IN UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Martin Wishnatsky, Plaintiff, v. Laura Rovner, Director; Clinical Education Program, University of North Dakota, School of Law, in her individual and official capacity, Defendant.	)	**Civil Case No. A2-04-1**

BRIEF OF THE CLINICAL LEGAL ASSOCIATION AND THE SOCIETY OF AMERICAN LAW TEACHERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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INTERESTS OF AMICI

The Clinical Legal Education Association (CLEA) is a non-profit educational organization formed in 1992 to improve the quality of legal education both in the United States and abroad. CLEA currently has over 700 dues-paying members representing more than 160 law schools in the United States, including members in the State of North Dakota, and additional members from law schools in other countries. CLEA supports the integration of lawyering skills and professional values in law school curricula through clinical courses in which law students learn by doing. CLEA and its members are committed to training law students to be competent, ethical practitioners.

The Society of American Law Teachers (SALT) was founded in 1973 by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to social concerns. SALT is now the largest membership organization of law professors in the United States, with over 850 members at more than 150 schools. SALT is committed to fostering public service in law practice, promoting social justice and advancing human rights. Encouraging and enabling greater access to the legal profession, transforming law school curricula to meet the needs of a just society, protecting academic freedom, and promoting legal services for underserved groups have always been central components of that mission. Many SALT members are educators who teach clinical legal skills. Others who are not clinicians teach at schools that have clinical programs, and they are familiar with and supportive of such programs.

CLEA and SALT offer their views to this Court because they and their members believe that clinical legal education is an important component of the overall education of our nation's

future lawyers, and an important means to providing legal representation to clients who would otherwise not be represented. CLEA and SALT firmly believe that the outcome of the pending case will affect the ability of the University of North Dakota School of Law to provide a first-rate ethical legal education, contribute important pro bono services to citizens of North Dakota, and may affect legal education in other parts of the United States as well. CLEA and SALT also believe that the fundamental ethical obligations of lawyers are at issue in this matter, as well as important issues of academic freedom for law school faculty.

ARGUMENT

I. Law School Clinics, Including Those at the University of North Dakota School of Law, Are Fundamental Components of Legal Education; In Light of Her Educational Goals, Professor Rovner Appropriately Declined to Represent the Plaintiff

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

Clinical education is now well established in American law schools and is a necessary component of the professional education of lawyers. The origins of clinical legal education date back as far as the early part of the twentieth century, when several law schools began using real cases to teach law students.[1] In 1933, Jerome Frank proposed that each law school develop a legal clinic, staffed by full-time "teacher-clinicians."[2] In the ensuing decades, leaders of the bench, bar and academia recognized that our nation's law schools were insufficiently preparing

[1] See, e.g., John S. Bradway, The Beginning of the Legal Clinic of the University of Southern California, 2 S. Cal. L. Rev. 252 (1929) (describing general practice clinic); John S. Bradway, Some Distinctive Features of a Legal Aid Clinic Course, 1 U. Chi. L. Rev. 469 (1934) (discussing clinical legal education and clinical program at Duke University).

[2] Jerome Frank, Why Not A Clinical-Lawyer School, 81 U. Pa. L. Rev. 907, 917 (1933); see also Karl N. Llewellyn, On What Is Wrong With So-Called Legal Education, 35 Colum. L. Rev. 652 (1935).

lawyers for practice and called for greater attention to lawyering tasks other than legal reasoning and writing.

By the 1960's, most American law schools had some form of clinical course in their curricula. Through the Council on Legal Education for Professional Responsibility (and, its predecessor, the Council on Education in Professional Responsibility), the Ford Foundation provided seed money for clinical programs at law schools across the country.[3] Former Chief Justice Warren Burger was a leading proponent of clinical legal education. In 1973, he complained that "from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."[4] He called for expanded law school skills programs: "The law school . . . is where the groundwork must be laid."[5]

Chief Justice Burger's campaign led to calls for even greater attention to clinical legal education. A committee formed within the Second Circuit found "a lack of competency in trial advocacy in the Federal Courts," and recommended that law schools teach trial skills.[6] A committee from the United States Judicial Conference made similar recommendations.[7] An American Bar Association task force also recommended that law schools offer instruction in litigation skills.[8] Amplifying the support of clinical programs by both the bench and bar, the United States Court of Appeals for the District of Columbia Circuit noted that "[t]his practice [student intern practice] has been praised by members of the judiciary and encouraged by the

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[3] See George S. Grossman, Clinical Legal Education: History and Diagnosis, 26 J. Legal Educ. 162, 172-80 (1974).
[4] Warren E. Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227, 234 (1973).
[5] Id. at 233.
[6] See Final Report of the Advisory Committee on Proposed Rules for Admission to Practice, 67 F.R.D. 161, 164, 167-68 (1975).
[7] See Final Report of the Committee to Consider Standards For Admission To Practice in the Federal Courts to the Judicial Conference of the United States, 83 F.R.D. 215 (1979).
[8] Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 3-4 (1979) (Recommendation 3).

Judicial Conference of the United States, and we have ample reason to extend our commendation." Jordan v. United States, 691 F.2d 514, 523 (D.C. Cir. 1982) (footnotes omitted).

In 1992, the ABA's Task Force on Law Schools and the Profession addressed the problem of lawyer competency and recommended that legal education necessarily include instruction in lawyering skills and professional values. The Task Force also promulgated The MacCrate Report, a statement of skills and values necessary for lawyers to assume "ultimate responsibility for a client."[9] These necessary skills are problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and litigation alternatives, organization and management of legal work, and recognizing and resolving ethical dilemmas.[10] The necessary values include: providing competent representation; seeking to promote justice, fairness, and morality; seeking to improve the profession; and commitment to self-development.[11] According to the Task Force, law schools must play an important role in developing these professional skills and values.[12]

As a result of these recommendations, professional skills programs are now firmly established in American law schools. Each law school accredited by the ABA "shall . . . offer instruction in professional skills."[13] Moreover, the ABA specifically acknowledged the value of law school clinics by amending its Standard 302 in 1996. In order to achieve and maintain ABA accreditation, a law school now must offer "live-client or other real-life practice experience."[14]

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[9] Legal Education and Professional Development – An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) 125 (1992) (hereafter MacCrate Report).
[10] Id. at 138-140.
[11] Id. at 140-141.
[12] Id. at 331-32 (Recommendations C.12, C.13, C.15, C.16, C.17 and C.19).
[13] ABA, Standards for Approval of Law Schools (1996) (Standard 302(a)(iv)).
[14] Id. (Standard 302(d)).

The profession thus recognizes that law school clinics in which faculty teach students through the vehicle of actual cases are necessary to the professional education of law students.

Law school clinics are unique vehicles for teaching law students the professional skills and values they must master.[15] In present-day clinics, students represent clients under student practice orders as the primary lawyer. They "meet with clients and witnesses to gather facts, analyze clients' legal problems and provide legal advice, negotiate matters on behalf of clients with opposing parties, and represent clients before courts and administrative tribunals."[16] Clinical programs strongly reinforce the non-clinical curriculum in developing students' legal analysis and research skills; more importantly, they provide law teachers an unequalled format for teaching students problem-solving, factual investigation, counseling, litigation, and negotiation.[17] Lawyering skills instruction must "(1) develop[ ] students' understanding of lawyering tasks, (2) provid[e] opportunities to . . . engage in actual skills performance in role, and (3) develop [students'] capacity to reflect upon professional conduct through the use of critique."[18] Professional educators consider each of these aspects of skills instruction in structuring law school clinics.

Additionally, in order to become competent and responsible attorneys, law students must be taught to recognize and resolve ethical dilemmas.[19] Live-client clinics have been widely recognized to have exceptional value in teaching professional responsibility and ethical skills.[20]

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[15] See MacCrate Report, at 234.
[16] Robert R. Kuehn and Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics,* 71 Fordham L. Rev. 1971 (2003).
[17] See MacCrate Report, supra, at 234.
[18] Id. at 243.
[19] See Maureen E. Laflin, *Toward the Making of Good Lawyers: How an Appellate Clinic Satisfies the Professional Objectives of the MacCrate Report*, 33 Gonz. L. Rev. 1, 4 (1997).
[20] See, e.g., Joan L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 Clinical L. Rev. 109 (1996).

To impart these skills, clinical professors themselves must be able to identify, analyze and decide the correct course when confronted with ethical issues.[21] Clinical professors are ethical role models[22] and clinics should be structured as "ethical law firms."[23]

B. Case and Client Selection and Professional Responsibility Are Crucial to a Clinic's Educational Role.

Clinic professors must be careful to select appropriate cases and clients in order to fulfill the educational goals of the clinic.[24] Cases must be screened according to student availability, level of difficulty and complexity, educational value, student and faculty interest and expertise, and time constraints.[25] A case should have the potential to providing students with actual litigation experience. A case that is likely to lack merit and thus be quickly dismissed would provide little "hands-on" experience for the students handling the case. Likewise, representation of a client in only certain phases of litigation would not fulfill a clinic's objectives of exposing students to as many facets of litigation as possible. If the very purpose of a clinic is to provide students with the opportunity to engage in "problem solving, factual investigation, communication, counseling, negotiation, and litigation," then the cases that the students handle must be likely to present those opportunities.[26]

For clinics that specialize in substantive legal areas, it is also important that the cases the students handle teach them about the law in that particular area. Cases that have no relation to the substantive law in which the clinic specializes should therefore not be chosen. Likewise, professors should decline a case that will merely duplicate what the students are already learning.

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[21] Laflin, supra, at 18.
[22] See Eleanor W. Myers, *"Simple Truths" About Moral Education*, 45 Am. U.L. Rev. 823 (1996).
[23] See Peter A. Joy, *The Law School Clinic as a Model Ethical Law Office*, 30 Wm. Mitchell L. Rev. 35 (2003).
[24] Cf. Paul D. Reingold, *Why Hard Cases Make Good (Clinical) Law*, 2 Clinical L. Rev. 545 (1996)(arguing that short, routine cases do not provide same learning opportunities as complex cases).
[25] Laflin, supra, at 9-10.

In sum, an overriding consideration, aside from logistical concerns, should be whether the case would be manageable yet challenging for students.[27]

While careful case selection is critical to a successful clinical curriculum, the selection of the client is equally important. In order to achieve the educational objectives of the clinic, the client should provide the students with a meaningful opportunity to interact and communicate so that the students will be able to form a strong lawyer-client relationship. Clinical students learn necessary counseling,[28] problem solving,[29] fact gathering and negotiating[30] skills through interactions with live clients. All of these elements require the active participation of the client. If a hostile or distrustful client were selected, the educational goals of the clinic might be undermined. While there may be some value in learning to handle a difficult client, the teaching of basic lawyering skills would be hampered by a client who had no real interest in forming a meaningful lawyer-client relationship.

Finally, law school clinics provide a unique opportunity for law students to grapple with their ethical obligations. Law student practice rules allow students to act in the role of lawyer under the supervision of a law professor.[31] In live client clinics, law professors and law students are governed by the rules for professional conduct of their jurisdiction. Of course, clinical professors and law students must act ethically like all other lawyers. The standards by which a clinical professor's acceptance or rejection of clients should be judged are no different than those of any other lawyer. The only important difference is that the considerations informing a clinical

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[26] MacCrate Report, supra at 234.
[27] Id. at 10.
[28] Id. at 39. See also Amy Gutman, *Can Virtue Be Taught to Lawyers?*, 45 Stan. L. Rev. 1759 (1993)(arguing that reaching mutual understanding of clients' informed preferences is ethical virtue taught in clinics).
[29] Id. at 20.
[30] Hurder, supra (advocating for process of negotiation in forming collaborative lawyer-client relationship through case study of clinical client).

professor's choice of client will necessarily be intertwined with the clinic's educational objectives.

C. The Civil Rights Project at the University Of North Dakota School Of Law is An Important Part of that Law School's Educational Program; Professor Rovner's Decision to Decline to Represent Mr. Wishnatsky Was Appropriate in Light of the Goals of that Program.

The Clinical Education Program at the University of North Dakota fulfills the educational goals set out by The MacCrate Report and the ABA. Specifically, the Civil Rights Project teaches students lawyering skills and values through their representation of clients with claims involving violations of civil and constitutional rights. (Affidavit of Laura Rovner in Support of Motion for Judgment on the Pleadings [hereafter Rovner Aff.] ¶ 3.) In the course of such representation, the Project's director, Professor Laura Rovner, the defendant in this case, is able to teach the students skills in the areas of "problem solving, factual investigation, communication, counseling, negotiation, and litigation."[32] The supervision and critique provided by Professor Rovner and her colleague, Professor Margaret Moore Jackson, are vital to the proper development of the skills that the students of University of North Dakota Law School will need after admission to the bar.[33] Professors Rovner and Jackson teach professional skills not only through supervision but also by their examples as ethical and professional role models.

In the present case, Professor Rovner has identified many of the goals of the Clinical Education Program at the University of North Dakota. The clinic's primary mission is the education of law students. (Rovner Aff. ¶ 5.) Specifically, the Civil Rights Project seeks to provide students with the opportunity to work on "complex civil rights matters" and to teach

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[31] See, e.g., N.D.R. Ltd. Practice of Law by Law Students.
[32] MacCrate Report, supra, at 234.
[33] See id. at 243.

students "how to represent clients on different types of claims (typically those involving violations of civil and constitutional rights) and to give them the opportunity to learn federal court practice." (Rovner Aff. ¶ 3.) It is these general goals that Professor Rovner seeks to achieve when selecting cases for her students to work on. In determining whether to take a new case, Professor Rovner considers primarily "whether . . . the case will provide a good educational experience for the students." (Rovner Aff. ¶ 7.) Additionally, she considers "factors such as the current mix of cases in [the] docket as well as whether . . . an applicant's situation presents a viable legal claim."

The plaintiff in this case, Martin Wishnatksy, asked the clinic to assist him in a challenge to the presence of a statue of "Blind Justice" in a local courthouse. Professor Rovner and the Clinical Education Program at the University of North Dakota declined to represent Mr. Wishnatsky for a number of reasons. The primary reason for the clinic's refusal was the Project's inability to take on any more cases due to a lack of time and resources. (Rovner Aff. ¶ 16.) However, Professor Rovner also had curricular and ethical concerns with Mr. Wishnatsky's proposal. These included the lack of meaningful litigation opportunities the claim would present; the duplicative nature of Wishnatsky's claim with another case the clinic was handling; and the general harassing behavior of Wishnatsky towards her office and herself. (Rovner Aff. ¶¶ 10-11, 14-16.) Given the goals of the clinic, these were all appropriate reasons to decline representation of Wishnatsky.

Professor Rovner's curricular reasons for declining to use Mr. Wishnatsky's case for teaching purposes were substantial. First, the legal assistance Mr. Wishnatsky sought would not have presented clinic students with even the possibility of participating in a wide array of litigation-related experiences. He was not requesting actual legal assistance, but instead asked

only for help in conducting research. Specifically, he sought aid in researching "the pagan religious origins of the Themis statute and . . . the facts demonstrating its roots in heathen worship." (Rovner Aff. Ex. 6. (Letter from Wishnatsky to Rovner of 10/29/03).) Such a research project would not present any opportunities for "hands-on" education and would not further any of the educational goals of the clinic. In fact, that is precisely why it is the Clinical Education Program's policy to "decline all requests for mere fact-finding, research, and other "'assistance' with lawsuits. (Jackson Aff. ¶ 9.) Furthermore, Professor Rovner determined that the case Wishnatsky was himself pursuing (or perhaps pretending to pursue) was unlikely to state a claim. Taking a case that has no merit implicates a lawyer's ethical obligations and certainly would further frustrate the Project's goal of providing a complete litigation experience for its students.

Second, even had Mr. Wishnatsky sought full representation from the Project for his entire case, his claim was substantively duplicative of another claim the Project was already pursuing. This was an Establishment Clause claim with respect to a monument of the Ten Commandments on government property. (Rovner Aff. ¶ 10.) Accordingly, Professor Rovner determined that handling a second Establishment Clause claim challenging an allegedly religious monument on government property would raise "very similar issues" and would therefore lack educational benefit to the students. (Rovner Aff. ¶ 16.)

Finally, Professor Rovner declined to accept Mr. Wishnatsky's case on ethical grounds. She made this determination based on Mr. Wishnatsky's previous treatment of the clinic and his harassing statements about her personally. (Rovner Aff. ¶ 10-11, 14-15.) Mr. Wishnatsky sent his request for representation not only to the Civil Rights Project but to media outlets and Representative Kasper, who had publicly questioned the actions of the clinic in the Ten

Commandments case. (Rovner Aff. ¶ 13.) His letter asking the Project for help did not appear to be a sincere request but instead an attempt to lay the groundwork for accusing the Project and Professor Rovner of hypocrisy. Professor Rovner was not the only one to understand it as such. A local newspaper ran a story about the request for representation, entitled "Goddess Gotcha," and noted that Wishnatsky "seems to be tweaking UND officials in his letter." Mr. Wishnatsky validated that perception by writing an editorial analogizing his request to *Twombly v. City of Fargo* and criticizing Professor Rovner and the Project. (Rovner Aff. ¶ 15, Ex. 10.)

Under the circumstances, Professor Rovner determined that the clinic would be unable to establish an effective attorney-client relationship with Mr. Wishnatsky. (Rovner Aff. ¶ 16.) Absent an effective attorney-client relationship, clinic students would lack any meaningful opportunity to conduct client interviews, counsel the client, or engage in any other activity that requires the client's active co-operation. Due to the evident antagonism of Mr. Wishnatsky toward her personally and toward the Project, Professor Rovner was obligated to take particular care in her decision whether to accept him as a client, since her students would bear the burden of working with a client who would be hostile to them from the outset.

II. The North Dakota Rules of Professional Conduct Require a Lawyer to Decline Representation under Certain Circumstances; Professor Rovner's Decision to Decline to Represent the Plaintiff Was Correct under these Rules.

A. Lawyers Have a Duty to Reject Clients When they Would be Unable to Provide Them With Diligent Representation; Professor Rovner's Decision to Reject the Plaintiff as a Client Was Compelled Under this Standard.

In North Dakota, as elsewhere, clinical professors and clinic law students must conform to the applicable professional standards.[34] The North Dakota Rule on Limited Practice of Law

[34] The North Dakota Rules of Professional Conduct are largely adapted from the Model Rules of Professional Conduct promulgated by the American Bar Association ("Model Rules"). The Model Rules were originally adopted in 1983 following the recommendation of the ABA appointed Kutak Commission. Regulation of Lawyers: Statutes

by Law Students specifically provides that a clinical professor "shall assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work."[35] In this case, Professor Rovner carefully considered and applied the correct ethical constraints when she concluded that, due to Mr. Wishnatsky's personal hostility to them, she and her students would be unlikely to be able to provide him with the zealous representation an attorney owes her client. She was therefore ethically compelled to decline to represent him.

The traditional rule is that lawyers enjoy almost complete discretion in their selection of clients.[36] This rule found its first statement in the Canons of Professional Ethics, adopted in 1908, which provided that "No lawyer is obligated to act either as adviser or advocate for every person who may wish to become his client."[37] One noted commentator has likewise stated, "[A] lawyer may refuse to represent a client for any reason at all—because the client cannot pay the lawyer's demanded fee; because the client is not the lawyer's race or socioeconomic status; because the client is weird or not, tall or short, thin or fat, moral or immoral."[38] This oft-quoted statement of a lawyer's prerogative deserves revision; a lawyer's discretion in selecting clients is not quite so absolute. First, several states have adopted laws that prevent invidious

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and Standards 4 (Stephen Gillers & Roy D. Simon eds., 2003). They replaced the ABA Model Code of Professional Responsibility ("Model Code"). Id. The Model Code was the product of the 1969 reformulation of the original statement of attorney ethics, the ABA Canons of Professional Ethics of 1908. Id. Many states have adopted some version of the Model Rules. Id. at 3. Other states, such as New York, retain versions of the Model Code, while a few, such as California, promulgate entirely unique formulations. Id. at 721, 939. Finally, the American Law Institute publishes the Restatement of Law Governing Lawyers clarifying what has become a highly specialized area of law. Id. at 497. While, among these, only the North Dakota Rules of Professional Conduct bind Director Rovner and the students practicing under her supervision, generalized formulations of attorney ethics are useful in analyzing the relevant issues.

[35] See N.D.R. Ltd. Practice of Law by Law Students at § VI(B).

[36] See Kuehn & Joy, supra at 1992-1998.

[37] ABA Canons of Professional Ethics, Canon 31 (1908). See also New York Code of Professional Responsibility, EC 2-26 (2000) (same).

[38] Charles W. Wolfram, Modern Legal Ethics § 10.2, at 573 (1986).

discrimination in choosing clients.[39] Second, lawyers are also encouraged to provide pro bono service to the poor[40] and are obligated to accept court appointments.[41] North Dakota Rule of Professional Conduct 6.2, comment 1, explains: "A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services."

The traditional rule clarifies that a lawyer *may* decline representation at any time and for almost any reason. There are also some traditional guidelines dictating when or for what reasons a lawyer *must* decline representation. The ABA Model Code of Professional Responsibility, Disciplinary Rule 2-109, mandates that "A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such a person wishes to: (1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harassing or maliciously injuring any person; (2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reversal of existing law." Lawyers serve an important function within the legal system as gatekeepers charged with a duty of weeding out

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[39] See, e.g., New York Code of Professional Responsibility, DR 1-102(a)(6); Stropnicky v. Nathanson, 19 M.D.L.R. (Landlaw, Inc.) 39 (MCAD Feb. 25, 1997) (holding female divorce attorney with personal dedication to fighting gender bias in family law liable for declining to represent man). See also Brenda Jones Quick, Ethical Rules Prohibiting Discrimination by Lawyers: The Legal Profession's Response to Discrimination on the Rise, 7 Notre Dame J.L. Ethics & Pub. Pol'y 5 (1993).

[40] See N.D.R. Prof. Conduct 6.1 (2003) ("A lawyer should render public interest legal service."). See also ABA Model Rule of Professional Conduct 6.1 (2002) ("Every lawyer has a professional responsibility to provide legal services to those unable to pay.").

[41] See N.D.R. Prof. Conduct 6.2 (2003) ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause. . . ."). See also MR 6.2 (2002) (same).

frivolous or harassing lawsuits.[42] Their proper discharge of this duty ensures that scarce judicial and legal resources are allocated only among meritorious claims.

North Dakota Rule of Professional Conduct 1.16 provides another circumstance under which a lawyer must decline representation. It states in relevant part, "[A] lawyer shall not represent a client . . . if: (1) The lawyer reasonably believes that the representation will result in violation of the rules of professional conduct or other law . . .."[43] At first glance, this admonition brings to mind potential breaches of the rules regarding conflict of interest.[44] Less immediately obvious, but more fundamental, are the basic tenets that lawyers must be competent[45] and diligent[46] in their representation of clients. The comment to Rule 1.16 states this idea succinctly: "A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."[47]

Like other attorneys, Professor Rovner has almost unlimited discretion in selecting clients. She is entitled to use whatever selection criteria she deems fit in choosing clients and cases to achieve her clinic's educational objectives. More importantly, she is required to decline to represent a client if she and the clinic would not be able to act competently or diligently in accordance with ethical requirements.

In this case, Professor Rovner was correct in her decision to decline to represent Mr. Wishnatsky given his history of antagonism toward the clinic and its clients. She wisely surmised that such antagonism would prevent a meaningful lawyer-client relationship. An

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[42] Robert T. Begg, *The Lawyer's License to Discriminate Revoked: How a Dentist Put Teeth in New York's Anti-Discrimination Disciplinary Rule*, 64 Alb. L. Rev. 153, 209-10 (2000).
[43] N.D.R. Prof. Conduct 1.16(a)(1). See also MR 1.16(a)(1) (substantially same).
[44] N.D.R. Prof. Conduct 1.7. See also MR 1.7 (same).
[45] N.D.R. Prof. Conduct 1.1. See also MR 1.1 (same).
[46] N.D.R. Prof. Conduct 1.3. See also MR 1.3 (same).
[47] N.D.R. Prof. Conduct 1.16, cmt. See also MR 1.16, cmt (same).

effective lawyer-client relationship cannot be formed where hostility and acrimony are present. See Wolgin v. Smith, 1996 U.S. Dist. LEXIS 12437, *12 (E.D.P.A. 1996) ("Mutual disrespect, disregard, and distrust are not the foundation of an effective attorney-client relationship."). The North Dakota Rules of Professional Conduct required that she turn down this case.

The lawyer-client relationship is of a unique character. Some have termed it a personal or intimate relationship given the exchange of secrets and confidences and the single-minded devotion required of a lawyer.[48] The attorney-client relationship has been associated with both friendship[49] and marriage. See Fisher v. State of Florida, 248 So. 2d 479, 484 (Fl. 1971) ("Shotgun weddings and enforced lawyer-client relationships fall in the same category"). These analogies recongize that lawyers and their clients must become "partners in a joint endeavor."[50]

The interests of justice are best served when lawyers are motivated to advocate for their clients with zeal.[51] The North Dakota Rule of Professional Conduct regarding conflicts of interest[52] recognizes the difficulty of diligently representing a client against whom a lawyer has strong personal feelings. The Comment following Rule 1.7 makes it clear that conflicts are not limited to financial or business dealings; lawyers' personal interests may also stand in the way of

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[48] Gabriel J. Chin, *Do You Really Want a Lawyer Who Doesn't Want You?*, 20 W. New Eng. L. Rev. 9, 13 (1998); Amy B. Letourneau, *Stropnicky v. Nathanson: Choosy Massachusetts Lawyers, Choose Your Fights With Care!*, 33 New Eng. L. Rev. 125, 148 (1998).

[49] Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

[50] Alex J. Hurder, *Negotiating the Lawyer-Client Relationship: A Search for Equality and Collaboration*, 44 Buffalo L. Rev. 71, 76 (1996).

[51] Chin, supra, at 16 (1998). See N.D.R. Prof. Conduct 1.3, cmt. ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf").

[52] N.D.R. Prof. Conduct 1.7(b) ("A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.").

their duty of loyalty.[53] Although some conflicts of interest may be waived by the client, only the lawyer can judge the depth of a conflict resulting from his or her own personal interests.[54]

B. Had She Undertaken to Represent the Plaintiff, The Standards for Terminating Existing Lawyer-Client Relationships Would Have Permitted Professor Rovner to Withdraw from His Case.

Due to her ethical obligation of diligent representation and the clinic's educational objectives, Professor Rovner declined to represent a client with whom a lawyer-client relationship could not be formed. She judged that a lawyer-client relationship could not be formed because of the already antagonistic dynamic that existed. She was free to exercise her professional judgment in this regard because she was under no obligation to accept Mr. Wishnatsky's request for legal help.

An analysis of the standards for terminating an existing lawyer-client relationship shows that the antagonism and hostility of Mr. Wishnatsky would meet even the higher standard for withdrawal of representation had an obligation to him been actually undertaken. The North Dakota Rules of Professional Conduct set out specific and detailed guidelines for terminating a lawyer-client relationship that has already commenced. Mandatory withdrawal is prescribed when the representation will lead to a violation of the law or another rule of professional responsibility, when the lawyer's physical or mental disability makes her no longer able to continue representation, when the lawyer learns that the client has perjured himself and the client refuses to inform the judge, or when the client fires the attorney.[55]

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[53] N.D.R. Prof. Conduct 1.7, cmt.
[54] Id. ("[W]ith respect to . . . the lawyer's own interests that might adversely affect the representation, the lawyer involved cannot ask for [the client's waiver] or provide representation on the basis of the client consent when the lawyer reasonably concludes that the client should not agree to the representation under the circumstances.").
[55] N.D.R. Prof. Conduct 1.16(a). See also MR 1.16(a)(substantially same).

Rule 1.16 allows permissive withdrawal for several reasons, including whenever "good cause" exists.[56] Irreparable breakdown of the lawyer-client relationship or personal animosity between lawyer and client are generally regarded to constitute good cause for withdrawal.[57] See McGuire v. Tilden, 735 F. Supp. 83, 85 (S.D.N.Y. 1990) (allowing withdrawal where fee dispute led to deterioration in relationship as evidenced by "animosity and vituperative letters documenting the hostility that exists between [client] and counsel"). Generally, the standards for withdrawal can be fairly lenient. See generally Goldsmith v. Pyramid Communications, Inc., 362 F. Supp. 694 (S.D.N.Y. 1973) (allowing withdrawal where client refused to follow attorney's settlement advice after consulting other counsel); Lasser v. Nassau Comm. Coll., 457 N.Y.S. 2d 343, 343 (N.Y. App. Div. 1983) (allowing withdrawal where client required attorney to seek approval of another attorney for all actions). Fisher v. State, 248 So. 2d 479 (Fl. 1971) (allowing withdrawal of lawyer retained by bankrupt insurance carrier from representation of insured absent "unusual circumstances" such as eve of trial timing). Courts focus on the inability to properly carry out an attorney-client relationship. Issues of respect, trust, and cooperation are

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[56] N.D.R. Prof. Conduct 1.16(b) states:

> [A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or: (1) The client persists in a course of action involving the lawyer's services that the lawyer believes is criminal or fraudulent; (2) The client has used the lawyer's services to perpetrate a crime or fraud; (3) A client insists upon pursuing objectives or means that the lawyer considers repugnant or imprudent; (4) The client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (5) The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (6) other good cause for withdrawal exists.

See also MR 1.16(b) (substantially same).

[57] See also Ashker v. Int'l Bus. Mach. Corp., 607 N.Y.S.2d 488 (N.Y. App. Div. 1994) (allowing withdrawal and citing "threats, accusations and refusal to accept her counsel's advice" as evidence that "the relationship between plaintiff and her attorney had deteriorated to the point where further representation was inappropriate"); In the Matter of an Anonymous Member of the Bar, 379 S.E.2d 723 (S.C. 1989) (allowing withdrawal where filing of grievance indicated that attorney-client relationship had deteriorated); Sobol v. District Court of Arapahoe County, 619 P.2d 765, 768 (Col. 1980)(rejecting reassignment of withdrawn counsel despite client's inability to retain another lawyer due to "mutual lack of confidence and mistrust").

key.[58] See Wolgin, 1996 U.S. Dist. LEXIS at *8 (E.D.P.A. 1996) (granting motion to withdraw citing client's lack of respect and attacks on lawyer's character); Sobol, 619 P.2d at 767 (Co. 1980) (approving withdrawal where client was uncooperative and withheld material information). A higher burden of good cause may exist for attorneys seeking to avoid or terminate a court appointment. Wilson v. State, 753 So. 2d 683 (Fl. App. 2000) (approving denial of motion to withdraw based on criminal defendant's lack of confidence and cooperation with court-appointed attorney). However, even when the court has appointed a lawyer, withdrawal may be permitted when a difficult client makes representation impossible. See Chaleff v. Superior Court of Los Angeles County, 138 Cal. Rptr. 735 (Cal. Dist. Ct. App. 1977) (allowing public defender to withdraw where pro se criminal defendant requested advisory lawyer but did not permit workable lawyer-client relationship).

To enter unnecessarily into an attorney-client relationship when it is reasonably foreseeable, if not already the case, that the relationship will be characterized by animosity, distrust and hostility, would display poor professional judgment.[59] Once a lawyer takes on a case she is under an obligation to see it through to completion.[60] A lawyer exercises good judgment in declining a representation from which she is likely to seek withdrawal in the future. An important consideration in granting or denying a motion to withdraw is the stage of the case and the potential harm to the client's interests.[61] Vachula v. General Electric Capital Corp., 199

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[58] See also Bankers Trust Co. v. Hogan, 589 N.Y.S. 2d 338 (N.Y. App. Div. 1992) (allowing withdrawal where client made verbal threats against firm and showed lack of trust in lawyer).

[59] There are of course lawyers who take on potentially difficult clients with their eyes wide open to the possibility of a rocky lawyer-client relationship because of the nature of their practice. Consider for example, lawyers who routinely work with the mentally ill or uncooperative criminal defendants. Judges may mandate the continuance of such representation, in spite of the requests of both attorney and client. See, e.g., Wilson, 753 So. 2d at 686.

[60] N.D.R. Prof. Conduct 1.16 cmt. See also Streetman v. Lynaugh, 674 F. Supp. 229, 234 (E.D. Tex. 1987).

[61] See also E.I. Dupont de Nemours & Co. v. New Press, Inc., 1999 U.S. Dist. LEXIS 1914, *3 (E.D.Pa. 1999) (denying motion to withdraw with leave to renew for parties' failure to address key issues).

F.R.D. 454, 458 (D. Conn. 2000) (denying motion to withdraw when case only days from jury selection). The probability that a withdrawal will prejudice the client's case, and delay or prejudice the administration of justice, increases as the litigation progresses. New Hampshire v. Emanuel, 549 A.2d 53 (N.H. 1994) (holding lower court abused discretion in allowing withdrawal six days before trial). It is far better to avoid a hostile relationship before an obligation to the client is formed than to risk harming the client's litigation interests when withdrawal becomes inevitable.

III. Clinical Legal Education Is Protected by the Constitutional Guarantee of Academic Freedom; Professor Rovner has a Constitutional Right to Choose those Cases and Clients that in Her Judgment Are Best Suited to Her Educational Goals.

A. Academic Freedom is an Important Right Protected by the First Amendment.

Academic freedom is fundamental to our democracy and is, of course, protected by the United States Constitution. As the Supreme Court has held, "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment." Regents of the University of California v. Bakke, 438 U.S. 265, 312 (1978). In recognition of this principle, the Eighth Circuit has emphasized the primacy of academic freedom in the nation's education system. In Lacks v. Ferguson Reorganized School Dist. R-2, 154 F.3d 904, 912 (8th Cir. 1998), for example, the court noted:

> When good educators are scared away or driven from our schools because they cannot trust the system to treat them honestly and fairly, we are all affected, most especially our children. As the Supreme Court declared over thirty years ago, [o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment.

This principle of academic freedom has a long history in Western societies. Indeed, the importance of autonomy in academic affairs was recognized and respected even by medieval authority[62] in very early European universities such as Bologna and Paris.

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

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

At 262-263 (Frankfurter, J., concurring) (quoting The Open Universities in South Africa, 10-12) (citation omitted).

The principle of academic freedom evolved not only to protect academic institutions but also to protect the rights of individual scholars "to teach, carry on research, and publish without interference from the government, the community, the university administration, or his fellow faculty members."[63] The impetus for these protections came from repeated attempts throughout history by powerful institutions to censure academicians who advocated unpopular ideas.[64] Recognition of the primacy of society's interest in free scholarship, original research, and independent inquiry underlies these developments. See Kunda v. Muhlenberg College, 621 F.2d

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[62] See, e.g., Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States, 5-6 (1955) ("In the social structure of the Middle Ages the universities were centers of power and prestige, protected and courted, even deferred to by emperor and popes . . . In internal matters the universities had the prerogative of self-government. They were autonomous corporations . . . ."); Pearl Kibre, Scholarly Privileges in the Middle Ages 325-330 (1962) (noting a measure of privilege and autonomy was always associated with the university).

[63] Thomas I. Emerson, The System of Freedom of Expression 594 (1970).

[64] See generally Hofstadter & Metzger, supra.

532, 547 (3d Cir. 1980) ("Our future, not only as a nation but as a civilization, is dependent for survival on our scholars and researchers, and the validity of their product will be directly proportionate to the stimulation provided by an unfettered thought process.").

In adherence to this tradition and these principles, the United States Supreme Court has long afforded constitutional protection to academic decision making. Nearly fifty years ago, Chief Justice Warren articulated the societal value of academic freedom in Sweezy:

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

354 U.S. at 250. In a concurring opinion in Sweezy, Justice Frankfurter noted the "grave harm resulting from governmental intrusion into the intellectual life of a university." Id. at 261 (Frankfurter, J., concurring). He wrote of the "four essential freedoms" of a university: "to determine for itself on academic grounds who may teach, *what may be taught,* how it shall be taught, and who may be admitted to study." Id. at 263 (Frankfurter, J., concurring) (emphasis added).

Ten years after Sweezy, the Court again emphasized the importance of academic freedom, specifically grounding it in the First Amendment:

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

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); see also; Bakke, 438 U.S. at 312; Shelton v. Tucker, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools."). Most recently, in Grutter

v. Bollinger, 123 S. Ct. 2324 (2003), the Court reaffirmed the "constitutional dimension, grounded in the First Amendment, of educational autonomy." Id. at 2334.

B. Academic Freedom Protects Clinical Legal Education, Including Professor Rovner's Choice of Cases and Clients.

Clinical legal education and clinical legal educators are fully entitled to academic freedom, just as are traditional university courses and teachers. As noted above, the primary objective of law school clinics is to complete the professional education of law students by giving them carefully supervised instruction in their future role through the judicious use of real-life experiences. Like other law school clinical programs nationwide, the Civil Rights Project at the University of North Dakota is designed to achieve this academic goal. Providing a real litigation experience from which the students can learn those skills and values that the faculty has identified as important to the students' education is the foremost pedagogical concern of the Project. Another important objective of the Project is to teach students civil rights law; it achieves this objective by selecting only those cases that will best enhance the students' education in this area.

These goals of the University of North Dakota's Civil Rights Project are fundamentally educational. The manner in which its faculty decides to achieve these goals is protected by academic freedom. When selecting cases and clients for the Civil Rights Project, Professor Rovner is creating the curriculum for her course. As one scholar has pointed out:

> [s]election of individual cases to handle and methods of handling those cases, like the selection of casebooks and classroom teaching approaches, lies at the very heart of the educational function of clinical programs. So long as the decisions made by a clinical teacher reasonably serve that educational function, a judgment

> that only the law school faculty is capable of making, these decisions should be protected by academic freedom.[65]

The choices made by clinical professors are no different from the educational choices made by professors of other courses or the research decisions made by other scholars,[66] and "the crucial educational function served by law school clinical programs protects clinic decisions concerning *case selection* and *choice of [clients]* from [government] interference as an academic freedom interest."[67]

The Supreme Court has continually insisted that professors and universities remain autonomous in making such educational decisions as the choice of cases in a law school clinical course. Any university must be free "to determine for itself on academic grounds who may teach, *what may be taught,* how it shall be taught, and who may be admitted to study." Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring) (emphasis added). In a clinical course, "what may be taught" most fundamentally includes the cases and clients selected to advance the law students' professional education. Moreover, the Court has cautioned the judiciary against interference with academic decisions, as it is ill-equipped to make such decisions. "The Supreme Court has repeatedly cautioned federal judges not to meddle with the discretion of academics, either on substantive or procedural grounds, when they make bona fide academic decisions."[68]

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[65] Elizabeth Schneider, Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom, 11 J.C. & U.L. 179, 190 (1984).

[66] See, e.g. Dow Chemical Company v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) ("[W]hatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom.").

[67] Schneider, supra, at 193 (emphasis added). The American Bar Association agrees. In 1997, it stated: "Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Resposibililty." Section of Legal Education and Admissions to the Bar, Am. Bar. Ass'n (June, 1997).

[68] J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 Yale L.J. 251, 326 (citing Bd. of Curators v. Horowitz, 435 U.S. 78 (1978)).

Thus, in Regents of the University of Wisconsin System v. Southworth, 120 S.Ct. 1345 (2000), the Court said, "It is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning." Id. at 1355.

The Constitution thus prohibits the courts from compelling the Clinical Education Program at the University of North Dakota to represent any particular client or to pursue any particular cause. Academic decisions belong exclusively to professors and universities who are entitled to freedom from outside interference. Professor Rovner's decision to decline representation of the plaintiff in this case was an academic decision. She made this curricular choice with her pedagogical objectives for the clinic in mind, determining that this client and case were not the client and case best suited to her students' educational needs. Her decision is entitled to full constitutional protection under the First Amendment's academic freedom doctrine.

CONCLUSION

For the foregoing reasons, the Clinical Legal Education Association and the Society of American Law Teachers, as *amici curiae,* join in the defendant's motion for judgment on the pleadings in this case.

Dated: May __, 2004

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IN UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA

Martin Wishnatsky, Plaintiff, v. Laura Rovner, Director; Clinical Education Program, University of North Dakota, School of Law, in her individual and official capacity, Defendant.	)	**MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE** **Civil Case No. A2-04-1**

The Clinical Legal Education Association (CLEA) and the Society of American Law Teachers (SALT) move for leave to file the attached Brief in Support of Motion for Judgment on the Pleadings in the above-captioned case as *amici curiae*. CLEA and SALT are organizations of legal educators and believe that the outcome of the pending Motion for Judgment on the Pleadings in this case will have an impact on the ability of the University of North Dakota School of Law to provide a first-rate ethical legal education, and may affect legal education in other parts of the United States as well. CLEA and SALT also believe that the fundamental ethical obligations of lawyers are at issue in this matter, as well as important issues of academic freedom for law school faculty.

Dated this ___ day of May, 2004.

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