IN THE

Supreme Court of Florida

Case No.: SC21-284

IN RE: AMENDMENT TO RULE REGULATING THE FLORIDA BAR 6-10.3.

COMMENTS OF CARLTON FIELDS, P.A.

This Court's proposed amendment to the Florida Bar Rules was prompted by a policy adopted by the Business Law Section, which mirrors a similar policy adopted by the ABA that went into effect in March 1, 2017. The ABA policy is designed to promote diversity by ensuring that individual CLE programs *include* representation from one or more "diverse" groups, defined as "race, ethnicity, gender, sexual orientation, gender identity, and disability." It requires that any such program consisting of a panel of three or more participants, including a moderator, include the following minimum number of "diverse" members, depending on the size of the panel:

- Panel composed of three or four participants – at least one diverse member

- Panel composed of five to eight participants – at least two diverse members

- Panel composed of nine or more participants – at least three diverse members

Under the ABA policy, the ABA "will not sponsor, co-sponsor, or seek CLE accreditation for any program failing to comply with this policy unless an exception or appeal is granted." The policy adopted by the Business Law Section of the Florida Bar (the "CLE Diversity Policy") is materially indistinguishable from the ABA's policy. But it contains two notable exceptions that allow "non-diverse" CLE panels to proceed where either (1) one or more "previously confirmed diverse speakers or moderators" become unavailable, and insufficient time exists to find a replacement; or (2) "after a diligent search and inquiry," the program sponsors affirm that they have been unable to "obtain the participation of the requisite diverse members of the CLE panel."

This Court disapproved of the Business Law Section's CLE Diversity Policy, citing *Grutter v. Bolliger*, 539 U.S. 306 (2003), and *Regents of University of Cal. v. Bakke*, 438 U.S. 265 (1978), prohibiting the use of quotas in admitting students to academic programs. These decisions are inapposite. In school admissions,

like employment offerings, quotas operate generally to *exclude* other applicants, inflicting legally cognizable harm. That is not the case here. In its Order, the Court does not identify complaints from individuals claiming credibly that they have been excluded from any program through application of the CLE Diversity Policy, which we must presume is why the Court issued its Order on its own motion. Indeed, the undersigned respectfully submit that no one can legitimately complain that they have been injured concretely by the disputed CLE Diversity Policy. This is because the purpose and effect of the CLE Diversity Policy is to *include* underrepresented persons more broadly in CLE programming and thus to expand the pool of talent participating in these important endeavors. The CLE Diversity Policy neither places any cap on participation, nor assumes that any exists. The Court can take judicial notice of the fact that no such cap exists in practice. CLE panels are constituted in a very fluid, *ad hoc* way.

Further, the CLE Diversity Policy includes a very broad definition of "diverse" that would be very hard *not* to satisfy in today's professional climate. Sponsors would almost have to try to exclude diverse participants to miss the mark. Or they might miss it

by not advertently considering the full range of talent available to participate in any given program. The whole point of the policy is to promote this broader perspective. This policy is clearly about "and," not "or," and, as such, it should be applauded by our profession and this Court. We have every reason to believe that this Policy will operate to expand professional growth opportunities to both program panelists and participants and to enrich CLE offerings in every important way.

Finally, the Florida Bar CLE Diversity Policy provides a safety valve for circumstances when this goal cannot be readily satisfied. As described, when the sponsor has lined up diverse members who cancel unexpectedly or when the sponsor is unable to engage diverse panel members despite good faith, diligent efforts, the sponsor may proceed with the program after all. This makes all that much clearer that this Policy is not intended to impose artificial restrictions on CLE programming or to reduce the value or availability of Florida CLE programs to participants or subscribers. Instead, this Policy will operate, in both intent and effect, to expand opportunities for all.

We respectfully request that the Court reconsider its preliminary ruling on these issues with the benefit of this additional input and withdraw its Order and proposed rule changes.

May 18, 2021

Respectfully submitted,

/s/ Gary L. Sasso
Gary L. Sasso (FBN 622575)
President & Chief Executive Officer
Nancy J. Faggianelli (FBN 347590)
Chief Diversity Officer
CARLTON FIELDS, P.A.
4221 W. Boy Scout Blvd., Suite 1000
Tampa, Florida 33607
Telephone: (813) 223-7000
gsasso@carltonfields.com
nfaggianelli@carltonfields.com
mbennett@carltonfields.com
tpaecf@cfdom.net

Rae T. Vann
Shareholder,
Labor & Employment Practice Group
CARLTON FIELDS, P.A.
1025 Thomas Jefferson Street N.W.
Suite 400 West
Washington, D.C. 20007
Telephone: (202) 965-8100
rvann@carltonfields.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing comments was filed with the Clerk of Court via Florida Courts ePortal this 18th day of May, 2021.

/s/ *Gary L. Sasso*
Gary L. Sasso
Florida Bar No. 622575

CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rules of Appellate Procedure 9.045 and 9.210, the undersigned certifies that the foregoing comment complies with the applicable font requirements because it is written in 14-point Bookman Old Style. The comment contains 737 words, excluding those parts exempted by Rule 9.045(e).

/s/ *Gary L. Sasso*
Gary L. Sasso
Florida Bar No. 622575