UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

C.A. 99-1205, Section L, Mag. 4

SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE, LOUISIANA CHAPTER; ST. JAMES CITIZENS FOR JOBS AND THE ENVIRONMENT; CALCASIEU LEAGUE FOR ENVIRONMENTAL ACTION NOW; HOLY CROSS NEIGHBORHOOD ASSOCIATION; FISHERMEN'S AND CONCERNED CITIZENS' ASSOCIATION OF PLAQUEMINES PARISH; ST. THOMAS RESIDENTS COUNCIL; LOUISIANA ENVIRONMENTAL ACTION NETWORK; LOUISIANA WILDLIFE FEDERATION; LOUISIANA ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW; NORTH BATON ROUGE ENVIRONMENTAL ASSOCIATION; ROBERT KUEHN; CHRISTOPHER GOBERT; ELIZABETH E. TEEL; JANE JOHNSON; WILLIAM P. QUIGLEY; TULANE ENVIRONMENTAL LAW SOCIETY; TULANE UNIVERSITY GRADUATE AND PROFESSIONAL STUDENT ASSOCIATION; INGA HAAGENSON CAUSEY; CAROLYN DELIZIA; DANA HANAMAN; AND C. RUSSELL H. SHEARER

VS.

THE SUPREME COURT OF THE STATE OF LOUISIANA

AMICUS CURIAE BRIEF OF THE CLINICAL LEGAL EDUCATION ASSOCIATION ("CLEA") IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The Clinical Legal Education Association submits the following Amicus Curiae brief in support of the Plaintiffs' opposition to Defendants' motion to dismiss for failure to state a claim upon which relief can be granted and for lack of standing. For the following reasons, the Amicus respectfully submits that the defendants' motion to dismiss must be rejected.

STATEMENT OF INTEREST

The Clinical Legal Education Association ("CLEA") is a non-profit educational organization which was formed in 1992 to improve the quality of legal education both in the United States and abroad. CLEA currently has over 1,060 dues-paying members representing more than 140 law schools from six continents. To meet its goal, CLEA engages in activities designed to: (1) encourage the expansion and improvement of clinical legal education in this country and abroad; (2) encourage, promote and support clinical legal research and scholarship by, among other things, publishing a peer edited journal devoted to such work; (3) disseminate information to and between clinical teachers; (4) work cooperatively with other groups interested in clinical education, the improvement of legal education, and the improvement of the legal system; (5) promote and/or conduct conferences and other educational activities designed to facilitate the other purposes of the organization; and (6) promote the interests of clinical teachers.1

CLEA is committed to ensuring the success and quality of clinical legal education because it is an integral part of a quality education for future attorneys. Through clinical education,

[1] By-Laws, Clinical Legal Education Association.

students "learn from experience"2 by interacting with and on behalf of real clients. Students develop their professional skills through both the educational and the service components of their clinical experience.

Part I of the Argument, below, describes the role of law school clinics within contemporary legal education, explains why a student practice rule is necessary to implement a "real-client" clinical program,[3] and demonstrates that Louisiana's student practice rule is inconsistent with student practice rules that have been adopted in other states. Part II explains how the proposed amendments violate plaintiffs' rights under the First Amendment. Part III explains how the amendments violate the principles of academic freedom that are likewise protected by the First Amendment. Finally, Part IV addresses the defendants' inaccurate misrepresentation of other states' rules which, in any event, do not support defendants' motion to dismiss.

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[2] Association of American Law Schools, Section on Clinical legal Education Report of the Committee on the Future of the In-House Clinic, 42 J. Legal Educ. 511 (1992) as excerpted in Clinical Anthology Readings for Live-Client Clinics (Anderson Publishing: 1997) at p. 25.

[3] "'[R]eal client' refer[s] to clinics where students provide representation to real clients with legal problems. These clinics are to be distinguished from clinics that are simulation based and use hypothetical clients." Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401, 403 n.9 (1994).

ARGUMENT

I. LAW SCHOOL CLINICS ARE ESSENTIAL TO THE PROVISION OF A QUALITY LEGAL EDUCATION.

CLEA has submitted its views to this Court because the outcome of this lawsuit will directly affect the ability of law schools in Louisiana to provide a first-rate legal education, and this lawsuit may hold implications for legal education in other parts of the United States as well. This case is not about whether the Louisiana Supreme Court has, in general, the power to regulate the practice of law. This case is not about whether non-lawyers can demand the ability to appear before State tribunals. Rather, this case is about whether the defendant Court can exercise its rulemaking authority in a way that violates the constitutional rights of faculty, students and clients of an established law clinic, and which also undermines the ability of schools to provide a quality legal education.

In arguing that the defendant Court can fashion whatever rule it wants in whatever manner it wants, the defendant misperceives the role and value of law school clinics in contemporary American legal education. To see why the defendant's arguments in its motion to dismiss must be rejected, it is important to understand the structure of legal education today. Thus, for example, the defendant claims that the law professor plaintiffs have no standing in this case because they can, personally, "take on the representation of any of the client-plaintiffs today." (*See* Memorandum of the Louisiana Supreme Court in Support of Its Motion to Dismiss This Action, hereafter "Defendant's Memorandum," at 30). That argument shows a lack of understanding of the way in which law school clinics teach. Clinic students do not function as assistants to law faculty; they are not, for example, mere researchers who help faculty provide

legal services. In law school clinics, students take on primary responsibility for cases and actually appear before courts and agencies. Law schools do not fund clinics merely so that law faculty can handle cases. Schools fund clinics so that students can learn by doing. That is why law school clinics cannot exist without a student practice rule, and why it is no answer to suggest that the amendments to the rule are harmless because law faculty can merely take cases on their own.

By providing legal services through real-client clinics, law schools in Louisiana are doing what they are required to do under the American Bar Association's accreditation standards. Every law school accredited by the ABA "*shall* . . . offer instruction in professional skills." ABA, STANDARDS FOR APPROVAL OF LAW SCHOOLS (1996) (Standard 302(a)(iv)) (emphasis added). More specifically, each law school accredited by the ABA "*shall* offer live-client or other real-life practice experience." *Id.* (Standard 302(d)) (emphasis added). The American Bar Association has therefore recognized that experiential learning is an essential part of a legal education and, also, that law schools are effective places in which to teach the skills and values that are central to the practice of law.[4]

[4]"Real-client" clinics are now established components of the curriculum at most of our nation's law schools, including Tulane, Loyola and Southern. The ABA recently reported that, as of 1990, 119 law schools operated 314 clinics in the United States. *See* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT -- AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 239 (1992). The most recent data collected by the Committee on In-House Clinics of the Association of American Law Schools' Section on Clinical Education indicates that there are real-client clinics at 147 law schools in the United States.

It was not always this way. Despite some earlier efforts to teach students with real cases,[5] clinical programs were not developed at most American law schools until the 1960s. The Ford Foundation provided initial money for clinical programs at law schools across the country. *See* George S. Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162, 172-180 (1974). Calls for expanded clinical opportunities by members of the bench and bar[6] led to further change.

Perhaps the most comprehensive recent appraisal of law schools and clinical legal education occurred in 1992. The ABA's Task Force on Law Schools and the Profession recommended that legal education include instruction in lawyering skills and professional values. The Task Force also issued a Statement of Skills and Values necessary for lawyers to undertake responsibility for a client. *See* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT -- AN EDUCATIONAL CONTINUUM (REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP) 125 (1992) (hereafter "MacCrate Report").[7] Law school clinics are unique settings in

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[5]*See, e.g.*, John S. Bradway, *The Beginning of the Legal Clinic of the University of Southern California*, 2 S.C. L. REV. 252 (1929) (describing a general practice clinic); John S. Bradway, *Some Distinctive Features of a Legal Aid Clinic Course*, 1 U. CHI. L. REV. 469 (1934) (discussing clinical legal education and the clinical program at Duke University); Jerome Frank, *Why Not A Clinical-Lawyer School*, 81 U. PA. L. REV. 907, 917 (1933) (proposing that law schools develop legal clinics).

[6]*See, e.g., Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 161, 164, 167-8 (1975) (noting the lack of competency of lawyers in federal court); *Final Report of the Committee to Consider Standards For Admission To Practice in the Federal Courts to the Judicial Conference of the United States*, 83 F.R.D. 215 (1979) (same); REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 3-4 (1979) (Report of ABA Task Force, recommending law school instruction in litigation skills).

[7]These skills can be generally categorized as: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation,

which to teach law students the professional skills necessary to the practice of law. *See* MacCrate Report, at 234. Clinical programs reinforce the non-clinical curriculum in developing students' skills in research and analysis. *Id.* Clinical programs also provide law students unparalleled opportunities to engage in problem solving, factual investigation, counseling, and negotiation. *Id.* That is why the MacCrate Report suggests that "[l]aw schools should assign primary responsibility for instruction in professional skills to permanent full-time faculty who can devote the time and expertise to teaching and developing new methods of teaching skills to law students." MacCrate Report at 333-334 (Recommendation C.24).

Clinics are essential to the training of the next generation of lawyers. Clinical education is more than a trial advocacy course or a clerkship at a law firm. Clinics teach students how to reflect on the practice of law; how to integrate the doctrines learned in traditional classes into practice; how to formulate hypotheses and test them in the real world; how to approach each decision creatively and analytically; how to identify and resolve issues of professional responsibility; and how to expand existing legal doctrine for the protection of the poor and powerless. *See* Anthony Amsterdam, *Clinical Legal Education -- A 21st Century Perspective*, 34 J. LEGAL EDUC. 612 (1984).

Further, law school clinical faculty are best able to assess law students and provide appropriate feedback on the students' performance because law school clinics provide more

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litigation and litigation alternatives, organization and management of legal work, and recognizing and resolving ethical dilemmas. *Id.* at 138-140. The professional values are, generally, providing competent representation, seeking to promote justice, fairness, and morality, seeking to improve the profession, and commitment to self-development. *Id.* at 140-141. According to the Task Force, law schools should play an important role in developing these professional skills and values. *Id.* at 331-32 (Recommendations C.12, C.13, C.15, C.16, C.17 and C.19).

intensive guidance than is generally available in any other setting. In 1980, a joint committee of the AALS and the ABA issued guidelines for law school clinics. The committee recommended that student-faculty ratios and student caseloads be strictly limited. Operating under these guidelines, clinical law faculty can supply closer supervision than can experienced lawyers in practice. Clinical faculty must assist students with case preparation, review their work, accompany them to court and observe and evaluate the students' performances. *See* CLINICAL LEGAL EDUCATION: REPORT OF THE AALS-ABA COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) (Guideline VII). This close and direct faculty supervision, and the resulting "co-counsel" relationship, is essential to creating an effective adult-learning environment. *See* Frank S. Bloch, *The Androgogical Basis of Clinical Legal Education*, 35 VAND. L. REV. 321, 347 (1982). This intensive supervision "distinguishes clinical training from the unstructured practice experience students encounter after graduation." Peter T. Hoffman, *Clinical Course Design and the Supervisory Process*, 1982 ARIZ ST. L.J. 277, 280 (footnote omitted). It also distinguishes "real-client" clinical training from the practice experience encountered by students in internship experiences. Bloch, *supra*, at 348-49.

Student practice rules are critical if law schools are to deliver on the promise of deliver clinical legal education. Through student practice rules, law students receive a limited license to practice law under the close supervision of a clinical faculty member, who is admitted to practice in the jurisdiction. In 1969, the American Bar Association promulgated a Model Student Practice Rule,[8] which enables law student practice under the supervision of licensed practitioners. The ABA Model Rule explicitly and implicitly recognized the importance of

clinical legal education as an integral part of a meaningful legal education.[9] As demonstrated by the student practice rules supplied to this Court by the defendant Court as part of its Memorandum, the importance of experiential learning is not only recognized and encouraged by the ABA Model Rule, it also is recognized and promoted by the adoption of student practice rules in all fifty states and the District of Columbia. Prior to the series of recent amendments to the Louisiana Student Practice Rule, Supreme Court Rule XX was substantially similar to the ABA Model Rule, and it promoted quality clinical legal education in the State of Louisiana.[10]

II. THE RULE CHANGES CONSTITUTE IMPERMISSIBLE INTERFERENCE WITH SPEECH BASED ON ITS CONTENT AND THERFORE VIOLATE THE FIRST AMENDMENT

CLEA is particularly troubled by the current Amendments to Rule XX because, as alleged in the Complaint, they were specifically and intentionally designed to limit representation of particular groups and particular ideas. As amendments that are content based, they are presumptively invalid for three distinct reasons, and the defendant Court's motion to dismiss must be rejected.

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[8] *See* ABA MODEL STUDENT PRACTICE RULE, Appendix A.

[9] *See* ABA MODEL STUDENT PRACTICE RULE. See also CLINICAL LEGAL EDUCATION: REPORT OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS– AMERICAN BAR ASSOCIATION COMMITTEE ON GUIDELINES FOR CLINICAL LEGAL EDUCATION (1980) [relevant portions appear as Appendix B].

[10] The version of Rule XX prior to the amendments appears as Appendix C.

First, the motion to dismiss must be rejected because it is clear that the amendments are impermissibly content based. In fact, examination of the history of these amendments makes it clear that they are designed to silence particular individuals and groups, and to limit their access to legal advocacy. As described in paragraphs 28 to 50 of the Complaint, each of these amendments were created by the Louisiana Supreme Court in direct response to articulated concerns of local business communities that one particular clinic – the Tulane Environmental Law Clinic – had been too successful in its representation of clients in environmental and regulatory advocacy. This purpose behind these amendments was clearly articulated by the groups who were advocating for them. For example, one group suggested to the Louisiana Supreme Court that Rule XX should be modified *because* clinical students and supervisors were trying to "push and impose social views" of the faculty and students. *See* Complaint, at para. 31. Another group asked the Louisiana Supreme Court to modify Rule XX as a means to deter what it called "anti-business" litigation. *See* Complaint, at para. 33. And yet another group requested that the court change Rule XX specifically s a means to silence the Tulane Environmental Law Clinic's "agenda" and perceived ability to "discredit industry in Louisiana". *See* Complaint, at para. 38. Prompted by these particular concerns, the Louisiana Supreme Court enacted the new amendments that create significant obstacles to the particular individuals and groups whose positions and ideas had been the subject of concern to these business groups. *See* Complaint, p. 24. Thus, under the new amendments to Rule XX: (i) law school clinics are prevented from representing any individual unless the individual meets 200% of federally established poverty level guidelines; (ii) law school clinics are prevented from representing community organizations unless the organization can certify that 51% of its members' would themselves be financially

eligible for clinic representation, and; (iii) students are prohibited from representing any person or group if any law school clinic member initiated contact with the client or assisted in establishing the group. Each of these amendments runs afoul of the First Amendment.

As alleged in the Complaint, there can be no doubt that the amendments to Rule XX were created because one particular clinical program was too successful in advocating particular positions for particular clients. As the Complaint alleges, Chief Justice Calogero specifically stated that review of Rule XX had been prompted "by letters sent by the New Orleans Chamber of Commerce, the New Orleans Business Council and the Louisiana Association of Business and Industry to Chief Justice Calogero complaining about the Tulane Environmental Law Clinic's activities". *See* Complaint, at para. 41. In amending the Rule, the Louisiana Supreme Court has attempted to limit the access of particular views and clients. Yet, obviously, "selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content". *See, e.g., Carey v. Brown*, 447 U.S. 455, 462-463 (1980). Indeed, while "services to individuals may be limited in order to use the program's resources. . . [t]hey may not be based upon consideration such as the identity of the prospective adverse parties or the nature of the remedy. . . sought to be employed." *ABA Comm. On Ethics and Professional Responsibility,* Formal Opinion 334 at p. 6 This, however, is precisely the motive behind the current amendments to Rule XX. Such "[c]ontent-based restrictions are presumptively invalid". *R.A.V. v. City of St. Paul, Minnesota,* 505. U.S. 377, 382 (1992).

Second, the defendants' motion to dismiss must be rejected because it is clear that the amendments impermissibly limit clinics from providing information and advocacy to groups. In fact, just as chilling as the *motive* behind the amendments is the defendant Court's attempt,

through them, to ban clinic faculty and students from providing information about legal remedies to particular clients. The amendments to Rule XX require clinics to choose between providing information to clients or being available to represent them. Under the amendments, they cannot do both. But, poor people and other disadvantaged groups, who often have serious problems that can be addressed through the legal system, are also frequently unaware that this avenue is open to them. The United States Supreme Court expressly recognized this dilemma in *In Re Primus,* 436 U.S. 412 (1978). In *Primus*, a state sought to discipline attorneys from the American Civil Liberties Union who were engaged in outreach to persons whose civil rights had been violated. While recognizing that states had a legitimate interest in limiting solicitation by lawyers engaged in fee generating work, the Court upheld the right of lawyers not so engaged to protect civil rights by soliciting clients because it:

> [c]omes within the generous zone of the First Amendment protection reserved for association of political expression and association, as well as a means of communicating useful information to the public. . .[T]he efficacy of litigation as a means of advancing the cause of civil liberties often depends on the ability to make legal assistance available to suitable litigants. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. The First and Fourteenth Amendments require a measure of protection of 'advocating lawful means of vindicating legal right', including "[advising] another that his legal rights have been infringed and [referring] him to a particular attorney or group of attorneys. . . for assistance. *Id.*, at 431.

Finally, it is clear that the defendants' motion to dismiss must be rejected because the amendments attempt to limit group advocacy in violation of political expression guarantees of the First Amendment.. It has been well recognized that litigation by groups is, in fact, often the

only viable means of asserting important rights that might otherwise go undefended. In fact, "the primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others." *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock,* 477 U.S. 274, 290 (1986). In recognizing this important principal, the Supreme Court has clearly held that litigation and the right to associate in groups for the purpose of litigation can be a "form of political expression" which is protected by the First Amendment. *See e.g. NAACP v. Button*, 371 U.S. 415 (1964); *United Transp. Union, v. State Bar of Michigan*, 401 U.S. 576, 582-83 (1971). Moreover, [i]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Clearly, the amendments to Rule XX, which ban group advocacy unless each group member divulges *individual* information, cannot pass muster under the First Amendment.

Since each of these amendments is presumptively violative of the First Amendment and the important principals behind it, the defendants' motion to dismiss must be rejected.

III. THERE IS AN IMPORTANT ACADEMIC FREEDOM INTEREST AT STAKE HERE

As alleged in the Complaint, Rule XX was modified by the Louisiana Supreme Court in direct response to the requests of business groups (*see* Complaint at para. 31, 37-47) and the criticisms of the Executive Branch (*see* Complaint at para. 28-30, 32-36) and these amendments severely restrict and effectively eliminate the constitutionally protected academic freedom interests of the clinical law faculty and law students in Louisiana. No longer do clinical faculty

in Louisiana have the academic freedom to select cases they deem the best for teaching law students substantive law, litigation skills, and professional values. The amendments to Rule XX are a direct intrusion into the academic freedom of law faculty and law students in the Louisiana, and, if allowed to stand, are a direct threat to clinical legal education in the United States.

"Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978). The right of academic freedom is so strong that "[i]t consists of 'the right of an individual faculty member to teach without interference from the university administration or his fellow faculty members.'" *Vance v. Board of Supervisors of Southern University*, 1996 WL 580905 (E.D. La.)(quoting from *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1275 (5th Cir. 1982)). Students share in this freedom for "[t]he First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know." *Presidents Council, District 25 v. Community School Board No. 25*, 409 U.S. 998, 999 (1972)(Douglas, J., dissenting from the denial of *certiorari*)(citations omitted).

The concept of academic freedom evolved to protect institutions and the rights of individual academicians "to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members." Thomas I. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 594 (1970). In the instant case, it was solely the success of the Tulane Environmental Law Clinic that served as the motivation of the complaints to the Louisiana Supreme Court. These criticisms led the defendant Court to interfere with the academic rights of law school clinical faculty in Louisiana through the amendments to Rule XX. (*See* Johnson, J., Dissenting, Supreme Court of Louisiana Resolution

Amending Rule XX (March 22, 1999)). As Justice Johnson indicates, the defendant Court was called upon "to curtail a program that teaches advocacy while giving previously unrepresented groups and individuals access to the judicial system in order to satisfy critics who are discomforted by successful advocacy." *Id.* The unprecedented action of the defendant Court in satisfying the critics of clinical legal education in Louisiana is the clearest case of interference with academic freedom.

Furthermore, as Justice Johnson notes, "An exhaustive review of all Louisiana law clinics failed to uncover any violations of the Law Student Practice Rule." *Id.* Yet, despite the lack of any unethical conduct by the law students and their clinical faculty supervisors, and despite the lack of complaints by any other sector except those unhappy with the selection of cases involved in the teaching of the faculty of the Tulane Environmental Clinic, the defendant Court amended Rule XX "to satisfy critics" of the Tulane Environmental Clinic. The sole impetus of the rule change was to limit the successful clinical teaching and law student advocacy under the then-existing rule. It is inescapable that the defendant Court amended Rule XX with the intent and purpose to satisfy the complaining business groups and politicians despite the lack of any other basis for amending the student practice rule.

By amending Rule XX to satisfy the critics of the successful advocacy of one clinical program, the defendant Court has limited the types of clients and cases clinical faculty in law schools across Louisiana are permitted to use in their clinical teaching. If the amendments to Rule XX are allowed to stand, parties unhappy with the clients or cases selected by law school clinical teachers in other jurisdictions will have precedent for seeking similar rule changes by complaining to and lobbying their states' highest courts. In those states, like Louisiana, where

the supreme court justices are elected, there is the potential that judicial campaign contributions may influence the future of student practice rules and the academic freedom of clinical faculty and students.[10]

IV. THE DEFENDANT'S CITATIONS TO OTHER STATES' RULES ARE INACCURATE AND MISLEADING AND DO NOT, IN ANY EVENT, SUPPORT THE MOTION TO DISMISS

In this lawsuit, the plaintiffs allege that the defendant Court amended the Louisiana Student Practice Rule to curtail the activities of the Tulane Environmental Law Clinic. As the Complaint describes, the defendant Court received a series of comments from business groups and the Governor's office, claiming that the Clinic was acting contrary to the interests of business leaders. *See* Complaint at para. 28-40. The Complaint further alleges that the defendant Court amended the Student Practice Rule in response to these criticisms, even though the defendant Court found no evidence of any ethical violation or wrongdoing by clinic faculty or students. *See* Complaint at para. 41-47.

In its motion to dismiss, the defendant Court cites to other states' student practice rules in an effort to minimize the implications of its unconstitutional conduct. That effort ought not to succeed. First and foremost, the defendant Court fails to point to any other student practice rule that was enacted to placate critics of the speech or activities of a clinical program's faculty or

[10]In Louisiana one of the groups behind the amendments to Rule XX, LABI, spent over $420,000 on judicial campaigns in the three elections prior to LABI requesting the defendant Court to amend Rule XX. Shelia Kaplan and Zoë Davidson, The Buying of the Bench, NATION, Jan. 26, 1998, at ll, 15. Those donations have been described as a "wise investment," and some commentators contend that since these contributions to judicial races the defendant Court has "increasingly ruled for business interests[.]" *Id*.

students. In other words, even if the amendments to Rule XX were to place that rule squarely within the mainstream of procedures promulgated in other states, those amendments would still be unconstitutional because they were enacted to quell the speech and protected activities of faculty and students. Second, the defendant Court's efforts must fail because the Court has incorrectly characterized the student practice rules in other jurisdictions. CLEA firmly believes that Rule XX, as amended, is the most restrictive student practice rule in the nation. No other rule forbids students from appearing in any case in which a law clinic has conducted constitutionally-protected client outreach. No other rule requires the assessment of an organization's eligibility under such divisive procedures. And no other rule expressly ties client eligibility to federal poverty standards. In this Brief, CLEA will examine several of the rules specifically discussed by the defendant Court though, as explained below, a full review of the rules as implemented in the various states may be more appropriate for a later stage in this litigation.

While the defendant Court has painstakingly compiled and reproduced the student practice rules from all fifty states and the District of Columbia, the defendant Court has not accurately explained the actual operation of the rules in many of the examples cited in its Memorandum. For example, on pages 13-14 of the defendant's Memorandum, the defendant Court cites several jurisdictions, including Massachusetts and the District of Columbia, and claims that their student practice rules limit certified law students to the representation of indigent "persons," implying that law students in those jurisdictions may not assist associations, corporations, or other entities. Yet the actual language of the Massachusetts rule authorizes the representation of "parties" in civil proceedings; it is not limited to "persons." *See* Massachusetts Rule of Court 3:03(1)(c)

(filed as an exhibit with the Defendant's Memorandum). Moreover, while the District of Columbia's student practice rule, Rule 48(a)(1), refers to "indigent person[s]," that rule must be read in tandem with the District's unauthorized practice of law rule, Rule 49.[11] Rule 49(a)(1) expressly defines "person" as "any individual, group of individuals, firm, unincorporated association, partnership, corporation, mutual company, joint stock company, trust, trustee, receiver, legal or business entity." Thus, law students in the District of Columbia can represent artificial persons.

By citing rules that authorize students to represent "persons," the defendant Court seems to argue that those rules limit representation to only "natural" persons. In fact, none of the rules cited by the defendant Court specifically precludes or the representation of associations, corporations, or any other artificial entities. In our legal culture, many artificial entities are considered "persons." Hence, as a result of the generally understood meaning of the word "person" or "parties" in student practice rules as including incorporated and unincorporated entities, law students in law school clinical programs in several of the states cited by the defendant Court routinely represent unincorporated organizations, associations, nonprofit corporations, and other entities. Thus, for example, Harvard University's Hale and Dorr Legal Services Center, located in Massachussetts, represents individuals as well as non-profit and for-profit organizations. In the District of Columbia alone there are community development clinics at American University, George Washington University and Georgetown University where most, if not all, of the clients represented by certified law students are entities and not individual persons. In Ohio, another state cited by the defendant Court as restricting student practice to

[11]Rule 49(a)(1) is reproduced in the exhibits provided by the defendant Court.

"persons" (*see* Defendant's Memorandum at 13), clinical programs at Case Western Reserve University and Ohio Northern University represent clients such as nonprofit corporations, and Cleveland-Marshall College of Law offers a Community Advocacy Clinic and a Law and Public Policy Clinic.[12] Therefore, even in those states that have rules that authorize representation of "persons," it does not follow that clinical programs are forbidden from assisting non-profits and other artificial persons.

The defendants' analysis and argument concerning the termination of law student representation without cause and without a hearing (*see* Defendant's Memorandum at 15), are similarly incomplete and misleading. In most instances, again for example with the District of Columbia Rule 48, this termination refers to the "certification of a student by the law school dean" as being of good character and competent legal ability. This certification can be withdrawn by the dean or terminated by the court. These procedures or qualifications to the student practice rules are consistent with ensuring competent, ethical legal representation by legal interns. These procedures or qualifications also take the place of the system of professional discipline applicable to lawyers licensed to practice in a jurisdiction.

Further, the defendant Court cites Mississippi's student practice rule, which provides that students may "assist" the attorney of record. *See* Defendant's Memorandum at 13. The defendant Court's Memorandum is less than clear on this point, but if the implication is that law

[12]*See, e.g., http://www.law.harvard.edu/Academic_Affairs/Clinical_Program/lsc/* (Harvard); *http://www.wcl.american.edu/clinical/community.html* (American); *http://www.law.gwu.edu/* (George Washington); *http://141.161.67.230/clinics/hi/index.html* (Georgetown); *http://lawwww.cwru.edu/cwrulaw/lsinfo/clinic.html* (Case Western Reserve); *http://www.law.onu.edu/clinic/description.htm* (Ohio Northern); *http://www.law.csuohio.edu/academics/scurricular.html* (Cleveland-Marshall). A useful index

students may not appear in court, the Memorandum is incorrect. The Mississippi Code expressly provides that students "may appear and participate in trials and hearings in courts." Mississippi Code § 73-3-207(e) (submitted with the defendant Court's Memorandum). Thus, the only implication of the "assist" language is that it ensures that the supervising attorney remain as counsel of record in a case.

Notwithstanding the defendant Court's efforts to portray Rule XX as consistent with other student practice rules, CLEA believes that Rule XX is currently the most restrictive student practice rule in the nation. If the Court would like, CLEA will prepare a state-by-state analysis of the actual practice in every state cited by the defendant Court. Since such an analysis would include affidavits or other evidence showing how the student practice rules are actually implemented in each jurisdiction, this analysis may be more appropriate for a later stage of this case, such as summary judgment or trial. CLEA is confident that a careful state-by-state analysis will amply demonstrate that the defendant Court's characterizations of the student practice rules from other jurisdictions are incorrect, incomplete, and misleading. Nevertheless, since the legal bases of the Plaintiffs' claims primarily address the unconstitutional and impermissible motives and processes behind the amendments to Rule XX, CLEA submits that such a state-by-state analysis is unnecessary at this stage in this litigation.

CONCLUSION

For the foregoing reasons, CLEA respectfully submits that the Defendants' motion to dismiss must be rejected.

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to many law school clinics and clinicians is: *http://www2.wcl.american.edu/clinic/.*

Respectfully Submitted

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