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Expert Report of Robert B. Webster

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EXPERT REPORT OF ROBERT B. WEBSTER

Grutter, et al. v. Bollinger, et al., No. 97-75928 (E.D. Mich.)

I. STATEMENT OF QUALIFICATIONS:

I am a member of the law firm of Clark Hill P.L.C. I have served as Chairman of that firm and am currently resident in its Birmingham, Michigan office. I have been with Clark Hill since 1982, and I was a member of one of its predecessor firms from 1969 to 1973.

In 1973, I was appointed by Governor William Milliken to the Sixth Judicial Circuit, Oakland County Circuit Court. I served in that capacity from 1973 through 1982. I served as Chief Judge of that Court from 1976 through 1978.

Within the State Bar of Michigan I have held the positions of Commissioner (1982–1990), Vice-President (1987–1988), President-Elect (1988–1989), and President (1989–1990). I have served on numerous State Bar committees, and was appointed by the Supreme Court of Michigan to chair the Committee to Revise and Consolidate the Michigan Court Rules. In that capacity I was charged with responsibility for directing the first general revision of the Michigan Court Rules since 1963; I subsequently also served as co-author of *Michigan Court Rules Annotated* (West 1985), a standard text on Michigan practice. I also served on the Michigan Supreme Court Task Force on Gender Issues in the Courts and, in that role, reviewed the report of the Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts and related materials.

I have been a member of the House of Delegates of the American Bar Association since 1990 and a Fellow of the American College of Trial Lawyers since 1991. A complete *curriculum vitae*, including list of major publications, is attached as Appendix A.[†]

II. INFORMATION CONSIDERED IN FORMING OPINIONS:

My opinions are based primarily upon knowledge and insight gained in the forty years in which I have been a practicing attorney, counselor, arbitrator, mediator, bar officer, and state court judge. My opinions are also based in part upon materials described in Section IV.B, within, copies of which will be provided upon request.

[†] Appendix A has not been reproduced here.

III. OTHER EXPERT TESTIMONY: COMPENSATION:

Within the past four years, I have testified as an expert on several occasions regarding issues such as attorney malpractice (standard of care) and reasonableness of attorney fees. Time spent working on this matter is being charged at the rate of two—hundred dollars per hour.

IV. OPINIONS TO BE EXPRESSED AND THE BASIS AND REASONS THEREFOR:

A.

One of the most important skills for a lawyer to develop is that of being able to understand and work well with individuals of diverse backgrounds, including racially diverse backgrounds. A lawyer will simply be more effective in the profession if he or she can think empathetically, interact comfortably with people whose perspectives and life experiences are different from their own, and resist stereotypes and other obstacles to understanding.

This is important for attorneys in virtually every aspect of the profession. It is obviously important for trial lawyers, who must interact persuasively and perceptively with clients, witnesses, opposing counsel, judges, and juries—people who may be of diverse races and backgrounds. But it is important for many other kinds of attorneys as well, including those who negotiate business transactions, mediate disputes, draft agreements, or provide advice concerning divorces, estate plans, or living wills. And as our society becomes increasingly multicultural and diverse—and as our boardrooms and bar associations and business meetings and communities follow suit—this skill becomes increasingly important. Simply put, ours is a profession of service, and it must keep pace with the Nation it serves.

This skill—being able to understand and work well with individuals of diverse backgrounds—is also related to issues of professionalism. Responsible attorneys act not only as advocates and advisors, but as counselors. An attorney is a more effective counselor if he or she has developed this capacity. If we want our attorneys to act as professionals and as counselors—and not just as “hired guns” who attend only to the bottom line and the billable hour—then we must enable and expect them to develop this skill as early as possible in their careers.

Of course, this is also critical to the many other roles that members of our profession disproportionately play in our society: community leaders; board members; law enforcement officials; legislators; public servants;

and so on. I personally found this skill indispensable to my service as a member of the judiciary. Unfortunately, because my exposure to people of other races was so limited before I was appointed to the bench, I was forced to learn about these issues “on the job” and after I had been practicing law for more than fifteen years.

I grew up in a predominantly white neighborhood and attended predominantly white schools, including Baldwin High School in Birmingham, Michigan. I attended the University of Michigan as an undergraduate (B.A., 1955) and as a law student (J.D., 1957). My memory is that my law school class had few, if any, students of color. After law school I joined the Detroit law firm that eventually became Hill, Lewis, Adams, Goodrich & Tait, a leading firm in the city. During this time I had very limited interactions with people of other races.

There was one exception to this. In 1967, rioting broke out in the City of Detroit and I was asked to represent a number of African American individuals who had been arrested. Observing how the justice system treated these individuals was an eyeopening experience for me. Learning even a little about their lives was a very important educational experience that changed my perspectives and challenged my assumptions. It is unfortunate that I only began to have these experiences a decade after I finished law school.

Indeed, it was not until I took the bench in 1973 that my education on these issues really began. As a partner in a prestigious big-city law firm practicing in the civil justice system in the nineteen-sixties, my exposure to African American attorneys had been extremely limited. But my experience was entirely different as a judge presiding in a county that included a number of cities (such as Pontiac) whose populations were substantially African American.

In my years on the bench I watched, listened to, engaged with, and learned from a number of African American attorneys who appeared before me. By way of example, this includes an attorney who was the best cross-examiner I had ever—and to this day have ever—seen, and it includes an attorney whose quiet dignity and scholarship later led to an appointment to the federal bench. These encounters exposed and destroyed racial stereotypes I did not even know I harbored. And, again, I found myself exposed to new perspectives, new kinds of life experiences, new ways of looking at the world—indeed, new worlds. But I did not learn only about differences; I also learned about similarities, about how much of the human condition transcends racial boundaries. Now, more than ever, our profession needs lawyers to be bringing these kinds of skills and insights to the bench—not to be acquiring them there.

In sum, the ability to empathize and work effectively with people of diverse races and backgrounds is critical to our profession. It is an ability

that must be developed as proficiently, and as soon, as it possibly can. For it is finally this simple: we cannot represent someone as effectively, cannot counsel someone as insightfully, and cannot persuade someone as convincingly, if their race or background makes them a stranger to us.

B.

When law schools graduate racially diverse student bodies, the legal profession enjoys an incidental but important benefit: a diverse legal profession enhances the appearance of justice and increases public confidence that our system is fair, unbiased, and accessible to all.

Reports of various Michigan commissions and task forces confirm that the appearance of bias in the judicial system constitutes a significant concern.

In 1986, the Michigan Supreme Court formed the Citizens Commission to improve Michigan Courts. The Commission, supervised by Justice Patricia Boyle, was asked "to recommend to the Court ways in which the court system may be made more readily accessible and more responsive to the needs of citizens of this State."

The Commission divided itself into committees, held public hearings, reviewed hundreds of letters, and conducted surveys. As a result of the investigation, the Commission issued some fifty recommendations to the Supreme Court.

In the course of its recommendations, the Commission found that "Fully one-third of the citizens of the state of Michigan believe that blacks and women are not treated as well by the court system as are whites and men . . ." The Commission therefore recommended that (among other things) the Supreme Court form a task force to study the extent and nature of the "disparate treatment accorded citizens."

In 1987, the Supreme Court responded by issuing Administrative Order No. 1987-6, creating a Task Force on Racial/Ethnic Issues in the Courts and a Task Force on Gender Issues in the Courts. These Task Forces issued Reports. Of particular importance here is the following finding by the Task Force on Racial / Ethnic Issues:

Diversity is an important goal for a quality justice system. The presence of minorities in all areas of the profession is not a guarantee of unbiased behavior. However, the research done by the Task Force is conclusive on several points. First, the presence of minorities in the profession increases public perception of fairness. It further responds to the need of citizens to feel less isolated and alone within the legal process. When asked an open-ended question regarding recommen-

dations for ensuring equal and fair treatment in the Michigan Court system, 231 court users said “increase the number of female and racial / ethnic minority judges and attorneys.” The next highest response, “speed up the system,” gained only 47 proponents.

In the fall of 1996, State Bar President Victoria Roberts created the State Bar Task Force on Race / Ethnic and Gender Issues in the Courts and Legal Profession to determine what, if any, progress had been made toward the goals identified in the earlier reports. In 1998, the Task Force issued its conclusions. This quotation from the executive summary of that report underscores the importance of diversity in the profession to the appearance of fairness:

The appearance of bias, as well as the reality of bias, damages our profession and our courts in their fundamental role as protector of freedom and dispenser of justice. In a very real sense, the implementation of these recommendations continues the process of insuring that the Michigan justice system accurately reflects the diversity of the constituency it serves, and that participants at all levels are afforded a level playing field upon which to operate.

I believe that task forces in other states have reached similar conclusions.

In sum, when diverse classes of law school students enter the legal profession it enhances the appearance that our system is just, unprejudiced, and equally available to people of all races. Of course, the educational reasons law schools admit a diverse array of students—and the policies they use to do it—are beyond my expertise and personal knowledge and I offer no opinions with regard to these issues. Nevertheless, as an attorney, bar leader, and former judicial officer I know that a system of justice only works well if people respect it, and that people cannot respect a system that appears to be unfair, to perpetuate prejudice, and to exclude certain people from its administration.