September 16, 2003

The Honorable Wayne Stenehjem
Office of the Attorney General
State of North Dakota
600 East Boulevard Avenue
Bismarck, ND 58505-0040

Dear Attorney General Stenehjem:

I understand you are considering the issuance of an Attorney General's Opinion regarding whether it is appropriate for a state-funded law school's legal clinic to represent clients in an action against a state or municipal agency.

This letter is submitted on behalf of the Association of American Law Schools to call your attention to issues and past decisions we hope you will find helpful in considering this issue. The Association of American Law Schools ("AALS") was founded in 1900 for the purpose of "improv[ing] the legal profession through legal education." It is the learned society for legal educators and serves as the principal representative of the nation's law schools to the federal government and other higher education organizations. One hundred sixty five of the nation's law schools have qualified for, and are, members of the AALS.

Important issues concerning clinical legal education and academic freedom are presented in the question involving the University of North Dakota Civil Rights Project. For the reasons stated below, the AALS urges you to determine that the University of North Dakota Law School and its legal clinics should retain full decision-making authority, within the guidelines established by the Law School, over selection of cases in which students will be representing clients under the supervision of law school faculty.

The operation by law schools of legal clinics through which law students gain practical experience, and academic credit, under the supervision of faculty and staff attorneys, is an important and relatively recent, development in legal education. Legal clinics constitute a significant method of insuring that our law schools not only train students to "think like a lawyer"

but also provide them with the opportunity to develop the "on-the-spot" judgment and pragmatic skills that will be as important as scholarly analytic skills in law practice. See generally Meltsner & Schrag, Report from a CLEPR Colony, 76 Colum. L.Rev.581, 584-87 (1976); E.S. Milstein, The Future of Clinical Legal Education, 6 District Law. 12 (May-June 1982).

Former Chief Justice Warren Burger on occasion criticized the nation's law schools for their failure to provide practical experience to their students and pointed to this failure as one cause of incompetency among legal practitioners. See Burger, C.J., The Special Skills of Advocacy: Are Specialized Training and Certification Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973). Several arms of the American Bar Association have concurred with the Chief Justice's position that practical training in lawyering skills is vitally important to effective legal education. See, e.g., American Bar Association Section of Legal Education and Admission to the Bar, Report and Recommendations of the Task Force on Law Schools and the Profession: Narrowing the Gap, 233-273 (1992); American Bar Association Task Force on Professional Competence, Interim Report 9-10 (1982); American Bar Association Section of Legal Education and Admission to the Bar, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools 3-4 (1979).

It is clear that principles of academic freedom are as important to law school clinical courses as to Property, Torts, or Constitutional Law. Faculty and students have the same cognizable academic freedom rights whether the teaching and learning takes place in a classroom, in a laboratory, or in any other location where teachers are teaching, students are learning, and scholarly activities take place. *See, e.g., Dow Chemical Company v Allen,* 672 F.2d 1262, 1275 (7th Cir. 1982("[W]hatever constitutional protection is afforded by the First Amendment extends as readily to the scholar in the laboratory as to the teacher in the classroom."); *Appearance* of *Rutgers Attorneys,* 561 A.2d 542, at 546-47 (construing state conflict-of-interest statute as not barring law faculty from appearing outside the traditional classroom before state agencies based, in part, on "the fundamental importance of academic freedom"). The courts' rulings in *Dow and Rutgers* are fully consistent with the AAUP's policies, which state: "Teaching...includes laboratory instruction, academic advising, training graduate students in seminars and individualized research, and various other forms of educational contact in addition to instructing undergraduates in the classroom," and that teaching occurs in a variety of settings, including "clinics." *The Work of Faculty*, at 130.

Further, the history of clinical legal education and the express language of the ABA's accreditation standards, which require law schools to afford students the opportunity to enroll in "real-client"clinics, demonstrate that clinical and classroom teaching are both integral to modern legal education. Indeed, the Supreme Court in *Sweatt v Painter*, 339 U.S. 629 (1950), recognized the importance of practical experience in legal education:

> The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced

> law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. (*Id.* at 634).

The principles of academic freedom apply where teachers teach and students learn, including in a law school clinic.

The ability to choose cases regardless of the status of the parties is at the heart of our legal system and is an important educational lesson to impart to students. Indeed, over thirty years ago the American Bar Association Committee on Ethics and Professional Responsibility in its opinion on "Limitations on the Operation of a Legal Clinic by a College of Law" stated, in a situation involving a state law school legal clinic, that governing bodies should seek to avoid making rules "[to] prohibit acceptance of controversial clients and cases or that prohibit acceptance of cases aligning the legal aid clinic against public officials, governmental agencies or influential members of the community." The opinion went on to say that "Acceptance of such controversial clients and cases by legal aid clinics is in line with the highest aspirations of the bar to make legal services available to all," ABA Informal Op. 1208, Feb. 9, 1972. A decision to limit the North Dakota law schools' ability to accept clients simply because the defendant would be a state or municipal agency would thus be contrary to ABA Ethical Guidelines.

Moreover, North Dakota's own Rules of Professional Conduct support the principle of representation of unpopular clients. "Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial," Comment to Rule 1.2, North Dakota Rules of Professional Conduct.

The AALS has a strong commitment to clinical legal education because it is vital to the overall education of future lawyers. The University of North Dakota Legal Clinic should be applauded for its commitment to training its graduates to be effective, well-educated members of the legal profession. Any decision that might limit the law school's ability to make important curricular and pedagogical decisions that have traditionally been protected by academic freedom would be harmful to the quality of legal education in North Dakota.

I hope this information, and the views of the AALS will be helpful to you in reaching your opinion.

Sincerely yours,

Carl C. Monk
Executive Director

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