UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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

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

versus

THE SUPREME COURT OF THE STATE OF LOUISIANA

MEMORANDUM OF THE LOUISIANA SUPREME COURT IN SUPPORT OF ITS MOTION TO DISMISS THIS ACTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND FOR LACK OF STANDING

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INTRODUCTION

The plaintiffs have filed a lengthy complaint attacking a rule promulgated by the Louisiana Supreme Court under its Constitutional and inherent authority to regulate the practice of law. The simple answer to the complaint is that there is no statutory or constitutional right of any individual or entity to counsel in a civil case. There is no statutory or constitutional right of students to practice law without a license. There is no statutory or constitutional right of a non-lawyer to represent any other person or entity in a state or federal court.

I. NO CAUSE OF ACTION

1. THE STANDARDS APPLICABLE TO A F.R.C.P. 12(b)(6) MOTION

The plaintiffs' claims are brought pursuant to 42 U.S.C. §1983, based on alleged violations of the First and Fourteenth Amendments to the United States Constitution, and pursuant to Article I, Sections 2, 3, 5, 7, 9, 22 and 23 of the Louisiana Constitution of 1974.

In analyzing the plaintiffs' asserted claims under Section 1983,[1] the Court must first determine whether the complaint properly sets forth a claim of a deprivation of rights, privileges, or immunities secured by the Constitution or the laws of the United States caused by persons acting under color of state law.[2] The Court's initial task is to examine the complaint, focusing upon the nature of the protected interest, the nature of the alleged deprivation and the state's involvement in

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[1]For the reasons stated elsewhere in this memorandum, the plaintiffs' state law claims are barred by the Eleventh Amendment and should be dismissed.

[2] *Fontana v. Barham*, 707 F.2d 221, 224, (5th Cir. 1983), *reh'g. denied*, 711 F.2d 1054 *cert. denied*, 464 U.S. 1043, 104 S.Ct. 711, 79 L.Ed.2d 175 (1984), citing *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981), *Baker v. McCollan*, 443 U.S. 137, 140, 99 S.Ct. 2689, 2692, 61 L.Ed.2d 433 (1979) and *Williams v. Kelley*, 624 F.2d 695, 697 (5th Cir. 1980), *cert. denied*, 451 U.S. 1019, 101 S.Ct. 3009, 60 L.Ed.2d 391 (1981).

that deprivation.[3] In making its decision, the Court should not accept as true conclusory allegations within the plaintiffs' complaint.[4]

2. THERE IS NO STATUTORY OR CONSTITUTIONAL RIGHT OF NON-LAWYERS TO REPRESENT ANY OTHER PERSON OR ENTITY

When one cuts through all the rhetoric of the complaint, the primary argument of all of the plaintiffs is that non-lawyers should have the right to represent third parties in civil litigation. Whether phrased as a claim by an individual or entity client, or as an assertion by a law student, teacher, or student organization, all of the plaintiffs want this federal court to create out of whole cloth a rule that grants unilateral permission to non-lawyers to appear in court and assert the rights of others.

The remarkable breadth of this argument is apparent from the relief sought. The plaintiffs want this federal court to enjoin Louisiana's highest court from making any determination of when non-lawyers may appear in court and under what circumstances. While ostensibly confined to "environmental" cases, the theories espoused in the complaint know no bounds. When stripped to their basics, however, each and every theory fails to state a claim upon which relief can be granted, for there simply is no "right," under any statute or under the U.S. or Louisiana Constitution, for a non-lawyer to represent third parties in litigation.

2.1 Under Louisiana Law, Non-Lawyers Do Not Have A Right to Represent Others

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[3] *Fontana v. Barham, supra.*

[4] *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 953 (1983).

While individuals may appear *pro se* in civil litigation,[5] Louisiana statutes are clear that only lawyers may represent third parties in court. Unless and until licensed to practice law by the Louisiana Supreme Court, neither an individual nor an entity may practice law, give legal advice, nor grant legal counsel. La. R.S. 37:213.[6] The statute could not be more precise, and anyone who

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[5]28 U.S.C. 1654; *Andrews v. Bechtel Power Corp.*, 780 F.2d 124 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172, 106 S.Ct. 2896, 90 L.Ed.2d 983.

[6]This statute provides:

> "No natural person, who has not first been duly and regularly licensed and admitted to practice law by the supreme court of this state, no corporation or voluntary association except a professional law corporation organized pursuant to Chapter 8 of Title 12 of the Revised Statues, and no partnership or limited liability company except one formed for the practice of law and composed of such natural persons, corporations, voluntary associations, and/or limited liability companies, all of whom are duly and regularly licensed and admitted to the practice of law, shall:
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> (1) Practice law;
> (2) Furnish attorneys or counsel or an attorney and counsel to render legal services;
> (3) Hold himself or itself out to the public as being entitled to practice;
> (4) Render or furnish legal services or advice;
> (5) Assume to be an attorney at law or counselor at law;
> (6) Assume, use or advertise the title of lawyer, attorney, counselor, advocate or equivalent terms in any language, or any phrase containing any of these titles, in such manner as to convey the impression that he is a practitioner of law; or
>
> (7) In any manner advertise that he, either alone or together with any other person, has, owns, conducts or maintains an office of any kind for the practice of law.
>
> No person, partnership or corporation shall solicit employment for a legal practitioner.
>
> This Section does not prevent any corporation or voluntary association formed for benevolent or charitable purposes and recognized by law, from furnishing an attorney at law to give free assistance to persons without means.
>
> Any natural person who violates any provisions of this Section shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both."

violates its provisions "shall be fined not more than one thousand dollars or imprisoned for not more than two years, or both." *Id.*

The term "practice of law" is defined in La. R.S. 37:212 as including appearing in court or filing pleadings for another. It is important to note that while the statute defines certain activities as the "practice of law" *only if* consideration flows to the practitioner, there is no such restriction on the definition when what one attempts is to appear in court or file papers with tribunals on behalf of another – that conduct constitutes the "practice of law" even if done for free or with eleemosynary intent.[7]

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[7] R.S. 37:212 provides:

A. The practice of law means and includes:

(1) In a representative capacity, the appearance as an advocate, or the drawing of papers, pleadings or documents, or the performance of any act in connection with pending or prospective proceedings before any court of record in this state; or

(2) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect;

(a) The advising or counseling of another as to secular law;
(b) In behalf of another, the drawing or procuring, or the assisting in the drawing or procuring of a paper, document, or instrument affecting or relating to secular rights;
(c) The doing of any act, in behalf of another, tending to obtain or secure for the other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
(d) Certifying or giving opinions as to title to immovable property or any interest therein or as to rank or priority of validity of a lien, privilege or mortgage as well as the preparation of acts of sale, mortgages, credit sales or any acts or other documents passing titles to or encumbering immovable property.

B. Nothing in this Section prohibits any person from attending to caring for his own business, claims, or demands; or from preparing abstracts of title; or from insuring titles to property, movable or immovable, or an interest therein, or a privilege and encumbrance thereon, but every title insurance contract relating to

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Parallel to the statutory requirements prohibiting non-lawyers from representing others in court are the Articles of Incorporation of the Louisiana State Bar Association, an entity created by the Supreme Court[8] to which every lawyer licensed to practice law must belong: "[N]o person shall practice law in this State unless he/she is an active member, in good standing, of this Association."[9]

Louisiana Supreme Court Rule XVII sets forth the procedure by which a person is licensed to practice law in Louisiana.[10] It mandates that Article XIV of the Articles of Incorporation of the Louisiana State Bar Association, as amended, and as approved by the Louisiana Supreme Court, shall govern all admissions to the bar. The State Bar articles require formal application, signed before a notary, along with proof of graduation from an accredited law school. In addition, there are requirements that the applicant be of sound mind, possess good moral character, be eighteen years of age, and be a citizen or resident alien of the United States. Further, the applicant must be certified to the Supreme Court by the Committee on Bar Admissions as having satisfactorily passed the required examinations, including the Multistate Professional Responsibility Examination. Thus,

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[7](...continued)
immovable property must be based upon the certification or opinion of a licensed Louisiana attorney authorized to engage in the practice of law. Nothing in this section prohibits any person from performing, as a notary public, any act necessary or incidental to the exercise of the powers and functions of the office of notary public, as those powers are delineated in Louisiana Revised Statues of 1950, Title 35, Section 1, et seq.

[8]La. R.S. 37:211 states:

"The Louisiana State Bar Association is created and regulated under the rule-making power of the Supreme Court of Louisiana, pursuant to a memorial addressed to the Court by the legislature in Act 54 of 1940."

[9] Article IV, Section 4 of the Louisiana State Bar Association Articles of Incorporation.

[10] Rule XVII has been amended, effective August 1, 1999, transferring to the Supreme Court (from the Louisiana State Bar Association) the governance of the bar admission process. Thus, the current Bar Rules will be superseded by new Supreme Court rules on bar admissions.

mere attendance at law school, and even mere graduation from an accredited law school, is insufficient for one to practice law in this state.

Numerous courts that have examined the issue have had no difficulty in determining when someone has engaged in the unlawful practice of law.[11] Thus, even in cases permitting non-lawyers to assist others in *pro se* litigation, the Louisiana courts have carefully noted that the practice of law is regulated by the Louisiana Supreme Court and that one who attempts to practice law without a license engages in a "species of fraud." *State v. Kaltenbach*, 587 So.2d 779, 784 (La.App. 3 Cir. 1991), *writ denied*, 592 So.2d 1332 (1992).[12]

2.2 Federal Statutes and Case Law Prohibit Non-Lawyers From Representing Another In Court

As has been shown, non-lawyers (be they students in a legal clinic or otherwise) do not have a "right" to represent others in court. In federal cases in this Circuit where a non-lawyer has sought to represent others before judicial tribunals, courts uniformly have held that no constitutional "right" exists and that the extent of representation of others, if allowed at all, is strictly subject to court rules.

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[11] *See*: *Alco Collections v. Poirier*, 952582 (La.App. 1 Cir. 9/27/96), 680 So.2d 735, 741, *writ denied*, 96-2628 (La.12/13/96), 692 So.2d 1067 (stating that the filing of a suit by a collection agency to collect a debt constituted the unauthorized practice of law); *Duncan v. Gordon*, 476 So.2d 896, 897 (La.App. 2d 1985) (holding that by representing a plaintiff in the negotiation and the settlement of a personal injury claim for consideration pursuant to a contingency fee contract, the defendant engaged in the unlawful practice of law).

[12] The Court stated: "The right to practice law in the state courts is not a privilege or immunity of a citizen of the United States. It is limited to those who are licensed for that purpose, and it follows that for an unlicensed person to hold himself out as entitled to practice is a species of fraud which the state may punish. *State v. Rosborough*, 152 La. 945, 94 So. 858 (1922). The supreme court possesses the power, irrespective of the legislature, to determine the qualifications of those who apply for admission to practice law." *Id.*

United States v. Anderson, 577 F.2d 258, 261 (5th Cir. 1978); *Weber v. Garza*, 570 F.2d 511, 514 (5th Cir.1978).

Even in the criminal context, courts consistently have held that a person's Sixth Amendment right to counsel of choice does not allow him to choose, as his representative with the court, a person not licensed to practice law. *Gille v. State of Oklahoma*, 743 P.2d 654 (Okla. Crim. App. 1987). In *United States v. Anderson*, 577 F.2d 258 (5th Cir. 1978), the Fifth Circuit held that defendants in a criminal trial were not entitled to representation by an individual who possessed some legal training but who was not a member of the bar admitted to practice before the federal district court: "[L]aw school attendance does not convert an individual into an attorney. There is no Sixth Amendment right to be represented by a non-attorney, as this court has consistently held in cases similar to this one. [citations omitted]. A defendant may either represent himself or he may have an attorney. That is all the Sixth Amendment requires."[13]

By federal statute, non-lawyers cannot represent individuals. Access to federal court may be *pro se*, but if representation is sought, that representative must be a licensed attorney. The statute also notes that courts may proscribe, by rule, who can appear for others and press their cause. 28 U.S.C. §1654 states:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

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[13]In *Anderson*, a husband and wife were convicted on charges of willfully filing a false withholding certificate and appealed. Both claimed that they were denied representation by their counsel of choice and that they did not effectively waive their right to counsel because they wished to be represented by an individual who was not a member of the bar but who apparently had some legal training. The Fifth Circuit noted that it has held consistently that there is no Sixth Amendment right to be represented by a non-attorney.

In the recent case of *Gonzales v. Wyatt*, 157 F.3d 1016, 1021 (5th Cir. 1998), a prisoner brought a §1983 *in forma pauperis* action against a corrections officer for use of excessive force. The prisoner's untimely complaint was not signed by the prisoner but rather was signed by a non-lawyer acting on behalf of the prisoner. The Court noted that only lawyers may represent others in court: "[A]s Judge Garza stated in *Turner v. American Bar Ass'n*, 407 F.Supp. 451, 477 (N.D.Tex.1975), 28 U.S.C. §1654 . . . only allows for two types of representation; that by an attorney admitted to the practice of law by a governmental body and that by a person representing himself." *Id.*

2.3 Courts Have the Constitutional, Statutory, and Inherent Powers to Regulate Those Who Attempt to Represent Litigants.

2.3a Louisiana State Constitutional and Statutory Authority to Regulate Those Who Represent Others in Court

The right of the Louisiana Supreme Court to regulate the practice of law is found not only in the current Louisiana Constitution; it has a long and distinguished history. The first express constitutional acknowledgment of the Louisiana Supreme Court's authority to regulate the practice of law appeared in Article 80 of the Constitution of 1898; the Court's jurisdiction expressly included "exclusive original jurisdiction in all matters touching professional misconduct of members of the bar, with power to disbar under such rules as may be adopted by the court." The Court's power was

set forth in each of the iterations of the Louisiana Constitution in 1913,[14] 1921,[15] and in the current version which was adopted in 1974.[16]

The Court's power over the practice of law is not merely constitutional and legislative.[17] The crux of its powers stems from the Supreme Court's "inherent judicial power emanating from the constitutional separation of powers, the traditional inherent and essential function of attorneys as officers of the courts, and this court's exclusive original jurisdiction of attorney disciplinary proceedings." *Succession of Wallace*, 574 So.2d 348 (La. 1991). Because the Louisiana Supreme Court is the ultimate authority for regulating the practice of law, its position as such cannot be compromised by the legislature, and the Supreme Court time and time again has overturned legislative attempts to interfere with its power to supervise and regulate lawyers.[18]

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[14] La. Const. art. 84 (1913), "The judicial power of the State shall be vested in a Supreme Court, in Courts of Appeal, in District Courts, in justices of the peace, and in such other courts as are hereinafter provided for."

[15] La. Const. art. 7 §1 (1921), "The judicial power shall be vested in a Supreme Court, in Courts of Appeal, in District Courts, and in such other courts as are hereinafter provided."

[16] La. Const. art. 5 §1. "The judicial power shall be vested in a Supreme Court, courts of appeal, district courts, and other courts authorized by this Article."

[17] In *Louisiana State Bar Association v. Connolly*, 9 So.2d 582 (La. 1942), the court distinguished the authority to regulate the practice, through adoption of rules and qualifications, from its authority over disbarment, stating that "[t]he limitation of jurisdiction with respect to disbarment proceedings contained in the constitution refers solely to the grounds for disbarment but the recognition of the power of the court to adopt rules in aid of its jurisdiction is not in anywise restricted," *Id.* at 590.

[18] *Saucier v. Hayes Dairy Products*, 373 So.2d 102 (La. 1978) (statute which allows contingency fee contracts is merely "a legislative aid in the judicial regulation of the practice of law"); *Singer Hutner Levine Seeman & Stuart v. Louisiana State Bar Association*, 378 So.2d 423 (La. 1979) ("It is well established that the final authority to regulate the practice of law is vested in this court, not in the legislature"); *Mire v. City of Lake Charles*, 540 So.2d 950 (La. 1989) ("Under its inherent judicial power and its original jurisdiction, the Supreme Court of

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The Supreme Court, in several cases, has addressed its authority to regulate the bar, mostly dealing with the ability of the court to adopt criteria for admission to the practice of law. In *Ex parte Steckler*, 154 So. 41 (La. 1934), students from Loyola and Tulane law schools challenged the constitutionality of the Louisiana Supreme Court's requirement that applicants to the bar pass an examination. The students based their challenge on a statute that granted Tulane the authority to bestow upon its students a degree which would authorize them to practice law and argued that the Court's imposition of the examination requirement as a condition to admission to the practice of law impinged upon their rights under this statute. The Supreme Court rejected the challenge and noted that regulation of the profession and admission to the bar was purely a judicial function justified by the special interest of the courts in regulating their "officers." *Id.* at 45.

The Supreme Court may define what acts constitute the practice of law and thus, by implication, what acts are subject to ultimate regulation by the court;[19] its powers include the right to adopt rules defining and regulating not only the conduct of those who are attorneys at law, but also of persons who are engaged in the unauthorized practice of law.[20] This broad authority is

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[18](...continued)
Louisiana has exclusive authority to regulate the practice of law in the state"); *Midboe v. Commission on Ethics for Public Employees*, 646 So.2d 351 (La. 1994) (disciplinary rules enacted pursuant to the court's inherent authority "override legislative acts which tend to impede or frustrate that authority . . . [o]nly legislative enactments which aid the court's inherent powers will be approved"); *O'Rourke v. Cairns*, 95-3054 (La. 11/25/96), 683 So.2d 697 ("Under its inherent judicial power and its original jurisdiction, the Supreme Court of Louisiana has exclusive authority to regulate the practice of law in this state . . . [t]his broad grant of regulatory power includes the responsibility to exert control by adjudicatory means of individual cases as they arise, including those relative to discharge of counsel and regulation of fees, whether by contingency contract or otherwise.")

[19]*Louisiana State Bar Association v. Edwards*, 540 So.2d 294 (La.1989).

[20] *Meunier v. Bernich*, 170 So. 567, 577 (La. App. Orl. 1936).

warranted by the role of the profession in the judicial process, for all attorneys are officers of the courts.

The Louisiana Supreme Court's "exclusive and plenary power to define and regulate all facets of the practice of law, including the admission of attorneys to the bar, the professional responsibility and conduct of lawyers, and the discipline, suspension and disbarment of lawyers" has been recognized by federal courts.[21] This power is so well-established that all three federal district courts sitting in Louisiana have adopted the Louisiana Supreme Court's Rules of Professional Conduct as part of the rules regulating the practice of law before the federal courts,[22] and admission to the bar of these courts is limited to "members in good standing of the bar of the Louisiana Supreme Court" except on a ***pro hac vice*** or visiting attorney basis.

Thus, pursuant to its constitutional, statutory and inherent authority, the Louisiana Supreme Court controls who appears in court representing clients; the Supreme Court is not required to permit students or any other non-lawyer to represent anyone else in court. The rules that it establishes limiting the parties non-lawyers may represent, or even the types of cases in which such representation may occur, are uniquely within its constitutional, statutory, and inherent authority.

2.3b <u>All Courts Have Inherent Authority To Regulate Those Who Wish To Represent Litigants</u>

All courts, in addition to constitutional and statutory grants of authority, have inherent powers to regulate those who appear before them. In *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), *reh. denied*, 501 U.S. 1269, 112 S.Ct. 12, 115 L.Ed.2d 1097

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[21] *See Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 43 (5th Cir. 1992), citing *Succession of Wallace*, 574 So. 348, 350 (La. 1991), and *Matter of P & E Boat Rentals, Inc.*, 928 F.2d 662, 664 (5th Cir. 1991).

[22] *See* LR83.2.4E, LR83.2.4M and LR83.2.4W

(1991), the U.S. Supreme Court noted that courts have the inherent power to sanction both attorneys and parties, even if the conduct does not violate statutes or court rules.

The inherent powers of courts to regulate the practice of law are illustrated by Louisiana Federal District Court Uniform Local Rules that control the process by which lawyers apply for admission to the court[23] and for permission to appear *pro hac vice* if they are not members of the court.[24]

There can be no clearer indication of the inherent powers of courts to regulate law student appearances than Uniform Local Rule 83.2.13. Law students have no right to appear in federal court on behalf of others; their appearances are strictly subject to the stringent requirements of the rule, and appearances are limited to civil matters in which a fee is not provided for or could not reasonably be anticipated and to criminal matters on behalf of indigent defendants.[25] In the absence of this rule, students could not appear at all.

2.3c Louisiana's Rules Are Not Unique; Other States and Federal Courts Have Similar, and In Some Cases, More Restrictive Rules

Most courts have rules permitting limited law student representation; however, when one reviews the rules of court from around the country on student appearances, it quickly becomes evident that the rules are varied. Rule XX of the Louisiana Supreme Court, entitled "Limited Participation of Law Students in Trial Work," specifically allows the representation of both indigent persons and indigent associations, and is much broader in scope than the rules of many state and

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[23] *See* Uniform Local Civil Rule 83.2.3

[24] *See* Uniform Local Civil Rule 83.2.6

[25] The Local Rules also provide that a student may appear in any criminal matter on behalf of the United States with the written approval of both the prosecuting attorney and the supervising attorney.

federal courts. (The pertinent rules of other states, discussed in this section of the memorandum, are attached as numbered exhibits, with the numbers corresponding to an alphabetical listing by state.)

For example, in Mississippi a law student may not directly represent clients but "may only assist the supervising attorney or clinical teacher in representing their clients."[26] Numerous state and federal courts limit representation by law students to indigent persons[27] and make no provision for the representation of "indigent associations" by law students. These states include: Florida, Georgia, Kansas, Kentucky, Maine, Massachusetts, Minnesota, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee as well as the District of Columbia.

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[26] Volume 15, section 73-3-207, Mississippi Code, attached to this Memorandum as an exhibit.

[27] See Rule 48 of the District of Columbia; Rule 11-1.2 of the Florida Rules of Court; Section 15-20-2 of Volume 13 of the Georgia Code; Rule 709 of the Kansas Court Rules and Procedure; Rule 2.540 of the Rules of the Kentucky Supreme Court; Rule 90 of the Maine Rules of Court; Rule 3.03 of the Massachusetts Rule of Court; Rule 1.01 of the Minnesota Rules of Court; Rule 13.01 of the Supreme Court Rules of the State of Missouri; Rule 36 of the New Hampshire Rules of Court; Rule C.0206, Rules of North Carolina Bar Association; Section 5(A), Rules of The Governance of the Bar of Ohio; Rule 322(a), Bar Admission Rules, Pennsylvania Rules of Court; Article 2, Rule 9 (a), (b), Supreme Court Rules of Rhode Island; Rule 401 of the Rules Governing the Practice of Law, Appellate Court Rules of South Carolina ; Rule 7, Section 10.03 of Rule of the Supreme Court of Tennessee and Rule 10.0 of the Rules for Admission to the Practice of Law, Court Rules of West Virginia. All of these are attached to this memorandum as exhibits.

The United States District Court for the District of New Hampshire limits law student representation to indigent persons. The United States District Court for the Southern District of Florida, the United States District Court for the District of Maine and the United States District Court for the Northern District of West Virginia limit law student practice to the representation indigents and the government. The United States District Court for the Southern District of West Virginia limits law student practice to representing indigents, the government and the federal public defender. See Rule 83.2(c) of the Local Rules of the United States District Court for the District of New Hampshire; Rule 6 F, Local Rules of the United States District Court for the Southern District of Florida, Rule 83.4(d) of the Rules of the United States District Court for the District of Maine, and LR GEN P 2.04 of the Local Rules of the United States District Court for the Northern and Southern Districts of West Virginia, attached as exhibits.

Delaware strictly and narrowly limits the courts or tribunals before which law students may practice and likewise limits the types of cases in which law students may appear.[28] Other states require the presence of a supervising attorney at all hearings in which the law student participates,[29] and still others require the consent of the judge presiding over the particular matter.[30] When a Colorado trial court would not allow student representation in a criminal proceeding, the Colorado Supreme Court upheld that exclusion.[31]

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[28]The Delaware Supreme Court Rules allow law students to practice before the Family Court, Justice of the Peace Courts, and the State Human Relations Commission, and it limits the types of proceedings in which law students may appear before these courts. See Rule 56 of Part V of the Supreme Court Rules of Delaware attached to this Memorandum as an exhibit.

[29] See Rule 983.2(d)(3)(ii) of the General Rules-All Courts of the State of California; Rule 16(a)(2), Maryland Rules Governing Bar Admission; Section 73-3-207, Volume 15, Mississippi Code; Rule 49.5, Section 6 of the Nevada Court Rules; Rule 1-094 of the New Mexico Rules of Civil Procedure for the District Courts; Rule IV A(1) of the Texas Rules of Court; and Volume 11, Part 6, Section IV, Paragraph 15 of the Code of Virginia, attached to this Memorandum as an exhibit.

[30] Rule 44, Section 5 of the Alaska Rules of Court allows law students to appear and participate "to the extent permitted by the judge or the presiding office . . . ". Rule 983.2(d)(3) of the General Rules-All Courts of the State of California allows law students to appear at public trial hearing or other proceeding to the extent approved by the court or hearing officer. Section 3-14 of the Connecticut Rules of Court allow law students to appear in court "with the approval of the judicial authority or before an administrative tribunal, subject to its permission. Rule 95 of the Georgia Court & Bar Rules allows eligible law students "to participate in the proceedings in such form and manner as the judge of the court where such authority is to be exercised may prescribe . . .". Rule 8.120(C)(3) of the Michigan Court Rules provides that a law student "may not appear in a case in a Michigan court without the approval of the judge of that court." Section 6 of Rule 49 of the Nevada Court Rules allows a student to appear on behalf of a client "to the extent approved by such court, public agency, referee, commissioner or hearing officer." Rule 1-094 of the New Mexico Rules of Civil Procedure for the District Courts requires the written approval of the judge presiding over the case. Section 10.03(a) of the Rules of the Supreme Court of Tennessee requires the approval of the trial judge involved. Section 13(a)(4) of Volume 2 of the Vermont Court Rules allows law students to appear as legal counsel when "The court has, in the exercise of its discretion, granted permission, and said permission has not been revoked." Copies of these rules are attached as exhibits.

[31] *People v. Coria*, 937 P.2d 386, 390-91 (Colo. 1997); a copy is attached as an exhibit to

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Not only do many states limit the nature of cases in which law students may appear and place detailed restrictions or conditions on their appearances, twenty-five states[32] and the District of Columbia[33] allow the termination of representation by a law student without cause and without a hearing.

The Louisiana Supreme Court's Rule XX is not unique in requiring evidence of a person's indigency before allowing law student representation or in establishing criteria for the determination of indigency. The Thirteenth Judicial Circuit Court of Missouri requires that a law student file, at

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[31](...continued)
this memorandum.

[32] Alabama, Arizona, Arkansas, Colorado, Delaware, Florida, Idaho, Illinois, Kansas, Maine, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Washington, Wisconsin, and Wyoming allow termination of law student practice without cause and without a hearing. See Rule VC of the Rules of Judicial Administration of the Alabama Supreme Court; Rule 38(f)3B of the Rules of the Supreme Court of Arizona; Rule X(V)D(2) of the Arkansas Court Rules; Section 12-5-116.3, Title 12, Volume 4 of the Colorado Revised Statutes; Rule 56(g)(3) of Part V of the Supreme Court Rules of Delaware; Rule 11-1.4(c), Rules Governing Law School Practice, Florida Rules of Court; Rule 221(q) of the Idaho Bar Commission Rules; Rule 711(e)(4) of the Illinois Court Rules; Rule 709c)(3) of the Supreme Court Rules of Kansas; Rule 90 (d)(3) of the Rules of Civil Procedure of the Maine Rules of Court; Rule 13.03c) of the Supreme Court Rules of the State of Missouri; Section IV C, In the Matter of The Establishment of a Montana Student Practice Rule, No. 12982, In the Supreme Court of the State of Montana; Section VC of the Rule of Legal Practice by Approved Senior Law Students of the Nebraska Court Rules and Procedure; Rule 49.5(3)(d)(1) of the Nevada Supreme Court Rules; Section C.0204(a)(3) of the Rules Governing Practical Training of Law Students of the North Carolina State Bar; Section IVC, Rules on the Limited Practice of Law by Law Students of the North Dakota Court Rules; Rule II, Section 4(B)(1) of the Rules for the Government of the Bar of Ohio; Rule 13.25(3) of the Law Student Appearance Program of the Oregon Rules of Court; Rule 321(b)(3), Bar Admission Rules, Pennsylvania Rules of Court; Rule 401(d)(3), Appellate Court Rules of South Carolina; Section 16-18-2.3(3) of the South Dakota Codified Laws; Rule III, Rules and Regulations Governing the Participation of Qualified Law Students and Qualified Unlicensed Law School Graduates in the Trial of Cases of Texas; Rule 9(e)(2), Admission to Practice Rules, Washington Court Rules; SCR 50.04(3), Supreme Court Rules of Wisconsin; Rule 18(c), Wyoming Court Rules, copies of which are attached as exhibits.

[33] Rule 48c)(3), Rules of the District of Columbia Court of Appeals attached as an exhibit.

the time he enters his appearance for a party, a notarized property and financial statement executed by the party to be represented and a verified statement of indigence signed by the party and the supervising attorney.[34] The State of Wyoming requires that an indigent person meet the income and asset criteria within the poverty guidelines of a legal services corporation in Wyoming before student representation is allowed.[35]

Florida and Georgia do not have state-wide universal standards of indigency but rather allow local determinations of who is indigent in determining whom law students may represent. The Florida Rules of Court provide that the Board of Governors of the Florida Bar fix the standard of indigency for law student appearances in Florida state courts;[36] this same rule applies in the United States District Court for the Southern District of Florida.[37] The Florida Rules state that the indigency standards are to be based on the recommendation of the largest voluntary bar association located in the circuit where the law school practice program is to be implemented.

Georgia limits law student representation to the "practice of legal aid," which it defines as "rendition of legal services to indigent persons." Georgia defines "indigent person" as a person financially unable to employ the legal services of an attorney as established by a judge of the superior court (the trial level court). Georgia requires that law schools which operate or propose to

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[34] Rule 21.9 B., Thirteenth Judicial Circuit, Volume II, Missouri Court Rules, a copy of which is attached as an exhibit.

[35] Rule 18, Rules for Organization and Government of the Bar Association of Wyoming, attached to this Memorandum as an exhibit.

[36] Rule 11-1.2(f), Rules Governing Law School Practice, Florida Rules of Court, attached as an exhibit.

[37] Rule 6 F, Local Rules of the United States District Court for the Southern District of Florida, attached as an exhibit.

operate a legal aid agency obtain approval by separate application in each county in which the legal aid agency operates or proposes to operate, and requires that a judge of the superior court in each county "establish a standard of indigency appropriate to that county for determining the persons who may be served by the legal aid agency." [38] The judge of the superior court may require such showing and give the matter such direction as he deems necessary to establish an appropriate standard of indigency. [39]

Louisiana Supreme Court Rule XX contains many of the same criteria used by state and federal courts across the nation to regulate and limit the practice of law by law students. Whether the student participation rules are promulgated by constitutional, statutory or inherent authority, the ultimate result is that each court has the power and authority to regulate student practitioners. There is no "uniform" national standard applicable to students as a whole, and there is no universal right of students to appear unilaterally and represent clients in civil cases.

2.4 The Plaintiffs Cannot Disguise Their Claim to Engage In The Unauthorized Practice of Law as a First Amendment Argument

The plaintiffs make numerous allegations that their First Amendment rights are being violated by the Louisiana Supreme Court's change in rules; those allegations are simply another way of saying that the ability to represent others in court is somehow amenable to First Amendment protection. That claim is without merit, and similar arguments have been roundly rejected by other courts.

Law review writers, summarizing statutes and jurisprudence, have noted that "[l]awyers, as professionals, are subject to speech restrictions that would not ordinarily apply to lay persons. * * *

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[38] Section 15-20-4 of Volume 13 of the Georgia Code.

[39] Section 15-20-5 of Volume 13 of the Georgia Code.

Rules of evidence and procedure, bans on revealing grand jury testimony, page limits in briefs, and sanctions for frivolous pleadings, to name a few, are examples of speech limitations that are widely accepted as functional necessities in the administration of justice."[40]

2.4a **Courts Reject Claims by Non-Lawyers that the First Amendment Permits Them to Practice Law**

In a case similar to this one, a Texas court rejected the claim of a non-lawyer that his First Amendment rights were violated by unauthorized practice of law rules. In *Drew v. Unauthorized Practice of Law Committee*, 970 S.W.2d 152 (Tx.App.-Austin 1998), the Unauthorized Practice of Law Committee brought suit against both a non-attorney and the Civil Rights Review Corporation for the unauthorized practice of law. As president of the corporation, Drew investigated reported deprivations of civil and constitutional rights of criminal defendants. He filed applications for writs of habeas corpus on behalf of persons who believed they had been denied their rights.

Texas prohibits (as does Louisiana) unlicensed persons from practicing law. Drew attacked the statute as unconstitutionally vague and asserted that it violated his First Amendment rights. The court disagreed and found that the statute "does not prohibit him from speaking out against perceived injustices and therefore does not impermissibly infringe on his First Amendment rights." *Id.* at 155. If a third party wanted to present a habeas petition, said the court, "he would need the aid of *an attorney* to draft the documents and appear in court on behalf of another." *Id.* at 156. (emphasis supplied).

Thus, the appellate court clearly held that even statutes which appear to give third persons the power to present papers to the court on behalf of another nevertheless must yield to the general rule that only licensed attorneys may actually draft documents and represent others before a court.

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[40] *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers' First Amendment Rights*, Kathleen M. Sullivan, 67 Fordham L. Rev. 569 at 569 (1998).

2.5 **No Due Process Rights Are Involved**

The other main prong of the plaintiffs' complaint is that the Louisiana Supreme Court's promulgation of rules regulating student non-lawyers somehow offends due process. The plaintiffs have no due process right to challenge Supreme Court rules regulating non-lawyers.

To have a due process claim at all, a plaintiff must first have a protected liberty or property interest;[41] as has been demonstrated, there is no "right" for non-lawyers to practice law or for litigants to have counsel in civil actions. Without a property right, the due process claims must fall.

Even if there were a tenuous claim of "property right" here, however, none of the plaintiffs have a due process claim.

A state's interest in regulating the practice of law within its borders is compelling, because lawyers are essential to the primary governmental function of administering justice.[42] When exercising its sovereign rule-making authority, a state supreme court occupies the same position as that of the state legislature. *Lewis v. Louisiana State Bar Association*, 792 F.2d 493 (5th Cir. 1986), citing *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).[43]

Legislative actions do not require the same procedural due process protections as adjudicative and administrative actions, and all public acts do not require individualized notice and an opportunity to be heard. Likewise, local rules adopted by a district court do not require individualized notice and an opportunity to be heard. *Brown v. McGarr*, 583 F. Supp. 734 (N.D. Ill.

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[41] *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[42]. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975).

[43] *See also Scariano v. Justices of the Supreme Court of Indiana*, 852 F.Supp. 708 (S.D. Ind. 1994), *aff'd*, 38 F.3d 920 (7th Cir. 1994), *cert. denied*, 515 U.S. 1144, 115 S.Ct. 2582, 132 L.Ed.2d 831 (1995).

1984), *aff'd*, 774 F.2d 777 (7th Cir. 1985). In *Brown*, an attorney challenged the constitutionality of local rules adopted by the District Court for the Northern District of Illinois creating a trial bar. The attorney alleged the rules violated the Fifth Amendment right to due process because he received no actual notice and was not given an opportunity to be heard. Relying on a decision of the U.S. Supreme Court,[44] the district court held that the due process clause did not entitle the attorney to notice and a hearing because the court's action was an exercise in rulemaking rather than adjudicatory power. *Id.* at 738. The Seventh Circuit affirmed.

The district court in *Brown* distinguished the delegation of authority to an administrative agency from the delegation of authority to the judiciary. Procedural requirements often accompany the delegation of authority to an administrative agency to serve the interest of public participation in national policy decisions;[45] however, the authority of a court to adopt local rules is uniquely within the judiciary's competence and implements no national policy set by Congress. The delegation to the judiciary is necessary to the smooth and independent functioning of the courts. *Id.* Therefore, judicially promulgated rules are not subject to the same procedural requirements as administrative rules.

Other courts have reached identical conclusions in determining that a state supreme court rule regulating the practice of law is essentially legislative. In *Scariano v. Justices of the Supreme Court of Indiana*, 852 F.Supp. 708 (S.D. Ind. 1994), *aff'd*, 38 F.3d 920 (7th Cir. 1994), *cert. denied*, 515 U.S. 1144, 115 S.Ct. 2582, 132 L.Ed.2d 831 (1995), an attorney licensed to practice in Illinois challenged the Indiana Supreme Court's bar rule requiring that applicants for a conditional license

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[44] *Bi-Metallic Investment Co., v. State Board of Equalization*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915).

[45] *Brown v. McGarr*, 583 F. Supp. 734, 738 (N.D. Ill. 1984).

practice predominantly in Indiana. *Scariano* held the rule was constitutional, for it was rationally related to a legitimate state interest[46] and found the Admission Rules were an exercise of the Indiana Supreme Court's rule-making authority and hence treated as legislation for equal protection purposes. In *Konigsberg v. State Bar of California*, 366 U.S. 36, 45, 81 S.Ct. 997, 1003, 6 L.Ed.2d 105 (1961), a court rule was challenged as being a violation of Fourteenth Amendment protection against arbitrary state action. The U.S. Supreme Court upheld the rule, noting that the fact that it found its source in the supervisory powers of the California Supreme Court over admissions to the bar, rather than in legislation, was not constitutionally significant.

Thus, whether the rule-making is judicial or even quasi-judicial,[47] there is no basis for a due process claim when the state Supreme Court establishes rules regulating the practice of law and delineating the conditions under which non-lawyers may represent others in court. Since the claim of a "right" to practice law without taking a bar examination is not a fundamental right,[48] clearly the claim of a law student to represent others is not entitled to any status as a "right."

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[46] *Id.* at 716.

[47] Even quasi-judicial rulemaking does not implicate procedural due process. *In re Herrick*, 922 P.2d 942 (Hawaii 1996). In *Herrick*, uncertified court reporters challenged an amended rule providing that a court reporter's verbatim transcripts could not be used in any court in Hawaii unless the reporter was certified in accordance with the rules of the Hawaii Supreme Court. The court held that the rule did not violate procedural due process. The court found the amendment to the rule constituted quasi-legislative rulemaking rather than an adjudication, because the amendment was generalized in nature, the Board had considered general facts rather than a particular set of disputed facts, and the amendment determined a general policy issue about certification rather than a specific legal dispute between particular parties. *Id.* at 957. Quasi-legislative decisions that affect large numbers of unspecified persons and are not directed at specific individuals do not give rise to the constitutional procedural due process requirement of individual prior notice.

[48] *Lowrie v. Goldenhersh*, 716 F2d 401, 412 (7th Cir. 1983).

2.6 **There is No Statute or Constitutional Provision That Would Allow Any Of the Relief Sought**

As has been shown, above, the thrust of the plaintiffs' claims – that law students possess some sort of right to represent others in court – is without any merit. Law students are no different than any other non-lawyer. Absent graduation from an accredited law school, absent having taken the Bar exam and passed it, and absent having been admitted to the Bar, no person has any claim of any sort to represent others in judicial matters.

While permission may be granted in limited circumstances by federal or state courts for law students to appear in court and make filings, the students' presence is always by permission, not as a matter of right. No viable issues have been raised by the plaintiffs. The plaintiffs' complaint should be dismissed.

3. **THERE IS NO STATUTORY OR CONSTITUTIONAL RIGHT OF ANY PERSON OR ENTITY TO HAVE LEGAL COUNSEL IN CIVIL MATTERS**

It can be anticipated that those plaintiffs who claim that they have been[49] or would like to be[50] clients of the Tulane Law Clinic will seek to argue that their claims are separately cognizable, apart from the right of students to appear in court absent permission granted by a statute or court rule. This claim also fails on its face, for when stripped down to its barest essentials, the claim is that individuals and organizations have a right to have representation in civil matters. Both the United

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[49] Southern Christian Leadership Conference; St. James Citizens for Jobs and Environment; Louisiana Environmental Action Network; North Baton Rouge Environmental Association; Louisiana Communities United.

[50] Fishermen's and Concerned Citizens' Association of Plaquemines Parish; St. Thomas Residents Council; Calcasieu League for Environmental Action Now; Holy Cross Neighborhood Association; Louisiana Association of Community Organizations for Reform Now.

States Supreme Court and United States Courts of Appeals have held that there is no constitutional right to counsel in civil cases; therefore all claims of the non-student plaintiffs must be dismissed.

In *Lassiter v. Department of Social Services of Durham County, North Carolina*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981), *reh. den.* 453 U.S. 927, 102 S.Ct. 889, 69 L.Ed.2d 1023 (1981), the United States Supreme Court found that an indigent's right to appointed counsel exists only where the litigant may lose his personal liberty if he loses the litigation; this test is clearly not met in the situation here. The Fourteenth Amendment does not guarantee any civil litigant the right to counsel; rather, what the due process clause of the Fourteenth Amendment guarantees is that a person cannot be deprived of liberty unless that person is aided by counsel. *Id.* at 2158.

The right to counsel in criminal litigation exists only in limited circumstances; it does not exist at all in civil litigation. Federal appellate courts in the Ninth and Eleventh Circuits have held squarely that a civil litigant does not have a right to counsel.[51]

Thus, regardless of the creative rationales that the plaintiffs employ to support their argument (including claims of equal protection and freedom of association), their claim fails as a matter of law, for no combination of clever uses of constitutional phrases can disguise the hollow core of their complaint – there is no right for clients to have counsel in civil cases, and there is no right for non-lawyers to represent others in litigation.

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[51]See: ***Bass v. Perrin***, 170 F.3d 1312 (11th Cir. 1999) (state inmates request for appointed counsel in § 1983 action against prison officials denied; it was not an abuse of discretion for the district court to refuse to appoint counsel because a plaintiff in a civil action does not have a constitutional right to counsel); ***United States v. Sardone***, 94 F.3d 1233 (9th Cir. 1996)(a defendant indicted on drug charges had no right to counsel in civil forfeiture proceeding because there is generally no right to counsel in a civil proceeding); ***Hedges v. Resolution Trust Corp.***, 32 F.3d 1360 (9th Cir. 1994), *cert. denied* 514 U.S. 1082, 115 S.Ct. 1792, 131 L.Ed.2d 721 (1995) (debtor in bankruptcy proceeding was not entitled to counsel because there is generally no right to counsel in civil proceedings).

4. **THIS COURT HAS NO JURISDICTION OVER THE PLAINTIFFS' STATE LAW CLAIMS**

The claims of the plaintiffs under the Louisiana Constitution must be dismissed under the Eleventh Amendment. The Eleventh Amendment states, "the Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." This Amendment also bars suits by the State's own citizens against the state in question. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). While there are exceptions to the Eleventh Amendment bar against state sovereign immunity to suit in federal court, the U.S. Supreme Court has held that there is no exception with regard to claims *under state law* against the state,[52] a ruling which the Fifth Circuit has reiterated several times.[53]

As the U.S. Supreme Court has stated, "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106, 104 S.Ct. at 911. Thus, plaintiffs' claims under the Louisiana Constitution must be dismissed.

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[52] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984).

[53] *Richardson v. Southern University*, 118 F.3d 450, 453 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 858, 139 L.Ed.2d 757 (1998); *World of Faith World Outreach Center Church, Inc. v. Morales*, 986 F.2d 962, *reh. denied, cert. denied*, 510 U.S. 823, 114 S.Ct. 82, 126 L.Ed.2d 50 (1993).

II. STANDING ISSUES

5. THE RULES APPLICABLE TO STANDING

Plaintiffs' Complaint makes various allegations about the plaintiffs' purported standing, allegations which the Supreme Court as defendant does not concede. The previous portions of this memorandum address why there is no cause of action here at all, and thus it is not necessary to reach the issue of standing. Since standing is jurisdictional, however, should the Supreme Court's Rule 12(b)(6) motion not be granted and the complaint dismissed in its entirety because the plaintiffs have failed to state a claim upon which relief may be granted, standing would become a crucial issue. This portion of the memorandum will discuss the legal tests applicable, and the next portion will show why discovery is necessary to address some of these issues.

Standing requirements are drawn from two sources, constitutional, *i.e.*, Article III "case and controversy", and prudential, *i.e.*, standing may be denied even if the Constitutional requirements are met if, as a matter of judicial self-restraint, it seems wise not to entertain the case.[54] In evaluating standing, "[t]he focus is on the party, not the claim itself."[55] The initial Article III requirements are met if there is (1) a judicially cognizable injury in fact (2) that has been caused by the challenged conduct (3) which can be remedied by a judicial decree. *Id.* at 346-47. Once a plaintiff has crossed this constitutionally-required threshold, a variety of prudential limits on the court's willingness to hear the complaint may be imposed. *Id.* at 347.

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[54] 13 Charles A. Wright, Arthur P. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3531 at 345 (2d ed. 1984).

[55] *Id.*, 3531 at 339.

Standing requirements are jurisdictional and are not subject to waiver;[56] the plaintiffs have the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "Since [these elements] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Id.*

6. **A NUMBER OF THE PLAINTIFFS LACK STANDING BASED UPON THE ALLEGATIONS IN THE COMPLAINT**

According to the Complaint, plaintiffs are nine different organizations[57] and one organization composed of twenty separate groups (collectivelythe "client-plaintiffs"),[58] five law school professors or clinical law instructors from two different law schools,[59] three law students (two law students currently enrolled in a law school clinic and one law student who has been accepted to a legal

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[56] *Lewis v. Casey*, 518 U.S. 343, 116 S.Ct. 2174, 2179, 135 L.Ed.2d 606 (1996); *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 529 (5th Cir. 1996).

[57] Those nine organizations are: Southern Christian Leadership Conference, Louisiana Chapter ("SCLC"), St. James Citizens for Jobs and the Environment ("St. James Citizens"), Calcasieu League for Environmental Action Now ("CLEAN"), Holy Cross Neighborhood Association ("Holy Cross"), Fishermen's and Concerned Citizens' Association of Plaquemines Parish ("Fishermen's Association"), St. Thomas Residents Council ("Residents Council"), Louisiana Environmental Action Network ("LEAN"), Louisiana Association of Community Organizations for Reform Now ("Louisiana ACORN"), and North Baton Rouge Environmental Association ("NBREA"). Complaint ¶ 13.

[58] That organization, Louisiana Communities United ("LCU") is described as a "coalition of 20 community, church and union groups in the Mississippi River Parishes of Ascension, Iberville, St. James, East Baton Rouge, and St. Charles." Complaint ¶ 13(j).

[59] Complaint ¶ 15.

clinic),[60] the Tulane Environmental Law Society ("ELS") (an organization of students including "student practitioners" at the Tulane Environmental Law Clinic (TELC)),[61] the Tulane Graduate and Professional Student Association (the governing entity for graduate and professional students),[62] and an environmental lawyer, C. Russell H. Shearer, who has donated and will continue to donate to the TELC.[63] Each group will be examined separately.

6.1 The Standing of the Client-Plaintiffs

The Complaint alleges that the client-plaintiffs have suffered various injuries relating to the Rule XX amendments and alleges that these organizations have standing to represent themselves and their members. Complaint ¶ 14.

All of these allegations rely on the premise that there is a right to representation in civil suits. As previously discussed in this memorandum, there is no such right, and, therefore, the clients cannot establish the first Constitutional prerequisite for standing to bring suit, "an `injury in fact' — an invasion of a *legally-protected* interest which is (a) concrete and particularized and (b) `actual or imminent,' not `conjectural' or `hypothetical[.]'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (internal citations omitted) (emphasis added).

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[60] Complaint ¶ 16.

[61] Complaint ¶ 16(a).

[62] Complaint ¶ 16(b).

[63] Complaint ¶ 18.

6.2 **The Standing of the Students Themselves**

Two of the law students who are named plaintiffs, Ms. Causey and Ms. Delizia, allege that they have been "'student practitioners' and 'eligible law students' in TELC" during the 1998-99 school year. Complaint ¶ 16(c). Plaintiff Hanaman, according to the complaint, is a Tulane law student who has been accepted as a "'student practitioner' and 'eligible law student' in TELC for the 1999-2000 school year." As noted earlier in this memorandum, students have no constitutional right to represent others in court.

6.3 **The Standing of the Donor**

On the face of the complaint, the "donor-plaintiff," Mr. Shearer, does not meet and cannot meet the three constitutional requirements: injury in fact, caused by defendant's conduct which is the subject of the complaint, and redressibility. The arguments of a violation of the donor's free speech rights are refuted by the allegations in the petition itself, for the donor alleges he will continue to donate to Law Clinic.[64]

The donor likewise has no standing to complain about the way Rule XX purportedly impacts on the use of his donated funds. His allegation that the Supreme Court's amendments "control the use of private funds" is completely unsupportable, for Rule XX regulates representation in Louisiana courts by non-lawyers; it does not "control the use of private funds." Further, the donor does not allege that, prior to the Rule XX amendments, he was able to dictate to TELC how the money he donated (the amount of which is not set forth in the complaint) be used. In any event, such a theoretical claim to injury cannot support standing. *See Lewis v. Casey*, 518 U.S. 343, 351, 116 S.Ct. 2174, 2180, 135 L.Ed.2d 606 (1996) (prison inmate could not establish "relevant actual injury"

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[64] Complaint, ¶123: "SHEARER has contributed, *and will continue to contribute, funds* to support TELC . . ." (emphasis supplied).

by simply establishing that the prison library or legal assistance program was sub-par "in some theoretical sense.").

Finally, the donor's allegations about Rule XX's purported impact on the rights of others must fail, for the donor is neither a student nor faculty member,[65] and he has no standing to raise claims on their behalf. To assert third-party standing, the U.S. Supreme Court required that the following three preconditions be met: (1) an injury in fact to the party; (2) the party has a close relationship to the third party; and (3) there is some hindrance to the third party asserting his or her own rights. *Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364, 1370-71, 113 L.Ed.2d 411 (1991). The donor fails to meet any of these tests,[66] and those whose rights he seeks to vindicate are already parties to this action.

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[65] The donor's own allegations about faculty independence undercut his claim of any real injury. The donor alleges both that the Rule XX amendments "prevent TELC faculty from exercising *their independent* pedagogic *judgment* about what and how to teach in their classes" and that the amendments "undercut *SHEARER's wish that such judgment be exercised to enforce laws and advance the public interest.*" Complaint ¶ 125 (emphasis added). If the faculty's judgment were truly independent, Mr. Shearer's "wish that such judgment be exercised to enforce laws and advance the public interest" would be just that — a wish.

[66] The donor cannot even meet the "close relationship" test, and his negligible connection to the law students and Law Clinic are easily distinguishable from those cases where standing has been found. For example, in *Singleton v. Wulff,* 428 U.S. 106, 117, 96 S.Ct. 2868, 2875, 49 L.Ed.2d 826 (1976), the Supreme Court found a sufficiently close relationship where two licensed physicians brought a challenge of a state statute excluding non-medically indicated abortions from medical benefits. As the Court observed in *Singleton,* to secure a safe abortion a woman needs the aid of a physician, and the decision to abort "is one in which the physician is intimately involved." *Id.*; *see also Barrows v. Jackson,* 346 U.S. 249, 259, 73 S.Ct. 1031, 1036, 97 L.Ed 1586 (1953), *reh. denied,* 346 U.S. 841, 74 S.Ct. 19, 98 L.Ed. 361 (1953) (the owner of real estate subject to a racial covenant had standing to challenge the covenant in part because she had the power to continue or to discontinue the discriminatory use).

6.4 **The Standing of the Law Professors**

With regard to the "law professor-plaintiffs,"[67] the complaint alleges that they are "'supervising lawyers' and 'clinical program supervising lawyers' within the meaning of the Rule XX Amendments." Complaint ¶ 15. As discussed *supra*, they do not allege a concrete and particularized injury in fact, *i.e.*, an invasion of a legally-protected interest. *See Lujan*, 504 U.S. at 560, 112 S.Ct. at 2136. Certainly, nothing in Rule XX impacts their actions in or outside of the classroom. As lawyers, they themselves can take on the representation of any of the client-plaintiffs today. They can speak in any way they wish, in any forum that they desire. The Texas court's statement in *Drew v. Unauthorized Practice of Law Committee*, 970 S.W.2d 152 (Tx.App.-Austin 1998), discussed earlier in this memorandum, is applicable here to each of the professors; Rule XX, like the Texas rule complained of in *Drew*, "does not prohibit him from speaking out against perceived injustices and therefore does not impermissibly infringe on his First Amendment rights." *Id.* at 155.

6.5 **The Standing of the Student Organizations**

The complaint names five "student-plaintiffs": two student organizations and three law students. The student organization (ELS) is, according to the Complaint, "an organization of students at Tulane University Law School who share academic, legal, recreational, and general interest in the environment." Complaint ¶ 16(a). The Complaint alleges that ELS's First Amendment rights have been violated. Complaint ¶ 111. Neither ELS nor its members have any First Amendment rights in this context; these plaintiffs cannot establish standing.

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[67] According to the Complaint, two of the law professor-plaintiffs are co-directors of TELC (Professors Keuhn and Gobert), one is a clinical instructor with TELC (Ms. Teel), one is the director of the Tulane Civil Litigation Clinic (Professor Johnson), and one is the director of the Loyola Law Clinic (Professor Quigley). Complaint ¶ 15(a)-(e).

Plaintiff GAPSA, according to the Complaint, is "the governing entity for all graduate and professional students at Tulane" and represents "graduate and professional students in the schools of Law, Medicine, Public Health, Engineering, Social Work, and Graduate Liberal Arts." Complaint ¶ 16(b). For the same reasons as set forth above, neither GAPSA nor its members have any cause of action and therefore cannot bring a claim.

7. DISCOVERY IS REQUIRED ON THE STANDING ISSUES INVOLVING THOSE PLAINTIFFS WHO ARE OR SEEK TO BE CLIENTS OF THE CLINIC

The Louisiana Supreme Court has demonstrated that the client-plaintiffs have no cause of action to seek free counsel in a civil action (be it law student representation or otherwise); they have no basis to assert a claim, no injury, and thus no standing. Should this Court, however, not dismiss their complaint outright, then, because standing is jurisdictional, discovery is appropriate to address factual issues regarding their allegations of standing.

The minimum requirements for standing of a plaintiff were laid out in *Lujan:*

> "First, the plaintiff must have suffered an 'injury in fact' — an invasion of a legally-protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' not 'conjectural' or 'hypothetical[.]' Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result of the independent action of some third party not before the court'. Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" 504 U.S. at 560, 112 S.Ct. at 2136 (internal citations omitted).

The United States Supreme Court has observed that where a plaintiff is challenging the legality of government action, the extent of the facts which must be averred (at the summary judgment stage) or proven (at trial) depends considerably on whether plaintiff is himself the object

of the government action. *Lujan* at 2137. When a plaintiff's asserted injury arises from the government's regulation of someone else, more is needed than when the plaintiff is the object of the governmental action. *Id.* Thus, it is not enough that the plaintiffs allege elements of their claims; since they bear the burden of proof, and since many of their allegations are factual in nature, an evaluation of their standing requires an evidentiary hearing, and the defendant is entitled to discovery on the basis of these factual allegations. As the defendant has noted in a companion motion and memorandum filed today with this Court, it is submitted that there should be no discovery at all until the defendant's Rule 12(b)(6) motion is decided; after that time, the only discovery that should occur should be limited to standing issues involving the plaintiffs.

Time and again in their pleadings, the client-plaintiffs allege as a crucial basis of their right to bring this action that they "lack resources to retain private counsel,"[68] "were unable to obtain free representation from other sources,"[69] "do not have adequate resources to retain private counsel to handle complicated and expensive environmental litigation,"[70] and "are not aware of available counsel capable of handling such complicated matters, especially in the environmental area,"[71] especially those who "are willing to work *pro bono*."[72] The entity client-plaintiffs claim that they are unable to even track the income of their members.[73]

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[68]Complaint, ¶3(b). Also see ¶¶3(d), 13(a), 13(b), 13(c), 13(d), 13(e), 13(f), 13(g), 13(h), 13(i), and 13(j).

[69]Complaint, ¶25.

[70]Complaint, ¶77.

[71]Complaint, ¶78.

[72]Complaint, ¶79.

[73]Complaint, ¶¶64, 65, 66.

(continued...)

As can be seen, the plaintiffs are asserting a right to *pro bono* counsel in civil actions, a matter as to which there is no cause of action. Even if there were a cause of action, however, the factual basis of these blanket assertions are and should be subject to scrutiny through discovery.

For example, as a result of these allegations, the defendant is entitled to ask each client-plaintiff for a list of every case in which it has been a party and all persons and organizations who at any time enrolled as counsel of record for that entity. In each of these cases, discovery is also appropriate on whether any member of that plaintiff entity also appeared as a party of record in that action, and, if so, in what capacity (as a member of that organization or as a separately named party or as both?). Discovery also should be had on whether any client-plaintiff ever signed any retention agreement or contract with any attorney (or organization) which dealt with payment of attorneys fees (hourly or contingent), advancing expenses, or recovery of expenses by the attorney.

In light of the allegations of the client-plaintiffs that they are indigent and unable to retain *pro bono* counsel, discovery also should focus on whether the relief sought in cases involving any of the plaintiffs included any claim for damages or attorneys fees and costs, and whether any damages, attorneys fees, or costs were obtained either through court judgment or settlement. If any were awarded, discovery on the amount and method of calculation of these items also is appropriate.

Each entity client-plaintiff also has put its financial resources at issue in conjunction with claims that each cannot afford to hire outside counsel (see Complaint, ¶13(a)-(j)). Thus, discovery into the finances, past and current, of each organization is pertinent.

This is just a partial list of the kinds of areas upon which discovery must and should be obtained to deal with the allegations of standing. The defendant has refrained from serving such

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[73](...continued)

discovery at this time, believing that the entire case must be dismissed because no cause of action is set forth.

II. CONCLUSION

As has been shown, there is no federal statutory or constitutional right to legal representation in civil matters. There is no right to have law students represent individuals or groups, indigent or otherwise, in civil matters.

An abundance of allegations is not a substitute for a cause of action. The legitimacy of a complaint is not determined by its length. If there were no Rule XX, law students could not represent any person or entity in any Louisiana Court. With or without Rule XX, the client-plaintiffs cannot demand the right to counsel in a civil action. Rule XX's existence causes no cognizable injury to law professors, to student organizations, or to donors to the Law Clinic (an entity that is not a party to this suit).

This complaint is without merit and should be dismissed.

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CERTIFICATE

I certify that a copy of this pleading has been sent to opposing counsel today, either through Hand-Delivery, through Federal Express overnight delivery, or by U.S. Mail, postage prepaid:

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Baton Rouge, Louisiana, this 26th day of May, 1999.

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