

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

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**PETITION FOR REHEARING  
OR REHEARING EN BANC**

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**STATEMENT OF NEED FOR REHEARING**  
**OR REHEARING EN BANC**

Pursuant to Rules 35(b)(1) and 40, Fed. R. App. P., Appellee seeks rehearing or rehearing en banc as to the reversal of the district court's Order Granting Judgment on the Pleadings. This petition is limited to a dispositive issue addressed and decided by the district court, but not addressed in this Court's opinion, namely, the proper standard of review of an attorney's exercise of professional judgment. Resolution of that issue by this Court is essential; it will result in either affirmance of the district court's judgment or guidance to the district court and parties on how to properly proceed in this matter.

In reviewing Defendant's exercise of professional judgment, the district court applied an objective, reasonableness standard. The district court found Defendant's exercise of professional judgment was reasonable. Although this Court held Defendant's professional decision was not mandated by ethical rules as a matter of law, Add. 7,<sup>1</sup> it did not address whether the district court applied the appropriate standard when reviewing Defendant's professional decision and, if so, whether the district court properly found Defendant's professional judgment was reasonably exercised.

What standard is to be applied when a court reviews an attorney's exercise of professional judgment is an issue of exceptional importance. The facts of this case should not be viewed in isolation. The issue goes far beyond Defendant's decision that she could not ethically represent Plaintiff. Indeed, the standard used by the

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<sup>1</sup> "Add." refers to the Addendum to this Petition, which includes this Court's decision. "Pl. Add." refers to the Addendum to the Brief for Appellant. "Clinic Add." refers to the Addendum to the Brief of Appellee.

courts when reviewing an attorney's exercise of professional judgment is not limited to ethical decisions, nor is it limited to employees of law school clinics.

Professional judgment is exercised prior to, during, and after an attorney undertakes representation. Throughout representation professional judgment is exercised when determining how to best represent the client's interests.<sup>2</sup> And issues requiring the exercise of professional judgment may arise after the representation is concluded.

Professional judgments are made by all attorneys, not just law school clinic faculty. Attorneys employed in public legal aid programs and government agencies daily exercise professional judgment. Legal aid programs are forced to deny representation to thousands of potential clients a year, based on program priorities, resource management, and the judgments of attorneys. Thus, this issue has wide application and is of exceptional importance, impacting the day-to-day workings of law school clinics, legal aid programs, and government agencies – all of which employ attorneys who use their professional judgment to represent them. The standard that will be employed when reviewing the professional judgments of those attorneys will affect whether the government or the program can effectively perform its missions.

Based upon all the facts before the district court, which included the Amended Complaint, documents referenced in the Amended Complaint, and matters of public

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<sup>2</sup> A party could challenge an attorney's exercise of professional judgment during representation, not just the decision whether the attorney can properly accept the party as a client. Had Defendant accepted Plaintiff as a client, Plaintiff could have alleged Defendant did not provide Plaintiff the same level or quality of services as Defendant provides her other clients because of Plaintiff's speech criticizing Defendant.

record, the district court held Defendant's decision that she could not properly represent Plaintiff was reasonable. Specifically, the district court found Defendant "legitimately perceived [the] inability to establish a productive attorney-client relationship with Plaintiff and effectively represent his interests." Pl. Add. A-5. Although the district court used the terms "legitimately perceived," rather than using the term "reasonable," the meaning is the same. "Legitimate" is defined as "[b]ased on logical reasoning, reasonable." The American Heritage Dictionary 723 (2d Coll. Ed. 1991). It also means "[i]n accordance with established or accepted patterns and standards." Id. Thus, the district court found the Defendant's exercise of professional judgment was "reasonable" and in accordance with professional standards.

This Court should specifically address and find that the district court appropriately applied an objective, reasonable professional judgment standard to review Defendant's exercise of professional judgment. The Court should also affirm that, based upon the undisputed facts before the district court, the district court properly found Defendant's exercise of professional judgment was reasonable.

### **STATEMENT OF THE FACTS**

During all times relevant to this action, the Clinical Education Program at the University of North Dakota School of Law (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 Laura Rovner was the

Director of the Clinic and directed the Civil Rights Project. See Pl. Add. A-13, ¶ 2.; Exs. 1 at p. 1; 2 at pp. 1-2; 3.<sup>3</sup>

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 remove its Ten Commandments monument from government property, Professor Rovner received a telephone call from Martin Wishnatsky (Wishnatsky). Clinic Add. 1; Pl. Add. A-14, ¶ 6. 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; Pl. 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. Wishnatsky then accused the Clinic and Professor Rovner of "engag[ing] in such 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." Pl. Add. A-10; A-14, ¶ 4. Wishnatsky sent that letter not only to Professor Rovner, but also to various media entities around the state. Clinic Add. 3-4, 5; Pl. Add. A-14, ¶ 6.

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<sup>3</sup> 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.

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.” Pl. 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, the letter explained, 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.

### **ARGUMENT**

In its opinion, this Court acknowledged the Clinic’s legitimate interests in professionally and ethically providing legal services. Add. 7-8. It further acknowledged that ethical considerations are a legitimate reason to decline representation. Id. Cf. Board of County Comm’rs v. Umbehr, 518 U.S. 668, 675 (1996) (holding the government can deny a governmental benefit to a person because of the person’s speech “when legitimate countervailing government interests are sufficiently strong”). Thus, the issue is not whether the Clinic could have legitimately declined to represent Wishnatsky if his speech created an ethical conflict of interest. The Court has already held it could. The issue is whether Professor Rovner appropriately exercised her professional judgment in determining Wishnatsky’s actions would adversely impact the Clinic’s ability to represent him.

This issue is also not one of pretext, where Wishnatsky claims the Clinic declined to represent him because of his speech, but justified its decision on some other basis. After explaining the Clinic lacked the resources to represent Wishnatsky, Professor Rovner candidly explained that the Clinic did not believe it could represent Wishnatsky because of his speech. That part of the Clinic’s decision was based on Wishnatsky’s speech. Thus, there is no issue of pretext; the issue is whether Professor Rovner reasonably exercised her professional judgment

when she determined Wishnatsky's speech could adversely affect her and the Clinic's ability to represent Wishnatsky.

**I. An attorney's professional judgment should be reviewed on an objective, reasonable professional judgment standard.**

Since ethical considerations are legitimate reasons to decline representation, the ultimate issue before the Court is the appropriateness of Professor Rovner's exercise of professional judgment in deciding that she and the Clinic could not ethically represent Wishnatsky. Resolution of that issue requires a determination of what standard should be employed when reviewing an attorney's exercise of professional judgment. The district court applied an objective, reasonable professional judgment standard and found that Professor Rovner reasonably exercised her professional judgment.

A court's review of an attorney's professional judgment should be significantly restrained to avoid judicial interference in those decisions. To prevent inappropriate second-guessing of an attorney's judgment, as well as burdensome and invasive discovery into an attorney's thought process and client files, an attorney's exercise of professional judgment is entitled to deference. If professional judgment was exercised, no further review of the attorney's professional judgment should be made. Any other approach places the courts in the role of second-guessing and interfering in attorneys' professional judgments. This could encourage attorneys to act contrary to their own independent professional judgment out of fear of potential litigation or liability. For example, if a claimant can sue a lawyer employed by the EEOC because of the lawyer's professional judgments regarding which cases to litigate, the lawyer's professional judgment will be adversely impacted by concerns



of liability, litigation, etc. The exercise of independent professional judgment, a hallmark and ethical requirement of the legal profession, should not be hampered in that way.

If an objective standard is not applied, government attorneys, law school clinics, and legal aid programs will be exposed to burdensome and invasive discovery, despite a decision being objectively reasonable. Expending time and resources on such discovery and litigation could interfere in the clinic or program's ability to perform its mission. Depending on the nature of the professional decision being questioned, the discovery may involve confidential information regarding the clinic or program's other prospective or actual clients. An attorney, including attorneys employed by a law school clinic or legal aid program, should not be subjected to such invasive discovery and second-guessing by the court when the attorney's professional decision is objectively reasonable.<sup>4</sup>

Courts have traditionally reviewed professional judgments on an objective basis, upholding the decision unless it is a substantial departure from accepted professional judgment, practice, or standards. For example, in Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court explained a decision made by a professional is presumptively valid. The Supreme Court limited review of the professional's decision to whether the decision was "such a substantial departure from accepted

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<sup>4</sup> Adopting a subjective review of an attorney's professional judgments will provide a blueprint on how to virtually guarantee representation by a public law clinic or legal aid program. The potential client will simply need to publicly attack the clinic or program right before or while a request for representation is pending. To avoid the costs and burdens of protracted litigation, and to prevent the possible exposure of client identities and information, despite its professional judgment to the contrary as to the merits of the case, conflicts of interest, etc., the clinic or program will have little choice but to accept the speaker as a client.

professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.” Id. at 323. Cf. Regents of Univ. v. Ewing, 474 U.S. 214, 225 (1985) (an academic decision will not be overturned unless the decision is “such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment”).

Whether Wishnatsky’s actions would adversely affect the attorney-client relationship and Professor Rovner and the Clinic’s ability to effectively represent Wishnatsky was a professional judgment that is entitled to great deference. No one but Professor Rovner could assess how Wishnatsky’s actions would affect her ability to interact with him. Certainly a judge or jury is not uniquely qualified to determine how Wishnatsky’s actions might personally affect Professor Rovner’s ability to interact with Wishnatsky as a client. Only she personally could make that independent professional assessment. And if her professional judgment on that issue was not a substantial departure from accepted professional judgment, practice, or standards, no further inquiry is warranted.

**II. The decision not to accept Wishnatsky as a client was objectively reasonable.**

A. Wishnatsky did more than criticize the Clinic’s use of public funds.

This is not a case where the district court was limited to the concise allegations in the Amended Complaint when ruling on the Motion for Judgment on the Pleadings. Rather, in addition to the Amended Complaint, the district court properly considered “materials embraced by the pleadings and materials that are part of the public record.” Pl. Add. A-2. Based upon the pleadings and the other

undisputed facts, the district court properly found Professor Rovner's exercise of professional judgment was objectively reasonable. Accordingly, the district court's judgment should have been affirmed.<sup>5</sup>

When objectively reviewing Professor Rovner's exercise of professional judgment, it is important to note that the speech in question involved much more than criticism of the Clinic's decision to represent the plaintiffs in the Ten Commandments suit. See Add. 2, 4. Rather, it involved personal and professional attacks against Professor Rovner and the Clinic, as well as attacks against the Clinic's current clients. Pl. Add. A-5. For example, in his letter to the Grand Forks Herald, 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." Clinic Add. 1. He also referred to the 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. While his request for representation was pending, in a "Viewpoint" article Wishnatsky accused Professor Rovner of abusing her position at the Clinic to further her own political agenda. Clinic Add. 6.

Based upon all of the statements made by Wishnatsky, not just the fact he was critical of the Clinic's use of public funds to advance the Ten Commandments suit, the district court found the Clinic "legitimately perceived [the] inability to establish a

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<sup>5</sup> Experts were not needed in this case to establish the acceptable standards of practice. The standards are established in the North Dakota Rules of Professional Conduct, and the courts are quite familiar with those standards. Because no discovery or evidence was required to establish the standards, resolution of the case on the Clinic's Motion for Judgment on the Pleadings was appropriate.

productive attorney-client relationship with [Wishnatsky] and effectively represent his interests.” Pl. Add. A-5.

B. Defendant’s judgment was not a substantial departure from accepted professional judgment, practice, or standards.

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 could, 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).

Similarly, another court explained:

The very existence of the attorney-client relationship raises a presumption that trust and confidence exists between these parties. Consequently, the relationship requires a high degree of fidelity and good faith. An attorney should never accept employment if the exercise of professional judgment may be affected by the attorney's own financial, personal or business interests. Likewise, an attorney should never accept employment if personal interests will adversely affect the services rendered to the client.

Tonwe v. Harris-Miles, 187 B.R. 178, 182 (Bankr. N.D. Ohio 1995) (citations omitted).

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.” Rule 1.16 focuses on the individual lawyer’s belief and whether that belief is reasonable.

A conflict may subjectively impact one attorney differently than another attorney. But the individual attorney must personally determine whether he or she believes the facts will adversely impact the representation. The ethical standard is whether that belief is reasonable. Thus, the issue that was before the district court, and is now before this Court, is whether, under the undisputed facts, a reasonable attorney could reasonably believe Wishnatsky's actions would adversely impact the attorney's representation of Wishnatsky. Although some attorneys might be able to "bury the hatchet" and provide representation, Add. 7, a reasonable attorney could also determine the recent and contemporaneous personal and professional attacks against the attorney could not so easily be forgotten. The issue is whether Professor Rovner's exercise of professional judgment was reasonable, not whether all attorneys would make the same decision. The district court correctly found Professor Rovner "legitimately perceived" that Wishnatsky's actions would adversely impact the attorney-client relationship and any representation provided Wishnatsky.

That Professor Rovner's judgment was reasonable is evidenced by significant case law where courts have authorized attorneys to withdraw from representation, a higher standard than simply declining to undertake representation, because of personal conflicts with a client. See, e.g., Augustson v. Linea Aerea Nacional-Chile S.A., 76 F.3d 658, 663 (5<sup>th</sup> 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 carry out their employment effectively); Ashker v. International Bus. Mach. Corp., 607 N.Y.S.2d 488, 489 (N.Y. App. Div. 1994) (client's threats, accusations and

refusal to accept advice rendered it unreasonably difficult for counsel to carry out 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, 414-15 (N.Y. App. Div. 1987) (permitting counsel to withdraw when plaintiff's papers indicated unproductive relationship); Wolgin, 1996 WL 482943, at 3-5 (permitting attorney to withdraw because the client attacked the attorney's character and professional ethics). In this case Professor Rovner did not withdraw from representation; on behalf of the Clinic she simply declined to undertake the requested representation because, in her professional judgment, an impermissible conflict existed. Pl. Add. A-12.

Adequate facts were before the district court and are before this Court, through the Amended Complaint and the documents it incorporates, to determine that the Clinic's decision was reasonable. As explained 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]." Pl. Add. A-5. Because of Wishnatsky's statements, the Clinic "legitimately perceived [the] inability to establish a productive attorney-client relationship with [Wishnatsky] and effectively represent his interests." Id.

The district court appropriately applied an objective, reasonable professional judgment standard. The district court also properly found Defendant's exercise of professional judgment was reasonable. Accordingly, the district court's Judgment dismissing the Amended Complaint should be affirmed.

## **CONCLUSION**

FOR THE ABOVE REASONS, Defendant respectfully requests that this Court grant her petition for rehearing or rehearing en banc and affirm the district court's July 29, 2004, Judgment dismissing the Amended Complaint.

Dated this \_\_\_\_ day of January, 2006.

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