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In The Supreme Court of Florida

Case No. SC21-284

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

COMMENTS OF THE INTELLECTUAL PROPERTY OWNERS ASSOCIATION

On April 15, 2021, the Supreme Court of Florida issued an Order on a recently adopted policy by the Business Law Section of the Florida Bar. This policy was related to regulating the composition of faculty at section-sponsored continuing legal education (CLE) programs (see Appendix A). The Court noted that “quotas based on characteristics like the ones in this policy are antithetical to basic American principles of nondiscrimination.” *In Re: Amendment to Rule Regulating the Florida Bar 6-10.3*, No. SC21-284, p. 2.

The Court cited *Regents of University of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) and *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003), to hold that the Florida Bar would withhold its approval from continuing legal education programs that are tainted by such discrimination. As remedial action, the Court amended Rule 6-10.3 as shown in Appendix B.

This decision by the Supreme Court of Florida has caught the attention of many in the legal profession. The Diversity & Inclusion committee and the Women in Intellectual Property committee of the Intellectual Property Owners Association (IPO) have several comments to share for consideration by the Supreme Court of Florida. IPO was established in 1972 and is an international trade association representing a “big tent” of diverse companies, law firms, service providers and individuals in all industries and fields of technology that own, or are interested in, intellectual property (IP) rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational

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services; and disseminating information to the public on the importance of IP rights. IPO is also committed to supporting and advancing diversity and inclusion in the legal profession – especially in the IP community. Many IPO members and member companies are located in Florida. As such, IPO has an interest in commenting on the recent decision by the Supreme Court of Florida, which might have a negative impact on diversity.

SUMMARY

At the core of the Order, there are four main issues that we would like to highlight and comment on. First, a rule requiring a minimum number of diverse panelists advances diversity and the quality of programming with no evidence of harm. The Court's Order to preclude CLE credit for courses requiring a degree of diversity among its panelists effectively eliminates credit for courses that may offer more value to attorneys than courses that have panels that do not have a diversity requirement. Second, the Court fails to offer any guidance on permitted diversity policies moving forward, contrary to *Grutter* and *Bakke*. Even so, the *Grutter* and *Bakke* decisions are distinguishable. Third, the Court's Order could have a chilling effect on addressing current structural and ongoing inequity. Fourth and finally, the *sua sponte* revision of the rule, without notice, will cause harm to Florida attorneys and diversity of the Florida Bar. The below discussion expands on all four issues listed herein.

I. Diversity Quota – No Harm

The use of mandatory quotas for advancing diversity and inclusion efforts can understandably seem problematic, when viewed superficially. However, not all quota-based rules can be viewed with the same lens. Some quota-based rules may cause harm to one or more classes of individuals. But this is not always the case. In this case, the implementation of the diversity policy by the Business Law Section of the Florida Bar for CLE programs will have minimal, if any, negative impact on non-diverse individuals, especially when compared to the impact that diverse individuals suffer without such policy in place. In fact, no harm to one or more individuals or classes of individuals has been shown as a result of the

diversity policy of the Business Law Section of the Florida Bar. On the flip side, the percentage of diverse attorneys throughout the nation, including in Florida, does not even come close to matching the state's demographics. Thus, in an effort to move the needle forward on increased representation of diverse attorneys in the bar, the Business Law Section of the Florida Bar's diversity policy aids in this forward movement by facilitating the offering of CLE programs taught by diverse faculty. This will not only give those diverse faculty members visibility that they may not have otherwise received but also inspire diverse individuals in the community to pursue a career in law.

Additionally, there is an independent educational value in having courses that are taught by a diverse faculty, who bring different and valuable perspectives to bear. As Justice O'Connor explained in *Grutter v. Bollinger*, 539 U.S. 306, 308 (2003), "[m]ajor American businesses"--including the legal profession--"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." In establishing its diversity policy for CLE courses, the Business Law Section of the Florida Bar recognized this key principle enshrined in the Supreme Court's case law. And a quota for some measure of diversity on CLE panels, however, advances this goal. Indeed, when all speakers come from a single shared set of experiences and a single group, diversity of thought suffers. Therefore, the Florida Supreme Court's decision to preclude CLE credit for these courses, somewhat ironically, eliminates credit for courses that may offer more value to attorneys than courses that have panels that are not assembled under the criteria established in the Business Law Section's policy.

Ultimately, not all quota-based rules are bad, and not all quota-based rules are good. There must be a case-by-case determination to weigh the benefits with the deleterious effects to the members of the Florida bar. The Florida bar is comprised of a diverse group of lawyers. According to the last official 2010 Census, Florida's demographic makeup was 75 percent white, 22 percent Hispanic, 16 percent black, 2 percent Asian and 51 percent female. In 2019, 82 percent of Florida Bar members were white, 10 percent Hispanic, 3

percent black, and 1 percent Asian, with 39 percent being women and 3 percent being members of the LGBTQ community. The CLE programs' faculty members / panelists should proportionally reflect the diversity of Florida Bar members. For example, the mandate of 1 of 3 or 1 of 4 in fact reflects the number of white versus non-white members. The alleged "quota" does not even meet the minimum for women, given 39% of the Florida Bar is female.

It is noteworthy that the Supreme Court of Florida did not suggest any aspirational goals to promote diversity. The failure to even suggest aspirational goals in lieu of mandatory quotas is a missed opportunity by the Supreme Court of Florida to promote diversity without any potential harm to any classes of individuals. Moreover, all the members of the Florida Bar are qualified to be licensed in Florida--as determined by the Florida Bar. Thus, the requirement for greater diversity in CLE panels does not appear to impact the quality of any CLE program as certainly there is no suggestion that the diverse members of the Florida Bar are somehow less qualified than their non-diverse members.

II. No Guidance on Permitted Diversity Policies

The Court's opinion, while electing to strike down the policy and eliminate all quotas from consideration in CLE programs absent even considering an aspirational goal, fails to articulate any affirmative explanation of what types of diversity initiatives would be permissible going forward. *Grutter* and *Bakke* ultimately permitted diversity initiatives to go forward, and narrowly tailored initiatives to promote diverse student bodies that are still permitted under the law. In contrast, the Florida Supreme Court's opinion declines to provide examples of ways that the State Bar can still promote diversity within its CLE panels.

Promotion of diversity assists members to find mentors, role models, and coaches that look like themselves. Team diversity has been shown to improve the overall IQ of the team as compared to a team having a more homogenous background. This would also increase the IQ of a diverse panel providing more thought leadership to legal issues. A failure to use the Business Law Section's provisions in any form would appear to be an anti-diverse sentiment that conflicts

with established business principles that more diversity increases the thought leadership present. As in *Grutter*, following an aspirational goal of seeking diversity on panels would “further a compelling interest in obtaining the educational benefits that flow from a diverse [student] body.” Promoting diversity and our understanding of diverse thought permits us as licensed attorneys to more competently uphold the law.

Along similar lines, cases like *Grutter* and *Bakke* related to law school and undergraduate admissions, and not to individuals who had already graduated both law school and college. Here, *all* of the attorneys who might be appointed to CLE panels are duly admitted and qualified members of the legal bar. The appointment of CLE faculty to conference panels is not a competitive admissions process like that at issue in *Grutter* and *Bakke*. The interest in promoting diversity amongst the duly admitted members of the bar is a compelling one, and none of the Supreme Court’s precedents undermine that interest. Further, in contrast to *Bakke*, we are unaware of any finding that any individuals have or will be harmed by the Business Law Section’s policy. In the absence of such harm, there is no reason to eliminate entirely that policy, which as noted herein serves an important purpose.

We respectfully ask the Florida Supreme Court to consider modifying the mandatory diversity policy to an aspirational policy rather than disallowing any diversity--mandatory or aspirational--in Florida CLE panels.

III. Chilling Effect on Improving Diversity

The efforts of the Florida Bar are consistent with the needs of the profession, which continues to struggle with improving diversity within and among its ranks. The action of the Business Law Section is not merely an attempt to ameliorate past racism but rather an attempt to address current structural and ongoing inequality. In light of these structural inequities there is a greater understanding that despite best efforts, seemingly objective measures or seemingly race-neutral approaches to improving diversity are quite poor at improving underrepresentation precisely because systemic issues make it likely that qualified diverse candidates will be overlooked without specific measures to

include them. Therefore, rather than discourage creative efforts to promote diversity, both this Court and the law should encourage such efforts. This reinforces that, without affirmative guidance, the Court's Order could have a chilling effect on additional creative efforts to promote the sorely needed diversity in the profession.

IV. *Sua Sponte* Revision of Policy, Without Notice

Apart from the chilling effects of the Court's decision to amend Rule 6-10.3 as a means to circumvent the policy at issue, the revision of the rule is disproportionate to the Court's concern with mandatory quotas. As an alternative, the Court could have simply required the Business Law Section of the Florida Bar to amend its diversity policy by requiring (i) replacement of the term "require" with "should consider including" and (ii) deletion of "The Business Law Section 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." Appendix C attached herein shows these proposed amendments. These amendments, along with guidance on what diversity policies are permissible, would aid the Florida Bar in achieving its goals in a manner with both U.S. Supreme Court and Florida Supreme Court precedent.

Finally, the current rule hurts Florida attorneys because many of them rely on CLE programs by the ABA (with diversity policies similar to the one enacted by the Business Law Section) and other groups that have measures in place to promote diversity for not just CLE credit but also networking, business contracts and other opportunities. By withholding credit for ABA and other continuing education seminars on the basis of a "Florida only" rule is likely to leave Florida attorneys with fewer CLE and networking opportunities. This is a real detriment to lawyers competing in this state--not just for Florida based business, but also for business from Florida clients with legal issues outside of Florida, as well as the national markets for legal services in patent, copyright, securities, antitrust, maritime, ERISA, EEOC, SEC, FTC, DoD, DOE and other departments of the federal government.

As with any rule, its potential harm must be considered. Here, the harm is real in increased costs for CLE credits, fewer opportunities to earn them and loss of business development opportunities. In contrast there has not been a demonstrable lack of opportunities for non-diverse attorneys in the ABA or organizations with similar diversity rules.

CONCLUSION

In sum, we request that the Supreme Court of Florida kindly consider the comments herein and modify the Business Law Section of the Florida Bar's diversity policy in a manner consistent with Appendix C instead of amending Rule 6-10.3 to conclusively bar any diversity policy.

This response includes comments prepared by the following members of IPO's Women in IP Law and Diversity & Inclusion Committees: Darryl Frickey, Scott Barker, Shruti Costales, Elaine Spector, DJ Healey, Rachael Rodman, Gunnar Gundersen, Dawn Mertineit, Christopher Suarez, Serena Farquharson-Torres, Mercedes Meyer, and Andrew Currier.

Thank you for considering our comments.

Sincerely,

A handwritten signature in blue ink that reads "Daniel J. Staudt". The signature is written in a cursive style with a prominent horizontal stroke across the middle.

Daniel J. Staudt
President

Appendix A
BUSINESS LAW SECTION OF THE FLORIDA BAR
CLE Diversity Policy Compliance

Pursuant to the Business Law Section's CLE Diversity Policy, the following guidelines apply to CLE programs with three or more panel participants, including the moderator:

(a) individual programs with faculty of three or four panel participants, including the moderator, require at least 1 diverse member;

(b) individual programs with faculty of five to eight panel participants, including the moderator, require at least 2 diverse members; and

(c) individual programs with faculty of nine or more panel participants, including the moderator, require at least 3 diverse members.

The Business Law Section 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.

Diverse members include members of diverse groups based upon race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism.

APPENDIX B

RULES REGULATING THE FLORIDA BAR

Rule 6-10.3. Minimum Continuing Legal Education Standards

(a)– (c) [No Change]

(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.

(e) – (g) [No Change]

Appendix C
BUSINESS LAW SECTION OF THE FLORIDA BAR
CLE Diversity Policy Compliance
PROPOSED AMENDMENT

Pursuant to the Business Law Section's CLE Diversity Policy, the following guidelines apply to CLE programs with three or more panel participants, including the moderator:

(a) individual programs with faculty of three or four panel participants, including the moderator, ~~require~~ should consider including at least 1 diverse member;

(b) individual programs with faculty of five to eight panel participants, including the moderator, ~~require~~ should consider including at least 2 diverse members; and

(c) individual programs with faculty of nine or more panel participants, including the moderator, ~~require~~ should consider including at least 3 diverse members.

~~The Business Law Section 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.~~

Diverse members include members of diverse groups based upon race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism.