WISCONSIN INSTITUTE FOR LAW & LIBERTY, INC.
330 E. Kilbourn Avenue, Suite 725, Milwaukee, WI 53202-3141
414-727-WILL (9455) | Fax 414-727-6385 |
www.will-law.org

May 21, 2024

Sent via Postal Service

Clerk of Court
United States Court of Appeals for the Eighth Circuit
111 S. 10th St., Room 24.329
St. Louis, MO 63102

Re: Brief Statement of Facts Describing Judicial Misconduct

Dear Judicial Council:

Article II of the Rules of Judicial-Conduct provides that "[c]ognizable misconduct includes intentional discrimination on the basis of race, color, . . . and national origin . . . ." This rule is "mandatory" and "superscede[s] any conflicting judicial-council rule." R. Jud.-Conduct art. I, § 2(a).

The Honorable Leo I. Brisbois, a magistrate judge in the District of Minnesota, violated this rule by participating—and at one point co-chairing—the American Bar Association's (ABA) Judicial Clerkship Program. He appears in a video promoting the program, in which his official title is prominently displayed[1]:

[1] See the second video from the top. https://www.americanbar.org/groups/diversity/diversity_pipeline/projects_initiatives/judicial_clerkship_program/

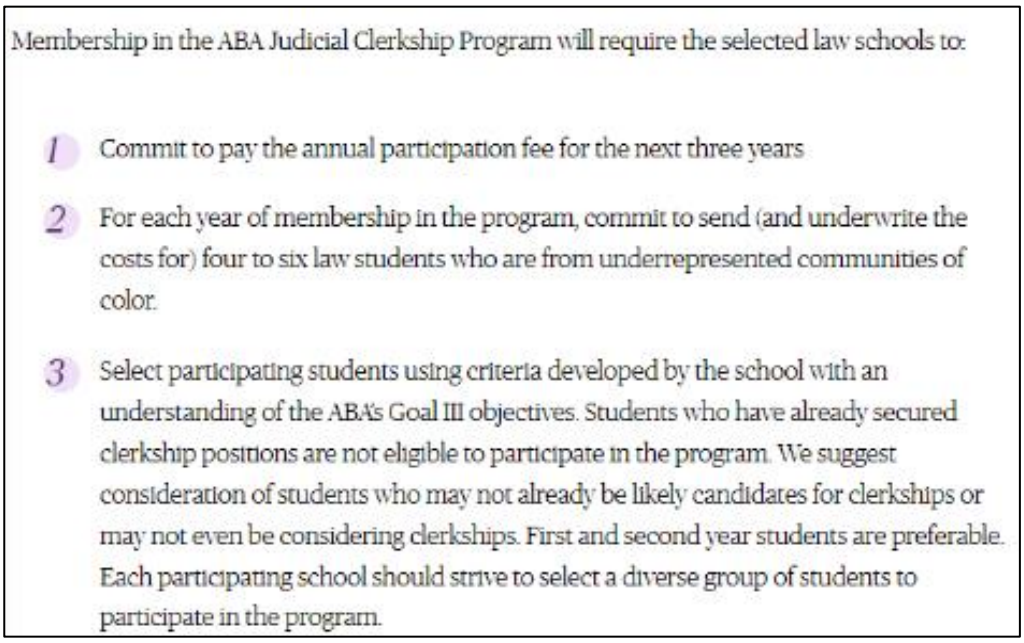
According to the ABA's website, the program "introduces law students from diverse backgrounds . . . to judges and law clerks." It also "informs and educates the students as to life-long benefits of a judicial clerkship" and "encourages judges to consider students of color . . . for a judicial clerkship." 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 from the ABA's website, which demonstrates that participating judges contract with the ABA to hire a specific number of clerks on the basis of race:

> 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.

Notably, the ABA—or perhaps LexisNexis—is likely paying for the travel expenses of judges who make this "commitment" so that those judges choose to attend the conference.

Below is another screenshot of the ABA's website showing race quotas:



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 provides that 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.

Whether Judge Brisbois actually participated this year is unclear from the public record; however, information online indicates that he participated in recent years, and his "commitment" to hire a specific number of "minority judicial law clerks" is likely still in effect. Notably, an article published in 2020 explains that "[Judge] Brisbois . . . served as chair and, even after completing that position, makes time to come back to the program and spend one-on-one time with Native American law students to encourage them on a path to the judiciary."[2] Exhibit 1 is a letter that was sent a few weeks ago to Judge Brisbois seeking clarification on his involvement in the program. He did not reply.

Racial quotas and preferences 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. In additional to the clear constitutional prohibition against race discrimination by federal officials, including judges, the Civil Rights Act of 1866 also provides

[2] https://www.nativeamericanbar.org/wp-content/uploads/2020/09/judges-journal-spring-2020-Art02.pdf

penalties to those who impair the formation or execution of contracts (such as employment relationships) based on race and provides additional penalties for those individuals who conspire to violate civil rights. *See* 42 U.S.C. §§ 1981, 1985.

The command of race neutrality is codified in the Rules of Judicial-Conduct. Notably, these rules apply to official duties, such as hiring law clerks, and they also apply to "conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people." R. Jud.-Conduct art. II, § 4(a)7.

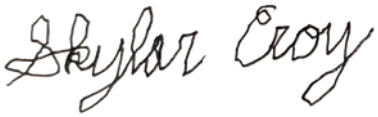
Judge Brisbois's misconduct brought the judicial branch into disrepute. He helped foster an environment in which racial discrimination thrived—and he used his official title in doing so.

Last year, the United States Supreme Court stated, "[e]liminating racial discrimination means eliminating all of it." *SFFA*, 600 U.S. at 206. If the very judges charged with enforcing this holding can undermine it with impunity, the judicial branch will lose its legitimacy in the eyes of the public.

Sincerely,

Rick Esenberg
President & General Counsel

Daniel P. Lennington
Deputy Counsel



Skylar Croy
Associate Counsel