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By e-mail and overnight mail

August 1, 2000

Charles R. Fulbruge, III
Clerk
U.S. Court of Appeals
Fifth Circuit
600 Camp Street
New Orleans, LA 70130

Re: **Comments on Proposed Fifth Circuit Rule 46.4.2**

Dear Mr. Fulbruge:

On behalf of the plaintiffs-appellants in *Southern Christian Leadership Conference, et al. v. Supreme Court of Louisiana*, Docket No. 99-30895, the Brennan Center for Justice respectfully submits the following comments on proposed Fifth Circuit Rule 46, which would regulate appearances by law students before the Fifth Circuit. Specifically, we urge the court to decline to adopt Proposed Rule 46.4.2 which provides:

> A law student who qualifies to practice under 5th Cir. R. 46.4.1 may appear in this court on behalf of any indigent party, provided . . . the applicable state law permits law students to appear as counsel in court under the circumstances.

Although the court's interest in recognizing and encouraging student law practice is welcome and laudable, adoption of proposed Rule 46.4.2 at this time would be inappropriate for the following reasons: 1) adoption of the proposed rule would interfere with the Fifth Circuit's need to avoid the appearance of partiality as it adjudicates the constitutionality of the Louisiana

student practice rule, Rule XX; 2) the Court should not adopt proposed Rule 46.4.2 while a lawyer defending Louisiana's student practice rule sits on the court's Lawyers Advisory Committee; 3) adoption would appear to compel compliance in the Fifth Circuit with a state court rule of questionable constitutional validity; and 4) adoption would be out of step with the practice of the other federal circuits as well as the district courts within the Fifth Circuit.

I.

Adoption of the Proposed Rule Would Interfere with the Fifth Circuit's Need to Avoid the Appearance of Partiality as It Adjudicates the Constitutionality of the Louisiana Student Practice Rule, Rule XX.

The proposed Fifth Circuit Rule 46.4.2 would make law student eligibility to appear before panels of this court hinge on students' eligibility to appear as counsel in the courts of their home state under the state's applicable student practice rules. For students enrolled in law school clinical programs in Louisiana, proposed Rule 46.4.2 thus appears to incorporate by reference Louisiana's student practice rule, Rule XX of the Rules of the Louisiana Supreme Court ("Rule XX"), which, after modifications enacted in 1998 and 1999, imposes a range of significant restrictions on the types of clients for whom Louisiana law students and clinics may volunteer their services. *See* LA. SUP. CT. R. XX (1999).[1] However, the constitutionality of

[1]The amended Rule XX effectively prevents community groups in Louisiana from obtaining law school clinic assistance — historically one of the few sources of legal aid to community groups in Louisiana unable to pay for lawyers. The rule compels members of a community group seeking assistance of a clinic to disclose their personal finances. LA. SUP. CT. R. XX §§ 4, 5. But many low-income members, like people of any income level, are reluctant to disclose information about their finances, particularly where it might get into the hands of powerful litigation adversaries who could use it to harass or embarrass them. Moreover, these documentation requirements impose severe burdens on community groups that typically lack the

Louisiana's Rule XX is the subject of an appeal currently pending before the Fifth Circuit. That case, *Southern Christian Leadership Conference, et al. v. Supreme Court of Louisiana*, Docket No. 99-30895, in which the undersigned counsel represent the appellants, raises the question of whether the defendant-appellee, the Louisiana Supreme Court, violated the First Amendment by incorporating certain unprecedented restrictions into the Rule XX student practice rule at the behest of Louisiana's Governor and certain political interests in Louisiana in retaliation for effective advocacy by the Tulane Environmental Law Clinic.

As this court is thus currently in the process of adjudicating the constitutionality of the Louisiana student practice rule, the incorporation of that very rule into Fifth Circuit practice through proposed Rule 46.4.2 would be inappropriate because it would risk conveying the misimpression that the court has endorsed the rule that it has been called on to review. Plaintiffs-appellants wish to be very clear that they do not suggest that this court has in any sense pre-judged the merits of the pending appeal. Nonetheless, the court's apparent incorporation by reference of Louisiana's challenged student practice rule at this time is awkward and risks promoting the misimpression that the court endorses the rule.

The Federal Judicial Conference has long recognized that in order to maintain full public

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administrative resources to gather and update on a regular basis information on their members' incomes sufficient to document their eligibility for representation. The rule also bars law students from work on cases that develop as the result of legal education and outreach by clinical professors or students to low-income individuals and communities. LA. SUP. CT. R. XX § 10. Although the First Amendment has long been interpreted as granting public interest advocates the right to engage in such outreach, the rule nonetheless conditions the authorization of law students to appear in law clinic cases on the requirement that not just the students, but the clinical law professors and other clinic staff as well, refrain from exercising this constitutionally protected right to pro bono legal outreach. This restriction thus interferes with efforts of clinics to combine their public education services with offers of legal assistance to needy individuals.

confidence in our institutions of justice, it is important that courts scrupulously avoid not only actual conflicts of interest, but any appearance of partiality as well. As explained in the Code of Conduct for United States Judges, judges should "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." CODE OF CONDUCT FOR U.S. JUDGES, Canon 2A. *Cf. United States v. Jordan*, 49 F.3d 152, 155-56 (5th Cir. 1995) (noting that "fundamental to the judiciary is the public's confidence in the impartiality of our judges and the proceedings over which they preside"). Hewing to this exceptionally protective standard necessarily requires a court at times to avoid taking positions that do not involve any actual impropriety or inappropriate partiality, but which nonetheless might create such a misimpression among observers. We respectfully suggest that, in view of the *Southern Christian Leadership Conference* litigation, proposed Rule 46.4.2 presents such a case.

Indeed, the pending appeal has aroused an exceptional degree of national attention, with groups as varied at the Association of American Law Schools, the American Association of University Professors, the Clinical Legal Education Association, the Washington Legal Foundation, and the Louisiana Chapter of the American Civil Liberties Union filing briefs *amicus curiae* with the court. Particularly in view of this national audience that will be following the court's consideration of the *Southern Christian Leadership Conference* appeal, it is all the more important that the court be attentive to such appearances. Even if the court eventually decides to take the novel step of incorporating portions of state practice rules into its own student practice rule, *see* discussion *infra* Section IV, it should refrain from doing so at this time by deferring consideration of proposed Rule 46.4.2 while the constitutionality of the Louisiana rule is pending before it.

II.

To Avoid the Appearance of Impropriety, The Court Should Not Adopt Proposed Rule 46.4.2 While a Lawyer Defending Louisiana's Student Practice Rule Sits on the Court's Lawyers Advisory Committee.

The court should refrain from adopting proposed Fifth Circuit Rule 46.4.2 at this time for the additional reason that the participation of counsel for the defendant-appellee in the *Southern Christian Leadership Conference* case on the Fifth Circuit Lawyers Advisory Committee further risks the misimpression that the process by which the proposed rule has been developed lacked impartiality. Michael H. Rubin, the lead attorney engaged by the Supreme Court of Louisiana to defend the constitutionality of its student practice rule in this court in *Southern Christian Leadership Conference*, is serving on the court's Lawyers Advisory Committee. *See* Joe Gyan, Jr., *Rules Allow Law Students to Appear in Court for Poor*, THE ADVOCATE, July 13, 2000, at B5. According to the Fifth Circuit's Internal Operating Procedures, the Lawyers Advisory Committee on which Mr. Rubin sits plays an important role in the court's rule-making activities:

> Lawyers Advisory Committee -- The court is assisted in its rule-making function and in the drafting of these internal operating procedures by a committee composed of 2 lawyers from each state in the circuit. These lawyers are appointed for staggered terms by the chief judge upon recommendation of the circuit judges from that state. Their terms are for 2 years. They examine and comment upon suggested rule and procedure changes.

5th Cir. Internal Operating Procedures. Needless to say, any involvement by Mr. Rubin in the preparation and consideration of proposed Rule 46.4.2 would be deeply troubling. An effort by a party to a pending lawsuit to gain a litigation advantage by exercising a position of trust and responsibility on a court advisory committee would be patently inappropriate and risk

jeopardizing public confidence in the institution.

We must stress that we have no specific knowledge of what, if any, role Mr. Rubin has played in the preparation and consideration of proposed Rule 46.4.2 and we understand from coverage in a Baton Rouge newspaper that, to date, he has not responded to inquiries seeking clarification of his role. *See* Joe Gyan, Jr., *Rules Allow Law Students to Appear in Court for Poor*, THE ADVOCATE, July 13, 2000, at B5. In view of the obvious conflict of interest stemming from his role as counsel in the *Southern Christian Leadership Conference* case, we presume that Mr. Rubin did the appropriate thing and recused himself from any involvement in the proposal, drafting, or consideration of the proposed Rule 46.4.2. However, even assuming that this was the case, Mr. Rubin's membership on the Lawyers Advisory Committee nonetheless creates the *appearance* of a conflict of interest. The importance of maintaining public confidence in the rulemaking process thus counsels that the court refrain from adopting the proposed Rule 46.4.2 at this time while Mr. Rubin's case remains pending before the court.

III.

Rule 46.4.2 Appears to Incorporate a State Rule That Is of Questionable Constitutional Validity.

The fact that, in the *Southern Christian Leadership Conference* litigation, this court may ultimately have to invalidate the challenged Louisiana student practice rule as unconstitutional — or at least remand the case for factual development — further counsels against adopting the proposed Rule 46.4.2 during the pendency of the case. That litigation raises very serious constitutional questions concerning both the process whereby Rule XX was adopted, and the substance of its restrictions. In light of those weighty questions, and the awkwardness that

would be associated with this court's invalidating a rule that it itself had previously incorporated by reference, the better course is to defer consideration of proposed Rule 46.4.2 until the court has disposed of the pending appeal.

As described in detail in the opening and reply briefs of the appellants in *Southern Christian Leadership Conference*, Docket No. 99-30895, the appellants have asserted in their complaint that Louisiana's student practice rule suffers from serious constitutional infirmities because it was enacted out of viewpoint discriminatory motive and because it imposes substantial burdens on the First Amendment right of low-income individuals to associate with one another and with law students and faculty enrolled in law school clinical programs. In particular, the appellants' briefs explain that, in a startling act of viewpoint-based retaliation, the Louisiana Supreme Court enacted its current student practice rule at the behest of the Governor of Louisiana and powerful business interests in that state because law students in Louisiana had successfully assisted community groups in opposing the construction of hazardous chemical plants and other polluting facilities in their neighborhoods. *See Southern Christian Leadership Conference* Appellants' Br. at 7-13. Public statements made clear that the Louisiana Supreme Court was pressured by these interests to amend the student practice rule in retaliation for this successful representation by law students, with the unabashed aim of preventing law school clinics in Louisiana from providing such assistance in the future. Indeed, the district court in *Southern Christian Leadership Conference* acknowledged this motivation, observing with surprising candor that "in Louisiana, where state judges are elected, one cannot claim complete surprise when political pressure somehow manifests itself within the judiciary." *Southern Christian Leadership Conference v. Supreme Ct. of La.*, 61 F. Supp. 2d 499, 513 (E.D. La.

1999). Because the First Amendment forbids the government from taking retaliatory action based on opposition to viewpoints expressed by parties in public controversies, *see, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional."); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812-13 (1985) (First Amendment violated where a government rule is "impermissibly motivated by a desire to suppress a particular point of view"), the appellants have alleged that adoption of the Rule XX student practice restrictions in this circumstance violated the Constitution.

Moreover, the appellants' complaint in *Southern Christian Leadership Conference* alleges that, even if the adoption of Louisiana's Rule XX had not been retaliatory, the rule would still be unconstitutional because it impermissibly burdens the rights of low-income individuals to associate with one another and with students and professors enrolled in law school clinical programs who seek to provide them with volunteer legal assistance. The Supreme Court has long recognized that the First Amendment's guarantees of freedom of speech and association forbid the government from interfering with the ability of individuals to associate with providers of pro bono legal assistance (such as lawyers and paralegals) to take legal action to protect their rights. *See, e.g., NAACP v. Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978). The appellants have asserted that Rule XX, by imposing severe and unprecedented restrictions on law students' and professors' freedom to help needy clients, including restrictions on outreach to disadvantaged individuals and community groups, impermissibly burdens these vital First Amendment rights. *See Southern Christian Leadership Conference* Appellants' Br. at 48-59.

Moreover, beyond these serious constitutional claims, incorporating by reference the

Louisiana rule into Fifth Circuit practice does not make sense simply as a matter of policy. As the Fifth Circuit's goals in proposing its student practice rule presumably include both increasing access of low-income individuals to lawyers and providing educational opportunities for law students, incorporating Louisiana's student practice rule into Fifth Circuit practice would have the perverse effect of burdening the constitutional rights of the rule's intended beneficiaries.

IV.

The Court Should Not Adopt Proposed Rule 46.4.2 Because It Is Inconsistent with the Practice of Other Federal Courts in Permitting Student Practice.

Because eight other federal courts of appeals have already adopted student practice rules, the Fifth Circuit has the opportunity to benefit from the significant experience of these courts. Proposed Rule 46.4.2, however, does not take into account this substantial, accumulated experience and is inconsistent with developing federal appellate practice governing law student appearances. Significantly, not a single federal appellate court has adopted a student practice rule incorporating any portion of a state's student practice rule. Currently, the Courts of Appeals for the First, Second, Third, Fourth, Eighth, Ninth, Tenth, and District of Columbia Circuits have in place student practice rules. These various student practice rules are remarkably similar. Each requires that: 1) a party represented by a student consent in writing to the representation; 2) an attorney generally supervise all of a student's legal work and be personally present at any court appearances; 3) students are enrolled at an accredited law school and have completed one-half or two-thirds of their legal education; 4) students do not receive compensation for their work from a client; and 5) the student's dean certify the student's character and legal ability. *See* 1st

Cir. R. 46.3; 2d Cir. R. 46(e); 3d Cir. R. 46.3; 4th Cir. R. 46(a); 8th Cir. R. 46B; 9th Cir. R. 46-4; 10th Cir. R. 46.7; D.C. Cir. R. 46. Some of these courts have added additional requirements, such as that students can only represent indigent clients, *see, e.g.*, 3d Cir. R. 46.3(a)(1); 4th Cir. R. 46(a), or that students have completed or be enrolled in a clinical course, *see, e.g.*, 1st Cir. R. 46.3(II)(1); D.C. Cir. R. 46(g)(3)(B). No federal appellate court, however, has in place a requirement such as that proposed by this court incorporating aspects of state student practice rules.

This consensus reflects the fact that it makes far more sense to coordinate practice rules for the federal courts of appeals with those of the federal district courts that they review, rather than with any state court rules. Where federal district courts permit law student practice, it is anomalous and unfair to both clients and law student counsel — and makes the work of this court more difficult — to force the students to abandon their clients on appeal, leaving them to search for substitute counsel, likely being forced to proceed pro se. It is difficult to imagine compelling reasons for forcing their clients to seek substitute pro bono counsel at that stage.

However, proposed Rule 46.4.2 would cause precisely this problem, since the Louisiana student practice rule that it incorporates by reference is inconsistent with the student practice rules of the federal district courts within the Fifth Circuit. The rules of the three federal district courts in Louisiana — the Eastern, Middle, and Western Districts of Louisiana — incorporate none of the restrictions contained in Louisiana's student practice rule. Accordingly, law students representing a client in a federal district court in Louisiana would have to abandon that client on appeal unless satisfaction of Louisiana's Rule XX could be established. Thus, Rule 46.4.2 would force law students to drop representation of a community organization unless the

organization collected intrusive financial information about its members as required by Louisiana's Rule XX *See* LA. SUP. CT. RULE XX § 5 (1999). Likewise, if adopted, Rule 46.4.2 would force law students to drop on appeal a client whom a law clinic professor had initially contacted to offer free legal assistance because Rule XX restricts the ability of those associated with a law clinic to offer free assistance even on matters of public concern. *See id*, § 10.

Although two district courts within the Fifth Circuit have incorporated specific provisions of their state's student practice rule into their own rules, these incorporated rules are not nearly as sweeping as those that would be incorporated from Louisiana's Rule XX. First, these two district courts, the Northern and Western Districts of Texas, have adopted state rules that solely govern the eligibility of law students to engage in practice; neither federal district court has permitted a state court to regulate the type of clients that eligible law students may represent.[2] Second, the incorporated state provisions are entirely typical of rules regulating

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[2]The rules of the Northern and Western Districts of Texas provide as follows:

> A qualified law student or a qualified unlicensed law school graduate who has been certified pursuant to Texas Revised Civil Statutes Art. 320a-1, Sec. 10(a), ["State Bar Act"] and the Texas Supreme Court's "Rules and Regulation Governing the Participation of Qualified Law Students and Qualified Unlicensed Law School Graduates in the Trial of Cases in Texas" shall be allowed to participate in hearings in this Court.

Misc. Order No. 47 (N.D. Tex. Oct. 27, 1993); and

> [A] law student or unlicensed law graduate may appear in this Court . . . provided that the student or law graduate is a "qualified law student" or "qualified unlicensed law school graduate" under the "Rules and Regulations Governing the Participation of Qualified Law Students and Qualified Unlicensed Law School Graduates in the Trial of Cases in Texas" as promulgated by the Supreme Court of Texas.

practice by law students and place no additional burden on law students seeking to practice in federal court. For instance, Texas's definition of a "qualified law student," which the Northern District of Texas has adopted, is almost identical to the requirements for practice proposed by this court in its rule. *Compare* TEX. STUDENT PRACTICE R. II, *with* proposed 5TH CIR. R. 46.4.1. Likewise, the Texas certification requirement for law students that the Northern District of Texas has incorporated into its student practice rule is no different from the certification requirement proposed by this court. *Compare* TEX. STUDENT PRACTICE R. II (B) & (D), *with* proposed 5TH CIR. R. 46.4.1 (c) & (e). This court's proposed student practice rule would permit a far greater degree of intrusion into federal court affairs by state courts than any rule adopted by other federal appellate courts or by district courts within this circuit.

Proposed Rule 46.4.2 is particularly puzzling as it is unaccompanied by any background material explaining the perceived need for the rule or the history of the proposal. *See* Notice of Proposed Revisions to 5th Cir. Rules (June 1, 2000) (stating that the proposed rule "provides for practice before the court by law students"). This bare notice and the accompanying text of the proposed student practice rule do not alert interested parties to the concerns or problems that have led to this proposed departure from established federal court practice concerning law student legal appearances. We thus respectfully suggest that the court make available for public consideration any record that has been developed in the course of the preparation, and Lawyers Advisory Committee review, of the proposed student practice rule so that the public may have the opportunity to address the court's concerns and better assist the court in its consideration of the proposed changes.

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We are unaware of any reported problems or abuses associated with the Fifth Circuit's policies to date regarding law student practice and, despite extensive research, we have uncovered no criticism of the practices of the other federal circuits that permit student practice without reference to the practices in their component states. Additionally, despite more than a decade of experience with student law practice, no federal appellate court has acted out of a concern for federal-state comity to modify its student practice rule to track or incorporate state student practice rules.

Conclusion

In its current form, proposed Rule 46.4.2 ill serves the goals of student law practice since it appears to incorporate by reference Louisiana's Rule XX student practice rule which, as the appellants in *Southern Christian Leadership Conference* have alleged, was enacted in a retaliatory effort to limit the types of volunteer assistance that law school clinics may provide to needy individuals and community groups. Adoption of proposed Rule 46.4.2 at this time endangers the court's ability to preserve an appearance of impartiality in light of the pendency of the *Southern Christian Leadership Conference* litigation challenging the Louisiana rule, and in light of the membership of defense counsel in that case on the Fifth Circuit's Lawyers Advisory Committee. Moreover, the proposed rule, insofar as it incorporates aspects of Louisiana's Rule XX, imposes unwarranted burdens on the representation of indigent groups and on the ability of lawyers, students, and community members to associate to engage in expressive activity. For all of these reasons, we respectfully suggest that the Court refrain from adopting the proposed rule.

Respectfully submitted,

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