IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Martin Wishnatsky, Plaintiff/Appellant, v. Laura Rovner, Director; Clinical Education Program, University of North Dakota, School of Law, in her individual and official capacity, Defendant/Appellee.	**Case No. 04-3503**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF APPELLEE

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SUMMARY OF THE CASE

Plaintiff Martin Wishnatsky filed an Amended Complaint naming as defendant Laura Rovner, Director, Clinical Education Program, University of North Dakota School of Law, in her individual and official capacities. The Amended Complaint alleges Plaintiff requested the Clinical Education Program represent him "in a lawsuit challenging the statue of the goddess Themis on the Grand Forks County Courthouse as an unconstitutional establishment of religion." It further asserts Plaintiff's request for representation was denied by letter dated November 12, 2003, which explained "the 'ethical obligations' of the Clinic under the North Dakota Rules of Professional Conduct prohibited such representation." The ethical obligations stemmed from Plaintiff's "persistent and antagonistic actions" against the Clinic and its faculty. Apparently alleging Plaintiff's actions were public speech, the Amended Complaint alleges the Clinic's decision not to represent Plaintiff violated his constitutional rights. The Amended Complaint requests the court declare the Clinic "unconstitutionally limited Plaintiff's access to the services of the Clinical Education Program" and issue an injunction prohibiting "such conduct in the future."

Defendant filed a Motion for Judgment on the Pleadings. On July 29, 2004, the district court entered its Order Granting Judgment on the Pleadings and a corresponding Judgment. The district court held Plaintiff failed to show his constitutional rights were infringed upon when his request for legal assistance was denied by the Clinic because of insufficient resources and ethical considerations.

Plaintiff filed a Rule 59 Motion to Alter or Amend Judgment, which was denied by Memorandum Opinion and Order Denying Plaintiff's Motion to Alter or Amend the Judgment entered September 7, 2004. In addition to the holding in its prior order, the district court found the Clinic's action was not sufficient to support a cause of action under 42 U.S.C. § 1983 since the action would not chill a person of ordinary firmness from continuing to engage in protected activity.

Plaintiff appeals from the July 29, 2004, Order Granting Judgment on the Pleadings, the July 29, 2004, Judgment, and the September 2, 2004, Memorandum Opinion and Order Denying Plaintiff's Motion to Alter or Amend the Judgment.

Appellee requests oral argument of 20 minutes per side. Oral argument should be heard because of the legal issues involved and the significance of this case to law school clinical education and academic freedom nationwide.

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II. Whether the district court properly found the Amended Complaint fails to state a claim under the "unconstitutional conditions" doctrine.

A. Whether the "unconstitutional conditions" doctrine does not apply to a prospective Clinic client because a pre-existing relationship does not exist. The most apposite cases are Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996); Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon, 162 F. Supp. 2d 1 (D. Puerto Rico 2001), aff'd, 301 F.3d 1 (1st Cir. 2002), cert. denied, 538 U.S. 999 (2003); McClintock v. Eichelberger, 169 F.3d 812 (3d Cir. 1999).

B. Whether representation by the Clinic does not constitute a "valuable governmental benefit" when the purpose of the Clinic is to educate law students and there is no expectation of representation since the Clinic's legal representation is based on students' educational needs and resources. The most apposite cases are Garcia v. City of Trenton, 348 F.3d 726 (8th Cir. 2003); Carroll v. Pfeffer, 262 F.3d 847 (8th Cir. 2001), cert. denied, 536 U.S. 907 (2002).

C. Whether the Clinic did not deny Wishnatsky's First Amendment rights when Wishnatsky's request for representation was denied due to lack of resources and to comply with professional ethics. The most apposite cases are Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

D. Whether the Clinic's legitimate interests in educating students, complying with ethical obligations, and providing quality legal services outweigh any speech interests at stake. The most apposite cases are Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996); Pickering v. Board of Ed. of Township High Sch. Dist., 391 U.S. 563 (1968).

III. Whether the Amended Complaint fails to state a claim even if an allegation of pretext is read into the Amended Complaint.

A. Whether a known conflict of interest existed, preventing the Clinic from ethically representing Plaintiff, due to Plaintiff's scathing and antagonistic attacks against the Clinic, its staff, and the Clinic's clients. The most apposite rule is North Dakota Rule of Professional Conduct 1.7.

B. Whether the district court properly found the Clinic legitimately perceived the inability to establish a productive attorney-client relationship with Plaintiff and effectively represent his interests due to his scathing and antagonistic attacks against the Clinic, its staff, and the Clinic's clients. The most apposite cases are Augustson v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658 (5th Cir. 1996); Sobol v. District Court, 619 P.2d 765 (Colo. 1980); McGuire v. Wilson, 735 F. Supp. 83 (S.D.N.Y. 1990).

STATEMENT OF THE CASE

On January 5, 2004, Martin Wishnatsky (Wishnatsky) filed a Complaint with the United States District Court, District of North Dakota. The Complaint named as defendant Laura Rovner, Director, Clinical Education Program, University of North Dakota School of Law, in her individual capacity (Professor Rovner). An Amended Complaint was filed on January 27, 2004. Add. A-13.[1] The Amended Complaint (hereinafter "Complaint") names Professor Rovner in both her individual and official capacities.[2]

The Clinic filed a Motion for Judgment on the Pleadings. On July 29, 2004, the district court entered its Order Granting Judgment on the Pleadings and a corresponding Judgment. Add. A-1, A-6. The district court held Plaintiff "failed to show his constitutional rights were infringed upon when his request for legal assistance was denied by [the Clinic] because of insufficient resources and ethical considerations." Add. A-1. See also Add. A-8.

[1] "Add." refers to the Addendum to the Brief of Appellant. "Clinic Add." refers to the Addendum to the Brief of Appellee.
[2] Professor Rovner has left employment with the Clinic.

Wishnatsky filed a Rule 59 Motion to Alter or Amend Judgment. By Memorandum Opinion and Order Denying Plaintiff's Motion to Alter or Amend the Judgment entered September 7, 2004, the district court denied Wishnatsky's Motion to Alter or Amend Judgment. Add. A-7. Assuming Wishnatsky had engaged in constitutionally protected activity, and that the Clinic took adverse action motivated by protected speech, the district court found the Clinic's action was not sufficient to support a cause of action under 42 U.S.C. § 1983 since the action would not chill a person of ordinary firmness from continuing to engage in protected activity. Add. A-8, A-9.

Wishnatsky appeals from the July 29, 2004, Order Granting Judgment on the Pleadings, the July 29, 2004, Judgment, and the September 2, 2004, Memorandum Opinion and Order Denying Plaintiff's Motion to Alter or Amend the Judgment.

STATEMENT OF THE FACTS

The Complaint alleges Professor Rovner is the Director of the Clinical Education Program at the University of North Dakota School of Law (Clinic). Add. A-13, ¶ 2. According to the Complaint, by letter dated October 29, 2003, Wishnatsky requested the Clinic represent him "in a lawsuit challenging the statue of the goddess Themis on the Grand Forks County Courthouse as an unconstitutional establishment of religion." Add. A-14, ¶ 4.[3] The Complaint asserts that Wishnatsky's request for representation was denied by letter dated November 12,

[3] Although the Complaint alleges the request was for "representation in a lawsuit," the actual request was for "assistance . . . in developing a lawsuit . . . ." Add. A-10. The request referenced assistance in factual research regarding "the pagan religious origins of the Themis statute . . . ." Id.

2003, which explained that "the 'ethical obligations' of the Clinic under the North Dakota Rules of Professional Conduct prohibited such representation." Add. A-14, ¶ 5. Ethical obligations prohibited the representation because of Wishnatsky's "persistent and antagonistic actions" against the Clinic and its faculty. Id. Finally, the Complaint asserts Wishnatsky's only actions toward the Clinic prior to November 12, 2003, were a phone conversation with Professor Rovner, his October 29, 2003, letter, and public letters and commentary in the Grand Forks Herald. Add. A-14, ¶ 6.

That is the extent of the factual allegations in the Complaint. Significantly, the Complaint at no time alleges the reason for denying Wishnatsky representation was pretextual.

In addition to the factual allegations made in the Complaint, the district court properly considered matters referenced in the Complaint and matters of public record when considering the Motion for Judgment on the Pleadings. See supra Section I(B). A brief summary of that undisputed factual information follows.

During all times relevant to this action, the Clinic operated two projects: the Civil Rights Project and the Civil Litigation Project. The Civil Litigation Project handled civil cases involving housing, employment, consumer rights and family law matters, among others. The Civil Rights Project provided a variety of legal services to clients who had been unable to secure representation elsewhere in

matters involving civil rights and civil liberties. Professor Rovner directed the Civil Rights Project. See Exs. 1 at p. 1; 2 at pp. 1-2; 3.[4]

The primary purpose of the Clinic is the education of law students. A secondary purpose of the Clinic is to "provide quality legal services to individuals who otherwise could not afford the services of an attorney and to individuals or groups who are unable to secure representation elsewhere because their cases may involve controversial issues or conflicts of interest for other lawyers." See Ex. 1 at p. 1.

After Professor Rovner and students from the Clinic appeared at a Fargo City Council meeting to request, on behalf of their clients, that the City move its Ten Commandments monument from government property, Professor Rovner received a telephone call from Wishnatsky. Clinic Add. 1; Add. A-14, ¶ 6.[5] After Wishnatsky's phone call, Wishnatsky wrote a letter to the Grand Forks Herald criticizing the Clinic's clients, the Clinic and Professor Rovner personally for their involvement in the Ten Commandments matter. Clinic Add. 1; Add. A-14, ¶ 6. In his letter Wishnatsky falsely represented that Professor Rovner appeared as the director of the Legal Aid Association of North Dakota (LAND). Clinic Add. 1.[6] Wishnatsky then accused the Clinic and Professor Rovner of "engag[ing] in such

[4] Exhibits 1, 2, and 3 are not reproduced in either party's addendum. They are attached to the Clinic's Motion for Judgment on the Pleadings.
[5] The Amended Complaint does not describe the tone or substance of the phone call.
[6] Professor Rovner's position and the Civil Rights Project have never been funded in any way with LAND money. Clinic Add. 2.

ideological warfare," and referred to the Clinic's clients as "parlor atheists who delight in attacking the faith of millions" and "militant atheists." Id.

Wishnatsky sent Professor Rovner a letter, dated October 29, 2003, requesting the Clinic's assistance in developing a lawsuit Wishnatsky wished to bring against "Grand Forks County and other relevant parties for having a statue of the goddess Themis on top of the Grand Forks County courthouse." Add. A-10. Wishnatsky sent that letter not only to Professor Rovner, but also to various media entities around the state. Clinic Add. 3-4, 5; Add. A-14, ¶ 6.

A "Viewpoint" article written by Wishnatsky was published in the November 5, 2003, edition of the Grand Forks Herald. Clinic Add. 6. Wishnatsky sent the article to the Grand Forks Herald prior to receiving a response from Professor Rovner regarding the request for representation. In his article, Wishnatsky made the following statements regarding Professor Rovner and the Clinic:

- "So we have the unseemly picture of a UND Law School associate professor, Laura Rovner, directing the program that is representing five other current or former state university professors -- and all at taxpayer expense."
- "The suspicion therefore arises that Rovner is abusing her position as head of the Clinical Education Program at UND to further her own political agenda. The ungodliness of Bill Clinton is well known. Less well-known is that Rovner signed a petition sent to Congress by law school professors arguing against Clinton's impeachment by the U.S. House of Representatives."
- "For the state government via its law school to call the Ten Commandments lawsuit 'education' seems far from the mark. As the Herald stated in an editorial, it smacks of 'indoctrination,' especially in light of Rovner's statement applauding the 'courage' of these atheistic professors in asserting their 'religious freedom.'"

Id.

On November 12, 2003, Professor Rovner sent Wishnatsky a letter explaining, "due to the high demand for our legal services coupled with our current caseload and limited resources, the Civil Rights Project is unable to accept any new cases at this time." Add. A-12. The letter further explained that "even if the lack of resources did not preclude the Clinic from representing you, our ethical obligations under the North Dakota Rules of Professional Conduct would prohibit us from doing so." Id. Professor Rovner explained: "Our independent, professional judgment is that your persistent and antagonistic actions against the Clinical Education Program and faculty involved would adversely affect our ability to establish an effective client-attorney relationship with you and would consequently impair our ability to provide legal representation to you." Id. Thus, even if the Clinic had the resources to represent Wishnatsky, the faculty's "ethical obligations" required the Clinic to decline Wishnatsky's request for representation. Id.[7]

SUMMARY OF ARGUMENT

When considering a motion for judgment on the pleadings, the court takes the factual allegations in the complaint as true. The court will not, however, inject allegations from a brief into a complaint. The Complaint does not assert or imply the

[7] Wishnatsky incorrectly asserts the Clinic conceded it was Wishnatsky's public speech that prompted the Clinic to decline Wishnatsky's request for representation. Br. of Appellant at 4. The Clinic has consistently stated, and the Complaint does not assert otherwise, that Wishnatsky's request was denied because the Clinic lacked resources to undertake the requested representation. Furthermore, the page referenced in Wishnatsky's brief does not support Wishnatsky's assertion. The referenced page simply argued Clinic staff must comply with their ethical obligations even if it is public speech that creates an ethical conflict. No factual concession was or has ever been made that the Clinic denied Wishnatsky's request due to his public speech.

Clinic's reason for denying Wishnatsky representation was pretextual. Accordingly, the district court properly considered whether the Clinic infringed Wishnatsky's constitutional rights by declining his request for representation due to insufficient resources or, alternatively, ethical considerations.

The Complaint fails to state a claim under the "unconstitutional conditions" doctrine. In the commercial setting, the "unconstitutional conditions" doctrine only applies to pre-existing commercial relationships. In the present case, the "unconstitutional conditions" doctrine does not apply because a pre-existing attorney-client relationship did not exist. Furthermore, the "unconstitutional conditions" doctrine only applies when a "valuable governmental benefit" has been denied. Representation by the Clinic does not constitute a "valuable governmental benefit" since the purpose of the Clinic is to educate law students and there is no expectation of representation since the Clinic's legal representation is based on students' educational needs and resources.

A claim does not exist under the "unconstitutional conditions" doctrine unless the plaintiff's protected speech was a "substantial" factor or the "motivating factor" in denying the valuable governmental benefit. Wishnatsky's claim fails because the Clinic declined his request for representation because it lacked the resources to undertake additional cases, not because of Wishnatsky's alleged protected speech.

Even if the unconditional conditions doctrine applies to the Clinic's decision not to represent Wishnatsky, Wishnatsky's constitutional rights were not violated by the Clinic's decision because the Clinic's legitimate interests in educating students,

complying with ethical obligations, and providing quality legal services outweigh any speech interests at stake. The Clinic has a legitimate interest in only taking cases it has the resources to handle. To do otherwise would adversely impact its educational mission and its ability to properly and efficiently provide legal services. The Clinic also has an overriding interest in complying with its ethical obligations. By doing so the Clinic provides a better education for its students and more effectively provides quality legal services to its clients. Simply put, the Clinic cannot properly fulfill its primary purpose of educating law students, or its secondary purpose of providing quality legal services, unless it complies with its ethical obligations.

The Complaint was properly dismissed even if an allegation of pretext is read into the Complaint. This is because, as a matter of law, the Clinic could not ethically accept Wishnatsky as a client. North Dakota Rule of Professional Conduct 1.7 absolutely prohibits an attorney from undertaking representation if the lawyer's own interests or the lawyer's responsibilities to another client create a conflict. The known conflict in this case ethically mandated the Clinic decline to represent Wishnatsky.

Even if the Clinic was not mandated to deny Wishnatsky's request for representation, the Clinic did not depart from accepted professional norms by doing so. Thus, whether the Clinic's professional and educational decision is reviewed with great deference, or for professional reasonableness, the Court should not override the Clinic's decision.

ARGUMENT

I. The district court properly considered the factual allegations in the Complaint and the Clinic's exhibits when ruling on the motion for judgment on the pleadings.

A. The Complaint does not allege the Clinic's reason for denying representation was pretextual.

This Court reviews a motion for judgment on the pleadings under the same standard as a motion to dismiss. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990); St. Paul Ramsey County Med. Ctr. v. Pennington County, S.D., 857 F.2d 1185, 1187 (8th Cir. 1988). Whether a complaint states a cause of action is a question of law which the Court reviews on appeal de novo. Westcott, 901 F.2d at 1488; St. Paul Ramsey County Med. Ctr., 857 F.2d at 1188. The complaint is construed in a light most favorable to the plaintiff, and the well-pleaded factual allegations in the complaint are taken as true. Westcott, 901 F.2d at 1488. However, a complaint must plead facts that, if true, state a claim as a matter of law. Conclusory allegations are not sufficient. See Martin v. Sargent, 780 F.2d 1334, 1337 (8th Cir. 1985); Johnson v. Stark, 717 F.2d 1550, 1552 (8th Cir. 1983). A grant of a motion for judgment on the pleadings will be affirmed if it appears beyond doubt the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Westcott, 901 F.2d at 1488.

"Although a pro se complaint is to be liberally construed, it 'must contain specific facts supporting its conclusions.'" Lally v. Crawford County Trust & Savings Bank, 863 F.2d 612, 613 (8th Cir. 1988) (quoting Martin, 780 F.2d at 1337)). "The court will not go so far as to inject allegations from a brief into a complaint where related allegations in the complaint are completely lacking, not simply in need

of clarification." Hancock v. Thalacker, 933 F. Supp. 1449, 1472 n.11 (N.D. Iowa 1996).

Wishnatsky's brief repeatedly asserts the district court erred by resolving the factual dispute of whether the reason for denying Wishnatsky representation was pretextual. No such factual issue, however, is raised by the Complaint. Rather, the Complaint references and partially quotes Professor Rovner's letter declining representation. Absolutely no factual allegation is made that the letter is pretextual.

In fact, despite it being plainly stated in the November 12, 2003, letter, the Complaint does not even mention the reason for denying representation (lack of resources), much less allege the reason was pretextual.[8]

The Complaint is completely lacking of any allegation Professor Rovner's explanation the Clinic lacked adequate resources to represent Wishnatsky was pretextual. The district court properly declined to inject such an allegation into the Complaint, and addressed the sufficiency of the Complaint based upon a liberal reading of the facts alleged in the Complaint, not belatedly asserted allegations in a brief. Thus, as explained by the district court, the issue presented by the Complaint is whether Wishnatsky's "constitutional rights were infringed upon when his request for legal assistance was denied by [the Clinic] because of insufficient resources and ethical considerations." Add. A-1. This Court's de novo review is of the same issue.

[8] Wishnatsky may argue the legal bases of his Complaint, made in paragraph 7, implies the basis for denying representation was pretextual. But paragraph 7, which is a legal not factual allegation, in no way implies such a factual allegation. The mere legal assertion the Clinic's action violated Wishnatsky's First Amendment rights does not constitute a factual allegation of pretext.

B. The district court properly considered the exhibits when ruling on the motion.

The district court considered the Clinic's exhibits when ruling on the Motion for Judgment on the Pleadings, holding it "may consider, in addition to the pleadings, materials embraced by the pleadings and materials that are part of the public record." Add. A-2. The district court's consideration of the Clinic's exhibits when ruling on the motion was proper, and this Court can likewise consider those exhibits as part of its de novo review.

This Court has made it clear that matters referenced in a complaint and matters of public record can properly be considered when addressing a motion to dismiss. See In re K-Tel Int'l, Inc. Sec. Litig., 300 F.3d 881, 889 (8th Cir. 2002); Silver v. H&R Block, Inc., 105 F.3d 394, 397 (8th Cir. 1997). Other federal courts have reached the same conclusion. See, e.g., Phillips v. LCI Int'l, Inc., 190 F.3d 609, 618 (4th Cir. 1999) (news article properly considered); Condit v. Dunne, 317 F. Supp. 2d 344, 357 (S.D.N.Y. 2004) (considering audio recordings of shows and printed articles); In re Compuware Sec. Litig., 301 F. Supp. 2d 672, 682-83 (E.D. Mich. 2004) (newspaper articles and other public information considered); Ireland v. Suffolk County, 242 F. Supp. 2d 178, 185 n.6 (E.D.N.Y. 2003) (documents referenced in complaint may be considered); Roedler v. United States Dep't of Energy, NO. CIV. 98-1843 (DWF/AJB), 1999 WL 1627346, at *4 (D. Minn. Dec. 23, 1999) (court may consider matters of public record and documents integral to the complaint and upon which the complaint relies), aff'd, 255 F.3d 1347 (Fed. Cir. 2001), cert. denied, 534 U.S. 1056 (2001); Salinger v.

Projectavision, Inc., 972 F. Supp. 222, 226 (S.D.N.Y. 1997) (court can consider press releases, magazine articles, and wire service stories); Jakobe v. Rawlings Sporting Goods Co., 943 F. Supp. 1143, 1149 (E.D. Mo. 1996) (court can consider full text of documents partially quoted and referred to in the complaint); Brogren v. Pohlad, 933 F. Supp. 793, 798 (D. Minn. 1995) (court may review documents referred to but not included with the complaint).

All of the exhibits are material embraced by the pleadings, or matters of public record. Exhibits 1, 2, and 3[9] are matters of public record. They are records of a government institution available to anyone and easily verified. Exhibits 6 and 11[10] are documents referenced and partially quoted in the Complaint, and made public by Wishnatsky providing them to the press. They are materials embraced by and integral to the Complaint. Similarly, Exhibits 4 and 10[11] are matters of public record and materials embraced by and integral to the Complaint. The exhibits are published articles written by Wishnatsky and generally referred to in paragraph 6 of the Complaint. Although not specifically referenced by or quoted in the Complaint, the remaining exhibits are also public documents/newspaper articles that the district court could properly consider in addressing the Motion for

[9] Exhibit 1 is a copy of the Clinic Manual; Exhibit 2 is a copy of a WebPage entitled Clinical Education Program; Exhibit 3 is a copy of the Clinical Education Homepage.

[10] Exhibit 6 is a copy of letter from Martin Wishnatsky to Laura Rovner (Oct. 29, 2003) (Add. A-10); Exhibit 11 is a copy of a letter from Laura L. Rovner to Martin Wishnatsky (Nov. 12, 2003) (Add. A-12).

[11] Exhibit 4 is a copy of Martin Wishnatsky, *MAILBAG: Legal Aid Association 'shatl not' fight the 10 Commandments*, Grand Forks Herald, Nov. 4, 2002 (Clinic Add. 1); Exhibit 10 is a copy of Martin Wishnatsky, *If the Fargo monument goes, Themis goes, too*, Grand Forks Herald, Nov. 5, 2003 (Clinic Add. 6).

Judgment on the Pleadings.[12] This Court should consider the exhibits when conducting its de novo review of the district court's Judgment.

II. The Complaint fails to state a claim under the "unconstitutional conditions" doctrine.

Under the "unconstitutional conditions" doctrine, the government may not deny a valuable governmental benefit to a person on a basis that infringes on the person's constitutionally protected freedom of speech, even if the individual has no right to the benefit. See Speiser v. Randall, 357 U.S. 513, 525-26 (1958). This general principle has been applied to denial of tax exemptions, id., disqualification for unemployment benefits, Sherbert v. Verner, 374 U.S. 398, 404-05 (1963), denial of welfare payments, Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969), withdrawal of welfare benefits, Goldberg v. Kelly, 397 U.S. 254 (1970), discharge from public employment, Perry v. Sindermann, 408 U.S. 593 (1972); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956); Wieman v. Updegraff, 344 U.S. 183, 192 (1952), and termination of government contracts, Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996). Application of the "unconstitutional conditions" doctrine to a law school legal clinic's denial of representation is a case of first impression. As argued below, due to the educational purpose of a law school legal

[12] Exhibit 5 is a copy of a letter to the Grand Forks Herald editor from Laura L. Rovner (Clinic Add. 2); Exhibit 7 is a copy of Stephen J. Lee, *Goddess gotcha*, Grand Forks Herald, Oct. 31, 2003 (Clinic Add. 3); Exhibit 8 is a copy of Lisa Davis, *Law school to treat case like any other*, Grand Forks Herald, Nov. 1, 2003 (Clinic Add. 5); Exhibit 9 is a copy of Letter Opinion 2003-L-42 (Clinic Add. 7); Exhibit 12 is a copy of Martin Wishnatsky, *Clinic's refusal to take Themis case shows a double standard*, Grand Forks Herald, Dec. 2, 2003 (Clinic Add. 7); Exhibit 13 is a copy of Stephen J. Lee, *Justice for all?*, Grand Forks Herald, Dec. 2, 2003 (Clinic Add. 8).

clinic and the nature of the attorney-client relationship, a request for representation by a law school legal clinic is most analogous to a bid for a government contract.

The First Amendment does not create property rights or guarantee absolute freedom of speech. Umbehr, 518 U.S. at 675. To state a free speech claim under the "unconstitutional conditions" doctrine, the speech at issue must be constitutionally protected, and the protected speech must be a substantial or motivating factor in the decision. Id. No liability exists if the same action would have been taken even in the absence of the protected speech. Id.; Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). "And even [action] because of protected speech may be justified when legitimate countervailing government interests are sufficiently strong." Umbehr, 518 U.S. at 675. The government's interest in efficiently and properly performing its services must be considered and given deference. Id. at 678. In the context of government employment cases, the Court has observed that the test the Court has established "must be judicially administered with sensitivity to governmental needs . . . ." Id. Thus, to state a claim, the Complaint must allege that Clinic denied Wishnatsky a valuable governmental benefit, and that the denial of that benefit was motivated by his protected speech. Id. at 685. If the action would have been taken regardless of his speech, or if the Clinic's legitimate interests as an education program, deferentially viewed, outweigh the free speech interests at stake, the Complaint fails. Id.

A. The "unconstitutional conditions" doctrine does not apply because a pre-existing relationship did not exist.

Wishnatsky's claim fails to state a claim under the unconstitutional conditions doctrine because a pre-existing attorney-client relationship did not exist.

The Umbehr Court, which held the unconditional conditions doctrine applied to termination of government contracts, emphasized the limited nature of its holding. The Court specifically explained that the case concerned the termination of a pre-existing relationship with the government, and that the holding did not extend to suits by bidders or applicants for new government contracts. 518 U.S. at 685. Recognizing this distinction, lower courts have held the "unconstitutional conditions" doctrine only applies to pre-existing commercial relationships. For example, one federal court noted:

> The Umbehr Court thus made it categorically clear that its holding did not apply to applicants or bidders for new government contracts, it only applies to those plaintiffs who can demonstrate that they have a pre-existing commercial relationship with the government. In Umbehr the Court refused to extend First Amendment protection to bidders or applicants for government contracts who do not have a pre-existing commercial relationship with the government.

Prisma Zona Exploratoria de Puerto Rico, Inc. v. Calderon, 162 F. Supp. 2d 1, 7 (D. Puerto Rico 2001), aff'd, 301 F.3d 1 (1st Cir. 2002), cert. denied, 538 U.S. 999 (2003). Based on Umbehr, the Prisma Zona court held: "The First Amendment protects any entity or person (who has been denied a benefit on unconstitutional grounds) if that person has a pre-existing commercial relationship with the government." Id. Similarly, McClintock v. Eichelberger, 169 F.3d 812 (3d Cir. 1999), refused to extend First Amendment protection to a bidder or applicant for a government contract, noting that the Court in Umbehr carefully cabined its decision

not to apply to bidders or applicants who do not have a pre-existing relationship. Id. at 817.

This case is more analogous to a prospective government contractor case than a government benefit case. The Clinic is an educational program, not a legal aid office. The purpose of the Clinic is to provide a government service – education. The purpose of the Clinic is not to provide a government benefit – free legal representation. And, when an individual requests to become an essential and active part of providing the governmental service–educating law students—the government (the Clinic) must form a close working relationship with the individual to properly provide the government service. A prospective Clinic client, thus, is similar to a prospective government contractor. Both are requesting the opportunity to work closely with the government in providing an important government service. Although both the contractor and Clinic client receive a benefit from their relationship with the government, the government enters the relationship so it can provide the important government service.

Since a prospective Clinic client is more akin to a prospective contractor than an ordinary citizen, the limitation in Umbehr equally applies to a prospective Clinic client. Under Umbehr, the "unconstitutional conditions" doctrine does not apply to individuals who do not have a pre-existing relationship with the government.

Wishnatsky did not have a pre-existing relationship with the Clinic. He is simply an individual who requested to participate in the Clinic's education process.

Accordingly, the "unconstitutional conditions" doctrine does not apply to Wishnatsky.

B. Representation by the Clinic does not constitute a "valuable governmental benefit".

An initial requirement under the unconstitutional conditions doctrine is that the individual be denied a "valuable governmental benefit." Speiser, 357 U.S. at 526; Perry, 408 U.S. at 597. The contours of what constitutes a "valuable governmental benefit" are unclear. The controlling precedent demonstrates, however, that the Clinic's decision not to represent Wishnatsky did not deny Wishnatsky a "valuable governmental benefit."

The purpose of the Clinic is to educate law students, who earn academic credit for completing Clinic courses. The Clinic provides practical opportunities for students to learn the practice of law, along with classes designed to explore the broader implications of being a lawyer. The primary purpose of the Clinic is not to provide members of the public the benefit of legal services. Thus, any legal services provided by the Clinic are not statutory entitlements, like tax exemptions and welfare payments. Tax exemptions and welfare payments are provided to all members of the public based upon specific statutes, regulations, or guidelines. The Clinic's legal representation of clients is based on students' educational needs and resources. There is no entitlement or expectation by the public to receive legal representation.

The Clinic declining to represent an individual is also unlike terminating government employment or a pre-existing government contract. Under those circumstances a prior relationship and expectations already exist. Such is not true

when an individual requests representation by the Clinic. A current relationship does not exist. And because of the number of requests and academic discretion in deciding whether to accept any particular case, there is no expectation of representation.

The district court recognized the requested representation was not a valuable government benefit when it held Wishnatsky has not "alleged he suffered any injury likely to chill a person of ordinary firmness from continuing to engage in that activity." Add. A-8. To constitute a valuable government benefit, denial of the benefit must, at the very least, be significant enough to tend to chill the exercise of First Amendment rights. See Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 352 (4th Cir. 2000). Not every denial of a government benefit is sufficient to chill the exercise of First Amendment rights. Cf. Garcia v. City of Trenton, 348 F.3d 726, 729 (8th Cir. 2003); Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001), cert. denied, 536 U.S. 907 (2002); DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995).

Because the Clinic's action "would not chill a person of ordinary firmness from continuing to speak out and did not chill [Wishnatsky's] speech," Add. A-9, the Clinic did not deny Wishnatsky a valuable government benefit.

C. The Clinic did not deny Wishnatsky's request for representation because of his speech.

In addition to the above reasons, Wishnatsky's claim fails because his alleged protected speech was not a "substantial" factor or the "motivating factor" in the Clinic's decision not to represent him. See Umbehr, 518 U.S. at 675; Mt. Healthy,

429 U.S. at 287. The Complaint and the referenced letter demonstrate Wishnatsky's request was denied because (1) the Clinic lacked the resources to represent Wishnatsky and (2) the requested representation would violate the Clinic's ethical obligations. The district court held these reasons for declining the requested representation were constitutionally permissible. Add. A-1. The district court properly applied the law.

1. The requested representation was denied due to lack of resources.

Although paragraph 5 of the Complaint references and quotes a portion of the Clinic's November 12th letter, the Complaint ignores the first and primary reason given in the letter for declining Wishnatsky's request for representation. The letter states: "[D]ue to the high demand for our legal services coupled with our current caseload and limited resources, the Civil Rights Project is unable to accept any new cases at this time." Add. A-12. The discussion in the letter regarding ethical issues was not the Clinic's reason for denying Wishnatsky's request for representation. Although the ethical issues would prevent representation "if the lack of resources did not preclude the Clinic from representing" Wishnatsky, the lack of resources did preclude the requested representation and was the reason the Clinic denied Wishnatsky's request. Id.

At no place does the Complaint allege the Clinic did not lack the resources to undertake representation of Wishnatsky, or that the Clinic's denial of representation for that reason was pretextual. Thus, accepting all factual pleadings in the Complaint as true, the Complaint fails to state a claim because Wishnatsky was not denied representation due to his speech.

2. Speech is not the motivating factor of a decision based on ethical obligations.

The Complaint alleges the Clinic denied Wishnatsky's request for representation because of the Clinic's "ethical obligations." Add. A-14, ¶ 5. According to the allegations, the ethical issue stemmed from Wishnatsky's "persistent and antagonistic actions" against the Clinic and its faculty. Id. The Complaint then alleges Wishnatsky's actions were public letters and commentary in the Grand Forks Herald, implying they constitute protected speech. Id. ¶ 6.

As discussed above, the Clinic denied Wishnatsky's request for representation because the Clinic lacked the resources to undertake the requested representation. Even if the Clinic did deny the request because of its ethical obligations, however, the Complaint still fails to state a claim. Declining to represent Wishnatsky because of ethical obligations is not a decision motivated by protected speech.

That Wishnatsky's antagonistic speech precluded the Clinic from being able to ethically represent Wishnatsky does not change the fact the Clinic's decision was based on professional ethics. It would be absurd to conclude that a decision based on ethical standards loses its character because the actions creating the ethical dilemma allegedly constituted protected speech. Denying representation due to antagonistic speech which creates an ethical conflict is viewpoint and content neutral. It is not the content of the speech, but the antagonism toward the Clinic and its staff, that precludes the representation. The basis (content) of the antagonism is not relevant. What is relevant is the antagonism destroys the possibility of a productive attorney-client relationship, ethically prohibiting representation.

Wishnatsky was denied representation due to lack of resources, a reason completely unrelated to speech. But even if a substantial or motivating factor in the Clinic's decision was the Clinic's ethical obligations, a decision based upon compliance with professional ethics is not constitutionally impermissible.

3. The "unconstitutional conditions" doctrine does not require the Clinic to favor Wishnatsky due to his speech.

Wishnatsky was given equal footing with other applicants. Applicants are not represented by the Clinic if the Clinic lacks the necessary resources, or if the representation creates a conflict of interest. Wishnatsky, apparently, does not want to be treated like other applicants. He wants to be favored. Because of his allegedly protected speech, Wishnatsky wants the Clinic to ignore whether it has adequate resources, and its ethical obligations, when deciding whether to represent him. But that is not required by the Constitution. Just like "discrimination laws do not require 'an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person,'" Kaltenberger v. Ohio Coll. of Podiatric Med., 162 F.3d 432, 436 (6th Cir. 1998) (quoting Southeastern Community Coll. v. Davis, 442 U.S. 397, 413 (1979)), the First Amendment does not require a law school legal clinic ignore its limited resources and ethical obligations when deciding whether to undertake representation.

D. The Clinic's legitimate interests in educating students, complying with ethical obligations, and providing quality legal services outweigh any speech interests at stake.

If, contrary to Umbehr, the "unconstitutional conditions" doctrine is found to apply to prospective Clinic clients, and if the Court finds the Clinic's decision not

to represent Wishnatsky did deny Wishnatsky a "valuable governmental benefit, and that Wishnatsky's speech was the motivating factor in the Clinic's decision, the Court should apply the Pickering balancing test used in public employee free speech cases. In Pickering v. Board of Ed. of Township High Sch. Dist., 391 U.S. 563 (1968), the Court balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Id. at 568. In so doing the Court considered whether the employee's statements would impede the employee's proper performance of his daily duties or interfere with the regular operation of the employer's business. Id. at 572-73.

Umbehr applied the balancing test to termination/nonrenewal of government contractors, stating the government prevailed if its "legitimate interests . . ., deferentially viewed, outweigh the free speech interests at stake." 518 U.S. at 685. In Waters v. Churchill, 511 U.S. 661, 675 (1994) (plurality opinion), the Court explained:

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate.

Similarly, the Clinic's interests in effectively administering its resources, properly educating students, and professionally and ethically providing legal services are elevated to significant interests when it is considering an individual's request to become a client of the Clinic and an intimate part of the clinical

education process. Thus, Wishnatsky's interest in engaging in the speech while a prospective Clinic client must be balanced against the interest of the Clinic in effectively administering its resources, properly educating students, and professionally and ethically providing legal services. The issue is not whether Wishnatsky can participate in the speech; he surely can. The issue is whether the Clinic's interests permit it to reject Wishnatsky as a client due to how his speech impacts the Clinic's ability to effectively achieve its goals. It surely can.

1. The Clinic's interests in only taking cases it has the resources to handle outweigh any speech interests at stake.

Given the pedagogical focus of the Clinic's primary mission, and the very small size of the Clinic's program (one faculty for the Civil Rights Project, see Ex. 2), the Clinic is only able to represent a small number of the people who request assistance.

Wishnatsky's request for representation was denied because the Clinic lacked the resources to take on any new cases at that time. The Clinic, of course, has a legitimate interest in only taking cases it has the resources to handle. Taking more cases than the Clinic can handle would adversely impact its educational mission, preventing appropriate handling and supervision of cases. See Ex. 1 at pp. 6-8. Taking on more cases than can be handled would also adversely impact the Clinic's ability to properly and efficiently provide legal services, preventing the Clinic from dedicating the appropriate resources to its current cases. The Clinic's interests in only taking cases it has the resources to handle outweigh any speech interests at stake.

2. The Clinic's interests in properly educating students outweigh any speech interests at stake.

The Complaint states Wishnatsky's request for representation was denied because the Clinic's ethical obligations prohibited the representation. Add. A-14, ¶ 5. Even if this was the Clinic's reason for denying Wishnatsky's request, the Clinic's interests in properly educating students and complying with its ethical obligations outweigh any speech interests at stake.

As an employer, the government has a strong interest in providing its services properly and efficiently. See Umbehr, 518 U.S. at 674; Waters, 511 U.S. at 672-75. Such is also true when the government is acting as an educator. As noted, a Clinic client is more akin to a government contractor or employee than an ordinary citizen. The Clinic works closely with the client in fulfilling its constitutional and statutory duty to educate students. See N.D. Const. art. VIII, § 2; N.D.C.C. ch. 15-10. The Clinic has an intimate working relationship with its clients, even more than it does its employees. See Fisher v. State, 248 So.2d 479, 484 (Fla. 1971) (attorney-client relationship "requires absolute confidence in the lawyer by the client and an equal confidence in the client by his lawyer"); Wolgin v. Smith, NO. CIV. A. 94-7471, 1996 WL 482943, at *4 (E.D. Pa. Aug. 21, 1996) ("Mutual disrespect, disregard, and distrust are not the foundation of an effective attorney-client relationship."). Because the client plays an essential role in whether the Clinic is able to properly and effectively educate law students, the government-friendly balancing test is most appropriate. To paraphrase Umbehr: "Deference is

therefore due to the government's reasonable assessments of its interests [as educator]." 518 U.S. at 678.

The impact the speech would have on employment relationships was considered in Pickering. Specifically, the Court considered whether the criticism was directed towards any person with whom the employee would normally be in contact. 391 U.S. at 569-70. This was important because such criticism could impact discipline by immediate superiors or harmony among coworkers. Id. at 570.

Unlike Pickering, where the employee's relationship with the board and superintendent was "not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning," id., personal loyalty and confidence is required for an effective attorney-client relationship. To paraphrase one of the Court's footnotes, "the relationship between [attorney] and [client] is of such a personal and intimate nature that certain forms of public criticism of the [attorney] by the [client] would seriously undermine the effectiveness of the working relationship between them . . . ." Id. n.3.

In Gordon v. City of Kansas City, Mo., 241 F.3d 997 (8th Cir. 2001), this Court identified six factors to be considered in balancing the interests. They included: (1) the need for harmony; (2) the closeness of the working relationship and the potential impact the speech might have on that relationship; (3) the time, place, and manner of the speech; (4) the context in which the dispute arose; (5) the

degree of public interest in the speech; and (6) whether the speech interfered with the speaker's ability to perform his duties. Id. at 1002.

The above factors evidence the disruptive nature of Wishnatsky's speech. The need for harmony, trust and confidence in the attorney-client relationship is very strong. The working relationship between attorney and client is extremely close, and demeaning and attacking personal and professional public statements against the attorney could have a significant impact on the relationship. In the present case, the remarks were made at the same time Wishnatsky requested representation, and arose in the context of a case being handled by and clients being represented by Professor Rovner and the Clinic. And the speech, which personally and professionally attacked the Clinic and its staff, interfered in Wishnatsky's ability to assist the Clinic in its educational mission. Wishnatsky's speech was "inherently disruptive" to the prospective attorney-client relationship. Id. at 1003.

Issues involving law school clinic lawyers also involve the issue of academic freedom. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 329 (2003); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Shelton v. Tucker, 364 U.S. 479, 487 (1960). The Clinic's decision regarding what cases to accept is protected by academic freedom. See Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957); J. Peter Byrne, Academic Freedom: A "Special Concern of the First Amendment", 99 Yale L.J. 251, 326 (1989); Elizabeth M. Schneider, Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic

Freedom, 11 J.C. & U.L. 179, 188, 190 (1984). The constitutional importance of academic freedom has long been recognized. See Grutter, 539 U.S. at 329; Board of Regents v. Southworth, 529 U.S. 217, 237 n.3 (2000) (Souter, J., concurring) (citing cases).

It is a clinic lawyer's duty and responsibility to determine which cases to accept based upon the students, including their abilities and interests, the clinic's resources, pedagogical objectives, ethical issues, etc. When evaluating the pedagogical benefit of a particular case, a clinic lawyer can consider whether the case appears to have merit,[13] what educational benefit the case is likely to provide (i.e., the nature and extent of the legal issues to be researched and case law to be analyzed and synthesized,[14] whether the case will include all facets of the civil litigation[15]), and the type of attorney-client relationship likely to exist. Because the primary purpose of the Clinic is to educate law students, not provide representation to the public, the Clinic's interests in properly educating students is a significant and overriding interest. "An initial ethics consideration in law clinic case and client selection is the independence of the law clinic supervising attorney to choose cases and clients that meet the clinic's educational and public service goals. Scarce clinical program resources and pedagogical objectives require some limits on who may be represented

[13] There are questions regarding the legal viability of Wishnatsky's claim. In Glassroth v. Moore, 335 F.3d 1282, 1300 n.4 (11th Cir. 2003), cert. denied, 540 U.S. 1000 (2003), the Eleventh Circuit summarily dismissed any argument the Themis statute was analogous to a Ten Commandments monument.

[14] Except for Glassroth, the undersigned counsel has been unable to locate any reported decision addressing the constitutionality of a statue of the goddess Themis.

[15] Wishnatsky only requested assistance in developing a lawsuit. Add. A-10.

or what cases may be handled." Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 Fordham L. Rev. 1971, 1975 (2003). By being able to choose clients and cases, law school clinics are able to better educate law students, their primary function, and able to be better advocates and provide better legal services. Id. at 1992, 1992 n.98.

Of course, one significant aspect of clinical education is teaching ethics. As noted in the Clinic Manual:

> The Clinic operates as a law office in which each student is expected to assume the professional duties and responsibilities of a practicing attorney under the direct supervision of Clinic faculty. Students are expected to know and observe the requirements of the Rules of Professional Conduct in their clinic practice. Students are also expected to assume the initiative and take responsibility for the progress and successful completion of cases assigned to them.

Ex. 1 at p. 1. The importance of the Rules of Professional Conduct is noted and addressed later in the Clinic Manual: "The opportunity to represent real clients carries with it certain professional responsibilities. All Clinic members are expected to review and scrupulously follow the requirements of the Rules of Professional Conduct." Ex. 1 at p. 5. The Clinic Manual then specifically addresses conflicts of interest. Ex. 1 at p. 5-6. And, stressing again the importance of the Rules of Professional Conduct, page 6 of the Clinic Manual states: "It is impossible to place too much emphasis on the Rules of Professional Conduct. Problems of professional responsibility appear in the simplest of situations without warning." Ex. 1 at p. 6.

The Clinic faculty members are role models to the law students. The Clinic cannot effectively teach the Rules of Professional Conduct unless its faculty know and are permitted to scrupulously follow them.

Permitting clinic attorneys to use professional judgment in addressing ethical dilemmas is both a part of academic freedom and professional responsibility. The Clinic's legitimate interest, as an educator of law students, in educating students and protecting its faculty's ability to exercise professional judgment and academic freedom, outweigh the free speech interests at stake.

3. The Clinic's interests in complying with its ethical obligations outweigh the speech interests at stake.

The Clinic also has a strong, legitimate interest in properly (i.e., ethically) providing legal services. The allegation that protected speech created the ethical dilemma does not eliminate the Clinic's interest in and duty to comply with its ethical obligations. Nor does the allegation Wishnatsky's persistent and antagonistic actions against the Clinic and the Clinic's faculty were public attacks, or attacks regarding a public issue, change the Clinic's legitimate interest in ethically providing legal services. It would be incongruous to conclude that ethical obligations must be ignored if the actions creating the ethical dilemma constitute protected speech.

As licensed professionals, the Clinic's attorneys must comply with professional standards or risk disciplinary action, up to and including revocation of licensure. As an arm of an educational institution, the Clinic has a compelling interest in educating future lawyers by teaching professional ethics and by practicing professionally. The Clinic's compliance with professional ethics, of course, also serves the public, the legal profession, and the courts. In short, compliance with professional standards is a must for the Clinic to properly fulfill its primary purpose of educating law students and its secondary purpose of providing quality legal

services to individuals otherwise unable to afford or secure legal representation. The Clinic's legitimate interests in complying with its ethical obligations are sufficiently strong to outweigh any free speech interests at stake.

The district court properly dismissed the Complaint because, as a matter of law, (1) the "unconstitutional conditions" doctrine does not apply to Wishnatsky because there was no pre-existing attorney-client relationship, (2) representation by the Clinic does not constitute a "valuable governmental benefit,"(3) the Clinic's decision not to represent Wishnatsky was not motivated by Wishnatsky's speech, and (4) the Clinic's interests in properly educating students and complying with its ethical obligations override any free speech interests at stake.

III. The Complaint was properly dismissed even if an allegation of pretext can be read into the Complaint.

If this Court reads into the Complaint an unstated allegation that the Clinic's reason for denying Wishnatsky representation was pretextual, the Complaint was still properly dismissed. First, as discussed in Section II(A), under Umbehr the "unconstitutional conditions" doctrine does not even apply to this case because Wishnatsky did not have a pre-existing relationship with the Clinic. Second, as a matter of law, the Clinic could not ethically represent Wishnatsky. Finally, the Clinic's exercise of professional judgment was not a substantial departure from accepted norms.

A. The Clinic could not represent Wishnatsky for ethical reasons as a matter of law.

Wishnatsky argues dismissal on the pleadings was inappropriate because the intent of the Clinic is a factual issue for the jury. Despite not making this factual

pleading in the Complaint, Wishnatsky now asserts the Clinic's explanation of lack of resources and ethical obligations was pretextual. Even if the Court reads this unasserted factual allegation into the Complaint, Wishnatsky's argument fails because, as a matter of law, the Clinic's ethical obligations required it deny Wishnatsky the requested representation. Thus, no liability exists because the same action had to be taken under the North Dakota Rules of Professional Conduct. See Umbehr, 518 U.S. at 675; Mt. Healthy, 429 U.S. at 287.

Professor Rovner, like all faculty at the Clinic and other attorneys licensed in North Dakota, must comply with the North Dakota Rules of Professional Conduct. North Dakota Rule of Professional Conduct 1.7 provides, in part:

> (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
> (b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.

The comment to Rule 1.7 emphasizes the importance of avoiding personal conflicts to protect the attorney-client relationship. "Loyalty is an essential element in the lawyer's relationship to a client. An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined." N.D.R. Prof. Conduct 1.7 cmt. Under Rule 1.7 an impermissible conflict can exist because of a lawyer's own interests or responsibilities to another client. If "the lawyer's own interests or the lawyer's responsibilities to another client" create a conflict, "the lawyer is absolutely prohibited from undertaking or continuing representation of the client." Id.

With regard to personal conflicts, "[a] lawyer is required to decline representation of a client if the lawyer's own . . . personal interests are likely to affect adversely the advice to be given or services to be rendered to the prospective client." Id. "[A] lawyer's personal interests cannot be allowed to affect the representation." Id. A conflict with a potential client due to the potential client's personal and public attacks on the attorney would, of course, qualify as a conflict likely to adversely affect the attorney-client relationship.

"Mutual disrespect, disregard, and distrust are not the foundation of an effective attorney-client relationship." Wolgin v. Smith, NO. CIV. A. 94-7471, 1996 WL 482943, at *4 (E.D. Pa. Aug. 21, 1996). As one court noted:

> The relationship of attorney and client is one involving great personal and professional integrity and responsibility on the part of the lawyer and an equal confidence and trust on the part of the client. . . . Such relationship requires absolute confidence in the lawyer by the client and an equal confidence in the client by his lawyer.

Fisher v. State, 248 So.2d 479, 484 (Fla. 1971).

An attorney cannot represent a client in circumstances void of the mutual trust and confidence that are critical to the attorney-client relationship. Such an estranged relationship is inconsistent with the notion of the attorney-client relationship.

Rule 1.16(a)(1), N.D.R. Prof. Conduct, prohibits a lawyer from representing a client if "[t]he lawyer reasonably believes that the representation will result in violation of the Rules of Professional Conduct or other law." The comment to Rule 1.16 states "[a] lawyer should not accept representation in a matter unless it can be performed . . . without improper conflict of interest and to completion."

A known personal conflict, which would prevent a trusting attorney-client relationship, precluded the Clinic from agreeing to represent Wishnatsky. As stated by the district court, Wishnatsky's "public criticism of some of the Clinic's clients, the Clinic itself, and Laura Rovner personally is indicative of the lack of trust and confidence [Wishnatsky] has in the Clinic and the Clinic would have in [Wishnatsky]." Add. A-5. In addition to the lack of trust, there was a known conflict between the Clinic's current clients and Wishnatsky. Wishnatsky made it clear his interests were contrary to and opposed those of the Clinic's current clients. See Clinic Add. 6, 7, 9. Because of these known conflicts, the Clinic was ethically required to decline to represent Wishnatsky.

On numerous occasions courts have authorized attorneys to withdraw from representation because of personal conflicts with a client. See, e.g., Augustson v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658, 663 (5th Cir. 1996) (noting courts have found just cause to withdraw if the client degrades or humiliates the attorney); Sobol v. District Court, 619 P.2d 765, 767 (Colo. 1980) (withdrawal permitted because of mutual antagonism between lawyer and client which rendered it unreasonably difficult for lawyers to carryout their employment effectively); Ashker v. International Bus. Mach. Corp., 607 N.Y.S.2d 488 (N.Y. App. Div. 1994) (client's threats, accusations and refusal to accept advice rendered it unreasonably difficult for counsel to carryout legal representation); McGuire v. Wilson, 735 F. Supp. 83 (S.D.N.Y. 1990) (counsel allowed to withdraw due to deterioration in relationship); Kolomick v. Kolomick, 518 N.Y.S.2d 413, 414 (N.Y. App. Div. 1987) (permitting

counsel to withdraw when plaintiff's papers indicated unproductive relationship); Wolgin, 1996 WL 482943, at *4 (permitting attorney to withdraw because the client attacked the attorney's character and professional ethics). In this case the Clinic did not withdraw from representation; it simply advised it could not undertake the requested representation, even if it had the resources to do so, due to a conflict with the prospective client. An attorney ethically must decline representation if the attorney knows a personal conflict would cause an antagonistic relationship between lawyer and client and prevent the attorney from effectively and appropriately carrying out the legal representation. That is all that occurred here.

It was ethically inappropriate for the Clinic to accept Wishnatsky as a new client. N.D.R. Prof. Conduct 1.7(a), (b); 1.16(a)(1). Thus, as a matter of law, Wishnatsky was not denied representation in violation of his constitutional rights.

B. Review of the Clinic's exercise of professional judgment is highly deferential.

If this Court determines the Clinic's ethical obligations did not require it to deny Wishnatsky the requested representation, the Court must determine what role courts play in reviewing attorneys' decisions of professional judgment. Because this case involves the Clinic's decision regarding how to educate law students, any review also involves review of the Clinic's constitutionally protected academic decisions. Wishnatsky apparently believes the role of the federal court is to second-guess and control, through injunctive relief, attorneys' exercise of professional judgment and educators' academic decisions. No authority has been provided to support that position.

At district court Wishnatsky argued that his scathing attacks against Professor Rovner and the Clinic could not have adversely affected the attorney-client relationship since a Jewish attorney chose to undertake representation of Nazis. Opp. to Mot. for Judg. on the Pleadings at 10. But Wishnatsky's example is inapposite to the case sub judice. The Nazis never personally attacked the Jewish attorney. Although they may have had political or religious differences, the clients had not made personal attacks against the attorney's character, competence, and professionalism, as in this case.

Furthermore, one attorney's decision to represent particular clients misses the point. Under the applicable ethical rules, the attorney chose, but was not obligated, to undertake the representation. He personally decided whether a conflict existed. The fact one Jewish attorney did not personally feel a conflict existed by him representing the Nazis does not mean every Jewish attorney must feel the same way. The individual attorney makes that very personal professional decision.

North Dakota Rule of Professional Conduct 1.7 focuses on the impact of the representation on the individual lawyer. The individual lawyer must determine whether he or she can provide appropriate representation under the circumstances. That–or simply because–an attorney works for the government does not deprive the attorney of the right–or the obligation–to exercise professional judgment consistent with the Rules of Professional Conduct that govern her practice.

Any review by this Court of Professor Rovner's professional judgment, as an attorney and educator, should be highly deferential. Professional judgment, by its

very nature, requires the exercise of discretion. And issues regarding personal conflicts, which are unique to each individual attorney, require the attorney be given even greater discretion. The highly deferential standard applied to academic decisions, which are implicated here given the academic mission/focus of the Clinic, is most appropriate.

The Supreme Court stated:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.
>
> Considerations of profound importance counsel restrained judicial review of the substance of academic decisions.

Regents of Univ. v. Ewing, 474 U.S. 214, 225 (1985). It further explained federal courts are not suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information . . . .'" Id. at 226 (quoting Board of Curators of Univ. v. Horowitz, 435 U.S. 78, 89-90 (1978)). Under this standard, a decision will not be overturned unless the decision is "such a substantial departure from accepted norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Id. at 225; cf. University of Pa. v. E.E.O.C., 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments.").

Deciding whether the Clinic had adequate resources, and whether forging an attorney-client relationship with Wishnatsky served the Clinic's pedagogical interest,

was a genuine academic decision. And deciding whether a conflict existed was a genuine professional judgment. Based upon the factual allegations, the Clinic's decision on both these issues did not depart from accepted professional norms. See supra Section III(A). Accordingly, this Court should not second-guess the Clinic's exercise of academic and professional judgment.

If great deference is not given to the Clinic's exercise of professional and academic judgment, at the most an objective, reasonable attorney standard should be applied. The reasonable attorney standard avoids judicial inquiry into subjective states of mind, recognizing some deference to professionals. It also avoids excessive disruption to and interference in professional and educational decisions.

Under this objective standard, the range of reasonable judgment depends in part on the nature of the relevant rule. The more specific the rule, the more narrow the judgment. Conversely, when the rule is more general, more leeway or discretion should be provided in its application. North Dakota Rule of Professional Conduct 1.7, the rule applicable to this case, is very general.

Review of Professor Rovner's professional judgment must be informed by the full set of circumstances surrounding this dispute. After Professor Rovner and others from the Clinic appeared at a Fargo City Council meeting to request, on behalf of their clients, that the City move its Ten Commandments monument from government property, Wishnatsky wrote a letter to the Grand Forks Herald. Clinic Add. 1. In his letter Wishnatsky accused Professor Rovner and the Clinic of using government funds to further an "agenda of moral corruption and unbelief" and to engage in

"ideological warfare." Id. Wishnatsky also referred to Clinic's clients as "militant atheists" and "parlor atheists who delight in attacking the faith of millions in furtherance of their religion that there is no god." Id.

Wishnatsky later requested the Clinic assist him with factual research in a lawsuit he wished to bring against "Grand Forks County and other relevant parties" for "having a statue of the goddess Themis on top of the Grand Forks County courthouse." Add. A-10. That Wishnatsky's request was insincere is evidenced by the fact he copied the letter to various media entities around the state and a legislator that criticized the Clinic's involvement in the Ten Commandment's case. Id. at A-11; Clinic Add. 3, 5; Add. A-11; Ex. 9.

Wishnatsky's insincerity in seeking Clinic assistance was further evidenced by a "Viewpoint" article written by Wishnatsky prior to him receiving a response from the Clinic. In the article, among other things, Wishnatsky challenged the appropriateness of the Clinic's involvement in the Ten Commandments lawsuit and accused Professor Rovner of abusing her position at the Clinic to further her own political agenda. Clinic Add. 6. This is hardly the activity of someone sincerely seeking representation from the Clinic.

Although the question of what is "reasonable" is difficult in some cases, it is not difficult here. In light of Wishnatsky's personal and professional attacks, a reasonable attorney (particularly a clinical instructor) could have reached the same conclusion as Professor Rovner. Clearly, since courts have permitted attorneys to

withdraw from representing a client when similar personal conflicts exist, an attorney can reasonably decline to represent a prospective client under the facts of this case.

The district court explained the Clinic "legitimately perceived [the] inability to establish a productive attorney-client relationship with [Wishnatsky] and effectively represent his interests." Add. A-5. It is unclear what degree of judicial review the district court used in reviewing the Clinic's exercise of professional judgment. What is clear, however, is whether this Court concludes its review should be highly deferential or one of reasonableness, this case was properly resolved as a matter of law. Adequate facts were before the district court and are before this Court, through the Complaint and the documents it incorporates, to determine, as a matter of law, that the Clinic's decision did not depart from accepted professional norms. The district court properly dismissed the Complaint.

CONCLUSION

FOR THE ABOVE REASONS, defendant respectfully requests that this Court affirm the district court's July 29, 2004, Judgment dismissing the Amended Complaint with prejudice.

Dated this ___ day of December, 2004.

State of North Dakota
Wayne Stenehjem
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