A “Critical Mass” of One
A Personal Perspective on Affirmative Action and Grutter v. Bollinger

ERIC BROOKS

I first heard of the Supreme Court’s Grutter v. Bollinger decision on the radio on my way into work. As soon as I got into the office, I downloaded the Grutter case, and began to read Justice O’Connor’s opinion. Just a few pages in, I came across two words—critical mass—that stuck in my mind as I continued through the opinion. Justice O’Connor, in reviewing the background of the case, noted that the University of Michigan’s affirmative action policy “aspired to achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”

And by enrolling a “critical mass of [underrepresented] minority students” the law school sought to “ensure[e] their ability to make unique contributions to the character of the Law School.”

The Court also noted that during the trial, the Director of Admissions at the law school, Erica Munzel, testified that a “critical mass” was a number that encourages underrepresented minority students to participate in the classroom and not feel isolated. The Dean of the law school, Jeffrey Lehman, had “indicated that critical mass means numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race.”

The concept of a need for a critical mass struck a nerve deep inside of me because at my law school, Boalt Hall, I was the critical mass.

I do not remember the exact day when I learned that I would be the only African-American to enroll in the University of California’s Boalt Hall School of Law’s Class of 2000, a class of 270 students, but I clearly remember the circumstances: I was packing to move from Massachusetts to California when the phone rang. On the other end was Herma Hill Kay, the Dean of Boalt Hall. When she said her name and who she was, I was speechless as to why she would be calling. A flurry of possibilities ran through my head, none of them good. Finally, after a painfully long pause, Dean Kay informed me that the Los Angeles Times was going to run a story the next day saying that Boalt Hall would have only one African-

Background
Grutter v. Bollinger
Gratz v. Bollinger

On June 23, 2003, the United States Supreme Court, in a landmark decision, upheld the University of Michigan Law School’s affirmative action program. In Grutter v. Bollinger, Barbara Grutter, a white Michigan resident, brought suit after the law school rejected her application. Grutter alleged “reverse discrimination,” arguing that the law school’s affirmative action program used race as a “predominant” factor in admissions and, thus, discriminated against her on the basis of race in violation of the Fourteenth Amendment.

The Court, in a 5 to 4 ruling, with Justice Sandra Day O’Connor writing for the majority, found that the law school’s admissions program involved a narrowly tailored use of race in admissions decisions, which furthered the State’s compelling interest in obtaining the educational benefits that flow from a diverse student body and, thus, did not violate the Fourteenth Amendment.

On the same day as the Grutter decision, the Supreme Court issued a companion decision in Gratz v. Bollinger, which struck down the University of Michigan’s undergraduate admissions program that employed a point system. The court found that the point system lacked the “individual considerations” required under the Supreme Court’s previous affirmative action decision in Regents of Univ. of Cal. v. Bakke. In Gratz, two white Michigan high school students, Jennifer Gratz and Patrick Hamacher, brought suit

Continued on page 9

Continued on page 10
The Changing Face of America

Brett J. Hart and Burnadette Norris-Weeks

Co-Chairs of the Minority Trial Lawyer Committee

The changing face of America raises important questions in the legal community. Undoubtedly, you have read diversity and the law reports that ask—and may pose answers—to such queries as: Are minorities fairly represented at all levels in the legal profession? Do the faces of American lawyers reflect the faces of our society? America’s demographics have greatly changed in recent decades. African Americans, Latinos, and Asian Pacific and Native Americans make up at least half of the residents of Miami, New York, San Antonio, Honolulu, and several other metropolitan areas. Such demographics represent a significant opportunity for minority lawyers to shape the business policies and practices of firms, corporations, and government.

The courtroom represents one aspect of that demographic opportunity. For example, if the jury pool in a given area has a sizeable minority population, lead counsel would be well advised to consider developing a diverse trial team (see “The Challenges of Trial Team Diversity,” in the Spring 2003 Minority Trial Lawyer at 17). Many people identify with people who look like them and may have had similar experiences. Jurors bring with them their prejudices, biases, and baggage. Diversity in the courtroom is being seen more and more as not just a lofty goal, but also a necessity affecting the bottom line.

Judges’ chambers present another setting that has yet to fully reflect the changing face of America. The ABA Section of Litigation is helping to improve diversity among judicial clerks through its Judicial Intern Opportunity Program (see this issue’s article on page 11).

It is no secret that more corporations are insisting that qualified minorities participate in litigation strategies at all levels. The value is clear. Additionally, corporations, as well as governmental entities, are realizing the business advantages of doing business with minority-owned firms. With these changes, lawyers of color now have opportunities to participate in the distribution of work. For this reason, and many others, it is critical that we provide a network of support for one another throughout the country.

The ABA Section of Litigation’s Minority Trial Lawyer Committee can serve as a mechanism for dissemination of information and resources particularly relevant to lawyers of color. If you have not done so, please take a few minutes to log your information into the Diversity Development Database at www.abanet.org/litigation/committee/minority/home.html, which will be a resource for identifying members who want to become actively involved in ABA and Section projects, publications, and programs.

The Minority Trial Lawyer Committee is planning a trial conference next year (date and place to be announced) that will present innovative trial techniques and the many challenging issues facing lawyers of color. Look for more information on this conference in upcoming issues of this newsletter and on the committee’s Website at www.abanet.org/litigation/committee/minority/home.html.

Don’t be left out. Let us know what you do and how this Committee can best assist you in your areas of practice. Log in today or contact us by e-mail (see e-mail addresses below). The Committee can be only as strong as its members. Together, we can make a difference!
Disability Discrimination Developments

LINDA B. KATZ AND TRACEY SALMON SMITH

In two recent decisions, the federal courts addressed two important issues that arise under the Americans with Disabilities Act (ADA). In the first case, the United States Supreme Court provided guidance on who is an “employee” for purposes of determining whether a business is covered by the 15-employee threshold for applicability of the ADA.

In the second case, the United States Court of Appeals for the Ninth Circuit held that an employer is not required to accommodate an employee who cannot perform the essential functions of the job, where the employee is merely perceived to be or “regarded as” disabled, but does not actually have a disability.

Who Is an Employee Under the ADA?
Employers who have 15 or more “employees” are covered under the ADA. Until the Supreme Court’s decision in Clackamas Gastroenterology Associates v. Wells, there had been a split in circuits regarding who should be counted as an “employee” under the ADA. The Supreme Court, in a 7-to-2 decision, resolved that split. The Court, following the approach advocated by the EEOC, found that the common-law element of “control” is the touchstone in deciding whether the physician-shareholders in a professional corporation are employees. The Court overturned a divided ninth circuit panel’s decision that had held that the physician-shareholders were employees, and that Clackamas Gastroenterology Associates, having 15 or more employees, was subject to the ADA.

Wells, a former bookkeeper for Clackamas for more than ten years, developed an auto-immune disease. Wells, who was demoted to receptionist and later terminated, sued under the ADA asserting that Clackamas unlawfully discriminated against her by refusing to reasonably accommodate her disability and by terminating her employment. Asserting that it was not a “covered employer” under the ADA because it did not have 15 or more employees, Clackamas successfully moved for summary judgment. A divided panel of the ninth circuit court of appeals reversed the decision of the district court, which had adopted the seventh circuit approach, and instead, followed the second circuit.

The seventh circuit, in EEOC v. Dowd & Dowd, Ltd., had held that an “economic realities” test should be used, as opposed to a “control” test. The economic realities test looks to the advantages gained by the use of the corporate form involved regarding such issues as tax and civil liability. For example, in Dowd, the seventh circuit found that, in reality, a professional corporation in Illinois in terms of management, control, and ownership functioned much like the management, control, and ownership of a partnership.

The second circuit, on the other hand, in Hyland v. New Haven Radiology Associates, PC, held that “the use of the corporate form precludes any examination designed to determine whether the entity is in fact a partnership.”

Resolving the conflict between the circuits, the Supreme Court reversed. It held that, in the absence of any meaningful definition of “employee” in the ADA, “the EEOC’s focus on the common-law touchstone of control” should serve as “the principal guidepost.” The Court noted that the EEOC’s Compliance Manual looks to a nonexhaustive list of six factors on the issue of “control.” They are:

(1) whether the organization can hire or fire the individual, or regulate the individual’s work;
(2) whether the organization supervises the individual’s work;
(3) whether the individual reports to a superior;
(4) whether the individual has influence over the organization;
(5) whether employment agreements exist; and
(6) whether the individual shares in the profits, losses, and liabilities of the organization.

Is an Employee Who Is Merely Regarded As Disabled Entitled to an Accommodation?
In a unanimous ruling in a case of first impression, the ninth circuit held in Kaplan v. City of North Las Vegas that a terminated employee, who—though not actually disabled—was regarded as having a disability and who could not perform his essential job functions without accommodation, does not have a cause of action under the ADA.

In Kaplan v. City of North Las Vegas, a former duty marshal brought suit under the ADA alleging that the City unlawfully discriminated against him by refusing to rea-

“The Court found that the common-law element of “control” is the touchstone in deciding who is an employee.
Minority Judicial Intern Program Places 72 Students

GAIL HOWARD

August marked the closing of a remarkable summer for the 72 students placed as interns through the Section of Litigation Minority Judicial Intern Program. The original goal for the Section was to place at least 55 students with federal and state judges for summer clerkships in Chicago, Rockford (IL), and Texas.

Upon screening the 191 applicants to this year’s program, the Section Leadership approved an increase in the number of funded positions due to the high quality of student applicants. Selected students represented 39 different law schools throughout the country. Twenty-five students secured Texas positions in Houston, McAllen, Laredo, Corpus Christi and Brownsville. Texas students were placed throughout the Southern District of Texas, and with the Houston District Court.

The remaining 47 students were placed in summer clerkship positions in the Northern District of Illinois, the Circuit Court of Cook County, and the Circuit Court of Lake County. The Houston District Court and the Circuit Court of Lake County were new expansion areas for the program. This year’s program was also fortunate enough to recruit 58 judges who participated.

This year’s program added supplemental programming and orientation sessions. Students in Chicago attended a program held at Loyola University. Judge Marvin Aspen provided program history and insights were shared by a panel of judges, law clerks, and the treasurer from the Chicago Commission on Minorities and Large Law Firms, and past program participants. Paul Henderson, Chair of the Section’s Young Lawyers Leadership Program, also gave students advice on developing their careers. Following the program, students were honored at an evening reception held in conjunction with the 35th anniversary of the Council on Legal Education Opportunity (CLEO), a partner in this year’s program.

Scott Atlas, then-Chair of the Section of Litigation, welcomed Houston students to their orientation, which included an interactive program provided by Judge Vanessa Gilmore. Houston students also heard from Patricia Lin, President of the Houston Asian American Bar Association and Robert Sohns, a member of the Section of Litigation leadership. Houston students were congratulated at a welcome reception hosted by the Houston Bar Association earlier in the month.

Section members are gearing up for the 2003-04 year’s program, now called the Judicial Intern Opportunity Program (JIOP). The program was renamed to better reflect the goal of placing minority and disadvantaged law students. Information on the program and the application process can be found at www.abanet.org/litigation.

Gail Howard is the JIOP Program Director.
**National Association of Securities Dealers Arbitration for the Uninitiated**

**WILLIAM F. STUTE**

It’s early Monday morning. A senior partner arrives unexpectedly in your office to discuss a new case. She tells you that an elderly couple—Mr. & Mrs. Williams—whom she has represented for years, has a problem. Ms. Partner represented the couple in the sale of the family business they owned and operated their entire lives. The Williamses sold their business in the late 1990s, and the proceeds constituted their only significant asset. The elderly couple received enough money as a result of the sale to live comfortably for the rest of their lives—or so they thought.

After receiving the proceeds of the sale, the Williamses engaged a stockbroker to invest their funds. Mr. Stockbroker put all their assets into a “can’t lose” portfolio of technology stocks. But when the technology bubble burst in 2000, the Williamses’ assets evaporated. The Williamses are now virtually penniless, and too old and disabled to work. Ms. Partner asks you to determine whether the Williamses have a legal claim against the stockbroker and to proceed accordingly. Welcome to the world of securities arbitration and the National Association of Securities Dealers (NASD).

**The National Association of Securities Dealers Dispute Resolution**

A record number of new cases have been filed with the National Association of Securities Dealers Dispute Resolution since 2000. The NASD is the leading private-sector provider of financial regulatory services. Nearly all securities firms in the United States are members of this private not-for-profit organization. The NASD establishes rules to govern the conduct of its members, registers firms, conducts compliance examinations, and disciplines members that fail to operate in accordance with its regulations.

NASD Dispute Resolution, Inc. (NASD-DR) administers more securities arbitrations than any other provider.1 Virtually all disputes between customers and their stockbrokers and member firms are resolved through this forum. More than 7,700 cases were filed with the NASD Dispute Resolution in 2002.2 As of May 2003, nearly 4,000 new cases were filed—a 22% increase over 2002.

The time from filing to final resolution of cases filed with NASD Dispute Resolution has grown from an average of 12.4 months in 2001, to an average of 14.1 months in 2003. In cases not resolved prior to the completion of a hearing, the average turn-around time has increased from 16.8 months in 2001, to 17.2 months in 2003. Between 21% and 25% of all disputes filed with NASD-DR go to hearing. Approximately 38% of cases are settled by agreement of the parties, with another 13% being settled through mediation, 10% withdrawn, and the remainder resolved or stayed for various reasons.3

The odds for a claimant in the NASD Dispute Resolution arbitration are better than even. From 1999 to 2003, between 53% and 61% of customers with claims received an award in their favor from the panel.4 Of course, just because an investor lost money does not mean that person has a valid claim. As every brokerage firm that has a claim brought against it will inevitably and correctly point out—firms are not guarantors of their clients’ investments. So, what types of conduct give rise to a valid claim?

**Prohibited Conduct**

The NASD includes a list of “prohibited conduct” on its Website.5 The NASD says that certain types of conduct are prohibited in the securities industry. Each of these types of conduct is prohibited by the industry, but also violate various federal, state, and common law doctrines and is accepted by NASD Dispute Resolution arbitration panels as valid theories of recovery. These categories of prohibited and illegal conduct include:

- **Unsuitability.** Stockbrokers are prohibited from recommending the sale of a security that is unsuitable for a particular customer based on that customer’s age, financial circumstances, investment objectives, and investment experience. Brokers must “know their customer”—meaning they are required to determine all of the relevant facts from their customers before recommending securities. The size of a particular investment or the frequency of transactions may also give rise to a claim for unsuitability.6 Unsuitability is one of the most frequently alleged legal claims in NASD arbitrations.7

- **Fraud/Misrepresentation.** In general, arbitration panels will require the parties to prove the basic legal elements of securities fraud claims—misrepresentation or failure to disclose material facts, in connection with the purchase or sale of a security, and proof of causation.8 What facts are material can vary, but, ordinarily, they include factors such as the level of risk involved in a particular security; the charges or fees involved in a transaction; and financial information about the company. Panels will likely view a broker’s optimistic statements about the market in general and even particular stocks as mere puffing. Yet, when the broker’s statements become specific predictions—and in particular the use of a percentage in making predictions—that can be actionable.9

- **Churning.** Churning occurs when a stockbroker recommends or effects transactions that are excessive in cost, size or frequency, without regard to the customer’s investment objectives, for the purpose of generating commissions for the broker. There are three elements to a claim for churning—control, excessive trading, and scienter (to knowingly transact a fraudulent securities deal) or intent. Control is easiest to establish when the broker has discretionary authority to buy and sell securities in the account. Absent that, control is ordinarily established...
by showing a pattern and practice of relying on the broker's advice.

Excessive trading is usually demonstrated through an account analysis to determine the "turnover ratio"—a measure of the total cost of purchases divided by the average net equity over a relevant time period. In essence, a turnover ratio shows the number of times that the total purchases in the account exceed the average net equity. A turnover ratio of 4.0 or higher can establish the presumption that the account has been churned and shift the burden to the broker of explaining the appropriateness of the trading. If the ratio is 6.0 or higher it becomes very difficult for the broker to meet this burden—even when it applies to an investor with a speculative investment objective. Another commonly used indicia of churning is the "break-even" or "cost-to-equity" calculation. This calculation demonstrates how much return on investment is necessary for the investor to profit in light of the fees being charged by the broker. Finally, switching between mutual funds with no legitimate investment purpose can also give rise to a churning claim. Claims involving the purchase and sale of mutual funds have risen dramatically over the past few years.

- **Unauthorized Trading.** The purchase or sale of securities in an investor's account without first contacting the investor for specific authorization is unauthorized trading. It is prohibited by the industry and illegal. Discretionary trading authority, however, is typically a bar to an unauthorized trading claim. Generally, discretionary authority must be in writing.

- **Failure to Supervise.** Under NASD rules, member firms must supervise the activities of their brokers. When abuses happen, claimants often allege that the firm has failed to supervise the broker adequately. Claimants are increasingly making claims for failure to supervise. In order to prevail, a customer must prove that something actionable took place in the account and that the supervisor's failure contributed to or fostered the broker's misconduct. Proof that the firm or a supervisory employee has failed to enforce one or more of the firm's internal compliance rules usually strengthens a claimant's case significantly.

There are a large number of recent regulatory decisions imposing strict sanctions on firms and supervisory employees for failure to carry out their supervisory responsibilities. Brokerage firms have heightened supervisory obligations with respect to brokers with a disciplinary history.

---

**Proof that the firm or a supervisory employee failed to enforce the firm’s internal compliance rules usually strengthens a claimant’s case significantly.**

- **Breach of Fiduciary Duty.** A broker is typically considered an agent of the customer. Indeed, brokerage firms will ordinarily argue that a fiduciary relationship is created only when the customer has given the broker written discretionary authorization to trade in the account. There are, however, other circumstances that can give rise to a fiduciary duty, e.g., de facto control over the account or a special relationship of trust. This claim is ordinarily “tacked on” to other claims and rarely stands alone.

- **Other claims.** There are a variety of other claims that are recognized by NASD arbitration panels, including: front-running, price manipulation, order failure, selling away, market manipulation or chop shop cases, and Internet trading claims.

---

**The NASD Arbitration Process**

Starting in the mid-1980s, most brokerage firms began the practice of including a binding arbitration clause in their account agreements with customers. Almost all customer complaints involving the securities industry are now resolved through the NASD Dispute Resolution arbitration process. This process has its own rules of procedure and particular customs and accepted practices that vary widely from other forms of dispute resolution.

Fortunately for the practitioner with little or no experience in this area, information is easy to obtain. The first place to look is the NASD's informative and comprehensive Website—www.nasd.com. There, one can easily find the NASD Code of Arbitration Procedure, instructions and forms for initiating an arbitration proceeding, a calculator for determining the applicable filing fee, and a wide variety of other useful information.

The NASD Code of Arbitration Procedure sets forth in fairly clear terms the rules applicable to the arbitration process. An inexperienced attorney should review the Code of Arbitration Procedure in detail, but the following overview of the process will assist in understanding the process from a broad perspective.

NASD arbitration is initiated by the filing of a Statement of Claim. The style of this document varies widely by practitioner—from a document resembling a formal complaint in state or federal court, to narrative approaches with persuasive argument. A Case Information Sheet must also be submitted that sets forth basic information about the claim and the parties.

NASD Dispute Resolution then serves the Statement of Claim on Respondents, indicating the deadline for service of the Answering Statement.

The next step in the process is the selection of the arbitration panel. Shortly after service of the Answering Statement, NASD Dispute Resolution forwards a slate of potential arbitrators and background information on each of them. A three-arbitrator panel is required for cases involving claims in excess of $25,000. One of the arbitrators is an "industry arbitrator," meaning someone who works in the securities industry. The other two are “public arbitrators,” commonly lawyers and business people.

In addition to the background information provided by the NASD, prior awards
NASD Arbitration Practice Pointers

NASD-DR arbitrations are fairly informal affairs, and the rules do not give much guidance on conducting the hearing itself. For that reason, an experienced attorney can sometimes have, and attempt to exploit, an advantage. Keeping the following considerations in mind will help inexperienced attorneys level the playing field:

- **Be ready for surprises.** Parties do not have to disclose exhibits used in rebuttal, and the arbitration panel is not required to enforce the rules of evidence. A common “tactic” used to exploit this situation is to seek the introduction of written settlement communications as rebuttal evidence. Another common tactic is to present evidence of prior irrelevant and unflattering acts as rebuttal exhibits. For example, the other side may seek to present evidence of divorce, criminal behavior, and other irrelevant prior behavior. An undisclosed witness may even appear to provide rebuttal testimony. You can and should object to the introduction of this type of evidence, but be prepared for the panelists to allow the evidence to come in.

- **Be organized and prepared.** This is good advice in any setting, but can be particularly important in NASD-DR arbitrations. Because the proceedings can be fairly flexible and informal, it becomes very important to plan the presentation of your case. Have a game plan and communicate it to the panel. Then follow it. The panelists will appreciate you leading them through your case in an efficient manner.

- **Tailor the presentation of your case to your audience.** This is not a jury trial. Your decision-maker is a panel of three professionals who are trained to conduct an efficient and fair arbitration hearing. Theatrics are not necessary and will probably be frowned upon. Make legal points clearly and in common-sense terms. Remember that at least one of your panelists is probably not an attorney. Refrain from complex oral arguments, and make certain to leave the legalese in your office.

- **Civility is paramount.** Most panels are sensitive to this issue. Be courteous at all times to opposing counsel, the parties, and the panel. Direct any objections to the chair. You should also be prepared for the panel to be involved. Panelists will sometimes let an attorney know she has made her point and ask her to move on—don’t be offended if this happens. Panelists have also been known to ask witnesses questions directly. Let your witnesses know this may happen before the hearing so that they are not surprised. Perhaps most importantly, make certain your client understands the importance of civility and respect for the panel and behaves accordingly.

- **File motions prior to the hearing.** Most times the panel will come to a decision right after the close of the hearing during a private caucus. As such, you should make sure you have addressed all important legal issues and complex arguments in writing prior to the hearing. Resist the urge to submit briefs or written argument at the close of the hearing. The panel is not likely to appreciate submissions and may not consider them, in any event.

---

One of the most effective ways to respond to these types of surprise tactics is to explain to the panel in closing that the information is irrelevant, that it was introduced for no reason other than to prejudice the panel against your client, and suggest that the other side is acting out of desperation.

The actual arbitration hearing is scheduled during a telephone conference by mutual agreement based on the availability of the parties and the panelists. Twenty days prior to the actual hearing, the parties must identify the documents they will rely on at the hearing and identify any witnesses they will call. This process is often referred to as the “20-day exchange.” Because there are often large volumes of documents including account statements, the preferable practice is for counsel to work together prior to the hearing to identify all the documents that will be exhibits at the hearing and submit one set of exhibit books.

Parties often hire expert witnesses to conduct account analysis, provide consulting services during discovery (particularly for claimants), and testify during the hearing regarding industry practices. In many cases, parties rely on the “industry arbitrator” on the panel and forgo their right to call a testifying expert. This saves time and expense.

Generally, the hearing itself takes place in the state where the claimant resides. Ordinarily, the hearing is held in a local hotel conference room or some other location negotiated between the parties and NASD-DR. The parties typically make brief opening statements and the case proceeds through direct and cross-examination of witnesses, and brief closing statements. An important nuance in NASD-DR arbitrations, however, is that parties are not required to disclose exhibits or witnesses used in rebuttal. This often leads to surprises during the hearing.

Another important thing to keep in mind in NASD-DR arbitrations is that the arbitrators determine the materiality and
relevance of any evidence and are not bound by the rules of evidence. The reality is that arbitration panels will usually give attorneys a good deal of leeway in questioning witnesses in areas that state or federal rules of evidence would prohibit. In addition, panels will commonly allow the presentation of evidence that would not be admissible under the rules of evidence.

After the hearing is concluded, the panels submit an order to NASD-DR, which forwards the order to the parties. Awards must be satisfied within 30 days of issuance. If not, NASD Regulation will enforce the judgment. Turning it into a judgment, and use the tools afforded by the court system to confirm the arbitration award, is also an adjunct professor at a local law school where he teaches a course on professional responsibility.

Endnotes
3. Id.
4. Id.
6. NASD Code of Conduct Rule 2310; Minneapolis Employees Retirement Fund v. Allison-Williams Company, 519 N.W.2d 176 (Minn. 1994).
13. NASD Conduct Rule 3010; see also NASD Notice to Members 98-38 (May 1998) and NASD Notice to Members 99-45 (June 1999).
16. NASD Notice to Members 97-19 and NASD Compliance Alert 6197.
Affirmative Action

Continued from page 1

American in its incoming class. Dean Kay and I then discussed the situation and made plans to meet before the first day of school. I hung up the phone and continued packing, the excitement I had just previously felt now replaced with anxiety.

My fate as the only African-American in my class had been sealed two years earlier on July 20, 1995, when the Regents of the University of California voted to end affirmative action by adopting Special Policy 1 (SP-1). It stated that “the University of California shall not use race, religion, sex, color, ethnicity, or national origin as criteria for admissions to the University.” My class would be the first admitted under the University’s new race-blind policy.

After the Regents passed SP-1, Ward Connerly, an African-American Sacramento businessman and University Regent, sought to expand the elimination of affirmative action in California and spearheaded Proposition 209, which was misleadingly entitled, “The California Civil Rights Initiative.” Proposition 209 sought to end affirmative action in all public sectors, including employment and contracting. On November 4, 1996, under the national media spotlight, California voters passed Proposition 209. While I was aware of the passage of Proposition 209 and understood that it would have negative consequences on minorities in the state, I had no idea at that time what a major impact the elimination of affirmative action would have on my life.

On the morning of August 18, 1997, after relocating to California a few weeks earlier, I awoke to a radio news story reporting that today was the first day of law school at Boalt Hall and that only one African-American would be enrolling this year. Needless to say, the fact that I was a news story for the day compounded the anxiety I felt starting my first day of law school. Knowing what lay ahead, I packed up my bag and headed off to school.

Of all the things that happened to me on that day, what will stick with me the most is the memory of my initial arrival. Given my previous visit with the Dean, I knew how to enter the school through the back to avoid the camera trucks and news reporters in front of the school. After ducking in the back way, I picked up my orientation packet and went to a courtyard where tables had been set out for first years to use before being shepherded to orientation. I found a table off in the corner, sat down, and tried to read through my orientation materials. Unable to concentrate, however, I instead looked around and took in my peers.

“This is an extremely white class,” was the first observation that struck me. I knew from my conversation with Dean Kay that people of color would be lacking, but not until I was present in that courtyard at that moment did I realize how white our class would be. It is possible, however, that I was hypersensitive to this fact, given the situation. Growing up and going to school in Indiana, I was used to being the only person of color in a room. So, while this was not a new experience for me, this day—and all my days at Boalt—would feel markedly different from my time in Indiana. I have found only one good way to describe it: At Boalt, there was a sense that animosity, and not circumstance, created the situation I was in. It felt different at Indiana University, which had an affirmative action program and seemed to be making an effort to diversify the student body. The University of California, on the other hand, had eliminated affirmative action in favor of a “merit” based system with full knowledge that this would greatly reduce the number of minority students that would be admitted.

At Boalt, I felt the door allowing African-Americans into this elite institution had been closed behind me, in the face of many people who wanted to get in. And because people had consciously closed the door to other people of color, I could not help but feel that those same people (who were not necessarily my classmates) did not want me there. Compounding this sense was the fact that I had been admitted to Boalt Hall while affirmative action was still in use. I had applied and was accepted in the spring of 1995, before the Regents’s resolution eliminated affirmative action. I had deferred enrollment for a year, setting up my current situation, where I had to wonder whether my teachers and my classmates questioned my right to be there.

When I had met with Dean Kay before school started to discuss the fact that I would be the only African-American in my class, we addressed the issue of how to handle any media attention I would attract. We decided that I would give a brief statement to the media on my first day in an attempt to satisfy any curiosity surrounding me.

When the appointed time came for my press conference, I, along with Dean Kay, walked into one of Boalt’s large lecture halls to a dozen cameras and even more reporters. I gave my brief statement where I said that I was shocked and disappointed at the news that I was going to be the only African-American to matriculate into the program that year and that I indeed placed a high value on diversity. I concluded by saying that I was confident that my classmates and instructors would treat me without bias and as an individual who had earned the right to attend Boalt Hall (although I believed this in my heart, I was not 100 percent sure I was correct).

After I left the press conference, I hid in an associate dean’s office while the media dispersed. While I was sitting there, I thought to myself, “The worst is over. Now it is time to have the best law school experience you can under the circumstances.”

In many respects, I did make it an amazing law school experience. I spoke in favor of affirmative action on the steps of the Capitol Building in Sacramento. I became Third-Year Class President and addressed my peers at graduation. I met political and civic leaders, as well as the foremost scholars on the issue of race in America. In this respect it was a true growing experience. My law school experience was marred, however, by the elimination of affirmative action. In my three years at Boalt, I could never shake the nagging question in the back of my mind as to whether I was wanted there. I found it ironic that one of the arguments for the elimination of affirmative action was that it harmed minority students by stigmatizing them as inferior. While I never felt stigma-
tized at Indiana University where affirmative action was openly practiced, my time at Berkeley, on the other hand, was spent full of self-doubt. My classmates lost out as well. Without the critical mass alluded to in Grutter of certain minority groups, certain points of view and life experiences were simply absent; they were never shared with my classmates. As Justice O’Connor wrote, diversity “promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’”7 Had there been a number of African-Americans in my class, we could have had a collective voice that would have informed and educated our classmates.

Instead, only my point of view was shared, and only in those rare circumstances when I felt compelled to share.

As I can attest, Dean Lehman was correct when he stated that without a critical mass, minority students feel isolated or like spokespersons for their race. The isolation was severe. And, even though my classmates endeavored to make me feel included, I could not shake the feeling of isolation and the sense that this situation was created with animosity. This isolation made me to retreat and not speak up as much as I should have. Also, being the only African-American, I had no doubt that when I spoke in class, it was as the spokesperson for my race. Had there been other African-Americans around me, I would have felt more comfortable offering my personal experience, knowing that it would not be taken as The Black Experience. “[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”8

I recall numerous occasions where having a diverse body could have enlightened discussions of race. In one contracts class, the teacher wanted to discuss a study that showed that on average, women and minorities pay more for the same type of car than white men. In my criminal law class, the Bernard Goetz/vigilante case could not be discussed without diving into the issue of race. And in my clinical program, race was always an issue given that a majority of the clinic’s clients were minorities. But because our class lacked a critical mass of minorities, these discussions were largely theoretical, when they could have been grounded in reality. These discussions represented missed opportunities to eliminate racial stereotypes because my classmates could not experience the variety of viewpoints from amongst a critical mass of minorities.

While the Grutter decision will be the topic of discussion and debate for years to come, for me it simply validates the thoughts and feelings I had during my three years of law school. When a law school does not have a critical mass of students of color, not only do those students of color suffer, the entire class suffers. As the Grutter Court said, “student body diversity…better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”9

---

Eric Brooks is an associate in the Securities Litigation Practice Group of Morrison & Foerster’s San Francisco office. Mr. Brooks’ practice focuses on representing public companies and their officers and directors in securities class actions, SEC investigations, and derivative suits.

Endnotes

2. Id. at *15.
3. Id. at *15-16 (emphasis added).
4. Id. at *20.
5. Id.
6. Whether or not a color-blind admissions policy is a true “merit based” policy is subject to reasonable dispute. See Silence at Boalt Hall: The Dismantling of Affirmative Action, pp. 172-175 University of California Press 2002.
8. Id. at *22.
9. Id. at *41.

Background

Continued from page 1

alleging the same constitutional violation as Grutter. Both the Grutter and Gratz cases were brought by the Center for Individual Rights (CIR) in 1997 in a push for a nationwide elimination of affirmative action from higher education. Prior to the University of Michigan cases, the CIR had successfully eliminated affirmative action at the University of Texas with the Hopwood v. Texas5 decision. In addition to CIR, other affirmative action foes in the past eight years had abolished affirmative action through ballot measures in California and Washington, and by executive order in Florida. The Supreme Court’s approval of the law school’s affirmative action program in Grutter ensures the constitutionality of race-conscious policies for at least the next quarter century.6

—Eric Brooks

Endnotes

2. Id. at *17.
5. 78 F. 3d 932 (5th Cir. 1996).
6. 2003 U.S. Dist. LEXIS 4800 at *64.
A Personal Perspective on Brown v. Board of Education

INTERVIEW WITH JUDGE CONSTANCE BAKER MOTLEY

Editor’s Note: The Summer 2003 issue of Litigation (the ABA Section of Litigation’s quarterly journal) features an interview with Judge Constance Baker Motley. In the interview, conducted by Jeffrey Cole and Judge Joseph A. Greenaway, Judge Motley candidly discusses a wide range of personal and professional topics. In the excerpt below she talks about her own experiences with Brown v. Board of Education.

Constance Baker Motley joined Thurgood Marshall’s legal team at the NAACP Legal Defense and Education Fund in 1945 while still a student at Columbia Law School. For the next 20 years, she was at the epicenter of the civil rights movement, suffering through its greatest agonies and participating in its greatest court victories both before and after Brown v. Board of Education.

Q: When you were working on those cases at the NAACP Legal Defense and Education Fund, did you realize you were making history?

A: We were conscious of the fact that the Brown case had historical meaning. I remember vividly being there at the oral argument in the Supreme Court. John W. Davis argued for the Board of Education in the Brown case. Bob Carter and Thurgood were our lawyers. Davis wore his cutaway coat and fine silk hat and all the rest of the formal attire.

Q: Did you anticipate the result in Brown?

A: We thought we might come out with five-to-four, but when it was unanimous, we were flabbergasted. In fact, we also thought we might even lose. We never thought it would be unanimous. Earl Warren did that. He understood, having been a politician, that you had to have unanimity because if you had a divided court, the Southerners would still be at it. But if you have a unanimous decision, they knew it was over. What we did not anticipate was the massive resistance to Brown in the South.

Q: What was your strategy to implement Brown?

A: We said we would start with one student going into a college or graduate school; nobody would mind that. Well, we coincided with history again. We got to Birmingham in January 1956, and Rosa Parks and Martin Luther King had marched in Montgomery the month before. Birmingham was aflame, they cut down the NAACP the membership list and everything. We were in the second civil war, really. I remember recently, in September, I was at the University of Mississippi for the 40th anniversary of James Meredith, and they had most of the ceremonies in the Lyceum Building, and they had just painted it. When we came out, the dean of the law school or the president said to me, “You see when we painted it, we left a bullet hole up there, that’s where the troops came in and started firing at that building.” I said, “That was the second civil war or the last battle of the Civil War?” … He didn’t want to hear that.

Q: There is a certain irony that so much of the judicial support for civil rights came from the Eisenhower appointees, first Warren and then the reconstituted Fifth Circuit with Judge Elbert Tuttle, while the Kennedy appointees in the South were hostile to the civil rights movement and to you personally.

A: You are absolutely right. The Fifth Circuit was perhaps the major battleground in the aftermath of Brown v. Board of Education. The Kennedy appointees in the South were segregationists, at least many of them were. Eisenhower appointed Republicans; that’s what you do when you are president, you appoint federal judges of your party in the main, and that’s what he did: Tuttle, Wisdom, Brown, and Reed from Montgomery, Alabama. There was an extraordinary man, Reed; he never went to law school. They said he read law in somebody’s office, and yet he was one of the greatest judges there. He suffered perhaps the most direct reprisal. He had a son who was buried in Montgomery, and they went there and desecrated his grave. He was an old man, but he ruled with us every time. I don’t know how you get a Southerner like that, to this day I don’t know.

The fact simply is that prior to Brown, we could not win a desegregation case in the Fifth Circuit. After Eisenhower’s election, the ideological composition of the court changed, starting in 1959 when Richard Rives became the Chief Judge. Eisenhower appointed pro-integration Republicans without whom implementation of Brown might have been retarded for many years. And without the appointment of Earl Warren as Chief Justice in 1953, who knows how history would have unfolded.

Q: What does the future hold, Judge Motley, for the civil rights movement?

A: I think we will repeat the same thing in the 21st century we did in the 20th, because people who don’t know their own history are bound to repeat it. Now why do I say that? On the 25th anniversary of Brown, I was invited to speak at University of Montevallo, which is about 25 miles out of Birmingham. They were having a civil rights conference. They put on a play where they imitated Thurgood Marshall and Bob Carter before the Supreme Court. The school is completely integrated. They had this young fellow, his job was to pick me up from the airport in Birmingham, drive me 25 miles south to Montevalle, and then take me back to the airport. As we are going back to the airport, three or four days later, he says to me, “Judge Motley, what is that case you said you were here on, what was the conference about?” I said, “The Brown case.” He said to me, “What was that?” Then I knew it was all over. We are going to fight the same battles in this century that we fought in the last. The reason is, if you don’t know your own history you are bound to repeat it. He is 18 years old, and he didn’t know what Brown was. He would have been seven when the Court decided it. He didn’t know. He was in Alabama, he never heard of Brown v. Board of Education. So that’s where we are, I am sad to say.

Online Extra
Section of Litigation members have exclusive access to the full interview at the Litigation Journal Website (http://www.abanet.org/litigation/journal/home.html).
Unpopular Clients or Causes and the Media

JEFFREY O. BRAMLETT AND PAUL H. SCHWARTZ

History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes.1 Even before the birth of the nation, John Adams and Josiah Quincy, Jr., weathered the angry storm of public opinion aroused by their defense of the British soldiers accused of murdering five colonists in the so-called Boston Massacre.2 Montgomery, Alabama, native Clifford Durr fought the injustices of his time and of the white Southern society from which he came, defending accused communists and both blacks and whites devoted to the cause of civil rights in the 1950s and 1960s. Examples of courageous lawyering abound, in cases both long forgotten and not soon to be forgotten.

In cases involving an unpopular client or cause, lawyers confront the special challenges presented by the intense media coverage, public scrutiny, and torrent of emotions such cases naturally inspire. Consider Adams’s and Quincy’s defense of sequential, separate trials of Captain Preston and the troops under his command for their respective roles in the Boston Massacre. Preston was tried first in a political atmosphere charged by the wide dissemination of an inflammatory report, dramatically entitled, “A Short Narrative of the horrid Massacre in Boston, perpetrated in the evening of the fifth day of March, 1770, by soldiers of the Twenty-ninth Regiment . . . with some observations on the state of things prior to that catastrophe.”3 When Adams and Quincy won Preston’s acquittal, the Boston Gazette went even further in calling for vengeance against Preston’s troops:

Is it a dream—murder on the 5th of March, with the dogs greedily licking human blood in King-Street? Some say that righteous Heaven will avenge it. And what says the Law of God, Whoso sheddeth Man’s blood, by Man shall his Blood be shed!4

Like Captain Preston, the British soldiers prevailed despite the Gazette’s pretrial verdict. In the early part of this century, Leo Frank of Atlanta was not so fortunate. In 1913, Frank, the Jewish part-owner of a pencil factory, was charged with the murder of a young girl at the factory. With blatant anti-Semitism,

[the three daily newspapers leapt upon the crime with an indecent, voyeuristic sensationalism of a sort very familiar to late-twentieth-century magazine readers and TV viewers. The public’s appetite for lurid details, and for justice, was boundless: newspaper circulation skyrocketed with slanderous reports of this archetypal southern crime. Accounts of the trial referred to the defendant as “the monster” and “the strangler.”5

After a trial in which angry mobs responded to newspaper editorials about the “jewpervert” by bombarding the courtroom with demands for a guilty verdict, Frank was convicted and sentenced to death. In 1915, when Georgia Governor John M. Slaton courageously commuted Frank’s death sentence because of the gross unfairness of the trial proceedings, a band of 25 men, including two former state supreme court justices, kidnapped Frank from his prison cell and hanged him from a tree.6

Arthur Kinoy presents us with a third example in recounting his efforts to stay the executions of convicted “atomic spies” Julius and Ethel Rosenberg at the height of anticommunist hysteria in 1951.7 Arguing before Second Circuit Judge Jerome Frank at his home in a desperate attempt to block electrocutions scheduled to proceed in less than six hours, Kinoy describes the result of his advocacy:

At last we were finished. We had been talking and arguing for more than an hour. We looked up at him, and [Judge Frank] looked at us and was quiet for a moment. Then he said something that I shall never forget. He said to us in soft, slow words, “If I were as young as you are, I would be sitting where you are right now and saying and arguing what you are arguing. You are right to do so. But when you are as old as I am, you will understand why I”—and he paused, and repeated—“why I cannot do what you ask. I cannot do it.”8

Lawyers’ Roles and Objectives When Interacting with the Media

These cases illustrate some of the recurring difficulties in representing unpopular causes or clients. Achieving justice for the unpopular is always an upstream swim, because the law and those who administer it have a tendency (like most human beings and human institu-
tions) to produce results that please the public. In high-profile cases, this tilt in the playing field is exacerbated as each participant—witness, juror, judge, and lawyer—experiences the glare of public scrutiny expressing, reinforcing, and serving as a reminder to all of the public will. Lawyers, who tend to be a competitive lot, generally hate to lose, especially when everyone is watching. Yet, in representing the unpopular client or cause, the risk of a painful public loss is always present.

Having acknowledged these realities, what are the lawyer’s legitimate roles and objectives when interacting with the media in these cases? When law enforcement authorities parade a suspect in a notorious criminal case before cameras in jail garb and chains, does “no comment” from the suspect’s advocate suffice as a public response? When public officials embroiled in a high-profile dispute over the civil rights of prisoners, gays and lesbians, immigrants, or flag burners offer public justification for their positions by appealing to public sentiment against these unpopular groups, can the opposing advocate responsibly ignore these out-of-court arguments that shape public perception and policy—not to mention juror predisposition—about the client and the cause?

If one crosses this threshold to the conclusion that out-of-court communication to the public through the media, shaped (if not delivered) by the advocate, is essential to balance the scales and secure for the client a fighting chance to prevail, options proliferate. Should the message stress the content of the client’s cause, or the process values advanced by a justice system that accords the respect of a fair trial even to the unpopular, or perhaps a combination of both? The judgment calls about how, and what, and when to communicate will vary from case to case, but should proceed from a fundamental, personal examination: Why am I advocating this unpopular client or cause in the first place?

Self-examination is the appropriate starting point because journalists are (or should be) intent on information that is accurate. This predisposes them toward focused and credible sources of information. Lawyers who have not gone through the exercise of examining their own motives are unlikely to persuade journalists that they are focused and credible sources of reliable information.

### Formulating a Rationale for the Representation

One might begin the explanation with the concept of a lawyer’s professional responsibility. The 1958 Report of the American Bar Association and Association of American Law Schools Joint Conference on Professional Responsibility, for example, states that “[o]ne of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public.”9 TheABA’s Model Code of Professional Responsibility makes the point even more forcefully: “Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.”10

Of course, reality and self-interest often clash with this ideal. Lawyers frequently are vilified for representing interests that the public at large, rightly or wrongly, views as immoral. Fifty years after his defense of the British soldiers, John Adams still felt the sting of popular condemnation: “At the present day it is impossible to realize the excitement of the populace, and the abuse heaped upon Mr. Quincy and myself for our defense of the British captain and his soldiers: We heard our names execrated in the most opprobrious terms whenever we appeared in the streets of Boston.”11

Not so long ago, David Goldberg and the American Civil Liberties Union suffered a similar flood of criticism, punctuated by massive membership resignations and even threats of physical violence, when they agreed to advocate the First Amendment rights of American Nazis to march in the predominantly Jewish community of Skokie, Illinois.12 Lawyers representing death-row inmates regularly are excoriated and frequently driven to (or beyond) the brink of financial ruin for their pains.

Moreover, even if abstract references to professional responsibility satisfy the lawyer’s inquiry, they may ring a bit hollow and unpersuasive to a public audience. Outraged at the client’s alleged conduct or cause, members of the public demand to know of the lawyer: “Must you be the Devil’s advocate?”13 In the absence of a message incorporating a focused defense strategy and an emphasis on process values, ethical platitudes are not likely to satisfy this curiosity.

### Advancing the Rationale: An Obligation?

Do lawyers have an obligation to justify to the public their representation of unpopular clients or causes? No easy answer lies in the rules of ethics. TheABA’s Model Code and Model Rules of Professional Responsibility neither impose on lawyers a burden of publicly justifying their representation of particular clients, nor say explicitly that no obligation of public justification exists. At least one scholar has suggested that several ethical rules cut directly against the notion of a burden of public justification.14 Presumably, this statement refers to, for example, the lawyer’s obligations to preserve the confidences and secrets of the client15 and to represent the client zealously within the bounds of the law,16 since in the process of justifying oneself to the public, the lawyer may reveal information or impressions about the case, or even reinforce the public’s negative view about the client, to the client’s detriment.

But these ethical considerations are more appropriately viewed as limitations on the ability of a lawyer publicly to justify representation of a particular client, rather than absolute prohibitions against the lawyer doing so. To be sure, regardless of public scorn or demand for answers, a lawyer may not undermine the confidential nature of the attorney-client relationship, nor act in any way that is detrimental to the client. But often some kind of explanation for the representation can be given without compromising any ethical principles. In such a case, must the lawyer representing an unpopular client or cause publicly defend his or her decision to take on the client?

The answer depends largely on how the
individual views his or her relationship to society as a lawyer. The unpopular client is unpopular generally because he stands for (or is perceived to stand for) some conduct or principle that the public views as immoral. Do we, as lawyers, have responsibility for the moral (or immoral) decisions of our clients? As lawyers in this society, do we have a moral obligation to justify our representation of a client perceived to be immoral?

**Decision and Execution**

Many of the greatest lawyers ultimately have decided to offer an explanation or justification for their representation of one or more unpopular clients or causes. In his autobiography, *The Story of My Life*, Clarence Darrow explains, among other things, his attraction to notorious criminal cases. In *One Man’s Freedom*, Edward Bennett Williams explains his representation of unpopular clients in terms of a greater need to protect the erosion of “the most basic principles of individual liberty guaranteed by our Constitution,” for “whenever government infringes on any of these rights it begins with the weak and the friendless, or the scorned and the degraded, or the nonconformist and the unorthodox. It never begins with the strong, the rich, the popular, or the orthodox.”

Even Michael Tigar, though vociferously denying a moral obligation to justify his representation of pariah clients, has chosen to provide such justifications in moving papers. In explaining his representation of Terry Lynn Nichols, Tigar wrote an eloquent essay on the difference between the “system-called-justice” (which Tigar distinguishes from a true “justice system”) and “justice properly-so-called.” Tigar describes his role in the Oklahoma City bombing case as trying to “see that the system-called-justice respects and renders justice properly-so-called.” Tigar’s defense of his representation of John Demjanjuk [who stood trial in the 1980s as “Ivan the Terrible” of the Holocaust] is especially stirring:

> When the most powerful country on earth gangs up on an individual citizen, falsely accuses him of being the most heinous mass murderer of the Holocaust, and systematically withholds evidence that would prove him guiltless of that charge, there is something Dra-...
SECTION OF LITIGATION

SECTION AND COMMITTEE ENROLLMENT FORM

Committee membership is free to all members of the Section of Litigation.* With your membership, you may join any three of the committees listed below at no additional cost. You can participate to whatever degree makes you most comfortable; from being active as a subcommittee chair to simply benefiting from quarterly newsletters geared to your areas of interest.

Please check here if you are providing updated or new contact information.

ABA ID #: ____________________________________________________________________________________
(The eight-digit number is located above your name on the address label)

Name: ____________________________________________________________________________________

Organization: ____________________________________________________________________________________

Address: ____________________________________________________________________________________

City/State/Zip: ____________________________________________________________________________________

Phone: ____________________________________________________________________________________

E-mail: ____________________________________________________________________________________
Providing your e-mail address will make certain you will receive communications such as Section member benefit updates and the ABA Journal’s eReport, a substantive e-newsletter. The Section’s e-mail policy ensures limited usage of your e-mail address.

☐ Please enroll me in the following committees. I am already a member of the Section of Litigation.

☐ Please enroll me in the Section of Litigation and the following committees. Enclosed is a check payable to the American Bar Association for the amount of $45.

☐ Please enroll me in the Section of Litigation and the following committees. I am an ABA law student member and will receive Section and Committee membership at no cost.

☐ I am not a member of the American Bar Association. Please send me information on joining.

☐ Alternative Dispute Resolution ☐ Corporate Counsel ☐ Mass Torts Litigation
☐ Antitrust Litigation ☐ Criminal Litigation ☐ Minority Trial Lawyer
☐ Appellate Practice ☐ Employment and Labor Relations Law ☐ Pretrial Practice and Discovery
☐ Aviation Litigation ☐ Energy Litigation ☐ Pro Bono and Public Interest
☐ Bankruptcy and Insolvency Litigation ☐ Environmental Litigation ☐ Products Liability
☐ Business Torts Litigation ☐ Ethics and Professionalism ☐ Professional Liability Litigation
☐ Children’s Rights Litigation ☐ Family Law Litigation ☐ Real Estate and Probate Litigation
☐ Class Actions and Derivative Suits ☐ First Amendment and Media Litigation ☐ Securities Litigation
☐ Commercial and Business Litigation ☐ Government Litigation ☐ Solo and Small Firms
☐ Computer and Internet Litigation ☐ Health Law Litigation ☐ Technology for the Litigator
☐ Condemnation, Zoning, and ☐ Immigration Litigation ☐ Trial Evidence
☐ Land Use Litigation ☐ Insurance Coverage Litigation ☐ Trial Practice
☐ Construction Litigation ☐ Intellectual Property Litigation ☐ Woman Advocate
☐ Consumer and Personal Rights Litigation ☐ International Litigation

RETURN ENROLLMENT FORM TO: ABA Section of Litigation
Attention: Krista Pratt
750 North Lake Shore Drive
Chicago, IL  60611
OR
FAX  312/988-6234
www.abanet.org/litigation

*Membership in the ABA and Section of Litigation is a prerequisite to joining committees.
In This Issue
A “Critical Mass” of One ..................1
A Personal Perspective on Affirmative Action and \textit{Grutter v. Bollinger}
Chairs’ Column ................................2
Disability Discrimination .................3
Developments
Minority Judicial Intern Program .......4
Arbitration for the Uninitiated ..........5
A Personal Perspective on ...............11
\textit{Brown v. Board of Education}
Unpopular Clients/Causes ...............12
and the Media

SECTION OF LITIGATION
American Bar Association
750 N. Lake Shore Drive
Chicago, IL 60611-4497