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SUBMISSION OF

THE ASSOCIATION OF AMERICAN LAW SCHOOLS

TO THE SUPREME COURT OF THE

STATE OF LOUISIANA

CONCERNING

THE REVIEW OF THE SUPREME COURT'S

STUDENT PRACTICE RULE

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INTRODUCTION

The Association of American Law Schools (AALS) is a non-profit educational organization that has as its purpose "the improvement of the legal profession through legal education."[1] The AALS was formed in 1900, under the auspices of the American Bar Association (ABA). The AALS is recognized by the Council for Higher Education Accreditation as the national accrediting agency for law schools. AALS members are required to meet standards of accreditation promulgated by the Association. Of the 181 ABA-approved law schools in this country, 160 have met these standards and have become members of the AALS. The AALS serves the legal community as a learned society of law school teachers, and it is legal education's principal representative to the federal government and to other higher education organizations and learned societies. The AALS is committed to ensuring the success of clinical legal education because clinical instruction is an important component of the overall education of our nation's future lawyers.

The AALS understands that three business groups have requested that this Court investigate Tulane Law School's Environmental Law Clinic and modify the Court's existing student practice rule. These groups seek to address situations they view as problematic, including: "students being empowered with all the rights of a fully qualified member of the Louisiana Bar;"[2] ". . . legal views [that] are in direct conflict with business positions;"[3] and "violation[s] of both the spirit and the letter of [the student practice rule]."[4] One group has also recommended ten specific amendments to the present student practice rule, such as

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[1] Article 3, Articles of Incorporation of the Association of American Law Schools, Inc.

[2] Letter from Business Council of New Orleans and the River Region to Chief Justice Calogero (July 16, 1997), at 1.

[3] Letter from The Chamber to Chief Justice Calogero (July 8, 1997), at 1.

[4] Letter from Louisiana Assoc. of Business and Industry to Chief Justice Calogero (September 9, 1997), at 1 (hereafter "LABI Letter").

limiting the types of clients that law school clinics may represent, requiring representation of other clients, and limiting the supervisory powers of clinical faculty.[5] In addition to these proposals to the Louisiana Supreme Court, the Governor and the Secretary of the Louisiana Department of Economic Development have also issued very public criticisms of Tulane Law School's Environmental Law Clinic. Disturbingly, the Secretary has been quoted as stating that he intends "to use every legitimate method at [his] command to defeat" the clinic, and he has accused faculty in that clinic of merely "indulging in an 'amusing' academic exercise."[6]

These proposals by business groups and public criticisms by the Executive Branch in Louisiana have so alarmed the membership of the AALS, that the organization has authorized submission of this memorandum.[7] The AALS believes that, in reviewing Louisiana's student practice rule, this Court should consider the full implications of any amendments to the student practice rule. The AALS submits that the information contained in this memorandum may assist members of this Court to appreciate the impact of the proposed amendments upon legal education in Louisiana. This memorandum will also show that clinical legal education is not "an 'amusing' academic exercise," but rather is an important component of a quality law school curriculum. Furthermore, the proposals and criticisms of the current student

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[5] *Id.* at 1-2; *see also* Louisiana Assoc. of Business and Industry, Proposal to Amend and Enforce Rule XX (Addendum to LABI Letter).

[6] The Secretary, Kevin P. Reilly, Jr., was quoted in Vicki Ferstel, *Shintech's Opponents Tracked in* THE ADVOCATE ONLINE, at *http://www.theadvocate.com/advocate/110597/news/1105shin.htm* (published Nov. 5, 1997).

[7] On November 21, 1997, the Executive Committee of the AALS approved the filing of this memorandum. Members of the Executive Committee are: John E. Sexton (President), New York University; Deborah Rhode L. Rhode (President-Elect), Stanford University; Wallace D. Loh (Immediate Past President), University of Colorado; Dale A. Whitman, Brigham Young University; Phoebe A. Haddon, Temple University; Elliott S. Milstein, American University; Pamela Brooks Gann, Duke University; David L. Chambers, University of Michigan; and Gregory H. Williams, Ohio State University.

practice rule represent political interference with the academic freedom of law faculties in Louisiana. The guarantees of quality legal education and academic freedom are basic tenets of the AALS[8] and the AALS respectfully submits its views on these matters to members of this Court.

As set forth below, the suggested amendments to Louisiana's student practice rule would undermine the ability of Louisiana's law schools to provide a first-rate legal education, as well as interfere with values protected by the First Amendment. Thus, this Court -- as a rulemaking body -- should not adopt the proposed amendments. Part I of the Analysis, below, describes the role of law school clinics within contemporary legal education. Part II explains why a student practice rule is necessary to implement a "real-client" clinical program,[9] and demonstrates that Louisiana's student practice rule is consistent with student practice rules that have been adopted in other states. Part III explains how the proposed amendments violate the principles of academic freedom that are protected by the First Amendment. Part IV demonstrates that Louisiana's student practice rule already provides a mechanism through which ethical breaches by any student or attorney associated with a law school clinic can be addressed. Further, the proposed amendments would require clinical faculty to violate provisions of the Louisiana Rules of Professional Conduct, and would effectively deny law students the benefits of "real-client" clinical legal education. For all of these reasons, this Court should not adopt any of the proposed amendments to Louisiana's student practice rule.

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[8] *See* AALS Bylaws, §§ 6-8, 6-9, *in* AALS HANDBOOK (1997).

[9] "'[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).

ANALYSIS

I. LAW SCHOOL CLINICS PROVIDE AN IMPORTANT COMPONENT OF A LEGAL EDUCATION.

A. Law Schools Are Required To Provide Legal Skills Instruction, Including Training In A Clinical Or Other Practice Setting.

The idea for clinical education has been around for quite some time. In the early part of this century, several law schools sought to teach students using real cases. *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). In 1933, Jerome Frank proposed that each law school develop a legal clinic, staffed by full-time "teacher-clinicians." Jerome Frank, *Why Not A Clinical-Lawyer School*, 81 U. PA. L. REV. 907, 917 (1933); *see also* Karl N. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 652 (1935). For decades, leaders in the bench, bar and academia recognized that our nation's law schools should do more to prepare lawyers for practice, and these leaders noted that practice alone does not always provide proper training for new lawyers.

Despite this recognition, clinical programs were not developed at most American law schools until the 1960s. Through the Council on Legal Education For Professional Responsibility (and, its predecessor, the Council on Education in Professional Responsibility), the Ford Foundation provided seed 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). Former Chief Justice Warren Burger was another catalyst for the growth of student clinics; in 1973, he stated that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation." Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42

FORDHAM L. REV. 227, 234 (1973). He called for expanded law school skills programs: "The law school . . . is where the groundwork must be laid." *Id.* at 233.

Chief Justice Burger's remarks, in particular, led to further calls for change. A committee formed within the Second Circuit found "a lack of competency in trial advocacy in the Federal Courts," and recommended that law schools teach trial skills. *See Final Report of the Advisory Committee on Proposed Rules for Admission to Practice*, 67 F.R.D. 161, 164, 167-8 (1975). Similar findings and recommendations were made by a committee from the United States Judicial Conference. *See 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). An American Bar Association task force also recommended that law schools offer instruction in litigation skills. REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYER COMPETENCY: THE ROLE OF THE LAW SCHOOLS 3-4 (1979) (Recommendation 3).[10] Amplifying the support of clinical programs by both the bench and bar, the United States Court of Appeals for the District of Columbia Circuit noted that "[t]his practice [student intern practice] has been praised by members of the judiciary and encouraged by the Judicial Conference of the United States, and we have ample reason to extend our commendation." *Jordan v. United States*, 691 F.2d 514, 523 (D.C. Cir. 1982) (footnotes omitted).

In 1992, a different task force expanded the recommendations of bench and bar. 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 promulgated a Statement of Skills and Values necessary for lawyers to assume "ultimate

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[10] Leaders of the bench and bar continue to call for increased law school clinical training. *See, e.g.*, Stephanie Goldberg, *Bridging the Gap*, 76 ABA J. 44, 50 (Sept. 1990) (quoting Roberta Ramo, former president of the ABA); Edward J. Devitt and Helen P. Roland, *Why Don't Law Schools Teach Law Students How to Try Lawsuits?*, 13 WM. MITCHELL L. REV. 445 (1987) (former federal judge); Herbert J. Stern, *Dreams*, 8 LITIGATION 5 (Summer 1982) (former federal judge); Benjamin R. Civiletti, *Clinical Education in Law School and Beyond*, 67 A.B.A. J. 576 (1981) (former Attorney General).

responsibility for a client." 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"). These skills can be generally categorized as: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, 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).

As a result of these recommendations and calls, professional skills programs are now firmly established in American law schools. Each 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). Moreover, the ABA specifically acknowledged the value of law school clinics by amending Standard 302 in 1996. Presently, each law school accredited by the ABA "*shall* offer live-client or other real-life practice experience." *Id.* (Standard 302(d)) (emphasis added). This recent amendment recognizes that law school clinics are effective settings in which to teach the skills and values central to the practice of law. The importance of clinical legal education is firmly established in Louisiana with clinical programs at Loyola, Southern and Tulane.

B. Law School Clinics Serve A Unique and Necessary Educational Role.

Law school clinics are unique vehicles for law schools to expose law students to the professional skills that they must develop. *See* MacCrate Report, at 234. Clinical programs strongly reinforce the non-clinical curriculum in developing student's legal analysis and research skills. *Id.* Clinical programs also provide law students paramount opportunities to engage in problem solving, factual investigation, counseling, and negotiation. *Id.* Prior to the advent of clinical programs, these skills "had previously been considered as incapable of being taught other than through the direct practice experience" of a newly-licensed lawyer. *Id.*

Good lawyering skills instruction must "1) develop[] students' understanding of lawyering tasks, 2) provid[e] opportunities to . . . engage in actual skills performance in role, and 3) develop[] [students'] capacity to reflect upon professional conduct through the use of critique." MacCrate Report, at 243. Professional educators consider these aspects of skills instruction in structuring law school clinics. Indeed, the MacCrate Report, recommends 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); *see also* Eric S. Janus, *Clinics and "Contextual Integration": Helping Law Students Put the Pieces Back Together Again*, 16 WM. MITCHELL L. REV. 463, 486-87 (1990) (professional educators must direct law school clinics because of the critical analysis required to integrate knowledge and practice).

Clinics are essential to the education 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). Students can continue to apply these methods throughout their legal careers. As Professor Amsterdam notes:

> The students who spend three years in law school will spend the next thirty or fifty years in practice. These thirty or fifty years in practice will provide by far the major part of the student's legal education, whether the law schools like it or not. They can be a purblind, blundering, inefficient, hit-or-miss learning experience in the school of hard knocks. Or they can be a reflective, organized systematic learning experience -- *if the law schools undertake as part of their curricula to teach students effective techniques of learning from experience.*

Id. at 616 (emphasis added).

Hence, law school clinics do not simply provide an alternative forum for skills instruction that will eventually be given to all new lawyers in practice. While lawyers can learn skills in law school clinics or in their law practice, "real-client" clinical instruction in law school emphasizes the "conceptual underpinnings of these skills." MacCrate Report, at 234. Clinical instruction can address these underlying concepts because skills are taught at law schools by professional educators. Moreover, actual practice might not provide the "opportunity for exposing students to the full range" of these lawyering skills; a well-structured clinical program can and does provide this opportunity. *Id.*

These conclusions flow naturally from the difference between law practice and law school. The pressures and intensity of practice prevent many lawyers from deeply considering the development of their skills. And the increased specialization of the profession limits the exposure that lawyers can have to situations that require the use of different skills. These limitations mean that newly-admitted lawyers cannot consistently receive good training in the area of skills development.

Furthermore, law school clinicians are better equipped to assess law students and provide appropriate feedback on the students' performance because law school clinics

provide more intensive guidance than is generally available in any other setting.[11] 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. 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. 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.

Nearly a decade ago, a report concerning the University of Oregon's environmental law clinic authored by a committee of distinguished legal and academic authorities considered the differences between an "in house" environmental law clinic at a law school, such as Tulane's Environmental Law Clinic, and a clinic where students leave the law school to work in an office outside of the school. The committee emphasized the important role of the law faculty in an "in house" clinic:

> In an "in house" clinic, clinical students are supervised directly by regular university faculty acting as clinical instructors . . .. The distinction between the two types of clinic does not lie primarily in their location, . . . *but by the role that the law*

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[11] The effective teaching of lawyering skills and professional values requires appropriate feedback and "reflective evaluation . . . by a qualified assessor." MacCrate Report, at 331 (Recommendation C.6).

> *school faculty has in their instructional function* . . .. Valuable as the experience in [outside] clinics may be, by the nature of these clinics, the students do not get as much supervision and critique as they do in an in-house clinic. This is a natural consequence of the supervising organization's case load and the usually limited resources. The participation of the law faculty in the students' clinical education would inevitably be decreased, and we believe that *the quality of the educational experience would be significantly lessened if such a change were made.*

Jon Jacobson, Robert Mazo, Robert McKay, Richard Nashtoll, Dean H. Rivkin, and Les Swanson, *Report of the Ad Hoc Study Committee for the Environmental Law Clinic University of Oregon School of Law* App. 6 & 17 (November 30, 1988) (emphasis added) (hereafter "*Report of the Ad Hoc Study Committee*");[12] *see also Student Suits Defended*, N.Y. TIMES, Dec. 16, 1988, at B7, col. 3. The committee noted at the conclusion of its report that the method of the education of law students is "primarily the responsibility of the law faculty" and that the committee "had no wish to interfere with this role." *Report of the Ad Hoc Study Committee, supra*, at App. 17.

The focus on applied learning and the close supervision provided in clinical programs "enables students to relate their later practice experience to concepts they have learned in law school." MacCrate Report, at 234. Similarly, clinical programs can provide "the rudiments of training for resolving [ethical dilemmas]." *Id.* at 235. This training can be translated into a fuller understanding of how to recognize and resolve the ethical dilemmas encountered in actual practice. *Id.* The same dynamic applies to the training that clinical programs offer in the organization and management of legal work. *Id.*

Hence, law school clinics provide unique educational opportunities for students to integrate "all the fundamental lawyering skills" and professional values into an actual practice setting. *Id.* at 238. At the same time, "real-client" clinics are not just microcosms of large law firms. Clinics provide students with an opportunity to reflect on the

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[12] For convenience, the *Report of the Ad Hoc Study Committee* is submitted to this Court as Exhibit A to this memorandum. The page numbers used in this memorandum correspond to the pagination of this memorandum's appendix.

development of their lawyering skills. Clinics also provide an unmatched level of supervision and guidance. This high level of supervision is not only unique within the law school environment, it is also unique within the legal profession.

Recognizing the important pedagogical role of law school clinics, Louisiana law schools are not the only schools that train students with actual cases. "Real-client" clinics are important parts of the curriculum at most of our nation's law schools, including Tulane, Loyola and Southern. The MacCrate Report noted that, as of 1990, 119 law schools operated 314 clinics in the United States. MacCrate Report, at 239. The most recent data collected by the Committee on In-House Clinics of the AALS Section on Clinical Education indicates that there are real-client clinics at 147 law schools in the United States.[13]

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[13] A more complete listing of law school clinics by law school or by subject can be accessed through the website *http://www2.wcl.american.edu/clinic*. For detailed descriptions of some law school clinical programs, *see* Eleanor W. Myers, *Teaching Good and Teaching Well: Integrating Values with Theory and Practice*, 47 J. LEGAL EDUC. 401 (1997) (describing Temple Law School's Integrated Transactional Practice Clinic); Jane L. Johnson, *Dean Kramer, Clinical Education, and Public Service*, 70 TULANE L. REV. 1803, 1805-1808 (1996) (describing Tulane's Law Clinics); Richard A. Rosen, *Clinical Legal Education*, 73 N.C. L. REV. 749 (1995) (describing the University of North Carolina's Clinical Programs); Peter Pitegoff, *Symposium: New Approaches to Poverty Law, Teaching, and Practice: Law School Initiatives in Housing and Community Development*, 4 B.U. PUB. INT. L. J. 275 (1995) (describing community development clinics at Seton Hall School of Law, Yale Law School, and SUNY Buffalo School of Law); Robert F. Kennedy, Jr. and Steven P. Solow, *Environmental Litigation as Clinical Education: A Case Study*, J. ENVTL. L. & LITIG. 319 (1993) (describing Pace University's Environmental Litigation Clinic); Jeffrey S. Lehman and Rochelle E. Lento, *Law School Support for Community-Based Economic Development in Low-Income Urban Neighborhoods*, 42 WASH U. J. URB. & CONTEMP. L. 65 (1992) (describing the University of Michigan's Urban Communities Program); Susan Bryant and Maria Arias, *A Battered Women's Right Clinic: Designing a Clinical Program Which Encourages a Problem-Solving Vision of Lawyering That Empowers Clients and Community*, 42 WASH U. J. URB. & CONTEMP. L. 207 (1992) (describing the Battered Women's Right Clinic of the City University of New York); Joseph B. Tulman, *The Best Defense is a Good Offense: Incorporating Special Education Law Into Delinquency Representation in the Juvenile Law Clinic*, 42 WASH U. J. URB. & CONTEMP. L. 223 (1992) (describing special project within the District of Columbia School of Law Juvenile Law Clinic); Stephen H. Leleiko, *Clinical Law and Legislative Advocacy*, 35 J.

II. A STUDENT PRACTICE RULE IS NECESSARY TO IMPLEMENT THE PROMISE OF "REAL-CLIENT" CLINICAL LEGAL EDUCATION AND LOUISIANA'S PRACTICE RULE IS CONSISTENT WITH STUDENT PRACTICE RULES ADOPTED NATIONWIDE.

A. Louisiana's Student Practice Rule Provides The Only Possible Vehicle For Students To Participate In A Law School Clinic.

Louisiana's Rule XX presently allows limited participation of law students in the courts and administrative tribunals of the State of Louisiana. LA. SUP. CT. R. XX, § 3. One of the goals of this Court in adopting Rule XX was to encourage Louisiana's law schools to provide clinical instruction. *Id.* at § 1. Indeed, without a student practice rule, "real-client" clinical programs could not exist; rather, professional skills instruction would be limited to classroom courses, scripted simulations and externships with law offices, government agencies, and judges. As already noted, these alternatives often lack an intensive level of

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LEGAL EDUC. 213 (1986) (describing a legislative advocacy program); Robert O. Dawson, *A Vision Worth Having*," 43 TEXAS BAR J. 1015 (1980) (describing clinics at various schools in Texas); David J. Oppenheimer, *Boalt Hall's Employment Discrimination Clinic: A Model for Law School/Government Cooperation in Integrating Substance and Practice*, 7 INDUS. RELAT. L.J. 245 (1985) (discussing a clinic jointly sponsored by a law school and civil rights agency); Roger S. Haydock, *Clinical Legal Education: The History and Development of a Law Clinic*, 9 WM. MITCHELL L. REV. 101 (1983) (discussing the development, over ten years, of a variety of "real-client" clinics); Howard R. Sacks, *Clinical Legal Education at the University of Connecticut School of Law*, 16 CONN. L. REV. 765 (1984) (describing the development of nine separate clinics).

Clinical training with real clients is also part of the curriculum of law schools in other common-law countries. *See* Andrew Boone, Michael Jeeves and Julie MacFarlane, *A Working Model of Clinical Legal Education: Testing the Definition Against A Range of Examples*, 21 THE LAW TEACHER 172 (1987) (Great Britain); D. J. Hogarth, *Diploma in Legal Practice*, 27 J. OF THE LAW SOC. OF SCOT. 189 (1982) (Scotland); Carol C. Bartlett, *Towards Professional Competence - Clinical Legal Education*, 56 LAW. INST. J. 121 (1982) (Australia); Neil Gold, *Legal Education, Law and Justice: The Clinical Experience*, 44 SASK. L. REV. 97 (1980) (Canada). It is interesting that even countries like Great Britain, which require apprenticeship training *after* law school, have clinical programs for students *in* law school.

supervision, which is the crux of adult learning. *See* Bloch, *supra*, at 346-50. In simulations, because the facts are scripted, the experience is much more limited than provided in the real world. In externship experiences, students are "likely to work unattended [and] to be limited to observing the 'real lawyers' in the office." *Id.* at 348. Without a student practice rule, law schools cannot give students the intensive "hands-on" training afforded in a law school clinic.[14]

B. Louisiana's Student Practice Rule Is Consistent With Student Practice Rules Adopted Nationwide.

Courts across the country have recognized the need for "hands-on" legal training. All fifty states, plus the District of Columbia and Puerto Rico, have adopted student practice rules.[15] *See* Joan W. Kuruc & Rachel A. Brown, *Student Practice Rules in the United States*, 63 B. EXAMINER, No. 3, at 40, 40-41 (1994). Many jurisdictions, including Louisiana, have adopted a student practice rule that substantially resembles the Model Student Practice Rule promulgated by the ABA in 1969. *See* James P. White, *State Supreme Courts as Regulators of the Profession*, 72 NOTRE DAME L. REV. 1155, 1165 (1997).[16] The United States Judicial Conference also adopted a model student practice rule in 1979. *See* George K. Walker, *A Model Rule for Student Practice in the United States Courts*, 37 WASH. & LEE L. REV. 1101 (1980). Louisiana's federal courts have their own student practice rule, which is consistent

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[14] *See also In re Determination of Executive Commission on Ethical Standards re: Appearance of Rutgers Attorneys*, 116 N.J. 216, 561 A.2d 542, 543 (1989) (noting that "[c]linical training is one of the most significant developments in legal education," and that the New Jersey Supreme Court changed its Court Rules "to afford students 'hands-on' experience in representing clients.")

[15] A chart describing the key features of the student practice rules in all fifty states, the District of Columbia, and Puerto Rico is submitted to this Court as Exhibit B to this memorandum.

[16] For convenience, the ABA Model Student Practice Rule is submitted to this Court as Exhibit C to this memorandum.

with the ABA Model Practice Rule. *See* UNIFORM U.S. DIST. CTS. R., DISTS. LA., LOCAL R. 83.2.13. Louisiana's Student Practice Rule, this Court's Rule XX, is substantially similar to student practice rules in other jurisdictions. The key components of the student practice rules in Louisiana and other jurisdictions are: (a) qualification requirements for student practitioners, (b) enumeration of permissible student activities, and (c) requirements for supervising attorneys.

All student practice rules, including Louisiana's, establish strict qualification requirements for student practitioners. For instance, a majority of states, including Louisiana, together with the ABA Model Rule, require enrollment in an ABA-accredited law school. *See* Kuruc & Brown, *supra*, at 41; LA. SUP. CT. R. XX, § 4(a); ABA Model Rule § III(A). Though a number of states have also amended their rules to allow second-year students to practice, most states (including Louisiana) and the ABA Model Rule limit student practice to third year-law students. *See* Kuruc & Brown, *supra*, at 41; LA. SUP. CT. R. XX, § 4(b); ABA Model Rule § III(B). Every state but one requires the law school dean to certify the student practitioner. *See* Kuruc & Brown, *supra*, at 41; LA. SUP. CT. R. XX, § 4(c); *see also* ABA Model Rule § III(C). The various states' processes for dean certification usually follow the ABA Model Rule and Louisiana's rule. *See* Kuruc & Brown, *supra*, at 41-42; LA. SUP. CT. R. XX, § 5; ABA Model Rule § IV. Most states also require the student to certify or take an oath that he or she has read and is familiar with the state rules of professional responsibility. *See* Kuruc & Brown, *supra*, at 42. Consistent with these states' rules, Rule XX also requires the student to take an oath acknowledging that he or she is bound by the same high ethical standards applicable to lawyers in the State. LA. SUP. CT. R. XX, § 4(f). Additionally, Louisiana, along with seven other jurisdictions, strictly forbids any compensation of student practitioners. *See* Kuruc & Brown, *supra*, at 42; LA. SUP. CT. R. XX, § 4(e); *see also* ABA Model Rule § III(E). And all student practice rules require that the client consent to the student practitioner's representation. *See* Kuruc & Brown, *supra*, at 44; LA. SUP. CT. R. XX, § 3. Notably, the student practice rule applicable in Louisiana's

federal courts has the same strict qualification requirements as this Court's Rule XX. *See* UNIFORM U. S. DIST. CTS. R., DISTS. LA., LOCAL R. 83.2.13(A).

In terms of permissible student activity, the majority of states, including Louisiana, and the ABA Model Rule, allow students to appear before any court or administrative tribunal in the state. *See* Kuruc & Brown, *supra*, at 43; LA. SUP. CT. R. XX, § 3; ABA Model Rule § II. "All states allow students to prepare documents, pleadings, and briefs under the general supervision of an attorney." Kuruc & Brown, *supra*, at 44; *see also* LA. SUP. CT. R. XX, § 6. A number of states have also increased the range of permissible activities for student practitioners. *See* Kuruc & Brown, *supra*, at 43. For instance, some states allow students to counsel clients and negotiate on their behalf. *Id.* And a few do not impose any limitation on the permitted activities of student practitioners. *Id.* Moreover, to the knowledge of the AALS, none of the student practice rules explicitly prohibits the representation of groups nor requires a clinic to balance the interests that are represented by the clinic and its students.

The various practice rules also establish requirements that apply to supervising attorneys. All states require that the supervising attorney be either a bar member or a licensed attorney. *See* Kuruc & Brown, *supra*, at 48-55; LA. SUP. CT. R. XX, § 7(a). Furthermore, many state rules, and the ABA Model Rule, require additional qualifications of the supervising attorney. *See* Kuruc & Brown, *supra*, at 43-44. For instance, Louisiana also requires that the supervising attorney be approved by the student's law school dean. LA. SUP. CT. R. XX, § 7(a). Additionally, Rule XX explicitly holds the supervising attorney personally responsible for any ethical breaches committed by the practicing student. LA. SUP. CT. R. XX, § 7(b). Louisiana, the ABA Model Rule, and several states require the presence of a supervisor when a student argues in an appellate court. *See* Kuruc & Brown, *supra*, at 44; LA. SUP. CT. R. XX, § 5. Furthermore, those states that allow students to represent criminal defendants when the defendant has a constitutional right to counsel require the presence of the supervising attorney during the criminal trial. *See* Kuruc & Brown,

supra, at 44; LA. SUP. CT. R. XX, § 3(c). Louisiana's federal courts place these same requirements on supervising attorney. *See* UNIFORM U.S. DIST. CTS. R., DISTS. LA., LOCAL R. 83.2.13(C). The federal rule also requires the supervising attorney to "be present throughout the proceedings and [to] be responsible for the manner in which they are conducted." *Id.*

Finally, the neighboring states of Texas, Arkansas, Mississippi, and Alabama all have student practice rules that closely resemble Louisiana's. *See* TX. R. OF CT., R. & REG. GOVERNING PARTICIPATION OF QUALIFIED LAW STUDENTS (hereafter "TX. STUD. PRAC. R."); AR. R. OF CT., R. GOVERNING ADMIS. TO BAR, R. XV (hereafter "AR. R. XV"); MS. ST. §§ 73-2-201, *et. seq.*; AL. R. OF CT., AL. R. FOR LEGAL INTERN. BY LAW STUDENTS (hereafter "AL. STUD. PRAC. R.") All these states have qualification requirements for student practitioners. *See* TX. STUD. PRAC. R., R. II & III; AR. R. XV (C); MS. ST. §§ 73-2-205 & 73-2-207; AL. STUD. PRAC. R. ¶ IV. Like Rule XX, these states' rules all bind the student practitioner to the respective state's ethical rules. *See* TX. STUD. PRAC. R., R. IID(2)(b); AR. R. XV (C)(6); MS. ST. § 73-2-207(g); AL. STUD. PRAC. R. ¶ IV(E). Texas, Arkansas, and Alabama also allow student practitioners to appear before any state court or administrative tribunal. *See* TX. STUD. PRAC. R., R. IV(A); AR. R. XV(B); AL. STUD. PRAC. R. ¶ II.[17] Alabama permits students to counsel clients and negotiate on their behalf. AL. STUD. PRAC. R. ¶ III(B). And, of course, these states require close supervision by the supervising attorney. *See* TX. STUD. PRAC. R., R. IV(A)(1), V; AR. R. XV (B)(3), (D); MS. ST. § 73-2-207(c), (e); AL. STUD. PRAC. R. ¶¶ II(A), VI.

As this discussion demonstrates, Rule XX is similar in every critical respect to student practice rules adopted in other jurisdictions. The AALS submits that substantial amendments to this Court's student practice rule will make it more difficult for law schools in Louisiana

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[17] Mississippi's statutes do not prohibit student practitioners from representing clients in administrative tribunals, but the statutes refer only to practice in the courts of the state. *See* MS. ST. § 73-3-207.

to afford students appropriate clinical training. Restricting the clinical curriculum at Louisiana's law schools will place those schools at a disadvantage as they attempt to recruit the nation's top law students. Further, as legal employers begin to look more and more at students' clinical experiences, graduates of Louisiana's law schools may be deemed less competitive than graduates of schools in other states, even the neighboring states of Texas, Arkansas, Mississippi, and Alabama.

III. THE CONSTITUTIONAL PROTECTION OF ACADEMIC FREEDOM IS ESPECIALLY PERTINENT TO CLINICAL LEGAL EDUCATION AND SCHOLARSHIP.[18]

The letters from various business groups to the Louisiana Supreme Court and the complaints from the Executive Branch seek to severely limit the academic freedom of law faculty and law students in Louisiana by drastically changing the Louisiana Student Practice Rule, Louisiana Supreme Court Rule XX. If the student practice rule in Louisiana is modified in response to the requests of these business groups and the comments of the Executive Branch, this Court will severely restrict and effectively eliminate the academic freedom interests of the clinical law faculty and law students in Louisiana. Such a result is both unnecessary and unwarranted. The AALS suggests that this Court ought not to promulgate a rule that so restricts First Amendment values.

This Court should consider the origins and development of academic freedom in the United States, and the impact that the proposed changes in the student practice rule would have on the academic freedom of law faculty and law students in Louisiana. The United States Supreme Court has recognized the constitutional importance of academic freedom to

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[18] This section relies heavily on the brief filed by the American Association of University Professors (AAUP) in *Determination of Executive Commission on Ethical Standards Re: Appearance of Rutgers Attorneys*, 116 N.J. 216, 561 A.2d 542 (1989), and the memorandum filed by the University of Pennsylvania in *University of Pennsylvania v. Equal Employment Opportunity Commission*, Civil Action No. 87-1199 (D.D.C. 1987).

our educational system and society as a whole. "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). As noted by the United States District Court for the Eastern District of Louisiana, 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).

A. An Overview of the Origins and Development of Academic Freedom in the United States Demonstrates Its Importance to This Matter.

Historically, there has been a recognition in Western civilization that universities and colleges need substantial freedom from governmental control and interference. The need for autonomy in academic affairs by early European universities such as Bologna and Paris was recognized and respected by medieval authority. *See, e.g.*, Richard Hofstadter & Walter P. Metzger, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 5-6 (1955). ("In the social structure of the Middle Ages the universities were centers of power and prestige, protected and courted, even deferred to by emperor and popes . . . In internal matters the universities had the prerogative of self-government. They were autonomous corporations . . ."); Pearl Kibre, SCHOLARLY PRIVILEGES IN THE MIDDLE AGES 325-330 (1962) (a measure of privilege and autonomy was always associated with the university). In this country, the tradition of independent, self-governing universities continued with the early establishment of Harvard, Princeton, the University of Pennsylvania, William and Mary, and Yale. *See*

generally, Hofstadter and Metzger, *supra*.

This long-standing historical deference to the independence of universities is based on the recognition that centers of higher learning cannot serve their role in society -- to question and experiment -- unless they are substantially free from outside intrusion and control. As Justice Frankfurter stated in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

> In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of the Church or State or any sectional interest . . . .
>
> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.

Id. at 262-263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12) (citation 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). The impetus for these protections came from the repeated attempts throughout history by powerful institutions to censure those academicians who advocated unpopular ideas. *See generally* Hofstadter & Metzger, *supra*.

Throughout history these special protections have been afforded universities and individual academicians because of the primacy of society's interest in free scholarship, research, and independent inquiry. *See Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3d Cir. 1980) ("Our future, not only as a nation but as a civilization, is dependent for survival on our scholars and researchers, and the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process").

In light of our society's long-standing tradition of respect and deference to academic freedom, the attempts of business groups and the Executive Branch in Louisiana to interfere with and to curtail seriously the clinical program which is part of the Tulane law faculty's

curriculum must not be tolerated. The Louisiana Supreme Court should not be influenced by these outside forces without regard to the legal implications of such an approach. Seeing that there were no actionable ethical or legal violations by the Tulane Environmental Law Clinic that could possibly be pursued, these outside groups are now engaged in an unprecedented attack on Tulane and are seeking to change the very student practice rule that permits underrepresented groups and persons access to the justice system.

B. The United States Supreme Court Has Recognized the Constitutional Right of Academic Freedom.

On many occasions, the United States Supreme Court has recognized constitutional protection for academic freedom under the First Amendment.[19] While teaching has long been afforded independent constitutional protection, the constitutional basis for the protection of academic freedom in a broader sense is of more recent origin. *See Farrington v. Tokushige*, 273 U.S. 284 (1927); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Chief Justice Warren recognized the societal value of academic freedom in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957):

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

Id. at 250. In a concurring opinion in *Sweezy*, Justice Frankfurter noted the "grave harm resulting from governmental intrusion into the intellectual life of a university." *Id.* at 261 (Frankfurter, J., concurring). He wrote of the "four essential freedoms" of a university: "to

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[19] "As a general rule, the First Amendment [of the federal Constitution and Article I, Sections 7 and 9 of the Louisiana Constitution of 1974] provide[] that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *DeSalvo v. State*, 624 So.2d 897, 899 (La. 1993), *cert. denied*, 510 U.S. 1117 (1994) (citation omitted). *See also* Analysis, *infra*, at §IV.B.

determine for itself on academic grounds who may teach, *what may be taught, how it shall be taught*, and who may be admitted to study." *Id.* at 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10-12) (citation omitted) (emphasis added).

Ten years after *Sweezy*, the Court noted the special relationship that academic freedom has with the First Amendment:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore *a special concern of the First Amendment*, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (emphasis added); *see also Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978) (Powell, J.) (quoting *Keyishian*); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools").

C. The Protection of Academic Freedom is Especially Pertinent to Clinical Legal Education and Scholarship.

In its academic freedom cases, the United States Supreme Court has identified two policies as basic to the academic freedom doctrine. First, it has recognized the valuable role that academic freedom plays in the development of new ideas. As the Court states in *Sweezy v. New Hampshire*:

> No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die.

354 U.S. at 250. Second, it has emphasized the part that academic freedom plays in educating the future leaders of our society. In *Keyishian v. Board of Regents*, for example,

Justice Brennan wrote for the Court:

> The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through a wide exposure to that robust exchange of ideas that discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

385 U.S. at 603 (citation omitted).

These two policies are especially pertinent to clinical legal education and legal scholarship. The clinic has become the law school's research laboratory for the development of new ideas. Litigating actual cases, clinical educators train their students in developing new legal theories and in expanding existing legal doctrine. In a classic case, for example, clinical teachers and students at the University of Chicago Law School Mandel Legal Aid Clinic, representing a client before the state Fair Employment Practices Commission, litigated their case up to the United States Supreme Court, expanding due process and equal protections for complainants in state administrative proceedings. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).[20] Under the proposed modifications to the Louisiana Student Practice Rule, Tulane's, Loyola's and other law school clinical programs in Louisiana would be barred from appearing in cases similar to *Logan* which are initiated in state administrative agencies because the client may not qualify under *in forma pauperis* rules or because the claim may be made that such cases supposedly foster "social positions."

Additionally, "real-client" clinics are laboratories for the development of new litigation methods and techniques. Within the law school, clinical educators have the opportunity to reflect -- in the context of actual practice -- on methods for improving the lawyering process. Based on their work on actual cases, clinical scholars have published

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[20] Among other numerous examples of creative attempts in new legal areas by clinical educators are the work of clinical programs to obtain decent housing for the homeless by working with local neighborhood development organizations, to expand the political asylum rights for persecuted refugees, and to obtain expanded legal protections for victims of domestic violence through both casework and legislative advocacy. For a collection of articles describing some of these clinics, *see supra* at note 13.

significant materials on trial preparation and trial method. Clinical scholarship is found in law reviews of almost every law school, and there is a special CLINICAL LAW REVIEW sponsored by the AALS, the Clinical Legal Education Association (CLEA) and New York University Law School.

In view of the benefits of clinical legal education and scholarship to the growth and development of the law and the education of future lawyers, the protections of academic freedom are especially applicable to clinical programs. This Court must, therefore, scrutinize closely any attempts to interfere with clinical teaching methods.

The criticisms of the Louisiana student practice rule constitute a direct intrusion into the academic freedom of law faculty and law students in the state.[21] If the student practice rule is modified to comply with its critics' objections, the law faculty will be limited in selecting what it deems the best method for teaching law students in the application of substantive law, litigation skills, and professional values.

The United States Supreme Court has invalidated legislative enactments proscribing teaching on particular subjects. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Edwards v. Aguillard*, 482 U.S. 578 (1987)(establishment clause case out of the State of Louisiana); *see* Dinah Shelton, *Legislative Control Over Public School Curriculum*, 15 Willamette L. Rev. 473, 490 (1979). Likewise, courts have held that the First Amendment protects a teacher's selection of materials and pedagogy. *See Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109 (5th Cir. 1980); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Sterzing v. Fort Bend Indep. School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated on other grounds,* 496 F.2d

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[21] The Submission of the Clinical Legal Education Association (CLEA) to the Supreme Court of the State of Louisiana Concerning the Review of the Supreme Court's Student Practice Rule specifically addresses the criticisms of the Louisiana Student Practice Rules sought by business groups lobbying on behalf of the special interests of their own members. While the submission of the AALS does not explore the business groups' motivations as does the CLEA submission, the AALS shares the concerns raised by CLEA.

92 (5th Cir. 1974); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970). In *Kingsville*, for example, the Fifth Circuit Court of Appeals held that a history teacher's selection of a role play method to teach the problems that African-Americans experienced in United States history was protected by the first amendment. *Kingsville*, 611 F.2d at 1113. In *Keefe* and *Parducci*, the courts decided that English teachers had protected rights to assign and discuss materials with vulgar terms in high school classes. *Keefe*, 418 F.2d at 360; *Parducci*, 316 F. Supp. at 356. And in *Sterzing*, the court upheld the rights of a civics teacher to use controversial current events issues as teaching materials. *Sterzing*, 376 F. Supp. at 662.

In determining whether a teacher had the right to select particular course materials and methods, the courts have considered several factors: whether the teaching materials and methods are appropriate to their instructive purpose, *see Kingsville*, 611 F.2d at 1113 and *Keefe*, 418 F.2d at 360; *see also Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976); whether the materials and methods are appropriate to the relevant educational standards being used at the particular educational level, *see Parducci*, 316 F. Supp. at 355, 356 and *Keefe*, 418 F.2d at 360; and whether the materials and methods are appropriate to the professional standards of educators in the particular field, *see Sterzing*, 376 F. Supp. at 662.

Applying these factors to the matter under review by this Court, it is clear that clinical teachers in Louisiana have a First Amendment right to select cases as their course materials for their clinics. Under the first factor, there is no proof that the cases selected by the clinical law teachers are inappropriate to their instructive purpose. Certainly, a law professor in a traditional lecture-type environmental law class has the First Amendment right to choose environmental cases as materials for his or her course. Likewise, such a professor has the right to use a simulated teaching method with student role plays of environmental law cases. Merely because a clinical teacher uses actual cases as course material, rather than a case book or simulation assignments, does not eliminate his or her First Amendment rights to

select materials.[22] Therefore, under the first test, a clinical law teacher's selection of environmental and other cases is a protected choice.

Under the second factor, the clinical law teacher's case selection is protected if it is appropriate to the educational standards set for students at the law school level. The specific matter that prompted this Court's investigation into the clinical programs in Louisiana concerns the teaching of environmental litigation principles to upper level law students. The environmental law issues raised in these cases are appropriate for these students. As future lawyers, many of them will face similar issues in practice. By helping to prepare them for the profession, the teachers have clearly chosen materials appropriate to their students. Therefore, the use of environmental cases and the representation of groups as well as individuals are protected under the second factor.

The issue under the final factor is whether the present student practice rule permitting teachers' choice of cases is appropriate under the professional standards of law school teachers. As discussed previously, *supra* at Analysis §§ I and II.B., for the past twenty-five years, the trend among law schools is to broaden the role of clinical training. Inherent in the clinical method is the use of actual cases.

Therefore, under all three factors, the law faculty case and client selection decisions are protected by the First Amendment. Law schools in Louisiana have hired clinical teachers to teach law students lawyering skills and professional values through the representation of actual clients. Once these teachers have been hired for that purpose, they must have the

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[22] Just as the critics of the student practice rule have left appropriately undisturbed the teaching activities of the nonclinical law faculty, they should not seek to intrude into the teaching activities of the clinical faculty. *See Trister v. University of Mississippi*, 420 F.2d 499 (5th Cir. 1969). In that case, the court invalidated a law school's differential treatment of faculty who had been involved with a controversial clinical litigation legal services program, holding, "What the University as an agency of the State must not do is arbitrarily discriminate against professors in respect to the category of clients they may represent." 420 F.2d at 504. That admonition is equally apt here where the Executive Branch and business groups seek arbitrarily to limit the types of cases and clients that clinical law professors select for teaching substantive, lawyering skills and professional values.

right, like any other law professor, to choose the materials which in their opinion are best suited to performing their objective. By attempting to interfere with this choice, the Executive Branch and business interests in Louisiana seek to impinge on the academic freedom of law teachers. Through its rulemaking capacity, this Court ought not become the instrument to extinguish academic freedom and the First Amendment rights of clinical faculty and students in Louisiana.

IV. THE PROPOSED MODIFICATIONS TO LOUISIANA'S STUDENT PRACTICE RULE ARE WHOLLY UNNECESSARY AND WOULD EFFECTIVELY DENY STUDENTS THE BENEFITS OF "REAL-CLIENT" CLINICAL LEGAL EDUCATION.

The LABI has proposed a series of amendments to Rule XX. The AALS believes that the proposed amendments are either unnecessary or unwise. One of the proposed amendments reflects a misconception that student practitioners are not required to abide by the same ethical standards that govern the profession. This proposed amendment is unnecessary and redundant. Rule XX already requires that students follow the Louisiana Rules of Professional Conduct, which apply to all lawyers in Louisiana. Other proposed amendments seek changes in the way in which law school clinics select cases and clients, and the manner in which clinical faculty supervise cases. These proposed amendments are unwise. These amendments would require clinical faculty to violate longstanding duties established under the Louisiana Rules of Professional Conduct, or would violate the First Amendment rights of clinicians, students and clients. Moreover, if adopted, the proposed amendments may very well discourage universities from providing clinical instruction. This would deprive Louisiana law students of an important educational opportunity and discourage top students from attending law schools in the state. As Chief Justice Vinson wrote almost sixty years ago, in a case involving the desegregation of a law school:

> [A]lthough the law is a highly learned profession, . . . it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law

interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

Sweatt v. Painter, 339 U.S. 629, 634 (1940).

A. Louisiana's Student Practice Rule Already Requires Students To Practice Under the Highest Ethical Standards of the Profession.

The Louisiana Association of Business and Industry (LABI) proposes that this Court amend Rule XX to prohibit client solicitation, to "[r]equire regular communication with the client and representation of the client's interests above those of the student attorney or law school clinic," to require student attorneys to take and pass the Multi-State Professional Responsibility Exam (MPRE), and to state that student attorneys and the clinics are bound by the Rules of Professional Conduct. *See* LABI Letter, at 1-2. Rule XX, in combination with other rules, already fully addresses these concerns.

Rule XX requires student practitioners to take an oath binding the student to the Rules of Professional Conduct "as fully as if [the student] were admitted to the practice of law in Louisiana." LA. SUP. CT. R. XX, § 4(f). The oath requires that the student practitioner "have read and [be] familiar with the Code of Professional Responsibility."[23] *Id.* Additionally Rule XX expressly makes the supervising attorney responsible for any ethical breaches committed by students under that attorney's supervision. *Id.* at § 7(b). Thus, Rule XX already makes clear that law students are subject to the very same ethical standards that govern the legal profession in Louisiana. If those rules are not sufficient for the small

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[23] The Rules of Professional Conduct replaced the Code of Professional Responsibility in Louisiana in 1987. *See* LA. R.S.A., Title 37, Ch. 4, art. 16 (West 1988). By requiring students to take an oath holding them accountable "as if" admitted to practice. it seems that Rule XX would require compliance with the Rules, as adopted in Louisiana. If any amendment to Rule XX is appropriate, the AALS suggests that the rule only be amended to clarify that students must be familiar with the Louisiana Rules of Professional Conduct.

number of clinical law students in the state, how can this Court deem them sufficient for the thousands of lawyers practicing in Louisiana?

By holding students accountable under standards set forth in the Rules of Professional Conduct, the student practice rule already ensures that the clients' interests will be paramount. Those Rules place upon the attorney the duty to keep the client informed about the status of the legal matter. LA. RULES OF PROFESSIONAL CONDUCT Rule 1.4. And the client "has the ultimate authority to determine the purposes to be served by legal representation." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.2(a). Hence, a student practitioner and supervising attorney must already communicate regularly with a client about the status of a case, and, under Rule 1.2, it is the client and the client's interests that determine the course of the representation. Any lawyer -- within or without a law school clinic -- who places his or her personal interests above those of the client effectively violates Rule 1.2.

Further, the Rules also place certain limitations on the solicitation activities of attorneys. Rule 7.3 prohibits personal solicitation "when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." LA. RULES OF PROFESSIONAL CONDUCT Rule 7.3. This limitation already applies to all lawyers, including law school clinicians. There is no reason to place greater burdens upon law school clinics than upon other attorneys or law firms. In fact, such a limitation would violate the holding in *In re Primus*, 436 U.S. 412 (1978) (in-person solicitation not for personal pecuniary gain may not be prohibited absent a compelling state interest).

Moreover, clinical programs are excellent vehicles for providing students with the skills to recognize and resolve ethical problems. *See* MacCrate Report, at 235. A study conducted for the American Bar Foundation even demonstrated that students who are involved in "real-client" clinics develop a greater concern for professional responsibility. *See Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 353, 387 (1973). For

students to take advantage of clinical opportunities to learn legal ethics, they need to be familiar with the rules of professional conduct, and Supreme Court Rule XX ensures that they are.

Finally, requiring completion of the MPRE prior to taking a clinical course is problematic. In order to pass the MPRE prior to the fall semester of a student's third year, the student would have to take the exam during his or her second year in law school. The student would likely have to take the MPRE before completing all of his or her ethics courses in law school and the MPRE date would be very early for bar purposes. In addition, this requirement may disqualify some students from enrolling in clinical programs because some states do not allow students seeking bar admission to take the MPRE prior to law school graduation. The present system, which requires students to read and be familiar with the Rules of Professional Conduct, suffices, particularly inasmuch as students practice under the close supervision of clinical faculty. In fact, the student practice rules in most states simply require a similar statement or oath to permit a student to participate in the representation of a client. *See* Kuruc & Brown, *supra*, at 42; TX. STUD. PRAC. R., R. II(D)(2); AR. R. XV(C)(6); AL. STUD. PRAC. R. ¶ IV(E). Hence, though ethical concerns should not be taken lightly, Rule XX adequately addresses those concerns.

B. The LABI's Proposed Client Limitations Do Not Further The Goals of Rule XX and Would Violate the First Amendment.

The LABI first proposes that Rule XX be amended to limit the clients that law school clinics may represent. The LABI suggests that clinics only represent clients who can meet formal *in forma pauperis* standards. *See* LABI Letter, at 1. As set forth below, this suggestion is contrary to the purposes of Rule XX. Next, the LABI seeks to prevent law school clinics from representing all groups except those "organizations formed to promote broader interests for the specific community affected." *Id.* This restriction would plainly violate the First Amendment, for it would make the availability of counsel for organizations

depend upon the content of the views of the groups and their members. Content-based restrictions on speech are presumptively invalid. The AALS is particularly troubled by these proposals, as they appear aimed at stifling the First Amendment rights of faculty and students at Tulane's Environmental Law Clinic.

With respect to the LABI's first proposal, Rule XX was not adopted simply to promote the provision of legal services to indigent individuals. In addition to encouraging schools to provide clinical training, Rule XX was adopted as "one means of providing assistance to clients unable to pay for such services." LA. SUP. CT. R. XX § 1. Generally, those who meet very low indigency standards are not the only clients unable to pay for legal services; low and middle income persons, and organizations of such persons, also have difficulty affording counsel, particularly in complex civil matters. *See* Anita P. Arriola and Sidney M. Wolinsky, *Public Interest Practice in Practice: The Law and Reality*, 34 HAST. L. J. 1207, 1212-18 (1983) (describing the dire needs of persons unable to afford attorneys, including public interest groups). Additionally, Rule XX was also adopted to "encourage law schools to provide clinical instruction in trial work of varying kinds." *Id.* A requirement limiting representation to very poor individuals would contradict the goal of encouraging instruction in "trial work of varying kinds." And creating additional obstacles that do not protect the interests of the client, of the school, and of the administration of justice will discourage, as oppose to encourage, law schools in providing clinical legal education.

These proposed client limitations would also run counter to a trend in amendments that many states have made to their student practice rules. Since the 1970's, many jurisdictions have changed practice rules to "allow practical exposure to a greater variety of clients, legal activities, and substantive bodies of law, and [to] prepare students to assume professional roles in many different practice settings and environments." *See* Kuruc & Brown, *supra*, at 46. These changes have often included eliminating the requirement that

students represent only indigent clients.[24] *Id.* In addition, many law school clinics represent groups as well as individuals.[25] No student practice rule in the nation explicitly prohibits the representation of groups.

The LABI's second proposal also would violate the First Amendment. The First Amendment is implicated when people seek to vindicate their rights in court. *See NAACP v. Button*, 371 U.S. 415, 443-44 (1963); *see also In re Primus* 436 U.S. at 428. Litigation can be "a form of political expression," which is protected by the First Amendment. *Button*, 371 U.S. at 429-30. Since litigation is a protected activity, the First Amendment also protects the right to associate for the purpose of litigation. *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[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."); *United Transp. Union v. State Bar of Michigan*, 401 U.S. 576, 582-83 (1971) (union members have a First Amendment right to assist each other in litigation); *Button*, 371 U.S.

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[24] Interestingly, none of Louisiana's neighboring states limits representation to only indigent clients. *See* TX. STUD. PRAC. R., R. IV(A); AR. R. XV (B)(1); MS. ST. § 73-2-207; AL. STUD. PRAC. R. ¶ II(A).

[25] A full list of law school clinics that have regularly represented groups cannot be presented in this limited space. However, a sampling of such clinics would include: the University of Baltimore's Community Development Clinic, the University of California at Berkeley's Environmental Law Community Clinic, Case Western Reserve University's Civil Clinic, the University of Chicago's Mandel Legal Aid Clinic, the Cleveland Marshall College of Law's Community Advocacy Clinic, the University of Colorado's Indian Law Clinic, Columbia University's Non-Profit Organization Clinic, the University of Denver's Earthlaw Clinic, Georgetown University's Institute for Public Representation, Golden Gate University's Environmental Law and Justice Clinic, the University of Idaho's Clinic, the University of Michigan's Urban Communities Program, the State University of New York at Buffalo's Legal Assistance Program, Pace University's Environmental Law Clinic, Rutgers University's Constitutional Litigation Clinic, Seton Hall School of Law's Development Clinic, the University of Southern California Law School's Post-Conviction Justice Project, and Yale University's Housing and Community Development Clinic.

at 430-31 (the First Amendment protects group activity). Indeed, individuals who may be "chilled" from pursuing legal remedies as individuals may find strength to vindicate their rights through collective action. *See id.* at 434-36; *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).[26] Hence, group action enhances the effectiveness of advocacy and litigation. *See id.*, at 460. 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). For these reasons, the ability to litigate as a group is protected by the United States Constitution.

What is remarkable, and quite alarming, about the LABI's second proposal is that it seeks to regulate speech based upon its content. The LABI would bar organizations from obtaining representation from law school clinics unless the groups were "formed to promote

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[26] Many of the concerns expressed by the *Button* Court may be directly applicable to the clients represented by Tulane's Environmental Law Clinic.

In *Button*, the Court was concerned that restricting the actions of the NAACP would have a debilitating effect on the ability of African-Americans to protect their rights because "under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances." *Button*, 371 U.S. at 430. Moreover,"[l]awsuits attacking racial discrimination . . . [were] neither very profitable not very popular" and there was "an apparent dearth of lawyers who [were] willing to undertake [racial discrimination] litigation." *Button*, 371 U.S. at 443.

For many disenfranchised individuals, particularly those with environmental concerns, group litigation may provide the only viable method to seek redress. *See* Hope Babcock, *Environmental Justice Clinics: Visible Models of Justice*, 14 STAN. ENV. L.J. 3, 9-10, 41 (1995). This may now be especially true in Louisiana. Given the highly publicized statements of the Governor of Louisiana and his staff, attacking the Tulane program and its clients, citizens may well be afraid to participate in environmental litigation even when they have important interests to vindicate. And even when groups seek to vindicate the rights of their members, it may still be difficult to raise funds to retain counsel. *See* Arriola and Wolinsky, *supra*, at 1215-16 ("[p]ublic interests groups cannot finance [necessary] litigation"). Hence, prohibiting law school clinics from representing organizations may block the "sole practicable avenue open to [these individuals] to petition for redress by way of litigation." *Button*, 371 U.S.. at 430.

broader interests for the specific community affected." LABI Letter, at 1. One can readily envision how this restriction could be applied. Students in a law school clinic could seek to appear before a court or administrative agency on behalf of an organization. Opposing counsel could then move to disqualify the students and the clinic from appearing, claiming that the client organization does not seek to promote sufficiently "broad" interests. Whether the group could obtain representation through a law school would thus depend upon the stated purpose of the group and the expressed views of its members, and the court or agency would be required to render a decision based upon the speech of the group and its members.

Of course, the First Amendment does not protect all manner of speech and association. But when the State seeks to regulate public speech based upon its content, the State must "show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Boos v. Barry*, 485 U.S. 312, 321 (1988) (quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)); *see also Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980). As the U.S. Supreme Court has declared, "[c]ontent-based restrictions are presumptively invalid." *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 382 (1992). "Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). "Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Thus, the Court has "upheld reasonable 'time, place, or manner' restrictions, but only if they are 'justified without reference to the content of the regulated speech.'" *R.A.V.*, 505 U.S. at 386 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Here, the proposed "manner" restriction is directly based upon "the content of the regulated speech." If the group's goals are not "broad" enough to satisfy a court or agency, the

organization will be prohibited from appearing with counsel from a law school clinic.

There is no compelling reason for the "manner" restriction proposed by the LABI. If this Court amends Rule XX as suggested by the LABI, there will undoubtedly be a series of motions before courts and agencies to disqualify law school clinics from appearing on behalf of organizations, and this Court will ultimately be required to decide whether the First Amendment rights of those organizations and their members are being infringed. This Court ought not wade into this thicket. The AALS suggests that this Court soundly reject the LABI's proposed restrictions on group representation. This Court ought not to promulgate a rule that raises such serious constitutional questions.

C. *Requiring Clinics To Represent A Mix Of Interests Is Contrary To The Structure Of Legal Practice Today, and May Require Clinical Faculty to Represent Clients with Conflicting Interests.*

At the same time that it seeks to restrict the types of clients who may be represented by law school clinics, the LABI recommends that this Court require that additional clients be served by these programs. Specifically, LABI would require "balanced representation of government, small business, and environmental interests." *See* LABI Letter, at 1. The LABI fails to appreciate the full effect of such a requirement.

Today, the practice of law is highly specialized. The days when all lawyers were generalists are long gone. Of course, part of this trend to specialization may be due in part to the ethical requirements of the profession. For instance, a lawyer has a duty to "provide competent representation to a client." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.1. This requirement prohibits a lawyer from accepting a case for which the lawyer is not adequately prepared or for which the lawyer cannot find assistance from competent co-counsel. *Louisiana State Bar Ass'n v. Causey*, 393 So. 2d 88, 91 (La. 1980) (finding ethical violation for neglecting legal matter). Hence, a lawyer, or law firm, that develops a specialization may be better able to fulfill the duty of competence in that area of the law.

The duty of loyalty also helps to explain why lawyers and law firms tend to represent

one category of clients in issues that frequently recur. This duty of loyalty requires that the lawyer not represent a client "if the representation . . . will be directly adverse to another client." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.7(a). Moreover, a "lawyer shall not represent a client if the representation . . . may be materially limited by the lawyer's responsibilities to another client." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.7(b). Furthermore, when any attorney (or law student) in the law clinic would be disqualified by Rule 1.7, all clinic participants would be disqualified. LA. RULES OF PROFESSIONAL CONDUCT Rule 1.10. These rules were promulgated in part "to encourage maximum disclosure by clients to counsel of all relevant facts, without fear of future adverse use of this confidence." *See Brasseaux v. Girouard*, 214 So. 2d 401, 406 (La. App. Ct. 1968) (discussing rationale for the fairly strict disqualification principle). Additionally, without rules of disqualification, "public confidence in the legal profession as a whole might . . . be impaired." *Id.* Because of these reasons, even in borderline cases involving these rules, a court should resolve all doubts in favor of disqualifying a firm. *Id.* "[E]ven the appearance of conflict should be avoided." *Id.*

In 1993, Louisiana's Attorney General responded to a request from the Public Service Commission, which sought to employ a law firm that, at the same time, represented regulated utilities. *See* La. Atty. Gen. Op. No. 93-148 (1993). The Attorney General described the situation as a "potential legal minefield" and "fraught with potential problems." *Id.* Creating a requirement that a specific clinic must "balance" representation among possibly conflicting interests would create a similar legal minefield. Furthermore, the Attorney General believed that it would be unable to offer concrete advice or counsel even assuming it could know sufficient information concerning potential conflicts of interests. *Id.* Nor would a potential client, such as the Commission, be in the best position to determine whether a potential conflict of interest existed. *Id.* The law firm, upon which the duty falls, is in the best position to make such a determination. *Id.* Similarly, neither this Court, nor the LABI, nor any client is in the best position to determine whether a conflict of interest exists. The

supervising lawyers and clinical students in a specific clinic are in the best position to decide whether there is a conflict.

Hence, this Court should continue to allow law school clinics to determine which clients to represent. If this Court requires that a law clinic simultaneously represent clients with possibly conflicting interests, this Court would place law school clinicians and students in an untenable position. Rule XX would directly conflict with several of the Rules of Professional Conduct. In the end, this would discourage faculty members from supervising clinics for fear that they would be required to violate the duties of the profession. Alternatively, the Court may be placed in the untenable position of recognizing a qualified immunity for law school clinics from any resulting ethical complaints or malpractice claims arising out of clinics forced to represent clients with conflicting interests. Such an amendment, and the unprofessional results it could cause, would send the wrong message to law students, the legal profession, and the citizens of Louisiana. Indeed, none of the states' student practice rules requires such "balancing" from a clinic.

Further, the AALS firmly believes that there is no pedagogical reason why students in a clinic must represent clients on both sides of an issue. *Accord Report of the Ad Hoc Study Committee, supra*, at App. 9-10. To the extent that the LABI may believe that students are not receiving an appropriately balanced education, Rule XX already permits students to receive a varied exposure to other legal environments. Louisiana students can intern with a prosecutor's office or other governmental agency and appear on behalf of the state or any of its political subdivisions. *See* LA. SUP. CT. R. XX, § 3. The state or local agency simply needs to make arrangements with the law school dean to provide competent supervising lawyers. *Id.* at § 7. This Court should let decisions about client representation be made by those best able to evaluate the competence of the clinical attorneys and the possibility of conflicts of interest: the clinical attorneys.

Finally, even apart from questions concerning the clinicians' expertise and their duty of loyalty to existing clients, it is difficult to imagine how this requirement could be

implemented. Currently, several of the clinical programs in Louisiana represent clients in cases against the government. In *Clements v. Dillon,* 1995 U.S. Dist. Lexis 16789 (E.D. La. 1995), *aff'd without opinion,* 81 F.3d 156 (5th Cir. 1996), a civil rights action in which the district court appointed the Tulane Law Clinic to represent an inmate, the judge noted that she

> routinely utilizes both the Tulane and Loyola Law Clinics to represent indigents who appear to have viable claims upon pre-trial screening. There has been a tremendous benefit to the court in utilizing these groups, over a period of years, in that their presence defines issues and guarantees access to court to individuals who would not otherwise be able to adequately present their position before a jury.

Id. at *6.[27] A requirement of "balanced representation" would likely end the ability of clinical programs to provide this acclaimed benefit, because the government could not be forced to allow clinical programs to represent it. Without any ability to represent government actors in civil rights actions, the clinic could not hope to meet the proposed requirement of "balanced representation."

The AALS submits that this proposed amendment to Rule XX is unwise, impractical, and would require clinicians to represent clients with conflicting interests. This Court ought not adopt the amendment.

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[27] *Accord, Argersinger v. Hamlin,* 407 U.S. 25, 40-41 (1972) (Brennan, J., concurring) ("Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. . . . Given the huge increase in law school enrollments over the past few years, . . . I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.") (citation omitted).

D. Requiring Continuing Screening Of Clinical Cases By A Panel With Conflicting Interests Would Compromise The Duty Of Confidentiality.

The LABI also recommends that this Court require continuing screening and approval of clinic cases "to determine whether there is a substantive basis for the action to be taken." LABI Letter, at 2. The LABI, however, would require a panel comprised of "individuals with knowledge and representations of the various types of interests and positions affected by the [case]." *Id.* Such a requirement would conflict with the Louisiana Rules of Professional Conduct, especially the rule describing an attorney's duty of confidentiality. And it would create innumerable practical difficulties. No other state has a student practice rule that requires such screenings.

An attorney has a duty to "not reveal information relating to [the] representation of a client." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.6. An attorney can only reveal this confidential information with the consent of the client or as necessary "to carry out the representation."[28] LA. RULES OF PROFESSIONAL CONDUCT Rule 1.6(a); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 404 (1996) (limited disclosures to nonlawyers to determine clients capacity does not violate ABA Model Rule 1.6, but this narrow exception does not permit disclosure of general information relating to the representation). A panel comprised of representatives of various community interests does not assure the level of confidentiality required by the Rules of Professional Conduct, especially as nonlawyers may serve as representatives.

The ABA Committee on Ethics has cautioned lawyers regarding arrangements similar to those proposed by the LABI. For instance, Formal Opinion 399 states that a legislative Legal Service Corporation funding proposal that "required disclosure of (a) the client's identity, and (b) certain other facts relating to representation, conflicts with the lawyer's obligation [of confidentiality]." ABA Comm. on Ethics and Professional Responsibility,

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[28] Rule 1.6(b) also provides for limited exceptions not generally applicable to this situation.

Formal Op. 399 (1996). Furthermore, a lawyer may not simply ask the client to agree to the limited representation if the lawyer believes that the representation may be adversely affected. *Id.* In that situation, the lawyer "should instead decline the representation." *Id.* The Ethics Committee held similar concerns regarding pre-paid legal service plans. In that situation, a plan with "quality control mechanisms and other features are unacceptable to the extent that they lead to the disclosure by the lawyer of information relating to the representation in violation of the Rules." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 355 (1987). Once again, the lawyer must not participate in such a plan. *Id.* Similarly, disclosures by staff lawyers to the board of directors of a legal services office may also violate the lawyer's duty of confidentiality. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 334 (1974); *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 393 (1995). In such a situation, procedures to insure the anonymity of the client must be followed and "the information sought must be reasonably required by the immediate governing board for a legitimate purpose and *not used to restrict the office's activities*." Formal Op. 334 (emphasis added). The Committee also found it "difficult to see how the preservation of confidence and secrets of a client could be held inviolate . . . when the [client's] proposed action is described to those outside of the [clinic]." *Id.*

The LABI would require that confidential aspects of a client's case be presented to a directing panel consisting of varied community interests who will decide whether that specific client deserves representation. In other words, the directing panel, comprised of *outside* interests, would receive information for the very purpose of restricting the office's activities. And the clinic lawyer's disclosures have the real possibility of adversely affecting the client, since the panel could use the information to deny representation and because members of the panel may represent opposing interests.

Furthermore, the LABI panel arrangement implicates the policies underlying LA. RULES OF PROFESSIONAL CONDUCT Rule 5.4. Rule 5.4 prohibits a lawyer from practicing

within "a professional corporation or association authorized to practice law for profit, if: . . . a nonlawyer has the right to direct or control the professional judgment of a lawyer." LA. RULES OF PROFESSIONAL CONDUCT Rule 5.4(d)(3). Though law school clinics are not conducted for profit, the policies underlying Rule 5.4 apply equally to law school clinics. One of the objectives of Rule 5.4(d) is to keep attorneys from conflicts of interests which could harm the client. *See Louisiana State Bar Ass'n v. Drury*, 455 So. 2d 1387, 1390 (La. 1984), *cert. denied*, 470 U.S. 1004 (1985) (discussing Disciplinary Rule 5-107, part of which is now Rule 5.4(d)). By definition, any panel comprised of representatives of "the various types of interests and positions *affected by the [case],*" would necessarily include interests in direct conflict with those of the client. *See* LABI Letter, at 2 (emphasis added). Any decision made by such panel affecting the client's interest might involve placing the interests of the panel's member above those of the client. This may violate Rule 1.2. *See* Analysis, § IVA., *supra.*

Moreover, Rule 5.4 is also concerned with the professional independence of lawyers. Formal Op. 355. Hence, a lawyer cannot participate in a pre-paid legal service plan if the "sponsoring entity [attempts] to interfere with the lawyer's exercise of independent professional judgment on behalf of a client or to direct or regulate the lawyer's professional conduct." *Id.* Similarly, in legal services programs, a board of directors must "insulate the staff from any influence, whatsoever, attempted by the Board or any member thereof *with respects to individual cases*." ABA Comm. on Ethics and Professional Responsibility, Formal Op. 345 (1979). The Board's role, in legal services program, is simply to establish broad policy without consideration to specific clients, the "identity of prospective adverse parties[,] or the nature of the remedies that would be employed." *Id.*; *see also* Formal Op. 334 (legal service program's board action on a "case-by-case, client-by-client basis" is improper). Even in perfect situations, when a boardmember has interests that conflict with a program client's interest, "[t]he real possibility of an appearance of impropriety, even though no actual impropriety may exist, is also troubling to the Committee." Formal Op.

345. The LABI's panel, however, would not only have an appearance of impropriety but would be created for the very purpose of attempting to control the lawyer's professional judgment in specific cases.

In addition to these concerns, the LABI's proposal would create innumerable practical problems. The law schools in Louisiana sponsor a variety of clinical programs. Tulane University, for example, has seven clinics in the areas of criminal defense, civil litigation, juvenile law, immigration law, appellate advocacy, legislative and administrative advocacy, and environmental law. Loyola University's clinic works in a range of areas, including, civil law, legislative and administrative advocacy, and criminal and juvenile law.[29] Southern University Law Center has three clinical programs: a criminal law clinic, a civil and administrative law clinic, and a juvenile clinic. Given the broad range of practice of these programs, it would be extremely difficult for these schools to create and maintain screening panels for each and every one of their multiple clinics.

The LABI's proposal should be rejected. It is difficult to imagine that any law school would sponsor a clinic when doing so would subject their supervising attorneys to professional sanctions for violating ethical rules.[30] To the extent that the LABI is concerned about clinics bringing "insubstantial" lawsuits, that concern is already addressed by Professional Conduct Rule 3.1 and LA. CODE CIV. PROC. art. 863. Rule 3.1 prohibits a lawyer from "bring[ing] or defend[ing] a proceeding, or assert[ing] or controvert[ing] an

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[29] The legislative and administrative advocacy program accepts both Tulane and Loyola students.

[30] At the very least, creating conflicts between an amended version of Rule XX and the Louisiana Rules of Professional Conduct would put clinical faculty at risk of being sanctioned. And while one might seek to apply a presumption that any requirements imposed upon students and clinical faculty by amendments to Rule XX are "ethical," it seems inappropriate for the LABI to suggest that this Court adopt changes to the student practice rule that would be contrary to longstanding nationwide ethical norms, as well as the Louisiana Rules of Professional Conduct, which are applicable to the rest of the practicing bar in the state, if not the nation.

issue therein, *unless there is a basis for doing so in good faith.*" LA. RULES OF PROFESSIONAL CONDUCT Rule 3.1 (emphasis added). Article 863 requires that an attorney certify that submitted pleadings are "well-grounded in fact; . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and . . . not interposed for any improper purpose." LA. CODE CIV. PROC. art. 863(B). A court must impose sanctions for a violation of this provision. LA. CODE CIV. PROC. art. 863(D). To the extent that the LABI seeks merely to prevent clinics from representing clients by placing on screening panels people with interests adverse to clients, the LABI's suggestion must be soundly rejected. This Court should not adopt a student practice rule that is in direct conflict with the Rules of Professional Conduct.

E. A Rule Restricting The Role Of A Supervising Attorney Would Fail To Sufficiently Protect A Client's Interest.

The LABI also would restrict the role of the supervising attorney by prohibiting "appearance[s] by supervising attorneys before courts or administrative agencies in the absence of the student." LABI Letter, at 2. But the LABI misunderstands the important role of the supervising attorney in cases involving student practitioners. Close supervision by a licensed attorney is necessary to protect the client's interests. *See* Kuruc & Brown, *supra*, at 43. For this reason, various jurisdictions around this country require the presence of a supervisor whenever the student makes a court appearance. *Id.* at 44. Rule XX, like all student practice rules around the country, also recognizes the importance of the supervising attorney. Rule XX requires the presence of a supervising attorney whenever a client has a constitutional right to counsel and during appellate arguments. LA. SUP. CT. R. XX, §§ 3 & 6. Rule XX also requires the supervising attorney's approval on pleadings and other appearances. *Id.* This measures insure that the client's interests are properly protected.

The clinical faculty member is ultimately responsible for protecting the client's interests. Additionally, the professor must evaluate various factors in determining whether

and when to intervene during a student's presentation. George Critchlow, *Professional Responsibility, Student Practice, and the Clinical Teacher's Duty to Intervene*, 26 GONZ. L. REV. 415, 430 (1990/91). The clinical professor must consider 1) the relationship between the student and the client; 2) the client's understanding of the student's role; 3) the student's competency; 4) the professor's own familiarity with the case; and 5) the imposition of additional burdens on the client, the court, and the adversary. *Id.* Indeed, a supervising attorney must intervene in situations where a failure to intervene would violate the ethical duties of the attorney to the client, court, or adversary.

A lawyer has the duty to "provide competent representation to a client." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.1. A supervising attorney and a client, however, frequently have new student practitioners who work on the case. Sometimes, a professor may not be able to accurately gauge the competence of a new student practitioner. In such a situation, the rules should permit intervention because of the more reliable representation that the supervising attorney would provide to the client. *See* Critchlow, *supra*, at 433.

Additionally, an attorney has a duty to "act with reasonable diligence and promptness in representing a client." LA. RULES OF PROFESSIONAL CONDUCT Rule 1.3. The nature of clinical programs means that, at times, allowing only students to appear on behalf of a client might create excessive delays. For instance, fewer students are available in the summer months or over the winter holidays, when law schools are typically out of session. Or students' availability may be limited by exams. Many cases that begin during the school year continue through exam periods and the summer. Limiting appearances only to students may create unnecessary or excessive delays that can adversely affect a client's or opposing party's interest. Such a delay may, at a minimum, cause needless anxiety. Critchlow, *supra*, at 435-36. It may also hurt the efficient work of the courts and frustrate the adversary. *Id.* at 436 In these situations, a supervising attorney should be permitted to appear on behalf of a client. *See id.* at 435-37.

F. A Rule Prohibiting Students From Participating In Other Forums Is Unnecessary.

The LABI seeks to limit practice of Louisiana law students only to state courts and administrative agencies. LABI Letter, at 2. Of course, Rule XX only authorizes a student to appear in the courts and administrative tribunals *of Louisiana*. LA. SUP. CT. R. XX, § 2. A strict provision forbidding student practitioners from representing clients anywhere but in Louisiana's state courts and administrative tribunals would be unnecessary, and possibly unconstitutional. Federal courts and agencies, and the courts of other states, retain authority to determine the qualifications of those who practice before them. As previously noted, all of the other states have their own procedures for allowing student practitioners. Louisiana's federal courts also have their own student practice rule. If a student would like to practice in any other court, the student must obtain permission from that jurisdiction, and that jurisdiction only.

CONCLUSION

As argued in this submission, the recommended changes to the Louisiana student practice rule would effectively end most, if not all, clinical legal education programs in the State of Louisiana. The Association of American Law Schools believes that clinical education and law student practice before courts and administrative agencies in Louisiana are vitally important to the quality of legal education in the State. As argued in this submission, Louisiana Supreme Court Rule XX should not be amended in response to complaints and lobbying pressure from business groups and the Executive Branch of the State of Louisiana. If this Court bows to this pressure, it will be abdicating its responsibility to preserve the high standards of legal education, academic freedom, and legal ethics in Louisiana. The Association of American Law Schools respectfully urges this Court to preserve Rule XX in its present form.

Respectfully submitted,

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