of the issue, not just those espoused by the proponents. The proposal itself is biased. It seeks to mandate presentation of one side of an issue on which there is much disagreement. The proponents ask the Court to grant a monopoly over the podium before which the bar would be commanded to sit. A fair and impartial Court ought not allow such and ought to ensure that such courses present opposing viewpoints. It would be ironic for the Court to establish a rule regarding diversity, inclusion, and bias that would only allow credit for a biased presentation.

The Court could adopt a rule making such education a creditable elective. That would be a better option, but it would not avoid the need to ensure that opposing views are also creditable. Whereas a mandatory course ought to include competing views within the same course, an elective course would not. But, other courses with competing views would need to be creditable so as not to systemically favor one position over another. Again, it would be ironic for the Court to establish a rule regarding diversity, inclusion, and bias that would allow credit for a presentation by Richard Delgado, but would not allow credit for a presentation by Thomas Sowell.

The proposal states that it would incentivize CLE producers to create content. The content it proposes exists. Some current CLE producers have

already created it and other would-be CLE producers probably have some sitting on a shelf. There is no need to incentivize its creation.

What the proponents seek to create is a market for the product. What they lack is demand, an audience, a captive audience, a paying captive audience. The proponents seek to require lawyers to buy a product lawyers do not want. The proponents want to force lawyers to fund through mandated purchases organizations lawyers may not wish to fund, organizations with which lawyers may disagree, or organizations whose values lawyers may oppose. Forcing lawyers to do so will create resentment.

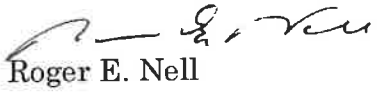
I am no fan of slippery slope arguments. They quickly devolve into the absurd. Yet, we cannot ignore that adopting this proposal will encourage other interests to peddle their doctrine to the Court seeking to force the purchase of their products in order to fund their agendas. Such is being discussed already.

This issue and others like it are better left to an individual lawyer's choice. If a lawyer finds value in learning more about it or finds it may make him a better lawyer or a better person or a better citizen, then the lawyer can seek out the information, pay for it, and support organizations that espouse it.

The Nashville Bar Association wants the Court to wield its power over the State bar of 23,000 active lawyers to mandate that they divert two hours per year from legal to non-legal education that is itself biased at a very large financial cost in order to fund a cause with which many lawyers disagree on pain of disciplinary action for failure to comply.

Respectfully, the Court ought not.

Very sincerely yours,



Roger E. Nell

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT TO RULE 21, Section 3.01(a)

No. ADM2020-01159

CHATTANOOGA CHAPTER OF THE CHRISTIAN LEGAL SOCIETY'S RESPONSE IN OPPOSITION TO PETITION

The Chattanooga Chapter of the Christian Legal Society (hereinafter referred to as "CLS") hereby submits its response in opposition to the petition filed by the Nashville Bar Association requesting the modification of Rule 21, section 3.01(a) of the Rules of the Tennessee Supreme Court to require every licensed attorney to complete two hours of mandatory continuing legal education (CLE) on the topic of diversity, inclusion, equity, and elimination of discriminatory bias.

Introduction of the Respondent

Founded in 1961, CLS defends the religious liberties of all Americans, not just those who profess to be Christian, and serves those most needy through making available Christian Legal Aid. By inspiring, encouraging, and equipping Christian lawyers and law students, both individually and in community, to proclaim, love, and serve Jesus Christ through the study and practice of law, the provision of legal assistance to the poor and needy, and the defense of the inalienable rights to life and religious freedom, CLS strives to fulfill the biblical command of Micah 6:8 to "act justly and to love mercy and to walk humbly with [our] God," ensuring the next generation of Americans has the same opportunities to share their faith in community as an integral part of their fundamental rights under the federal and state constitutions.

Summary of the Argument

While CLS does not question the good-faith intentions behind the petition, there is no hard evidence showing that Tennessee's judicial system is permeated with systemic racial discrimination, or any other systemic discrimination. The petitioner has not provided any factual support, nor has it demonstrated or explained how Tennessee's attorneys are influenced or motivated in their practices by implicit bias. Moreover, the proposed mandatory CLE lacks viewpoint neutrality and crosses the threshold of violating an attorney's freedom of belief or rights of conscience granted under the Free Exercise Clause of the First Amendment and Tenn. Const. art. I, § 3. The very recent *Greenberg* decision, discussed at pages 6-8 infra, shows the unconstitutionality of similar viewpoint-based discrimination as applied to attorneys. Finally, if this Court were to adopt some type of mandatory bias and discrimination CLE requirement, it is suggested that one CLE hour, rather than two hours, would be more appropriate, and a modification for a broader inclusion of bias categories.

Basis for Mandatory Legal Education

The petition's argument implies that "systemic racism" and forms of "gender bias" exist within Tennessee's legal system. However, the petition gives no examples or evidence of systemic racism or other forms of discrimination in our present legal system. While the petition mentions recent examples of police misconduct – which CLS does not condone – there are no facts to support the sweepingly broad characterizations of a broken legal system, which the petition decries. The petition calls for a systemic change to our legal system, but it does not describe the change for which it strives or envisions.

Beyond the lack of evidentiary support for the petition, the petition links the lack of diversity and inclusion with a possible limitation to the access to justice. There is no support

offered for this position. The Tennessee Supreme Court's own initiative through the Access to Justice Commission and Faith and Justice Alliance has bridged the gap in providing voluntary efforts that have improved access to justice to all classes of people. Indeed, Tennessee's efforts have become models in other parts of the country. Again, there are no examples given to support a causal connection between a lack of diversity training and access to justice.

Additionally, the language of the petition is unduly vague and broad sweeping. Phrases such as "the inherent value of inclusion and equity" are nebulous and undefined. In fact, the term "implicit bias" is undefined. All attorneys generally understand that every individual (including attorneys, jurors, and judges) has some level of bias shaped by the individual's world view and cultural and religious values. This recognition of bias is one reason why *voir dire* exists in litigation so that trial attorneys can determine implicit bias in juries – whether the bias is for or against the attorney's client. However, without more concrete or detailed explanations, the petition's request is too conclusory to justify mandatory legal education training for all attorneys. A variety of diversity education is already offered by the Tennessee Bar Association as part of its continuing legal education, and like other offerings related to the practice of law, attorneys participate in these courses on a voluntary basis. Why is there a need to make such offerings mandatory?

Constitutional Implications

The United States and Tennessee Constitutions place the freedom of belief (or rights of conscience) beyond government control or interference. Accordingly, under the Free Exercise Clause of the First Amendment and Tenn. Const. art. I, § 3 the freedom of belief is absolute and inviolate. As Justice Jackson stated in another First Amendment context:

> 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.
>
> *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

Article 1, section 3 of the Tennessee Constitution states that "no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishment or mode of worship." Tenn. Const. art. I, §3. "[T]he language of this section [Tenn. Const. art. I, §3], when compared to the guarantee of religious freedom contained in the federal Constitution, is a stronger guarantee of religious freedom." *Planned Parenthood of Middle Tenn. V. Sundquist*, 38 S.W.3d 1, 13 (Tenn. 2000) (citing *Carden v. Bland*, 288 S.W.2d 718, 721 (Tenn. 1956)). The term "conscience" is defined as "that moral sense in man which dictates to him right and wrong." *Harden v. State*, 216 S.W.2d 708, 711 (Tenn. 1948). In addition, the Tennessee Constitution specifically protects an individual's right to speech, expressive conduct, and ideas. "The free communication of thoughts and opinions, is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty." Tenn. Const. art. I, § 19. Section 19 of Article I of Tennessee's Constitution should be construed to have a scope at least as broad as that afforded the freedom of speech set forth in the federal Constitution. *Leech v. American Booksellers Assoc.*, 582 S.W.2d 738, 745 (Tenn. 1979). The Tennessee Supreme Court has hinted that the Tennessee Constitution may provide "a potentially greater state protection" for freedom of speech than the federal Constitution. *Planned Parenthood*, 38 S.W.3d at 13.

The petition proposes mandatory training on certain subjects – namely educational training that focuses on "racism, gender bias, discrimination on the basis of gender identity and sexual orientation, and other forms of inherent discrimination that exist in our legal system." Such

proposed mandatory training is not content or viewpoint neutral. Rather, the petition "prescribe[s] what shall be orthodox in politics . . . or other matters of opinion." *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943). In other words, the mandatory training envisioned by the petition encompasses only some viewpoints, but eschews other viewpoints on controversial topics such as gender identity and sexual orientation. For example, many Tennessee attorneys have sincerely-held religious beliefs about individuals' sexuality. These attorneys would find it offensive and against their consciences to be compelled to attend educational training promoting a contrary viewpoint. In many cases, the lines are blurred between a neutral presentation of viewpoints and the promotion of only one viewpoint.

The mandatory promotion of only certain types of speech or beliefs is unconstitutional, especially if it gives a government official or agency "unbridled discretion" or "substantial power" to allow or prohibit compulsory speech or training based on its content or viewpoint. *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 757, 759 (1988). There are limits on the ability of the government to regulate speech based on its substantive content. *See Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828–29 (1995). A law that restricts speech on the basis of "content discrimination" is one that (1) targets speech on a particular subject or (2) engages in "viewpoint discrimination" which occurs when it singles out speech based on the speaker's position on the subject. *Id.* The same federal constitutional prohibition against viewpoint discrimination applies under Tennessee law. The Tennessee Supreme Court has held that governmental restriction on speech exempting some, but not all, categories of speech "obliterates content neutrality and subjects the entire prohibition to the objection that speech is being restricted or prohibited on the basis of 'its message, its ideas, its subject matter, or its content.'" *H & L Messengers, Inc. v. City of Brentwood*, 577 S.W.2d 444, 453 (Tenn. 1979) (quoting *Police*

Department v. Mosley, 408 U.S. 92, 95 (1972)). "Restrictions, regulations, and exemptions so based are constitutionally offensive whether [their motives] be evil or benign." *Id.*

Herein lies the danger of this seemingly benign mandate, which itself is discriminating based upon the petitioner's own viewpoint. Determining what educational content "promote[s] diversity and inclusion" or satisfies the "elimination of bias" completely depends on the beholder's subjective beliefs. Where one person sees inclusion, another may see exclusion. Where one person sees the promotion of diversity, another may equally sincerely see the promotion of conformity, uniformity, or religious orthodoxy. These subjects are not well defined and are vigorously debated in our current society. It is almost impossible to apply a uniform standard to determine what content would be acceptable or unacceptable for the proposed legal education content. Compelling every licensed attorney to attend legal training that promotes only one viewpoint on issues that may very likely offend the freedom of conscience and sincerely held religious beliefs of some attorneys does not pass constitutional muster.

Government-mandated attendance at seminars that promote certain viewpoints while denigrating or condemning other viewpoints runs afoul of attorneys' free speech rights. Such state action is essentially government promotion or advancement of certain ideas over other ideas. A very similar issue was recently decided in the federal district court case of *Greenberg v. Haggerty*, Case No. 2:20-cv-03822, 2020 WL 7227251 (E.D. Penn. Dec. 8, 2020). In *Greenberg*, a Pennsylvania attorney sued to block enforcement of the Pennsylvania Supreme Court's adoption of the American Bar Association's Model Rule of Professional Conduct Rule 8.4(g), which, in relevant part, declares that a lawyer "by words or conduct" to "knowingly manifest bias or prejudice" constitutes professional misconduct. (A version of this amendment was rejected by this

Court two years ago.) The district court agreed with the plaintiff-attorney that such amendment to the ethics rules was viewpoint-based discrimination in violation of the First Amendment.

Fundamental to the court's analysis in *Greenberg* was the bedrock principle "that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Greenberg*, 2020 WL 7227251, at *13 (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Viewpoint discrimination includes "giving offense" because it, too, is a viewpoint, even if the government restriction appears to even-handedly prohibit disparagement against all groups. *Id.* (citing *Matal v. Tam*, 137 S.Ct. 1744, 1763 (2017) (Kennedy, J., concurring)). In determining that the ethics rule violates the First Amendment, the court noted that while the rule restricts an attorney's ability to express bias or prejudice against certain statuses (e.g., sexual orientation, religion, gender expression), it also allows (and even encourages) an attorney to express tolerance and respect based on these same statuses. *Id.* at *14. "In short, Defendants seek to impose their personal moral values on others by censoring all opposing viewpoints." *Id.* The *Greenberg* court concluded its analysis with the following astute observations.

> There is no doubt that the government is acting with beneficent intentions. However, in doing so, the government has created a rule that promotes government-favored, viewpoint monologue and creates a pathway for its handpicked arbiters to determine, without any concrete standards, who and what offends. This leaves the door wide open for them to determine what is bias and prejudice on whether the viewpoint expressed is socially and politically acceptable and within the bounds of permissible cultural parlance. Yet the government cannot set its standard by legislating diplomatic speech because although it embarks upon a friendly, favorable tide, this tide sweeps us along with the admonished, minority viewpoint into the massive currents of suppression and repression. Our limited constitutional Government was designed to protect the individual's right to speak freely, including those individuals expressing words or ideas we abhor.
>
> *Greenberg*, 2020 WL 7227251, at *15.

Applying the analysis and principles in *Greenberg* to the present petition, it appears clear that the petitioners are seeking this Court to approve and even sanction certain ideologies and viewpoints while disfavoring other ideologies and viewpoints. Requiring all attorneys to express tolerance and respect for certain viewpoints while admonishing attorneys from holding, expressing, or practicing opposite viewpoints is unconstitutional viewpoint discrimination, no matter whether the form taken is an ethics rule or a mandatory CLE.

Broadening Mandatory Education to Include Bias Based upon Religion and Ideology

If this Court is inclined to modify Rule 21, then we would suggest that the Petitioner's description of bias is too narrow. Instead of limiting "bias" and "diversity" to race, sex, and sexual orientation, the modified rule should also include religion and ideology, as well as other categories of commonly recognized discrimination. Furthermore, mandating one (1) hour of continuing legal education on this topic should be sufficient.

Accordingly, while the Chattanooga Chapter of the Christian Legal Society would suggest that no modification of Rule 21 is necessary, the following modification would be more viewpoint neutral and would encourage further diversity and the elimination of bias in the legal profession and in the practice of law, while at the same time being the least intrusive in compelling legal education training on this topic:

> 3.01 (a) unless otherwise exempted, each attorney admitted to practice law in the State of Tennessee shall obtain by December 31st of that compliance year a minimum of fifteen (15) hours of continuing legal education. Of those fifteen hours, three (3) hours shall be approved for ethics/professionalism credit ("EP credit"), <u>one (1) hour</u> shall be approved for Bias Elimination credit ("BE credit"), and eleven (11) hours shall be approved for General credit. Bias Elimination shall include, <u>but not be limited to, courses addressing bias against persons because of race, color, national origin, sex, sexual orientation, creed, religion, age, disability, and ideology.</u>
>
> (Proposed changes underlined).

Conclusion

Based on the foregoing, the CLS Chattanooga Chapter opposes the proposed amendment of Rule 21. In the alternative, a modification for a broader inclusion of bias and only one mandatory hour of training is suggested.

Respectfully submitted January 27, 2021.

CHRISTIAN LEGAL SOCIETY
CHATTANOOGA CHAPTER

By: _____

J. Christopher Clem, BPR # 015793
Chattanooga CLS Vice President
130 Jordan Drive
Chattanooga, TN 37412
(423) 892-2006

Michael S. Jennings, BPR # 011010
Chattanooga CLS Secretary/Treasurer
William H. Vetterick, BPR # 035372
Chattanooga CLS President
J. Wayne Cropp, BPR # 005874
Chattanooga CLS President Emeritus

Non-CLS Members signing on to this Brief:

Nancy A. Cogar, BPR # 32035
Richard Crotteau, BPR # 01675
James A. Fields, BPR 011484 (Past President of Chattanooga Bar Ass.)
Nathaniel S. Goggans, BPR # 022809
Douglas S. Hamill, BPR # 022825
Thomas Horne, BPR # #013833
Richard P Jahn, Jr. BPR 01435
Todd C. McCain , BPR # 026993
David L. Moss, BPR #011076
Stephany Pedigo, BPR # 019534
Richard Pettit, BPR # 014656
Jaclyn Walliser, BPR #034480

Scott N. Brown, Jr., BPR # 001212 (Past President of Chattanooga Bar Ass.)
(retired/inactive)
Leslie A. Cory, BPR # 022055
(retired/inactive)

State Senator Mike Bell, Chairman of
State Senate Judiciary Committee

JOSEPH H. VAN HOOK
ATTORNEY AT LAW
(865) 435-1145 (VOICE)
(865) 435-9639 (FACSIMILE)

MAILING ADDRESS:
POST OFFICE BOX 613
OLIVER SPRINGS, TENNESSEE 37840

STREET ADDRESS:
1042 EAST TRI COUNTY BOULEVARD
OLIVER SPRINGS, TENNESSEE 37840

January 27, 2021

The Tennessee Bar Association
221 4th Avenue North, Suite 400
Nashville, Tennessee 37219

Chief Justice Jeffrey S. Bivens
401 7th Avenue North, Suite 321
Supreme Court Building
Nashville, Tennessee 37219-1407

Re: Amendment to Rule 21, Tennessee Supreme Court Rule
Number ADM2020-01159

Gentlemen:

It has come to my attention that the Tennessee Bar Association is proposing an amendment to Rule 21, Section 3.01(a) of the Rules of Tennessee Supreme Court to mandate that each attorney complete two hours of the annual fifteen hours of required continuing legal education in diversity, inclusion, equity, and elimination of bias. The deadline for written comments is now March 3, 2021.

I have great concerns about this proposed amendment. Who or what will define "diversity," "inclusion," "equity," and "elimination of bias"?

All individuals are generally in favor of the concepts of diversity, inclusion, equity, and the elimination of bias. However, many well-intentioned but misguided people in society are using the concept of diversity, inclusion, equity, and elimination of bias, to put forth various "lifestyle" agendas with which many individuals in our great country strongly disagree.

We are now seeing that many of the same proponents of this diversity, inclusion, equity and elimination of bias agenda combine this agenda with an agenda wherein those who disagree with their version of "diversity" agenda, are dishonest, racist, homophobic, etc., and must be "reeducated" and/or must be "reprogrammed" to eliminate their (beliefs) dishonesty, racism, homophobia, etc..

To put it bluntly, the liberals desire to reeducate and/or reprogram the conservatives to eliminate any debate and/or opposition to this liberal agenda.

I have great concerns that this "noble-sounding" concept of diversity, inclusion, equity, and elimination of bias, is nothing more than the attempt to introduce a liberal agenda to destroy sincere conservative beliefs held by what I believe to be the majority of citizens in Tennessee.

If the required continuing legal education on these specific topics ignore and/or attack individuals who do not necessarily agree with the liberal interpretations of these worthy concepts, this will result in an attack, and in today's climate, it would be an attack to obliterate and destroy any individual that disagrees with these liberal definitions and understandings of these topics.

Therefore, I am opposed to any mandate that each attorney complete two hours of required continued legal education in diversity, inclusion, equity, and elimination of bias.

Thank you very much.

Sincerely yours,

Joseph H. Van Hook

JHV:srb

TBA letter 1.26.21

Adam Bennett - Docket number ADM2020-01159

From: Deborah Buchholz <dbuchholz@bskplc.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 1/15/2021 8:55 AM
Subject: Docket number ADM2020-01159

I'm writing to express my opposition to the Nashville Bar Association's proposed modification of Rule 21 to mandate that 2 of the 15 hours of mandatory continuing legal education be devoted to diversity, inclusion, equity, and elimination of bias.

Mandating such training presupposes and accepts the position that the United States is a country rife with deeply rooted and systematic racism, gender bias, and other forms of discrimination and that 2 hours of education per year is necessary to combat such inequities. Not all attorneys subject to Rule 21 share that position. To the extent that some attorneys believe such training to be valuable, they are already free to voluntarily pursue CLE on those topics. Thus, the proposed modification would serve no purpose other than to force those attorneys who fundamentally disagree with the underlying premise to attend 2 hours of propaganda in an attempt to indoctrinate them to the preferred viewpoint. Such forced attendance is unlikely to change minds. Accordingly, it is my belief that mandating this training would serve no practical purpose and the Nashville Bar Association's petition to modify Rule 21 should be denied.

Best regards,

Deborah Buchholz

BROCK · SHIPE · KLENK
265 Brookview Centre Way, Suite 604
Knoxville, Tennessee 37919
(865) 338-9700

Christopher A. Hall
1429 Cherokee Blvd
Knoxville, TN 37919
(865) 274-9898

January 5, 2021

Mr. James M. Hivner. Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

VIA E-MAIL TRANSMITTAL

Re: Tenn. Sup. Ct. R. 21, section 3.01
Supreme Court of Tennessee No. ADM2020-01159
My Comments with Respect to the Proposed Change to Rule 21

Dear Mr. Hivner:

I previously submitted a letter in response to the Order of the Court filed on September 28, 2020 soliciting comments with respect to the Petition filed by the Nashville Bar Association to amend Tenn. Sup. Ct. R. 21, Section 3.01(a) on December 30, 2020, which I understood to be the deadline for submitting such comments at that time.

I have since learned that the deadline has been extended to March 3, 2021 to permit the Tennessee Bar Association (the "TBA") to meet and consider its response to the proposed rule change.

As a result of such development, I ask that you withdraw my previously submitted comments set forth in my letter to the Tennessee Supreme Court and to you dated December 30, 2020. After the TBA publishes its response to the proposed rule change, I will refine and resubmit such letter.

I have been unable to locate your telephone number to call you and confirm the withdrawal of my response with you. Would you please be kind enough to advise me electronically (chall@lrwlaw.com) or by phone call ((865) 274 – 9898) to confirm that you have withdrawn such comments.

I must also acknowledge that, as a transactional lawyer, December is invariably an extremely busy month for me, so I was not able to give adequate attention to some of the syntax and style of my December 30, 2020 letter.

Thank you for your time and consideration with respect to this matter.

With best regards,

Christopher A. Hall

Christopher A. Hall

CAH/mkl

Christopher A. Hall
1429 Cherokee Blvd
Knoxville, TN 37919
(865) 274-9898

December 29, 2020

The Honorable Jeffrey S. Bivins, Chief Justice
The Honorable Cornelia A. Clark, Justice
The Honorable Holly Kirby, Justice
The Honorable Sharon G. Lee, Justice
The Honorable Roger A. Page, Justice

Attn: Mr. James M. Hivner. Clerk
100 Supreme Court Building
401Seventh Avenue North
Nashville, TN 37219-1407

Re: Tenn. Sup. Ct. R. 21, section 3.01
Supreme Court of Tennessee No. ADM2020-01159

Dear Chief Justice Bivins, Justice Clark, Justice Kirby, Justice Lee, and Justice Page:

I send this letter in response to the Order of the Court filed on September 28, 2020 soliciting comments with respect to the Petition filed by the Nashville Bar Association to amend Tenn. Sup. Ct. R. 21, Section 3.01(a) (the "Petition").

1. Background.

In considering the Petition, it is appropriate to frame its broader context by viewing it in tandem with the Joint Petition of the Tennessee Board of Professional Responsibility (the "BPR") and the Tennessee Bar Association (the "TBA") that was filed on November 21, 2017 and which urged the Court to adopt amendments to Rule of Professional Conduct 8.4 to mimic the ABA Model Rule 8.4(g) (the "Joint Petition"), because the similarities between them are so striking. The Court declined to so amend Rule 8.4.

The purpose of the amendments set forth in the Petition is to dictate how lawyers think, while the purpose of those set forth in the Joint Petition was to direct how lawyers speak (or, more accurately, not speak).

But their greater purpose is to ask the Court to use its powers to mandate that lawyers follow the political orthodoxy of the parties who signed them.

In a letter to the Court dated March 16, 2018, Attorney General Herbert H. Slatery III eloquently explained how the proposed amendment to Rule 8.4 set forth in the Joint Petition would unlawfully restrict the free speech rights of lawyers guaranteed by the United States Constitution and the Tennessee Constitution and how it conflicts with other Rules of Professional Conduct. The fact

that the TBA and the BPR were so unconcerned about the First Amendment rights of Tennessee lawyers begs the question whether they were unaware of the Joint Petition's suggested intrusions on free speech or they simply did not care about them. Given the vast legal expertise represented by the TBA and the BPR and their respective members, I can certainly make an educated guess as to the answer to such question.

2. The Politicization of Bar Associations.

It is not at all surprising that the TBA would proffer a patently unconstitutional rule to the Court. Engaging in this type of wantonly political activity, under the pretext of protecting our profession and its public image, is a part of the pathology of the TBA and other bar associations.

The TBA's efforts with respect to the Joint Petition were consistent with the its earlier failed attempts to perpetuate its role in blocking the duty of a Governor under the Tennessee Constitution to freely appoint appellate judges and justices. To say the least, the TBA's efforts did not seek to obtain diversity and inclusion on the Court. Instead, it endeavored to enshrine in the Tennessee Constitution a mechanism to maintain control of the Court by one political party. Those efforts were abundantly clear at the time.

The TBA and its lobbyist worked with its legislative emissaries prepare a proposed amendment to the Tennessee Constitution which would thwart the ability of a Governor to appoint appellate judges and Court justices of his or her own choosing. Its desire was to cause an unelected commission, accountable to no one, decide which applicants would go to the Governor for his or her assessment and those whom the Governor could not consider. In so doing, the TBA was attempted to disenfranchise the voters of Tennessee with respect to judicial appointments.

The TBA chose political party affiliation as a prerequisite for service on the Court.

The TBA's true motive was to prevent the composition of the Court as it presently exists.

But the citizens of Tennessee decided differently in ratifying the "Yes on 2" amendment to the Tennessee Constitution and, in so doing, proved that the TBA had bet unwisely.

While the TBA and its sponsors contemplated a "roll out" of their amendment to the public, the sponsors of the "Yes on 2" amendment got their bill through their respective committees and to the floor of the Senate and House and to the voters for their consideration. After being legislatively outflanked, the TBA fell in line and supported the "Yes on 2" amendment as if it was its own legislation. Other bar associations followed lockstep in line with respect to the "Yes on 2" amendment that the TBA had unsuccessfully attempted to thwart.

When all of this drama played out in the General Assembly, the TBA's actions had become comedic. This is unfortunate, because the TBA had rightfully served as the vanguard for the practice of law in our State for decades. In pursuing its partisan political agenda, in this case unsuccessfully, it sacrificed its reputation as a trustworthy representative of our profession. Each time it and other bar associations pursue these types of politically motivated activities, they continue to sacrifice their remaining stature and credibility.

One would think that the trade-off between being regarded as the objective public face of our profession on the one hand and being viewed as a partisan political voice on the other would be an easy decision, but bar associations have, nonetheless, continued to barter away their longstanding professional reputations for the opportunity to advance their own political initiatives.

The TBA is by no means alone as a bar association with respect to these matters, but it serves as the best example in our State as a result of its prominence. I declined to renew my TBA membership many years ago solely as a result of its political agenda. It did not remotely represent my views. If the TBA and local bar associations were to completely abandon their political efforts and focus solely on matters affecting our profession and the clients we serve, I would rejoin it without hesitation.

One needs to look no further than the American Bar Association (the "ABA") to witness the steep cost a bar association pays when it pursues politics over professionalism. The once venerable and powerful legal institution has been in a state of complete freefall for decades. The public views the ABA as a liberal lobbying organization and not as the public image of our profession. At this point, the ABA has become the legal arm of one political party. It has no remaining influence. As of 2017, it only counted 14.4% of licensed attorneys as dues-paying members. It has hemorrhaged members to the point that it has been forced to lay off employees and offer buyouts to others. The fine work that the ABA continues to do to educate lawyers with its outstanding legal publications and to evaluate and accredit law schools is completely overshadowed by the political zealotry of its leadership.

Our profession, and I respectfully believe, the Court, need bar associations. But we do not need ones which have been co-opted by any political party. Nor do we need bar associations which are more political than professional. The void created by a lack of serious, apolitical bar associations can only be filled by them. They need to look deeply inward and reflect on the consequences of their political activism before they can reverse course and once again become the voice of all lawyers and not simply those who adhere to their political narratives.

The current efforts of the NBA, along with the foregoing past efforts the TBA and others which will invariably follow (and also seek the imprimatur of the Court), are based on attempts to advance the partisan ideologies held by many bar associations. When they engage in partisan politics, however, they do so at a steep cost, because they forfeit any semblance of credibility among lawyers who do not share their political agendas and, much more importantly, among the public. To the very same extent that bar associations become political, they cease to be professional. Their members respond by resigning or declining to renew their memberships, and the bar associations further marginalize their influence.

More critically, though, trying to use bar associations, and ultimately the Court, to inject political activism into how attorneys think and practice law is wrong for our profession at multiple levels, and it is certainly not in the best interests of our clients, who would undoubtedly prefer that we focus on more germane matters, such as practicing law competently and honorably.

3. **The Relief Requested in the Petition.**

With this history as a backdrop, the Petition pays a rather obligatory reference to several provisions of the preamble to Rule 8 (that I still enjoy reading as a mantra for what a lawyer should be and what the practice should entail) and then seeks to refashion them as somehow necessitating Court-mandated lawyer education on the topics of diversity, inclusion, equity and bias elimination. I do not come to this same conclusion when I read the preamble to Rule 8. This attempted stretch of the concepts set forth in the preamble goes on for several paragraphs, citing no meaningful authority whatsoever. It is a loose litany of rationalizations designed to sway the Court to bring its considerable powers to such cause.

All of this caterwauling set forth in the Petition, and the similar arguments contained in the Joint Petition, are based on the false notion that the practice of law and attorney licensure should serve as the crucible in which all societal issues must be resolved. This is not the case.

The job of the Court does not include solving the various entrenched societal issues relating to race relations in our State, nor would attorney licensure requirements constitute the proper vehicle for effectuating such result if the Court possessed those vast capabilities.

As lawyers, we zealously represent our clients, irrespective of their race, religious beliefs, sexual preferences (or choices) or other defining aspects of their personalities or belief systems. We represent our clients with respect to their legal issues. Many of us take their needs to heart and think about them constantly when circumstances merit such concern. We frequently come to care for our clients very deeply and develop life-long friendships.

However, we take ourselves way too seriously as a profession if we think that clients seek our counsel for anything other than the handling of their legal matters. When bar associations clamor that we need to serve the public in other areas, usually to advance the political agendas of their leadership, they miss the mark entirely. Clients do not care about bar associations. Why would they? Most of their contacts with lawyers involves muting insufferable lawyer advertisements which, although legal, do not place our profession in a serious public view.

If the NBA's leadership was truly concerned about what the public expects from our profession, it should ask its members to poll their clients to learn their most critical concerns with our profession and the services those members perform for them. This would actually take courage, because the NBA members may not like their clients' answers. Does the NBA leadership truly believe that their clients would be most concerned with diversity, inclusion, equity and bias elimination? One does not need to be a clairvoyant to know that the greatest criticisms of most clients would undoubtedly be the cost of legal services and the timeliness in which lawyers provide them.

I do not expect the NBA, the TBA or any other bar association to petition the Court to require specific CLE hours to be devoted to billing and punctuality, although virtually all of us would benefit greatly from such instruction. I would write a letter to the Court in support of such a petition.

If a bar association is truly as concerned about the practice of law, including the protection of clients and the safeguarding of our profession's public image, as the NBA claims to be, presumably it would also look to the BPR for guidance regarding the nature of ethical complaints against Tennessee attorneys. Fortunately, the BPR is remarkably organized and publishes a very helpful pie chart which illustrates the categories of alleged infractions committed by lawyers. In reviewing the pie chart for 2019 ethical complaints, I do not see any categories which lend themselves to complaints involving a lack of diversity, inclusion, equity or bias elimination. This pie chart is set forth on page 31 of the Fall 2020 edition of *Board Notes*.

The stated purpose of the Petition is to amend a Rule of Professional Conduct to include matters which do not relate to any existing provisions of Rule 8 regarding the ethical obligations of lawyers or to any types of specific ethical complaints filed against Tennessee lawyers with the BPR. There reason for this incongruity is the fact that the NBA is seeking a Court-directed disciplinary approach to the fulfillment of its political agenda.

The Petition goes on to ask the Court to appropriate two (2) of the fifteen (15) required CLE hours to use for the study of "diversity, inclusion, equity, and elimination of bias". Thus, the NBA has determined that we need this specific instruction to the partial exclusion of substantive law courses and professionalism and ethics courses. Even if a need existed for the mandated study of the topics the NBA currently finds compelling, is such need paramount to our profession's need for instruction on substantive law matters or ethics and professionalism? I think that fifteen (15) hours of mandatory CLE is inadequate to satisfy the practice of law issues that lawyers routinely face. And the NBA really wants us to reduce our fifteen (15) hours of CLE by two (2) hours to require us to endure instruction in its new ideology?

I find the NBA's present leadership to be rather dubious standard-bearers for any efforts relating to race, diversity and inclusion. I suggest that the Court go to the NBA's website and click on the links of the NBA's 2020 officers. After doing so myself, I discerned that such slate of officers, as well as some of their own law firms, have an inordinately high Caucasian representation. And yet they seek to lead the charge to require the rest of us to learn about diversity, inclusion, equity and bias.

And what exactly would such CLE courses teach and who would select the permitted speakers? I will hazard a guess that the proposed required instruction will certainly not include the "discussion about race" that we frequently hear bandied around by the media and others. Instead, it will be a *lecture* about race. The presenters will speak and the Tennessee lawyers will dutifully listen.

If the NBA feels so strongly about these issues, perhaps it should sponsor a a series of debates about them. Or perhaps the TBA should do so on a statewide basis. I would certainly attend. When hearing differing views about these topics, perhaps everyone will hear different perspectives, learn something new and have better informed views regarding these topics.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

4. The Motives Underlying the Petition.

At its core, the Petition is grounded on the assumptions that:

1. The deaths of persons dying at the hands of a police officer (we will assume wrongfully for purposes of discussion) is something that the Court and the lower judiciary are incapable of satisfactorily addressing (it is noteworthy that the NBA chooses to concern itself with matters involving police officers on the street and not rogue prosecutors who violate their Brady disclosure obligations and let innocent parties languish for years in prison);

2. Lawyers are completely unaware of racism, gender bias, discrimination on the basis of gender identity and sexual orientation and other forms of inherent discrimination which exist in our legal system;

3. Lawyers must not only receive course work on these topics, but must also "acknowledge[e]", and presumably agree with the presenters' assessments of, them;

4. Riots, destruction of property, looting and assaults on law enforcement and others constitute "protests";

5. Law enforcement, including police officers, detectives, prosecutors and judges, are inherently racist; and

6. Caucasian people suffer from the original sin of racism.

These are the implicit tenets of the agenda the NBA is putting forth, although the NBA is intentionally rather circumspect in its diction.

I disagree with each of them. The purveyors of these untruths are the same types of activists who shout down public speakers who have a contrary viewpoint. Anyone with a television or a computer knows about the underlying issues even if we reach diametrically opposite conclusions as to their causes and effects.

They are issues best suited for the ballot box – not the Rules of Professional Conduct or bar associations.

More importantly, though, is the fact that these notions, as well as the stated concepts of diversity, inclusion, equity and bias elimination are code words for Critical Race Theory, which has become the new theology with respect to which bar associations and other institutions adhere. It includes reparations for slavery, the elimination of history, the removal of statues, rioting and looting, white fragility and a host of other actions and beliefs. All of these notions and concepts have absolutely nothing to do with the practice of law or attorney licensure, which are supposed to serve as the basis of the Petition.

In drafting the Petition, the NBA, which I assume to not want for excellent legal writers, chose to be extremely oblique in the concepts it presents to the Court to cause it to foist upon the Tennessee attorneys as licensure requirements. Its attempts to present rather amorphous, undefined and general terms to the Court is by design. The NBA seeks to avoid asking the Court to impose the study of Critical Race Theory and similar progressive and "woke" political agenda items on Tennessee lawyers. The Petition thus asks the Court require lawyers to study concepts and theories that it fails to even describe, with any particularity whatsoever, to the Court. This is analogous to the idea that Congress needs to pass legislation so it can later "find out what's in its"

5. Personal Observations on Race and the Practice of Law.

The Petition presupposes that attorneys lack sufficient knowledge of all matters involving race. Because this categorical assertion includes me, I will seek to briefly disabuse the NBA of its claim.

I was born in East St. Louis, Illinois, I grew up in St. Louis and Memphis, and I have practiced law in St. Louis, Shelby County (including Memphis) and Knoxville. Race has been a constant factor in my life for a very long time. I could not escape race, race relations and race politics if I tried. I am a graduate of a public school in the former Memphis City Schools system. We were not able to afford the cost of tuition for private colleges to which I was accepted, so I went to an in-state public university. I similarly attended an in-state public university law school and a state university tax school program. I worked side by side with both black and white people in menial jobs at the bottom of the economic food chain. I rode city and national bus lines with them until I graduated law school and tax school.

These experiences inform my thinking on all matters every day, including race. I would not trade them for anything. They have had a remarkable impact on my appreciation for other people of all races and persuasions and of all rungs on the socio-economic ladder. They continue to give me a perspective that I could never learn from reading a book or sitting in a class.

These same life experiences, particularly those I shared with the working poor, have led me to the rather simple approach that I employ in the practice of law and otherwise – namely, to treat people kindly and to try to help them. The results have suited me well in my life and in my practice of law.

The fact that a bar association now seeks to control my thoughts on racial matters is itself rather rich. I should be teaching whatever classes they propose – not sitting in in the audience.

My personal experiences are not unique. To the contrary, in my practice of law in Tennessee for the last 36 years, I know of many lawyers who have had similar, or even more hands-on, experiences in race and social class matters. A good many of our attorneys are combat veterans who have experiences which make my own pale by comparison.

I like notions of diversity and inclusion, but I place a much higher value on character and competence. It is not a close call to me, even though it makes me very happy to see our profession and other institutions garner greater representation among various ethnicities and groups.

Ordinarily, these notions should not conflict with one another, but when law schools, bar associations and law firms venerate skin color and sexuality over character and capabilities and insist that others do so as well, a conflict necessarily arises.

No required classes or ideological inculcation will ever cause me to be in league with the proponents of these practices. Are we to believe that they have no personal biases? Does anyone really think that if they needed a cutting-edge medical procedure, they would select a physician on the basis of diversity and inclusion or on the basis of competence? Consider the same question if such a person came home from work to find a divorce lawyer's business card on his or her refrigerator. Is that lawyer going to try to find the best divorce lawyer he or she can find or, alternatively, look to notions of diversity and inclusion in selecting a divorce lawyer?

The lawyers who insist on viewing our profession through a prism of black and white, so to speak, certainly do not need any assistance on my part to wander their chosen path. There is nothing anyone can say or do, nor are there any courses I can take or books I can read, which will cause me to view the practice of law from such a cynical and shallow perspective..

6. Conclusion.

I appreciate the Court's consideration of my comments on the Petition. For the reasons set forth hereinabove, I respectfully request that the Court decline to provide the relief requested in it.

Sincerely,

Christopher A. Hall

Christopher A. Hall

CAH/mkl

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

IN RE: AMENDMENT OF RULE 21, RULES OF THE TENNESSEE SUPREME COURT

No: ADM2020-01159

RESPONSE OF THE TENNESSEE COMMISSION ON CONTINUING LEGAL EDUCATION

In response to the petition filed by the Nashville Bar Association, the Tennessee Commission on Continuing Legal Education (hereinafter "Commission") would show unto the Court that the Commission has considered the Nashville Bar Association's thorough and detailed petition on this worthy and important issue. After much consideration, it is the Commission's position that a CLE requirement incorporating coverage of diversity and elimination of bias should be in the form of a one (1) hour professionalism CLE requirement imposed on an annual basis. The Commission also submits that a one (1) hour CLE requirement on professionalism should count as one (1) of the three (3) Dual credit hours required each year. Furthermore, in addition to diversity and elimination of bias programs, CLE programs on pertinent social and professional topics—including but not limited to mental health, substance abuse, sexual harassment, and congeniality among the bar—should also be designated to satisfy the CLE requirement on professionalism.

Respectfully submitted:
Tennessee Commission on
Continuing Legal Education

By: _____
John O. Alexander, Chairman
Tennessee Commission on CLE

_____
Judy Bond-McKissack, Exec. Director
Tennessee Commission on CLE
1321 Murfreesboro Pike, Suite 810
Nashville, TN 27217

CERTIFICATE OF SERVICE

I certify that a photocopy of this Response was mailed, first class postage paid, to the attached list of individuals and organizations, and was posted on the Commission's web site, www.cletn.com, this 29th day of December, 2020.

Judy Bond-McKissack, JD, BPR No. 009004
Executive Director, *Tennessee Commission on Continuing Legal Education*

List of Individuals and Organizations Receiving Notice of the Foregoing by Mail

Dwight Aarons, President
National Bar Association,
William Henry Hastie Chapter
University of Tennessee College of Law
1505 Cumberland Avenue, Room 363
Knoxville, TN 37996

John Alexander
Tennessee CLE Commission Chair
Rainey, Kizer, Reviere & Bell PLLC
201 4th Avenue North, Suite 1850
Nashville, TN 37219

Justin Engel, President
Twelfth Judicial District Bar Association
Circuit Court Judge, TN-12th, III
3235 Main Street
Pikeville, TN 37367-5754

Ariel Anthony, President
National Bar Association,
S.L. Hutchins Chapter
Husch Blackwell
735 Georgia Avenue, Suite 300
Chattanooga, TN 37402

Bryce Ashby, President
Federal Bar Association
Memphis/Mid- South Chapter
Donati Law, PLLC
1545 Union Ave. Memphis, TN 381043726

James Bagby, President
Montgomery County Bar Association
Public Defender 19th Judicial District
112 S. 2nd Street
Clarksville, TN 37040-3460

Jeremy Ball, President
Jefferson County Bar Association
District Attorney Office
P.O. Box 690
Dandridge, TN 37725

Beri Bernstein, Executive Director
Tennessee Bar Foundation
618 Church Street, Suite 120
Nashville, TN 37219

Sara Anne Quinn, President
Lawyers Association for Women
Marion Griffin Chapter
Butler Snow
150 3rd Avenue South, Suite 1600
Nashville, TN 37201

Mark Blakley, President
Scott County Bar Association
Office of the District Attorney
8th Judicia! District
2792 Baker Highway
Huntsville, TN 37756-3818

Doug Blaze; Interim Dean
University of Tennessee College of Law
1505 W. Cumberland Avenue, Room 272
Knoxville, TN 37996

Ben Boston, President
Lawrence County Bar Association
Boston, Holt, & Durham PLLC P.O. Box 357
Lawrenceburg, TN 38464

Lucie Brackin, President
Memphis Bar Association
The Landers Firm
65 Union Avenue, 9th Floor
Memphis, TN 38103

Kristin Brown, President
Bedford County Bar Association
1303 N. Main Street
Shelbyville, TN 37160-2331

Ne'Keisha Kee Bryant-McComick, President
Sumner County Bar Association
Bone McAllester Norton PLLC
100 Bluegrass Commons, Suite 2370
Hendersonville, TN 37075

Caroline Sapp, President
Upper Cumberland Young Lawyers Assoc.
6844 Sunnywood Dr.
Nashville, TN 37211

Melanie Totty Cagle, President
Hickman County Bar Association
Cagle & Boehms, LLC
1200 North Oak Drive
Centerville, TN 37033-1116

Elizabeth Carroll, President
East TN Lawyers Association for Women (ETLAW)
Tennessee Valley Authority
400 West Summit Hill Drive, WT-3C
Knoxville, TN 37902

Patrick M. Carter, President
Maury County Bar Association
Wolaver, Carter & Heffington
809 South Main Street
Columbia, TN 38401

Andy Clark, President
Paris-Henry County Bar Association President
Clark & Cox PLLC
104 N. Brewer Street
Paris, TN 38242

Jeff Coller
Campbell County Bar Association
Coller & Evans
550 W. Main Street, Suite 775
Knoxville, TN 37902-2548

Curt Collins, President
Greene County Bar Association
Collins Shipley, PLLC
102 South Main St.
Greeneville, TN 37743-4922

Daryl Colson, President
Overton County Bar Association
Colson & Maxwell
808 N. Church Street
Livingston, TN 38570-1134

Isaac Conner, President
Tennessee Alliance for Black Lawyers
Manson Johnson Conner, PLLC
215 2nd Avenue N., Suite 300
Nashville, TN 37201-1601

Bratten Hale Cook II, President
Dekalb County Bar Association
104 North 3rd Street
Smithville, TN 37166

Jonathan Cooper, President
Tennessee Assn. of Criminal Defense Lawyers
Whitt, Cooper, Trent & Hedrick
607 Market Street, Suite 1100
Knoxville, TN 37902-2240

Loretta Cravens, President
Tennessee Lawyers Association for Women
Cravens Legal
P.O. Box 396
Knoxville, TN 37901

Celeste Creswell, President
Federal Bar Assn. Chattanooga Chapter
Kabat Chapman & Ozmer LLP
171 17th Street, NW, Suite 1550
Atlanta, GA 30363

Creed Daniel, President
Grainger County Bar Association
Daniel & Daniel
115 Marshall Avenue, P.O. Box 6
Rutledge, TN 37861-0006

Lindsay Daniel, President
Washington County Bar Association
East Tennessee State University
P.O. Box 70285
Johnson City, TN 37614-1700

Michael Davis, President
Morgan County Bar Association
General Sessions & Juvenile Court
416 N. Kingston Street, P.O. Box 925
Wartburg, TN 37887-0925

Lynn Dougherty, President
B1istol Bar Association
131 8th Street
Bristol, TN 37620

Dan Douglas
Lauderdale County Bar Association
President
P.O. Box 489
Ripley, TN 38063-0489

Joanna Douglass, President
Lawyers Association for Women,
Anne Schneider Chapter
Tennessee Department of Human Services
225 Martin Luther King Dr., #210
Jackson, TN 38301

Hon-Vinh Duong, President
Tennessee Asian Pacific American Bar
Association (TAPABA)
Waller Lansden Dortch & Davis LLP
511 Union Street, #2700
Nashville, TN 37219

David Eldridge, Chair
Tennessee Bar Foundation
Eldridge & Blakney PC
P.O. Box 398
Knoxville, TN 37901

Sam Felker, President
TN Stonewall Bar Association
Baker, Donelson, Bearman, Caldwell &
Berkowitz
211 Commerce Street, Suite 800
Nashville, TN 37201

Joseph Ford, President
Franklin County Bar Association
McBee &Ford
17 S. College Street
Winchester, TN 37398

Maury Tower
Interim Executive Director
Memphis Bar Association
80 Monroe, Suite 220
Memphis, TN 38103

Sandy Garrett
Chief Counsel
TN Board of Professional Responsibility
10 Cadillac Drive, Suite 220
Brentwood, TN 37027-5078

Ashley Gibson, President
Southeast TN Lawyers Association for
Women
Baker, Donelson
633 Chestnut Street, #1900
Chattanooga, TN 37450

Melanie Gober Grand, Executive Director
Lawyers Association for Women
Marion Griffin Chapter
P.O. Box 210436
Nashville, TN 37221

Dean Alberto Gonzales
Belmont University College of Law
1900 Belmont Boulevard
Nashville, TN 37212

Michelle Greenway Sellers, President
Tennessee Bar Association
Rainey, Kizer, Reviere & Bell PLC
P.O. Box 1147
Jackson, TN 38302

Dean Chris Guthrie
Vanderbilt University
131 21st Ave. South, Room 108
Nashville, TN 37203-1181

Bill Harbison, President
Tennessee Board of Law Examiners
Sherrard Roe Voigt & Harbison
150 3rd Avenue S., #1100
Nashville, TN 372012011

Matt Hardin, President
Tennessee Trial Lawyers Association
207 23rd Avenue N.
Nashville, TN 37203

John Harrison, President
Chattanooga Bar Association
Evans Harrison Hackett PLLC
835 Georgia Avenue, Suite 800
Chattanooga, TN 37402-2225

Olen Haynes, President
Federal Bar Association Northeast
Tennessee Chapter
The Haynes Firm
P.O. Box 1879
Johnson City, TN 37605

James Haywood
Haywood County Bar Association
President
Haywood Law, PLLC
50 Boyd Avenue
Brownsville, TN 38012-2655

Michael Hill, President
Gibson County Bar Association
Flippin Collins & Hill PLLC
1066 South Main St.,
P.O. Box 679
Milan, TN 38358-0679

Craig Holloway, President
Blount County Bar
Craig Holloway Attomey
at Law, PLLC
P.O. Box 1416
Cleveland, TN 37364

Lynda Hood, Executive Director
Chattanooga Bar Association
801 Broad Street, Suite 420
Chattanooga, TN 37402

Floyd Flippen, Chair
Board of Professional Responsibility
Flippin Law, P.C.
1302 Main Street
Humboldt, TN 38343

Dennis Humphrey, President
Roane County Bar Association
300 E. Race Street
Kingston, TN 37763

Robert Jolley, President
Monroe County Bar Association
800 S. Gay Street, Suite 2100
Knoxville, TN 37929-9711

Raymond Jones, President
Fifteenth Judicial District Bar Association
Office of the Public Defender
213 N. Cumberland Street
Lebanon, TN 37087-2718

Amanda Jowers, President
Obion County Bar Association
Maness & Jowers, PLC
P.O. Box 2041
Union City, TN 38281

Suzanne Keith, Executive Director
Tennessee Trial Lawyers Association
629 Woodland St.
Nashville, TN 37206

Rebecca Ketchie, President
Kingsport Bar Association
Wilson Worley PC P.O. Box 88
Kingsport, TN 37662-0088

Bill Koch, Dean
Nashville School of Law
4013 Armory Oaks Drive
Nashville, TN 37204-4577

Barry Kolar
Assistant Executive Director
Tennessee Bar Association
221 Fourth Avenue North, Suite 400
Nashville, TN 37219

Karol Lahrman, Executive Director
Tennessee Lawyers Association for Women
P.O. Box 331214
Nashville, TN 37203

Megan Lane, President
Association for Women Attorneys
Harris Shelton Hanover and Walsh
6060 Primacy Parkway, Suite 100
Memphis, TN 38119

Denise Lawrence, Executive Director
Tennessee Association of Criminal Defense Lawyers (TACDL)
530 Church Street, Suite 300
Nashville, TN 37219

William Lawson
Unicoi County Bar Association President
William B. Lawson, Attorney at Law
112 Gay Street, Suite A
Erwin, TN 37650-1275

Lynn Lawyer, President
Tennessee Defense Lawyers Association (TDLA) President
Law Office of Gary Wilkinson
51 Century Blvd., Suite 300
Nashville, TN 37214

Taylor Luther, President
Dickson County Bar Association
Taylor R. Luther, Attorney at Law
104 Masonic Street, Suite 6
Dickson, TN 37055-2188

Matt Lyon, Dean
Lincoln Memorial University
Duncan School of Law
601 W. Summit Hill Dr.
Knoxville, TN 37902

Monica Mackie, Executive Director
Nashville Bar Association
150 4th Ave N, Ste 1350
Nashville, TN 37219

Matt Maddox, President
Carroll County Bar Association
Law Office of Matthew M. Maddox
19695 Main Street E.
Huntingdon, TN 38344-3825

Ian McCabe, President
Loudon County Bar Association
TN Department of Children's Services
182 Frank L. Diggs Dr., Suite 100
Clinton, TN 37716

Hon. Donna Scott Davenport, President
Middle TN Lawyers' Association for Women (MTLAW)
1710 South Church Street, Suite 1
Murfreesboro, TN 37130

Willis McKee, President
Coffee County Bar Association
Office of the Public Defender
14th Judicial District
1100 1st Avenue
Manchester, TN 37355-2697

J. Carty McSween, IV, President
Cocke County Newport Bar Association
McSween, McSween, and Greene, PLLC
321 E. Broadway
Newport, TN 37821

Mark Mesler, Chairman
Tennessee Lawyers Fund for Client Protection
Rosenblum & Reisman, P.C.
6070 Poplar Avenue, Suite 550
Memphis, TN 38119-3906

Jonathan Miley
Robertson County Bar Association
President
Walker & Gamer
122 6th Avenue W.
Springfield, TN 37172-2405

Denny Mitchell, President
White County Bar Association
Mitchell Law Office
112 South Main Street
Sparta, TN 38583

David Myers, President
Union County Bar Association
105 Monroe Street, P.O. Box 13
Maynardville, TN 37807-0013

Lynn Newcomb, President
Cheatham County Bar Association
Lynn Newcomb, Attorney at Law
410 Timber Road
Ashland City, TN 37015

Rob Norred, President
Bradley County Bar
Logan-Thompson, PC
30 2nd Street
Cleveland, TN 37311

Julie Palmer, President
Dyer County Bar Association
West Tennssee Legal Services
208 S. Chuch Avenue, P.O. Box 1112
Dyersburg, TN 38024

Melissa Parsons, President
McMinn Meigs County Bar Association
Parker and Parsons, Attorneys at Law
420 N. Tennessee Avenue
Etowah, TN 37331

John Partin, President
Warren County Bar Association
Office of the Public Defender
31st Judicial District
115 College Street
McMinnville, TN 37110-2537

Beau Pemberton, President
Weakley County Bar Association
Bradberry And Pemberton
109 N. Poplar Street
Dresden, TN 38225-1115

Lisa Perlen, Executive Director
Tennessee Board of Law Examiners
511 Union Street, Suite 525
Nashville, TN 37219

Lia Perryman, President
Sevier County Bar Association
Johnson, Murrell & Associates, P.C.
150 Court Avenue, Suite 1
Sevierville, TN 37862-3576

Jennifer Potts, President
Rutherford Cannon County Bar Association
Young & Potts
119 N. Maple Street
Murfreesboro, TN 37130-3506

Ann Pruitt, Executive Director
Tennessee Alliance for Legal Services
1220 Vintage Place
Nashville, TN 37215

Shayla Purifoy, President
National Bar Association,
Ben Jones Chapter
Shelby County Government
201 Poplar Avenue, Suite LL-56
Memphis, TN 38103-1945

Mario Ramos, President
Tennessee Association of Spanish Speaking Attorneys (TASSA)
Mario Ramos PLLC
2021 Richard Jones Road, Suite 300
Nashville, TN 37215

Arrin Richards, President
National Bar Association,
Napier-Looby Chapter
Neal & Harwell, PLC
1201 Demonbreun Street, Suite 1000
Nashville, TN 37203

Dean Katharine Schaffzin
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103-2189

Randall Self, President
Lincoln County Bar Association
Randall E. Self, Attorney at Law
131A Market Street E., P.O. Box 501
Fayetteville, TN 37334-3063

James K. Simms, President
Federal Bar Association Nashville Chapter
Thompson Burton, PLLC
6100 Tower Circle, Suite 200
Franklin, TN 37067

Amy Kathleen Skelton
Hawkins County Bar Association President
Law Office of Mark A. Skelton
121 South Depot Street
Rogersville, TN 37857

Wayne Stambaugh, President
Hamblen County Bar Association
Wayne R. Stambaugh, Attorney At Law
509 A1lison Street, P.O. Box 1896
Morristown, TN 37814

David Stanifer, President
Claiborne County Bar Association
Stanifer & Stanifer
1735 Main Street, P.O. Box 217
Tazewell, TN 37879-0217

Joycelyn Stevenson, Executive Director
Tennessee Bar Association
221 Fourth Avenue North, Suite 400
Nashville, TN 37219

Hanson Tipton, President
Knoxville Bar Association
Watson, Roach, Batson & Lauderback PLC
P.O. Box131
Knoxville, TN 37901-0131

Kelly Tollett, President
Cumberland County Bar Association
Fields & Tollett, Association of Attorneys
169 E. First Street
Crossville, TN 38555

Austin Stokes
Jackson-Madison-Henderson County Bar Association
Pentecost, Glenn, & Mauldin
51 Abbey Place
Jackson, TN 38305-1793

Deborah Tate, Director
Administrative Office of the Courts
511 Union Street, Suite 600
Nashville, TN 37219-1768

James Taylor, President
Rhea County Bar Association
Office of the District Attorney
12th Judicial District
375 Church Street, Suite 300
Dayton, TN 37321-1322

Robert Thomas, President
National Bar Association,
Ballard Taylor Chapter
Federal Defender Office
200 Jefferson Avenue, Suite 200
Memphis, TN 38103-8307

Harriet Thompson, President
Hardeman County Bar Association
P.O. Box 600
Bolivar, TN 38008

Nick Utter
Marshall County Bar Association President
104 Belfast Street
Lewisburg, TN 37091-3317

David Veile, President
Williamson County Bar Association
Schell & Oglesby, LLC
509 New Highway 96 W., Suite 201
Franklin, TN 37064

Virginia Walsh, President
Anderson County Bar Association
Office of the District Attorney
101 S. Main Street, Suite 300
Clinton, TN 37716-3619

Ashley Waters, President
Putnam County Bar Association
Waters Law
116 Locust Avenue, Suite A
Cookeville, TN 38501

Marsha Watson, Executive Director
Knoxville Bar Association
P.O. Box 2027
Knoxville, TN 37901

John Lee Williams, President
Humphreys County Bar Association
Porch, Peeler, Williams, and Thomason
102 South Court Square
Waverly, TN 37185

Rachel Witherington, President
Tipton County Bar Association
Owen, Jenkins, Dedmon
Witherington Law Group LLP
P.O. Box 846
Dyersburg, TN 38025

EMAIL TO: appeallatecourtclerk@tncourts.gov

James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: No. ADM2020-01159 Regarding Tenn. Sup. Ct. R. 21, §3.01

Opposition to "Petition of the Nashville Bar Association to Modify Rule 21 of the Rules of the Tennessee Supreme Court to Require 2 Hours of CLE Annually in Diversity, Inclusion, Equity, and Elimination of Bias" (the "Petition")

Dear Sir:

I am writing ***in opposition*** to the above-referenced Petition of the Nashville Bar Association ("NBA"). I am submitting my comments anonymously because, as stated by others who have submitted negative responses, I expect retribution. I can take care of myself, but without my name they cannot harm my clients to get to me.

1. The False Accusation of "Systemic" Injustice: The Petition charges that the Tennessee judicial system is "systemically" and "structurally" racist, gender-biased and discriminatory. By proposing the re-education and indoctrination of lawyers as a remedy, the Petition impliedly charges every lawyer in Tennessee with racism, gender-bias and other discrimination.

Neither charge is true. The NBA offers no evidence for the truth of the charges. It simply mentions some recent examples of police misconduct—which everyone abhors—and then appeals to the authority and opinions of other "woke" leftist lawyers and legal organizations. The truth is that recent studies, including one for the Obama Justice Department, tend to disprove "systemic" racism or bias in the criminal justice system in relation to arrests, prosecution or sentencing. [i]

I am offended by the false charge against me and other Tennessee lawyers. The Court should be offended that it is accused of presiding over a "systemically" unjust system, and it should stand up for the judges, court clerks, prosecutors and lawyers who are being smeared without evidence.

2. The Petition Seeks an Official Confession to the False Accusation: The proposed rule change cannot be separated from the reasoning which purportedly necessitates it. If the Court grants the Petition, it will be construed as an official confession of the false accusations that the Tennessee judicial system is systemically racist, gender biased and discriminatory. Beyond that, it will be construed as an admission that the Court believes that all Tennessee lawyers are racist, gender biased, discriminatory and in need of re-education.

3. Do Not Be Fooled—the Proposed Rule Change is Not "Neutral": The Court should not be fooled by arguments that the proposed change to Tenn. Sup. Ct. R. 21, §3.01(a) is "neutral"—by those who contend it is just a minor change to further the laudable goal of "bias elimination" ("BE"). And who doesn't want to eliminate bias? Those who make that argument are inviting the Court to wreck its own credibility. Everyone knows what this is about because we have seen it play out in other jurisdictions. The proposed rule change is intended as a vehicle for indoctrinating all Tennessee lawyers in highly dubious "woke" leftist political theories like "critical race theory" and "feminist jurisprudence." [ii] No one would believe the Court if it claimed to be approving the proposed change as some sort of "neutral" educational requirement.

4. What Real "Neutrality" Would Look Like: If the true objective of the Petition is to eliminate "all forms of discrimination within the judicial system," then the proposed rule change would define BE to include the elimination of political, religious, philosophical and ideological viewpoint bias as well as bias due to race, gender and gender assignment. If, for example, lawyers can earn 2 hours of CLE credit learning about "critical race theory," then they should be able to earn the same credit attending seminars that criticize critical race theory as is biased, divisive, racist and linked to Marxism. Also, a neutral rule change must be accompanied by an order that the Commission on CLE be "unbiased" in its approval of qualifying courses, and that the Commission must approve an equal number of equally aggressive courses presenting the opposing views.

5. Unconstitutional Remedy: If the Court issues a new rule that is not neutral—*i.e.* like the proposed rule, which requires all Tennessee lawyers to take 2 hours of CLE per year on BE and, as a practical matter, results in all Tennessee lawyers being indoctrinated in leftist political (or quasi-religious) theories—then the rule would be unconstitutional. The Court would be imposing moral, ethical and viewpoint conformity in violation of the religious liberty clauses of the U.S. and Tennessee Constitutions. [iii]

6. What the NBA is Not Telling the Court: The most glaring omission in the Petition is that the NBA fails to inform the Court of the natural and logical consequences of taking the actions the NBA urges upon it. If the Court does what the NBA wants—*i.e.* confesses to the lie that the Tennessee justice system is "systemically racist"—then it begs this question: Why waste time re-educating lawyers? That is a practically useless remedy, like putting a band-aid on a broken leg. After all, lawyers are just the worker-bees licensed by the state to help people negotiate the racist system. [iv]

If "systemic racism" or "systemic gender bias" is to be meaningfully remedied, isn't the obvious first step to cleanse the racist and bigoted "system" of the racists and bigots who run it—you know, the justices, judges, court clerks, and prosecutors, the people getting the tainted money from the rotten system? Why isn't the NBA calling for these officials to be stripped of their ill-gotten gains—their positions, salaries, pensions, and all of the other benefits and perks of office? Are they afraid to inform the Court of where they are leading it? Is the strategy to obtain the crucial confession first and give the Court the bad news later?

7. What the Court Should Do: Rather than confess a lie, which will then be unjustly imputed to the rest of the legal community, ***the Court*** (and its Access to Justice Commission) ***should do more than just reject the Petition***. It should issue a full-throated defense of the U.S. justice system and, by extension, the Tennessee justice system. It should explain why our system of justice, while imperfect, is the most "just" in the world and the envy of the world. It should make clear that the critics of our justice system are largely reduced to relying upon "microaggressions" that no reasonable person can detect and that have no measurable impact on justice. It should note that the critics rarely leave because no other country provides such justice or aspires to be a just place where "all men are created equal." The Court should affirmatively declare that Tennessee is not going to mandate that its lawyers be indoctrinated in dubious political theories like "critical race theory" and "feminist jurisprudence." It should explain why those theories: (a) are themselves divisive and racist or sexist, (b) are contrary to the fundamental principles on which the U.S. was founded, (c) are designed to coerce conformity of viewpoint, (d) they perpetuate racial and gender stereotypes, and (e) they reinforce biases.

That is the only proper response of the Court to the Petition. The people who work in the system deserve the Court's defense, not a betrayal. What will the Court do?

Sincerely,

A Tennessee Lawyer

cc: Access to Justice Commission [Email To: bcoley@hdclaw.com]

ENDNOTES:

---

[i] *See, e.g.* https://www.washingtonpost.com/graphics/investigations/police-shootings-database/. According to this Washington Post database, police fatally shot 14 unarmed blacks and 25 unarmed whites in 2019; https://www.phillypolice.com/assets/directives/cops-w0753-pub.pdf. Fachner & Carter, *An Assessment of Deadly Force in the Philadelphia Police Department* (2015). According to this U.S. Justice Department study, white police officers were less likely than black and Hispanic officers to shoot unarmed black suspects (see pg. 33); https://www.pnas.org/content/116/32/15877 Proceedings of the National Academy of Sciences, *Officer Characteristics and Racial Disparities in Officer-Involved Shootings* (2019). "[The researchers] did not find evidence for anti-Black or anti-Hispanic disparity in police use of force across all shootings, and, if anything, found anti-White disparities when controlling for race-specific crime."

[ii] *See, e.g.*, Richard A. Posner, *The Skin Trade*, NEW REPUBLIC (Oct. 13, 1997) (calling critical scholars the "lunatic fringe" and critical race scholars "whiners" and the "lunatic core."); *see also* Daniel A. Farber & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997); Heather MacDonald, *The Myth of Systemic Police Racism,* WALL STREET JOURNAL (June 2, 2020).

[iii] *See* U.S. Const., Amend. 1 and Tenn. Const., Art. I, § 3; *see also West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943)("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.").

[iv] Besides, if some Tennessee lawyers are inalterably and irredeemably racist and gender biased by virtue of their race, sex and privilege—as some of these philosophies teach—then 2 hours of CLE each year would be of no benefit.

Beacon
CENTER OF TENNESSEE

James M. Hivner, Clerk
Tennessee Appellate Courts
100 Supreme Court Building
401 7th Ave. N.
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

December 18, 2020

Re: Docket No. ADM2020-01159 - Opposition to Amendment to Rule 21 of Section 3.01(a)

Dear Mr. Hivner,

On behalf of the Beacon Center Legal Foundation, we write to oppose the petition from the Nashville Bar Association to amend Rule 21 Section 3.01(a) to require that two hours of continuing education be dedicated to the study of systemic racism. While we commend the willingness to address ongoing racial disparities, the NBA's proposal appears to endorse critical race theory. This is not a productive approach, and we suggest an alternative.

Defining terms

The petition employs terms that it does not define: "systemic racism," "structural racism," "implicit bias and privilege," "systemic oppression," and "systemic change."[1] The failure to define terms was either unintentional or deliberate. If it is the former, then it provides reason enough deny the request. Until the NBA says what it means, we cannot sufficiently evaluate the proposal. If the NBA intended to be vague, then we should question what will happen when the curriculum takes forms. More on this below.

The NBA is using the language of critical race theory. Even if it will not acknowledge it, we should discuss what this entails. Critical race theory accepts as a given that white supremacy surrounds us, pervading all aspects

[1] Petition at 2.

of American life.[2][3] Under critical race theory, America was built upon white supremacy with all institutions, including the U.S. Constitution, oriented to its perpetuation. These are among the "structures" referenced in the term "structural racism."

We know what it looks like when these ideas become realized. An investigation into critical race theory in the federal government found the following:[4]

- The Treasury Department held a training session telling employees that "virtually all White people contribute to racism" and demanding that white staff members "struggle to own their racism" and accept their "unconscious bias, White privilege, and White fragility."
- The National Credit Union Administration held a session for 8,900 employees arguing that America was "founded on racism" and "built on the backs of people who were enslaved."
- Sandia National Laboratories—which produces our nuclear arsenal—held a three-day reeducation camp for white males, teaching them how to deconstruct their "white male culture" and forcing them to write letters of apology to women and people of color.

Perhaps NBA was not deliberately employing "strategic ambiguity,"[5] whereby one says something uncontroversial while intending something radical. If it wished to find common ground, then we would welcome the discussion.[6] But if it sought commonality, then it had an obligation to avoid confusing things with polemical terms. Until it says something different, we have no option but to

---

[2] The book *White Fragility* — a canonical text in this ideology – puts it this way: "Racism is a systemic, societal, institutional, omnipresent, and epistemologically embedded phenomenon that pervades every vestige of our reality." Robin Diangelo, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018) < https://www.amazon.com/White-Fragility-People-About-Racism/dp/0807047414>.

[3] According to Professor Ibram X. Kendi – who literally wrote the book on how to be an "anti-racist" – "[t]here is no such thing as a nonracist or race-neutral policy. Every policy in every institution in every community in every nation is producing or sustaining either racial inequity or equity between racial groups." Ibram X. Kendi, HOW TO BE AN ANTI RACIST (2019) <https://www.ibramxkendi.com/how-to-be-an-antiracist-1>.

[4] Christopher Rufo, Summary of Critical Race Theory Investigations <https://christopherrufo.com/summary-of-critical-race-theory-investigations/>.

[5] Jonathan Butcher and Mike Gonzalez, *Critical Race Theory, the New Intolerance, and Its Grip on America*, The Heritage Foundation (Dec. 7, 2020) < https://www.heritage.org/civil-rights/report/critical-race-theory-the-new-intolerance-and-its-grip-america>.

[6] Racism remains with us and Americans should engage into open and frank conversations over how to improve upon racial disparities. The language the NBA chose to employ implies that its vision is not limited to the preceding observations.

understand these terms as having the intended meaning under critical race theory with all that implies.

The Proposal Should Be Rejected.

So, with these terms now identified, the suggested rule change ought to be rejected. It should go without saying that the Supreme Court should not take sides on a topic that is, to put it mildly, contentious and debatable. The purpose of CLE is to ensure professional competency, not to promulgate controversial viewpoints. It should equally go without saying that the Supreme Court should not require training in an ideology that openly promotes racial discrimination in the name of combatting racial discrimination.[7] Nor should we lend any credence to the suggestion that any *thought*, racism included, is so dangerous that it should be criminalized. Make no mistake about it; that is embraced under critical race theory.[8]

Hostility to freedom of speech is part of critical race theory's abandonment of liberal values wholesale, with its emphasis on the protection of individual liberty, and the rule of law which is, to its collective mind, a non-neutral power grab "favor[ing] the historically privileged and disadvantage[ing] the historically underprivileged."[9] We should absolutely be swimming upstream against the rising waters of this trend.

But there is a far more important reason why the Supreme Court should reject the petition's effort to force training in critical race theory. It undermines our shared sense of American self-worth by accepting as true that America and its Founding ideals rest on white supremacy.

To this, we cannot accede.

---

[7] According to Professor Kendi: "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.*" (emphasis added) <https://www.goodreads.com/work/quotes/62549152-how-to-be-an-antiracist?page=2>.

[8] Professor Kendi proposes an "anti-racist" amendment to the Constitution that would, among other things, make illegal "racist ideas" and create a "Department of Anti-Racism" empowered with "disciplinary tools to wield over and against policymakers and public officials who do not voluntarily change their racist policy and ideas." Ibram X. Kendi, *Pass an Anti-Racist Constitutional Amendment*, Politico <https://www.politico.com/interactives/2019/how-to-fix-politics-in-america/inequality/pass-an-anti-racist-constitutional-amendment/>.

[9] Butcher, SUPRA, n. 5 (quoting Cornell Law School, "Critical Legal Theory," <https://www.law.cornell.edu/wex/critical_legal_theory>).

Frederick Douglass was neither stupid, nor guilty of false consciousness, when he described the Constitution as a "glorious liberty document." [10] The widespread misperceptions about the role white supremacy played in our Nation's Founding show a real need for serious reacquaintance with our state and federal constitutions. We would better confront racial injustice if we committed ourselves to a reengagement with American constitutional thought. Critical race theory implies that the entire project was corrupt from the start, cannot be redeemed, and we need to start over.

We should not foster antipathy towards our shared heritage. We should cultivate a sense of gratitude and reverence for America and its Founding documents. We have an obligation to understand and pass down our appreciation to future generations as part of their cultural inheritance. As lawyers, the custodial duty over this sort of informed reverence for our legal structure adheres particularly to us. If we can no longer stand, or stand for, the extraordinary ideas woven from the beginning into the culture that nurtured us and gave us a home – that is, to *advocate for* our country – then I cannot see any way in which we are, on the whole, a beneficial profession.

No one is advocating for a sanitized view of our Nation's history. An examination of slavery's uncomfortable existence alongside our Founding documents is an entirely worthy project. But we should never be less than perfectly clear that the moral philosophy represented in the Declaration of Independence and Constitution was a repudiation of this horrid but longstanding aspect of humanity, and would one day destroy it. It took far too long to actualize, but it is nevertheless true. "Take the Constitution according to its plain reading," said Frederick Douglass, "I defy the presentation of a single pro-slavery clause in it."[11] On the subject, a number of excellent books and articles have recently been written. The NBA would do well to consider them.[12]

---

[10] Frederick Douglass, *What to the Slave is the Fourth of July*? (July 5, 1852) in 50 CORE AMERICAN DOCUMENTS 202, 222 (Ashbrook Press, 2015).

[11] *Id.* at 223.

[12] Timothy Sandefur wrote excellent articles rebutting the argument of the *1619 Project* that America was founded to promote slavery and white supremacy. *See* Timothy Sandefur, *The Anti-Slavery Constitution*, NATIONAL REVIEW (Sept. 30, 2019) <https://www.nationalreview.com/magazine/2019/09/30/the-anti-slavery-constitution/> and *The Founders Were Flawed. The Nation is Imperfect. The Constitution is Still a 'Glorious Liberty Document'"* REASON (Aug. 21, 2019) (reprinted in <https://www.cato.org/publications/commentary/founders-were-flawed-nation-imperfect-constitution-still-glorious-liberty>. For longer treatments, see C. Bradley Thompson, AMERICA'S REVOLUTIONARY MIND: A MORAL HISTORY OF THE AMERICAN REVOLUTION AND THE DECLARATION THAT DEFINED IT (2010) and Sean Wilentz, NO PROPERTY IN MAN: SLAVERY AND ANTISLAVERY AT THE NATION'S FOUNDING (2018).

A Counter-Proposal

Let us be the first to submit a counter-proposal to the NBA. Let us wield America's political philosophy as a tool to combat racial injustice. The Constitution is written one way, but enforced another. I propose that we ask what role the failure to enforce the Constitution *as written* contributes to present-day racial inequalities. We would enthusiastically contribute to the development a legal program along these lines.

Our state and federal constitutions have quite a lot to say that remains relevant. For instance, health care is one area in which the American Bar Association identified racial disparities.[13] As of 2017, Tennessee maintained and enforced monopolies in 23 forms of health care services alone, [14] notwithstanding Tennessee's constitutional prohibition on state-sanctioned monopolies.[15] Here is a question only lawyers can address: if monopolies "shall not be allowed" in Tennessee, TENN. CONST. ART. I, § 22, then how could we have 23 of them in Tennessee's health care services alone? What role do these state-sanctioned restrictions on health care services play in promoting disparate health care outcomes? Health care is but one field in which we may have a productive discussion.

It strikes me that, as lawyers, here we might actually be of some use because the project is, at its heart, a legal question. We are less well positioned as a profession to be instrumental in the "[r]ooting out of systemic racism, gender bias, and all forms of discrimination within the judicial system,"[16] which are already illegal and policed by a variety of agencies.

Conclusion

I propose we make good use of our skills while knitting together our divisions as a country and profession by fostering an appreciation for America's true purpose. While we recognize that racial injustices are real, and commend the NBA's willingness to confront them, forcing lawyers to absorb a deeply polarizing and ahistorical doctrine is the wrong approach.

---

[13] Khlara M. Bridges, *Implicit Bias and Racial Disparities in Health Care* (excerpted from CRITICAL RACE THEORY: A PRIMER (2018)) <https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-state-of-healthcare-in-the-united-states/racial-disparities-in-health-care/>.

[14] A 2017 study by the Mercatus Institute identified 23 health care services that require a certificate of need for a new or expanded service as a matter of state law. <https://www.mercatus.org/system/files/tennessee_state_profile.pdf>.

[15] " That perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed." TENN. CONST. ART. I, § 22.

[16] Petition at 2.

We respectfully ask the Supreme Court to reject the adoption of the proposed rule in question.

Respectfully submitted,

s/B.H. Boucek
BRADEN H. BOUCEK
B.P.R. No. 021399
Beacon Center of Tennessee
P.O. Box 198646
Nashville, TN 37219
Tel.: 615/383.6431
Fax: 615/383.6432
braden@beacontn.org

ADM2020-01159

FILED
DEC 16 2020
Clerk of the Appellate Courts
Rec'd By KJM

From: "Porter, Kaya Grace" <KPorter@LewisThomason.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/16/2020 3:55 PM
Subject: No. ADM2020-01159

Dear Sir or Madam:

I wholeheartedly support the above referenced initiative requiring that Tennessee attorneys complete two hours of continuing legal education focused on diversity, inclusion, equity, and elimination of bias. In my opinion, this is the least we of an esteemed profession can do to make our world a better place for all.

Sincerely,

Kaya Grace Porter

LEWIS THOMASON
Kaya Grace Porter Attorney at Law
Lewis Thomason, P.C.
424 Church Street, Suite 2500 | P.O. Box 198615 | Nashville, TN 37219
Tel: 615-259-1366 | Fax: 615-259-1389
Web Page | My Bio

ADM2020-01159

Gary S. Humble, Esq.

James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Tenn. Sup. Ct. R. 21, section 3.01

Dear Mr. Hivner:

Thank you for the opportunity to provide input regarding the modification of Rule 21. I have always appreciated how our bar (of which I have been a proud member since 1980) seeks input from practitioners regarding policy matters. Please accept my suggestions in the spirit in which they are intended: borne out of humility, experience, and careful consideration.

I oppose the petition submitted by the Nashville Bar Association ("NBA") asking the Court to modify Rule 21, section 3.01(a) to require lawyers to complete two hours training in diversity, inclusion, equity, and elimination of bias. While I believe the proposal is well-intended, I respectfully submit that it misses the mark and may be counterproductive.

Firstly, I always take issue with the concept of generalizing from the specific. The petition is political in nature. It assumes systemic racism. It bases this assumption on cases, such as George Floyd, that may not support the conclusion. Like all others, I found Mr. Floyd's treatment and subsequent death horrific. However, there is no publicly available evidence that the force used was motivated by racism. Similar cases may show that some police officers engaged in excessive force, but there are obviously motivations other than racism that may be the drivers of such behavior. More significantly, there is no evidence that racist *policies* are in place in any of our institutions, especially our court system.

Secondly, I respectfully note that the Court is a state actor and that the Court's requirements are coercive. A recommendation that lawyers take diversity training rather than making it compulsory would be a better approach, assuming the Court were to find such training worthwhile. Compulsory bias training assumes that lawyers are biased and need to be taught otherwise. I do not believe lawyers in this state are. As a retired federal prosecutor and sitting judge, I have never witnessed a lawyer give any client less than her/his best effort irrespective of the client's color, national origin, sex, or sexual orientation. Most attorneys are sufficiently aware to know where they need help and CLE is a good place to get it.

Currently, only ethics training is mandatory. We can all agree that such training is a necessary requirement for practicing law and being current in that area is important. We cannot all agree on diversity training. If the Court is contemplating using its coercive

powers to improve the ability of lawyers to represent all clients, there may be other, substantive areas that are more important to improving the quality of our representation.

Finally, while not intending to write a vouching or self-serving letter, it is important I note that since my retirement from the U.S. Attorney's Office I have represented all kinds of defendants in state and federal court. As an Assistant U.S. Attorney, I prosecuted cases involving all varieties of individuals. I have prosecuted law enforcement officers (including elected sheriffs and federal officers, such as an FBI agent),con men and women of every stripe, drug distributors, and violent predators. I also prosecuted individuals associated with white supremacist groups who had committed violent crimes. I have a small concern that *requiring* diversity training will be used by certain groups against defense counsel, particularly in the nationalist or white supremacist realm. As I am certain the Court is aware, defendants can be quite creative when raising conflict and post-conviction theories. Giving any ammunition to such defendants ("my lawyer took diversity training and was hostile to me") to suggest that a lawyer/prosecutor was not impartial is a mistake.

For the reasons cited above, I object to compulsory diversity training. Thank you for allowing me to share my thoughts.

Respectfully,

Gary S. Humble

Gary S. Humble
No.007325

Knoxville Bar Association

Knoxville Bar Association
505 Main Street, Suite 50
P.O. Box 2027
Knoxville, TN 37901-2027
PH: (865) 522-6522
FAX: (865) 523-5662

December 9, 2020

VIA E-Mail: appellatecourtclerk@tncourts.gov

James Hivner, Clerk of Appellate Courts
Tennessee Supreme Court
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: No. ADM2020-01159 - Amendments to Tennessee Supreme Court Rule 21

Dear Mr. Hivner:

I am writing to you and to the Tennessee Supreme Court on behalf of the Board of Governors of the Knoxville Bar Association (KBA) regarding the Nashville Bar Association's (NBA) petition to amend Rule 21 of the Rules of the Tennessee Supreme Court to require mandatory CLE training for Tennessee attorneys on the topics of diversity, inclusion, equity, and elimination of bias.

In August, when the NBA shared a copy of their petition, the KBA began requesting input from members regarding the proposed change to Rule 21. Since that time, we have heard from members strongly advocating both for and against the petition. The KBA's Professionalism Committee carefully considered the Court's Order with the NBA's petition during both its October and November 2020 meetings. For more than twenty-five years, the KBA's Diversity in the Profession Committee, and its predecessor, the Minority Opportunities Committee, have sponsored at least one annual continuing legal education (CLE) program on the topics of diversity and inclusion. During its October meeting, members of the Diversity in the Profession Committee expressed their support for the NBA petition.

The members of the KBA Board of Governors were asked to consider the proposed changes to Rule 21 and to inquire of their colleagues in the bar about the NBA petition. Having been made aware of concerns and questions raised during Committee discussions and by other KBA members, the Board was provided with a summary, including but not limited to, the following:

1. Whether two of the fifteen mandatory hours should be spent on this, or some lesser amount, e.g. one hour, one hour every other year, or expiration of the requirement after an attorney has taken a certain number of hours.
2. How the hours should be categorized, i.e., whether for general credit, ethics/professionalism credit, or dual credit.
3. Whether it is appropriate to use any mandatory CLE instruction time to take the place of other substantive legal topics addressing attorneys' most pressing needs and deficiencies.
4. How the proposed CLE programs would be evaluated for effectiveness or approved as diversity or inclusion programs.
5. Whether the existence of systemic racism or bias in the bar, as opposed to in society at large, has been established and/or is assumed in the petition.

6. Whether, if systemic racism is an issue in the bar, two hours of CLE would be enough to address it or whether additional measures would be required.
7. Whether, even if the existence of systemic racism in the bar has not been established, the proposed CLE courses are still a good idea because of the prevalence of diversity and inclusion-related issues that lawyers and judges encounter.
8. Whether the petition is seeking to require instruction in a particular political or another viewpoint that might not be appropriate for required legal education.
9. Whether the petition subjects attorneys to viewpoints in violation of the First Amendment right to freedom from expression.
10. What is the scope of the diversity or bias that will be addressed in the approved CLE courses, e.g., whether in addition to race and gender, the scope will or should include other areas such as cultural, political, or religious diversity and bias.

At the November 18, 2020 meeting, the Board of Governors engaged in extended discussion about the proposed changes and unanimously voted to support the proposed amendment to the extent that it requires some CLE on the subjects of Diversity and Inclusion. The Board did not vote specifically on whether to support an annual requirement of two hours but did vote to share the concerns above, as raised by the Professionalism Committee and other members of the Knoxville bar, to assist the Court as it evaluates the petition.

As always, the KBA appreciates the invitation to consider and comment on proposed rules changes.

As always, the KBA appreciates the opportunity to comment on proposed Rules and changes to such Rules promulgated by the Tennessee Supreme Court.

Sincerely,

Hanson Tipton, President
Knoxville Bar Association

cc: Marsha Watson, KBA Executive Director (via e-mail)

Crane, Lee & Moya, P.L.L.C.

Attorneys and Counselors at Law

Julie E. Moya
Chattanooga conference office:
6708 Heritage Business Court
Chattanooga, TN 37421
Telephone: (423) 316-0920
Facsimile: (865) 415-0571
Office hours by appointment only

Stewart M. Crane
Nathanael H. Lee
Knoxville conference office:
9111 Cross Park Drive, Suite D-200
Knoxville, TN 37923
Telephone: (865) 539-8282
Facsimile: (865) 415-0571
Office hours by appointment only

December 7, 2020

James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

re: No. ADM2020-01159

Dear Sir:

I write to express my opposition to the petition filed by the Nashville Bar Association (NBA) under the above docket number. I have been licensed to practice law in Tennessee since 1985.

While mandatory continuing legal education(CLE) is acceptable, mandating the content of any part of CLE is not, with the notable exception of Tennessee's requirement of three (3) hours of legal ethics education. Tennessee's current ethics education requirement allows a broad spectrum of content within its scope. The CLE requirement proposed by the NBA is narrowly tailored and politically charged. If the Tennessee Supreme Court grants the NBA's petition, I expect to be compelled to listen to Marxist/Communist/totalitarian dogma under the guise of "racial equality" training. I expect to be told that I am a racist, sexist, and unfairly privileged merely because I am a Caucasian male, and that the United States of America is an evil, racist nation. Such CLE bears a frightening resemblance to the "re-education camps" of the Marxist/Communist governments of the former Soviet Union and the People's Republic of China. Much of the content of such so-called "education" will doubtless be created by persons with Marxist/Communist/anti-American/totalitarian leanings, while flying the false flag of racial equality. I have heard enough of it already. I object to being forced to pay to hear more.

The first paragraph of page 3 of the NBA's petition notes that "the vast majority" of jurisdictions do not require the sort of CLE that the NBA's petition proposes, and that the few jurisdictions that have such a requirement only require one (1) hour every three (3) years. If Tennessee attorneys are subjected to such a mandate, all of our required annual ethics CLE hours will be consumed with such training. There is no shortage of such CLE courses available to those who wish to take them and are willing to pay for them.

The first paragraph of page 3 of the NBA's petition also urges Tennessee's Supreme Court to become a "leader" by requiring three (3) hours of diversity, inclusion, equity, and elimination of bias training each year for attorneys licensed to practice law in Tennessee. Tennessee does not need to be that sort of "leader." I do not want my state to "lead" the United States into socialism/Marxism/totalitarianism. We are too far along that path already.

The Constitutions of the United States and the State of Tennessee probably protect Tennessee attorneys from the sort of political indoctrination proposed in the NBA's petition, but I will leave those arguments to my colleagues who are constitutional attorneys. Hopefully some of them will find the courage to bring their legal abilities to bear against such forced indoctrination.

Yours truly,

Stewart M. Crane

Stewart M. Crane
BPR No. 011257

- Critical Race Theory

From: Linda Thomas <slt1956@hotmail.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/4/2020 9:33 AM
Subject: Critical Race Theory

Critical race theory is racist and should not be allowed. Everyone should be treated equally by the law.
Nashville Bar Association Petitions Tennessee Supreme Court to Require Annual Critical Race Theory Training of Tennessee Attorneys and Judges - Tennessee Star

Linda Thomas
Lebanon Tennessee

- NBA Petition Annual Critical Race Theory - Tenn. Sup Ct. R.21, section 3.01, 100

ADM2020-01159

From: Angela Ball <angela@angela-ball.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/4/2020 9:03 AM
Subject: NBA Petition Annual Critical Race Theory - Tenn. Sup Ct. R.21, section 3.01, 100
Cc: Angela Ball <angela@angela-ball.com>

Mr. James M. Hivner, Clerk

Dear sir, it has come to my attention that the Nashville Bar Association has petitioned for continued education to now include critical race theory. This is dangerous and walking a fine line of allowing social justice to enter what is already assumed in Rule 6, Admission of Attorneys. As a resident of the state of Tennessee and a constituent in Davidson county, I already feel powerless to have a voice. I hope and pray you will consider the outspoken, those supportive but unaware of how to voice opposition and others who are scared to object. We cannot allow a continued threat of social justice to enter what is already perfect because of a popular culture war issue.

With all respect and concern

Angela M Ball
615-477-9214
angela@angela-ball.com
LinkedIn

From: "Wm. J. Hart" <bill.crossbridge@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 12/2/2020 6:14 PM
Subject: ADM2020-01159

Please be advised that I oppose the imposition of mandatory diversity training as a condition of maintaining or renewing my law license.
Sincerely,
William J. Hart
BPR #009984

Sent from my iPad

From: "Blue, Zan" <ZBlue@constangy.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 12/2/2020 6:45 PM
Subject: NBA proposed CLE requirements ADM2020-01159

Good evening, and thank you for the opportunity to present comments.

I speak only for myself and not on behalf of the firm or anyone else.

The purpose of CLE requirements is to maintain competence as an attorney. While diversity and inclusion is an admirable social objective, requiring attorneys to take classes concerning diversity and inclusion does not further the purpose of CLE. It furthers a social and/or political objective. Harold Maier, an excellent professor at Vanderbilt in my day, taught us that the policy behind the rule should inform its application. The policy of CLE is not to further social or political objectives other than maintaining a competent bar in which the public can have confidence.

While I stand behind no one with respect to my support, proven by my actions, for diversity and inclusion, I must oppose this proposed requirement.

In my view, the Supreme Court takes the proper approach to social issues with its active encouragement of pro bono legal work. The Court does not require pro bono legal work, and it should not.

One of my ongoing concerns as an officer of the court is the growing involvement of the judiciary in political and social issues better left to the democratic process and elected officials. The judiciary is already called upon far too often to resolve social and political issues posed as legal questions and engaging in that process has created a public perception of politicized judges. That is socially undesirable and jurisprudentially unwise.

Again, I must oppose this proposed requirement.

Zan Blue

Zan Blue
Partner - Office Head

Direct: 615.340.3800 • Direct Fax: 615.810.8061
E-mail: ZBlue@constangy.com •View Bio/VCard
SunTrust Plaza
401 Commerce Street, Suite 1010
Nashville, TN 37219
Main: 615.320.5200 • Fax: 615.810.8060

CONSTANGY
BROOKS, SMITH &
PROPHETE LLP

http://www.constangy.com

Alabama • California • Colorado • Florida • Georgia
Massachusetts • Minnesota • Missouri • New Jersey • New York
North Carolina • South Carolina • Tennessee • Texas • Virginia
****

From: STEPHEN GARRETT <stephengarrett0702@comcast.net>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 11/25/2020 8:57 AM
Subject: Docket No. ADM2020-01159

The practice of law is a demanding, yet highly rewarding endeavor. For the vast majority of time, I love what I do for a living. I treasure, most of all, my interaction with my clients and with my colleagues in the bar and on the bench. Those clients and colleagues range the broad spectrum of people of different faiths, races and backgrounds.

I do believe that racism continues to exist in this country, but I do not believe that racism to be systemic. I certainly believe that our bench and bar in this State do not suffer from that horrible issue to any pervasive extent. For these reasons, I oppose the proposal put forward by the Nashville Bar Association to mandate that two hours of the required fifteen hours of annual CLE be taken in diversity, inclusion, equity and elimination of bias. When the requirement for CLE was put into effect many years ago, it was certainly a very good idea. One definitely understands the need for all attorneys to remain abreast of new developments in the substantive law. It is indeed a necessity.

However, to place a new requirement such as is being proposed would put the profession onto what I would view a "slippery slope" toward an era wherein attorneys might continually be required to "learn" about any sort of social issue that some organization might find appropriate at any given time. Learning "the law" with which we attorneys must deal on a daily basis is vital. Learning about some person's or organization's take on the social or political "issue of the day" is not.

For these reasons, I respectfully urge the Court to **not** modify Rule 21, section 3.01(a) in the manner suggested.

Stephen K. Garrett (BPR No. 012082)
7838 Barker Road
Corryton, TN 37721

Saturday, November 28, 2020

James M. Hivner, Clerk
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

RE: Tenn. Sup. Ct. R. 21, section 3.01, Docket No. ADM2020-01159

I am writing to you today to request that you deny the Nashville Bar Association's petition to modify Rule 21, Section 3.01(a) to require each attorney to complete two hours of diversity, inclusion, equity, and elimination of bias training.

To put it bluntly, this endeavor is an attempt at forced indoctrination. Diversity, inclusion, equity, and elimination of bias are political doctrines based on the moral values of those who adhere to them. Though those people may be well-intentioned, their belief in the rightfulness of their cause does not entitle them to force those values on others. Additionally, it is not the place of government to decide that bias, like any other idea, shall be eliminated. Though I believe that people ought not to be biased, it is a violation of the First Amendment for government to obligate anyone to be trained to stop holding any particular idea. There is no exception in the First Amendment for the elimination of bad ideas. Moreover, there is no exception in the First Amendment for the forced promotion of good ideas. Thus, even if their views are morally righteous, the First Amendment still prohibits ideological indoctrination like what is proposed here. The adherents to this ideology seek a captive audience for promoting their beliefs. If the Tennessee Supreme Court grants them such a captive audience by modifying Rule 21 as proposed, then the Court will have deprived us of our First Amendment rights.

I anticipate that arguments will be made that the proposed modification imposes no greater violation upon our First Amendment rights than the requirement that we receive three hours of ethics courses. However, though the concept of ethics in general does involve moral values, the purpose of ethics courses is to provide instruction regarding the rules of professional conduct to avoid violation. It is not the purpose of ethics courses to provide instruction as to what the providers of the course view as right and moral. Likewise, it is not the purpose of ethics courses to eliminate any particular ideas held by the attorneys attending them. Providing instruction regarding the content and interpretation of the law is not a violation of the First Amendment, but compelling instruction in the tenants of a political ideology is.

Furthermore, the ideology sought to be promoted by the Nashville Bar Association is wrong and un-American. The term "equity" refers to people receiving the same outcome.[1] Adherents of this ideology use the term "equity" to distinguish their endeavor from the American concept of "equality," which refers to treating people the same way. Adherents of the equity ideology, which is sought to be promoted by force through the Nashville Bar Association's petition, believe that equality is morally inferior to equity because equality allows for people to have different outcomes. Some people become more successful than others in an equal system. By contrast, in an equitable system, no one is more successful than anyone else. Success in an equal system is often attributed by these adherents to privilege, the accusation of which is then used both to denigrate successful individuals and to attack the notions of individual responsibility and the value of hard work.

An extreme example of the diversity, inclusion, and equity ideology in action can be found in the training materials used by Sandia National Laboratories in its mandatory training called "White Men's Caucus on Eliminating Racism, Sexism, and Homophobia in Organizations." These materials were leaked by whistleblowers at Sandia National Laboratories to Christopher Rufo, the director of the Discovery Institute's Center on Wealth & Poverty, who brought national attention to the content of this training.[2] This training involved racially and sexually targeted criticisms of its participants, obligated that those participants acknowledge and apologize for racist and sexist stereotypes of themselves, and claimed that concepts like "rugged individualism" and "hard work" are racist and sexist.

Another example of this ideology can be found in materials provided to employees of the Department of Homeland Security in a document titled "Diversity and Inclusion Certificate Program."[3] These materials, like the Sandia National Laboratories materials, were provided by whistleblowers to Christopher Rufo, who keeps a record of them at the website provided in the footnote below. This particular training in diversity, inclusivity, and equity sought to provide instruction regarding the concepts of "microinequities" and "microaggressions." The materials claim that statements such as "America is a melting pot," "I believe the most qualified person should get the job," and "America is the land of opportunity" are racist and sexist.

By providing these examples, I do not intend to suggest that completely identical trainings would necessarily be mandated for Tennessee attorneys. However, the ideology that led to these trainings is the same as that which the Nashville Bar Association now petitions for this Court to force upon the attorneys of the State of Tennessee. Regardless of what form such trainings take, the courses created by the adherents to this ideology will seek to indoctrinate

[1] A brief description of this concept was provided by Senator Kamala Harris in a video that she promoted, which can be found here: https://twitter.com/KamalaHarris/status/1322963321994289154.
[2] https://christopherrufo.com/national-nuclear-laboratory-training-on-white-privilege-and-white-male-culture/
[3] https://christopherrufo.com/department-of-homeland-security-training-on-microinequities/

these values into Tennessee attorneys, and granting the Nashville Bar Association's petition will enable them to do so with the force of law.

Finally, in the Nashville Bar Association's petition, it lists five jurisdictions that it claims have implemented CLE requirements around bias elimination and diversity. Of those five jurisdictions, only one appears to share Tennessee's long history of embracing the freedoms enshrined in the First Amendment: West Virginia. However, here the Nashville Bar Association engages in deception. The Rule 6 revisions that the Nashville Bar Association cites do not require any training in diversity, inclusion, equity, or the elimination of bias. Rather, the Rule 6 revisions merely allow attorneys to take elimination of bias courses instead of taking ethics, office management, or attorney well-being courses. West Virginia does not appear to require any particular instruction in diversity, inclusion, equity, or elimination of bias. I have attached a copy of West Virginia's Rule 6 revisions to this letter.

Tennesseans are a free people who enjoy living in a free country, and the rules governing the practice of law in Tennessee should reflect our enjoyment of our freedoms. Courses promoting the diversity, inclusion, and equity ideology should continue to be permitted so long as participation is voluntary. Though I personally disapprove of the ideology of equity, as explained above, I believe that a free Tennessee requires tolerance of all ideologies but compelled indoctrination of none. Therefore, I respectfully request that this Court deny the petition to modify Rule 21.

Sincerely,

Anthony Berry
Attorney at Law

5.05 Canvassing of ballots.

(a) The results of the electronic ballots shall be canvassed by the committee on elections. On March 21st of each year, or within five days thereafter, not counting weekends and holidays, the committee shall meet and review the electronic ballot results.

(b) The nominee who receives the plurality of the votes cast in their district shall be declared to be elected from that district. If for any district two or more nominees are found to have received an equal and the highest number of votes, the committee shall, cause a run-off election to be conducted by electronic ballot, in such manner as it may select, and the one so determined shall be certified as elected.

(c) The committee shall certify to the Executive Director of the State Bar the results of the election.

(d) The Executive Director shall forthwith publicly announce the results of the canvass and notify each candidate of the results of the election. At the Board's quarterly meeting following the election the Executive Director shall present the certificate of the committee on elections and the President shall officially declare the result.

5.06 Other elections and referenda.

Unless otherwise provided by order of the Supreme Court of Appeals, the applicable provisions of this Rule shall apply to any election on the adoption of proposed amendments to the Constitution and Bylaws and to any referendum on any proposal submitted to the membership under the applicable provisions of Article 11 of the Bylaws.

[CLERK'S COMMENTS: This Rule is derived from Chapter I of the State Bar Rules and Regulations. In addition to formatting and consistency changes, the Rule now provides flexibility with regard to certain types of notice and eliminates archaic provisions that have not been followed. The electronic voting procedures have been in use for several years under a Supreme Court Administrative Order. In addition, inserted language would allow the Court to issue an order modifying deadlines and procedures.]

Rule 6 Mandatory continuing legal education

6.01 Definitions

(a) "Active non-practicing lawyers" — An active non-practicing member of the West Virginia State Bar as defined in Bylaw 2.04.

(b) "Approved activity" — A continuing legal education activity that is offered by a presumptively-accredited provider under Rule 6.08, or an individual continuing legal

education activity that has been approved by the Mandatory Continuing Legal Education Commission ("Commission").

(c) "Commission" — The Mandatory Continuing Legal Education ("MCLE") Commission established in Bylaw 15.02.

(d) "Credit hour" —Each period of fifty minutes of instruction actually attended in an approved activity.

(e) "Inactive lawyers" — An inactive member of the West Virginia State Bar as defined in Bylaw 2.05.

(f) "In-house activity" — Activities offered by law firms, corporate legal departments, governmental legal agencies, or similar entities for the education of lawyers who are members of the firm, department, or entity.

(g) "Lawyer"or "active member"— An active member of the West Virginia State Bar as defined in Bylaw 2.03.

(h) "Reporting period" — A time period during which a certain number of credit hours must be obtained.

(i) "Provider" — An entity that offers a continuing legal education program.

(j) "Written materials" — Any materials, whether in writing or electronic digital format, required to be provided as part of the approval of a continuing legal education activity.

6.02 Minimum continuing legal education requirements; required reporting; carry-over credits

(a) *Obligation.* As a condition of maintaining a license to practice law in the State of West Virginia, every active member shall satisfy the minimum continuing legal education and reporting requirements in this Rule.

(b) *MCLE requirements.* Each active member shall complete a minimum of twenty-four hours of continuing legal education, as approved by this Rule or accredited by the Commission, every two fiscal years. At least three of such twenty-four hours shall be taken in courses on legal ethics, office management, attorney well-being, or elimination of bias in the legal profession.

(c) *Reporting.* On or before the first day of July of every even year, each active member must file a report of completion of continuing legal education activities. The reporting is to be completed electronically using the web-based membership portal maintained by the State Bar. Any lawyer who submits a paper-based report must include a $25 fee with the report or it will not be processed.

(d) *Carryover credits.* Members who exceed the minimum requirements in this Rule may carry a maximum of six credit-hours forward to only the next reporting period, except

that no carryover credits can be applied to the three-hour minimum requirement for courses on legal ethics, office management, attorney well-being, or elimination of bias in the legal profession.

6.03 Bridge-the-Gap Program

(a) *Obligation.* Newly admitted members are required to complete a mandatory Bridge-the-Gap Program sponsored by the State Bar within twenty-four months after admission to the West Virginia State Bar. The mandatory Bridge-the-Gap Program shall be provided by the State Bar at least twice per year at locations within West Virginia. The Bridge-the-Gap Program will be provided free of charge to newly admitted members. Continuing legal education credit shall be available for completing the mandatory Bridge-the-Gap Program.

(b) *Suspension.* Any lawyer subject to this requirement who fails to complete the mandatory Bridge-the-Gap Program within six months after written notice of noncompliance from the Commission shall have their license to practice law in the State of West Virginia automatically suspended until such lawyer has complied with this requirement. Any member of the West Virginia State Bar otherwise in good standing who is suspended for failure to complete the mandatory Bridge-the-Gap Program shall be reinstated as a member of the West Virginia State Bar upon completion of the mandatory course, payment of a reinstatement fee of $200, and fulfillment of any other administrative requirements.

(c) *Exemption.* A member required to complete the Bridge-the-Gap Program may, upon application to and approval by the Executive Director, be exempted from the requirement if: (1) the member can certify having been admitted to practice in another jurisdiction for a minimum of five years; or (2) the Commission can certify that the member has completed a comparable mandatory new lawyer training program offered by the state bar of another jurisdiction of at least seven credits, including two credits of legal ethics, office management, attorney well-being, or elimination of bias in the legal profession. The request for an exemption must be filed no later than twenty-four months after admission to the West Virginia State Bar and no extensions of time are permitted.

(d) *Extension of time.* The time for completion of the Program may, upon application to and approval by the Commission, be extended. Written applications for an extension must be received by the Commission no later than thirty days after the deadline to complete the Program or obtain an exemption. If the written application includes supporting documentation that demonstrates hardship or other good cause for an extension, the member will be permitted to complete the Program at the next regularly scheduled opportunity. If the application for extension does not demonstrate hardship or good cause warranting an

extension, the member must pay a late fee of $200 and complete the Program at the next regularly scheduled opportunity.

6.04 Exemptions from mandatory continuing legal education requirements

(a) Any lawyer not previously admitted to practice in West Virginia who is admitted during the first twelve months of any 24-month reporting period is required to complete twelve hours in approved MCLE activities including at least three hours in legal ethics, office management, attorney well-being, or elimination of bias in the legal profession before the end of the reporting period. Any lawyer not previously admitted who is admitted during the second twelve months of any 24-month reporting period is exempt for that entire reporting period.

(b) Any lawyer previously admitted to the State Bar who is restored to active status pursuant to Rule 6.07 during the first twelve months of any 24-month reporting period is required to complete twelve hours in approved MCLE activities including at least three hours in legal ethics, office management, attorney well-being, or elimination of bias in the legal profession before the end of the reporting period. Any lawyer who is restored to active status under Rule 6.07 during the second twelve months of any 24-month reporting period is exempt for that entire reporting period.

(c) For good cause shown, the Commission may, in individual cases involving extreme hardship or extenuating circumstances, grant conditional, partial or complete exemptions of these minimum continuing legal education requirements. Any such exemption shall be reviewed by the Commission at least once during each reporting period unless a lifetime conditional exemption has been granted.

(d) Active non-practicing and inactive members, judicial members as specified in Bylaw 2.07(d), the Clerk of the Supreme Court of Appeals, Deputy Clerks of the Supreme Court of Appeals, and any other individuals as may hereafter, from time to time, be designated by the Supreme Court of Appeals, are not required to comply with these requirements.

6.05 Obtaining credits to satisfy mandatory continuing legal education requirements

Members of the State Bar may obtain credit for purposes of the mandatory continuing legal education requirements as follows:

(a) One hour of credit may be obtained for each period of fifty minutes of instruction attended in an accredited course.

(b) One hour of credit may be obtained for each period of fifty minutes of digital or electronically presented instruction provided that such digital or electronic presentation is accredited by the Commission.

(c) No more than half of the total required mandatory continuing legal education requirements may be satisfied by pre-recorded presentations that do not offer an interactive component.

(d) A maximum of six hours of mandatory continuing legal education credit may be obtained for the teaching of each individual accredited course when the period of teaching lasts for at least fifty minutes. If the teacher participates in a panel discussion or teaches for a period of less than fifty minutes, three hours of credit may be obtained. No more than half of the total required mandatory continuing legal education credit for any reporting period may be satisfied by teaching credits.

(e) The Commission may give credit for publication, including, but not limited to, publishing an article in the law review of an ABA-accredited law school; publishing an article in the official publication of the State Bar; authorship or co-authorship of a book; contribution of a paper published in a legal society's annual, hardbound collection; publication of an article in a bar journal in another state; and contribution through either editing or authorship to periodic newsletters designed to serve the interests of specialists. The Commission has authority to allocate the amount of credits to be given for publication.

(f) A lawyer may obtain one credit hour for every three completed hours of pro bono legal service which satisfies Rule 6.1 of the West Virginia Rules of Professional Conduct and is performed during the reporting period through one or more of the following approved pro bono organizations: (1) Legal Aid of West Virginia; (2) the State Bar's West Virginia Free Legal Answers Program; (3) the State Bar's Tuesday Legal Connect Program; and (4) the West Virginia University College of Law Center for Law and Public Service. The approved pro bono organizations shall report each lawyer's pro bono service hours by June 1 of each year in the format required by the Commission. Credits obtained under this subsection are subject to the limitation set forth in Rule 6.05(c) and are not credited as live instruction under Rule 6.05(a). A maximum of six hours of mandatory continuing legal education credit for approved pro bono service hours may be obtained for any two-year reporting period, and no additional service or credit hours may be carried over to the next reporting period. The Commission has the authority to review a lawyer's pro bono service hours to ensure compliance with this rule.

6.06 Noncompliance and sanctions

(a) Noncompliance with the reporting or minimum continuing education requirements of this Rule may result in the suspension of a lawyer's license to practice law until such lawyer has complied with these requirements.

(b) As soon as practicable after July 1, the Commission shall notify all active members of the State Bar who are not in compliance with the reporting or minimum continuing education requirements of this Rule of the specific manner in which such member has failed, or appears to have failed, to comply with this Rule. Any member of the State Bar shall have until October 1 to correct such noncompliance or provide the Commission with proper and adequate information to establish that such member is in compliance with this Rule. A delinquency fee of $200.00 shall be imposed upon any lawyer who does not submit a report of MCLE activity by July 31, including a request for teaching or publication credit.

(c) An additional fee of $200.00 shall be paid upon application for reinstatement by those attorneys whose licenses have been suspended for failure to comply with the MCLE requirement. This fee is in addition to the reinstatement fee charged for suspension for non-payment of membership fees. The attorney will not be reinstated unless all outstanding fees have been paid. MCLE credits, if reported late, will not be entered until all outstanding fees have been paid.

(d) As soon as practicable after October 1, the Commission shall give notice, by certified or registered mail to the mailing address of record with the State Bar, to any active member who has still not established that they are in compliance with this Rule for the preceding two-year reporting period that after thirty days, the Commission will notify the Supreme Court of Appeals of such this fact and request the Court to suspend such lawyer's license to practice law until the lawyer has established that they have complied with the requirements of this Rule for the preceding two-year reporting period.

(e) During such thirty-day period, any lawyer having received a thirty-day notice may demand a hearing before the Commission. Any such hearing shall be conducted within a reasonable period of time after receipt of the demand. At such hearing the lawyer shall have the burden of establishing either (1) that they are in fact in compliance with the requirements of this Rule or (2) that they are entitled to an exemption. In the event such burden is not carried, the Commission shall by appropriate petition notify the Supreme Court of Appeals that the lawyer has failed to comply with the reporting or education requirements for the preceding two-year reporting period and request the Court to enter an appropriate order suspending such lawyer's license to practice law in the State of West Virginia until the lawyer has complied with such requirements. Any adverse decision by the Commission may be appealed to the Supreme Court of Appeals. In the event such lawyer does not prevail at such hearing or appeal, they shall be assessed the costs thereof.

(f) In the event no demand for a hearing is received within the thirty-day period, the Commission shall by appropriate petition notify the Supreme Court of Appeals of the names of any members of the State Bar who have failed to comply with the reporting or education requirements of this Rule for the preceding two-year reporting period and request the Court to enter an appropriate order suspending each such lawyer's license to practice law in the State of West Virginia until the lawyer has complied with such requirements.

(g) A lawyer who has not complied with the mandatory continuing legal education requirements by June 30 may thereafter obtain credits to be carried back to meet the requirements of the preceding two-year reporting period. However, any credit obtained may only be used to satisfy the mandatory continuing legal education requirements for one reporting period.

(h) No lawyer shall be permitted to make use of a transfer from active to inactive or active non-practicing membership in the State Bar as a means to circumvent the mandatory continuing legal education requirements.

6.07 Change to active status

(a) Any person previously enrolled as an active member of the State Bar who is an active non-practicing or an inactive member of the State Bar, administratively suspended by the State Bar, or suspended or disbarred by the Supreme Court of Appeals, shall demonstrate that they have complied with a minimum of twelve hours of continuing legal education, as approved by this Rule or accredited by the Commission, at least three hours of which shall be taken in courses in legal ethics, office management, attorney well-being, or elimination of bias in the legal profession within twelve months immediately preceding the application to change to active status. Any person previously enrolled as an active member of the State Bar who has served as a Justice of the Supreme Court of Appeals, Circuit Court Judge, or Family Court Judge immediately preceding the change to active status shall be exempt from this requirement but shall be subject to the mandatory continuing legal education requirements upon change to active status.

(b) Any lawyer who was administratively suspended by the State Bar for any reason under Bylaw 2.09(a) and who is returned to active status within six months of the date of suspension will not be required to submit any additional information regarding mandatory continuing legal education provided that the attorney has otherwise been in compliance with the continuing legal education requirements.

6.08 Accreditation of providers and approval of courses, generally

(a) The Commission has sole authority to accredit providers and approve courses and programs for purposes of the mandatory continuing legal education requirements established by this Rule.

(b) The Commission may establish a list of presumptively accredited providers whose courses—including those provided through digital and electronic mediums—are approved activities. The Commission shall publish the list of providers that are presumptively accredited on the State Bar website and update the list periodically.

(c) Courses offered by organizations that are not on the list described in Rule 6.08(b) may be approved by the Commission upon the request of an individual lawyer or organization on a case-by-case basis in accordance with this Rule.

(d) To be approved, a course shall have significant intellectual or practical content; it shall deal primarily with matter directly related to the practice of law (which includes professional responsibility and office practice); it shall be taught by persons who are qualified by practical or academic experience in the subjects covered and must include the distribution of high quality written materials pertaining to the subjects covered. One-hour courses presented by local bar associations shall be exempt from the written materials requirement. In rare instances, providers other than local bar associations may exhibit good cause for waiver of the written materials requirement. A provider seeking a waiver of the written materials requirement shall present a written request of such waiver to the Commission, explaining why the provider believes that written materials should not be provided. The Commission will consider each request for a written waiver on a case-by-case basis.

(e) One hour of continuing legal education credit shall be given for each period of fifty minutes of instruction in an accredited course. Based upon this standard, providers of approved activities given in West Virginia shall include with their course materials a statement that, "This course or program has been approved for ____ hours of continuing legal education credit in West Virginia."

(f) The Commission may refuse to accredit a course change or may revoke the accredited status of any provider that misrepresents the extent to which any information relating to course approval under this Rule.

(g) In cases where approval could not be reasonably obtained in advance for a given course, an individual lawyer may request approval after attendance in accordance with this Rule.

(h) All decisions of the Commission concerning accreditation of providers and approval of courses shall be final.

6.09 Standards for approval of continuing legal education activities

(a) A continuing legal education activity qualifies for approval if the Commission determines that: (1) it is an organized program of learning (including a workshop, symposium or lecture) which contributes directly to the professional competency of a lawyer; (2) it deals primarily with matter directly related to the practice of law or to the professional responsibility or ethical obligations of the member, and may include activities that involve the crossing of disciplinary lines, such as a medicolegal symposium or an accounting tax law seminar; (3) each activity is taught by a person qualified by practical or academic experience to teach the activity the person covers; (4) high quality, readable, carefully prepared written materials pertaining to the subjects covered shall be distributed to attendees at or before the time the course is offered in accordance with Rule 6.08(d); and (5) the provider must keep digital records of all attendees for a minimum of three years following the activity, and those attendee records must be made available to the Commission upon request.

(b) No credit shall be given for any activity attended before being admitted to the West Virginia State Bar, including preparation for admission to the West Virginia State Bar.

(c) Credit may be earned through teaching or participating as a panelist in a panel discussion in an approved continuing legal or judicial education activity. In awarding credit for teaching or participating as a panelist in an approved program, the Commission will be controlled by Rule 6.05(d). A lawyer may receive credit for teaching or participating as a panelist in a panel discussion in an approved continuing legal or judicial education activity by submitting an application to the Commission that furnishes the appropriate information using the web-based membership portal maintained by the State Bar. Any lawyer who submits a paper-based request must include a $25 fee with the request or it will not be processed.

(d) Credit hours for writing an article published in the law review of an ABA-accredited law school or for other approved publication activity shall be allocated in the year of publication and limited as provided in Rule 6.05(e).

(e) An in-house activity may be approved for continuing legal education credit under the rules applicable to any other provider, plus the following additional requirements: (1) the courses shall be submitted through electronic format for approval on a course-by-course basis, rather than an accredited-provider basis; (2) the courses shall be submitted for approval at least thirty days in advance; (3) an outline or written materials must be presented to the Commission through the appropriate West Virginia State Bar electronic interface at the time of submission for approval and written, digital, or electronic copies of the outline and/or materials must be distributed to all attendees at the course; (4) the courses must be open to observation by the Justices of the Supreme Court of Appeals of West Virginia, the officers or staff of the State Bar, the members of the Board, and members or staff of the Commission;

(5) the courses must be scheduled and arranged at a time and location so as to be free of interruptions from telephone calls and other office matters; (6) No more than half of the mandatory continuing legal education requirements may be satisfied by in-house teaching or attendance at in-house activities; and (7) an in-house activity on legal ethics may not be taught by a member of the firm or entity offering such activity.

(f) Client-oriented seminars shall not be approved for CLE credit.

(g) The total credit for digital or electronic training courses and in-house instruction shall not exceed half of the mandatory continuing legal education requirements.

(h) A lawyer attending a digital or electronic presentation or training course is entitled to credit hours under the following circumstances: (1) if a course is an approved activity, digital or electronic distribution of that course is also an approved activity; (2) Any digital or electronically distributed presentation produced by an provider that is not presumptively accredited must meet the requirements for approval set forth in Rules 6.08(c) and 6.09(a); (3) Unless the entire digital or electronically distributed presentation has been produced by a presumptively accredited provider, the person or organization offering the program or the attorney seeking credit must receive advance approval from the Commission by submitting the appropriate information using the web-based membership portal maintained by the State Bar. Any lawyer who submits a paper-based request must include a $25 fee with the request or it will not be processed.

(i) The Commission may permit an active member to meet the full mandatory continuing legal education requirements by attending or participating in a seminar that includes a digital or electronic presentation as part of a live program.

(j) Simultaneous electronic synchronous broadcasts will be approved for the full mandatory continuing legal education requirements if the following criteria are met: (1) the broadcast is designed and organized for interaction among a group of attorneys; (2) the broadcast is merely a distribution of a live program with the same qualified speakers which would address a seminar with live attendees; and (3) attendees are able to have questions answered through synchronous or asynchronous digital media.

(k) The mandatory continuing legal education requirements may not be satisfied by receiving credit for teaching the same activity more than once during a two-year reporting period.

(l) A lawyer may receive credit for authorship and publication of legal materials by submitting an application to the Commission using the web-based membership portal maintained by the State Bar. Any lawyer who submits a paper-based request must include a $25 fee with the application or it will not be processed. The application must include: (1) a copy of the work and a statement by the applicant that the material is an original work; and (2) the name and address of any other person participating in the authorship of the published

material, and a statement with respect to the extent to which the applicant contributed to the authorship of the material; and (3) a statement that the authored material has been published in a publication having distribution to at least 300 attorneys; and (4) the name and address of the publisher. Credit hours shall be allocated for the authorship and publication of the material in the year in which the publication actually occurs. The Commission will determine the number of credits to be allocated to the authorship and publication of the work. Credits will be awarded for scholarly pieces involving legal research as indicated by citation to authority. A lawyer may not receive more than half of their credit hours for authorship and publication of any materials in any two-year reporting period except as set forth in Rule 6.04(a).

(m) An attorney may not earn double credit for either (1) attending the same seminar held in different locations or (2) attending a seminar and completing a digital or electronically distributed presentation of the same seminar.

(n) To earn continuing legal education credit for attendance at any Bar Committee meeting, the Committee must submit an approved agenda at least thirty days in advance, which lists the topics covered and a brief biographical sketch of each speaker. Presentations at Bar Committee meetings must include at least fifty minutes of actual instruction. No audio or video taped presentations of Bar Committee meetings will be approved. If the meeting is approved by the Commission, only those members of the Bar Committee may earn continuing legal education credit. Committee meeting attendance credit may not be earned by attorneys that are not members of that Committee. The maximum number of continuing legal education credits that may be earned from attendance at Bar Committee meetings during any two-year reporting period is three credits.

(o) Any person employed on a full-time or part-time basis as a professor of law or other instructor of courses in a law school or other academic institution shall not receive CLE credit for teaching those courses.

(p) Digital or electronic training courses may be approved for continuing legal education credit under the rules applicable to any other course or program, plus the following additional requirements: (1) the digital or electronic training course must be part of a structured course of study; (2) a written outline or written materials fully describing the course must be presented to the Commission at the time of submission for approval; (3) in awarding credit for digital or electronic training courses, the Commission shall consider the extent to which the lawyer's educational effort in the course is evaluated by the provider; (4) The provider shall provide the number of credits possible for completion of the course; and (5) credit reported shall not exceed the maximum number of credits as designated by the provider.

6.10 Procedures for accreditation of providers, activities

(a) *Presumptive accreditation of providers.* A provider not presumptively accredited by the Commission may apply for presumptive accreditation by submitting an application in the form required by the Commission. Presumptively accredited providers shall provide to the Commission, upon request, a list of all courses offered in the preceding year by August 30 of each year. A list of all lawyers in attendance at any presumptively accredited program shall be maintained by the provider for not less than three years and made available to the Commission upon request. Presumptively accredited providers shall allow the West Virginia State Bar or MCLE Commission members and staff to audit, free of charge, any of its accredited continuing legal education programs. Failure to comply with MCLE rules shall result in the revocation of presumptively accredited status.

(b) *Prior approval of individual activities of providers who are not presumptively accredited.* A provider desiring prior approval of an activity shall apply for approval by submitting an application in the form required by the Commission at least 30 days in advance of the commencement of the activity. A lawyer desiring prior approval of an activity shall apply for approval to the Commission using the web-based membership portal maintained by the State Bar at least 30 days in advance of the commencement of the activity. Any lawyer who submits a paper-based request must include a $25 fee with the request or it will not be processed.

(c) *Post-approval of activities of providers that are not presumptively accredited.* A lawyer seeking approval of an activity that was not conducted by a presumptively accredited provider and was not otherwise approved shall request credit within 30 days after completion of such activity using the web-based membership portal maintained by the State Bar. Any lawyer who submits a paper-based request must include a $25 fee with the request or it will not be processed.

(d) *Multiple providers.* Courses offered by more than one provider are presumptively accredited if at least one of the providers is presumptively accredited.

6.11 Ethics in reporting continuing legal education activities

The filing of a false report, form, or statement, or any other misrepresentation may result in the initiation of a disciplinary proceeding for engaging in unethical conduct.

6.12 Time limits

For good cause shown, any time limitations or requirements imposed by this Rule may be modified by the Commission.

6.13 Confidentiality

The files, records, and proceedings of the Commission, as they relate to or arise out of the compliance or noncompliance of an active member of the State Bar with the requirements of this Rule, shall be deemed confidential and shall not be disclosed, except in furtherance of the Commission's duties, or upon written request of the lawyer affected, or as directed by the Supreme Court of Appeals.

[CLERK'S COMMENTS: Rule 6 integrates and reconciles three different governance documents. The first was previously reviewed and approved by the Court: Chapter VII of the Rules and Regulations of the State Bar, entitled "Rules to Govern Mandatory Continuing Legal Education." The second is a stand-alone document that was posted on the State Bar's website, entitled: "Regulations, WV Mandatory Continuing Legal Education Commission." The third source for this rule is the October 25, 2017 Supreme Court Administrative Order relating to changes in the Bridge-the-Gap Program. This Rule incorporates those documents, with some modifications to be consistent with changes already made in other areas. The major governance provisions relating to a lawyer's basic obligation to maintain CLE credits, the existence of the Commission, and its powers and duties, are now all contained in Article 15 of the Bylaws. Rule 6 sets forth the specifics of the process. When combining the disparate parts, a number of inconsistencies in terminology (accredited vs. approved, provider vs. sponsor) needed to be addressed on a uniform basis. In Bylaw Article 15 and this Rule, the term "accredited" is used to apply to a provider; while the term "approved" applies to an individual course. All of the courses offered by a "presumptively accredited" provider are approved, whereas an unaccredited provider must apply for approval on a course-by-course basis. The provisions set forth in Rule 6.03 relating to the Bridge-the-Gap Program are a revised version of amendments that were drafted by the Young Lawyer Section, approved by the Board of Governors, and by the Supreme Court in October 2017. The changes set forth in Rule 6 are not effective until the July 1, 2020 – June 30, 2022 reporting period, with two exceptions: changes to the Bridge-the-Gap Program set forth in Rule 6.03 are effective July 1, 2019, and Rule 6.05(f), which allows lawyers to obtain MCLE credits for pro bono service in certain circumstances, is also effective July 1, 2019.]

Rule 7 Procedure for Unlawful Practice Committee matters

7.01 Origin of cases

A case before the Unlawful Practice Committee may originate upon a request for investigation from the Unlawful Practice Committee, upon a request from a grievance committee, upon the request of the Board, the president, the president-elect or vice president,

TENNESSEE TRIAL LAWYERS ASSOCIATION

John Griffith, Franklin, President

Suzanne Keith, Executive Director
skeith@ttla.org

629 Woodland Street | Nashville, TN 37206 | 615.329.3000 | fax 615.329.8131

WRITTEN COMMENT ON BEHALF OF TTLA

AMENDMENT OF RULE 21, RULES OF THE TENNESSEE SUPREME COURT

No. ADM2020-01159

November 2, 2020

James M. Hivner, Clerk
RE: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407
appellatecourtclerk@tncourts.gov

Dear Mr. Hivner:

The Tennessee Trial Lawyers Association appreciates the opportunity to comment regarding Supreme Court Rule 21 regarding diversity. Our association's comments are set out below.

Understanding and addressing issues of diversity, inclusion, equity, and elimination of bias are consistent with TTLA's mission. The Tennessee Supreme Court noted, "it is our moral obligation and our sworn duty to ensure that the people of Tennessee receive equal protection of its law." As attorneys, we share that obligation to uphold the guarantees of rights in the United States and Tennessee constitutions. Discrimination, implicit or otherwise, threatens the constitutional rights of Tennesseans. Moreover, discrimination threatens access to our civil justice system.

As the Tennessee Supreme Court stated, "racism still exists and has no place in our society." Discrimination continues to exist in other forms, as well. As attorneys and as members of the TTLA, our sworn obligations do not permit us to sit passively by as our sisters and brothers suffer discrimination in our state.

Accordingly, the TTLA supports the Nashville Bar Association's petition regarding education for attorneys licensed to practice law in Tennessee to increase the awareness and understanding of issues of diversity, inclusion, equity, and elimination of bias. We defer to the wisdom of the Tennessee Supreme Court and the CLE Commission to determine the scope of the educational requirement that most effectively and fairly accomplishes this imperative.

TENNESSEE
TRIAL LAWYERS
ASSOCIATION

John Griffith, Franklin, President

Suzanne Keith, Executive Director
skeith@ttla.org

629 Woodland Street | Nashville, TN 37206 | 615.329.3000 | fax 615.329.8131

Please don't hesitate to contact us if you have questions or we can assist you in any way. Thank you for your service to our legal community and the citizens of Tennessee.

Respectfully submitted,

John Griffith, President of the Tennessee Trial Lawyers Association

And Suzanne G. Keith, Executive Director

DISABILITY RIGHTS TN

800.342.1660 | www.disabilityrightstn.org | gethelp@disabilityrightstn.org

Middle Tennessee Regional Office
Administration & Legal Department
2 International Plaza, Suite 825
Nashville, TN 37217
615.298.1080 phone
615.298.2046 fax

Appellate Court Clerk, State of Tennessee

RE: Docket # No. ADM2020-01159

VIA EMAIL: appellatecourtclerk@tncourts.gov

Dear Appellate Court Clerk:

Disability Rights Tennessee (DRT) is Tennessee's Protection & Advocacy organization. We are a legally-based organization which protects the rights of individuals with disabilities across the state. DRT believes that Docket # No. ADM2020-01159, which proposes to update the state's mandatory 15 continuing legal education credits to require "each attorney to complete two hours of the required fifteen in diversity, inclusion, equity, and elimination of bias," will have a positive impact on Tennesseans with disabilities. As an organization, DRT's primary goal is to ensure individuals with disabilities, who include people from diverse racial and ethnic groups, have freedom from harm and discrimination and are afforded equal access to services and programs in their communities. DRT openly condemns discrimination of any kind, including systemic racism, and is prioritizing its own efforts to ensure a bias-free, diverse, and inclusive workplace. Members of the Tennessee Bar should also prioritize diversity, inclusion, and equity in their own practices, whether that be in the people they hire, work alongside, or the clients they serve. Diversity, equity, and inclusion allow all individuals, regardless of disability or race, to access the legal profession, allow the best ideas to flourish, connect talented individuals from underrepresented backgrounds with opportunities that those in the majority often have unfair access to, and empower lawyers, firms, and other organizations to thrive. Therefore, DRT believes that requiring lawyers to take two continuing legal education credits a year regarding diversity, inclusion, equity, and the elimination of bias will positively impact Tennesseans with disabilities.

We would be happy to speak further with you about the positive impact we think this proposed update will have for Tennesseans with disabilities. My contact information is below.

Sincerely,

Jack W. Derrybery, Jr.

Jack W. Derrybery, Jr., Legal Director
Disability Rights Tennessee
2 International Plaza, Suite 825
Nashville, TN 37217
(615) 298-1080
Email: jackd@disabilityrightstn.org

Lisa Marsh - Comments re: ADM2020-01016; Inclusion of Diversity in CLE Requirements

From: Darla Walker <darlawalkerlaw@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 10/16/2020 9:49 AM
Subject: Comments re: ADM2020-01016; Inclusion of Diversity in CLE Requirements

Just my thoughts on this: If you require any type of CLE, this takes away hours the attorney could use for a CLE that focuses on his/her specific law practice, which would be much more beneficial to the attorney than requiring a CLE he/she may not want to take.

Also, I have found that most times when someone takes a class or performs a task only because it is required, it is of little to no benefit to the person. He/she does not make an effort to learn, and he/she takes the class/completes the task to get it finished and out of the way.

Just my thoughts. Thanks!

ADM2020-01159

FILED
OCT 16 2020
Clerk of the Appellate Courts
Rec'd By LM

Darla Walker
--
Darla M. Walker, Esq.
2125 Middlebrook Pike
Knoxville, TN 37921
865-546-2141

Kim Meador - AMENDMENT OF RULE 21, RULES OF THE TENNESSEE SUPREME

ADM2020-01159

FILED
OCT 07 2020
Clerk of the Appellate Courts
Rec'd By KJM

From: Steve Newton <sdnewton50@outlook.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 10/7/2020 5:57 AM
Subject: AMENDMENT OF RULE 21, RULES OF THE TENNESSEE SUPREME

I believe that there is no empirical evidence to show that this is need for our attorneys in Nashville. This is simply a political stunt by parties that want to subvert our legal system.

Sincerely
Steve Newton

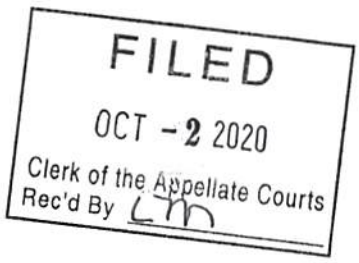
Kim Meador - CLE on diversity, inclusion

ADM2020-01159

From: Melody Bock <melodybock@yahoo.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 10/6/2020 10:02 AM
Subject: CLE on diversity, inclusion

There are too many CLE hour requirements already. If you want to do this, require it once every 3 years, offer it for free and don't increase the minimum number of required hours of CLE each year. It is hard to ask working female attorneys with children to comply with so many CLE hours and then the Supreme Court is always asking them to do pro bono work on top of CLE. The Bar has never understood the difficulty of working parents.

As a female attorney, I found more discrimination within the firms I worked for dealing with pregnancy and partnership issues than I did while actually practicing law. I did have one Judge, now retired, give the opposing attorney a new trial based on the argument that I was pregnant while trying the case; and the jury must have felt sorry for me as the reason my client prevailed.



September 28, 2020

James M. Hivner, Clerk
RE: Tenn. Sup. Ct. R. 21, section 3.01
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

RE: Memphis Bar Association's Letter in Support of Nashville Bar Association's Petition to Modify Tennessee Supreme Court Rule 21
Docket No. ADM2020-0115

Dear Clerk Hivner,

Please accept this letter on behalf of the Memphis Bar Association ("MBA") in support of the Petition to Modify Rule 21 of the Tennessee Supreme Court ("Petition") filed by the Nashville Bar Association on
August 28, 2020.

The MBA was established in 1874, four years before the founding of the American Bar Association. The MBA is a professional organization for attorneys in Memphis and the surrounding Mid-South area that seeks to provide a place for lawyers to grow, connect and serve. The MBA stands committed to ensuring diversity, equity, and inclusion in the practice of law, and recently created a Diversity and Outreach Committee that will focus on raising awareness and educating the membership around the issues of systemic racism, implicit bias, and diversity and inclusion within the legal profession

In June, the MBA proudly participated in the Bar Unity March organized by the Ben F. Jones Chapter of the National Bar Association. Along with local judges, lawyers, and law students, MBA members proudly participated in a peaceful march to show that our local bar organizations stand unified in recognizing that because racism reaches every facet of our lives, it must be addressed within the legal community and legal system. Now we stand united with the Nashville Bar Association in support of its Petition requiring that all Tennessee lawyers educate themselves on topics related to diversity, inclusion, equity, and the elimination of bias every year.

For many years, the MBA has sought out speakers on issues related to these topics and encouraged its members to attend these sessions. For example, the MBA sought out nationally known speaker, Kimberly Pappillion, to speak at the 2017 Bench Bar Conference in St. Louis about the neuroscience of decision-making, which focused on the implicit biases we all have. Following

Memphis
Bar Association

her presentation in St. Louis, Ms. Pappillion spoke to a number of different groups of legal professionals as part of a series presented by the MBA and the Center for Excellence in Decision Making ("CEDM"). Since that time, the MBA has continued to partner with the CEDM to present CLE sessions focused on diversity, inclusion, equity, and the elimination of bias.

As an organization, the MBA has been and remains committed to these important issues and proudly supports the Nashville Bar Association's Petition. To require all Tennessee attorneys to take two (2) hours of continuing legal education focused on diversity, inclusion, equity, and elimination of bias is but a small step toward ensuring that the legal profession can move past issues of systemic racism that have plagued our state and our nation for far too long.

Sincerely,

Lucie Brackin
President, Memphis Bar Association

appellatecourtclerk - ADM2020-01159 Comments

From: John Harris <jharris@slblawfirm.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 9/30/2020 11:57 AM
Subject: ADM2020-01159 Comments

Dear Sirs

As a practicing attorney in Tennessee, I oppose the petition of the Nashville Bar Association for many of the same reasons that President Trump has issued an Executive Order on September 22, 2020, regarding Combating Race and Sex Stereotyping training.

I urge the Court not to modify the existing CLE requirements by requiring annual hours devoted to diversity or sensitivity training. If individual attorneys, law firms, or employers want to provide this training as part of either the existing 3 hours of ethics requirements or as part of the required 12 hours of general credits, that can be done now. However, for many of Tennessee's practicing attorneys there is no need for a requirement of 2 hours of training on diversity or sensitivity annually.

John I. Harris III
TBPR - 012099
3310 West End Avenue, Suite 460
Nashville, Tennessee 37203
(615) 244 6670 Ext. 111
Fax (615) 254-5407
www.johniharris.com
www.slblawfirm.com

appellatecourtclerk - Re petition regarding docket No. ADM2020-01159

From: Richard Archie <RArchie@hmcompany.com>
To: "appellatecourtclerk@tncourts.gov" <appellatecourtclerk@tncourts.gov>
Date: 9/30/2020 3:27 PM
Subject: Re petition regarding docket No. ADM2020-01159

Per the NBA's request No. ADM2020-01159 that all Tennessee attorneys be required to take at least two hours of their yearly fifteen (15) hour requirement in continuing education to specifically include "diversity, inclusion, equity, and elimination of bias", I purport a far better use of their time, (and of benefit to the People of Tennessee), would be a requirement that each attorney take that two (2) hour course in the Tennessee Constitution.

Should the powers that be decide on this course of action, the aforementioned qualifiers would be addressed.

As a disproportionate number of attorneys wind up as legislators, I think it would be prudent to have all their continuing education consist of the study of said document (Constitution) with emphasis on Article one (1) Sections one (1) and two (2)and Article eleven (11) Section sixteen (16) where the Power to govern is explained.

Should such action be taken, the learned of jurisprudence could then temper their more base brothers and sisters in service to the People with good instruction.

I oppose the mandating of the course matter included in the petition, as it is too narrowly focused and generally inconsiderate of the Rights of all the People of Tennessee.

Kim Meador - No. ADM2020-01159

From: Ward Huddleston <ward.huddleston@gmail.com>
To: <appellatecourtclerk@tncourts.gov>
Date: 9/29/2020 1:48 PM
Subject: No. ADM2020-01159

I respectfully opposed the Petition of the Nashville Bar Association and even though I fear retribution in the form of being called a "racist," and otherwise demeaned for my opposition, I submit my reasons. I have been a supporter of Civil Rights legislation and court rulings for more than the 44 years I have been licensed as an attorney in Tennessee. However, I adhere to our legal tradition of requiring proof before a thing is accepted as established fact. The NBA relies upon "systemic racism" as a basis for its position. The anecdotal evidence of police misconduct and apparent criminal behavior in the instances cited by Petitioner has not been adjudicated in a court of law as proof of "systemic racism." I observed the De Jure and De Facto discrimination against minorities that existed during my lifetime. Legislation followed by judicial enforement addressed that head on with specific detail describing prohibited activity such as racial discrimination in employment, housing and access to public services. I was taught to be "color blind" as was the goal of the Civil Rights Acts and court rulings.

My concern is sloppy thinking confuses insulting or insensitive actions and/or language with unlawful racist activity or behavior. Diversity is a current catch-phrase that seems to be targeted toward an undefined objective or specific goal. My question is, does the Petitioner seek to educate lawyers about the area of law called diversity or is it an attempt at indoctrination to a social movement? As I understand the Tennessee Supreme Court Rules regarding CLE, attendance is mandatory subject to certain exceptions and time frames but may result in loss of license to practice law. This is a heavy weapon for a social movement that has not been codified into law. I have personally observed the fantastic good our system of laws and norms have produced over the last 60 years for everyone especially minorities. "Social Justice" and elimination of "systemic racism" appear to be logically admirable but are too vague and unproven to be a subject matter for CLE. Thank you for allowing me this opportunity to address the petition.

Ward Huddleston Jr
1687 Shelby Oaks Dr Ste 6
Memphis, TN 38134
BPR 004281

ADM2020-01159

FILED
SEP 29 2020
Clerk of the Appellate Courts
Rec'd By KJM

National Bar Association
BEN F. JONES CHAPTER
P.O. Box 3493
Memphis, Tennessee, 38173

September 29, 2020

Via Electronic Mail Only (Due to COVID-19 and Other USPS Concerns)

Chief Justice Bivins
Supreme Court of Tennessee
401 Seventh Avenue North
Nashville, TN 37219
Via Email: justice.jeff.bivins@tncourts.gov

Justice Cornelia Clark
Liaison Justice to Tennessee Commission on Continuing Legal Education
401 Seventh Avenue North
Supreme Court of Tennessee
401 Seventh Avenue North Nashville, TN 37219
Via Email: cclark@tncourts.gov

Re: Ben F. Jones Chapter of the National Bar Association's Letter of Support for the Nashville Bar Association's Petition to Modify Rule 21 of the Rules of the Tennessee Supreme Court, Docket No. ADM2020-01159

Dear Justices of the Tennessee Supreme Court:
On behalf of the Ben F. Jones Chapter of the National Bar Association, we join the Tennessee Employment Lawyers Association and the Center for Excellence in Decision-Making, among multiple other groups, in strongly supporting the Nashville Bar Association's Petition to Modify Rule 21 of the Tennessee Supreme Court requiring two hours of continuing legal education annually in diversity, inclusion, equity and the elimination of bias.

The Ben F. Jones Chapter of the National Bar Association was officially founded in 1966 to address the unique needs of African-American lawyers and to enhance performance and professionalism at a time when they were systemically excluded by the majority bar. One of the purposes of our Chapter is to proactively and visibly advocate causes that protect and advance the rights and privileges of its members, families and communities. More specifically, we strongly promote diversity within the bar.

Over the last several years, it has become more evident than ever that systemic racism continues to subvert the basic constitutional promises of equal protection by the justice system.

As attorneys, it is our job to denounce racism and acts of racial injustice to

accomplish constructive change in the justice system and the legal profession—but members of the Tennessee bar cannot do that if they cannot recognize it.

The effects of systemic racism have only recently begun to be studied in earnest, but recent findings are instructive. A report[1] released earlier this month by researchers with the Criminal Justice Policy Program at Harvard Law School illuminates how an examination of the disproportionate amount of criminal cases involving African-American and Latino suspects and defendants reveals that institutional racism permeates the Massachusetts criminal justice system. The researchers point to the creation of legislation that results in racially disparate impacts and the fostering of racially disparate treatment by police, prosecutors, and judges as the reasoning behind this disproportionality. Like Massachusetts, the Tennessee criminal justice system experiences similar disproportionalities with regard to African-American suspects and defendants in relation to the African-American population as a whole, and the possibility that systemic racism similarly permeates the criminal justice system—from legislation to policing—in our state deserves the legal community's attention.

Systemic racism not only affects the legal system, but also impacts every other facet of society. Indeed, yet another report[2] released this month by researchers with Citigroup found that since 2000 alone, systemic inequities and racism has resulted in the loss of $16 trillion from the gross domestic product through discrimination in housing, lending, employment, education, and elsewhere. It is overly simplistic to conclude that an entire segment of society is held down due solely to its own shortcomings; instead, outside forces at play should regularly be identified, explored, and discussed to make this imperfect Union more perfect.

It is vital for members of the bar, their families, and communities that we have more lawyers who are competent and willing to advocate for citizens who are supposed to enjoy equal protection under the law. We cannot continue to live in a society in which some are more equal than others. We believe that mandatory training will nurture better understanding within the legal profession of the impact of racism, discrimination, and implicit bias in our legal system and, in doing so, will produce more culturally competent attorneys. In order to steward a system that fosters justice for all we must root out and dismantle systemic racism and other forms of discrimination that deny this basic right. It is the collective opinion of our Board that requiring those charged with upholding and promoting the law to regularly complete training in diversity, inclusion, equity and the elimination of bias is the first and necessary step in doing so.

Sincerely,

Quinton E. Thompson
National Bar Association, Ben F. Jones Chapter
2020 Vice President and President-Elect 2021

---

[1] Bishop, Elizabeth Tsai, et al. "Racial Disparities in the Massachusetts Criminal System." *Criminal Justice Police Program*, Harvard Law School, Sept. 2020, cjpp.law.harvard.edu/assets/Massachusetts-Racial-Disparity-Report-FINAL.pdf.

[2] Peterson, Dana, et al. "Closing the Racial Inequality Gaps." *Citi GPS: Global Perspectives and Solutions*, Citigroup, Sept. 2020, ir.citi.com/NvIUklHPilz14Hwd3oxqZBLMn1_XPqo5FrxsZD0x6hhil84ZxaxEuJUWmak51UHvYk75VKeHCMI%3D.

TENNELA

Tennessee Employment Lawyers Association

September 16, 2020

Chief Justice Bivins
Supreme Court of Tennessee
401 Seventh Avenue North
Nashville, TN 37219

Via U.S. Mail and Email:
justice.jeff.bivins@tncourts.gov

Justice Cornelia Clark
Liaison Justice to Tennessee Commission
on Continuing Legal Education
401 Seventh Avenue North

Via U.S. Mail and Email:
cclark@tncourts.gov

Supreme Court of Tennessee
401 Seventh Avenue North
Nashville, TN 37219

Re: Nashville Bar Association's Petition to Modify Rule 21 of the Rules of the Tennessee Supreme Court, Docket No. ADM2020-0115 9

Dear Justices of the Tennessee Supreme Court:

On behalf of the Tennessee Employment Lawyers Association (TENNELA), I submit this letter to strongly support the Nashville Bar Association's August 28, 2020, Petition to Modify Rule 21 of the Tennessee Supreme Court to require two hours of continuing legal education annually in diversity, inclusion, equity and the elimination of bias. It is the collective opinion of our members that such a requirement is long overdue and necessary to ensure that Tennessee attorneys can meet their oath to practice with fairness, integrity, and civility.

TENNELA is an affiliate chapter of the National Employment Lawyers Association (NELA), the largest group of plaintiffs' employment lawyers in the country and the only professional membership organization comprised of lawyers who represent employees in labor, employment, and civil rights disputes. Specifically, TENNELA consists of lawyers dedicated to eradicating employment discrimination in all forms from the workplace.

Over the last several years, a movement has been building that has created a consensus that we as a society and especially as attorneys must forcefully and actively address the

engrained factors that have allowed systemic racism to undermine the fundamental constitutional promises of equal justice and treatment within our legal system. It is incumbent upon us as attorneys to insist that our profession meets those highest ideals.

Critically, it is not simply the headline-grabbing instances of discrimination and bias that we must address. In fact, implicit biases begin before an attorney-client relationship is even formed. A number of recent studies in California, for example, found that white-sounding names from potential clients received 50% more replies from attorneys than potential clients with black-sounding names. Because of the pervasiveness and depth of bias within our system and within all of us as individuals, we believe that our profession should lead the effort to face and overcome these challenges.

Accordingly, we believe that the Nashville Bar Association's petition to include two hours of diversity, inclusion, equity, and elimination of bias training is a proper and appropriate step toward reaching the goal of eliminating bias in our profession. If TENNELA can provide any other information to assist you in your consideration of this important proposal, please contact me.

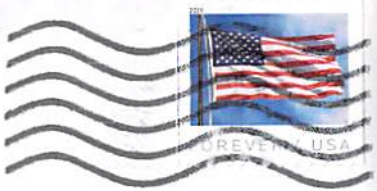
Sincerely,

Maureen Holland, Esq.
TENNELA President

cc: Jim Hivner, Clerk of Court (jim.hivner@tncourts.gov)

TENNELA
Tennessee Employment Lawyers Association
% Maureen Holland, Esq., TENNELA President
1429 MADISON AVENUE
MEMPHIS, TENNESSEE 38104

MEMPHIS TN 380
18 SEP 2020 PM 3 L



RECEIVED
By
SEP 21 2020

Supreme Court of Tennessee
401 Seventh Avenue North
Nashville, TN 37219

37219-140001

ADM2020-01159

FILED
SEP 15 2020
Clerk of the Appellate Courts
Rec'd By KJM

September 15, 2020

Chief Justice Bivins
Supreme Court of Tennessee
401 Seventh Avenue North
Nashville, TN 37219
Via U.S. Mail and Email: justice.jeff.bivins@tncourts.gov

Justice Cornelia Clark
Liaison Justice to Tennessee Commission
401 Seventh Avenue North
Liaison Justice to the Tennessee Commission on Continuing Legal Education
Supreme Court of Tennessee
401 Seventh Avenue North
Nashville, TN 37219
Via U.S. Mail and Email: cclark@tncourts.gov

Re: Center for Excellence in Decision-Making's Letter of Support for the Nashville Bar Association's Petition to Modify Tennessee Supreme Court Rule 21 Docket Number ADM2020-0115

Justices of the Tennessee Supreme Court:

The Center for Excellence in Decision-Making (CEDM) unequivocally supports the Nashville Bar Associations' (NBA) Petition to modify Tennessee Supreme Court Rule 21 to require, on an annual basis, two hours of continuing legal education on the topics of diversity, inclusion, equity, and the elimination of bias.

The CEDM is a judge-led initiative that began in 2018 in response to a recognized need in Shelby County to address systemic institutional racism and combat detrimental unconscious bias in decisions made by community leaders and stakeholders. The CEDM's Board of Directors includes U.S. Sixth Circuit Court of Appeals Judge Bernice Donald, U.S. District Court Judge

Tommy Parker, Shelby County Circuit Court Judge Gina Higgins, and Shelby County Chancellor JoeDae Jenkins.

Since its inception, the CEDM has provided intensive interactive training and education in the areas of diversity, inclusion, cultural competence, and unconscious bias to judges, attorneys in the district attorney's and U.S. attorney's offices, federal public defenders, and key decision-makers in law firms and corporate legal departments. This training includes workshops facilitated by world-renowned experts in the fields of neuroscience and psychology and authors who have studied and written extensively on implicit bias. The CEDM's initiatives have also included dual credit CLE webinars addressing these topics.

The proposed modification to Rule 21 emulates the CEDM's mission and is a tangible step toward addressing certain obstacles that have plagued the Tennessee justice system for generations. Evidence of these obstacles can be found in a multitude of areas. For instance, in the criminal justice system, the U.S. Justice Department's Civil Rights Division, under the Obama administration, investigated Memphis's juvenile justice system and found that "African-American children [were] treated differently and more harshly" than white children. And, black juveniles arrested in Shelby County were twice as likely as white juveniles to be detained in jail and twice as likely to be recommended for transfer to adult court, where a conviction generally brings harsher punishment. The adult population suffers from similar institutional inequity in the Shelby County criminal justice system. Despite making up 60.2% of Shelby County's population, blacks and Hispanics, on average, make up 86% of the total jail population.

In the civil justice system, evidence of racial inequity can be found in the ethnic composition of large Memphis-based civil law firms. In 2018, only 5.2% of attorneys employed by the 22 largest Memphis law firms identified as minorities, with only 8.9% classified as associates and 4.3% classified as partners. This low percentage must be considered in context; from 2008 through 2020, an average of 21.4% of students enrolled in the University of Memphis law school were minorities, with little attrition from a corollary graduation rate.

The CEDM strongly suspects that Memphis is a microcosm for many other communities in Tennessee, and we cite these statistics to exemplify the need for increased education and training on diversity, inclusion, equity, and the elimination of bias that perpetuate the above-referenced obstacles. The Tennessee Bar should not ignore the renewed call for social justice sparked by the civil unrest following the repeated high-profile mistreatment of members of our minority communities. On the contrary, the Tennessee Bar should proactively meet this moment with bold action and lead the charge to eradicate inequality and injustice, and a good start would be the proposed modification to Rule 21. Indeed, our beloved profession has a special duty to lead in this initiative since we are guardians of justice, help develop the law, practice within the criminal justice system, and help clients navigate the legal system.

It was encouraging that the Tennessee Supreme Court issued a statement on its commitment to equal justice on June 25, 2020 and set forth a plan to combat racism in our society.

The CEDM respectfully asks that the proposed amendment to Rule 21 be incorporated in that plan. It is time for Tennessee to join the other states, as identified in the NBA's Petition, that require such annual CLE credit.

For the foregoing reasons, and infinite others, the CEDM proudly joins the NBA's Petition to modify Rule 21.

Respectfully submitted,

Terrence O. Reed

Terrence O. Reed (TN Bar #20952)
Vice President, CEDM
Managing Director / Employment Litigation
3620 Hacks Cross Road - Bldg. B, 2nd Floor
Memphis, Tennessee 38125
Phone: (901) 434-8603
Terrence.Reed@fedex.com

/s/ Earle J. Schwarz

Earle J. Schwarz (TN Bar #007192)
President, CEDM
Offering Mediation, Negotiation, and Dispute Resolution Services
2157 Madison Ave., Suite 201
Memphis, Tennessee 38104
Phone: (901) 272-0607
eschwarz@earle-schwarz.com

/s/ Katharine Traylor Schaffzin

Katharine Traylor Schaffzin
Secretary/Treasurer, CEDM
Dean & Professor of Law
The University of Memphis
Cecil C. Humphreys School of Law
1 North Front Street
Memphis, TN 38103
Phone: (901) 678-1623
k.schaffzin@memphis.edu

cc: Jim Hivner, Clerk of Court (jim.hivner@tncourts.gov)