

MEMORANDUM

TO: REPRESENTATIVE JIM KASPER

CC: REPRESENTATIVE RICK BERG

FROM: CANDACE M. ZIERDT, INTERIM DEAN
UNIVERSITY OF NORTH DAKOTA SCHOOL OF LAW

RE: YOUR REQUEST FOR INFORMATION

DATE: JANUARY 31, 2003

The purpose of this memorandum is to respond to your email message of January 26, 2003, addressed to Professor Laura Rovner, Clinical Director at the University of North Dakota School of Law. You asked the following question: "[u]nder what North Dakota statute do you have the authority to spend state funds to provide free legal services to the Free thinkers?" You "desire a complete justification under the laws of the state of North Dakota as to how you are able to expend public funds for what I believe to be a private matter."

As an initial matter, let me clarify two misconceptions you seem to have about the clinic. First, the clinic is **NOT** representing the Free thinkers organization. Rather, they are representing five individual plaintiffs and not all of those individual plaintiffs are members of that organization. Second, all of the law that is practiced in the clinic involves "private matters" whether they are domestic violence, a contract dispute, or a private citizen trying to enforce the Constitution.

The UND School of Law, like 183 other law schools in the country, operates an in-house clinic that is an integral part of our legal education program. Through the clinic, students have the opportunity to represent real clients in real cases in an actual practice setting. In the clinic, students learn by doing. They take on primary responsibility for cases and actually appear before courts and administrative agencies, under close faculty supervision. The students' hands-on work on these cases is essential to their learning process and to their development as attorneys.

Section 15-11-01 of the North Dakota Century Code provides generally for the establishment of the State University of North Dakota here in Grand Forks. Just as the legislature has not enacted specific statutes authorizing, for example, the English or Mathematics Departments, similarly, the Code does not contain provisions pertaining specifically to the clinical education program of the School of Law, the School of Medicine, or other similar Colleges or departments of the University. Rather, the North Dakota Constitution simply provides authority for the establishment of the University itself as well as for the Board of Higher Education, which was created in 1938 in

response to the political activities of Governor William Langer. See N.D. Const. Art. VIII, Sec. 6. The Board, which is charged with "the control and administration of . . . the state university," recites as one of its guiding principles that "effective service from each campus requires faculty involvement and institutional latitude for . . . determination of curriculum, decisions about research and public service initiatives . . . consistent with each institution's mission and subject to provisions of related Board policies." N.D. State Board of Higher Ed. Policy Manual, Section 100.6-IC(2). Finally, Section 15-10-16 of the Century Code states that "the state board of higher education has the control of the expenditure of the funds belonging and allocated to the institutions under its control and also of those appropriated by the legislative assembly for such institutions."

By wisely choosing to entrust the design and teaching of the curriculum of the various disciplines taught at the University to the faculty members who teach in those disciplines, both the Legislature and the Board have affirmed the Board's belief that "the faculty are the foundation of the North Dakota University System." N.D. State Board of Higher Ed. Policy Manual at Sec. 100.5-I. The Board has also recognized that the guarantee of academic freedom is vital to each faculty member's ability to exercise his or her professional judgment about how to best teach students. Indeed, the State Board of Higher Education's Policy Manual states that "the people of North Dakota created the Board through the state Constitution to ensure the institutions and their employees were protected from political interference." Manual at p. 1 (emphasis added). I suspect one reason for this may have been to guarantee that people would not be able to interfere with the colleges and universities of North Dakota simply because they teach or hold unpopular ideas. One very important way of ensuring that teachers are not sanctioned for what or how they teach is through the principle of academic freedom. The regulations of the State Board of Higher Education establish and guarantee teachers the right to academic freedom. This right is fully supported by the U.S. and North Dakota constitutions. I will expand on this point a little later in this memo.

As an accredited law school we are also governed by certain regulations of the American Bar Association (ABA) and the American Association of Law Schools. We must follow these regulations if we wish to remain accredited and I am certain the state has no desire for an unaccredited law school. Standard 301 (a) of the ABA Standards for Approval of Law Schools requires that "[a] law school shall maintain an educational program that prepares its graduates for admission to the bar and to participate effectively and responsibly in the legal profession." Standard 302 (c) requires all law schools to offer adequate opportunities for law students to learn specific skills and it mandates that we provide clinical experience for our students. The ABA requires us to teach these types of courses because they are vital to a student's legal education. Clinical education is important for all students. It is even more important for law students at the University of North Dakota because many of our students eventually practice law either alone or in small firms. By participating in a clinic, a student learns how to competently and ethically practice law while at the same time allowing underrepresented groups and individuals to secure high quality legal representation.

Today more than ever, in the wake of attacks on America, it is critical that law students learn the legal concepts that make our country great. One of those concepts is that every individual should be afforded basic rights and those rights should be protected by the court system – even if they involve unpopular viewpoints or beliefs. Our clinical program teaches students how to put theory into practice. It also teaches them that they have certain professional and ethical responsibilities as attorneys. Clinical settings provide unique opportunities for students to learn these skills and professional values.

It is important to understand that in a clinic the “text” that the students learn from is the clinic office itself where they meet and interview their clients and the courtroom where they represent them. Who decides what text will be used in any given class? That answer, of course, is that it is the Professor who is teaching the course. The Civil Rights Clinic was developed because Professor Rovner came to UND with a special expertise in Civil Rights and Disabilities Law and because there is a great need for these services in our state, as evidenced by the most recent report of the North Dakota Advisory Committee to the U.S. Commission on Civil Rights.

Professor Rovner, as the teacher, has the duty and power to develop the course in the way that best utilizes her experience and expertise. Like any other faculty member, she also has the right to decide what text to use for her course. This is basic to academic freedom. The Supreme Court of the United States, as well as other courts across the country, has noted how important academic freedom is in a democratic society. Luckily, we do not live in a country like Iraq where the government attempts to control the teaching and actions of university professors. In a country like Iraq the state controls who professors and researchers may speak with as well as what and how they teach. I am sure they have never even imagined a truly free country that permits academic freedom.

The concept of academic freedom was described succinctly by the United States Court of Appeals for the Fifth Circuit when it stated “[a]cademic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment. The principle of academic freedom abjures state interference with curriculum or theory as antithetical to the search for truth.” Aguillard v. Edwards, 765 F. 2d 1251, 1257 (5th cir., 1983), *aff’d* 482 U. S. 578 (1987).

The First Amendment of the Constitution of the United States, Article One, Sections 1- 7 of the Constitution of North Dakota, and regulations promulgated by the State Board of Higher Education protect academic freedom. Courts across the country have recognized the rights of teachers to assign controversial material to their students. The American Association of University Professors issued a well-known statement on academic freedom and tenure many years ago. The 1940 Statement of Principles on Academic Freedom and Tenure provides that “[i]nstitutions of higher education are conducted for the common good. The common good depends upon the free search for truth and its free exposition. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.” The AAUP’s interpretation of this statement on academic freedom explains that “[c]ontroversy is at the heart of the free academic inquiry which the entire statement

is designed to foster." This 1940 statement on the principles of academic freedom and tenure has been endorsed by scores of organizations including the American Library Association, the American Catholic Historical Association, the College Theology Society, the American Academy of Religion, the Association for the Sociology of Religion, the American Society of Christian Ethics, the American Society of Church History, American Risk and Insurance Association, American Association of Law Schools, and the Society of Biblical Literature.

The North Dakota Board of Higher Education has also recognized how critical academic freedom is to institutions of higher learning.

8.1.1 (1) (a) of the State Board of Higher Education Regulations on Academic Freedom and Tenure states the following:

"1. General Principles

- a. A college or university is a forum for ideas, and it cannot fulfill its purpose of transmitting, evaluating, and extending knowledge if it requires conformity with any orthodoxy of content and method. Academic freedom and tenure are both important in guaranteeing the existence of such a forum. This policy is intended to enable institutions under the authority of the Board to protect academic freedom."

The UND faculty handbook in the section on Academic freedom further states at Section II.6 :

"A. General Principles: The primary responsibility of the academic community is to provide for the enrichment of intellectual experience. Conflict of ideas cannot occur unless there is opportunity for a variety of viewpoints to be expressed. The academic community must be hospitable even to closed minds, and it must welcome the conflict of ideas likely to ensue. Academic responsibility to provide opportunity for expression of diverse points of view generates academic freedom.

C. Students: Students are entitled to be taught by unfettered teachers and to have access to all information pertinent to their subjects of study. They are entitled to as complete freedom as possible in the selection of their curriculum, teachers, and associates."

One of the concerns you emphasize in your e-mail is the fact that clinic clients are not charged for our representation. The clinic provides legal services to all of its clients free of charge. This has been true for the clinic's clients ever since the clinic was founded in 1968. The clinic does, however, require all its clients to pay the costs associated with their cases. It is important to note that two of the ethical and professional responsibilities that we seek to instill in our students are the duty and professional responsibility of an attorney to represent a cause no matter how controversial it may be and to provide pro bono representation to people who are otherwise unable to obtain legal representation. The clinic is certainly accomplishing at least one of these goals because our students are learning that representing those with unpopular viewpoints brings an avalanche of attacks on the source of that representation.

It may be useful to explain the eligibility criteria for the Civil Rights Project. (CRP) The Project provides a variety of legal services to clients who are unable to secure representation elsewhere in matters involving civil rights and civil liberties. There are usually two reasons why people are unable to obtain legal representation. One reason clients of CRP are unable to find other lawyers to represent them relates to the types of cases they may have, which often involve controversial issues or conflicts of interest for other lawyers. A second reason CRP clients are unable to find lawyers elsewhere is due to a lack of financial resources. The plaintiffs in this case met CRP's eligibility requirements.

Finally, from an educational standpoint, it is particularly important—and appropriate—that a law school clinic is representing clients involved in civil rights matters. The controversial nature of the issues involved force students to confront, in very concrete ways, the ethical obligations of lawyers. For example, a comment to one of the ethical rules governing attorneys in the State of North Dakota states that “[l]egal representation should not be denied to people who are unable to afford legal services, or whose cause is *controversial or the subject of popular disapproval*.” (NDRPC 1.2, Cmt., emphasis added.) Similarly, the oath taken by every attorney admitted to practice in North Dakota requires those attorneys to pledge that “I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed.”

The case is providing an excellent educational experience for the students. It provides them a unique opportunity to litigate constitutional law issues, as well as to learn how to litigate a case in federal court. It also teaches them some of the hard lessons about what it means to represent unpopular clients. If the clinic were to bow to outside pressure against this case, what would the law school be teaching its students about the principles of our profession and the importance of representing those who would not otherwise have a voice?

It is worth noting that because this clinic seeks to protect the Civil Rights of the citizens of the state of North Dakota, many of the clients it accepts will be unpopular. Does that mean that the clinic should not represent them? I certainly hope not. It is disturbing that some opposition to the clinic's representation of these clients seems to be targeted at the specific viewpoint of the plaintiffs.

The bottom line is that the State of North Dakota is paying for education and I believe the Law School provides our students with one of the best legal educations available today. I hope you will not attempt to hamper it.