IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO RULE REGULATING THE FLORIDA BAR— RULE 6-10.3(d)

Case No. SC21-284

COMMENTS OF THE FLORIDA BAR CRIMINAL LAW SECTION

The Florida Bar Criminal Law Section files the following comments in this cause.[1] In so doing, the Criminal Law Section respectfully requests this Honorable Court to reconsider and withdraw the amendment added to Rule 6-10.3(d)[2] with the benefit of additional input provided by comments submitted in this case. The CLS recommends the Court substitute language to add to Rule 6-10.3(b) to state: "The Florida Bar encourages sponsors of CLE courses, including sections and committees of The Florida Bar, to meaningfully broaden, without the use of quotas, participation in the instructor pool for its educational offerings to include individuals with

[1] These comments are submitted solely by the CLS and supported by the separate resources of this voluntary organization—not in the name of The Florida Bar.

[2] (d) Course Approval. Course approval is set forth in policies adopted pursuant to this rule. Special policies will be adopted for courses sponsored by governmental agencies for employee lawyers that exempt these courses from any course approval fee and may exempt these courses from other requirements as determined by the board of legal specialization and education. The board of legal specialization and education may not approve any course submitted by a sponsor, including a section of The Florida Bar, that uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants.

different and diverse backgrounds and experiences." The CLS believes that the adoption of aspirational language (as opposed to mandatory quota requirements) as suggested would reinforce and reaffirm The Florida Bar's commitment to promote and acknowledge the importance of diversity in the profession.

Respectfully, language to that effect added to the rule would also be consistent with and supportive of the comments by Justice Lawson in his concurring opinion in the opinion adopting the amendment in the case styled as *In re: Amendment to Rule Regulating The Florida Bar 6-10.3*, No. SC21-284 (April 15, 2021), to be discussed *infra*.

I THE CRIMINAL LAW SECTION

The Criminal Law Section (CLS) of The Florida Bar, created in 1976, consists of over 2,300 members, including prosecutors, public defenders, private attorneys, judges, law professors, and others. CLS created two areas of board certification, Criminal Trial and Criminal Appellate, and maintains a substantial involvement in each of those areas. The CLS is very interested in the pending issue as it believes that the legal profession more than any other profession has an affirmative obligation to promote, encourage and recognize the societal benefit of diversity to include representation based upon race, ethnicity, gender, religion, national origin,

disability and sexual orientation as leaders, speakers and role models in all bar and law-related activities, including as speakers and presenters at legal seminars and other educational functions. The CLS recognizes that the legal profession in the past has not always lived up to that responsibility and for that reason it has an obligation to be vigilant to take steps to promote and acknowledge the value of diversity in the profession.

The CLS commends The Florida Bar Business Law Section (BLS) for taking this responsibility seriously and for attempting to articulate written guidelines to implement inclusiveness regardless of whether those written guidelines need to be amended to properly and appropriately achieve those policy goals. The CLS shares the BLS's desire to have a diverse group of CLE presenters and speakers, but it has chosen other methods to attempt to achieve this goal. The CLS does not have a written policy similar to the one employed by BLS that gave rise to the amendment adopted in this case. Respectfully, however, the CLS does believe that the wording chosen by the Court for the amendment—unless changed or modified--will adversely affect the perception by lawyers and the public of The Florida Bar and its commitment to promoting and recognizing the value of diversity to the profession. This concern is validated by some of the comments already

received by the Court, including the comments of the respected Wilkie D. Ferguson, Jr. Bar Association.

II THE SCOPE OF THESE COMMENTS

These comments will not further specifically address whether or not the BLS's policy at issue was in violation of the Constitution. CLS recognizes that without regard to that question, this Court has supervisory power over The Florida Bar under Article V, Section 15 of the Florida Constitution, *Liberty Counsel v. Florida Bar Bd. Of Governors*, 12 So.3d 183, 184 (Fla. 2009), and is thus free to amend the Rules Regulating The Florida Bar for whatever reason it chooses—such as a belief that a policy is unconstitutional, a desire to insulate the Bar from a possible lawsuit that might raise a claim of unconstitutionality, or a conclusion that a policy is not appropriate regardless of its constitutionality.

Nor will these comments argue either in favor or against this Court's objective of ensuring that neither The Florida Bar nor any of its entities, such as sections, divisions, and committees, will use a speaker selection process identical to that of BLS,[3] using the term "quota."

---

[3] CLS recognizes as does PILS that this Court cannot under its supervisory power simply preclude sections for using a quota policy because the supervisory power does not extend to the regulation of the activities of those voluntary entities. *Liberty Counsel*, 12 So.3d at 189. It is clear, however, that the amendment this Court adopted will effectively eliminate the use of such policies because it would be economically foolish for

Rather, CLS will focus on why this Court should, and how this Court can, through a clarifying opinion or a change in wording, achieve its objective in a manner that CLS asserts would be better for the lawyers of this state, the legal profession, and the public.

III CLS'S SUGGESTED MODIFICATION OF COURT'S LANGUAGE AMENDING RULE 6-10.3

As previously stated, the CLS believes that the wording chosen by the Court to amend Rule 6-10.3(d) unless changed or modified will create (unintentionally) negative interpretations by lawyers and the public that could possibly adversely affect the perception of The Florida Bar and may cause some to question its commitment to promoting and recognizing the value of diversity to the profession. In support of the need for modification and clarification of the specific language in the amendment, the CLS points to the concurring opinion by Justice Lawson in this case, wherein he states, in part:

> At this Court's direction, both the Bar and the State Court System have for many years worked diligently to assure a system of justice that is fair for all and that treats all individuals as equal under the law. This Court is

---

sections to present courses that do not carry CLE credit and because, without regard to economics, sections will certainly give great deference to this court's concerns.

> steadfast in its firm commitment to these ideals. I believe that these ideals are best advanced when individuals with very different backgrounds and experiences work together. This is because our experiential differences often result in starkly different modes of thought and perception—including deeply divided perceptions surrounding concepts as facially straightforward as "fairness" and "justice."

When lawyers and the public read the amended language in Rule 6-10.3(d), they may perceive that the Bar does not value or recognize the benefits of diversity regarding the composition of faculty at section-sponsored continuing legal education programs. Stated differently, when lawyers or the public read the amended rule without the benefit of Justice Lawson's comments and appropriate clarifying language, they may viscerally react that the Bar has the opposite commitment as to the value of diversity under these circumstances. Lawyers are wordsmiths. The pen is often more powerful than the sword. Words, optics and perceptions matter. The perception concern is validated by some of the comments already filed in this case.

The CLS respectfully recommends the Court substitute language to add to Rule 6-10.3 to state something to the effect: "The Florida Bar encourages sponsors of CLE courses, including sections and committees of The Florida Bar to meaningfully broaden, without the use of quotas, participation in the instructor pool for its educational offerings to include individuals with different and diverse backgrounds and experiences." The CLS believes that the adoption of aspirational language (as opposed to mandatory quota requirements) to that effect would reinforce The Florida Bar's commitment to promote and acknowledge the importance of diversity in the profession.

Respectfully, language to that effect would also be consistent with the excellent and powerful comments to that effect by Justice Lawson in his concurring opinion in the opinion adopting the amendment. Alternatively, the CLS agrees with the dissent of Justice Labarga, wherein he stated:

> Because I do not believe that the enactment of a rule specifically addressing this issue is necessary, I dissent. I believe that a simple letter directed to the Business Law Section, communicating that such action may be in violation of United States Supreme Court precedent, would have sufficed. *See e.g., Grutter v.*

Bollinger, 539 U.S. 306, 334 (2003); *Regents of Univ. of Cal. V. Bakke,* 438 U.S. 265, 307 (1978).

IV ADOPTION OF THE COMMENTS OF THE FLORIDA BAR PUBLIC INTEREST LAW SECTION, THE COMMENTS OF CARLTON FIELDS, P.A., AND THE COMMENTS OF THE MIAMI-DADE COUNTY BAR ASSOCIATION

CLS has reviewed the comprehensive and well-reasoned comments filed by The Florida Bar Public Interest Law Section (PILS) on 6/29/2021, the comments of Carlton Fields, P.A., filed on 5/18/2021, and the comments of the Miami-Dade County Bar Association filed on 6/29/2021. Following the lead of The Florida Bar PILS, Carlton Fields, P.A., and the Miami-Dade County Bar Association, CLS hereby agrees with, adopts, and reasserts those comments on its own behalf with the additional comments contained herein, and urges the Court to reconsider its amendment to Rule 6-10.3 with the benefit of this additional input.

V PRACTICAL NEGATIVE IMPACTS AS A RESULT OF RULE CHANGES

The Comments by PILS filed with the Court persuasively point out several additional substantial practical negative consequences that would arise from the rule amendments, including:

A. The rule as interpreted by the Bar will preclude Florida attorneys from obtaining CLE credit for attending courses that meet all

qualitative requirements and will deter them from attending courses that might offer the most appropriate CLE for them.

B. The rule as interpreted by the Bar will diminish the opportunities for Bar entities to cosponsor CLE programs with non-Bar entities.

C. The rule as interpreted by the Bar will keep Florida attorneys from receiving CLE credit for courses even when no quotas were used to select speakers.

D. The rule as interpreted by the Bar will keep Florida attorneys from receiving CLE credit for speaking at CLE courses and will deter them from speaking at such courses.

E. The rule as interpreted by the Bar will keep Florida attorneys from receiving board certification (as opposed to CLE) credit despite the fact that board certification is voluntary while CLE is mandatory.

The Criminal Law Section also fully adopts the Comments of Carlton Fields, P.A., in which it states:

> 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" became 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. Bollinger*, 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 Police 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.

DATED this 8th day of July, 2021.

Respectfully submitted,

/s/ Jason B. Blank

JASON B. BLANK, Chair
The Florida Bar Criminal Law Section
Florida Bar No. 28826
Haber Blank, LLP
888 S. Andrews Ave., Suite 201
Fort Lauderdale, FL 33316-1047
jblank@haberblank.com

/s/ Warren William Lindsey

WARREN WILLIAM LINDSEY, Immediate Past Chair
The Florida Bar Criminal Law Section
Florida Bar No. 299111
Lindsey & Ferry, P.A.
1150 Louisiana Ave., Suite 2
Winter Park, FL 32789-2354
warren@warrenlindseylaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of Court on July 8, 2021, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

/s/ Warren William Lindsey
_____
WARREN WILLIAM LINDSEY

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this document complies with the appropriate font (Arial 14-point) and word count limit requirements.

/s/ Warren William Lindsey
_____
WARREN WILLIAM LINDSEY