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Rima Sirota

Georgetown University Law Center, rs367@georgetown.edu

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MANDATORY ANTI-BIAS CLE: A SERIOUS PROBLEM DESERVES A MORE MEANINGFUL RESPONSE

By Rima Sirota*

Anti-bias training in various corporate, government, and other organizational sectors took hold in the 1960s and 1970s as part of the push for affirmative action and other measures to bring women and persons of color into workplace cultures.¹ The industry has grown exponentially since that time, often in response to lawsuits or public accusations of institutional bias.² A recent study estimates that the U.S. market for anti-bias training and related services reached \$4.3 billion in 2022 and will grow to \$5.8 billion by 2030.³

Such training goes by a multitude of names including many variations on “diversity, equity, and inclusion.” Because the trainings all target various aspects of bias against historically marginalized groups, and because that focus is particularly true of training targeted at lawyers, for purposes of this essay, I collectively refer to these programs as anti-bias training (ABT).

Forty-six American states require continuing legal education (CLE),⁴ and eleven of these states require lawyer ABT as one facet of CLE requirements.⁵ I have previously criticized the mandatory CLE system because so little evidence supports the conclusion that it results in more competent lawyers.⁶ The central question tackled by this essay is whether there is any reason to believe that ABT requirements have had or will have any more impact on bias in the law than general CLE requirements have had on lawyer competence. The answer, unfortunately, seems to be no, or at least not as ABT requirements are currently defined and regulated.

* Professor of Law, Legal Practice, Georgetown University Law Center. Thank you to Diana Artis, Anjali Patel, and Leah Rosenstiel for their feedback on drafts of this essay; to Tuan Samahon and the other organizers of and participants in the Symposium on Continuing Legal Education and the Professional Education of Lawyers for providing a forum and sounding board for the ideas expressed in this essay; and to Sara Brizio, Nick Grande, and Sophia Li for their excellent research assistance.

¹ See, e.g., Patricia G. Devine & Tory L. Ash, *Diversity Training Goals, Limitations, and Promise: A Review of the Multidisciplinary Literature*, 73 ANN. REV. PSYCH. 403, 406 (2022).

² *Id.*

³ GLOBAL INDUSTRY ANALYSTS, GLOBAL DIVERSITY AND INCLUSION (D&I) INDUSTRY (Apr. 2023), https://www.reportlinker.com/p06219616/Global-Diversity-and-Inclusion-D-I-Industry.html?utm_source=GNW (figures taken from the publicly accessible “Summary”).

⁴ All American states require CLE except Massachusetts, Maryland, Michigan, and South Dakota. Among American nonstate jurisdictions, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands require CLE; Washington, D.C., and American Samoa do not. See AM. BAR ASS’N, *Mandatory CLE*, <https://www.americanbar.org/events-cle/mcle/?login> (last visited Nov. 18, 2023) (hereinafter *ABA Mandatory CLE*) (click on dropdown menu under “MCLE Rules by Jurisdiction”). As of this writing, the Maryland Supreme Court is considering a mandatory CLE proposal. See MD. CTS., A REPORT ON MANDATORY CLE IN MD., <https://www.courts.state.md.us/lawyers/cle> (last visited Nov. 18, 2023).

⁵ See *ABA Mandatory CLE*, *supra* note 4 (providing topic-specific requirements on the web page for each state).

⁶ Rima Sirota, *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, 36 NOTRE DAME J. LEGAL ETHICS & PUB. POL’Y 1 (2022); Rima Sirota, *CLE Accreditation Should Be Tied to Learning Outcomes*, LAW360 (June 1, 2022); Rima Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, 78 LA. L. REV. 547 (2018).

Part I of this essay summarizes the very real problems that mandatory lawyer ABT aims to address: bias in the legal profession and bias against individuals caught up in the legal system. Part II describes the debate over mandatory lawyer ABT and the various requirements imposed by adopting states. Part III addresses the lack of empirical evidence or other reason to believe mandatory lawyer ABT is an effective response to bias in the law. Finally, Part IV considers an alternative path for mandatory lawyer ABT, one that engages in ABT research and responds to that research in ways that result in more intentional and meaningful ABT going forward.

I. Bias in the Legal Profession and Legal System

Bias in the law is pervasive and stubbornly intractable, impacting historically marginalized groups that include persons of color, women, immigrants, non-English speakers, persons with disabilities, persons of limited financial means, and members of LGBTQ+ communities. Bias infects both the legal profession and the criminal and civil justice systems.

Reams of scholarship have documented the problems and explored the ramifications. The following several paragraphs cannot possibly do the subject justice, but I include them to provide a sense of the very real problems targeted by ABT.

Bias can crop up in all phases of a lawyer's professional life and in a variety of professional settings. A much-cited 2018 study documents bias against women and persons of color in hiring, assignments, evaluations, networking opportunities, compensation, and promotion in law firms and in-house legal offices.⁷ Various researchers have documented bias against female litigators and judges.⁸ Racist tropes ("We can't find any qualified Black candidates") and unwritten, shifting hiring standards keep professor candidates of color out of the legal academy.⁹

Of course, that's not to say that no progress has been made. For example, a recent study by Amber Boydston and Christopher Zorn found progress in law firms' willingness to consider women and lawyers of color for leadership roles such as equity partnerships and executive committees, and to appoint them to such roles. However, the study was limited to specific leadership roles in law firms, and, as the authors say, although the situation in this regard is improving, such improvement is not happening fast enough.¹⁰

⁷ Joan C. Williams et al., *YOU CAN'T CHANGE WHAT YOU CAN'T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION* (2018).

⁸ See, e.g., Connie Lee, *Gender Bias in the Courtroom: Combating Implicit Bias Against Women Trial Attorneys and Litigators*, 22 *CARDOZO J.L. & GENDER* (2016); Amy J. Griffin, *Treatise Tactics*, 100 *DENVER L.R.* 347, 368–69 (2023).

⁹ Carliss Chatman & Najarian Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 *UCLA L. REV. DISC.* 2, 4, 7 (2021).

¹⁰ Amber E. Boydston & Christopher Zorn, *Data Shows Mansfield Firms Are Adding Diverse Leaders Much Faster*, *AM. LAW. ONLINE* (May 8, 2023); see also, e.g., Michele DeStefano, *Chicken or Egg: Diversity and Innovation in the Corporate Legal Marketplace*, 91 *FORDHAM L. REV.* 1209, 1215–19 (2023) (describing "minimal progress" at law firms and just slightly better progress at in-house legal departments in hiring, retaining, and, especially, promoting diverse lawyers notwithstanding twenty years of encouragement to do so by major corporate clients); Scott Hofer & Susan Achury, *Examining Diversity, Inclusion, and Equity in the Legal Profession*, in *OPEN JUDICIAL POLITICS* CH. 2 (Rorie Spill Solberg et al. eds., 2020) ("While recent efforts to diversify the profession have successfully increased the presence of historically underrepresented groups, career outcome disparities take a long

Bias in the law extends beyond legal employment to those caught up in the criminal or civil justice systems.¹¹ Lawyers' biases negatively impact client representation.¹² Judges' biases lead to unfair outcomes.¹³ The biases of other individuals within the system perpetuate and reinforce these problems.¹⁴

Disparities on the criminal side are staggering. A 2020 American Bar Association (ABA) report broadly observed that implicit bias throughout the system “may result in excessive charges, ineffective assistance of counsel, or wrongful prosecution.”¹⁵ For example, *Terry stops* have long been demonstrated to disproportionately impact persons of color.¹⁶ Black and Hispanic males who go to trial rather than take a plea deal receive harsher sentences than individuals from other groups.¹⁷ Incarcerated individuals with disabilities face systemic barriers to appropriate accommodations.¹⁸

Disparities on the civil side are similarly overwhelming. For example, the housing eviction system perpetuates discrimination against poor people of color, and Black women in particular.¹⁹ Eminent domain takings law discriminates against racial minorities, except when their interests happen to converge with the interests of white property owners.²⁰ Legally supported hierarchies discriminate against the needs of children based on race, gender, and class.²¹ Workplace discrimination law makes cases based on implicit bias extremely difficult to prove.²²

time to alleviate, and the legal profession is still significantly whiter and more male dominated than the American population as a whole.”).

¹¹ See, e.g., Debra Lyn Bassett, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 U.C. DAVIS L. REV. 1563 (2013) (discussing unconscious bias throughout various types of legal proceedings and by various actors in the system); Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55 (2017) (discussing social science literature regarding gender bias in court cases).

¹² See, e.g., Chris Chambers Goodman, *Shadowing the Bar: Attorneys' Own Implicit Bias*, 28 BERKELEY LA RAZA L.J. 18 (2018).

¹³ See, e.g., Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L.R. 63 (2017) (finding judicial bias extends even to so-called “privileged” minority groups, such as individuals from Asian or Jewish communities).

¹⁴ E.g., AM. BAR ASS'N, RESOLUTION 116G AND REPORT (2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/116g-annual-2020.pdf> (urging mandatory implicit bias training for commissioners, referees, probation officers, and court personnel, as well as for lawyers and judges).

¹⁵ *Id.* at 10; see also William Y. Chin, *Racial Cumulative Disadvantage: The Cumulative Effects of Racial Bias at Multiple Decision Points in the Criminal Justice System*, 6 WAKE FOREST J.L. & POL'Y 441 (2016).

¹⁶ See, e.g., David Rudovsky & David A. Harris, *Terry Stops and Frisks: The Troubling Use of Common Sense in a World of Empirical Data*, 79 OHIO ST. L.J. 501, 531–37 (2018).

¹⁷ Peter S. Lehmann, *The Trial Tax and the Intersection of Race/Ethnicity, Gender, and Age in Criminal Court Sentencing*, 47 LAW & HUM. BEHAV. 201 (2023).

¹⁸ Peter Blanck, *Disability in Prison*, 26 S. CAL. INTERDISC. L.J. 309 (2017).

¹⁹ Nicole Summers, *Civil Probation*, 75 STANFORD L. REV. 847, 854–55 (2023).

²⁰ Philip Lee, *A Wall of Hate: Eminent Domain and Interest-Convergence*, 84 BROOK. L. REV. 421 (2019).

²¹ Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367 (2020).

²² Dunham, *supra* note 11, at 85–98 (discussing barriers to successful gender bias litigation).

The above examples represent but a drop in the bucket that is bias in the law. The following section describes the mandatory CLE response.

II. Anti-Bias Training in Continuing Legal Education

The ABA has taken a leading role in the mandatory ABT effort, culminating in the 2017 adoption of an ABT requirement as part of revisions to the Model Rule for Minimum CLE (Model Rule).²³ The requirement reflected the ABA’s conclusion that merely encouraging such training was insufficient to achieve the ABA’s goal of “one hundred percent” participation.²⁴

Eleven states now require anti-bias training for lawyers: California, Colorado, Illinois, Maine, Minnesota, Missouri, New Jersey, New York, Oregon, Vermont, and Washington.²⁵ As to both quantity and substance, the ABT requirements in these eleven states generally reflect the Model Rule approach.

Regarding quantity, the Model Rule proposes at least one required ABT hour every three years.²⁶ All eleven states meet or exceed this standard, within a fairly narrow band. Washington requires the ABA minimum, while Maine and Missouri require the most ABT—an average of one hour per year.²⁷

Substantively, the Model Rule specifies that ABT programs should address either (1) “diversity and inclusion in the legal system of all persons regardless of race, ethnicity, religion, national origin, gender, sexual orientation, gender orientation, gender identity, or disabilities,” or (2) “elimination of bias.”²⁸ While the wording varies among the eleven states, most incorporate a similarly broad sweep.

Mandatory ABT opponents often focus on what they perceive to be a one-sided, liberal approach to a politically divisive topic. This perspective led to a modification of the requirement in one mandatory ABT state. Beginning in 2001 and backed by Oregon Bar authorities, Oregon CLE included a yearly three-hour ABT requirement.²⁹ Spurred in part by what opponents viewed as a coercive exercise in political correctness, the Oregon Bar membership voted in 2006 to eliminate the requirement.³⁰ Ultimately, the Oregon Supreme Court approved a compromise that reduced Oregon’s ABT requirement to three hours every six years and narrowed the focus from

²³ See AM. BAR ASS’N, MODEL RULE FOR MINIMUM CONTINUING LEGAL EDUCATION RESOLUTION AND REPORT (Feb. 2017 https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2017/2017_hod_midyear_106.pdf (hereinafter “MODEL RULE AND REPORT”). The ABT requirement is discussed on page 8 and note 12 of the Report section of that document.

²⁴ *Id.* at n. 12. Only three states—California, Minnesota, and Oregon—had adopted mandatory ABT before the 2017 Model Rule revision. *Id.*

²⁵ See *ABA Mandatory CLE*, *supra* note 4.

²⁶ MODEL RULE AND REPORT, *supra* note 23, at § 3(A)(2)(c).

²⁷ *ABA Mandatory CLE*, *supra* note 4.

²⁸ MODEL RULE AND REPORT, *supra* note 23, at § 1(C).

²⁹ George Riemer, *Notice of Election: Advisory Vote: MCLE Elimination of Bias Requirement*, 66 Or. St. B. Bull. 13, 13 (Feb./Mar. 2006); Gary M. Georgeff, Letter to the Editor, *Time Will Tell*, 69 OR. ST. B. BULL. 5, Oct. 5, 2008).

³⁰ Georgeff, *supra* note 29, at 5.

“elimination of bias” to eliminating “barriers to access to justice arising from biases against” various marginalized groups.³¹

George Floyd’s 2020 murder and growing public awareness of similar events sharpened the debate over mandatory lawyer ABT and added a sense of urgency on both sides.³² In Colorado, for example, bar leaders’ successful ABT campaign was motivated in substantial part by “the tragic deaths of George Floyd, Breonna Taylor, Rayshard Brooks, and . . . countless other Black Americans.”³³

Tennessee’s experience, however, is more typical. In 2020, the Nashville Bar Association petitioned the Tennessee Supreme Court to require two ABT hours per year.³⁴ The petition made note of George Floyd’s murder and other racial injustices and emphasized anticipated benefits such as helping lawyers understand the impact of bias in the legal system and aiding efforts to eliminate it.³⁵ Many Tennessee lawyers opposed the petition based on the perceived dangers of “indoctrination,” “reeducation,” and “critical race theory.”³⁶ In its decision, the Tennessee Supreme Court acknowledged the importance of eliminating bias and “encourage[d]” CLE on this topic but, without explanation, declined to make ABT mandatory.³⁷

Sitting at the extreme edge of anti-ABT sentiment is Florida where the state supreme court has, on its own motion, (1) removed “bias elimination” from the list of topics approved to meet the state’s professionalism CLE requirement,³⁸ (2) sharply limited the extent to which Florida judges may choose to satisfy their continuing judicial education requirements with “fairness and diversity” courses,³⁹ and (3) prohibited CLE organizers from requiring diversity on CLE panels.⁴⁰ These decisions follow on the heels of Governor Ron DeSantis’s “Stop W.O.K.E.”

³¹ See OR. MINIMUM CONTINUING LEGAL EDUC. RULES r. 1.2, 3.2(e), 5.14(d) (Or. St. Bar Ass’n 2023); see also Georgeff, *supra* note 29, at 5.

³² See, e.g., Jesse Singal, *What if Diversity Training is Doing More Harm than Good?*, Opinion, NYTIMES.COM (Jan. 17, 2023).

³³ Christine Hernandez & Annie Martinez, *Leading the Way to a Diversity Focused CLE Requirement*, COLO. LAW 4, 4 (Dec. 2020).

³⁴ Stacey Shrader Joslin, *NBA Asks Supreme Court to Require Diversity CLE Hours*, TBA LAW BLOG (Aug. 28, 2020).

³⁵ *Id.*; Stephen Elliott, *Nashville Bar Request for Diversity Training Requirement Denied*, Nashville Post (Apr. 19, 2022).

³⁶ Elliott, *supra* note 35.

³⁷ In re: Amend. of Rule 21, Rules of the Tenn. Sup. Ct., No. ADM2020-01159 (Tenn. Apr. 14, 2022); see also Elliott, *supra* note 35. The arguments and outcome in Wisconsin present a similar recent example. See In re Diversity, Equity, Inclusion, and Access Training for Continuing L. Educ., No. 22-01 (Wis. July 13, 2023), <https://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=679679> (rejecting proposal to create a Wisconsin ABT credit, with commentary on the merits in the concurring and dissenting opinions).

³⁸ In re Code for Resolving Professionalism Referrals, 367 So. 3d 1184, 1185-86 (Fla. 2023).

³⁹ In re Amendments to Fla. Rule of Gen. Prac. & Jud. Admin., 356 So. 3d 766 (2023). This order also eliminated a “fairness and diversity” education requirement for new judges and the judiciary’s Standing Committee on Diversity. *Id.*; see also Jim Ash, *Court Eliminates Separate Fairness and Diversity Training for Judges*, FLA. BAR NEWS (Feb. 8, 2023).

⁴⁰ In re Amendment to Rule Regulating Fla. Bar 6-10.3, 315 So. 3d 637, 637 (Fla. 2021) (finding “quotas based on characteristics” such as race, ethnicity, and gender “are antithetical to basic American principles of nondiscrimination”), *aff’d in relevant part by* 335 So. 3d 77 (Fla. 2021).

legislation, which prohibits employers from requiring employee education courses that “promote[]” ABT concepts.⁴¹

Anti-“woke” opponents of lawyer ABT generally offer no alternatives to combat bias in the law; indeed, some opponents—as in Florida—appear to believe that bias in the law is not a real problem at all. As ABT debates continue,⁴² this dangerous position detracts from the reasoned conversation that we should be having: Does mandatory ABT actually advance its anti-bias goals? The next section addresses this question.

III. ABT Evidence

Proponents of ABT requirements for lawyers often seem to take for granted that ABT will have a positive impact on bias in the law. That is, proponents claim broad ABT benefits with no evidence to support such claims, relying instead on an implicit appeal to the seemingly commonsense proposition that programs designed to impact lawyers’ understanding of and willingness to combat bias will in fact have those impacts, at least for most lawyers.⁴³

Common sense may supplement or even substitute for data when impacts have not yet been measured or are difficult to measure.⁴⁴ However, where the extant evidence runs contrary to a supposedly commonsense claim, it is time to reexamine that claim.⁴⁵ Such is the case with mandatory lawyer ABT.

ABT proponents cannot point to any empirical evidence assessing the efficacy of ABT in the CLE context because no such evidence exists. This absence of CLE-specific studies is deeply problematic. As the ABA has observed, different professions face “vastly” different circumstances regarding bias and its impacts, and, accordingly, ABT found to be effective for nonlaw audiences may not be effective for lawyers.⁴⁶ Scholars studying ABT in nonlaw contexts have reached similar conclusions.⁴⁷

⁴¹ See H.R.7(4)(b) & (8)(b), 124th Leg. Reg. Sess. (Fla. 2022).

⁴² At the time the time of this writing, for example, the Maryland Supreme Court was considering a mandatory ABT proposal, *see* MD. CTS., *supra* note 4, and the Pennsylvania Supreme Court had just rejected such a proposal, *see* notes on file with the author.

⁴³ For example, members of New York’s CLE Board proclaimed, with no support, that mandatory ABT would result in benefits ranging from “improved attorney-client relationships” to “opening the legal system as well as the profession to all people, regardless of race, gender, ethnicity, religion, or orientation.” *See* Betty Weinberg Ellerin et al., *Changes to State CLE Requirements Now Include Diversity, Inclusion and Elimination of Bias*, LAW.COM (Mar. 23, 2018). ABT providers similarly offer little evidence of the efficacy of their programs. *See* Devine & Ash, *supra* note 1, at 404.

⁴⁴ *Cf.* Amy Salyzyn, *Taking Up the Challenge: A Roadmap for Studying the Effectiveness of Mandatory Continuing Legal Education*, JOTWELL (Mar. 31, 2022) (observing in the context of mandatory CLE generally that the absence of evidence supporting mandatory CLE’s impact on lawyer competence may reflect the “notorious[]” difficulty of evaluating the quality of legal services rather than intractable failures of the mandatory CLE system).

⁴⁵ *Cf.* Rudovsky & Harris, *supra* note 16 (criticizing the Supreme Court’s acceptance of seemingly commonsense justifications for investigatory stops in the face of evidence contradicting those justifications).

⁴⁶ *See* AM. BAR ASS’N, RESOLUTION 116G AND REPORT, *supra* note 14, at 6 (urging implicit bias training for legal, medical, and social services professionals).

⁴⁷ *See, e.g.*, Lisa A. Cooper et al., *Mandated Implicit Bias Training for Health Professionals—A Step Toward Equity in Health Care*, JAMA HEALTH FORUM (Aug. 11, 2022) (finding anti-bias training programs for health professionals

When proponents do cite law-related “evidence” in support of mandatory lawyer ABT, such data often simply reflects that bias is a real and substantial problem in the law. That observation is certainly true, but it does not speak to the efficacy of mandatory ABT to address the problem.

Typical of this approach was an opinion piece published in the Colorado Bar Association magazine describing bar leaders’ vigorous support for mandatory ABT but offering no evidence supporting the efficacy of such training.⁴⁸ A critical reader’s letter published several months later pointed out this lack of evidence.⁴⁹ Responding to the reader’s criticism, the bar leaders cited one essay in support of their argument that ABT is “[not] ineffective.” The data included in that essay, however, established only the fact and impact of bias in the law, not the efficacy of ABT.⁵⁰

Other proponents have collected and relied on data for the unremarkable proposition that many lawyers will not take ABT courses unless mandated to do so. For example, proponents of mandatory ABT in Illinois and Colorado relied on data demonstrating that merely encouraging lawyers to take ABT programs did not increase the number of lawyers taking them.⁵¹ Again, however, such findings fail to demonstrate that imposing the requirement results in impacts beyond more lawyers attending more ABT programs.

Hundreds of studies assess ABT efficacy in non-CLE and nonlaw contexts. These studies, however, usually do not appear in the literature urging mandatory lawyer ABT. This disconnect may be due to the problematic research designs employed in these studies and their often-disappointing results.

One particularly significant design problem with assessments of ABT and other bias-reducing interventions⁵² is the use of very small sample sizes, leading to less precise and often larger estimated effects.⁵³ Other problems include high participant attrition rates, group rather than individual random assignment to experimental and control conditions, and testing only in academic laboratory settings.⁵⁴ The field also suffers from a lack of transparency, with

should be specific to particular health problems and populations); Laura J. Gill & Michael A. Olson, *A Dual-Process Framework for Diversity Training to Reduce Discrimination in Organizational Settings*, 17 SOC. ISSUES & POL’Y REV. 79 (2022) (advocating for anti-bias interventions tailored to particular individuals and organizations).

⁴⁸ Hernandez & Martinez, *supra* note 33, at 4.

⁴⁹ Newman McAllister, *Comments on Colorado Lawyer, Mandatory CLE Requirement, December 2020, page 4*, COLO. LAW. 12 (Feb. 2021). The writer also stated his disagreement with implicit bias and critical race theories and “wager[ed] that many lawyers would think [ABT] is a load of bricks.” *Id.*

⁵⁰ Jessica Brown et al., *Comments on Colorado Lawyer, Mandatory CLE Requirement, December 2020, page 4*, COLO. LAW. 12 (Feb. 2021) (citing Jeffrey Rachlinski et al., *Getting Explicit About Implicit Bias*, 104 JUDICATURE 75 (Fall/Winter 2020–2021)).

⁵¹ Michael Karlik, *Justices Hear Forceful Support for Equity. Diversity, Inclusivity Training for Colorado Attorneys*, COLORADOPOLITICS.COM (Apr. 7, 2021; updated Apr. 16, 2021).

⁵² See Elizabeth Levy Paluck et al., *Prejudice Reduction: Progress and Challenges*, 72 ANNUAL REV. PSYCHOLOGY 533, 535 (2021) (describing different types of anti-bias interventions).

⁵³ See, e.g., *id.* at 537; Chloe FitzGerald et al., *Interventions Designed to Reduce Implicit Prejudices and Implicit Stereotypes in Real World Contexts: A Systematic Review*, 7 BMC PSYCHOLOGY (Article 29) 1, 9 (2019).

⁵⁴ See, e.g., Paluck et al., *supra* note 52, at 537; Devine & Ash, *supra* note 1, at 409.

publications preferring studies showing positive ABT results (“publication bias”) and scholars failing to cite examples of null or negative outcomes (“citation bias”).⁵⁵ Observing this multitude of design issues, authors of a recent meta-analysis cautioned researchers to “discount reported results for many prejudice reduction interventions, especially those based on small studies.”⁵⁶

Moreover, to the extent that researchers find positive effects, those effects are underwhelming. First, reported positive effects generally extend only to short-term gains.⁵⁷ For example, one of the most optimistic meta-analyses found beneficial effects across a variety of ABT models, but the authors’ only direct durational analysis found the highest cognitive benefits where results were assessed within one month of the training and significantly lower benefits where assessment occurred after that point.⁵⁸ Second, reported positive effects tend to be fairly superficial, such as self-reported increased awareness and the extent to which attendees enjoyed the program. Usually not assessed are the extent to which such shifts result in behavioral and systemic changes that would make a difference in the lives of those most negatively affected by bias.⁵⁹

Ineffectual ABT isn’t just a wash. Time and money that could have been put to other uses are wasted.⁶⁰ Moreover, ABT may give participants and sponsoring organizations a false sense of security that inroads are being made against bias, when the training does not in fact have any ameliorative effect.⁶¹

Even worse, ABT may exacerbate biases. For example, ABT focused on implicit bias is a popular intervention in many industries. However, training that emphasizes unconscious

⁵⁵ E.g., Jason Chin et al., *Metaresearch, Psychology, and Law: A Case Study on Implicit Bias*, at 49 (2023), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=4400&context=faculty_scholarship; Patrick S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures*, 117 J. PERSONALITY & SOC. PSYCH. 522, 538 (2019); Paluck et al., *supra* note 52, at 537–38.

⁵⁶ Paluck et al., *supra* note 52, at 554.

⁵⁷ E.g., Edward H. Chang et al., *The Mixed Effects of Online Diversity Training*, 116 PROC. NAT’L ACAD. SCI. 7778, 7778 (2019); Gill & Olson, *supra* note 47, at 80; Katerina Bezrukova et al., *Reviewing Diversity Training: Where We Have Been and Where We Should Go*, 11 ACAD. MGMT. LEARNING EDUC. 207, 222 (2012).

⁵⁸ See Zachary T. Kalinoski et al., *A Meta-Analytic Evaluation of Diversity Training Outcomes*, 34 J. ORGANIZATIONAL BEHAV. 1076, 1094 (2012); see also Ashley N. Robinson et al., *Expanding How We Think About Diversity Training*, 13 INDUSTRIAL & ORGANIZATIONAL PSYCH. 236, 236 (2020) (citing the Kalinoski et al. study as an example of demonstrating ABT benefits but also noting the “ephemeral” nature of such benefits).

⁵⁹ See, e.g., Devine & Ash, *supra* note 1, at 409–10; Forscher, *supra* note 55, at 543 (finding mostly “trivial” effects on behavior); Gill & Olsen, *supra* note 47, at 81 (finding studies “generally show that [ABT] does not contribute to increased representation of minoritized individuals”); see also Jamillah Bowman Williams & Jonathan Cox, *The New Principle-Practice Gap: The Disconnect Between Diversity Beliefs and Actions in the Workplace*, 8 SOCIOLOGY OF RACE & ETHNICITY 301 (2022) (finding even with widespread exposure to diversity programs, favorable attitudes toward workplace diversity do not translate into action that substantively addresses inequality, particularly for people who believe workplace diversity is important because it improves business outcomes).

⁶⁰ See, e.g., Fitzgerald et al., *supra* note 53, at 10 (“The fact that there is scarce evidence for particular bias-reducing techniques does not weaken the case for implementing widespread structural and institutional changes that are likely to reduce implicit biases . . .”).

⁶¹ See *id.* at 2; Frank Dobbin & Alexandra Kalev, *Why Doesn’t Diversity Training Work?*, 10 ANTHROPOLOGY NOW 48, 50 (2018).

prejudice as an explanation for discrimination may be interpreted as excusing prejudiced behavior.⁶²

If there were reasons to believe that ABT outcomes would be more compelling in the CLE context than in other contexts, the absence of more supportive data might be less troubling. But no such reasons exist. The current structure of typical CLE offerings suggests that even perfected assessment methods would be unlikely to measure positive ABT impacts on bias in the law.

ABT programs for lawyers reflect the problematic structure of CLE courses generally. CLE regulations generally require no or minimal interactivity—usually nothing more than a brief Q&A period and no follow-up.⁶³ Accordingly, it is unsurprising that ABT programs in the CLE catalog usually are one-hour, one-off, lecture-based individual or panel presentations.⁶⁴

Programs structured in this way are the least likely to result in meaningful learning and change. This observation has been made in the mandatory CLE context generally.⁶⁵ It has also been made in the ABT context outside of CLE. For example, Katerina Bezrukova and colleagues found stand-alone trainings using one method of instruction, such as a lecture, to be among the least effective of the many anti-bias interventions analyzed in a 2012 meta-analysis.⁶⁶

Mandatory lawyer ABT might bring potential secondary benefits that are not readily reduced to data points. For example, many proponents believe that mandatory ABT signals an important message—that the profession cares deeply about eliminating bias in the law and pledges to combat it.⁶⁷ However, if ABT does not in fact ameliorate bias, signaling through CLE that the

⁶² Paluck et al., *supra* note 52, at 548–49; FitzGerald et al., *supra* note 53, at 2; *see also* Gill & Olsen, *supra* note 47, at 82 (describing various ways ABT can “backfire”); Devine & Ash, *supra* note 1, at 407 (finding ABT in organizational settings may cause increased negativity if attendees believe they were targeted for training because of complaints against them).

⁶³ Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, *supra* note 6, at 562.

⁶⁴ The descriptions of ABT offerings by the ABA give a sense of what attendees can expect at typical ABT sessions. *See* AM. BAR ASS’N, *CLE Marketplace*, <https://www.americanbar.org/cle-marketplace/> (last visited Nov. 18, 2023) (click on “Elimination of Bias/Diversity and Inclusion”).

⁶⁵ *See* Sirota, *Making CLE Voluntary and Pro Bono Mandatory: A Law Faculty Test Case*, *supra* note 6, at 562–63 (describing how typical CLE lecture format is inconsistent with adult learning theory best practices).

⁶⁶ Bezrukova et al., *supra* note 57, at 222; *see also, e.g.*, Dobbin & Kalev, *supra* note 61, at 48 (finding diversity training to likely be the most expensive and least effective anti-bias intervention).

⁶⁷ Statements by California and New Jersey bar officials are typical in this regard. *See* STATE BAR OF CAL., MEMO TO COUNCIL ON ACCESS & FAIRNESS 4 (Aug. 28, 2020), <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000026395.pdf> (stating that increasing California’s ABT requirement, as was ultimately done, “will signal that this subject demands a more serious engagement across the profession”); N.J. SUP. CT., NOTICE TO BAR: CONTINUING LEGAL EDUCATION—REQUIREMENT OF TWO HOURS (“TWO HOURS”) 2 (Oct. 20, 2020), <https://www.njcourts.gov/sites/default/files/notices/2020/10/n201021e.pdf> (stating that mandatory ABT in New Jersey will “send a message that the legal profession and courts are serious about taking steps to effect lasting change”). One conservative commentator put a different spin on the signaling effect, arguing that mandatory ABT signals that conservatives should not become lawyers. David Randall, *Wokeness Is Creeping into Continuing Legal Education*, THE JAMES G. MARTIN CENTER FOR ACADEMIC RENEWAL (Feb. 2, 2023), <https://www.jamesgmartin.center/2023/02/wokeness-is-creeping-into-continuing-legal-education/>.

profession cares and is doing something about it would seem to be a cynical exercise, one that might allow the profession to check a box and move on to other priorities.⁶⁸

IV. Moving Forward

Continuing to require ABT for lawyers is hard to justify given the overall absence of empirical evidence or other reason to believe that such requirements have any substantial impact on bias in the law. Ending ABT requirements, and perhaps putting those resources toward other anti-bias initiatives, would be a reasonable choice. An alternative reasonable choice, discussed below, is for the profession to take up the challenge of adding to the science, making ABT requirements for lawyers a more meaningful endeavor.⁶⁹

Many social scientists who have assessed ABT and found discouraging results do find at least glimmers of hope. As noted by the authors of a recent meta-analysis of ABT studies, evidence for ABT efficacy is “for the most part wanting,” but the research does provide “some clues” for moving forward toward better assessments and better outcomes.⁷⁰ Proponents of mandatory lawyer ABT can learn from these clues.

Among the most substantial problems with current ABT research is the lack of large-scale studies and studies that assess typical ABT programs in real-world circumstances. Most ABT studies observe small groups in academic settings and usually involve interventions other than typical ABT training, suggesting limited application to real populations. An ABT study by Edward H. Chang and colleagues is almost unique in having addressed these problems.⁷¹ These researchers designed and tested the typical format of a one-hour, one-off, online ABT program on several thousand employees of a large cooperating corporation, a design praised as being a “quantum leap” beyond other ABT studies.⁷²

Chang et al. incorporated adult learning principles to maximize the short program’s effectiveness in achieving its primary goal of improving employee behavior and attitudes toward women in the workplace. With these principles in mind, the researchers targeted specific psychological processes believed to produce biased behavior, took steps to destigmatize ABT participation, provided personalized feedback, and offered actionable anti-bias strategies and opportunities to put these strategies into practice.⁷³

⁶⁸ Robinson et al., *supra* note 58; Singal, *supra* note 32.

⁶⁹ Cf. Sirota, *Can Continuing Legal Education Pass the Test? Empirical Lessons from the Medical World*, *supra* note 6, at 38 (making a similar argument in the context of mandatory CLE generally).

⁷⁰ Devine & Ash, *supra* note 1, at 409; *see also* Gill & Olsen, *supra* note 47, at 79 (“[ABT] risks both being oversold as a panacea and undersold as a worthless effort.”).

⁷¹ *See* Chang et al., *supra* note 57.

⁷² Paluck et al., *supra* note 52, at 552; *see also* Devine & Ash, *supra* note 1, at 423 (praising the Chang et al. study as being one of the most “methodologically impressive” ABT studies). In addition to involving a large number of subjects studied in a real-world setting, the Chang et al. study is also praised for preregistering the study design and for effectively randomizing control and test groups. Paluck et al., *supra* note 52, at 552.

⁷³ Chang et al., *supra* note 57, at 7778.

The results were a mixed bag—encouraging, but with caveats. The researchers assessed attitudinal and behavioral impacts at various points up to twenty weeks after the training. They found a robust positive attitudinal impact on attendees who were relatively less supportive of women in the workplace before the training. They also found positive impacts—although less robust—on workplace behaviors of attendees whose pretraining attitudes were relatively more supportive of women in the workplace.⁷⁴

Overall, Chang et al. concluded that more effortful interventions were needed to robustly change workplace behavior, including programs that engaged attendees over a period of weeks or months and that were more specifically targeted to different employee groups.⁷⁵ They also concluded that training was unlikely to work as a stand-alone solution.⁷⁶ Many other researchers have similarly observed that effective anti-bias interventions and rigorous studies in this field will be hard, expensive, and multi-faceted.⁷⁷

If ABT is to have a real impact, many more large-scale real-world studies are needed, with programs being redesigned in iterative fashion to reflect the results. As modeled by the Chang et al. study, collaborative relationships between social scientists and organizations are key to this effort.⁷⁸ State and local bar organizations, which represent large numbers of working professionals, could make an enormous contribution, joined by social scientists and CLE providers.

For social scientists, the draws would be access to large groups of participants from various corners of the legal profession and design opportunities in a field ripe for scientific intervention. To motivate CLE providers, bar associations might take a page from the experience of continuing medical education (CME) regulators. The Accreditation Council for Continuing Medical Education requires all providers to gather and analyze data on the degree to which program goals are met and to make changes to better meet those goals. CME providers also may choose to earn “accreditation with commendation” status based, in part, on demonstrating that

⁷⁴ *Id.* at 7778, 7781. One of the strongest behavioral effects observed was that the training prompted female employees to seek out mentorship from more senior women in the organization. *Id.*

⁷⁵ This conclusion reflects the researchers’ observation that the brief training may not have enduring effects, that the attitudinal effects may have reflected attendees’ desire to give socially desirable responses, that those in the most powerful positions in the organization showed little if any behavioral changes, and that even less supportive attendees may still have been more supportive of women in the workplace before the training than nonattendees or employees in other organizations. *Id.* at 7781.

⁷⁶ *Id.*

⁷⁷ *E.g.*, Devine & Ash, *supra* note 1, at 422 (acknowledging the “tremendous resources in terms of time, money, and personnel” necessary for an effective ABT research agenda); Dobbin & Kalev, *supra* note 61, at 49 (“[T]raining tends not to change workplaces unless it is part of a broader effort, involving multiple components.”); Doyin Atewologun et al., *Unconscious Bias Training: An Assessment of the Evidence for Effectiveness*, EQUALITY AND HUMAN RIGHTS COMMISSION, RESEARCH REPORT 113, at 40–41 (Mar. 23, 2018) (listing multiple recommendations regarding content, context, and measurement for more effective ABT); FitzGerald et al., *supra* note 53, at 9 (“If change is really to be produced, a commitment to more in-depth training is necessary.”).

⁷⁸ Devine & Ash, *supra* note 1, at 422; *see also* Paluck et al., *supra* note 52, at 554; Chin et al., *supra* note 55, at 51; FitzGerald et al., *supra* note 53, at 10.

their CME programs have improved attendees' professional performance or have benefited positively impacted patients and their communities.⁷⁹

Current opportunities for ABT study in the CLE context abound. For example, important outstanding research questions include whether voluntary or mandatory ABT programs are more likely to be effective, and, "more effective" for what purposes?⁸⁰ With cooperation from regulators and providers, social scientists could compare bias-reduction outcomes in the law between states that do and do not require ABT.

Scientists could also consider whether more targeted requirements make more of an impact.⁸¹ For example, California requires ABT trainings to include actionable steps that participants can take to recognize and address their own implicit biases⁸²; do California lawyers actually employ such steps after the training? Scientists could also study outcomes from different course formats. For example, do courses with greater interactivity or those involving several or more sessions over a period of time bring greater benefits in attitude or behavior, as adult learning principles would suggest?

Regulators could encourage innovation with an "ABT sandbox" approach. Regulatory "sandboxes," first developed for the financial technology industry, encourage supervised experimentation with models that demonstrate theoretical promise but would otherwise violate existing industry rules.⁸³ For example, a state considering mandatory ABT could allow the bar association in a county where the proposal enjoys substantial support to impose an ABT requirement on its members, studying county-wide reactions and impacts. Or, all lawyers in one county could be required to take a particularly promising ABT course while lawyers in other counties were afforded more options, opening the design and results to social scientists.⁸⁴

⁷⁹ ACCREDITATION COUNCIL FOR CONTINUING MED. EDUC., *Accreditation Criteria*, <https://www.accme.org/accreditation-rules/accreditation-criteria> (last visited Nov. 18, 2023). ACCME standards are voluntary but widely adopted by state and other medical associations. See ACCREDITATION COUNCIL FOR CONTINUING MED. EDUC., *CME Collaborations*, <https://accme.org/cme-collaborations> (last visited Nov. 18, 2023).

⁸⁰ See, e.g., Gill & Olson, *supra* note 47, at 82; Dobbin & Kalev, *supra* note 61, at 51–52; Devine & Ash, *supra* note 1, at 409.

⁸¹ In the broader CLE context, mandatory CLE has been found to have no ameliorative effect on the quantity of lawyer disciplinary cases. David D. Schein, *Mandatory Continuing Legal Education: Productive or Just PR?*, 22 GEO. J. LEGAL ETHICS 301 (2020). However, an intriguing and more focused study found that increasing ethics CLE requirements substantially reduces lawyer disciplinary cases. Frank Fagan, *Reducing Ethical Misconduct of Attorneys with Mandatory Ethics Training: A Dynamic Approach*, 15 REV. L. & ECON. 1 (2019).

⁸² Rules of the State Bar of Cal., r. 3.602(G), https://www.calbar.ca.gov/Portals/0/documents/rules/Rules_Title3_Div5-Ch1-CLE-Providers.pdf.

⁸³ See generally Amy Salzyzn, *What's at Play? Learning About the Design and Impact of Legal Innovation Sandboxes*, JOTWELL (Mar. 3, 2023); Cristie Ford & Quinn Ashkenazy, *The Legal Innovation Sandbox*, AM. J. COMPAR. L. (forthcoming 2023).

⁸⁴ For example, the Pennsylvania State Bar and CLE Board collaborated with Carnegie Mellon University to develop "Project Objection," described as an "interactive training on diversity, inclusion and anti-bias" to "advance awareness of these issues in the legal community." The program is already available free of charge to CLE providers in the state. PACLE, *Diversity*, <https://www.pacle.org/diversity-cle> (last visited Nov. 18, 2023). Has the program advanced awareness? In what ways? What impact might requiring the course have as a common touchstone for all members of a local legal community?

More boldly, regulators might consider whether to award CLE credit to programs outside the traditional ABT sphere. For example, a recent study of the “Mansfield Rule” program demonstrates the potential of intense, evidence-based programs that do not include typical ABT classes. Hundreds of law offices have voluntarily enrolled in Mansfield Rule certification programs, which aim to diversify organizational leadership. Separate programs were developed for in-house legal departments and law firms of various sizes. Participants engage in monthly “knowledge-sharing” calls and must regularly track, measure, and report on a host of leadership-related practices and activities.⁸⁵ Though the Mansfield Rule is not without critics,⁸⁶ early data on the program is remarkably promising.⁸⁷

Would a Mansfield Rule-type program have more impact than a traditional ABT requirement for some lawyers and some sectors? Could ABT courses work in tandem with Mansfield Rule or other initiatives?

A world of ABT research questions awaits study, with the results of such study informing new generations of ABT offerings. Failing to engage in this process discredits the profession and calls into question our commitment to eliminating bias in the law.

⁸⁵ See DIVERSITY LAB, *Mansfield Rule*, <https://www.diversitylab.com/pilot-projects/mansfield-overview/> (last visited Nov. 18, 2023); John Iino et al., *Diversifying Leadership: How the Mansfield Rule is Doing*, *Bloomberg Law* (June 17, 2022, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/diversifying-leadership-how-the-mansfield-rule-is-helping>; Boydston & Zorn, *supra* note 10.

⁸⁶ See Paola Cecchi-Dimeglio, *Why the 30 Percent Mansfield Rule Can't Work: A Supply-Demand Empirical Analysis of Leadership in the Legal Profession*, 91 *FORDHAM L. REV.* 1161 (2023) (arguing that sustainable increases in diverse law office leadership requires changes all along the developmental pipeline, not just at the interview stage, which is the focus of the Mansfield Rule).

⁸⁷ See Boydston & Zorn, *supra* note 10.