

IN THE SUPREME COURT
STATE OF NORTH DAKOTA**COMMENT OF SARAH VOGEL**

Supreme Court No. 20160436

**In the Matter of a Petition to Terminate the Special Provision of Legal Services by
Qualified Attorneys From Outside North Dakota**

I am Sarah Vogel and I was one of the North Dakota attorneys who signed the December 14, 2016 Petition to Permit Temporary Provision of Legal Services by Qualified Attorneys from Outside North Dakota. I was pleased that the Supreme Court amended its Admission to Practice Rules to allow streamlining of its procedures for temporary admission of lawyers to provide pro bono services in an order dated January 18, 2017.

I believe that the January 18, 2017 Order has been very beneficial to the administration of justice during the DAPL crisis. I was accordingly dismayed to learn that on September 11, 2017 Judge Hagerty, on behalf of the South Central Judges, filed a Petition to Terminate the Special Provision of Legal Services by Qualified Attorney from Outside North Dakota ("Petition to Terminate"), in which they requested that only attorneys "actively representing a client and listed as attorney of record on September 11, 2017" be allowed to provide pro bono services after that date.

I urge the Supreme Court to deny the Petition to Terminate.

DAPL has been a significant trauma to all participants, including protesters and law enforcement. The publicity arising from DAPL also has hurt the reputation of the State of North Dakota. For a number of years, my law practice has involved many Native American clients from across the country. I work with attorneys who are civil rights experts who recognize racial injustice when they see it, and they believe they saw it in North Dakota during the DAPL protests. I've also been actively involved with national and regional philanthropies and many Native American-led organizations who are grantees of these philanthropies. I have found it to be very painful to be from North Dakota at many of the meetings I have attended since the DAPL protests and arrests began. The military style response to the protests has had a terrible effect on the perception of North Dakota held by my friends, colleagues and clients across the country. They watched news clips on DAPL on the nightly news with horror and disbelief -- as did I. I took pictures of phalanxes of riot-gear clad police watching a small crowd of concerned citizens (of which I was one) who gathered on the capitol grounds with a permit and were listening to speakers who were not inciting violence, but rather were discussing court rulings. I also shared pictures of a tank outside the Morton County Courthouse and a wall of riot-gear police barring anyone - other than lawyers - from entering the Courthouse on a day that a national journalist was making a first appearance for being arrested for photographing dogs attacking people. Rather than

viewing North Dakota as a "beacon on the prairie". it is too often viewed as a racist and violent state. I know of Native Americans invited to meetings in North Dakota who won't come here, regardless of the merit of the program ("If I were black, I wouldn't want to go to Mississippi: why would I as a Native American want to go to a meeting in North Dakota?") People in North Dakota may not want to admit this effect on our reputation, but it has happened.

However, the court system of North Dakota has been an isolated bright spot in the calamity that has become known as DAPL. The charge against Amy Goodman was dropped. And, other news stories have covered the fair trials, and neutral judges who considered evidence -- not innuendo -- and listened to attorneys' motions and arguments and who ruled on the merits. Some cases are headed to the Supreme Court on appeal, where they will be soberly and carefully considered. Because the courts behaved as courts should behave, I believe the reputation of North Dakota has begun a long and painful process of restoration. However, I fear that if this Petition to Terminate is granted and if there is a precipitous "eviction" of a number of the lawyers who have helped represent DAPL defendants *and where this eviction is at the behest of the judges before whom the DAPL defendants are being tried, it will cause another calamitous blow to our state's reputation.*

I believe that the better course would be to simply let the cases wind down in a natural way. If lawyers aren't needed or requested, they simply won't come. Having lawyers' names on a list in the interim does no harm, and may do some good. At some time in the not-too-distant future, the surge of DAPL cases will wind down and be over and the January 18, 2017 order will be irrelevant. But that time is not now. There are simply too many cases still in the courts or capable of being recharged. The right to counsel is so central to our Constitution and system of laws that only in the most extreme conditions should this court or the District Courts step back from the commitment to adopt procedures to encourage and support the provision of adequate counsel to DAPL defendants. Denial of the right of counsel impeaches "the very integrity of the fact-finding process" and the right to counsel is "fundamental and essential to a fair trial." State v. Orr, 375 N.W. 171, 177-179 (ND 1985). Accordingly, I believe it is critical that care be taken to provide all possible due process and support to DAPL defendants who are indigent by keeping intact the provisions for *pro hac vice* lawyers admitted under the January 18, 2017 Order.

Moving to the arguments raised in the Petition to Terminate, I question the claim in Par. 3 that "new cases are no longer being filed." This is a claim that could plausibly be made by a prosecutor, but cannot be made by a judge. Further, it fails to consider the fact that various prosecutors have repeatedly and publicly stated that they intend to recharge certain DAPL defendants whose cases have been dismissed. I have never done criminal law, but I believe that my civil clients would not believe that our attorney/client relationship is terminated when an issue goes on the back burner of the adversary. Indeed, this "quiet" period is one in which the attorney and client need to stay in touch so as to be ready when the issue again surfaces. To summarily "yank" the licenses of the *pro hac vice* lawyers retroactive to September 11, 2017 because a

particular case was not "active" as of September 11, 2017 -- even though the client might be recharged -- would infringe on the client's reasonable expectations of a continuing attorney-client relationship. Until such time as the prosecutors in the DAPL cases firmly and unequivocally advise the Supreme Court that no recharging of previously dismissed cases will occur or until the statute of limitation has run on all of the dismissed charges, this Court should disregard this argument.

Par. 3 utilizes a double negative in saying that there is "no indication that local attorneys are unavailable to provide representation." To flip this statement, there is no proof in the Petition to Terminate to indicate that local attorneys are available to provide representation. The December 14, 2016 Petition that led to the January 18, 2017 Order was replete with information that local attorneys were not able to timely deal with the hundreds of cases that arose with DAPL and the special challenges these cases created (e.g., each defendant charged with a conspiracy needed his/her own lawyer.) The emergency detailed in the initial petition has lessened, but it is not over -- at least according to the Emergency Commission of the state of North Dakota. The Emergency Commission voted on Monday September 25, 2017 to borrow an additional \$5 million from the Bank of North Dakota, of which \$2.4 million is specifically for "court and attorney fees for 'indigent defense'." See, Bismarck Tribune, Sept. 25, 2017, p. A8: "Bill Rises for DAPL protest cost." Major General Dohrmann is quoted in this story as telling the Emergency Commission that the anticipated costs of indigent defense "might decrease with many of the cases getting dismissed." But cases don't just "get dismissed". Dismissal of DAPL cases came about because of good legal work on the part of defense counsel, including work between January and September 2017 by the *pro hac vice* lawyers. Attorneys are still needed.

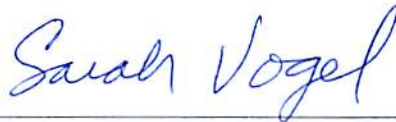
Par. 4 expresses discomfort about the numbers of North Dakota-licensed attorneys who do not have offices in North Dakota who served as sponsors of attorneys practicing under the special rule. However, it is not surprising that a number of the sponsoring lawyers have out-of-state addresses. The 2017 North Dakota Directory of Lawyers and Judges lists 56 pages of North Dakota- licensed lawyers with offices from Alabama to Wyoming (pages 124 through 180). The Directory's list of North Dakota-based lawyers with offices from Ashley to Wishek covers only 79 pages (pages 44 to 123). With roughly 41% of the North Dakota-licensed lawyers having their primary offices out-of-state, it is not surprising that a significant number of sponsors have addresses from other states. Further, when it is considered the stated purpose of the January 18, 2017 order was to increase the availability of criminal lawyers and North Dakota (due to its historically low crime rate) does not have a very large criminal defense bar, the number of such sponsoring lawyers with offices from out-of-state makes eminent sense. If a particular team of lawyers fails to follow local rules or local practices, the appropriate remedy is to have the trial court deal with them as individuals, but not to penalize others who have followed all local rules and practices.

Par. 5 of the Petition to Terminate is also perplexing because whether or not *pro hac vice* fees are paid or waived is not germane to the role of presiding judges, and payment or waiver of a fee has no bearing on the qualifications of the attorney representing the

client. In any event, *pro hac vice* fees are insignificant in the overall scheme of things. See, Bismarck Tribune, Sept. 25, 2017, p. A8: "Bill rises for DAPL protest cost," stating the state has borrowed \$43 million for unbudgeted DAPL expenditures, primarily for policing.

Finally, I can see no logical reason for the judicial branch of the State of North Dakota to reject the offer of pro bono legal assistance from attorneys who are willing to provide free help to indigent clients, when paying for that assistance will otherwise become the responsibility of the state's taxpayers. Every client accepted by a pro bono attorney reduces the demand on indigent defense program, including the \$2.5 million very recently borrowed by the state from the Bank of North Dakota. At the meeting at which the decision to borrow this money occurred, Governor Burgum stated that he was open to accepting resources from the federal government and other sources, such as Energy Transfer Partners, saying "Everything is on the table. I'm open to whatever source of money and where it may come from" in order to help assuage the potential costs of DAPL from being assessed onto the North Dakota taxpayer. See, "Bill rises for DAPL protest costs," Bismarck Tribune, September 26, 2017, p. A8. It is simply common sense to facilitate use of pro bono attorneys if that will save North Dakota taxpayers from having to pay for the same services.

Dated: September 28, 2017



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