

IN THE SUPREME COURT OF FLORIDA

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

CASE NO. SC21-284

COMMENT OF THE
NATIONAL ASSOCIATION FOR PUBLIC DEFENSE

The National Association for Public Defense (NAPD) respectfully urges this Honorable Court to reconsider its amendment to the Rule Regulating The Florida Bar 6-10.3. Having diverse speakers train assistant public defenders, assistant regional counsels, and private court appointed counsel (public defense counsel) is crucial to helping those lawyers gain the competence necessary to represent their clients.

NAPD is the only national organization representing attorneys who work in public defense, consisting of more than 25,000 public defense counsel and public defense professionals. A significant portion of our activities involve sharing high-quality training and relevant resources to improve client-centered representation of indigent clients who are accused of crime.

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Training public defense counsel presents a special challenge. Despite best efforts to hire diverse attorneys, attorneys in public defender offices remain largely white non-hispanic because of the pool from which hiring necessarily occurs—attorneys who are admitted to the practice of law. According to the most recent data available, The Florida Bar is 82% white, 10% Hispanic, and 4% black.¹ These newly-minted assistant public defenders, many of them recent graduates from law school, walk into an overburdened criminal justice system where black defendants make up a disproportionately large percentage of their clients.²

These attorneys would not intentionally violate the ethical prohibition on discrimination. R. Regulating Fla. Bar 4-8.4(d). But

¹ <https://www-media.floridabar.org/uploads/2019/03/2018-Economics-Survey-Report-Final.pdf>. According to ABA data, of the current law school students, 61% of are white, 7.7% are black, 13% are Hispanic, with smaller percentages of other racial or ethnic groups.
[https://www.americanbar.org/groups/legal_education/resources/statistics/\(click on 2020 1L Enrollment by Gender & Race/Ethnicity \(Aggregate\)\)](https://www.americanbar.org/groups/legal_education/resources/statistics/(click%20on%202020%201L%20Enrollment%20by%20Gender%20&%20Race/Ethnicity%20(Aggregate))).

² Blacks make up 26.6% of those arrested for crime, approximately double the 13.4% of the population that is black. Department of Justice, Federal Bureau of Investigation, 2019 Crime in the United States, Table 43 (<https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/tables/table-43>); United States Census Bureau, Quick Facts, (<https://www.census.gov/quickfacts/fact/table/US/PST045219>).

good intentions pave a well-known path. When the Herald-Tribune published a study showing the racial disparity in sentencing,³ the response from the bench was that “the vast majority of sentencing outcomes . . . are dictated by the parties and the result of negotiations that take place outside the courtroom, without any judicial input.”⁴ That fact highlights a problem—well-intentioned defense attorneys are negotiating pleas that are on average worse for black clients, even when all other factors are equal. The existence of such a bias in the best-intentioned public defense counsel is becoming an increasingly recognized phenomenon.⁵

³ Josh Salman, Emily Le Coz, Elizabeth Johnson, *Florida’s broken sentencing system*, HERALD-TRIBUNE (Dec. 12, 2016) (<http://projects.heraldtribune.com/bias/sentencing/>).

⁴ Charles E. Williams, Chief Judge, 12th Judicial Circuit, *Bias on the Bench?*, THE FLORIDA BAR NEWS, letters (June 15, 2017) (<https://www.floridabar.org/the-florida-bar-news/letters-184/>).

⁵ *E.g.*, L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L. J. 2625 (2013) (https://www.yalelawjournal.org/pdf/1199_pzeey4t1.pdf); Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755 (2012) (<https://digitalcommons.law.seattleu.edu/sulr/vol35/iss3/7/>); Jeff Adachi, *Public defenders can be biased, too, and it hurts their non-white clients*, THE WASHINGTON POST (June 7, 2016) (<https://www.washingtonpost.com/posteverything/wp/2016/06/07/public-defenders-can-be-biased-too-and-it-hurts-their-non-white-clients/>).

This unintentional bias is a matter of competence. The ethical duty to competence requires “preparation reasonably necessary for the representation.” R. Regulating Fla. Bar 4-1.1. Part of that preparation involves taking whatever steps are necessary to ameliorate any unintentional bias that blocks a lawyer from acting “with commitment and dedication to the interest of the client and zeal in advocacy upon the client’s behalf.” R. Regulating Fla. Bar 4-1.3 (Diligence) (Comment).

Countering unintentional bias requires very different tools than the colorblindness used to combat intentional racism. While there are no easy or complete solutions, two meta-analyses (studies of multiple studies), using different methodologies, both suggest that exposure to counterstereotypical examples is helpful.⁶ One

⁶ Chloe FitzGerald, et al., *Interventions designed to reduce implicit prejudices and implicit stereotypes in real world contexts: a systematic review*, 7 BMC PSYCHOL. 29 (2019) (“two of the categories that were most effective in our review, evaluative conditioning and counterstereotypical exemplars, involve associating sets of concepts, and interventions invoking goals or motivations would be included in our intentional strategies category, which also included effective interventions. Any confirmation between our review and that of Forscher et al. is of note, especially given that we used different search terms, research questions, and inclusion criteria.”) (available at: <https://bmcpyschology.biomedcentral.com/articles/10.1186/s40359-019-0299-7#citeas>); Patrick S. Forscher, et al., *A Meta-Analysis*

way to gain such exposure is by attending courses, trainings, and workshops that not only address these topics, but that have speakers who reflect the racial and ethnic diversity of our client population, have lived experiences that are similar to those of the people we serve, and can help prepare public defenders to provide equitable services to all of their clients. As such, it matters who is asked to speak at CLE presentations. The ABA recognized this reality in promulgating its policy requiring the person(s) putting together a panel discussion to make sure they were including diverse presenters. As other commentators have noted (and therefore will not be repeated in detail here), expanding a panel to include diverse voices is not a quota because it excludes no one. Quite literally, it is just putting one or two more chairs on the dais.

As of now, there is no magic bullet that defeats unintentional bias. A diversity requirement to expand counterexamples is at least a helpful start. The Business Law Section should be commended, not condemned, for following the ABA's lead in this matter. Many

of Procedures to Change Implicit Measures, 117 J. PERSONALITY & SOCIAL PSYCHOL. 522-59 (2019) (available at: <https://psyarxiv.com/dv8tu/>).

CLE programs rely on the generosity of presenters who donate their time and resources to teach.

The NAPD's experience is that an increasing number of high-quality trainers and presenters now factor the CLE provider's commitment to faculty and participant diversity into their decision about whether to accept an invitation to teach. Increasingly, presenters from all points on the spectrum of racial, ethnic, religious, gender, national origin, and sexual orientation are refusing to lend their expertise to programs that do not have diversity policies and requirements.

The net result of this Court's order is that Florida's public defense counsel will not be able to receive continuing education credits for, and therefore are unlikely to attend, high-quality national training programs designed to further their competence. That would be a loss for both the attorneys and their clients, with no offsetting gain to anyone.

The NAPD salutes this Court's proactive attention to ensuring that its policies do not increase racial divisions in society. This Court's amended Rule 6-10.3, however, has the opposite effect of its intentions. In remedying what this Court erroneously perceived as

a quota that excluded based on race, this Court prohibited an inclusive policy that is at least a helpful start in healing racial divisions.

The NAPD therefore urges this Court to revise its amendment to Rule 6-10.3. In addition to banning quotas, this Court should also promulgate a rule allowing diversity policies in selecting CLE presenters that require inclusion of diverse voices. The NAPD respectfully suggests that this Court adopt a policy similar to the following:

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 to exclude faculty or participants based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation. The board of legal specialization and education may approve a course that requires inclusion of faculty or participants based on race, ethnicity, gender, religion, national origin, disability, gender identity or sexual orientation.

Respectfully submitted by the
NATIONAL ASSOCIATION FOR
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CERTIFICATES

I hereby certify that these comments were filed with Clerk of the Court via the ePortal on July 14, 2021, and that they are printed in 14-point Bookman Old Style.

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