

The American Bar Association’s Discriminatory Continuing Legal Education “Diversity” Policy

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KEY TAKEAWAYS

The American Bar Association no longer focuses on ensuring equality under the law; instead, it focuses on the perverse idea of “equity” under the law.

Through its educational policies, the ABA is promoting this nefarious and nebulous idea among both law students and practicing lawyers.

The Florida Supreme Court has prohibited the awarding of continuing legal education credit for programs sponsored by organizations with divisive quota policies.

The American Bar Association’s promotion of left-leaning policies has a long and storied history. America’s oldest voluntary legal organization no longer focuses on ensuring equality under the law; instead, it focuses on the more nefarious and nebulous idea of “equity” under the law. This shift away from a “color-blind” society that emphasizes equality of opportunity to a “color-conscious” society that emphasizes equality of outcomes necessarily means discriminating against some to advantage others—an idea that many Americans thought the nation had rejected long ago.

Much has been said about the problematic nature of the ABA’s “Diversity, Equity, and Inclusion” campaign directed at law schools,¹ but this is not its first foray into the mandating of educational “diversity.” Long before the ABA considered mandating diversity as part of its law school accreditation process, it rolled

This paper, in its entirety, can be found at <http://report.heritage.org/lm302>

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out a much more widespread—and for a long time, below-the-radar—educational diversity policy. This policy generally required Continuing Legal Education (CLE) programs sponsored by the ABA, depending on the CLE panel’s size, to have a minimum number of “diverse” panelists—meaning of a differing race, ethnicity, gender, sexual orientation, gender identity, or disability status.

As one commentator noted, “Most states require lawyers to take a certain number of CLE [credits] every year or lose their license. The ABA is a major supplier of CLE courses. Like a huge ship in a small lake, when the ABA moves, we all feel the waves.”² That has certainly proven to be true as some state bar associations and other private bar associations have sought to follow the ABA’s lead by implementing similar policies.

The controversy over these policies burst onto the national stage in 2020 when a section of the Florida Bar took its cue from the ABA and implemented its own CLE diversity policy. The ABA’s influence on the Florida Bar was—as it is for most state bars—abundantly clear. “As we understand it, the Florida Bar adopted an approach to diversity on panels in continuing legal education programs based on the policy and extensive work that the American Bar Association (ABA) has done on the subject,”³ noted one commenter, adding that the “ABA adopted [its] approach after extensive research and deliberation.”⁴

Fortunately, the Florida Supreme Court saw the dangers and problems posed by such policies and prohibited the Florida Bar from awarding CLE credits for any program sponsored by an organization “that uses quotas based on race, ethnicity, gender, religion, national origin, disability, or sexual orientation in the selection of faculty or participants.”⁵ The ABA, of course, was such an organization.⁶ The Florida Supreme Court took this action because it is the final supervisory authority over lawyers practicing in its state, as is true for most state supreme courts.

ABA Diversity and Inclusion Policy

The ABA’s explicit push to “diversify” the legal profession dates from the 1980s,⁷ but the association has mounted a much more aggressive effort over the past two decades. As the ABA has explained, in “2008, the ABA’s House of Delegates adopted the ABA’s Goal III—one of only four [overarching] ABA Goals”⁸ intended to “eliminate bias and enhance diversity.”⁹ As Professor Ronald Rotunda has noted, “Obviously, these are worthy goals. The problem is how the ABA chooses to implement them.”¹⁰

Specifically, in “May 2011, the ABA adopted its Diversity Plan to achieve Goal III.”¹¹ According to the ABA, “The Diversity Plan was intended to...enhance opportunities for diverse individuals to participate in ABA activities and programs...”¹² Included “in the Diversity Plan [was] the promotion of ‘diversity in CLE and other programming,’...”¹³ There were no mandatory guidelines in place under this policy; it simply contained aspirational goals. According to the ABA, however, “voluntary efforts fell far short of the Diversity Plan’s aspirations.”¹⁴

So, in a June 2016 letter, the ABA’s then-president announced the recommendations of her “Diversity & Inclusion 360 Commission,” which included replacing the voluntary CLE diversity and inclusion goals with a mandatory CLE diversity and inclusion policy.¹⁵ The ABA’s House of Delegates adopted this policy, and it took effect on March 1, 2017. The policy specifies that:

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 [the Standing Committee on Continuing Legal Education] will be created which will include representatives from [the Section Officers Conference]. 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.¹⁶

Florida Bar Business Law Section Policy

In September 2020, the Business Law Section of the Florida Bar implemented a CLE Diversity Policy based on the ABA’s. It required certain CLE panels sponsored by the Section to have a “diverse” faculty based on certain

defined characteristics such as “race, ethnicity, gender, sexual orientation, gender identity, disability[,] and multiculturalism.”¹⁷ According to the Section, its “CLE Diversity Policy is consistent with the CLE policies from other organizations like the American Bar Association.”¹⁸

In April 2021, however, the Florida Supreme Court correctly directed the Florida Bar, “effective immediately,” to “withhold its approval from continuing legal education programs that are tainted” by discrimination.¹⁹ It said that quotas “based on characteristics like the ones in this policy are antithetical to basic American principles of nondiscrimination.”²⁰ Although the court’s decision took immediate effect, it did provide a period for interested parties to comment on the new policy. As the court itself said after the comment period closed, “With a handful of exceptions, the forty-plus comments the Court received in response to the rule amendment were negative. But we respectfully disagree with the opponents’ principal objections, and we will explain why.”²¹

Flawed Defenses of These “Diversity” Policies

What were those principal objections, and what were the principal defenses of policies like the ABA’s and the Business Law Section’s? Generally speaking, the objections and defenses fell into two broad categories: (1) the policies did not implement prohibited quotas, and (2) even if they did, organizations like the ABA and the Florida Bar Business Law Section are private entities free to adopt any policies they please.

Quotas. Do CLE diversity requirements qualify as quotas? The ABA, the Business Law Section, and others that support the policies argue that they do not.²² The ABA said that its “Diversity & Inclusion Policy for Continuing Legal Education (CLE) panels is *not* a constitutionally forbidden ‘quota.’ It is a policy of *inclusion*—not *exclusion*.”²³ The Business Law Section said that because its “policy considers diversity as a plus factor while still evaluating each potential speaker as an individual without race or ethnicity being the defining feature of his or her credentials,” because the policy “does not set aside any number of speaker spots, programs, or even time, for diverse speakers,” and because the “Section may waive the CLE Diversity Policy or make an exception to it,” it is not a quota.²⁴ Others made essentially the same argument, adding that because of the unique nature of CLE programs and the way they are conducted, no hard caps—and thus no quotas—exist.

At a minimum, however, some of the policy’s requirements would likely constitute a quota. Having considered these arguments, the Florida Supreme Court said that:

Many commentators object to our labeling the Business Law Section's and the ABA's policies as "quota" policies. These commentators further maintain that, labels aside, the policies harm no one and are intended to include rather than to exclude. We have no doubt that supporters of the policies at issue genuinely see things this way.

But we already have explained why it is correct, as a matter of standard English, to describe these policies as imposing quotas.²⁵

The court had earlier said that the "label [of quota] fits: as a matter of ordinary usage, the term 'quota' includes '[a] number or percentage, especially of people, constituting a required or targeted minimum."²⁶ That is exactly what these policies require. The Court said that the "Section's policy requires a minimum percentage of 'diverse' CLE panelists. [And in] doing so, the policy necessarily caps the allowable percentage of nondiverse panelists."²⁷

The Business Law Section's policy, which is based on the ABA's, specifically provides that "individual programs with faculty of three or four panel participants, including the moderator, will require at least 1 diverse member"; that "individual programs with faculty of five to eight panel participants, including the moderator, will require at least 2 diverse members"; and that "individual programs with faculty of nine or more panel participants, including the moderator, will require at least 3 diverse members."²⁸ Standing alone, those certainly sound like quotas, the Business Law Section's and the ABA's protests notwithstanding.

Moreover, the Florida Supreme Court's use of the term "quota" aligns with the U.S. Supreme Court's use of that term. In *Grutter v. Bollinger*, the U.S. Supreme Court said that "[p]roperly understood, a quota is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. 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 available seats."²⁹ In an earlier opinion, *Regents v. University of Cal. v. Bakke*, the Court said that the use of quotas in higher education "must be rejected" as "facially invalid."³⁰

Some proponents of these policies argued that CLE courses are not higher education. Therefore, these commenters contended, *Grutter* and *Bakke* do not apply in the CLE context. This necessarily raised a few important questions:

- Are the educational opportunities and benefits provided by CLE courses so dissimilar to the educational opportunities and benefits provided by higher education courses that *Grutter* and *Bakke* do not control?
- If those cases do apply, do certain carveouts and exemptions to these CLE policies provide sufficient flexibility for them to avoid qualifying as prohibited quotas under *Grutter* or *Bakke*?
- In particular, what level of scrutiny is appropriate for mixed-class cases such as the ones presented by these policies (an important issue because the level of scrutiny could very easily determine the outcome of any decision on the merits)?³¹

The very fact that these are difficult legal questions supports the Florida Supreme Court’s decision to “disassociate The Florida Bar’s CLE infrastructure from program sponsors that use discriminatory quota policies,” especially because the court was acting in its supervisory capacity rather than its adjudicative capacity.³² The court made clear that it objected to these CLE policies on the grounds that they are bad policy:

[The] commenters’ objections to this Court’s...citations of [*Grutter*] and [*Bakke*], are beside the point. We did not say that the Business Law Section and the ABA are state actors, nor did we purport to apply the Equal Protection Clause to those groups’ CLE speaker policies. *Grutter* and *Bakke* are relevant because they illuminate the harm caused by race-based quotas and stress the importance of treating people as individuals, rather than as members of groups.³³

State Action. Could these policies violate the Constitution even though they are the policies of private organizations? After all, it is blackletter law that unless a governmental entity takes or refuses to take action, no constitutional violation can occur no matter how heinous the conduct of private parties may be.

In this case, the Florida Bar’s Business Law Section claims to be a private entity because of the structure of the Florida Bar, and so does the ABA.³⁴ As a general rule, they are free to adopt any policies they wish without worrying about potential constitutional violations.³⁵ Even though the Florida Supreme Court deftly avoided the question of whether state action exists when the Florida Bar approves the CLE credits, the issue is open for debate under the U.S. Supreme Court’s current precedent and must be discussed because other state supreme courts might disagree on the policy grounds.

During the comment period on the court's action, the Business Law Section addressed this issue and defended its policy by saying that "[t]o the extent The Florida Bar's approval of a CLE course proposal is government action, it is not imposing or ratifying the CLE Diversity Policy."³⁶ Essentially, the Business Law Section's argument was that because no state action exists, the Florida Supreme Court should not concern itself with the diversity policies of voluntary private organizations like the Business Law Section or the ABA.³⁷

The Section said that the Fifth and Fourteenth Amendments "erect no shield against merely private conduct"³⁸ and cited to a D.C. Circuit Court of Appeals case that quotes the U.S. Supreme Court decision in *Shelley v. Kraemer*. Both the D.C. Circuit case and *Shelley* dealt with the question of when state action exists, the former in terms of funding certain foreign organizations and the latter in terms of when private discriminatory agreements can be enforced by courts. After all, if state action does not exist, no constitutional violation can exist. In its comments, the Business Law Section even appended a parenthetical to its *Shelley* citation. The parenthetical says that "covenants between private individuals prohibiting minorities from purchasing property 'cannot be regarded as a violation of any rights guaranteed...by the Fourteenth Amendment.'"³⁹

The parenthetical misses the point of *Shelley*. It is true that the enactment of certain policies or requirements by a private entity typically does not constitute state action and that the Constitution therefore provides no shield against those actions no matter how distasteful they may be. In fact, the Constitution, especially in the First Amendment context, might affirmatively provide protection to those actions. However, state action could be present when the Florida Bar, carrying out its mandate from the Florida Supreme Court, approved the CLE credit.

Courts historically have found state action and have refused to enforce policies that are constitutionally problematic. Restrictive housing covenants are the classic example.⁴⁰ In fact, in *Shelley v. Kraemer*, the U.S. Supreme Court specifically recognized that if a court issues a judgment to enforce a racially or ethnically restrictive housing covenant, state action has occurred,⁴¹ and such enforcement is impermissible.

In *Shelley*, the U.S. Supreme Court stated, "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials."⁴² Because the "restrictions on the right of occupancy of the sort sought to be created by the private

agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance,”⁴³ the U.S. Supreme Court found it irrelevant that the “pattern of discrimination” was “defined initially by the terms of a private agreement.”⁴⁴ Consequently, the housing covenant could not be enforced by the judicial branch of government and still remain consistent with the Constitution.⁴⁵

The same problems could exist when the Florida Bar attempted to use the power of the state to accept and enforce certain CLE requirements. When a state is being asked to enforce or ratify an action that would “deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of [courts] to enforce the constitutional commands” rather than to enforce or ratify the constitutionally questionable actions.⁴⁶

First “Revised” ABA Policy Solved None of These Problems

While the ABA contends that its original policy was not bad policy, was not a quota system, and was not constitutionally impermissible regardless, it said that:

Following the issuance of [the Florida Supreme Court’s] order and The Florida Bar’s application of the order to bar ABA CLE programs from accreditation in Florida...[but before the Florida Supreme Court’s final reaffirmation of that order], 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.⁴⁷

Setting aside the condescending tone of this statement, which suggests that those who objected to the ABA’s policy were simply too stupid to understand it and had “misperceived” it, the ABA’s revised policy is equally as insulting and solves none of its problems. While it tweaked some irrelevant language in the policy, the ABA added two sentences that it claimed solved all of the problems: “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.”⁴⁸ It went on to say that 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*.”⁴⁹

On its face, however, the addition of these two sentences changed nothing about how the policy actually operated.⁵⁰ Simply seeking to invoke a talismanic phrase like “This is a policy of inclusion and not exclusion” changes nothing. The Florida Supreme Court obviously agreed when it reaffirmed its earlier order: “We sincerely hope that the ABA will solve this problem by abandoning its quota policy and pursuing its diversity-related goals without resorting to discriminatory quotas—something that institutions throughout our society have shown themselves able to do.”⁵¹

Second Revised ABA Policy: Better But Still Suspect

The ABA also showed itself able to do it, albeit begrudgingly. After the Florida Supreme Court refused to back down and accept the tainted CLE credits from ABA-sponsored programs because of the association’s quota policy, the ABA suddenly saw fit to change its “misperceived” policy and supposedly eliminate its quota requirements.⁵² According to the *ABA Journal*, the “new ABA policy eliminates numeric requirements for panel diversity while requiring organizers to meet the objectives of the association’s Goal III to eliminate bias and enhance diversity.”⁵³ A spokesperson for the Florida Bar agreed: “The Florida Bar has reviewed the ABA’s revised Diversity, Equity and Inclusion CLE Policy, and it appears to comply with [the] Rules Regulating the Florida Bar...”⁵⁴

But does it? A closer inspection of the new policy shows that this determination is questionable. For example, the new policy says that “[a]ll programs sponsored or co-sponsored by the ABA *will* meet the objectives of Goal III to eliminate bias and enhance diversity.”⁵⁵ It goes on to say that “[p]rogram organizers *will* invite and include prospective moderators and faculty members to create CLE panels that meet the objectives of Goal III.”⁵⁶ Those statements are not permissive. They are mandatory. The policy further specifies that those who *will* be invited *and* included in panels “include[], among others, moderators and faculty members from historically underrepresented communities e.g., racial and ethnic demographic groups/people of color, women, persons with disabilities, and LGBTQ+ individuals.”⁵⁷ That still sounds like a quota, just a less obvious—though still equally as obnoxious—one. The Florida Bar should publicly state its rationale for why this new policy does not contain a quota.

This is especially important in light of the fact that the ABA is ordering the creation of a subcommittee, which “will include representatives from... the [ABA’s] Diversity and Inclusion Center” and “shall monitor the Association’s CLE programming to ensure that Association entities conduct

CLE programs in accordance with this policy.”⁵⁸ As if that were not enough, the ABA makes clear that the “subcommittee will have authority to engage and assist any ABA entity found not to be in compliance with this policy.”⁵⁹

Conclusion

As Justice John Marshall Harlan said in his lone dissent in *Plessy v. Ferguson* over 125 years ago, “Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”⁶⁰

What is shocking today is that in the name of increased diversity, some advocates, however well-intentioned they may be, are making many of the same arguments that were made more than 60 years ago to prevent black and other minority students from attending the educational institutions of their choice.⁶¹ In reaching its decision, the Florida Supreme Court said, “We reject the notion that quotas like these cause no harm. Quotas depart from the American ideal of treating people as unique individuals, rather than as members of groups. Quotas are based on and foster stereotypes. And quotas are divisive.”⁶² U.S. Supreme Court Justice Clarence Thomas struck a similar note in his partial concurrence in *Grutter*: “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”⁶³

Instead of doubling down on these demeaning, divisive policies, organizations like the American Bar Association should reject them and focus on fostering an environment in which ensuring equality under the law, not the nefarious and nebulous idea of “equity” under the law, is of primary importance. This shift would promote and preserve the “color-blind” Constitution that Justice Harlan, Justice Thomas, the Florida Supreme Court and many others have so eloquently defended.

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Endnotes

1. See Sarah Parshall Perry and Zack Smith, *The American Bar Association's "Diversity" Agenda Endangers the Integrity of the Legal Profession*, HERITAGE FOUND. LEGAL MEMORANDUM No. 299 (Mar. 31, 2022), <https://www.heritage.org/sites/default/files/2022-03/LM299.pdf>.
2. Ronald D. Rotunda, *The ABA's New Rules Mandating "Diverse" CLE Panels*, VERDICT (Oct. 24, 2016), <https://verdict.justia.com/2016/10/24/abas-new-rules-mandating-diverse-cle-panels>.
3. COMMENT BY THE LEGAL SERVICES CORPORATION at 3, available at https://efactssc-public.flcourts.org/casedocuments/2021/284/2021-284_response_56357_comments.pdf.
4. *Id.*
5. *In Re: Amendment to Rule Regulating The Florida Bar 6-10.3*, No. SC21-284 (Fla. Apr. 15, 2021) [hereinafter "Original Order"]; see also *In Re: Amendment to Rule Regulating The Florida Bar 6-10.3*, No. SC21-284 (Fla. Dec. 16, 2021) [hereinafter "Final Order"].
6. See *infra*.
7. COMMENTS OF THE AMERICAN BAR ASSOCIATION at 5, available at https://efactssc-public.flcourts.org/casedocuments/2021/284/2021-284_response_56441_comments.pdf.
8. *Id.*
9. *Id.*
10. Ronald D. Rotunda, *The ABA Decision to Control What Lawyers Say: Supporting "Diversity" But Not Diversity of Thought*, HERITAGE FOUND. LEGAL MEMORANDUM No. 191, at 7 (Oct. 6, 2016), <http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf>.
11. COMMENTS OF THE AMERICAN BAR ASSOCIATION at 7.
12. *Id.*
13. *Id.*
14. *Id.* at 9 (citations omitted).
15. *Id.* at 9–10.
16. *Id.* at 10–11.
17. EXHIBIT B, APPENDIX TO COMMENTS OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR TO AMENDMENT TO RULE 6-10.3(D), RULES REGULATING THE FLORIDA BAR, BLS DIVERSITY & INCLUSION CLE SPEAKER PANEL POLICY (hereinafter "CLE DIVERSITY POLICY") (SEPT. 1, 2020). The Section provided no definition for any of these.
18. COMMENTS OF THE BUSINESS LAW SECTION at 4; see also ABA DIVERSITY & INCLUSION CLE POLICY, available at https://www.americanbar.org/content/dam/aba/administrative/diversity-portal/cle_policy_adopted_by_bog_june10_16.pdf.
19. Original Order, *supra* note 5, at 2.
20. *Id.*
21. Final Order, *supra* note 5, at 6. For one of the "handful of exceptions" to the negative comments, see COMMENTS OF ZACK SMITH, LEGAL FELLOW, THE HERITAGE FOUNDATION, available at https://efactssc-public.flcourts.org/casedocuments/2021/284/2021-284_response_56451_comments.pdf.
22. See, e.g., COMMENTS OF THE BUSINESS LAW SECTION at 13 (stating "[T]he CLE Diversity Policy did not use a quota"); see also COMMENTS OF THE AMERICAN BAR ASSOCIATION at 14–22.
23. COMMENTS OF THE AMERICAN BAR ASSOCIATION at 1 (emphasis in original).
24. COMMENTS OF THE BUSINESS LAW SECTION at 20.
25. Final Order, *supra* note 5, at 7.
26. *Id.* at 3–4 (citing American Heritage Dictionary at 1447 (5th ed. 2011)).
27. *Id.*
28. 0 CLE DIVERSITY POLICY, *supra* note 17; see also ABA DIVERSITY & INCLUSION CLE POLICY, *supra* note 18.
29. *Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (quotations and citations omitted).
30. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).
31. See *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607–08 (discussing the different standards of scrutiny that are applicable depending on the classifications involved and stating that in "determining what level of scrutiny applies to a plaintiff's equal protection claim, we look to the basis of the distinction between the classes of persons").

32. Final Order, *supra* note 5, at 7. While the Florida Supreme Court cited U.S. Supreme Court precedent in its Order and Final Order, it is always free to interpret the Florida Constitution or Florida state law in a different, more protective way as well as long as this interpretation does not run afoul of the U.S. Constitution. *Rigterink v. State*, 66 So. 3d 866, 888 (Fla. 2011) (citations and quotations omitted) (stating that “state courts are absolutely free to interpret state constitutional provisions to accord *greater protection* to individual rights than do similar provisions of the United States Constitution”).
33. Final Order, *supra* note 5, at 7 n. 3.
34. COMMENTS OF THE BUSINESS LAW SECTION at 13–15. The ABA also functions as the sole federally recognized law school accrediting agency, and many states require that anyone seeking to join the state bar must be a graduate of an ABA-accredited law school. Some have suggested that in certain circumstances, accrediting agencies could be treated as state actors. See, e.g., Samantha Harris, *Is NCATE a “State Actor”?*, THEFIRE.ORG (Jun. 5, 2006), <https://www.thefire.org/is-ncate-a-state-actor/>. This *Legal Memorandum* takes no position on this argument.
35. Of course, other statutory violations, such as employment discrimination, could still occur.
36. COMMENTS OF THE BUSINESS LAW SECTION at 16.
37. *Id.* at 14 (stating that “the Section is a voluntary, self-funded association”).
38. *Id.* at 13 (citations and quotations omitted).
39. *Id.* (citing *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)).
40. *Restrictive Covenants, Conditions, or Agreements in Respect of Real Property Discriminating Against Persons on Account of Race, Color, or Religion*, 3 A.L.R.2d 466 (stating that “Efforts to defeat the restrictions continued, however, and the attack upon them eventually was concentrated around the theory that, even though such antiracial covenants might be valid private agreements, judicial enforcement thereof by a state court amounts to state action and denies a thereby excluded person of the affected race the equal protection of the laws, in violation of his constitutional rights under the Fourteenth Amendment”).
41. *Shelley*, 335 U.S. at 14–23; see also *Harris v. Sunset Islands Property Owners, Inc.*, 116 So. 2d 622 (Fla. 1959).
42. *Shelley*, 335 U.S. at 18.
43. *Id.* at 12.
44. *Id.* at 20.
45. *Cf. Whole Women’s Health v. Jackson*, 595 U.S. ____ at 5 (slip opinion) (explaining that generally federal courts cannot enjoin state court judges from deciding cases).
46. *Shelley*, 335 U.S. at 20 (also noting that “State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms”).
47. COMMENTS OF THE AMERICAN BAR ASSOCIATION at 22.
48. *Id.* at 22–23.
49. *Id.* at 24.
50. The amended policy, with additions in bold and deletions noted by strike throughs, is as follows: “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.” COMMENTS OF THE AMERICAN BAR ASSOCIATION at 22–23.
51. Final Order, *supra* note 5, at 9.

52. The new, supposedly non-quota policy reads as follows: “The ABA supports proactive measures to ensure that individuals from all backgrounds are afforded fair opportunities to participate in CLE programs. All CLE programs sponsored or co-sponsored by the ABA will meet the objectives of Goal III to eliminate bias and enhance diversity. ¶ Program organizers will invite and include prospective moderators and faculty members to create CLE panels that meet the objectives of Goal III. This includes, among others, moderators and faculty members from historically underrepresented communities e.g., racial and ethnic demographic groups/people of color, women, persons with disabilities, and LGBTQ+ individuals. ¶ SCOCLE [the Standing Committee on Continuing Legal Education] will create a subcommittee, which will include representatives from SOC and the Diversity and Inclusion Center. The subcommittee shall monitor the Association’s CLE programming to ensure that Association entities conduct CLE programs in accordance with this policy. The subcommittee will have authority to engage and assist any ABA entities found not to be in compliance with this policy. SCOCLE shall report the subcommittee’s finding at regularly scheduled meetings for the Board of Governors. ¶ The implementation date for this Diversity Equity and Inclusion CLE Policy shall be April 5, 2022. ABA DIVERSITY EQUITY AND INCLUSION CLE POLICY (Adopted by the Board of Governors, Apr. 5, 2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/04/diversity-equity-and-inclusion-cle-policy.pdf>.
53. Debra Cassens Weiss, *ABA’s New CLE Policy Appears to Comply with State Ban on Diversity “Quotas,” Florida Bar Says*, ABA JOURNAL (Apr. 6, 2022, 2:38 PM CDT), <https://www.abajournal.com/web/article/aba-revises-cle-policy-after-florida-bans-course-credit-over-panel-quotas-numeric-mandates-are-gone>.
54. *Id.*; see also Mark D. Killian, *ABA Revises Its Diversity, Equity and Inclusion CLE Policy*, THE FLORIDA BAR NEWS (Apr. 18, 2022), <https://www.floridabar.org/the-florida-bar-news/aba-revises-its-diversity-equity-and-inclusion-cle-policy/>.
55. ABA Policy, *supra* note 52 (emphasis added).
56. *Id.* (emphasis added).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J. dissenting).
61. See, e.g., *Virgil D. Hawkins Story*, UF LAW, <https://www.law.ufl.edu/areas-of-study/experiential-learning/clinics/virgil-d-hawkins-story> (last visited Jul. 14, 2021); Cf. Darryl Paulson & Paul Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 FLA. ST. U. L. REV. 59, 66 (1984) (stating that “the Board [of Control, which oversaw higher education in Florida at the time] expressed fear of declining revenue in cafeterias and a decline in alumni contributions because of integration”), with COMMENTS OF THE BUSINESS LAW SECTION OF THE FLORIDA BAR at 4 (filed Jul. 13, 2021) (stating that “For Florida and the Section to continue to attract businesses to this state, they must continue to demonstrate their commitment to diversity manifest in programs offered”); Cf. COMMENTS OF THE BUSINESS LAW SECTION at 6–7 (stating that “Diverse CLE faculty is important both to the professional development of those presenting, and to those attending the classes. The path to partnership and achieving higher level success as an attorney often includes attorneys being able to position themselves as experts through serving as CLE faculty”) and COMMENTS OF CARLTON FIELDS, P.A. (filed May 18, 2021) (stating that “We have every reason to believe that this Policy will operate to expand professional growth opportunities to both program panelists and participants and to enrich CLE offerings in every important way”), with *Fisher v. Univ. of Texas at Austin*, 570 U.S. 297, 322–23 (Thomas, J. concurring) (stating that “It is also noteworthy that, in our desegregation cases, we rejected arguments that are virtually identical to those advanced by the University today.... The University asserts, for instance, that the diversity obtained through its discriminatory admissions program prepares students to become leaders in a diverse society.... The segregationists likewise defended segregation on the ground that it provided more leadership opportunities for blacks....”); Cf. COMMENTS OF THE BUSINESS LAW SECTION at 4 (stating that “To continue working with those clients who drive business, lawyers representing business clients—the Section members—must follow the clients’ admonitions.... The CLE Diversity Policy the Section adopted, in effect, reflects what businesses are requiring: Ensuring diversity in everything we do”), with *Fisher*, 570 U.S. at 325 (Thomas, J. concurring) (stating that while “the University admits that racial discrimination in admissions is not ideal, it asserts that it is a temporary necessity because of the enduring race consciousness of our society.... Yet against, the University echoes the hollow justifications advanced by the segregationists”).
62. Final Order, *supra* note 5, at 4.
63. *Grutter v. Bollinger*, 539 U.S. 306, 353 (Thomas, J. concurring in part and dissenting in part).