CHRISTIAN LEGAL SOCIETY

Seeking Justice with the Love of God

January 11, 2016

Allan K. DuBois, President
State Bar of Texas

Nancy Smith, MCLE Director
State Bar of Texas

Re: Religious Discrimination by the MCLE Committee of the State Bar of Texas

Dear Mr. DuBois and Ms. Smith:

We write as concerned members of the State Bar of Texas in response to the recent action of the Texas MCLE Committee denying accreditation—and threatening to deny future accreditation—to CLE programs with religious content. We know that you are longstanding and faithful servants of Texas lawyers, and we are grateful for your continuing sacrificial service to the bar. Yet we oppose this discriminatory action, and we urge the Committee and the State Bar to reconsider and rectify it.
The State Bar itself recognizes that ethical rules without moral foundations are sterile and ineffectual, and the Disciplinary Rules state as much:

> The rules and Comments do not, however, exhaust the moral and ethical considerations that should guide a lawyer, for no worthwhile human activity can be completely defined by legal rules.
>
> Texas Disciplinary Rules of Professional Conduct, *Preamble* para. 11.

Religious faith is of course one way that human beings have sought to define and explore what "worthwhile human activity" might actually be. So the demand that lawyers (or CLE providers) should always be able to clearly separate "secular law and legal ethics" from "instruction on religious or moral responsibilities" misunderstands both legal ethics and religious belief.

The reality is that most attorneys in the state of Texas seek to live lives that integrate religious, moral, and professional duties in order to serve their clients and the profession better. These lawyers deserve the encouragement and support of the State Bar for seeking to live up to the ethical standards suggested by its own Rules. Instead, the MCLE Committee is seeking to affirmatively discourage such lives of integrity.

The actions of the MCLE Committee may arise out of an improper interpretation of the MCLE Accreditation Standards "Definitions" section. In her denial letter, Ms. Smith has said that "the definition of legal ethics/professional responsibility allows credit only for those topics dealing with matters pertaining specifically to attorney duties and responsibilities and excludes credit for individual religious or moral responsibilities."

The definitions do indeed exclude some topics:

> "Legal Ethics and Legal Professional Responsibility" shall not include programs or topics that deal with government or business ethics, individual religious or moral responsibilities, training in personal organizational skills, general office skills, time management, leadership skills or stress management.

The MCLE Committee, however, has singled out "religious responsibilities" for an interpretation remarkably different from its interpretation of other "excluded" topics in this paragraph. In short, the way the Committee reads it, *any* topic *touching on* "religious responsibilities" is automatically disqualified from accreditation. Yet this is not how the Committee treats any of the other topics in the "excluded" paragraph. For example, if a CLE program references "stress management" or "leadership skills," it is not automatically ineligible for accreditation, as long as it addresses stress management or leadership skills in the context of professional duties or "customs among professionals" and the like. The same goes for "business ethics," "organizational skills," and "time management." As long as these topics are discussed in relation to legal ethics, accreditation is not in jeopardy.[1]

It is this singling out of "religion" that is troubling. The Committee, rather than treat religion in the same way it treats business ethics, stress management, and general moral responsibilities—that is, evaluated in relationship to law practice and lawyers' duties—treats religion as a poison that taints the entire CLE program.

The State Bar has consistently recognized, properly, that faith traditions and experiences are central to the successful practice of law, and, not coincidentally, has suggested that religious practices can help provide solutions to some of the challenges that lawyers face. For example, the Texas Bar has advised that lawyers ought to "develop or maintain a sense of spirituality" to fight anxiety, burnout, depression, and substance abuse.[2] The same article recommends meditation and "mindfulness" as well. Both are of course religious practices.

Given all of this, it is surprising that the Texas Bar would discourage deeper inquiries into the life of integrity that religious lawyers seek and that the Bar recommends.

In addition to the many practical reasons for including religious ideas in programs for attorneys, there are foundational legal principles that prohibit censorship of ideas because they are religious in nature. The exclusion of religious expression is viewpoint discrimination that is prohibited by the First Amendment of the United States Constitution. As the United States Supreme Court has explained, "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger v. University of Virginia*, 515 U.S. 819, 829 (1995), *citing* R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992). Because "[v]iewpoint discrimination is thus an egregious form of content discrimination," the Court instructed, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion

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[1] This is readily apparent from a list of hundreds of accredited Texas Bar CLE offerings.

[2] Ann D. Foster, *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression* (State Bar of Texas, Lawyers' Assistance Program).

or perspective of the speaker is the rationale for the restriction." *Id.* This is particularly true when the speech being regulated is religious speech. *See Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Rosenberger, supra*; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981).

Instead, the MCLE Committee's censorship of religious speech represents a serious risk of violating the Establishment Clause by entangling government officials in determining what speech is and is not religious. The Supreme Court has warned against "the viewpoint discrimination inherent in [a governmental] regulation" that "requires public officials to scan and interpret . . . publications to discern their underlying philosophic assumptions respecting religious theory and belief." *Rosenberger*, 515 U.S. at 845. Such a "course of action [is] a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires." *Id.* at 845-46. Accordingly, the MCLE policy of excluding religious ideas and viewpoints "raises the specter of governmental censorship, to ensure that all [CLE] writings and publications meet some baseline standard of secular orthodoxy" and "imperil[s] the very sources of free speech and expression." *Id.* at 844-45; *see also, Widmar,* 454 U.S. at 269-70 n. 6.

Religion, for lawyers of most faith traditions, is not some sort of private ritual that has nothing to do with their other "professions" in the world. Rather, for most of us, religious faith informs all that we do, including the practice of law. The State Bar of Texas MCLE Department need not endorse this reality in order to recognize that professional and ethical formation is a much more complex process than simply learning the Rules of Professional Conduct.

Please reconsider and reverse your decision that seeks to exclude religious ideas and viewpoints from CLE programs. Thank you, again, for your service to Texas lawyers.

Sincerely,

Michael P. Schutt, Texas Attorney
Director, Attorney Ministries, Christian Legal Society

Chad A. Olsen, President
Christian Legal Society, San Antonio Chapter

Greg Wilhelm, V.P.
Christian Legal Society, Dallas Chapter
Gregory E. Wilhelm, P.C.

Stephen L. Moll, President
Christian Legal Society, Houston Chapter

Jon Mureen
Dallas Chapter, Christian Legal Society

Hon. Raul A. Gonzalez

Dean Brad Toben
Baylor Law School

Frank Rynd
General Counsel
Archdiocese of Galveston-Houston

Sarah H. Romero
Associate General Counsel
Archdiocese of Galveston Houston

Maureen Peltier
Associate General Counsel
Archdiocese of Galveston-Houston

Tim O'Hare
Licensed by State Bar of Texas since 1996
Member, State Board of Dental Examiners

Darrell F. Smith
Darrell Frank Smith, P.C.

Gary E. Ramirez
Ramirez Law Offices, PC

Randal Cashiola
Cashiola & Bean

Fred Griffin
Sell Griffin McClain, PC

Barbara J. Maseberg
Houston

Chris W. Kirby
Austin

Sherry Barnash
San Antonio

Brad Wiewel
Austin

Steve R. Campos
President, Christian Legal Society Austin Chapter

John C. Hille, Jr.
Austin

Roger B. Borgelt
Austin

Paul V. Storm
Austin

J. Lee Baldwin
Dallas