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COMMENTARY

It's Déjà Vu All Over Again For Rutgers' Legal Clinics

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In 1989, the New Jersey Supreme Court ruled in the case of *In Re Appearance of Rutgers Attorneys* that Rutgers Law School clinical teachers were not state employees for purpose of the state's Conflict of Interest Law, and therefore could not be prohibited from representing their clinics' clients before state administrative agencies.

In 2002, the state Legislature enacted New Jersey's Open Public Records Act, OPRA, to make government records subject to public disclosure. Since the Supreme Court had already ruled that Rutgers' clinicians were not acting as public employees when they represented private clients, the Legislature had no reason to think it had to provide an OPRA exemption for the clinics, as it did for the state's publicly funded Public Defender's Office, which also represents private clients.

As a consequence of this understandable omission, a state appellate court ruled on Oct. 25 in *Sussex Commons Associates v. Rutgers, The State University* that the law school's clinical files were public records subject to disclosure under OPRA.

If that ruling is not overturned by the state Supreme Court, it will place an onerous and undue burden on the legal clinics at Rutgers' two law schools, which represent thousands of clients every year without fee. Unlike every other law firm in the state and the clinics at Seton Hall University School of Law, the Rutgers clinics would be forced to tell their clients and other correspondents that private materials submitted to the clinics would be subject to requests for disclosure as public records.

While it is true that OPRA does exempt from disclosure certain classes of files (such as those protected by attorney-client privilege), the *Sussex Commons Associates* ruling means that anyone who wants to harass the clinics and their clients (such as polluters or developers sued by them or spousal abusers in domestic violence proceedings) could make demands that would divert the clinical faculty from their primary purposes of training students and providing legal services to underrepresented private clients to responding to frivolous requests and litigating such requests in court.

In the meantime, clients and others would be threatened with public disclosure of private materials they could submit to any other law office in the state, secure in the knowledge that they were protected from public scrutiny:

- Clients' medical information, such as the presence or possibility of HIV/AIDS, herpes, cancer, bipolar disorder or drug abuse — plus disbursements to and communications with specialists in these fields and messages from specialists in those fields, treatment centers, etc.
- Clients' sexual orientation (think Tyler Clementi) and documents relating to harassment of such people, consultation and documents from gay and lesbian legal advocacy organizations, and statements from gay witnesses regarding the clients.
- Clients' financial information — witness preparation of financial analysis, bank accounts and other documents with financial submissions, bankruptcy filings, etc.
- Clients' employment evaluation information and even clients' school grades and test scores and similar documents history.
- Similar information submitted by people seeking legal assistance whom the clinics were unable to represent.
- Correspondence with and materials received from colleagues about possible litigation projects, whether or not they were ultimately pursued.

These materials could not only be sought by opposing counsel as a "second bite of the apple" in ongoing cases after unsuccessfully seeking these materials through normal discovery processes, they could also be sought by any member of the public who dislikes one of the clinic's clients or is simply curious about a client's personal facts.

Now, it is true that courts might find some of these materials protected from

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disclosure under one or another OPRA exemption, but each request would require time and attention from clinical faculty, time and attention away from their primary duties of training future lawyers and serving the poor and underrepresented.

This is why it is undoubtedly of critical importance to the state public defender that its similarly indigent and underrepresented clients' files are completely and categorically exempt from OPRA disclosures, notwithstanding the ability to assert the same privileges on a case-by-case basis. The Rutgers' clinics seek no more and no less for its clients and programs than the same protections extended to the state Public Defender's Office and clients.

Nor is the desired protection a function of paranoia on the part of clinicians. In just the past few years, law school clinics in Louisiana, Maryland and Pennsylvania have been under attack by adversaries, particularly by corporations sued for despoiling the environment.

In the conflict-of-interest case 21 years ago, the Supreme Court said it was inconceivable that the Legislature "would have intended to disable a clinical education program at our State university" in such a way, as compared with a clinical program at a private law school. The Court then cited "a venerable principle of the law that a law will not be interpreted to produce absurd results." Citing the takeover of Rutgers University by the state in 1956, the Court added that "the fact there is state involvement in education should never be a disadvantage."

No one denies that Rutgers University itself is a state entity subject to OPRA, and the university has willingly turned over to the requesters all information concerning the funding of the law school clinic. However, as the Court added in the earlier case, "it has never been the law that for all purposes Rutgers is to be regarded as an alter ego of the State" and "it is equally not true that its teaching faculty members are employees of the state for all purposes."

The Appellate Division opinion in *Sussex Commons Associates* is in direct conflict with the earlier decision. The purpose of OPRA is to make public records transparent. The client files maintained by the Rutgers clinics are not public records in any sense of that term. They are no more public records than those of any other private law office in the state or the clinics at Seton Hall Law School.

The fact that Rutgers receives some small part of its budget from the state of New Jersey does not turn these teaching law offices into state entities. To the contrary, the Rutgers clinics are more often than not adversaries of the state, challenging legislation, defending people accused of wrongdoing by state agencies, providing representation to families denied special education by public schools or protecting families from improper interference by child welfare agencies.

As proclaimed by our Supreme Court in the earlier case of *Appearance of Rutgers Attorneys*, "The fact that there is state involvement in education should never be a disadvantage." ■