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April 24, 2024

Sent via Email

American Bar Association
Mary L. Smith
President
321 North Clark Street
Chicago, IL 60654

**Re: ABA's Illegal Judicial Clerkship Program & Judicial Intern
Opportunity Program**

Dear Ms. Smith:

We write to demand that the American Bar Association (ABA) cease and desist from using race as a factor in its Judicial Clerkship Program and Judicial Intern Opportunity Program. These programs, in their current form, violate multiple federal, state, and local civil-rights laws, and harms innumerable law students around the country. Unless the ABA announces by April 30, 2024, that these programs will no longer use race as a factor, we will pursue appropriate legal action.

The ABA's Judicial Clerkship Program "introduces law students from diverse backgrounds . . . to judges and law clerks."¹ It also "informs and educates the students as to life-long benefits of a judicial clerkship" and "encourages judges to consider students of color . . . for a judicial clerkship." These activities occur annually at a conference sponsored by LexisNexis, which took place this year in Louisville, Kentucky. The conference is essentially a job fair at which judges from across the nation meet potential clerk applicants. Law schools contract with the ABA to send students to the conference. The ABA boasts on its website that "53 minority law students" participated at a past conference.

Below is a screenshot of the ABA's website, which shows the three criteria a law school must agree to if it wishes to participate, at least one of which is illegal:

¹ https://www.americanbar.org/groups/diversity/diversity_pipeline/projects_initiatives/judicial_clerkship_program/

The Process

Membership in the ABA Judicial Clerkship Program will require the selected law schools to:

- 1 Commit to pay the annual participation fee for the next three years
- 2 For each year of membership in the program, commit to send (and underwrite the costs for) four to six law students who are from underrepresented communities of color.
- 3 Select participating students using criteria developed by the school with an understanding of the ABA's Goal III objectives. Students who have already secured clerkship positions are not eligible to participate in the program. We suggest consideration of students who may not already be likely candidates for clerkships or may not even be considering clerkships. First and second year students are preferable. Each participating school should strive to select a diverse group of students to participate in the program.

Number two imposes a racial quota: Each law school must send—and pay for—“four to six law students who are from underrepresented communities of color.” The phrase “underrepresented” is undefined.

The American Bar Association also imposes a second quota, which is just as nefarious, as shown in the screenshot below:

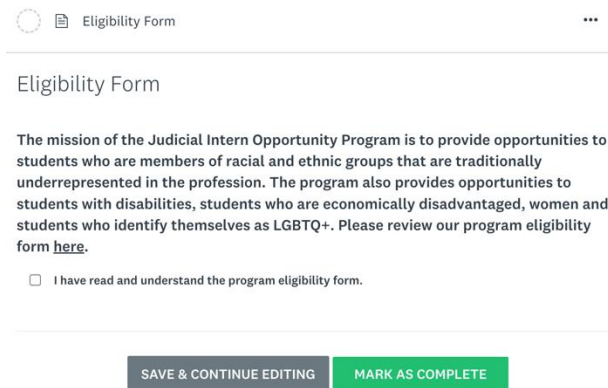
Judges from around the nation have agreed to participate in the Program. Article III judges and state supreme court justices will receive preference in selection of judges. Each judge will be asked to make a commitment to strive to hire at least two minority judicial law clerks over the next five years. The minority judicial law clerks they hire need not have participated in this Program.

This paragraph is troubling in that it suggests that judges must agree to hire a specific number of “minority judicial law clerks” to participate.

The Judicial Intern Opportunity Program “provide[s] opportunities to students who are members of racial and ethnic groups that are traditionally underrepresented in the profession” to work with a judge over the summer.² These interns are paid \$2,000 for their work.

² <https://www.americanbar.org/groups/litigation/about/awards-initiatives/jiop/program/>

As indicated by the screenshots below, at multiple points during the application process, law students are told that race is a factor. First, they must read an eligibility form:



The screenshot shows a web form titled "Eligibility Form". At the top, there is a header with a circular logo, a document icon, the text "Eligibility Form", and a three-dot menu icon. Below the header, the title "Eligibility Form" is repeated. The main text of the form states: "The mission of the Judicial Intern Opportunity Program is to provide opportunities to students who are members of racial and ethnic groups that are traditionally underrepresented in the profession. The program also provides opportunities to students with disabilities, students who are economically disadvantaged, women and students who identify themselves as LGBTQ+. Please review our program eligibility form [here](#)." Below this text is a checkbox labeled "I have read and understand the program eligibility form." At the bottom of the form, there are two buttons: "SAVE & CONTINUE EDITING" and "MARK AS COMPLETE".

That form defines various racial categories:

JJOP ELIGIBILITY

The mission of the Judicial Intern Opportunity Program is to provide opportunities to students who are members of racial and ethnic groups that are traditionally underrepresented in the profession. The program also provides opportunities to students with disabilities, veterans, students who are economically disadvantaged, students who identify themselves as LGBTQ+, and women.

The ABA and Litigation Section are committed to advancing Goal III of the ABA: Eliminate Bias and Enhance Diversity. JJOP is advancing a commitment to historical exclusion of many groups based on race, ethnicity, gender, sexual orientation, and disability status. We will not be specifically sharing demographic data and will keep sensitive personally identifiable information anonymous. Please use the following definitions to help identify program qualifications.

African American/Black refers to people having origins in any of the Black racial groups of Africa or those with or of African descent. Some examples of self-identifications of those in this group may include (but are not limited to): people who identify their racial/ethnic background as Black, African American, Nigerian, or Haitian.

Asian (Central/East/South/Southeast) refers to people having origins in any of the original peoples of the Far East, Southeast Asia, or South Asia. Some examples of specific self-identifications within this group may include (but are not limited to): people who identify their racial/ethnic background as Indian, Bangladeshi, Pakistani, Desi, Chinese, Filipino, Korean, Japanese, Vietnamese, Hmong, Thai.

Middle Eastern/North African refers to people having origins in any of the countries in the Middle East and North Africa, which includes approximately 19 countries in the areas between Morocco and Somalia in Northern Africa, and between Yemen and Iran in West Asia/the Middle East.

Native Hawaiian/Pacific Islander refers to people having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. Some examples of specific self-identifications within this group may include (but are not limited to): people who identify their racial/ethnic background as Native Hawaiian, Guamanian or Chamorro, Samoan, Tahitian, Mariana Islander, or Marshallese.

White refers to people having origins in any of the original peoples of Europe. Some examples of specific self-identifications within this group may include (but are not limited to): people who identify their racial/ethnic background as White, Irish, German, Italian, or Romanian.

Hispanic/Latino/a/x refers to people having origins in Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish-speaking or Portuguese speaking culture or origin, regardless of race.

Native American/Indigenous refers to people having origins in any of the original peoples of North and South America (including Central America), including American Indians and Alaska Natives (including Inuit and Aleuts), and who maintain tribal affiliation or community attachment. Some examples of specific self-identifications within this group may include (but are not limited to): people who identify their racial/ethnic background or tribal affiliation as Rosebud Sioux, Chippewa, Menominee, or Navajo.


Two or More Races refers to people whose racial/ethnic background falls into one or more of the categories listed above.

Next, they must check a box indicating how they qualify:

Please identify how you qualify for the program:

- ☐ Hispanic or Latino
- ☐ Asian (Not Hispanic or Latino)
- ☐ Native American or Alaska Native (Not Hispanic or Latino)
- ☐ Black or African or American (Not Hispanic or Latino)
- ☐ Native Hawaiian or Pacific Islander (Not Hispanic or Latino)
- ☐ Two or More Races
- ☐ Economically Disadvantaged
- ☐ Gender Identity
- ☐ Veteran
- ☐ Disabled
- ☐ Caucasian
- ☐ LGBTQ+
- ☐ I prefer not to include that information

Students are told that an answer to this question will “assist the screening committee to better identify those applicants most deserving”:

 Program Eligibility ...

Form for "Program Eligibility"

This is my form.

Program Eligibility

To assist the screening committee to better identify those applicants most deserving of these positions we invite you to voluntarily self-identify answers to the following optional questions. The information obtained will be kept confidential and when reported, data will not identify any specific individual. Please review our program eligibility form [here](#).


Racial quotas have been recognized as illegal for decades. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 209 (2023).

More recently, the United States Supreme Court has recognized that under the “twin commands” of equal protection, “race may never be used as a ‘negative’ and . . . may not operate as a stereotype.” *Id.* at 218. These legal principles apply not only to state actors under the Constitution, but also private actors under 42 U.S.C. §§ 1981 & 1985, as well as Titles VI and VII of the Civil Rights Act of 1964. The *SFFA* decision interpreted and applied Title VI against Harvard, which is a private non-profit organization, like the ABA. Moreover, the judicial code of conduct for federal judges codifies these commands: “Cognizable misconduct includes intentional discrimination on the basis of race, color, . . . , [and] national origin” R. Jud. Code Conduct & Jud.-Disability Procs. 4(a)3.

Accordingly, the Judicial Clerkship Program and Judicial Intern Opportunity Program are illegal. They violate numerous civil rights statutes. The legal standards applied above are also codified in state and local laws, which also prohibit the type of race discrimination present in the Judicial Clerkship Program and Judicial Intern Opportunity Program.

Recently, the Wisconsin State Bar settled a lawsuit over a similar program.³ Exhibit A of the settlement agreement is reproduced below:


³ <https://will-law.org/state-bar-abandons-dei-program/>



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Diversity Clerkship Program

The State Bar's Diversity Clerkship Program is a 10 week paid summer employment opportunity where first-year Marquette University Law School and University of Wisconsin Law School students ~~with backgrounds that have been historically excluded from the legal field~~ are matched with a wide array of employers from private law firms, corporate legal departments and governmental agencies. Student clerks gain practical legal experience, and participating employers obtain valuable legal support.

Eligibility

First-year Marquette University Law School and University of Wisconsin Law School students ~~with backgrounds that have been historically excluded from the legal field~~ who are in good standing may apply. Successful applicants demonstrate a commitment to diversity and a record of academic achievement.



The 2022 Diversity Clerkship Program participants.

Additionally, under the settlement, the Wisconsin State Bar agreed to replace its definition of diversity with the following and to “prominently display[] on the State Bar’s website” this new definition:

Old Definition	New Definition
<p>The term “diversity” has a dynamic meaning that evolves as the demographics in the state change. It is an inclusive concept that encompasses, among other things, race, ethnicity, national origin, religion, gender, gender identity, age, sexual orientation and disability. Inclusion helps to create a culture that embraces people from the widest range of talent and experience and promotes understanding and respect for all people and different points of view in the legal profession.</p>	<p>Diversity means including people with differing characteristics, beliefs, experiences, interests, and viewpoints. Diversity promotes an environment in which all individuals are treated with dignity and respect, regardless of their differences and without regard to stereotypes, and helps to ensure a better understanding and consideration of the needs and viewpoints of others with whom we interact.</p>

Similar settlements have been reached in lawsuits brought against private law firms.⁴

The ABA should follow these precedents as soon as possible. Specifically, it must publicly agree to remove the illegal racial quotas. It must further agree that race will not be employed, in any way, to judge who may participate in the Judicial Clerkship Program and Judicial Intern Opportunity Program. As the United States Supreme Court has instructed, “[e]liminating racial discrimination means eliminating all of it.” *SFFA*, 600 U.S. at 206.

We look forward to your response by April 30, 2024.

⁴ <https://news.bloomberglaw.com/business-and-practice/perkins-coie-dei-suit-dropped-by-anti-affirmative-action-group>

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Esenberg". The letters are cursive and fluid, with a long horizontal stroke at the end.

Rick Esenberg
President & General Counsel

A handwritten signature in black ink, appearing to read "Dan Lennington". The signature is highly stylized with large loops and a long horizontal tail.

Daniel P. Lennington
Deputy Counsel

A handwritten signature in black ink, appearing to read "Skylar Croy". The signature is written in a cursive, slightly slanted style.

Skylar Croy
Associate Counsel