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Re: Comments on Proposed Amendments to SJC Rule 3:03

Dear Attorney Phinney:

On behalf of the Boston Bar Association ("BBA"), I thank you for the opportunity to comment on amendments to Supreme Judicial Court Rule 3:03 as proposed by the SJC Committee to Study Rule 3:03 (Committee). The BBA's members include many law students and lawyers who have benefited from the Rule, either during law school or as supervising attorneys. As an organization, our mission is to "advance the highest standards of excellence for the legal profession, facilitate access to justice, foster a diverse and inclusive professional community, and serve the community at large," and Rule 3:03, as currently written, has been effective in promoting these goals. For this reason, the BBA took a keen interest in the proposed changes and shared them with all our sections for possible comment. These comments were prepared by the BBA's Delivery of Legal Services section, which brings together leaders from across the legal-aid community, who work alongside the private bar in efforts to identify community needs and engage in meaningful pro bono efforts. The section focuses on improving access to legal services, with special attention to the challenges of low-income communities.

Because the proposed Rule 3:03 amendments, if adopted, will create unnecessary barriers to law student contributions to pro bono efforts and will undermine access to justice for community members of limited means, we write to register our concerns about several of the proposed amendments. The BBA Council voted to endorse the comments as a formal position of the BBA, because of the importance of Rule 3:03 and the salience of these concerns.

To begin, we must emphasize that law students play a critical role in helping to address the access to justice crisis in Massachusetts. Through law school clinical programs and school year and summer internships with legal services providers and other pro bono organizations, law students make substantial and invaluable contributions to our shared goal of expanding access to justice.¹ Law students are force multipliers. They expand the capacity of organizations to provide free legal representation at all times of the year and in all manner of case types, everything from housing law to family law, and from safety net benefits to criminal law, and much more. Rule 3:03 is the mechanism by which this army of public-service minded law students—working under attorney supervision—can appear in court and before other tribunals on behalf of low-income clients. Thus, among what are certainly many relevant considerations, any proposed amendments to Rule 3:03 must also be carefully analyzed through an access to justice lens.²

¹ See Colleen Shanahan, *et al.*, *Measuring Law School Clinics*, 92 *Tulane L. Rev.* 547 (2018) (describing empirical study and analysis showing that clinical law programs were equally effective in their representation of low-income clients compared to lawyers generally).

² See Boston Bar Association, Statewide Task Force to Expand Civil Legal Aid in Massachusetts, *Investing in Justice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts* 2, 6 (Oct. 2014) (describing

In our view, the proposed amendments to Rule 3:03, if adopted, would operate to restrict access to justice. This is so for several reasons. **First**, because of the structure of many law schools' upper-level curricula, the proposal to require a course in professional responsibility as a pre-requisite or co-requisite would dramatically reduce the number of second-year students who can enroll in a clinic and contribute to the representation of clients under Rule 3:03.³ It is our understanding that in many law schools professional responsibility is a third-year course. The existing Rule ensures close attorney supervision, contains other curricular requirements that properly balance the need for classroom training and hands-on learning opportunities, and provides sufficient protection for the public.

Second, and in the same vein, the proposal to require a separate course in criminal procedure as a predicate for law student representation of indigent clients in criminal law matters would dramatically reduce the number of students who can enroll in a criminal defense clinic and contribute to the representation of clients under Rule 3:03.⁴ It is our understanding that law school offerings do not always make a criminal procedure course readily available to second-year students. Further, even when such a course might be offered with slots available to second-year students, the semester when that course is offered may not be well timed with when a criminal defense clinic enrollment opportunity arises. Again, the existing Rule ensures close attorney supervision, contains other curricular requirements that properly balance the need for classroom training and hands-on learning opportunities, and provides sufficient protection for the public.

Third, access to justice will be seriously undermined by the proposal to bar students from appearing before administrative tribunals unless the administrative agency has affirmatively adopted a regulation authorizing students to participate in cases under Rule 3:03.⁵ At present, Rule 3:03-certified law students contribute to the representation of low-income clients in a wide variety of important administrative law matters, including, but not limited to, unemployment insurance, healthcare access, income supports, and veterans' benefits. These cases involve critical components of the Commonwealth's social safety net. Many fewer low-income clients would receive representation in these matters if law student participation were governed by the vagaries and often extended timelines of each individual agency's rulemaking process. Moreover, the proposed amendment risks creating a patchwork of agency-by-agency restrictions on law student participation. This will lead to uncertainty and constrain the ability of legal services providers and pro bono organizations to triage requests for legal assistance effectively and deploy their resources—including law student resources—in a way that best meets community need.

Fourth, the proposed amendments appear to eliminate the ability of second-year clinical law students to appear in civil proceedings in Superior Court.⁶ As is true with other Commonwealth tribunals, law students currently appear before the Superior Court under Rule 3:03 in the course of representing indigent clients. These cases range from consumer law matters to judicial review of agency decisions and a host of other matters. By restricting the ability of law students to appear in Superior Court in civil matters, legal services providers and pro bono organizations will be forced to take fewer cases to Superior Court, leaving more indigent clients without representation and with severely diminished, if not extinguished, odds of vindicating their legal rights.

Fifth, the proposed amendments would reinforce the disadvantages that indigent litigants face by creating a two-tiered system for a tribunal's regulation of advocacy in the courtroom.⁷ Judges already possess an array of tools to ensure the orderly administration of justice—for licensed

how legal aid programs, because of limited resources, turned away 64% of low-income clients eligible for free representation and recommending, among other things, that law school clinical programs be expanded to address the crisis in access to justice).

³ Proposed Amended Supreme Judicial Court Rule 3:03 (Proposed Rule) § 3.1(e)(iii) (2024).

⁴ *Id.* at § 4.2(a).

⁵ *Id.* at § 4.3.

⁶ *Id.* at § 4.6.

⁷ *Id.* at § 4.7.

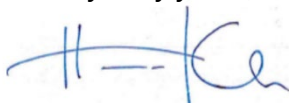
attorneys and Rule 3:03-certified law students alike.⁸ If adopted, the proposed amendment authorizing exclusion specific to Rule 3:03-certified law students would have a chilling effect on legal services and pro bono lawyers, and, in turn, negatively affect the already-limited representation available to low-income community members. Indeed, the proposed amendment would encourage the creation of two classes of litigants—one whose chosen representative is subject only to the Court’s general discretion to manage trials and attorney conduct and the other whose chosen representative is also subject to a unique exclusionary rule directed solely at Rule 3:03-certified team members. Critically, these two classes of litigants would be divided by socio-economic status. Because of Rule 3:03’s—entirely logical—focus on representation for indigent parties, those whose representatives were not at risk of exclusion would necessarily belong to higher socio-economic statuses. And those whose representatives were uniquely at risk of exclusion—because their litigation team included a Rule 3:03-certified law student or students—would necessarily belong to lower socio-economic statuses. Further, because income-level is strongly correlated with race in Greater Boston, these two classes of litigants would also be divided by race to a substantial extent.⁹ In this and the other ways outlined above, the proposed amendments risk reinforcing the disadvantages low-income community members, particularly low-income community members of color, face within our legal systems.

Even apart from these specific concerns and threats to access to justice, we believe that the proposed amendments would likely have a general negative impact on the legal profession in Massachusetts. There is considerable evidence that law students especially value and benefit from experiential learning opportunities, including through participation in clinics and internships.¹⁰ To whatever extent hands-on learning opportunities for students are restricted, law students’ transition into the profession will be bumpier. What is more, as students even decide in what jurisdiction they may want to attend law school and where they may want to put down roots and build their legal careers, the availability of experiential learning opportunities while in law school may be an important factor. The health of the Commonwealth’s legal profession, the vibrancy of its bar associations and affinity groups, and the learning and career pathways that are available to law students and law graduates—all depend on our ability to provide hands-on learning opportunities for students commensurate to the opportunities other states provide, and on our ability to ensure that there is an effective pipeline for new lawyers to join the ranks of our profession dedicated to addressing the pressing civil and criminal law needs of our most vulnerable community members.

As we encourage students to enter our noble profession and to uphold the profession’s pro bono ideals, we would urge the Committee to be extremely cautious about any amendments that might—however unintentionally—erect barriers to law student participation in the representation of indigent clients. Our collective commitment to access to justice requires deliberate consideration of any amendments to Rule 3:03.

We appreciate the Committee’s careful work and deliberations. And we thank the Committee for its consideration of our comments. Please feel free to contact me should you have any questions or concerns.

Very truly yours,



Hannah L. Kilson
President

⁸ See, e.g., *Olson v. Ela*, 8 Mass.App.Ct. 165, 169-72 (1979) (describing trial court’s broad discretion to determine how a trial proceeds and the orderly presentation of evidence, including what questions can be posed to witnesses); *Comm. v. Portillo*, 462 Mass. 324, 332 (2012) (describing trial judges’ “inherent authority reasonably to manage a trial...”).

⁹ See The Boston Foundation, [The Greater Boston Housing Report Card 4](#) (2023) (“The housing crisis has direct ties to our state’s racial wealth gap.”).

¹⁰ Shanahan, *supra* n. 1.

