IN THE FLORIDA SUPREME COURT

No. SC21-284

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

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COMMENTS OF THE AMERICAN BAR ASSOCIATION

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The American Bar Association's Diversity & Inclusion Policy for Continuing Legal Education (CLE) panels is *not* a constitutionally forbidden "quota." It is a policy of *inclusion*—not *exclusion*. As designed and carried out, the policy has fostered the participation and engagement by diverse lawyers that may not otherwise have been available in CLE programs. The policy does so without infringing on constitutionally protected individual rights.

The ABA's mission "is to serve equally our members, our profession and the public by defending liberty and delivering justice as the national representative of the legal profession." As the leading national membership organization of the legal profession, the ABA has worked for decades to ensure that all Americans—regardless of racial or ethnic background, gender, sexual orientation, or disability—are able meaningfully to participate in our legal system's institutions.

Not long ago, this country not only denied the value of diversity, but actively sought to prevent it. The ABA, for example, excluded African Americans from membership until 1943. The ABA and the nation have taken significant steps to put that shameful history

behind us; we no longer question the benefits of diversity and inclusion so that all Americans can be full and effective participants in national life, nor the value of that participation. Nonetheless, many diverse communities still are not full and effective participants in the legal system. We must not now abandon our course of the last 80 years, which has moved the country closer to achieving our crucial, but as yet unrealized, goal of full and equal participation for all persons.

The ABA has made great strides toward removing obstacles to the participation by diverse populations in the practice of law. Its commitment was reinforced and revivified with the 2008 adoption of ABA Goal III, which pledges to eliminate bias in the legal profession. As the national representative of the legal profession, the ABA believed—and believes—that it was of key importance that the ABA take the lead on this important issue.

The adoption of Goal III notwithstanding, the ABA found in a 2010 report on diversity that "[s]everal racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession." To redress

that failing and the historical exclusion of many groups of people, the ABA adopted its Diversity Plan and, most recently, has conducted a top-to-bottom analysis of diversity and inclusion, both in the profession and within the ABA.

One of the outgrowths of this work was the adoption of the Diversity & Inclusion Policy for CLE panels that are sponsored or co-sponsored by the ABA. The ABA's approach is neither a "quota" nor a preference system that would fail under the United States Supreme Court's equal protection case law. The essence of the Court's cases is that quotas cannot be used to infringe on legally protected interests—and the Diversity & Inclusion Policy infringes on no one's protected interests.

There are no "set asides" or reserved seats for certain categories of individuals. In the rare instance in which a panelist who brings diversity could not be located, the ABA is empowered to grant a waiver for an individual program. More typically, however, an individual who brings diversity has been identified—and then *added* to the CLE panel. No panel members are displaced or replaced under

the Diversity & Inclusion Policy's aegis. There is thus no interest of any individual to be protected from the policy.

Because this Court found that the diversity policy adopted by the Business Law Section was impermissibly quota-based, the Court adopted an amendment to Florida Rule Regulating The Florida Bar 6.10(3)(d) on April 15, 2021. *In re: Amendment to Rule Regulating The Florida Bar 6-10.3*, No. SC21-284 (Apr 15, 2021). A possibly unintended consequence of the amendment has been the exclusion of the ABA's CLE programs from Florida Bar accreditation, which is depriving Florida lawyers of access to a vast array of ABA CLE presentations. The ABA requests that the Court clarify its opinion by distinguishing between forbidden quotas and a policy, such as the ABA's, that promotes only inclusion and does not run afoul of equal protection guarantees.

The ABA's CLE programs should not be denied Florida accreditation. Doing so would greatly disserve Florida lawyers, to no discernible beneficial end.

I. THE ABA'S GOAL III AND DIVERSITY INITIATIVES.

In 2008, the ABA's House of Delegates adopted the ABA's Goal III—one of only four ABA Goals—which states:

> **GOAL III: ELIMINATE BIAS AND ENHANCE DIVERSITY**
>
> Objectives:
>
> 1. Promote full and equal participation in the Association, our profession, and the justice system by all persons.
>
> 2. Eliminate bias in the legal profession and the justice system.

Appendix (hereinafter, "A") at 82. Goal III's antecedent, Goal IX, was adopted by the ABA in 1986 to promote participation in the legal profession by racial minorities and women. Goal IX was amended in 1999 to include persons with disabilities, and in 2007 to address sexual orientation and gender identity. In 2008, the House of Delegates voted to revise the ABA's goals to ensure that the rights of all groups would be addressed, and Goal III, which speaks to "eliminating bias," was adopted.

In the pursuit of Goal III, the ABA's Center for Diversity and Inclusion in the Profession, the Commission on Women in the

Profession, the Commission on Mental and Physical Disability Law, and the Commission on Sexual and Gender Identity, have led the way in undertaking a wide range of diversity and inclusion efforts. In 2010, the ABA's Presidential Initiative Commission on Diversity published its Report and Recommendations, which found that "[s]everal racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession." A.B.A. Presidential Diversity Initiative, Diversity in the Legal Profession (2010) (Diversity Report) at 3 (A:46). A diverse legal profession, however, "is more just, productive and intelligent because diversity, both cognitive and cultural, often leads to better questions, analyses, solutions, and processes." *Id.*

"If any part of our profession—especially the vast and powerful fields of private practice—fails to be diverse and inclusive, we are sending meaningful symbolic messages to members of underrepresented groups, especially those of lower socioeconomic status." Diversity Report at 21 (A:64). Moreover, "the actual state of diversity among judicial and government offices" was found to be "woefully inadequate." *Id.* at 25 (A:68).

II. THE DIVERSITY PLAN.

In May 2011, the ABA adopted its Diversity Plan to achieve Goal III. A.B.A., Diversity Plan (May 2011) (the Diversity Plan).

The Diversity Plan was intended to:

- foster the recruitment and retention of diverse lawyers and law students in the ABA;
- enhance opportunities for diverse individuals to participate in ABA activities and programs; and
- promote a culture of inclusion.

Diversity Plan at 2 (A:83). Building diversity within the ABA provides the foundation to the ABA's efforts to promote diversity throughout the profession, including academia, the judiciary, and workplaces, both public and private.

The Diversity Plan was devised to achieve both diversity, *i.e.*, the presence of lawyers from all backgrounds, *and* inclusion, through the full and equal participation of those lawyers in the ABA. *See* A.B.A., Goal III Report (2020) (A:6-41). Included in the Diversity Plan is the promotion of "diversity in CLE and other programming," the effectuation of which requires the ABA to:

- Implement strategic actions to improve diversity among speakers, moderators, and attendees.
- Ensure program content appeals to diverse communities, consistent with the sponsoring entities' subject matter specialties, if any.
- Urge ABA entities to explore partnering or co-sponsoring opportunities with affinity bars and other organizations that can contribute to diversity.
- Ensure program venues and materials are accessible to participants with disabilities.
- Urge ABA entities to use program locations and venues, as well as social media, to enhance opportunities for participation by diverse lawyers and law students.

Diversity Plan at 6 (A:87).

Following adoption of the 2011 Diversity Plan, the ABA made significant efforts to achieve diversity and inclusion goals through voluntary action. *See* Standing Comm. on Continuing Legal Educ. (SCOCLE), Strategic Actions for Enhancing Diversity in CLE Programming (July 17, 2012) (A:90-95) (outlining strategic action

plan to "develop and maintain diversity in all phases" of CLE and other programming); SCOCLE, Goal III Policy (Oct. 15, 2014) (A:96-97) (outlining basic statistical data on diversity and goals to advance the ABA's Goal III). Unfortunately, voluntary efforts fell far short of the Diversity Plan's aspirations. *See* Letter from Paulette Brown, A.B.A. President, to A.B.A. Chairs (June 15, 2016) (A:98-99); Decl. of Paulette Brown (A:455-57).

III. THE DIVERSITY & INCLUSION CLE POLICY.

In 2015, then-ABA President Paulette Brown created the ABA Diversity & Inclusion 360 Commission (the 360 Commission) to conduct a review of diversity and inclusion within the legal profession, and to develop a comprehensive and sustainable plan for the ABA going forward. A.B.A., Diversity & Inclusion 360 Commission Executive Summary (2016) (A:101); Brown Decl. at 2-3 (A:456-57). The 360 Commission recommended the adoption of 10 proposals to foster diversity and inclusion, among which was the Diversity & Inclusion CLE Policy.

As President Brown explained:

> [F]or numerous years, the ABA had an aspirational policy which provided that all entities of the ABA, when sponsoring or co-sponsoring a program, would have diversity on its panels.
>
> Over the years, many [ABA] entities have made great efforts and strides in that regard, and have been models for success. Unfortunately, there are some entities that sponsor or co-sponsor panels which do not include diverse members of our profession. This failure to comply stands in the way of fulfilling one of the ABA's four goals—to promote full and equal participation in our association, profession, and justice system by women, racial and ethnic minorities, persons with disabilities, and persons of differing sexual orientations and gender identities. We believe all ABA entities can be successful in this regard. As leaders in the legal profession, we know we cannot be successful and our Association cannot grow if we are not inclusive of all people.

Letter from Paulette Brown, A.B.A. President, to A.B.A. Chairs (June 15, 2016) (A:98).

The policy, as presented to and adopted by the ABA's House of Delegates and Board of Governors in June 2016, states:

> The ABA expects all CLE programs sponsored or co-sponsored by the ABA to meet the aspirations of Goal III by having the faculty include members of diverse groups as defined by Goal III (race, ethnicity, gender, sexual orientation, gender identity, and disability). This policy applies to individual CLE programs whose faculty consists of three or more panel participants, including the moderator. Individual programs with faculty of three or four panel participants, including the moderator, will require at least 1 diverse member; individual programs

> with faculty of five to eight panel participants, including the moderator, will require at least 2 diverse members; and individual programs with faculty of nine or more panel members, including the moderator, will require at least 3 diverse members. 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 ABA implementation date for the new Diversity & Inclusion CLE Policy shall be March 1, 2017.
>
> A subcommittee of SCOCLE will be created which will include representatives from SOC. If for some rare or extraordinary reason a panel does not comply and not [sic] be granted an exception for one time only on behalf of that panel the entity can opt to pay a fine of $2500 to the diversity center rather than lose CLE credit for that panel. This exception can only be granted one time.

ABA Diversity & Inclusion CLE Policy (June 10, 2016) (A:112).[1]

The Diversity & Inclusion Policy, which was the product of extensive study and consideration by the 360 Commission, ensures that each potential ABA CLE faculty member is considered based on the member's accomplishments, expertise, and ability to contribute to an effective learning environment—including whether the member brings diversity to a CLE panel. The policy was implemented on March 1, 2017.

[1] For the 2021 revised version of the Diversity & Inclusion Policy, see Part V, *infra*.

The Diversity & Inclusion Policy is *not* exclusionary in operation, as the 360 Commission explained:

> Unfortunately, too often when diversity and inclusion is advocated, some incorrectly believe there will be an exclusion of certain segments of the population. The purpose is to include those who traditionally have not been invited to participate. *All others can continue to participate.*

Memorandum from Diversity & Inclusion 360 Comm'n to A.B.A. Bd. of Governors., ABA CLE Policy on Diverse Faculty - Amended at 2 (June 3, 2016) (A:114) (emphasis added).

Since the Diversity & Inclusion Policy went into effect in March 2017, there have been eight waiver requests, only two of which were granted; other requests were either withdrawn because the panels included members who brought diversity or were resolved by **adding** individuals who brought diversity to the panels. Decl. of Gina Roers-Liemandt, Ex. A, Gina Roers-Liemandt, A.B.A. Director, MCLE & Prof'l Dev., ABACLE Programming After the Effective Date of the ABA CLE Diversity and Inclusion Policy – March 1, 2017 – April 15, 2021 (2021) (ABACLE Programming Report) (A:119-23). The ABA has received no "negative feedback about the policy itself or expressions

of difficulty meeting the policy from ABA staff or volunteer planning committees, leadership, or speakers." *Id.* at 3 (A:122).

The Diversity & Inclusion Policy is but one component of the ABA's diversity and inclusion efforts. As set forth in the 360 Commission's report:

> [T]he Commission stitched together disparate bodies of information. It created a national database of pipeline programs and launched a diversity and inclusion web portal, both of which pull together important information that is empowering when assembled and placed—virtually—into the hands of its intended end users. . . . [T]he Commission probed into sensitive areas such as the implicit bias that compromises our justice system but has its origins in our very own hearts and views of the world. It created a series of training videos—for judges, prosecutors, and public defenders—that examine implicit bias and what to do about it. The Commission also prodded others to act. It proposed policies that will encourage clients to use their purchasing power to increase economic opportunities for diverse attorneys and called for governing bodies to make diversity and inclusion a required area of study within mandatory continuing legal education.

A.B.A., Diversity & Inclusion 360 Commission Executive Summary (2016) at 2 (A:103).

IV. THE DIVERSITY & INCLUSION POLICY DOES NOT OFFEND EQUAL PROTECTION GUARANTEES.

The Diversity & Inclusion Policy readily passes muster under the principles exemplified in *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). It offends nothing in the Supreme Court's jurisprudence.

First, the Policy does *not* create impermissible quotas. "Properly understood, a 'quota' is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups." 539 U.S. at 335 (citation and internal quotation marks omitted). "Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the individual from comparison with all other candidates for the available seats." *Id.* (citation and internal quotation marks omitted). The "narrow tailoring" requirement imposed by the Supreme Court on race-conscious policies exists to ensure that such policies do "not unduly harm members of any racial group." *Id.* at 341. The Diversity & Inclusion Policy harms *no* members of *any* identifiable group.[2]

[2] Quotas, in the sense of seats set aside for certain persons to serve on government boards and panels, are found throughout Florida statutes and rules—ranging from the requirement that The Florida

Rather, as set forth above, diversity is but *one* factor that it taken into consideration in determining whether an individual is added to an ABA CLE faculty.[3] Diversity may be "a 'plus' factor in the context of individualized consideration of each and every applicant," but that is an entirely "permissible goal." *Id.* at 334, 355. As the Supreme Court stated in *Grutter*, equal protection "permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate compete[s] with all other qualified applicants." *Id.* at 335 (citation and internal quotation marks omitted). That is *not* "the functional equivalent of a quota merely because it had some 'plus' for race, or gave greater weight to race

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Bar's Standing Committee on Pro Bono Legal Service include representatives of civil legal assistance providers and voluntary bar associations, as well as members of the public, Fla. R. Reg. Fla. Bar 4-6.5(b), to the specific qualifications of members of the public who can serve on the Statewide Drug Policy Advisor Council, § 397.333(1)(c), Fla. Stat. 2021). (A:471-472). It is only *discriminatory* quotas that draw the Equal Protection Clause into operation.

[3] Indeed, the ABA "does not track or record specific diversity information related to our speakers." ABACLE Programming Report at 4 (A:123). Panel planners need only check a box on the application form to confirm compliance with the Diversity & Inclusion Policy (or request a waiver); the ABA neither requests nor records data on the makeup of its panels. *Id.* at 2, 4 (A:121, 123).

than to some other factors, in order to achieve student body diversity." *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317-18 (1978) (opinion of Powell, J.)).[4]

Second, the Policy would be valid as a racial classification under *Grutter*. "[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, the action is reviewed under strict scrutiny." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).[5] That burden requires a showing that the classification "is narrowly tailored to achieve a compelling government interest." *Id.* (citations and internal quotation marks omitted). In the context of racial classifications for school admissions there are two valid government interests:

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[4] *Cf., Gratz v. Bollinger*, 539 U.S. 244, 271-72 (2003) (awarding points to college applicant based solely on race is unlawful; "automatic distribution" of points "has the effect of making the 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant").

[5] The standard is somewhat less stringent for sex or gender classifications, which are reviewed under a "heightened scrutiny" test. *E.g., Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1689-90 (2017); *Adams v. Sch. Bd. of St. Johns Cnty.*, 968 F.3d 1286, 1295-96 (11th Cir. 2020). Classifications based on disability are subject to the "rational basis" test. *E.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985).

"remedying the effects of past discrimination"; and "the interest in diversity in higher education." *Id.* at 721-22.

In *Grutter*, the Supreme Court held that the University of Michigan Law School "has a compelling interest in attaining a diverse student body." *Grutter*, 539 U.S. at 328. "As part of its goal of assembling a class that is both exceptionally academically qualified and broadly diverse, the Law School seeks to enroll a critical mass of minority students." *Id.* at 329 (citation and internal quotation marks omitted). "[The] benefits are substantial":

> [T]he Law School's admission policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.
>
> . . . [N]umerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.
>
> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. . . . .

Id. at 330 (citations and internal quotation marks omitted).

"To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)). The Court explained:

> Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file," without "insulat[ing] the individual from comparison with all other candidates for the available seats." In other words, an admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

Grutter, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315, 317 (opinion of Powell, J.)).

The ABA's Diversity & Inclusion Policy satisfies these standards. As Professor Theodore M. Shaw, who served on the University of Michigan Law School faculty committee that wrote the admissions policy upheld in *Grutter*, explains:

> *Grutter* is inapplicable to the ABA's Diversity and Inclusion policy because: (i) although racial quotas in admissions to selective public colleges and universities violate the

> Fourteenth Amendment's equal protection clause, even applying strict scrutiny, the U.S. Supreme Court in *Grutter* upheld Michigan's race-conscious admissions plan designed to achieve diversity because it did not employ quotas; (ii) . . . the ABA Diversity and Inclusion policy does not impose racial quotas or otherwise inflexibly require any number of CLE faculty from any specific racial background; and (iii) the ABA policy does not deprive any individual of any legally cognizable interest, opportunity or right.

Declaration of Theodore M. Shaw at 1-2 (A:462-63).

In operation, the Diversity & Inclusion Policy is precisely engineered to ensure fairness and inclusion. If, after a panel of presenters is assembled, the Policy is found to be satisfied by panel members who bring diversity, the program proceeds to the next step in the CLE approval process. If, on the other hand, the selected panel members do not include an individual who brings diversity, the ABA entity can *add* a panel member who does. Declaration of Porscha Boyd (A:447). And, absent that, the entity can apply for a waiver of the Policy. As former ABA President Paulette Brown has explained: "[I]nclusion is not exclusion." Brown Decl. at 3 (A:457).

This goal is effectuated in practice as explained by John C. Bonnie, a leader in the Insurance Coverage Litigation Committee of

the ABA's Litigation Section, who has organized numerous CLE conferences:

> Based upon my experience as a vice-chair of the 2016 CLE conference, chair of the 2017 CLE conference, and a vice-chair of the ICLC itself beginning in 2019, as a result of which I was involved in the selection of programs for the 2020 and 2021 CLE conferences, I can attest to the fact that panel selections for these meetings were not decided based upon the gender, racial, ethnic or other diverse characteristics of the proposed panelists. No panel was rejected on the basis of a lack of diversity in the make-up of the panel. After selecting a panel for presentation, requests were made to increase diversity among the speakers if it was lacking to find an additional speaker who would – foremost – bring expertise to the panel, but also diversity. Sometimes a diverse speaker was thereafter added to a panel; other times there was no change in the make-up of the panel. No speaker was ever removed from a proposed panel in order to accommodate a diverse speaker.

Declaration of John C. Bonnie (A:451).[6]

The Diversity & Inclusion Policy is "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them

[6] Mr. Bonnie's affidavit cites examples of other inclusion efforts in ABA CLE programs. (A:451-52).

the same weight." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315, 317 (opinion of Powell, J.)). The Policy is directly targeted at achieving the laudable goals set forth in *Grutter*: "better prepar[ing] [lawyers] for an increasingly diverse workforce and society"; "promot[ing] cross-racial understanding"; and ensuring that "the path to leadership [is] visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. at 330, 332 (citation omitted). Diversity on CLE panels also benefits other panelists by introducing new ideas and perspectives into programs, all without infringing on individual presenters' rights.

As the Program Manager for the ABA's Litigation Section explains, the Diversity & Inclusion Policy "does not stop the [ABA] from admitting a speaker to a panel because of a 'held spot' or 'quota'"; rather, "[a]ll people have equal opportunity to speak on a panel." Boyd Decl. (A:448). As Professor Shaw puts it: "No one has been excluded from ABA CLE programs. No one is denied an opportunity to serve as a CLE faculty member as a result of the ABA inclusion policy." Shaw Decl. at 2 (A:463). The Diversity & Inclusion Policy hews closely to Chief Justice Roberts' adjuration that "[t]he

way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved*, 551 U.S. at 748.

V. THE ABA'S REVISED POLICY.

As set forth in the preceding section, the ABA's CLE Diversity & Inclusion Policy was not intended be, and has not operated as, an impermissible quota. As effected, the policy does not offend the principles established in *Grutter* and *Bakke*.

Following the issuance of this Court's order and The Florida Bar's application of the order to bar ABA CLE programs from accreditation in Florida, however, the ABA undertook to reconsider the policy from the ground up, in an effort to understand how the policy could have been misperceived. That process culminated in a revised policy, the language of which now accurately reflects the policy's actual operation since its inception.

The amended policy reads as follows, with additional words in bold and deletions struck through:

> The ABA expects all CLE programs sponsored or co-sponsored by the ABA to meet the aspirations of Goal III by having the faculty include members of diverse groups

as defined by Goal III (race, ethnicity, gender, sexual orientation, gender identity, and disability). This policy applies to individual CLE programs whose faculty consists of three or more panel participants, including the moderator.

Individual programs with faculty of three or four panel participants, including the moderator, will require at least 1 diverse member; individual programs with faculty of five to eight panel participants, including the moderator, will require at least 2 diverse members; and individual programs with faculty of nine or more panel participants, including the moderator, will require at least 3 diverse members.

This is a policy of inclusion and not exclusion. To that end, if a CLE panel is not otherwise diverse, program organizers will add panel participants who bring diversity to achieve the goal of this 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~~ **a waiver** is granted. The ABA implementation date for the new Diversity & Inclusion CLE Policy shall be March 1, 2017.

A subcommittee of SCOCLE will be created which will include representatives from SOC. **On one occasion per entity only,** the subcommittee of SCOCLE may permit **an entity to go forward with a CLE program that has a nondiverse panel if the entity does not receive a waiver for that program**. ~~If for some rare or extraordinary reason a panel does not comply and not be granted an exception for one time only on behalf of that panel the entity can opt to pay a fine of $2500 to the diversity center rather than lose CLE credit for that panel. This exception can only be granted one time~~

(A:454).

With this clarification, which reflects how the Policy actually operates, the ABA believes that there can no longer be any doubt that its Diversity & Inclusion Policy does not offend the equal protection principles set forth in *Grutter* and *Bakke*. Turning again to Professor Shaw:

> Diversity efforts in the context of ABA CLE faculty and programs do not discriminate against white individuals. They have always been represented and will continue to be. Efforts to guarantee that others are included in ABA faculty panels are not discriminatory; they are inclusive.

Shaw Decl. at 3 (A:464).

VI. EXCLUDING THE ABA FROM PRESENTING CONTINUING LEGAL EDUCATION PROGRAMS IN FLORIDA WOULD DISSERVE FLORIDA LAWYERS.

Since March 1, 2017, the effective date of the Diversity & Inclusion Policy, through April 2021, the ABA has presented in Florida:

- 2,893 CLE programs offering CLE credit to Florida-licensed lawyers;
- comprising 8,402 sessions within those programs that satisfied the Diversity & Inclusion Policy;

- that offered 12,297 CLE credits to Florida-licensed lawyers.

ABACLE Programming Report at 1 (A:120); *see also* Roers-Liemandt Decl., Ex. C, ABA MCLE Florida Attendance Worksheet (A:222-444). From January 2019 (the earliest date for which this data is available) through April 2021, a total of 2,758 Florida-licensed lawyers have taken ABA programs for CLE credit. ABACLE Programming Report at 2 (A:121).

The ABA's CLE offerings cover a wide range of practice areas and skills training, presented by experts from across the country, much of which is not readily available from other providers. *See* ABACLE Programming Report (A:119-23); *see also* Roers-Liemandt Decl., Ex. B, ABA MCLE Program and Session Offering Worksheet (A:124-221); Roers-Liemandt Decl., Ex. C, ABA MCLE Florida Attendance Worksheet (A:222-444). From January 2019 through April 2021, a total of 8,662 certificates for program completion have been issued for ABA programs, including 2,645 ethics, professionalism, substance abuse, mental health, elimination of bias, and technology certificates. Roers-Liemandt Decl., Ex. B (A:124-

221). The across-the-board high quality of the ABA's CLE programs only adds to their tremendous value to the profession.

A significant number of the ABA's CLE programs are included in ABA membership, such that those programs are available to Florida lawyers with no cost above ABA membership dues. Correspondingly, denying CLE credit to Florida lawyers for ABA CLE will likely result in increased expense to Florida lawyers and firms, who would have to seek other providers that might be able to provide CLE programs and credits that they could otherwise obtain from the ABA at no additional cost.

CONCLUSION

Denying Florida lawyers access to the ABA's trove of CLE programs, based on a Diversity & Inclusion Policy that neither disadvantages anyone based on impermissible classifications nor creates improper diversity "set asides" would be a disservice to Florida Bar members.

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CERTIFICATE OF SERVICE

I certify that, on July 15, 2021, the foregoing was filed with the Clerk of Court, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

/s/ Elliot H. Scherker
Elliot H. Scherker

CERTIFICATE OF COMPLIANCE

I certify that that submission complies with the typeface and type style requirements of Florida Rule of Appellate Procedure 9.045(b) Fed. R. App. P. 27(d)(1)(E) because it has been prepared using Microsoft Word 2010 in Bookman Old Style, 14-point font.

/s/ Elliot H. Scherker
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