Supreme Court of Florida

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Case No. SC21-284

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

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COMMENTS OF DEBORAH HARDIN WAGNER

I appreciate the opportunity to comment on the Court's Amendment to Rule 6-10.3(d) of the Rules Regulating the Florida Bar. I write as a member of the state Bar for more than three decades, now retired. I also served as executive director of the Florida Supreme Court Racial and Ethnic Bias Study Commission.[1]

A number of commentators have already detailed the myriad logistical problems invited by the Court's amendment. Meaningful

[1] The Florida Supreme Court Racial and Ethnic Bias Study Commission was created in 1989 by administrative order of then-Chief Justice Raymond Ehrlich. It served for two years and published two final reports: "Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice*: *Reforming Practices which Impede the Dispensation of Justice to Minorities in Florida*," December 11, 1990; and "Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, *Where the Injured Fly for Justice*: *Reforming Practices which Impede the Dispensation of Justice to Minorities in Florida,*" December 11, 1991. I offer this comment in my individual capacity, as its representations and opinions are wholly my own and do not reflect those of any other individual or entity, unless otherwise noted.

CLE instruction may well shrivel, ultimately jeopardizing attorney competence while punishing clients; attorneys will struggle in frustration, and perhaps ultimately in vain, to fulfill credit requirements; and Florida will likely lose business and tourism dollars to states more welcoming of the ABA's diversity commitment.

Other commentators have argued, persuasively in my view, the inaptness of *Bakke* and its progeny to CLE-panel minimum-representation requirements. Unlike the medical-school admissions decision at issue in *Bakke*, the selection of diverse speakers is not a zero-sum gain that burdens members of more represented groups -- particularly since slots, like the panels themselves, can grow along with the need and interest.[2] Instead, the diversity requirement puts necessary muscle behind well-meaning but often weak and ineffective aspirational guidance. Requiring inclusion in this context

[2] See Justice Powell's articulation of the admissions decision at issue there: "[This] special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status." Regents of University of Cal. v. Bakke, 438 U.S. 265, 307 (1978). Commentator William Hodes has suggested that the Florida Supreme Court, acting in its Bar-supervisory and not case-adjudicatory role, was "not applying binding legal precedent" but instead making "its own policy judgment that it would not permit hard quotas to infect the legal system in this State." Regardless of which hat the Court was wearing when it amended the rule, the reality is the same: it did so based on an overly narrow and arguably incorrect view as to the reach of *Bakke* and *Grutter v. Bollinger*, to the detriment of Florida's underrepresented attorneys and the goals of equality, equity, and excellence in Florida's legal profession.

would redeem vitally important but as-of-yet unrealized "basic American principles," to borrow the Court's phrase, including those of eliminating bias, ensuring inclusion and equitable participation, and improving our profession through diversity of thought and experience, broader utilization of attorney talent and excellence, and the greater ascension of attorneys of color to leadership roles that remain too often elusive. Ultimately, such a policy serves the interests of all attorneys and the profession itself.[3]

Though certainly supportive of that commentary, I write today with a different goal altogether, however: to remind this Court of the central role it has played historically -- both for bad and for good -- in this vital area and to urge it to build upon, not retreat from, the commitment of previous high-court colleagues who recognized the Court's responsibility to address the underrepresentation of Black attorneys in the legal profession and on Florida's judicial bench. Without elaboration, the Court says it "understands the objectives underlying the policy at issue here." This pivotal moment calls for pairing such an understanding with the active and creative embrace

[3] The inclusion requirement is good for the speaker, as it offers the networking and wider exposure that can lead to expert witness opportunities and advancement as a leader in the profession. It is good for the listener and the listener's clients, as it provides the benefit of expertise and talent from a wider collection of individuals, enhancing what and how much is learned. It is good for the Florida Bar, as it encourages greater participation in CLE programs and, ultimately, in bar organizations and projects. And it is good for Floridians, as the higher visibility and participation of Black and other diverse members would entice more young people from underrepresented groups to envision themselves as lawyers, entering a profession that presents a host of opportunities for employment and leadership.

of those objectives in a manner that not only reflects but extends the Court's historical resolve toward ensuring equal access and opportunity.

The commentary filed by the Wilkie D. Ferguson, Jr. Bar Association lays out poignantly, if painfully, the "bad" role the Florida Supreme Court played, when the state's justices defied fairness and constitutional precedent -- not to mention a direct order of the United States Supreme Court -- to block Virgil Hawkins and future Black students from entering the all-white law school at the University of Florida. Mr. Hawkins, who had wanted to become a lawyer ever since witnessing, as a young child, the discriminatory treatment of Black defendants in court, fought doggedly for a decade, refusing to be shunted off to the hastily created, separate-but-decidedly-unequal law school at Florida Agricultural and Mechanical University. On five different occasions, he sought relief in the Florida Supreme Court, only to be pushed back by the Court each time. "It was an imponderable sin, a black man trying to get into a white college," Mr. Hawkins would remark years later, adding that he persisted because "the greatest profession in the world is the law," not the least because a "lawyer is someone to interpret how man should live with his brother."[4]

In the decades to follow, many of Florida's justices, including Leander J. Shaw, Jr., Major B. Harding, R. Fred Lewis, and Harry

[4] See The Miami News, February 11, 1984, page 1.

Lee Anstead, would denounce the Court's actions[5] -- and shortly before the turn of the millennium, on the fiftieth anniversary of Virgil Hawkins' lawsuit, the Florida Supreme Court as an institution would take official responsibility, through a formal apology with Chief Justice Harding's words: "Ladies and gentlemen, you have heard about a regrettable and poignant moment in the jurisprudential history of this Court. We must learn from the lessons taught [and not let] hatred and discrimination…triumph."[6]

In the end, the racial discrimination that had long barred Virgil Hawkins may not have triumphed, but its realities and

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[5] *Justice Shaw*: "I find it incredible that this court would have said what it said even in those times….[T]he law was not so different than it is today and there's no way to escape the fact that there was an outright defiance of the United States Supreme Court that said that you shall admit Virgil Hawkins. This court…said, 'We're not going to do it. We are going to find as many ways to keep him out as you can find to try to put him in." *Justice Lewis*: "I read those court opinions in horror….We represent the branch that is supposed to support equality, yet we were standing in the doorway." *Justice Anstead*: "[I've read] thousands of opinions from the Florida Supreme Court. Unfortunately, amongst those, one issued in the [1950s] was shocking….They became the only opinions issued by the Supreme Court that I and my colleagues were truly ashamed of." See Interview of Leander Shaw by Professor and Documentarian Lawrence Dubin, pages 12-3 (1998 approx.); Statement of Fred Lewis to Florida Times Union reporter (April 2, 2008); and Statement of Harry Anstead to the Florida State University President's Advisory Panel on University Namings and Recognitions (March 6, 2018).

[6] See St. Petersburg Times, May 26, 1999, page B1. While applauding the move, the newspaper's editorial board stressed that future dedication would speak even louder than words: "It's important and appropriate for the Florida Supreme Court to have registered its apology this week. But the best way to honor the legacy of Virgil Hawkins is for the court to ensure that no person in Florida is ever again denied equal opportunities on the basis of skin color or any immutable characteristic." May 29, 1999, page 18A.

remnants would remain -- long after UF's law school was finally desegregated in 1958. It would be years after Mr. Hawkins' battle before Black students were admitted to Florida's law schools in larger numbers. Three decades hence, Black law students would continue to account for merely 4.7% of state law-school enrollees, and Black lawyers would still make up barely one percent of all attorneys practicing in Florida.[7]

It was stark realities such as these -- and no doubt the Court's historical complicity in perpetuating them -- that led two Florida Supreme Court justices, then-Chief Justice Raymond Ehrlich and Justice Shaw, to spearhead in 1989 the creation of the Florida Supreme Court Racial and Ethnic Bias Study Commission. Attorney Frank Scruggs, currently of Boca Raton and a former state Department of Labor Secretary, was appointed by the Court as Chair, while Justice Shaw served as Vice-Chair and helped to lead the diverse group of twenty-seven lawyers, lawmakers, and laypersons. The Florida Supreme Court was one of the first high courts in the nation to take this step, prompting a former governor to commend its bold leadership, by way of this understatement: "It

[7] See Commission Report, December 11, 1991, at pages 97 and 74. The law-school figure is as of 1990, derived from a study ultimately performed by the Commission. While statistics regarding the percentage of Florida attorneys who are African-American were hard to come by in 1990, The Florida Bar subsequently began collecting racial-identifying data regarding its members, on a voluntary basis. A Bar survey, later in the decade, showed that the percentage of African-American attorneys had risen only slightly, to two percent.

takes a lot of commitment to justice to ask some questions [when] you know that the answers are not going to be pleasant or positive."[8]

Recognizing that Florida's judicial system is "founded upon the fundamental principle of the fair and equal application of the rule of law for all," the Court charged the Commission to focus on this important question, among others:

> *What, if any, measures should be taken by the Supreme Court, law schools, the Board of Bar Examiners, the profession, and the Legislature to accelerate the rate at which disadvantaged minorities enter the legal profession and ascend through its ranks in the public and private sectors*?[9]

Though not prejudging the outcome, the justices left no doubt, early on, that the Court was prepared to take an active role in addressing any continuing inequities the Commission's study might

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[8] See quoted remark by Florida Governor Bob Graham in "Retiring justice played central role," by John D. McKinnon, St. Petersburg Times, October 12, 2005.

[9] Other questions included: Does race or ethnicity affect the dispensation of justice, either through explicit bias or unfairness implicit in the way the civil and criminal justice systems operate? What are the elements of a coherent, long-term strategy to eradicate the vestiges of any legally prescribed discrimination? Are there practical measures which can be taken to alleviate any underrepresentation of disadvantaged minorities from positions of responsibility in the justice system, including as judges and court employees? What, if any, changes should be made in the manner of selecting judges to increase the racial and ethnic diversity of the bench? See Administrative Order Creating the Racial and Ethnic Bias Study Commission, issued by Chief Justice Raymond Ehrlich on December 11, 1989.

lay bare. "[Even] the *perception* of racial and ethnic bias in the state judicial system undermines the Court's fundamental responsibility of guaranteeing equal justice for all Florida citizens," explained Chief Justice Ehrlich. "The Commission's task is to take a hard look at current practices in the state judicial system to uncover any [actual] bias or inequity *and then to act on those findings*."[10] Justice Shaw was equally clear. "If we find a vestige of racial bias in the system that is causing minorities not to enjoy the same degree of justice others might, we intend to do something about it," he told the press and public in May of 1990."[11]

For two years, the Commission conducted academic studies and held hearings around the state, receiving heart-rending and often infuriating testimony, from hundreds of attorneys and law students of color, regarding biases and barriers they were routinely forced to overcome. The challenges noted were many and stacking: few classmates and even fewer instructors of color; isolating and discriminatory experiences while in law school; limited and often unequal placement services; more financial stress than assistance and a Bar exam reflecting perceived cultural biases; public legal employers who blamed "pipeline" problems as cover for their own failure of outreach, and private law firms that demanded higher

[10] See The Tampa Tribune, December 15, 1989, page 8B. Emphasis is added.

[11] See Tallahassee Democrat, May 4, 1990, page 3B.

credentials from Black lawyers than from white ones; a state government that passed over minority attorneys when choosing outside counsel, and judges who favored white attorneys when appointing conflict counsel; and judicial-nominating and other legal committees that excluded attorneys of color from equitable participation in opportunities, benefits, and governance.

It's no wonder that one law graduate, a young Black man who had led his college as student-body president yet was counseled not to wear a bowtie on interviews lest the white partners regard him as arrogant, lamented in 1990 that "frustration, doubt and uncertainty" confronted many, if not most, Black law-school graduates.

> "The major law firms are not hiring us. They are not recruiting us – they do not want us. Then they say, well go to the public sector, go practice for the Public Defender's Office, the State Attorney's Office and get some experience and come back, but then the cycle goes around, and when you go to the Public Defender's Office or the State Attorney's Office, they then say, well, for whatever reasons, we can't hire you."[12]

Robert Saunders, the longtime Florida NAACP Field Director who took over after Harry T. Moore was killed when a bomb planted by the Ku Klux Klan exploded under his East Florida home,

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[12] See Transcript of Racial and Ethnic Bias Study Commission, Miami Public Hearing, Convened at the Metro-Dade Government Building, February 15, 1990, page 46.

approached the Tampa podium in March of 1990 and endorsed the Supreme Court's central role in addressing these and other exclusionary practices.

> "Let me congratulate the Supreme Court on coming up with this kind of commission -- because in 1950 up to 1960, we could not have gotten this type of commission coming in to do this study, especially from a Court that made it impossible for us to get into the University of Florida. In the 1950's, what we saw were courts and law enforcement assuming the role of the majority group that made it possible for them to be there. As we made progress, and began to share some of that power, we began to see some of the walls breaking down…."

As the civil-rights leader continued, however, his tone grew increasingly somber.

> "What I want to say is…the slow progress that black people made in Florida was due to the fact that there were so few black lawyers. As more black lawyers came into the field, more and more progress was made in the area of civil rights. [But] some of the things that I've heard here today are reminiscent of the fights we had back in the '50's and '60's. What we see now is that we're slowly slipping back into the '50's and the '40's and the '30's….[D]iscrimination not only can be overt, but it can [evolve]. [D]iscrimination as we are now seeing it is very hidden, and we are going to have to dig deeper to identify it. As one who just retired from the field, I want to say to you, *don't let us lose the gains we've made*."[13]

[13] See Transcript of Racial and Ethnic Bias Study Commission, Tampa Public Hearing, Convened at the Hillsborough County Courthouse, March 20, 1990,

After two years, and armed with significant data, the Commission recommended that a series of aggressive steps be taken by lawmakers, law schools, The Florida Bar, Bar examiners, the state Department of Administration, and public and private legal employers – as well as the Supreme Court itself – aimed at improving the inclusion and fair advancement of attorneys of color in the judicial system workforce and legal profession. The Commission explained why:

> "The lack of minority attorneys in the state is an issue of particular concern. The underrepresentation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies or individual practices, unfair and insensitive to individuals of color….and deprives the public debate of voices which speak with conviction [on] public and social policy matters…."[14]

The Commission's report stressed the irony of a court system and legal profession – the same ones "where the injured fly for justice" – *not* ensuring equal access and opportunity for their own personnel and members.

> "[I]t is especially ironic to witness how the legal profession has itself remained static in the area of equal opportunities for minority lawyers," the report

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pages 29-31 (emphasis supplied). At the time of his testimony, Mr. Saunders had recently retired as the Equal Opportunity Director for Hillsborough County government, after working in Tampa since 1976.

[14] See the Commission's First Final Report, December 11, 1990, at inset on page 28.

> concluded. "By its very nature, the legal profession should be a model of opportunity for all. Yet, countless minority attorneys have documented for the Commission [that ours] is a profession in which 'equal opportunity for all' remains an elusive ideal.…
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> Manifestly, we, as a State, must work to ensure that a young minority student who looks out over his or her books into the horizon of career possibilities as a lawyer sees a landscape filled with fair and equal opportunities for employment and advancement. Until that happens, the state will continue to experience a problem with enormous ramifications for the legal profession – and beyond."[15]

If there were doubts as to the Court's sincerity in accepting an expansive oversight role, the manner in which the justices chose to accept the Commission's conclusions and recommendations put those to rest. This was the first time the Supreme Court had convened a ceremonial session, in the Court's main chambers, to receive a report from one of its commissions -- and the justices did so twice, within two years, to receive each of the Commission's two final reports. Justice Ehrlich explained that the Court's decision was intended to emphasize the central and vital nature of the issues at hand and to reflect the seriousness with which the Court, as an institution, was committing itself to the task of eliminating bias and other barriers to representation and advancement.

> "This is the first occasion…that the Court has seen fit to meet in ceremonial session to receive a report

[15] See the Commission's Second Report, December 11, 1991, pages vii, 5, and 62.

> from one of its Commissions," he told the packed courtroom. "[T]his emphasizes the importance that I think the Court attaches to the subject matter of the Commission's work and the Commission's work itself.
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> [T]hat the diversity of the court system must be enhanced is perhaps the most prevalent theme of the report. I join with the Chief Justice and the entire Court in saying that…the Court will do all it can to accomplish and support the goal of greater diversity."[16]

Chief Justice Shaw, who had recently been tapped by his colleagues to lead the high court, strongly echoed the notion that, far from its conclusion, the submittal of the final report signaled merely the beginning of the Court's continuing commitment.

> "I think the message of this report is clear: the court system must enhance its efforts to diversify its work force and to act in a manner which is sensitive to the many ethnic and cultural differences among all of Florida's citizens….Study of the issue and compilation of data is only the first step; implementation is the second step and the key to necessary change….In the spirit of this report, the Judicial Branch will take a hard look at…ways to ensure that equal justice and employment opportunity are a reality in the state court system.
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[16] Comments of Justice Raymond Ehrlich, in ceremonial session in the Florida Supreme Court chambers in Tallahassee, following receipt of the Commission's first final report, on December 11, 1990.

> "I assure you that the Commission's call will not be ignored."[17]

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The Commission's call was not ignored. The Supreme Court took the lead, both in making changes within its purview and in needling other actors to do the same. It appointed an EEO officer, strengthened its affirmative-action plan, developed a grievance procedure, broadened its recruitment and referral practices, adopted amendments to the Rules of Professional Conduct, and refined its racial-bias curriculum for the training of judges. Meanwhile, its staff helped marshal through the Legislature pivotal changes to diversify the judicial nominating commissions; require clerks of court, as well as state attorneys and public defenders, to review hiring and salary policies; create a new civil-rights division in the Attorney General's Office; and require the Attorney General to extend greater efforts to hire African-American attorneys as outside counsel, among other changes. It also supported the Florida Board of Bar Examiners in providing Bar-exam writers with tools to avoid bias and in using affirmative efforts to include more attorneys of

[17] Comments of Chief Justice Leander J. Shaw, in ceremonial session in the Florida Supreme Court chambers in Tallahassee, following receipt of the Commission's second final report, on December 11, 1991. The Racial Commission was not the Court's first examination of bias in the courts. Earlier, in 1987, Chief Justice Parker Lee McDonald had created the Florida Supreme Court's Gender Bias Study Commission, whose final report Chief Justice Ehrlich published in March of 1990. In the fall of 1994, Chief Justice Stephen Grimes created the Gender Bias Implementation Commission, to follow-up on the original report and subsequent work by intervening implementation groups.

color as drafters and graders -- and was pleased when The Florida Bar demonstrated its own expansive commitment, by choosing more diverse attorneys in its selections to the judicial nominating commissions, as well as to its own staff.[18]

The Court's commitment to racial inclusion and opportunity – and its self-crafted, robust role -- did not end with the work of the Racial Commission. Subsequent chief justices, presiding over the Court's ever-changing member composition, have not only built upon the Commission's seminal work but reaffirmed the Court's continuing, fundamental duty to address concerns with resolve and creativity.[19] Among those many efforts was the "Ten-Year Retrospect," convened by then-Chief Justice Charles Wells in December of 2000, to examine which of the Racial Commission's 1990 and 1991 recommendations had not yet been implemented. "Increasing the number of minority lawyers and fostering their professional development" was a top priority of the Retrospect effort.

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[18] In 1989, the same year the Court created the Racial Commission, The Florida Bar formed its Commission on Equal Opportunities in the Profession which, through subsequent iterations, became in 2013 the Standing Committee on Diversity and Inclusion.

[19] Subsequent commissions and committees, appointed or supervised by the Court, include its Commission on Fairness, created by Chief Justice Gerald Kogan in 1997, and restored and expanded by Chief Justice Barbara Pariente, in 2004, into the Standing Committee on Fairness and Diversity; the Diversity Committee of the Commission on Professionalism; the State Courts System Equal Employment Opportunities Committee; the Employment Fairness Committee; and others.

Through such Court leadership, combined with the efforts of the Florida Bar, much progress has indeed been made. That reality is nowhere more encouragingly exemplified than by the many Black attorneys and students of color who, having testified to the Racial Commission in 1990, in later years served with distinction as leaders in the profession and on the bench, including one as Florida Bar president and many others as trial-court and appellate judges (and, in the case of one public-hearing participant from Orlando, a Florida Supreme Court justice). Yet, no one can argue but that the work of inclusion is far from finished. As the report of the Ten-Year Retrospect accurately concluded: "While much progress has been made in the last ten years, much remains to be done."[20] That same sentiment certainly holds true today, when Black attorneys still

[20] See *"Where the Injured Fly for Justice," A Ten-Year Retrospect on the Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission,"* December 2000, page ii. In her insightful commentary, attorney Twyla Sketchley writes that Florida's attorneys will be "baited" by the Court's Order into trying to justify diversity requirements or to otherwise demonstrate the underlying need – implying that such attempted commentary would be superfluous, at best, or futile, at worst, because the Court and Bar, having issued multiple reports, are already fully aware of the problems. I not only share the frustration perceived to be at the root of that commentary but concur in the factual observation, as noted in my text: since the Supreme Court's first foray into racial-inclusion matters with the Racial Commission in 1989, there has been no shortage of committees or reports documenting the continuing concerns and needs. As one who "took the Court's bait," however, I must also say that I did so precisely in light of what the commentator's conclusion suggests: that "the Order undermines these efforts" and should be reconsidered. This is no time to retrench or retreat from the Court's historical – and, sadly, still necessary -- intervention.

account for little more than six percent of Florida's judges -- and fewer than five percent of all Florida Bar members.[21]

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In his special concurrence, Justice Lawson writes that "[a]t 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, [and] it is essential that we continue this work[.]" Justice Lawson is absolutely right, of course, on both those scores. The problem is that there is nothing in the language, procedural posture, or implications of the Court's per curiam opinion that reflects either an expansive appreciation for the Court history Justice Lawson references or a fulsome embrace of the imperative responsibility to build on that historical progress moving forward.

By reaching, legally and procedurally, to nullify the Business Law Section's policy and preempt any similar attempts in the future, the Court has not merely deprived Bar leaders of a creative and likely effective tool but left itself open to concern that it may be content to recede from the "steadfast dedication" Justice Lawson attributes to the Court. With its precipitous stance, the Court has signaled – perhaps for the first time since it created the Racial

[21] According to the Bar, Black attorneys made up 3% of all members in 2016 and, in 2017, 6.4% of all state judges. See "Minorities in the Legal Profession," updated March 2017. More current figures may vary, but likely only slightly.

Commission in 1989 -- that it may be willing to jeopardize the gains diverse groups have won in representation and advancement and to diminish the duty the Court carved out for itself and has repeatedly reaffirmed over the last three decades.

The eyes of the state are on this Court, as it determines the fate of the diversity-inclusion requirement. Time for excluding any attorney or group from positions of power and prominence, and all of us from the collective benefit of those voices of diversity and brilliance, is long past. The actions this Court takes now will speak volumes as to whether it plans to further the efforts of its dedicated predecessors to see that opportunities for professional advancement are open and available to all attorneys – and whether traditionally underrepresented groups, including the state's Black attorneys, can proceed with optimism on the slow, if not always steady, march toward justice.

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Respectfully submitted,

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This comment is being filed with the Clerk of Court via the Florida Courts E-Filing Portal. As a retired attorney thereby ineligible to practice law in the state, I believe that I am not permitted to certify that this comment complies with the font and spacing requirements of the Florida Rules of Appellate Procedure, though I have attempted to be compliant, with only slight alterations due to the numerous footnotes. I appreciate the Court's indulgence.