

STATE BAR EFFORTS TO DENY ACCREDITATION TO
FAITH-BASED CLE ETHICS PROGRAMS SPONSORED
BY RELIGIOUSLY AFFILIATED LAW SCHOOLS

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TABLE OF CONTENTS

INTRODUCTION	293
I. BACKGROUND	294
A. <i>The Mission of Our Schools</i>	294
B. <i>Our Mission Extends Beyond Three Years of Law School</i>	296
C. <i>St. Mary's Struggle to Obtain CLE Accreditation for Faith- Based CLE Programs in Texas</i>	297
II. BRINGING A FAITH-BASED APPROACH TO CLE ETHICS PROGRAMMING	301
A. <i>Applicable Ethics Rules Allow Discussions of Moral Concerns with Clients</i>	301
B. <i>There Can Be No "Secular" as Opposed to "Non-Secular" CLE Programs Because Moral and Religious Concerns Factor into the Substantive Law</i>	302
C. <i>The First Amendment Guarantees Us the Right to Discuss Issues of Faith and Morality in the Practice of Law, and Precludes the States from Denying Accreditation for Those Presentations</i>	303
D. <i>There are Potential Due Process and Equal Protection Problems Regarding Denial of Accreditation to Faith-Based CLE Programs</i>	304
E. <i>How to Achieve Accreditation of Faith-Based CLE Programs</i>	305
CONCLUSION	308

INTRODUCTION

Religiously affiliated law schools focus on the integration of faith in the formation of future attorneys and leaders. Yet our students are only our students for three years. We can extend our influence and continue

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to provide a faith-based perspective to them and to other attorneys during the thirty, forty, or more years of their careers by offering continuing legal education (CLE) courses, which bring attorneys and judges together to provide a model for incorporating faith and morality into our professional roles. However, CLE programs must receive accreditation by state authorities if participants are to receive credit for them.¹ Recently, the State Bar of Texas' Minimum Continuing Legal Education (MCLE) Committee refused to accredit such a program, determining that only "secular" programs could receive CLE credit.² That committee was forced to reverse itself by virtue of a formal appeal filed by this author, and supported by evangelical Christian and Catholic attorneys and entities, including St. Mary's University School of Law.³ This Article examines that situation, and provides the framework other schools may use to prevent similar denials from occurring in their states.

I. BACKGROUND

A. *The Mission of Our Schools*

There is obviously something in the mission of religiously affiliated law schools which differentiates our schools from secular law schools. This difference—the focus on integrating faith in the formation of our future lawyers and leaders—is clearly identified in the mission statements of those respective schools. While the list to follow is not exhaustive, a quick examination of the mission statements of a few of our schools reveals what it is that sets us apart from secular institutions.

"St. Mary's University School of Law, a Catholic Marianist institution, prepares its graduates for the competent and ethical practice of law in a community of faith that encourages and supports educational excellence, scholarship, public service, and the promotion of justice."⁴ Similarly, Regent University School of Law states that its "mission is to provide an excellent legal education from a Christian perspective, to nurture and encourage our students toward spiritual maturity, and to

¹ See ST. BAR TEX., STATE BAR RULES Art. XII, § 2(J) (2016), https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents&Template=/CM/ContentDisplay.cfm&ContentID=11009.

² Adam Cassandra, *Texas State Bar Demands Secularization of Legal Ethics Training Held at Catholic Law School*, CARDINAL NEWMAN SOC'Y (Dec. 2, 2015), <https://cardinalnewmansociety.org/texas-state-bar-demands-secularization-of-legal-ethics-training-held-at-catholic-law-school/>.

³ Bill Piatt, *Catholic Education Before the Texas Bar*, CARDINAL NEWMAN SOC'Y (Jan. 20, 2016), <https://cardinalnewmansociety.org/catholic-education-before-the-texas-bar/>.

⁴ AMY HARDBERGER, ST. MARY'S UNIVERSITY SCHOOL OF LAW POLICIES AND PRACTICES MANUAL – PRACTICING FACULTY 2 (2016), <https://www.stmarytx.edu/policies/wp-content/uploads/2016/10/law-school-policies-and-practices-manual-for-faculty-2016-07.pdf>.

engage the world through Christian legal thought and practice.”⁵ According to Brigham Young University Law School’s mission statement:

The mission of the BYU Law School is to teach the laws of men in the light of the laws of God. The Law School strives to be worthy in all respects of the name it bears, and to provide an education that is spiritually strengthening, intellectually enlarging, and character building, thus leading to lifelong learning and service.⁶

“Loyola University Chicago School of Law is a student-focused law center inspired by the Jesuit tradition of academic excellence, intellectual openness, and service to others.”⁷ Likewise, “Liberty University School of Law exists to equip future leaders in law with a superior legal education in fidelity to the Christian faith expressed through the Holy Scriptures.”⁸ As a final example, “[t]he mission of Pepperdine University School of Law is to provide highly qualified students with a superior legal education. . . . The school’s Christian emphasis leads to a special concern for imbuing students with the highest principles of professional, ethical, and moral responsibility.”⁹

Another class of religiously affiliated law schools asks the prospective student to consider the sponsoring university’s mission statement. For instance, Baylor University School of Law “shares in the University’s mission to educate men and women by integrating academic excellence and Christian commitment within a caring community . . . who are sensitive to the needs of a pluralistic society.”¹⁰ Catholic University’s Columbus School of Law “advances the aims and goals of the university as a whole These aims and goals manifest themselves in . . . the dignity of each human person; respect for the inviolability of all human life . . . and the obligation of love for one another.”¹¹ As a final example, St. John’s School of Law states that, “[c]onsistent with the Vincentian Mission of St. John’s University, St. John’s School of Law seeks to: [a]chieve academic excellence through a commitment to

⁵ *Mission Statement*, REGENT U. SCH. L., <http://www.regent.edu/acad/schlaw/whyregentlaw/mission.cfm> (last visited Jan. 11, 2017).

⁶ *Mission & Goals*, BYU L. SCH., <http://www.law2.byu.edu/site/mission/> (last visited Jan. 11, 2017).

⁷ *Missions, Goals and Objectives*, LOY. U. CHI. SCH. L., <http://www.luc.edu/law/about/mission.html> (last visited June 7, 2016).

⁸ *About Liberty School of Law*, LIBERTY SCH. L., <http://www.liberty.edu/law/about-liberty-law-school/> (last visited Jan. 11, 2017).

⁹ *Mission Statement: About Us*, PEPP. SCH. L., <http://law.pepperdine.edu/about/our-story/mission/> (last visited Jan. 11, 2017).

¹⁰ *Mission Statement*, BAYLOR U. SCH. L., <http://www.baylor.edu/law/index.php?id=930089> (last visited Jan. 11, 2017).

¹¹ *Columbus School of Law: Mission Statement*, CATH. U. AM.: COLUMBUS SCH. L., <http://www.law.edu/missionstatement.cfm> (last updated Dec. 18, 2009).

rigorous teaching . . . [and] scholarly research . . . [and] [e]ngage students to search out the causes of economic and social injustice . . .”¹²

The purpose of our schools, and our roles within the American legal education system, have been succinctly set forth in the literature on this topic.¹³ Our schools have been approved not only by receiving accreditation from the American Bar Association and the Association of American Law Schools,¹⁴ but also by the state supreme courts and bar associations which authorize our graduates to take their respective bar examinations and be admitted to the practice of law.¹⁵

B. Our Mission Extends Beyond Three Years of Law School

If each school is fulfilling its mission,¹⁶ our students receive at least some exposure for the three years that they are with us to the application of a faith-based approach to the provision of legal services. However, we hope that our contact with and influence upon the careers of our students will not be limited to the three years that they find themselves within our walls. After all, most of our graduates can expect to pursue a career of thirty, forty, or even more years. The potential impact upon their clients in society is immeasurable. As a result, if we are truly focused on influencing their outlook, religiously affiliated law schools should strive to participate post-law school by sponsoring faith-based continuing legal education programs.¹⁷

¹² *Mission*, ST. JOHN'S SCH. L., <http://www.stjohns.edu/law/about> (last visited Jan. 11, 2017).

¹³ See, e.g., Howard A. Glickstein, *Academic Freedom in Religiously Affiliated Law Schools: A Jewish Perspective*, 11 REGENT U. L. REV. 17, 19 (1998) (quoting *Deuteronomy* 16:20 (New American Standard Version)) (describing the roots of Judaism as a law-based religion in pursuit of justice, and explaining that a law school centered on Judaism should “pursue the command of Deuteronomy: ‘Justice, and only justice, you shall pursue’”).

¹⁴ Steven R. Smith, *Accreditation and Religiously Affiliated Law Schools*, 78 MARQ. L. REV. 361, 368 (1995) (discussing the accreditation process of law schools and how the accreditation rules do not interfere significantly with the central mission of religiously affiliated law schools).

¹⁵ STATE BAR OF TEX., STATE BAR RULES Art. III, § 2 (2016), https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents&Template=/CM/ContentDisplay.cfm&ContentID=11009.

¹⁶ See generally Michael Herz, *The Role of One Religiously Affiliated Law School*, 59 J. LEGAL EDUC. 136 (2009) (describing the mission and role of a religiously affiliated law school). Religious affiliation within a law school has become a commitment to ethical standards. A religiously affiliated law school, which speaks of ethics, service, morals and values instead of its source, has domesticated religion into a secularized belief system in an attempt to be more inclusive and diverse. *Id.* at 147. However, students who share the religious beliefs of the law school are free to pursue the law in congruence with their beliefs.

¹⁷ See Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377, 377 (1980) (explaining that law schools have a duty to teach professional ethics to their students). Chief Justice Burger

C. St. Mary's Struggle to Obtain CLE Accreditation for Faith-Based CLE Programs in Texas

Consistent with these goals, the Catholic Lawyers Guild of San Antonio, of which this author is President, joined with the Christian Legal Society of San Antonio to persuade St. Mary's University School of Law to allow us to conduct the first-ever Christian Legal Perspectives seminar in the San Antonio, Texas area. We approached this with a very modest goal which we did not think would ever be controversial. We hoped that we could re-convince attorneys to incorporate moral and religious considerations in their practices. By way of example, we put together a panel consisting of a former Texas state district judge, a mediator with more than thirty years' experience in the practice of law, and two other attorneys with substantial family law backgrounds to discuss faith, lawyering, and divorce. We believed that it would be important to remind attorneys who are asked to represent clients in divorce proceedings to consider the religious view of the sanctity of marriage.¹⁸ This approach might result in attorneys referring their

repeatedly encouraged law schools to provide the ethical foundations for the profession. *Id.* Law schools have a "profound duty" and a "unique opportunity" to fulfill an obligation "[t]o see that higher standards of responsibility permeate the profession." *Id.* He believed law schools, state bars, and the judiciary should collaborate to achieve a common goal. *Id.* His warning is sincere.

Of course, there are exceptions, but, on the whole, what the law schools have done is to take young men and women and train them in the skills of a professional monopoly, leaving the learning of moral and ethical precepts—which ought to guide the exercise of such an important monopoly—to a vague, undetermined, unregulated, and undefined future. . . .

Some observers argue that character and moral sense are largely molded by the time students get to law school. There is some truth to this. The law school cannot replace the family, the church or synagogue, or the strong role model provided by the classroom teacher during the years of elementary and secondary school. But we know full well that the law school is an immensely powerful force in defining, structuring, and internalizing professional norms, values and attitudes. . . . [L]awyers who know how to think in legal terms, but have not learned how to behave, are a menace to society and a liability, not an asset, to the administration of justice.

Id. at 388, 390 (citations omitted).

Legal ethics should not be taught by lecturing or tested through memorization. *Id.* at 393. Students and lawyers learn professional responsibility through candid conversations with professionals speaking of ethical issues as they arise in various aspects of their own practice. *Id.* Chief Justice Burger does not expressly state the following, but it seems practical that the CLE was envisioned as this opportunity.

¹⁸ See Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 71 (2001) (discussing the benefits and dangers of legal and non-legal professionals relying on their religious beliefs in their practices). Often, religion strengthens individuals who act as professionals. However, "[w]hen there is a conflict between religious and professional norms, . . . are compromises possible? . . . And in the absence of such a conflict, what are the benefits and what are the dangers—for those they serve and for the larger society—if professionals rely on their religions to guide their

clients to faith-based counseling in order to determine whether a divorce really would be in the best interests of all parties involved, including children. The hope was that this approach might preserve marriages where possible, and where not possible, that the parties might at least be given a perspective that could enable them to work better together post-divorce in their own best interests and those of the children.¹⁹ These are not radical ideas.

However, the Texas MCLE Committee initially denied accreditation.²⁰ We asked for reconsideration and the committee reluctantly granted our request.²¹ Our program took place on the afternoon of October 21, 2015; however, on November 4, 2015, the MCLE committee abruptly announced that it would not accredit any further ethics programs which we might present that dealt with “religious or moral” themes.²² They informed us that only “secular” programs would receive such credit. The letter from Nancy R. Smith, Director of the State Bar of Texas MCLE, to this author, stated, in relevant part:

Dear Mr. Piatt:

The MCLE Committee recently evaluated the above-referenced activity to determine if credit can be granted for future similar programs. As discussed, we granted a one-time MCLE accreditation to the above-referenced activity. However, because we were uncertain as to whether this activity would fully satisfy all of the criteria outlined in the accreditation standards, we sent your application and supporting documentation to the MCLE Committee for further review.

conduct?” *Id.* A lawyer who chooses to practice in accordance with her faith should disclose her beliefs to the clients. *Id.* at 678–79. For those clients that do not share the lawyer’s view or feel they will not be served, a referral is the appropriate measure. *Id.* Furthermore, Title VII provides safeguards for clients. *Id.* at 681 (citing *EEOC v. Rinella & Rinella*, 401 F. Supp. 175, 179–81 (N.D. Ill. 1975)). A lawyer’s duty to the client includes counseling the client and preserving the right to raise moral objections to their desires rather than implementing every desire. *Id.* at 678.

¹⁹ Burger, *supra* note 17, at 378. “We have served, and must continue to see our role, as problem-solvers, harmonizers, and peacemakers, the healers—not the promoters—of conflict.” *Id.* Lawyers should be able to refuse to work for a client or on a particular issue, if their objection stems from a religious or a sincere conscientious belief. Refusal should not violate discrimination protections of Title VII, nor should their demurral become a platform to grandstand on platitudes. A genuine refusal framed in humility and respect will accommodate the best interests of their client or prospective client. Similarly, the lawyer should not be compelled to serve the client. *Cf.* *United States v. Seeger*, 380 U.S. 163, 176 (1965) (explaining objection on the basis of sincere religious beliefs in the context of a statute exempting conscientious objectors from military service). For a discussion of appointments, see Teresa Stanton Collett, *Professional Versus Moral Duty: Accepting Appointments in Unjust Civil Cases*, 32 WAKE FOREST L. REV. 635, 638–39 (1997) (noting that courts may have inherent or statutorily-created authority to appoint counsel).

²⁰ Cassandra, *supra* note 2.

²¹ *Id.*

²² Letter from Nancy R. Smith, Director, St. Bar Tex. Minimum Continuing Legal Educ., to Bill Piatt (Nov. 4, 2015) (on file with author).

Upon completion of their evaluation, the Committee found that this activity does not satisfy several of the accreditation criteria and therefore, will not be approved in the future.

Based upon the course description and materials submitted with the application, it was determined that this activity would be denied accreditation by the definition of legal ethics as outlined in the enclosed Accreditation Standards for CLE Activities. 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. To be approved for partial credit in the future, the portions devoted to secular law and legal ethics would need to be clearly identified and separate from instruction on religious or moral responsibilities. Otherwise, we would not be able to allow MCLE accreditation for any portion of the program.²³

While this development was stunning, even more surprising was the fact that other CLE programs proposed by faith-based attorney groups in Texas had also been denied accreditation.²⁴ After much reflection and prayer we determined that in order to preserve our right to present future post-law school Christian CLE programs, we would need to lodge a formal appeal. This was not an easy decision to reach. The thought of challenging the actions of our own State bar in a formal and aggressive fashion caused us some pause. After all, the bar has vast resources. It could undoubtedly rely upon some very high-profile attorneys providing legal services to quash our efforts. Moreover, there were some personal concerns. Some of the decision-makers were our friends. Some were people with whom we had worked. Some were people with whom we would need to continue to work. We reflected upon this, we prayed upon this, and in the end, we were convinced we really had no recourse but to pursue the appeal if we wanted to be able to continue to present faith-based CLE programs in the State of Texas.

As it turned out, we were not alone in our efforts. St. Mary's University School of Law, the Catholic Lawyers' Guild of San Antonio, and eight individual attorneys signed off on the appeal.²⁵ Numerous other educators, attorneys, and political figures rallied to our support. Our supporters included the national Christian Legal Society as well as some individual chapters of the same, the Dean of Baylor Law School, and the Governor of the State of Texas, Greg Abbott. Our efforts were

²³ *Id.*

²⁴ Letter from Jimmy Blacklock, General Counsel, Office of Governor Greg Abbott, to Allan DuBois, President, St. Bar Tex. 6 (Dec. 22, 2015) (on file with author).

²⁵ Cassandra, *supra* note 2.

publicized extensively by The Cardinal Newman Society.²⁶ Articles also appeared in the *Texas Lawyer*.²⁷

Now comes the spoiler alert: We were successful. The State Bar of Texas rescinded its letter of November 4, 2015, on January 12, 2016.²⁸ The Bar wrote, in part: “It is the MCLE committee’s position that MCLE credit, including legal ethics credit, may be granted for training and education on moral and religious topics presented in the context of legal training.”²⁹ While we achieved success in this endeavor, rulings can change depending upon who has the authority to administer CLE accreditation procedures. As of this writing, the State Bar of Texas has not yet formally amended its CLE Rules to recognize the legitimacy of faith- and morality-based CLE ethics programs. As part of the settlement, the State Bar of Texas also agreed to put on an ethics CLE program at the State Bar Convention in Fort Worth in June 2016 involving the role of faith and morality in the practice of law.³⁰ While the Bar put together a distinguished panel, it declined this author’s offer to participate (this author understands human nature!). Unfortunately, it also declined to include any Catholic attorneys on the panel. Thus, work remains, in Texas and perhaps elsewhere.

In order to help guarantee that our law schools and our graduates can continue to extend a faith-based approach to the practice of law beyond our classrooms, we turn to a summary of the legal authority, arguments, and practical approaches upon which CLE providers may rely as they insist on the right to receive accreditation for faith-based CLE programs.

²⁶ E.g., Cassandra, *supra* note 2; Adam Cassandra, *Texas Governor’s Office: State Bar Continuing Education Ruling Discriminates Against Religion*, CARDINAL NEWMAN SOC’Y (Dec. 29, 2015), <https://cardinalnewmansociety.org/texas-governors-office-state-bar-continuing-education-ruling-discriminates-against-religion/>; Adam Cassandra, *State Bar of Texas Says Discriminatory Ruling Against Christian Law Program a ‘Miscommunication,’* CARDINAL NEWMAN SOC’Y (Jan. 14, 2016), <https://cardinalnewmansociety.org/state-bar-of-texas-says-discriminatory-ruling-against-christian-law-program-a-miscommunication/> (discussing MCLE Committee’s reversal to deny credit for a continuing legal education program in Christian legal ethics); Piatt, *supra* note 3.

²⁷ Brenda Sapino Jeffreys, *Governor Accuses State Bar of Religious Discrimination in Continuing Legal Education Accreditation Battle*, TEX. LAW. (ONLINE), Jan. 7, 2016, LEXIS (discussing Governor Abbott’s position on MCLE’s denial for credit on a continuing legal education program on Christian legal ethics).

²⁸ Letter from Nancy R. Smith, Director, St. Bar Tex. Minimum Continuing Legal Educ., to Bill Piatt (Jan. 12, 2016) (on file with author).

²⁹ *Id.* at 1. The letter explained that the accreditation requirement for CLE activity is that the activity must directly relate to legal subjects, and that “[t]here is no question that programs which approach those issues from a moral or religious perspective can fully satisfy this ‘directly relate’ standard, and such programs are routinely approved.” *Id.*

³⁰ ST. BAR TEX., ANNUAL MEETING FORT WORTH 2016 REGISTRATION BROCHURE 8 (2016), <https://www.texasbar.com/Content/NavigationMenu/Events/AnnualMeeting/AnnualMeetingHome/AnnualMeetingRegistrationBrochure.pdf>.

II. BRINGING A FAITH-BASED APPROACH TO CLE ETHICS PROGRAMMING

A. Applicable Ethics Rules Allow Discussions of Moral Concerns with Clients

Lawyers are required to receive annual training in ethics.³¹ One of the ethical rules which law students must learn, and to which attorneys must adhere, involves the rendering of legal advice to a client. Rule 2.1 of the American Bar Association's Model Rules of Professional Conduct provides: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."³² Comment 2 to this Rule explains the importance of the attorney being encouraged to speak to clients in these terms:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.³³

While the Rule and Comment do not explicitly use the word "religion," it is clear that "other considerations"³⁴ in the context of morality and ethics would include such an approach. If attorneys are being encouraged to incorporate such considerations in their discussions with clients, it makes sense that attorneys who are continuing in their legal education may be reminded of this fact in a CLE program. Religious attorneys should be offered opportunities to see how such an approach might be implemented in their practices.³⁵

As noted above, Governor Greg Abbott of the State of Texas supported our appeal.³⁶ He noted:

Studying the interplay between morality, religion, and the law is not a new concept, and educating the legal profession on these issues is not

³¹ See, e.g., ST. BAR TEX., STATE BAR RULES Art. XII, § 2(J) (2016), https://www.texasbar.com/AM/Template.cfm?Section=Governing_Documents&Template=/CM/ContentDisplay.cfm&ContentID=11009.

³² MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2016).

³³ *Id.* at r. 2.1 cmt. 2.

³⁴ *Id.* at r. 2.1.

³⁵ The Texas Disciplinary Rules of Professional Conduct do not contain the language of ABA Model Rule 2.1, but do contain, verbatim, as Comment 2 to TDR 2.01, the exact language of Comment 2 to ABA Model Rule 2.1. Compare TEX. DISCIPLINARY R. PROF'L CONDUCT, R. 2.01 (TEX. ST. BAR 2017), with MODEL RULES OF PROF'L CONDUCT r. 2.1 cmt. 2 (AM. BAR ASS'N 2016).

³⁶ Letter from Jimmy Blacklock, *supra* note 24 at 1.

a novel pursuit. In the Supreme Court's words, "We are a religious people whose institutions presuppose a Supreme Being." It should be no surprise, then, that American legal education and scholarship has long sought to better understand how religion and morality interact with the law and with a lawyer's responsibilities.³⁷

The Governor went on to cite numerous symposia, books, articles, and the like discussing the role of faith, morality, and religion in the ethical practice of law.³⁸ And, in a powerful summary, he observed:

The Committee's position that "legal ethics" and "religious or moral responsibilities" should be—or even can be—completely divorced from each other is entirely without basis. . . . To be honest, the idea that a lawyer's professional ethics have nothing to do with morality sounds more like the start of a bad joke than a serious philosophical or legal proposition. But if our profession has in fact reached the point where its leaders no longer think lawyers need concern themselves with the morality of their professional conduct, we should consider whether the lawyer jokes have it right.³⁹

B. There Can Be No "Secular" as Opposed to "Non-Secular" CLE Programs Because Moral and Religious Concerns Factor into the Substantive Law

The Texas State Bar was convinced in its initial rulings that there is some distinction between secular and non-secular CLE programs; it would accredit the former and deny accreditation to the latter.⁴⁰ This notion, of course, is absolutely inconsistent with our system of jurisprudence. A discussion of this topic would be quite lengthy. Nonetheless, a quick look at two decisions of the Supreme Court of the United States reveals how important morality and religion are to contemporary jurisprudence.

In 1964, the Supreme Court decided the case of *Heart of Atlanta Motel, Inc. v. United States*.⁴¹ In that case, the owner of the motel brought a challenge to the provisions of Title II of the Civil Rights Act of 1964.⁴² That Act outlawed race discrimination in public accommodations, including motels.⁴³ The owner of the motel did not deny that he was

³⁷ *Id.* at 5 (citation omitted) (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)).

³⁸ *Id.* at 5–6.

³⁹ *Id.* at 2.

⁴⁰ Letter from Nancy R. Smith, *supra* note 22.

⁴¹ 379 U.S. 241, 257, 261 (1964) (holding Congress's ability to appropriately regulate intrastate commerce that affects interstate commerce is a legitimate exercise of the power granted to Congress, including enforcing regulations prohibiting moral and social wrongs); *see also* *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819); *United States v. Darby*, 312 U.S. 100, 114 (1940) (discussing the importance of morality and high standards in jurisprudence).

⁴² *Heart of Atlanta*, 379 U.S. at 243, 247.

⁴³ *Id.* at 247.

engaging in race discrimination.⁴⁴ Rather, he argued that legislation aimed at eliminating racial discrimination was outside of Congress's constitutional power to enact.⁴⁵ The Supreme Court rejected his argument.⁴⁶ The court concluded, "[t]hat Congress was legislating against moral wrongs in many of these areas [i.e., prostitution, gambling, racial discrimination in interstate carriers] rendered its enactments no less valid. In framing Title II of this Act, Congress was also dealing with what it considered a moral problem."⁴⁷

Similarly, in *Roe v. Wade*,⁴⁸ the majority opinion explicitly recognized that the abortion controversy involved moral and religious concerns.⁴⁹ Thus, if moral and religious concerns are relevant factors in the creation and interpretation of the law, certainly those same concerns are relevant in a discussion of the role of morality and faith in the practice of law.

C. The First Amendment Guarantees Us the Right to Discuss Issues of Faith and Morality in the Practice of Law, and Precludes the States from Denying Accreditation for Those Presentations

While there are some limits, attorneys do not surrender their First Amendment rights by becoming attorneys. For example, the First Amendment guarantees attorneys the right to advertise within a certain framework.⁵⁰ Similarly, attorneys have a First Amendment right to speak at CLE programs and to listen to those presentations, and to associate with attorneys who share similar interests.⁵¹ Given that the foundation of law concerns morality and at times religion,⁵² there is a First Amendment right of attorneys to speak on these issues as they impact the professional obligations of attorneys, especially given that the

⁴⁴ *Id.* at 243.

⁴⁵ *Id.* at 243–244.

⁴⁶ *Id.* at 257.

⁴⁷ *Id.*

⁴⁸ 410 U.S. 113 (1973).

⁴⁹ *Id.* at 116.

⁵⁰ *Bates v. State Bar of Az.*, 433 U.S. 350, 363–64 (1977). A lawyer's advertising, although lacking cultural, philosophical, or political subject matter, is protected. *Id.* The listener has a substantial interest in hearing the speech. *Id.* at 364. "In short, such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Id.*; see also *Va. Pharmacy Bd. v. Va. Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (holding that speech does not lose First Amendment protection simply because it is in the form of paid advertisement).

⁵¹ *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 543 (1963) ("This Court has repeatedly held that rights of association are within the ambit of the constitutional protections afforded by the First and Fourteenth Amendments.").

⁵² *Heart of Atlanta*, 379 U.S. at 257.

Model Rules encourage such discussions.⁵³ State denial of accreditation where attorneys discuss these matters as part of a CLE program would violate the First Amendment guarantees to speak and assemble,⁵⁴ and would likely violate comparable state constitutional provisions.⁵⁵ It would constitute an unconstitutional prior restraint upon the speech of the organizers, presenters, and potential attendees.⁵⁶ And, limiting accreditation to “secular” speech would be an unconstitutionally vague, and at the same time, blunt crushing of any speech deemed not to be “secular.”⁵⁷

Similarly, attorneys do not surrender their right to the free exercise of their religion⁵⁸ by becoming attorneys. And what does free exercise of religion entail in this context? Free exercise means more than worship. As the Supreme Court has held, “the ‘exercise of religion’ involves ‘not only belief and profession but the performance of (or abstention from) physical acts’ that are ‘engaged in for religious reasons.’”⁵⁹ As Christian attorneys, and as Christian educators, we have the First Amendment right to exercise our religion by participating in CLE programs that explain to our peers various perspectives on law, including an application of moral concepts. Any ban on such activity would violate the Free Exercise Clause of the First Amendment.

D. There are Potential Due Process and Equal Protection Problems Regarding Denial of Accreditation to Faith-Based CLE Programs

Typically, the CLE accreditation process involves the submission of a proposed agenda, teaching materials, and some biographical

⁵³ MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR. ASS'N 2016).

⁵⁴ U.S. CONST. amend. I.

⁵⁵ See TEX. CONST. art. I, § 8, 27 (containing language similar to the First Amendment to the United States Constitution).

⁵⁶ See, e.g., *Kunz v. New York*, 340 U.S. 290, 293 (1951) (holding that an ordinance preventing public worship on the streets without a license constituted an unconstitutional prior restraint on speech); *Follett v. Town of McCormick, S.C.*, 321 U.S. 573, 582 (1944) (upholding the right to publish and distribute religious books); *Murdock v. Pennsylvania*, 319 U.S. 105, 140 (1943) (holding that there is a right to benefit from religious activities); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (holding that there is a First Amendment right to publish and distribute religious material).

⁵⁷ *Wright v. Georgia*, 373 U.S. 284, 292 (1963) (“[A] generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute.”).

⁵⁸ U.S. CONST. amend. I.

⁵⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2770 (2014) (quoting *Emp't Div., Dep't Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (emphasizing “. . . that a State would be ‘prohibiting the free exercise of religion’ if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display”)).

information regarding the presenters.⁶⁰ It is also typical that the accreditation committee requires program organizers to state that approval is pending up to the point where final approval is given.⁶¹ A State Bar official can delay the issuance of final approval,⁶² thereby discouraging potential participants from enrolling in the CLE. It is also possible, as was the case in our Texas matter, that an accreditation entity might make a determination to deny accreditation without providing any notice or opportunity to be heard.⁶³ Either of these approaches would deny presenters and potential participants their rights to Due Process as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States⁶⁴ and by comparable provisions in state law.⁶⁵ In our case, the Due Process violations were even more egregious—we were denied the right to receive accreditation for any *future* CLE presentations, even though none had been planned or submitted for approval at that point.

In the strange circumstance, again as appeared in Texas, where the state bar accrediting entity will accredit the faith-based CLE presentations of some religions and not others, an obvious Fourteenth Amendment denial of Equal Protection arises.⁶⁶

E. How to Achieve Accreditation of Faith-Based CLE Programs

The first step to putting together an effective faith-based CLE program is to enlist the participation of thoughtful and articulate presenters who bring important and diversified backgrounds to the program. Law school deans and former deans, law professors, experienced attorneys and mediators, and judges all fit the bill. That describes exactly the program we assembled—and yet we were still initially denied accreditation in Texas. Ultimately, however, the strength of our panels would have helped ensure success in the unfortunate event that we were forced into litigation.

Of course, strict compliance with all the technical requirements of the CLE accreditation process is also critical. This involves timely submissions of accreditation requests, careful preparation of materials,

⁶⁰ See, e.g., ST. BAR TEX., TEXAS MINIMUM CONTINUING LEGAL EDUCATION REGULATIONS, at §§ 10.2(d), 10.2(f) (2015), https://www.texasbar.com/AM/Template.cfm?Section=MCLE_Rules1&Template=/CM/ContentDisplay.cfm&ContentID=31721 (explaining the procedures necessary to apply for accreditation of CLE activities).

⁶¹ *Id.* at § 10.1.8.

⁶² *Id.* at § 10.1.12.

⁶³ *Id.* at § 10.9.

⁶⁴ U.S. CONST. amend. V; *id.* amend. XIV, § 1.

⁶⁵ See FLA. CONST. art. I, § 9 (containing language similar to the Fifth Amendment of the United States).

⁶⁶ U.S. CONST. amend. XIV, § 1; *Niemotko v. Maryland*, 340 U.S. 268, 284 (1951).

and the like. And, because we are educators, our first obligation and challenge will be to educate the accreditation committee of the validity and the importance of these topics. A succinct and polite summary of some of the themes of this Article would be helpful to a well-intentioned accreditor who is not familiar with the importance of the interplay of law, faith, morality, and ethics. Such a summary would also be helpful if the accreditor turns out to be not-so-well-intentioned. In such a case the summary might assist in convincing that person that it might not be a good idea to have his or her State Bar brought before the courts to resolve the accreditation issue.

In the unfortunate situation where accreditation is denied, sponsors would have several alternatives. One would be to cancel the program. Of course, such an approach, while avoiding conflict, would prevent the spread of the message of incorporating faith into practice. It would reinforce in the minds of the CLE accreditors that their position was correct. It would likely intimidate other providers from any further attempts at creating faith-based CLE programs.

Another approach would be to put on the program, even without accreditation, in order to provide participants the benefits of sharing in the faith-based perspectives. After all, the benefits provided by such a program to the lives of the practitioners, their clients, and the system of justice does not depend upon accreditation. The number of participants who would attend and thereby benefit, however, would likely be reduced if the program does not offer CLE credit.

Soon after our battle over accreditation regarding the St. Mary's CLE program, this author learned that a group of faith-based practitioners had prepared a similar CLE program in Dallas. After putting on their program, which was attended by over sixty attorneys, the program was denied accreditation. When the organizers of that program informed us of their situation, this author urged them, even though the time had passed to request reconsideration, to attach the State Bar's letter of January 21, 2016 to such a request. The sponsors did so. In response, the State Bar then granted accreditation.⁶⁷

In addition to either canceling the program or presenting it without accreditation, there are mechanisms to bring administrative denial of faith-based CLE programs to review by the highest court in the state. State Supreme Courts typically exercise superintending control over licensing and accreditation issues.⁶⁸ One potential remedy would be to go

⁶⁷ Correspondence between Bill Piatt and the organizers of the Dallas CLE program (on file with author).

⁶⁸ See *CLE FAQs*, AM. BAR ASS'N, <http://www.americanbar.org/cle/faqs.html> (last visited Feb. 14, 2017) (explaining that state supreme courts grant accreditation through a CLE board or commission).

straight to the highest court of the state with a request for that body to exercise superintending control and grant accreditation.

Another possible remedy would be to take advantage of applicable civil rights laws. The violation of the First Amendment rights of the CLE presenters could be addressed in an action brought under 42 U.S.C. § 1983.⁶⁹

Remedies could also be sought under applicable state Religious Freedom Restoration (RFRA) statutes.⁷⁰ The Texas statute is illustrative. Under that Act, remedies are provided for the violation by the government of the “free exercise of religion.”⁷¹ “Free exercise” is defined as “an act or refusal to act that is substantially motivated by sincere religious belief.”⁷² The person bringing such an action must first give notice to the entity that the free exercise of religion “is substantially burdened by an exercise of the government agency’s governmental authority.”⁷³ A person must also identify the particular act or refusal to act that was burdened⁷⁴ and the manner in which exercise of governmental authority burdens the act.⁷⁵ The government agency would then have to demonstrate “that the application of the burden to the person . . . is in furtherance of a compelling governmental interest [and] is the least restrictive means of furthering that interest.”⁷⁶ Declaratory relief, compensatory damages, costs, and attorneys’ fees are available to the successful claimant.⁷⁷

Our RFRA notice to the State Bar of Texas stated:

The undersigned give notice as required by the Texas Religious Freedom Restoration Act that, as set out above, the actions of the MCLE Board and Ms. Smith constitute a substantial burden upon the religious freedom of the undersigned by the exercise of the governmental authority of the Board and Ms. Smith. The manner in which the respondents have acted will preclude the undersigned from

⁶⁹ See 42 U.S.C. §1983 (2012) (providing a civil cause of action for the deprivation of constitutional rights).

⁷⁰ See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 110.003(a) (West, Westlaw through 2015 Reg. Sess. of the 84th Legislature) (preventing government agencies from placing substantial burdens on the free exercise of religion).

⁷¹ *Id.*

⁷² *Id.* at § 110.001(a)(1).

⁷³ *Id.* at § 110.006(a)(1).

⁷⁴ *Id.* at § 110.006(a)(2).

⁷⁵ *Id.* at § 110.006(a)(3). Claimants in Texas ordinarily must give the agency 60 days to correct the violation, although that time limitation can be waived if “(1) the exercise of governmental authority that threatens to substantially burden the person’s free exercise of religion is imminent; and (2) the person was not informed and did not otherwise have knowledge of the exercise of the governmental authority in time to reasonably provide the notice.” *Id.* at § 110.006(b)(1)–(2).

⁷⁶ *Id.* at § 110.003(b).

⁷⁷ *Id.* at § 110.005(a).

organizing, presenting, and attending accredited CLE programs which touch on religious or moral themes. Law and religion are important aspects of the free exercise of the religion of the undersigned, in their respective roles as educators and attorneys. The Notice which is the subject of this appeal and notice should be immediately rescinded.⁷⁸

This, in connection with the other arguments raised in our appeal, caught the attention of the Bar. It is difficult to imagine any “compelling governmental interest” which the Bar could have raised to our attempt to provide CLE courses so clearly aligned with the applicable ethical rules. There seems to be no argument which the Bar could have advanced to show that denying *future* accreditation for programs which the Bar had not even seen (and which had not even been submitted) could be the “least restrictive means” of accomplishing any compelling governmental interest. The approach we followed in this regard would be a template for other schools in the unfortunate situation where litigation becomes necessary.

CONCLUSION

Religiously affiliated law schools offer our students a faith-based approach to the practice of law. That approach benefits not only our individual students, but their future clients and society. What if we could continue to bring this message to them throughout their careers? The answer is obvious. Faith-based CLE programs will bring this assistance to them and to other attorneys. Our profession, our society, and our economic and political systems will benefit from the infusion of the deeply held moral, ethical, and religious values that brought us into the teaching of law in our unique schools in the first place. We should take the lead in the creation of such programs, and fight, where necessary, with the faith that guides our lives, to receive accreditation for them.

⁷⁸ Letter from Bill Piatt to Nancy R. Smith, Director, St. Bar Tex. Minimum Continuing Legal Educ. (Nov. 18, 2015) (on file with author).