

IN THE FLORIDA SUPREME COURT

No. SC21-284

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

COMMENTS OF THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION, THE ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF TAMPA BAY, THE ASIAN PACIFIC AMERICAN BAR ASSOCIATION OF SOUTH FLORIDA, THE GREATER ORLANDO ASIAN AMERICAN BAR ASSOCIATION, AND THE JACKSONVILLE ASIAN AMERICAN BAR ASSOCIATION

The National Asian Pacific American Bar Association (“NAPABA”), and its Florida affiliate bar organizations, the Asian Pacific American Bar Association of Tampa Bay, the Asian Pacific American Bar Association of South Florida, the Greater Orlando Asian American Bar Association, and the Jacksonville Asian American Bar Association (hereinafter, the Florida affiliate bar organizations are referred to as the "Florida Affiliates") submit the following comments on proposed amendments to Rule Regulating the Florida Bar 6-10.3 as promulgated in *In re: Amendment to Rule Regulating the Florida Bar 6-10.3*, No. SC21-284 (Fla. April 15, 2021).

I. NAPABA and its Florida Affiliates' Missions in Advancing Diversity, Equity, and Inclusion in the Legal Profession

NAPABA represents the interests of over 60,000 Asian Pacific American (“APA”) attorneys, judges, legal scholars, and law students, and is comprised of nearly 90 national, state, and local APA bar affiliates across the country. Its members include solo practitioners, large firm lawyers, corporate counsel, legal service and non-profit attorneys, and lawyers serving at all levels of government. Founded in 1988, NAPABA continues to be a leader in addressing civil rights issues confronting APA communities and serves as the national voice for increased diversity in federal and state judiciaries, and advocates for equal opportunity in the workplace, works to eliminate hate crimes and anti-immigrant sentiment, and promotes the professional development of people of color in the legal profession. NAPABA and its Florida Affiliates all serve to promote justice, equity, and opportunity for APAs and to foster professional development, legal scholarship, advocacy, and community involvement.

II. The Need for Diversity, Equity, and Inclusion in Continuing Legal Education Programs

A. Continuing Legal Education and the Current Anti-Asian Hate Crimes Crisis

In response to the surge of reported hate crimes and hate incidents targeting Asian and Pacific Islander Americans, beginning in early 2020, the APA legal community has been thrust into the forefront of efforts to advocate for the safety of this population which has suffered thousands of attacks¹, to represent victims, to explain to the public and to APA communities in particular, federal and state hate crimes laws, and to use all legal mechanisms available to combat discrimination and hate-fueled violence.

In 2020, NAPABA held nearly 40 accredited Continuing Legal Education (“CLE”) programs on a diverse range of topics of interest to its members. Several of these programs focused on the practice of law during the COVID-19 Pandemic and the rise in anti-Asian

¹ See, e.g., JEUNG, ET AL, *Stop Asian Hate National Report* (March 31, 2021), <https://stopaapihate.org/wp-content/uploads/2021/05/Stop-AAPI-Hate-Report-National-210506.pdf> (“This report covers the 6,603 incident reports to Stop AAPI Hate from March 19, 2020 to March 31, 2021.1 The number of hate incidents reported to our center increased significantly from 3,795 to 6,603 during March 2021. These new reports include incidents that took place in both 2020 and 2021.”).

sentiment. Including the perspectives of APA lawyers or other professionals – especially former APA U.S. Attorneys, state and federal prosecutors, civil litigators, mediators, mental health professionals, and civil rights advocates on CLE panels discussing anti-Asian hate crimes and legal responses and remedies is critical to the credibility and success of any CLE on these topics.

B. The Importance of Diversity, Equity, and Inclusion to the Professional Development of, and Overcoming Barriers Faced by, the APA Legal Community in Florida and Nationwide

Just as the APA population is not monolithic and represents a wide variety of cultures, languages, ethnicities, and experiences, the APA legal bar is also diverse; and NAPABA and its affiliates encourage the presentation of a variety of viewpoints for their members' benefit as part of continuing legal education.

As such, diversity, equity, and inclusion are of paramount concern to the APA legal community in Florida. Over 760,000 Florida residents are APA, accounting for over 3% of the population.² Yet of

² *2020 State Factsheet: Florida*, A.A.P.I.DATA (2020), <https://aapidata.com/wp-content/uploads/2020/02/Florida-2020.pdf>; *see also Florida Quick Facts*, U.S. CENSUS BUREAU (2021), <https://www.census.gov/quickfacts/fact/table/FL/POP010220#POP010220> (last update May 18, 2021).

the over 77,000 attorneys eligible to practice law in, and residing in Florida,³ only one percent of respondents identified as APA,⁴ according to the most recent Florida Bar Economics and Law Office Management Survey.

In Florida, there are no APA Federal Courts of Appeals judges, in the state or even on the Eleventh Circuit. There is only one APA Federal District Court judge sitting in Florida. APA jurists make up less than 1% of all Florida state court judges.⁵ There has never been an APA Florida Supreme Court justice or Attorney General.

In 2017, NAPABA published its landmark study, “A Portrait of Asian Americans in the Law,” (“Portrait Project”). That study found that the APA legal community faces particular barriers to

³ In the year 2021, the resident active attorney count in Florida was 77,223, down from 79,328 in 2020. *2021 ABA National Lawyer Population Survey*, A.B.A. (2021) (https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf; see also *2020 ABA Profile of the Legal Profession*, A.B.A. (July 2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> (last visited June 24, 2021).

⁴ *Results of the 2018 Economics and Law Office Management Survey*, THE FLA. BAR (Mar. 2019), <https://www-media.floridabar.org/uploads/2019/03/2018-Economics-Survey-Report-Final.pdf> (last visited June 24, 2021).

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https://www.floridabar.org/about/diversity/diversity003/resource_s003/#V.%20Facts%20and%20Statistics

advancement including inadequate access to mentors and contacts, lack of formal leadership training programs, and lack of recognition for the work of its members.⁶ Stereotyping, even for ostensibly positive traits such as quiet diligence, has often disadvantaged APA attorneys who may be passed over for assignments because of misguided perceptions of being too passive to be effective in a litigation or courtroom setting.⁷

The Portrait Project also found that while Asian American law students are disproportionately enrolled in top-ranked schools, they do not obtain judicial clerkships in numbers comparable to their enrollment at highly ranked schools, and they are significantly underrepresented in the partner and leadership ranks of law firms.

This is because:

These selection processes—clerkships and law firm promotion—involve not only objective measures of ability, but also access to mentorship and subjective criteria such as likability, gravitas, leadership potential, and other opaque or amorphous factors that may inform whom judges, faculty members, or law firm partners regard as their protégés. Asian

⁶ LIU, ET AL, A PORTRAIT OF ASIAN AMERICANS IN THE LAW 29 (2017).

⁷ *Id.* at 3.

*Americans appear to face significant obstacles in these settings.*⁸

As bar associations dedicated to the advancement of equality and opportunity for APA attorneys, NAPABA and its Florida Affiliates believe it is imperative to feature a diverse range of views, experiences, and backgrounds in CLE programs in order to address the critical gaps in mentors, connections, and role models that are so important for career advancement. This is true for both panelists and audience members. Panelists benefit from recognition as experts which burnishes their credentials, and audience members can be inspired by witnessing those with similar backgrounds or experiences serving as role models and educators in the profession.

The dearth of APA mentors, role models, and connections in the legal profession may also explain the Portrait Project's finding that APA lawyers "skew toward law firm jobs [which] account for the higher salaries[,] but also [for] lower career satisfaction and higher frequency of mental health problems observed among Asian American attorneys."⁹ Additionally, the Portrait Project noted that

⁸ *Id.* at 41.

⁹ *Id.*

few Asian Americans appear motivated to pursue law in order to gain a pathway into government or politics. Given that in 2015, Asian Americans comprised only 3.1% of senior level U.S. Department of Justice attorneys¹⁰, this finding is not surprising.

As noted above for Florida, the judicial bench is another legal arena where APA attorneys face barriers. In a country where persons of color account for nearly 40% of the population, only 15% of the state supreme court seats are held by them.¹¹ On the federal level, at the end of 2020, only 37 out of 871 Article III judges were APAs¹², accounting for barely over 4% of the federal bench, even though APAs comprise nearly 6% of the U.S. population.

NAPABA itself has long championed the importance of diversity in the legal profession by recognizing achievement in this area: The NAPABA Law Firm Diversity Award honors law firms that actively, affirmatively, consistently, and enthusiastically recruit, retain, and

¹⁰ *Id.* at 24.

¹¹ Robbins, et al, *State Supreme Court Diversity*, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW (July 23, 2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_State_Supreme_Court_Diversity.pdf.

¹² Asian Pacific Americans and the Federal Judiciary, NAPABA (June 26, 2020), <https://www.napaba.org/page/JudicialNom>.

promote APA lawyers to equity partnership and firm leadership. It celebrates law firm successes in recognizing the potential, supporting the promise, and raising the influence of APA lawyers. The NAPABA Partners Network Diversity Leadership Award honors an in-house NAPABA member who has demonstrated leadership and commitment towards supporting NAPABA partners and diversity in the legal profession.

Without role models, mentors, and connections who can be seen and heard in the continuing legal education arena, members of the APA legal community will continue to face barriers to advancement.

III. NAPABA's and Florida Affiliates' Views on the Florida Supreme Court's Opinion and Amendment

NAPABA and its Florida Affiliates have carefully reviewed and disagree with both the conclusion and legal reasoning of the Florida Supreme Court in its recent opinion, *In re: Amendment to Rule Regulating the Florida Bar 6-10.3*, No. SC21-284 (Fla. April 15, 2021). In this case, the Florida Supreme Court, by its own motion, amended the Rules of the Florida Bar to prohibit the approval of any CLE courses submitted for accreditation by any sponsor that employs

purported “quotas” based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of course faculty or participants. For the following reasons, NAPABA and its Florida Affiliates believe the CLE policies in question are wholly distinguishable from the higher education cases on which the Court relied.

A. Background on the CLE Policy

In September, 2020, the Business Law Section (“BLS”) of the Florida Bar approved a new CLE Diversity Policy, (“BLS CLE Policy”) developed by members of its Inclusion, Mentoring and Fellowship Committee (“IMF”) and the Florida Bar Diversity and Inclusion Committee.¹³ Under the policy, the BLS would only endorse CLE programs with a certain number of diverse faculty. For instance, a CLE with three or four panelists, including the moderator, would require one “diverse” member, and panels with five to eight panelists, two “diverse” members, and nine or more would require three. The

¹³ Jim Ash, *Business Law Section to Diversify its Educational Program Panels*, FLORIDA BAR (Sept. 8, 2020), <https://www.floridabar.org/the-florida-bar-news/business-law-section-to-diversify-its-education-program-panels/>. 2020 Annual Labor Day Retreat Meeting Agenda, BUSINESS LAW SECTION OF THE FLORIDA BAR (Sept. 2, 2020), <http://www.flabizlaw.org/files/imfagenda0910.pdf>.

stated goal of the policy was to eliminate bias, increase diversity, and implement tactics aimed at recruiting and retaining diverse attorneys. “Diversity” as defined in the policy, included members of groups based on race, ethnicity, gender, sexual orientation, gender identity, disability, and multiculturalism.¹⁴

The policy did not prohibit CLEs that lacked diversity from taking place; rather, it simply stated a policy preference by the BLS that they would not affirmatively sponsor, co-sponsor, or seek accreditation for any CLE program that did not meet these guidelines. Furthermore, the policy was by no means absolute – the BLS Chair and IMF Committee had the discretion to grant exceptions to this requirement in the event that CLE sponsors, after a diligent search, were unable to find requisite diverse members for a proposed panel, or if a previously confirmed diverse speaker cancelled or withdrew and there was insufficient time to replace them with an alternative. In other words, the CLE policy was aspirational – the BLS could sponsor a CLE program without a diverse panel if one could not be attained.

¹⁴ *Id.*

B. The Florida Supreme Court’s Reliance on U.S. Supreme Court Higher Education Cases is Distinguishable from the BLS CLE Policy

The Florida Supreme Court decision cited to two U.S. Supreme Court cases, *Grutter v. Bollinger*¹⁵ and *Regents of University of Cal. v. Bakke*¹⁶. In both cases, the Supreme Court of the United States rejected the use of quotas for ***race-based*** admissions policies at post-graduate university programs (law school and medical schools respectively). There are three primary distinctions between these higher education decisions and the BLS CLE Policy.

- First, the Florida Supreme Court applied the highest level of strict-scrutiny review to strike down the BLS CLE Policy. Strict scrutiny requires narrow tailoring of programs involving *racial* classification and the prohibition on quotas implicating suspect classes such as race, religion, and national origin.¹⁷ The BLS CLE policy however, allows for diverse panelists not only with respect to race or religion, but also gender and sexual orientation which are held to a lower “intermediate scrutiny”

¹⁵ 539 U.S. 306 (2003).

¹⁶ 438 U.S. 265 (1978).

¹⁷ *Id.* at 279.

level of review where a policy must further an important government interest and the means to do so are substantially related to that interest¹⁸; and disability which is held to an even lower “rational basis” level of review where the policy in question must bear some rational connection with the policy’s goals.¹⁹

The Court’s ruling thus imposed the most stringent level of review, by applying *Grutter’s* admonition that “to be narrowly tailored a race-conscious admission program cannot use a quota system,” to CLE panelists who might not be selected on the basis of race, but for example based on sexual orientation, gender, or disability.

- Second, the Court’s reliance on *Bakke’s* articulation that numerical goals “must be rejected” as “facially invalid” is wholly distinguishable from the BLS CLE policy. In *Bakke*, Justice Powell’s reasoning for striking down the Davis Medical School’s quota for minority students was that imposition of a quota conferred “disadvantages upon persons like respondent [Bakke]

¹⁸ See *Craig v. Boren*, 429 U.S. 190 (1976) and *United States v. Windsor*, 570 U.S. 744 (2013).

¹⁹ See *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered” and are therefore unjustified.²⁰ In *Bakke*, Justice Powell found odious, a preference for “designated minority groups *at the expense of other individuals who are totally foreclosed from competition.*”²¹ This is not the case with the BLS CLE policy. Unlike a university admissions program which has a finite number of available slots for which there may be hundreds or thousands of candidates competing, having a minimum number of “diverse” presenters at a CLE does not deprive “non-diverse” participants from being on a panel. The CLE sponsors can simply raise the number of presenters to accommodate more non-diverse panelists. The bottom line is that in contrast to the situation in *Bakke* which the U.S. Supreme Court viewed as a zero-sum proposition where if a “minority” received a slot, it meant a “non-minority” was deprived of the slot, no such disadvantage to non-minorities exists here. Unlike an incoming law school class, the sponsors

²⁰ *Bakke* at 310.

²¹ *Id.* at 305 (emphasis added).

of a CLE program can simply expand the number of presenters to accommodate more speakers – both “diverse” and “non-diverse.”

It is notable that the Florida Supreme Court issued this opinion on its own accord, *sua sponte*, and NAPABA is not aware of any member of the Florida bar complaining that they have been excluded from participation in any CLE panel due to the BLS CLE Policy.

- Finally, the BLS CLE policy does not prohibit the presentation of CLE programs lacking requisite diverse panels. Rather, the guidance simply articulates the BLS’s values and criteria for programs it chooses to *endorse or co-sponsor*. A CLE sponsor who chooses not to present a program with diverse speakers may easily approach any one of the Florida Bar’s other 22 Sections or Divisions for their endorsement.

Note that the *Bakke* case upheld the use of race as a criteria in university admissions. Attainment of diversity was a “clearly constitutionally permissible goal.”²² Indeed, the Supreme Court has

²² *Id.* at 312.

explicitly endorsed diversity in education as not only a laudable, but necessary goal, stating, “The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues’.”²³ Furthermore, in the event that after a good-faith effort to find diverse panelists, a requisite number cannot be attained, the sponsors can apply for an exemption. This built-in flexibility in the CLE policy makes application of *Bakke* wholly inapposite.

IV. Conclusion: Why Diversity and Inclusion is Critical to Continuing Legal Education

NAPABA and its Florida Affiliates strongly believe that the goals of the BLS CLE Policy are both laudable and necessary. Diversity for diversity’s sake alone is not the objective; rather fostering diversity is an increasingly necessary component to the successful functioning of institutions such as the legal system. In fact, the Florida Supreme Court’s citation to *Grutter* explicitly underscores the importance of diversity in legal education: “As we have recognized, law schools

²³ *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (citing *United States v. Associated Press, D.C.*, 52 F.Supp. 362, 372 (1943)).

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served via the ePortal on 29th day of June, 2021, to the Office of the Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927.

Jacksonville Asian American Bar Association

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CERTIFICATE OF COMPLIANCE

I certify that the typeface used in the foregoing is 14-point Bookman Old Style, complying with Florida Rule of Appellate Procedure 9.045(b) and (e). The word count is 2,985 words.

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