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Sent via Email

Wisconsin State Bar
c/o Attorney Roberta F. Howell
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Re: Diversity Clerkship Settlement and Public Statements

Dear Attorney Howell:

Certain comments being made by the State Bar in the wake of the settlement in the *Suhr* matter have come to my attention. The Bar is apparently taking the position that its diversity clerkship program will "continue[] unchanged."[1] For the Bar's sake, I certainly hope not. The State Bar is both constitutionally and statutorily forbidden from using race as a factor in selecting students for clerkships. For this reason, it quite properly agreed to removed "race, ethnicity, national origin, religion, gender, gender identity, age, sexual orientation and disability" from the program's definition of "diversity." It even agreed to remove, from its eligibility criteria, the idea that students might be preferred because they come from "backgrounds that have been historically excluded from the legal field …." The Bar undertook to make clear that the program will be open to all students.

[1] https://www.wisbar.org/NewsPublications/Pages/General-Article.aspx?ArticleID=30358&source=carousel.

Here is a summary of how the definition has changed:

Old Definition	New Definition
The term "diversity" has a dynamic meaning that evolves as the demographics in the state change. It is an inclusive concept that encompasses, among other things, race, ethnicity, national origin, religion, gender, gender identity, age, sexual orientation and disability. Inclusion helps to create a culture that embraces people from the widest range of talent and experience and promotes understanding and respect for all people and different points of view in the legal profession.	Diversity means including people with differing characteristics, beliefs, experiences, interests, and viewpoints. Diversity promotes an environment in which all individuals are treated with dignity and respect, regardless of their differences and without regard to stereotypes, and helps to ensure a better understanding and consideration of the needs and viewpoints of others with whom we interact

"Unchanged" would not seem to be an accurate description of this *change*. But if that's all that happened, this letter might be unnecessary. The Bar put out a statement this morning that the new definition clearly includes race, ethnicity, national origin, religion, gender, gender identity, age, sexual orientation and disability as these include persons with "differing characteristics, beliefs, experiences, interests, and viewpoints …." Under common conventions of legal interpretation, this is wrong. These factors were once expressly identified but were eliminated. The term "characteristics" does not include them.

It is impermissible (and, frankly, offensive) to equate "race, ethnicity, national origin, religion, gender, gender identity, age, sexual orientation and disability" with an individual's "characteristics, beliefs, experiences, interests and viewpoints …." Certainly, persons of differing races, ethnicities, gender, etc., might, *as individuals*, have differing "characteristics, beliefs, experiences, interests and viewpoints" that might be of interest in selecting clerks. But unless one is willing to engage in rank stereotyping, these immutable characteristics don't tell you what those attributes are in any individual. That is why the Bar can't use them under both the agreement and under those legal standards that apply without regard to any agreement between Mr. Suhr and the Bar. The new definition, which the Bar has agreed to, expressly states that decisions will be made "without regard to stereotypes," which is what the law requires anyway.

So, no, the Bar is not going to proceed "unchanged." That is particularly so in light of this morning's statement. It has all but announced its intent to break the law by suggesting that the characteristics that it will consider are those that are legally forbidden. This morning's statement will be Exhibit A in any ensuing litigation.

Perhaps the Bar is permitted to mischaracterize the settlement and even the Constitution. But it ought not to seek to intimidate those with a differing view. Last week Thursday, the *Wisconsin Law Journal* published an article titled, "WILL: State Bar of Wisconsin to end DEI practices; State Bar: No changes other than diversity definition."[2] The Managing Editor, Steve Schuster, let WILL know that he got "scolded" by the State Bar for publishing WILL's position, as articulated in its press release.[3] He also said, "The State Bar ... literally demanded we take down the story ...."

We don't represent Mr. Schuster, and I'm sure he can take care of himself. But are temper tantrums really necessary? As you know, the State Bar is a state actor. It was created and is regulated by the Wisconsin Supreme Court and is placed in a privileged position. As a matter of civility – and perhaps even law – it shouldn't be intimidating legal publications.

I would have hoped that the Bar had learned that it must treat persons as individuals and not archetypes. I might have expected that it would now understand that our law does not create group entitlements in the name of equity. Perhaps these are lessons it has yet to learn.

Sincerely,

Rick Esenberg
President & General Counsel
Wisconsin Institute for Law & Liberty, Inc.

[2] https://wislawjournal.com/2024/04/04/state-bar-of-wisconsin-reaches-settlement-in-diversity-lawsuit/.
[3] https://will-law.org/state-bar-abandons-dei-program/.