



October 2, 2023

Via Electronic Mail

Chair, Legal Ethics Committee
District of Columbia Bar
901 Fourth Street NW
Washington, DC 20001
ethics@dcbar.org

Request for Opinion: Do Law School, In-House, and Law Firm Diversity Programs Violate District of Columbia Rule of Professional Conduct 9.1?

Dear Sir or Madam:

America First Legal Foundation (AFL) is a national, nonprofit organization working to promote the rule of law in the United States, prevent executive overreach, and ensure due process and equal protection for all Americans, all to promote public knowledge and understanding of the law and individual rights guaranteed under the Constitution and laws of the United States. We write to request an ethics opinion regarding the application of Rule 9.1 of the District of Columbia Rules of Professional Conduct to law school, in-house, and law firm diversity programs given the Supreme Court's ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023).

Background

1. District of Columbia Rule of Professional Conduct 9.1 provides that “A lawyer shall not discriminate against any individual in conditions of employment because of the individual’s race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.”

2. Comment 9.1(1) provides that “This provision is modeled after the D.C. Human Rights Act, D.C. Code § 2-1402.11 (2001), though in some respects is more limited in scope. There are also provisions of federal law that contain certain prohibitions on discrimination in employment. The Rule is not intended to create ethical obligations that exceed those imposed on a lawyer by applicable law.”

3. The Supreme Court has held that racial discrimination is invidious in all contexts. *See Students for Fair Admissions*, 143 S. Ct. at 2170, 2176–77.

4. D.C. Code § 2-1402.11 prohibits discrimination based upon the actual or perceived race, color, religion, national origin, sex, or sexual orientation of any

individual in hiring, training, and promotion. It is modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

5. Title VII prohibits discrimination against whites, males, Jews, or Asians “upon the same standards as would be applicable” to blacks. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976).

6. Title VII also prohibits discrimination based on sex; any preference for an individual because he or she identifies as LGBTQ+ is an unlawful employment practice. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739–41 (2020).

7. Accordingly, lawyers and law firms that run “diversity, inclusion, and equity” programs that balance or engineer an interview pool, management committee, or a hiring and promotion process based on race, color, national origin, religion, or sex, whether through quotas, mandates, “aspirational goals,” or otherwise, to give preference or advantage to some individuals (e.g., “persons of color,” women, blacks, Latinos, Native Americans, homosexuals, and Hispanics) over others (e.g., whites, men, heterosexuals, Jews, and Asians) facially violate Rule 9.1.

Questions Presented

1. Do Bar Members who segregate, limit, or classify an employee or applicant for employment based on his or her race, color, religion, sex, or national origin in any way that deprives or tends to deprive this person of employment opportunities violate Rule 9.1?

2. Do Bar Members who oversee, operate, or control internship, training, promotion, or hiring programs that prefer some individuals based on race, color, religion, sex, or national origin over others, whether for the purpose of racial, ethnic, or gender diversity or otherwise, violate Rule 9.1?

3. Do Bar Members who, as in-house attorneys, contract with outside counsel based on attorney diversity — that is, based on attorney race, color, national origin, religion, or sex — violate Rule 9.1? *See Christine Simmons, 170 GCs Pen Open Letter to Law Firms: Improve on Diversity or Lose Our Business*, AmLaw (Jan. 27, 2019), <https://bit.ly/3YsQyIu>.

4. Do Bar Members who “ensure” that their firm’s “candidate pool” for hiring, promotion, attrition, and “leadership roles” was “30% diverse in all instances” violate Rule 9.1? *See Laura Saklad, Orrick, Diversity rules: A closer look at Mansfield Certification: Case Study*, fivehundred magazine (last accessed Oct. 2, 2023), <https://bit.ly/45iJXm4>.

5. Do Bar Members who are partners or shareholders in law firms that provide training and scholarship opportunities based on race, color, national origin, religion, or sex violate Rule 9.1?

6. Do Bar Members who are partners or shareholders in law firms that consider race, color, national origin, religion, or sex with respect to terms, conditions, or privileges of employment, including but not limited to hiring; training; pitch team participation; promotion to partner or shareholder; or firm management positions, violate Rule 9.1? See e.g., Covington, *Covington Achieves “Mansfield Rule Certification 5.0 Plus” For Diversity* (Oct. 18, 2022) (last accessed Oct. 2, 2023), <https://bit.ly/47y6Gwq>; Kirkland & Ellis, *2L Diversity Fellowship Program* (last accessed Oct. 2, 2023), <https://bit.ly/44ZaqoM>.

7. Do Bar Members responsible for law-school faculty hiring or student admissions who limit, segregate, or classify applicants in any way that would deprive, or tend to deprive, any person of employment opportunities or of law school admission because of his or her race, color, national origin, religion, or sex, whether for the purpose of measuring or achieving diversity or otherwise, violate Rule 9.1?

8. Does the conduct of Bar Member Erwin Chemerinsky, Dean of the University of California, Berkeley, School of Law (“Berkeley Law School”), as described below, violate Rule 9.1 because applicants for faculty positions and admissions are segregated and classified based on race, color, national origin, religion, or sex, and those who are not deemed “diverse” are denied equal opportunity?

- a. On June 29, 2023, journalist Chris Rufo released a video of Mr. Chemerinsky teaching a class in which he seemingly admits that the law school discriminates in its hiring of faculty members and that he would lie about this if examined under oath.¹ Chemerinsky later confirmed to the Daily Mail that the video was an authentic excerpt from his constitutional law class from the spring semester of 2023. He said that his remarks were taken out of context and that “[a]s per existing California law, the Berkeley Law School cannot and does not consider race in any of its hiring and admissions decisions.”²
- b. However, the 59-second video clip begins with Chemerinsky referring to “unstated affirmative action,” explaining that this happens when a “college or university doesn’t tell anybody, doesn’t make any public statements.” He said: “I’ll give you an example from our law school, but if ever I’m deposed, I’m going to deny I said this to you.” He then said:

When we do faculty hiring, we’re quite conscious that diversity is important to us. And we say diversity is important, it’s fine to say that, but I’m very careful when I’m at a faculty appointments committee meeting, any time somebody says, “you know we should really prefer this candidate or this candidate, ’cause this

¹ Chris Rufo (@realchrisrufo), TWITTER (Jun. 29, 2023, 6:42 PM), <https://tinyurl.com/ya4da65k>.

² Aneeta Bhole, *Recording Shows White Berkeley Law Dean Appearing to Tell Class he Illegally Discriminates Against Potential Hires to Boost Diversity - and Bragging He’ll Deny it if Deposed*, THE DAILY MAIL, (July 1, 2023), <https://tinyurl.com/4f9rmzhp>.

person would add diversity.” I say, don’t say that. You can think it. You can vote it, but our discussions are not privileged, so don’t ever articulate that that’s what you’re doing. Well, that works more easily with regard to faculty hiring. With regard to student admissions it becomes more difficult because of statistical measure.³

- c. There is troubling evidence of unlawful disparate impact discrimination under Mr. Chemerinsky’s watch. According to an official Berkeley Law press release: “Berkeley Law has significantly increased the diversity of its students, faculty, and senior administrators since Chemerinsky arrived. Of the 16 faculty members hired under his watch, nine are people of color.”
- d. This press release further states:

[According to Chemerinsky], “It is essential, too, that we be an anti-racist law school. Like all aspects of culture, this requires a sustained commitment and many different efforts.” When [Chemerinsky] arrived at Berkeley Law, there were 12 Black students in the entering J.D. class of 320 students. The following years, that number increased to 28, 33, and this year 43. Berkeley Law also dramatically increased its Native American and Latinx student enrollment and has the largest percentage of women students at any top 20 law school (over 60%).⁴

Conclusion

Thank you for your consideration. Please feel free to contact me if you have any questions.

Sincerely,

/s/ Reed D. Rubinstein

Senior Counselor and Director of Oversight
and Investigations
America First Legal Foundation

³ Rufo, *supra* note 1.

⁴ Andrew Cohen, *Leadership Renewed: Dean Erwin Chemerinsky is Eager to Build on his Success During a Second Five-Year Term*, BERKELEY LAW (SPRINT 2022), <https://bit.ly/44ZTcXH> (last accessed Oct. 2, 2023).