Filing # 129868050 E-Filed 06/30/2021 11:51:55 PM

Supreme Court of Florida

No. SC21-284

Amendment of Rule 6-10.3(d) (Quota Provisions for CLE Programs)

Comments of Florida Attorney William Hodes

RECEIVED, 06/30/2021 11:52:27 PM, Clerk, Supreme Court

I was first admitted to the Bar in Louisiana in 1969 and have been a member of the Florida Bar since 2011. I am a Professor Emeritus of Law at the Indiana University School of Law at Indianapolis, where I taught Civil Procedure, Constitutional Law, and Professional Responsibility between 1979 and 1999. I am the co-author, with Geoffrey Hazard and Peter Jarvis, of *The Law of Lawyering*, a well-known treatise on legal ethics and related subjects that has been updated at least once annually since original publication in 1985.

In 2000, I established what is now The William Hodes Law Firm, a solo practice law firm limited almost exclusively to counseling, assisting, and representing other lawyers and law firms in legal ethics and legal malpractice matters (including service as an expert witness). I have been a member of the Association of

Professional Responsibility Lawyers (APRL) for almost 30 years and served a term on its Board of Directors.

On June 23, 2021, APRL filed a Comment in this matter, opposing this Court's amendment to Rule 6-10.3(d). Contra APRL, I agree with the Court's analysis of quota regimes generally, and the tenor of its April 15, 2021, *Per Curiam* Order. However, there are interpretive and administrative difficulties that should be addressed through further refinement of the amendment and a fuller explanation by this Court.

First, it should be obvious what the Court meant when it declared that CLE panels put together based on "quotas" are "out of bounds" (in terms of the means employed). Regrettably, however, that is not the case. In professional commentary, and even in comments posted to this Court's Portal, the April 15, 2021, Order has been mischaracterized as *active opposition* to the participation of anyone other than a white male. Other commentary—somewhat less disingenuous, but still erroneous so far as the record reveals—has faulted the Court for being *indifferent* about the lack of racial,

gender, and other diversity on CLE panels, or at least *insufficiently concerned* to support and encourage corrective action.

To clarify its position, this Court should recite and analyze the actual language of the Florida Business Law Section policy that it disapproved. (Or, since that policy has been rescinded, use the American Bar Association policy, which figures heavily in the commentary in any event.)

The word "quota" has been used in many ways over the last 50 or more years, often depending on the attitude of the user towards the program in question. But the touchstone for the kind of genuine quotas that this Court surely meant to put "out of bounds" is the notion of a mandatory *requirement*, based on hard numbers or hard percentages.

In 2017, the ABA changed its CLE policy from an aspirational policy infused with passionate exhortation to one based on hard *mandatory* quotas across the six groupings race, ethnicity, gender, sexual orientation, gender identity, and disability. The ABA did not try to hide the nature of its new policy—CLE programs that do not include the requisite number of presenters from more than one of

these groups simply will not be approved. This was said to be necessary, because the aspirational program had not led to sufficient presenters from certain groups—particularly women and racial and ethnic minorities.[1]

It would also be helpful if the Court would remind the Bar that it issued its Order in furtherance of its authority to regulate and supervise the conduct of lawyers in Florida, *not* in furtherance of its judicial function deciding individual cases. If someone had filed a lawsuit seeking to enjoin the ABA's application of its policy, or to

---

[1] Although the impetus for the new policy was thus to *increase* those numbers, the policy is strangely ineffective in that regard, because it is couched in terms of diversity *only*. There is no requirement that any specific number of individuals from any one of the groups be included; so long as the requisite number of individuals *do not match*—are diverse—a program will be approved if it is otherwise sound.

This means that a CLE panel of three white males *will* be approved, so long as one of them is gay or disabled. By the same token, an ABA Section would be permitted to put on an unending series of programs without *any* participation by lawyers of color, so long as both white men and white women were involved. Similarly, programs including *no* women would routinely be approved, so long as the racial or ethnic diversity requirement was met.

It is unlikely that these extremes would occur in practice other than sporadically, and almost unthinkable that they would occur by design. But that is a result of the Bar's success in internalizing the value of diversity, not because of anything in the new quota policy.

stop Florida from recognizing ABA-approved CLE credits, difficult standing issues would be presented at the threshold, because it would be hard to demonstrate legally cognizable harm fairly traceable to the policy. That difficulty would be matched by the difficulty of distinguishing between state and private action, the difference between classifications based on race and those based on gender or other characteristics, and whether constitutional or statutory norms were in play.

In litigation of that kind, this Court could not have made any substantive ruling without full briefing and oral argument. But it was well within this Court's supervisory powers—and in my view commendable—to take the initial action of simply prohibiting a *Florida* bar entity from adopting "ABA-style" hard quotas, for want of a better word.

Clarifying the basis for the Court's action would also make clearer that it was *not* applying binding legal precedent that specifically outlaws *race-based* quotas in *state-run* programs and institutions. Instead, as this Court said, all hard quotas are "antithetical to basic American principles of nondiscrimination,"

which is true *whether or not they violate the Constitution or other law*. This Court made its own policy judgment that it would not permit hard quotas to infect the legal system in this State.

That leads to the second area in which this Court's Order and the text of the amendment to Rule 6-10.3(d) require further refinement. The Court's response to what it had just effectively found to be "un-American" quota-based discrimination was to withhold CLE credit for programs "that are *tainted* by such discrimination." But how is that taint to be shown? What result, if the organizers of a particular program had proposed a set of presenters without giving even a moment's thought to whether there was a diversity quota in place or whether it would be satisfied? What result, if the presenters had considered diversity, *but would have done so even in the absence of a hard quota regime*?

The text of this Court's amendment to Rule 6.10-3(d) does not take this difficulty into account. The new language bars CLE credit if the *"sponsor . . . uses quotas . . .* in the selection of course faculty or participants." This has widely been taken to mean that *all* programs sponsored (or approved) by the ABA are disqualified in

Florida, without regard to whether the specific program under consideration selected its faculty through the "use" of quotas, merely because the ABA itself does.

That approach to ABA programs is not necessary to this Court's appropriate insistence on removing the "taint" of quotas from its CLE approval process, and it would throw out too many (untainted) babies with the bathwater.

Indubitably, many programs that meet the ABA's quota requirements were developed, and the faculty selected, without any taint: the unanimous first choices for slots on the panel all accepted immediately, and at least one (on a three-personal panel) belonged to a different group than the other two. On the other hand, it must be conceded that at least some panels that eventually passed muster with the ABA did so only after the planners made choices that they would not or might not have made in the absence of a need to conform.

Determining which of those scenarios played out in fact—and numerous intermediate variations are possible—is not a trivial

undertaking. But nor is it markedly more burdensome than many administrative tasks commonly arising in the law.

Any program that has received the imprimatur of the American Bar Association will perforce be "diverse" as defined in its 2017 policy. But this Court could respond by requiring certification that that diversity did not occur "because of" the quota, or some similar formulation.

In most cases, putting together a solid CLE program requires consideration of a variety of sometimes interlocking factors. Many organizers are favorably inclined towards presenting a "diverse" panel, and would do so on their own initiative, in the absence of any quota requirement. Yet virtually none are completely unaware of the ABA's quota system. Thus, because it is impossible to blot out awareness of what it would take to satisfy the ABA, it would be impractical for this Court to require certification that the mere existence of a quota played *no role whatsoever* in the composition of panel.

If a Florida entity is seeking CLE credit for its program, this Court's Order will already have assured that no hard quota is in the

picture. If a Florida entity seeks to bring an ABA-approved program to Florida, it will be responsible for assuring that the program is approved for credit for Florida lawyers who attend. And if an individual member of the Florida Bar seeks credit for having attended such a program out-of-state, that member is already required to describe the program in sufficient detail to satisfy Florida CLE authorities.

In the latter two situations, it should be sufficient for *Florida* officers of the court to make a certification in good faith that they have determined, after reasonable inquiry, that satisfying a hard quota did *not* materially taint the planning process for the program.

Respectfully submitted,

s/ William Hodes
William Hodes
The William Hodes Law Firm
3658 Conservation Trail
The Villages, FL 32163
Florida Bar No. 87764
Tel. 352-630-5788
Email: bill.hodes@gmail.com

Certificate of Compliance

I certify that the foregoing Comment was originally produced as a Word 365 document in 14-point Bookman Old Style. It contains 1652 words.

s/ William Hodes
William Hodes
Florida Bar No. 87764