IN THE

Supreme Court of New Jersey

No. 67,232

SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE,	:	**ON A PETITION FOR CERTIFICATION TO THE APPELLATE DIVISION, SUPERIOR COURT, NO. A1567-08T3**
Plaintiffs-Respondents,	:	
	:	APPELLATE DIVISION:
vs.	:	NO. A1567-08T3
	:	SAT BELOW:
RUTGERS, THE STATE UNIVERSITY, RUTGERS ENVIRONMENTAL LAW CLINIC, and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS,	:	FUENTES, J.A.D., GILROY, J.A.D. and SIMONELLI, J.A.D.
	:	
	:	LAW DIVISION:
	:	No. L-8465-06
Defendants-Petitioners.	:	SAT BELOW:
	:	HON. TRAVIS L. FRANCIS

BRIEF OF AMICI CURIAE RUTGERS CLINICS IN SUPPORT OF PETITION FOR CERTIFICATION

JOHN J. FARMER, JR.
FRANK ASKIN
JON C. DUBIN
RONALD K. CHEN

Rutgers School of Law, Newark
Center for Law & Justice
123 Washington St.
Newark, NJ 07102
(973) 353-5687

Attorneys for Amici Curiae Rutgers Clinics

JOHN C. LORE III

Rutgers School of Law, Camden
217 North Fifth Street
Camden, NJ 08102

Of Counsel.

December 15, 2010.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Amici Curiae, the law clinics of Rutgers School of Law, Newark, and Rutgers School of Law, Camden, respectfully submit this brief in support of the petition for certification in this matter.[1]

ARGUMENT

I. THE APPELLATE DIVISION IGNORED THE CONTROLLING PRECEDENT, APPEARANCE OF RUTGERS ATTORNEYS, IN HOLDING THAT RUTGERS CLINICAL ATTORNEYS ARE STATE ACTORS FOR PURPOSES OF THE OPEN PUBLIC RECORDS ACT.

In its opinion below, the Appellate Division ignored both the reasoning of In Re Determination Of Executive Committee On Ethical Standards Re: Appearance Of Rutgers Attorneys, 116 N.J. 216 (1989)(hereinafter Appearance of Rutgers Attorneys) and the method that this Court employed in reaching its decision. New Jersey courts have repeatedly recognized that Rutgers and, by extension, the Rutgers legal clinics, are not "arms of the State" for all purposes. See id. at 229 (finding that clinic professors are not state employees under the conflicts of interest law); cf., Fuchilla v. Layman, 109 N.J. 319, 324 (1988)(finding a public university is not alter ego of the state but a separate juridical "person" for purposes of 42 U.S.C. § 1983); Right to Choose v. Byrne, 173 N.J. Super. 66, 74 (Ch. Div. 1980), rev'd on other grounds, 91 N.J. 287 (1982)(finding that Rutgers' clinics may collect attorneys fees in civil rights litigation).

[1] Amicus relies on the Statement of Matters Involved contained in the Petition for Certification.

A. In Appearance of Rutgers Attorneys, This Court Laid Out a Test to Determine Whether Rutgers Attorneys Are State Employees for a Particular Purpose.

In Appearance of Rutgers Attorneys, this Court applied a test that considers: (1) the evil sought to be remedied by the statute, and (2) Rutgers' unique position within the executive structure, before (3) determining whether the Legislature intended to include Rutgers as a state actor. 116 N.J. at 223-27. Applying the test, this Court found that the evil that the conflicts of interest law sought to remedy was an appearance of impropriety that violated or appeared to violate the public trust. Id. at 226. This Court decided that considering the need for academic independence and the clinic's academic mission, no appearance of impropriety was likely to arise from a clinic professor appearing before a state agency. Id. Therefore, this Court concluded that the Legislature could not have possibly intended to include clinic professors as "state employees" under the statute. Id. at 228-29.

In finding that the clinics are public agencies under OPRA, however, the Appellate Division erroneously relied on a simplistic syllogism that completely ignored the holding and method that this Court employed in Appearance of Rutgers Attorneys. The panel's logic boils down to: (1) the University is an agency of the state subject to OPRA; (2) the clinics are a department in the University; (3) therefore, the clinics are public agencies subject to OPRA and/or therefore, clinical information is subject to OPRA as university information. Pca23-

24. Essentially, the lower court assumed that because Rutgers is subject to OPRA, it automatically follows that the clinics are subject to OPRA as well. Pca23-24.[2]

Appearance of Rutgers Attorneys mandates, however, that this Court employ a very different syllogism when determining if the clinics are a "public agency" when representing clients: (1) Rutgers University is a hybrid state agency that is not an "arm of the state" where this Court has determined it performs an independent function; (2) this Court has held that clinics do perform an independent function, and therefore that clinical professors are not "state employees" when they are representing clients; (3) therefore, records related to client representation are not "government records" within OPRA's definition. This Court was clear that its holding did not apply to Rutgers as a whole, but rather was limited to the clinics and the clinic attorneys alone. 116 N.J. at 229. Therefore, the mere fact that Rutgers University generally is subject to OPRA does not lead to an inevitable conclusion that the clinics, as a subdivision of the university, are subject to OPRA as well.

The definition of "state employee" under the conflicts of interest law is "any person . . . holding an office or employment in a State agency." N.J.S.A. § 52:13D-13(b). A "state agency" under the conflicts of interest law encompasses "any of the principal departments in the Executive Branch of the State Government, and any division, board, bureau, office, commission

[2] Pca refers to Petitioner's Appendix.

or other instrumentality within or created by such department." N.J.S.A. § 52:13D-13(a)(emphasis added). Therefore, when this Court held that Rutgers attorneys were not state employees for purposes of representation, it implicitly held that the clinics are not "state agencies" under the statute nor are they instrumentalities or subdivisions created within a state agency.

OPRA's definition of "public agency" or "agency" (see N.J.S.A. § 47:1A-1.1) is substantially similar to that contained in the conflict of interest statute. The Appellate Division reasoned, however, that the clinics are obviously subject to OPRA because they are subdivisions of Rutgers. Pca23-24. Thus, rather than reading the two statutes *in pari materia*, the Appellate Division inexplicably found that identical language in similar statutes had completely opposite meanings. But since the statutory language is the same, the panel should have applied the analysis of Appearance of Rutgers Attorneys to determine if the clinics are "arms of the State" under OPRA.

The policy considerations are identical. The evil that OPRA seeks to remedy is the lack of transparency in government that seeks to limit the appearance of impropriety, just as does the Conflict of Interests law. Furthermore, the academic mission of the clinics and its professors, as well as the need for academic freedom, are paramount concerns in both cases because, as this Court said in Appearance of Rutgers Attorneys, "[t]he fact that there is State involvement in education should never be a disadvantage." 116 N.J. at 223. Therefore, the conclusion that

the clinics are subject to OPRA because Rutgers is "indistinguishable" for purposes of document access is erroneous. The clinics are completely distinguishable under the test adopted by this Court. That test need only be applied.

With remarkable candor, in their opposition brief Respondents make clear their distaste for the majority's holding in Appearance of Rutgers Attorneys and their preference for the dissent. Respondents argue that Rutgers "succeeded in this cynical and deliberate strategy 21 years ago," but that "such practices should no longer be validated or successful before any Court." Brief of Plaintiffs-Appellants [Respondents] dated December 13, 2010, p.8. But inconsistency with a prior holding of this Court is a strong reason to grant the Petition for Certification, not deny it. Respondents are free to attempt their substantive argument should the Court grant review, but the suggestion that the Court simply leave matters in a state of flux is hardly consistent with sound judicial practice.

The Appellate Division mischaracterized the clinic's request that the court recognize its case files' *exclusion* from OPRA as a request that the court create a new *exemption*, when OPRA's general non-applicability to Rutgers clinic files actually stems directly from the Court's decision in Appearance of Rutgers Attorneys. A proper application of this Court's holding mandates that the clinical programs be categorically excluded from OPRA, as they do not meet OPRA's definition of "public agency." Even assuming arguendo that the Rutgers Newark and Camden clinical law

offices could be considered public agencies for some purposes, all documents related to clinic cases must be categorically exempt from OPRA, as Appearance of Rutgers Attorneys establishes that the clinics are not "arms of the state" for the purpose of client representation, and thus their client files are not "government records" as defined under OPRA. N.J.S.A. § 47:1A-1.1 (defining "government record" as record made or held by "any officer, commission, agency or authority of the State").

The same reasoning demands that clinic records be exempt from the common law right of access. The common law right extends to "records made by public officers in the exercise of their functions." Wilson v. Brown, 404 N.J. Super. 557, 581 (App. Div. 2009), certif. den. 198 N.J. 473 (2009). Since clinic professors are not "State employees" under the Conflicts of Interest law and under OPRA, they are not "public officials" under the common law right to know.

B. The Same Policy Considerations That Guided the Court's Decision in Appearance of Rutgers Attorneys Are Applicable Here.

As this Court recognized in Appearance of Rutgers Attorneys, law school clinics serve a vital educational function in preparing law students for practice by involving them in every level of actual litigation. See, 116 N.J. at 218-19.[3]

[3] See also Hope Babcock, Environmental Justice Clinics: Visible Models of Justice, 14 Stan. Envt'l L.J. 3, 24 (1995) (defining clinical education as "first and foremost a method of teaching"). See also, Frank Askin, A Law School Where Students Don't Just Learn the Law; They Help Make the Law, 51 Rutgers L. Rev. 855, 858 (1999); Arthur Kinoy, The Present Crisis in

Subjecting Rutgers' legal clinics to OPRA would severely burden their educational mission in the same way that subjecting the law school clinical professors to the state's conflicts of interest law would have.

1. To hold law school clinics subject to OPRA would seriously disadvantage them professionally.

Allowing public records requests to invade internal workings and client files of law clinics will have a chilling effect on the types of cases and clients that law school clinics handle. As Judge Francis noted in his opinion below, if the clinics' files were subject to non-discovery disclosure, "[i]t is likely that clients would be more hesitant to enlist the services of the clinic." Pca21.

A categorical exemption is necessary because, as the trial court recognized, imposing a responsibility to respond to, and litigate against, harassing and burdensome requests for documents on the clinics would divert their time and attention from their primary purpose of training future lawyers and providing legal representation to an under-served population. Pca21. Moreover, transforming the clinics' files into public records could also discourage potential clients from seeking their assistance. Pca21.

Although OPRA may exempt some information from discovery under N.J.S.A. § 47:1A-1.1, those privileges are not all-

---

American Legal Education, 24 Rutgers L. Rev. 1, 7 (1969).

encompassing.[4] Subjecting potentially non-privileged information in client files to a presumption of access -- such as, depending on context, certain witness statements, medical information, information regarding sexual-preference, or financial information regarding non-clients -- would create an avenue of unwarranted discovery and abusive litigation.[5] The Appellate Division gave insufficient attention to the burden its ruling would place on the Rutgers' clinics to sift through all documents in its files and separate exempt documents from those that might be covered under OPRA by calling it a trade-off for the acceptance of public funds by Rutgers University, totally ignoring this Court's admonition that "[t]he fact that there is state involvement in education should never be a disadvantage." 116 N.J. at 223.

2. To hold law school clinics subject to OPRA would undermine academic freedom and interfere with their educational mission.

In addition to their public service role, clinics also

[4] The attorney-client privilege, for instance, is quite narrow, and "documents do not become cloaked with the lawyer-client privilege merely by the fact of their being passed from client to lawyer." Tractenberg v. Township of W. Orange, 416 N.J. Super. 354, 376 (App. Div. 2010).

[5] Most of the Rutgers clinics handle litigation and other projects in teams which include a faculty member and several students. Pending and potential cases are discussed within the team, and then often with other students and faculty during weekly case rounds and seminars. One of the requests still pending in this case is a request for records of "all board and staff meetings at which the Sussex Commons application was discussed." Pca14, 32. Whether such "minutes" or other students' or faculty notes taken at such meetings are exempt under OPRA is an issue that might entail significant disagreement and protracted court litigation.

serve a vital academic purpose. In 1996, the American Bar Association began to require that each ABA-accredited law school "offer live-client or other real-life practice experiences." As a result, more and more law schools established legal clinical programs as one way of implementing this requirement. Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 Fordham L. Rev. 1971, 1973 (2003) (citing Standards and Rules of Procedure for Approval of Law Schools, 302(b)(1), Am. Bar Ass'n(2002)). Currently, the ABA lists approximately 90 accredited public university law schools that have legal clinics.

Mirroring the ABA's recognition of the importance of hands-on legal education, this Court acknowledged the educational importance of legal clinics as being "one of the most significant developments in legal education." Appearance of Rutgers Attorneys, 116 N.J. at 218. Legal clinics bridge the gap between the case-oriented learning emphasized by the traditional law school curricula and the more comprehensive and complex work undertaken by practicing lawyers. In other words, whereas traditional law school classes teach students about the law, legal clinics teach law students *how to be* lawyers. See, Askin, supra at 860. Encouraged by an ABA mandate for "hands-on" experience in serving client needs, this Court has recognized the importance of clinical legal education, including "participating in client interviews, investigations, preparation of pleadings, and, in permitted circumstances, appearing in

court." Appearance of Rutgers Attorneys, 116 N.J. at 218-19.

Both the United States and the New Jersey Supreme Courts have recognized the need to protect academic programs from outside interference. The U.S. Supreme Court noted in NLRB v. Yeshiva University that universities are "guilds of scholars . . . responsible only to themselves." 444 U.S. 672, 680, (1980). This Court cited that language in Snitow v. Rutgers University, 103 N.J. 116, 122 (1986), and repeated it in Appearance of Rutgers Attorneys, 116 N.J. at 224, noting: "In Snitow we recognized the fundamental importance of academic freedom in our society." This Court then cited to Sweezy v. New Hampshire for the proposition that "'the four essential freedoms' of a university [have been said to include the freedom] 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" 354 U.S. 234, 263 (1957)(Frankfurter, J., concurring). This Court then added for itself: "To characterize one of these scholars, for all purposes, as the equivalent of a 'State employee' is to misperceive history and to traduce legislative purpose." Appearance of Rutgers Attorneys, 116 N.J. at 224. Those words apply equally to this case. See generally, Kuehn & Joy, supra 71 Fordham L. Rev. at 1988.

The Court has also highlighted the important work that Rutgers clinics do, such as "the Women's Rights Litigation Clinic … represent[ation] [of] women subjected to sexual harassment … [and] in child-advocacy issues", and "the Urban Law Clinic …

handl[ing] clients' housing, employment, and income assistance claims." Appearance of Rutgers Attorneys, 116 N.J. at 219. A number of the clinics have undertaken controversial cases which provoke opposition from powerful adversaries. Efforts to harass (and even shut down) such clinics have become commonplace. See Robert Kuehn & Peter Joy, Kneecapping Academic Freedom, Academe, Vol. 96 No. 6 (Nov./Dec. 2010). The ABA also recognized this problem and has maintained a standing policy regarding interference in law school clinical activities:

> Improper attempts by persons or institutions outside law schools to interfere in the ongoing activities of law school clinical programs and courses have an adverse impact on the quality of the educational mission of affected law schools and jeopardize principles of law school self-governance, academic freedom, and ethical independence under the ABA Code of Professional Responsibility.

Interference in Law School Clinical Activities, Accreditation Information, Council of the Section, Council Statements No. 9, Am. Bar Ass'n, p.4 (2010). Without protection for their academic freedom from such harassment, these clinics could not successfully function.

Clinics take on the same role as any other class for which students receive academic credit. Academic freedom protects against a court or legislature interfering in the clinical educational experience just as it forbids going into a classroom and changing the teaching materials or syllabus.[6] Id. By

[6] Clinics cases are even protected against interference or supervision by the school, including the dean or a faculty committee, as "it would violate the professional ethics of the . . . clinic director." Kuehn & Joy, supra, 71 Fordham L. Rev. at

holding that the burden on the clinics is offset by public funding, the Appellate Division ignored the import of Appearance of Rutgers Attorneys "that the Legislature [] would [never] have intended to disable a clinical education program at our State University." 116 N.J. at 218. The reasoning in Appearance of Rutgers Attorneys is dispositive because the dispute, both in that case and the present case, concerns the application of a statute intended to apply generally to state actors, but the application of which would have deleterious effect if applied to the law school clinics. Pursuant to that principle, this Court excluded legal clinics from the statute, observing "it is a venerable principle that a law will not be interpreted to produce absurd results." Id. at 221 (citations omitted).

C. The Purpose of OPRA Is To Promote Government Transparency, and There Is No Expectation of Transparency of Records Held by Law School Clinics in Representing Private Clients and Training Of Law Students.

Applying OPRA to clinic files would contravene its overall legislative purpose. The purpose of OPRA is to promote the public interest in transparency of public records. The Legislature could not have intended OPRA to include records produced by Rutgers law clinics in the course of representing private clients amongst these records, which is a process in which the public interest is in promoting confidentiality. To

---

1978 (citing ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972)). Since "[a]cademic freedom is intended to protect the learning process and the search for truth, it cannot be a privilege enjoyed solely by faculty and students in traditional classrooms." Id.

assume so could deprive an underserved and disadvantaged section of society, which may have no other means of obtaining representation from the benefits of the legal services that such clinical programs provide.

At the time of OPRA's adoption in 2001, Appearance of Rutgers Attorneys was prevailing case law. Because this prevailing case law had definitively established that Rutgers clinical law professors were not state actors, the Legislature had no reason to think it necessary to carve out a separate exemption for them from a state open records law. "There is a long-standing canon of statutory construction that presumes that the Legislature is knowledgeable regarding the judicial interpretation of its enactments." Coyle v. Bd. of Chosen Freeholders, 170 N.J. 260, 267 (2002); See also, DiProspero v. Penn, 183 N.J. 477, 494 (2005)("the Legislature is presumed to be aware of judicial construction of its enactments"); Cruz v. Central Jersey Landscaping, Inc., 195 N.J. 33, 47 (2008)(same).

Furthermore, nothing produced by law school clinics or their faculty would fall under the definition of a government record in N.J.S.A. § 47:1A-1.1. That provision defines a government record as a communication "maintained or kept on file in the course of his or its *official business* by any officer." (emphasis added.) Rutgers clinical professors have already been found not to be state actors when engaged in private client representation, nor in that capacity do they conduct any official business for the State. Rutgers clinical professors

are not sought out because they are members of the government, but rather because they are practicing attorneys offering pro bono services to persons in need of legal representation.

In Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities, the Appellate Division ruled that even though the League of Municipalities was composed of all municipalities in New Jersey and advised all municipal governments and officers, its role was similar to that of a private association, and found that it was not a state agency "within the intent of" OPRA. 413 N.J. Super. 423, 430 (App. Div. 2010). The Court held that "the terms 'office,' 'instrumentality' and 'agency' are generally understood . . . to refer to an entity that performs a governmental function." Id. Rutgers' clinical programs perform no governmental function.

In this case, the Appellate Division incorrectly analogized the current case to Times of Trenton Publishing Corp. v. Lafayette Yard Community Development Corp., 183 N.J. 519 (2005). In Times of Trenton, the Court dealt with a non-profit corporation created to aid with the city's redevelopment. Id. at 521. The Court noted that "the Mayor and the City Council have absolute control over the membership of the Board of Lafayette Yard and that the Corporation could only have been 'created' with their approval." Id. at 535.

Rutgers clinics, by contrast, are not performing necessary government functions and were not created to aid with any aspect of the State or any State function. The governing officers of

the university have no control -- nor, ethically, could they -- over the manner in which clinic professors practice law. The American Bar Association's Informal Opinion No. 1208, found that the "lawyer-client relationship exists between the clients and the clinic lawyers, [and] not between the governing body [of the law school]." Informal Ethics Opinions, Committee on Ethics and Professional Responsibility, American Bar Association, Vol. II, 867-1284, p. 442. The opinion further states that "the governing board must be particularly careful not to interfere with the handling of a particular matter once it is accepted." Id. at 444. See, In re Education Law Center, Inc., 86 N.J. 124, 139 (1981) (governing board of public interest law firm must not exercise control over staff attorney's representation of individual client). Even though Rutgers University and Rutgers Law School may be State agencies for purposes of OPRA, they have no supervisory authority over clinic litigation.

Moreover, since much of clinical litigation is against state agencies, it would be clearly unethical for case selection and strategy to be subject to government control or influence. This conflict is specifically recognized by the OPRA exemption for the Office of Public Defender. N.J.S.A. § 47:1A-5(k) (exempting all [public defender] files "that relate to the handling of any case [which] shall be considered confidential and shall not be open to inspection by any person unless authorized by law."). Although wholly funded by the State, the Office of the Public Defender functions as a private entity

representing private clients, just as the clinical programs at Rutgers do. It obviously did not occur to the Legislature to carve out a similar exemption for Rutgers legal clinics since Rutgers clinical professors had already been determined to be non-state actors in Appearance of Rutgers Attorneys. There is no reason to believe that the Legislature would have intended to treat Rutgers legal clinics differently from the Public Defender. "It is a venerable principle that a law will not be interpreted to produce absurd results." 116 N.J. at 221 (citing K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 325n.2, (1988)(Scalia, J., concurring in part and dissenting in part).

II. APPLYING OPRA TO DOCUMENTS RELATED TO AN ATTORNEY'S CLIENT FILE WOULD TRIGGER AN UNNECESSARY CONSTITUTIONAL CONFLICT REGARDING SEPARATION OF POWERS.

Misinterpreting OPRA to cover documents held by Rutgers clinical attorneys in connection with representation of private clients would also create a potential constitutional conflict between the Legislature and this Court, which alone is vested with ultimate and plenary authority to make rules governing the administration of all courts in the State, and regulating the practice of law and the discipline of persons admitted. N.J. Const., Art. VI, §2, ¶3.

It is well-settled that this Court's power to adopt rules governing administration of the courts and concerning the conduct of members of the Bar is exclusive, and not subject to overriding legislation. Winberry v. Salisbury, 5 N.J. 240, 255 (1950); Knight v. Margate, 86 N.J. 374, 387 (1981). Although the Court

may, in its discretion, decide to acquiesce when the Legislature enacts a regulation that affects the conduct of members of the Bar, such acquiescence is done in the "spirit of comity," not obedience, and this Court has "upheld narrowly-circumscribed legislation that touches on attorney discipline" only after it determines that doing so "*does not improperly encroach on judicial interests*." In re Advisory Committee on Professional Ethics Opinion 705, 192 N.J. 46, 55 (2007) (upholding applying general post-employment restrictions to former state employees who were lawyers after finding that doing so would not encroach on judicial interests)(emphasis added).

Unlike the, at most, indirect effect on this Court's ability to regulate the Bar at issue in Opinion 705, application of OPRA to private client records would profoundly undermine this Court's ultimate rule-making authority. Doing so would utterly disrupt the finely honed mechanisms that have been developed by this Court to determine the limits of pre-trial discovery, which contain contextual and balancing justifications against disclosure, such as the requirement that discovery be calculated to lead to relevant evidence and that requests not be either burdensome, duplicative, cumulative or available from a better source. See, R. 4:10-2. In addition, clinical case files would be open for disclosure under OPRA to millions of non-parties who are in no way authorized under any court rules.

If OPRA is applied to clinic client case files, private clients represented by the Rutgers legal clinics, and *only those*

clients, would be subject to a different set of discovery rules than any other civil litigant, thus confounding this Court's authority to establish uniform rules for the efficient administration of justice. This bizarre result would clearly require the Court to assert its ultimate responsibility under Art. VI, §2, ¶3.

Moreover, under R. 4:10-2(a), "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action" (Emphasis added). Thus, this Court has determined under its rule-making authority that, in the administration of civil justice, all the absolute privileges contained in N.J. Evid. R. 501-517 are incorporated by reference and thus non-disclosable in discovery. OPRA, on the other hand, only recognizes the attorney-client privilege, a limited inter-agency and intra-agency consultative and deliberative privilege, and a few other exemptions that do not begin to replicate fully the many other privileges that have been recognized by the courts (e.g. marital privilege, physician-patient privilege, counselor and psychologist privileges, newsperson's privilege, penitent-cleric privilege, self-critical analysis privilege).

Rule 4:10-2(c) also imposes strict limits on the extent to which attorney work product prepared in anticipation of litigation -- even though not covered under the attorney-client or other absolute privilege -- is susceptible to discovery. But the stringent test of "necessity" established by this Court under

R. 4:10-2(c) to overcome the attorney work product privilege, and the accompanying protection against disclosure of mental impressions and opinions of counsel, would be rendered nugatory if they could be trumped by the unconditional access permitted by OPRA.

It is true that there exists some uncertainty as to whether OPRA, by its own terms, recognizes all the substantive evidentiary privileges established by court rules or judicial decision.[7] But even if, *arguendo*, all potential pre-existing evidentiary privileges were so incorporated, there would still be significantly different disclosure rules applicable to Rutgers case files if OPRA were made applicable to them. File materials would still be available even when determined non-disclosable in discovery under the contextual and balancing rules in R. 4:10-2, and would still be available to the millions of potential requesters authorized to seek them under OPRA. In addition, all privileges from judicial disclosure that arose after 2002 are not incorporated into OPRA by N.J.S.A. § 47:1A-9 and would thus be unavailable to protect Rutgers case file materials from OPRA

[7] N.J.S.A. § 47:1A-9(b) provides that OPRA "shall not abrogate or erode any executive or legislative privilege or grant of confidentiality heretofore established or recognized by the Constitution of this State, statute, court rule or judicial case law." One lower court, reading the term "grant of confidentiality" as an independent clause, has interpreted that provision broadly to incorporate the attorney work product privilege as an exemption to OPRA. Gannett N.J. Partners, LP v. County of Middlesex, 379 N.J. Super. 205 (App. Div. 2005). Some may contend, however, that this exemption is limited to "executive or legislative privilege" as those concepts were understood at the time OPRA was adopted, and this Court has not had occasion to decide this issue.

requests in clinic cases.

At the very least, if the Rules of Court and the availability of discovery protections are to be subjected to such wholesale revision in civil actions in which a Rutgers clinic is counsel, then such a result should be accomplished through the formal processes set out in the Evidence Act of 1960, N.J.S.A. § 2A:84A-33 to -44. As this Court recently noted in State v. Byrd, 198 N.J. 319 (2009), the formal procedural requirements of the Act are particularly necessary when the result would be "a fundamental change" in evidentiary rules that have "serious and far-reaching" consequences. Id. at 349. The Evidence Act contemplates the cooperative actions of all three branches of government, and such rules changes cannot be accomplished by one branch unilaterally. See id. at 343.

Of course, the Legislature should not be easily assumed to have intended to trigger all these constitutional difficulties. The well-known doctrine of "constitutional avoidance" (e.g. In re N.J. Am. Water Co., 169 N.J. 181, 197 (2001)) counsels against a strained interpretation of OPRA that is both at odds with its legislative history, and also would provoke an unnecessary constitutional dispute.

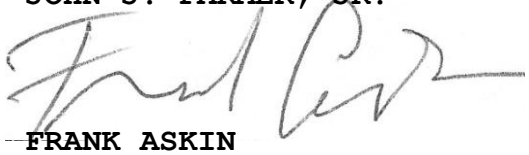
CONCLUSION

For the reasons stated herein, the Petition for Certification should be granted.

December 15, 2010. Respectfully submitted,

Respectfully submitted,

JOHN J. FARMER, JR.



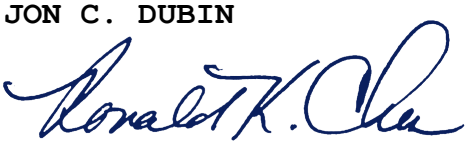
FRANK ASKIN

JOHN C. LORE III

Rutgers School of Law, Camden
217 North Fifth Street
Camden, NJ 08102

Of Counsel.

JON C. DUBIN



RONALD K. CHEN

Rutgers School of Law, Newark
Center for Law & Justice
123 Washington St.
Newark, NJ 07102
(973) 353-5687

Attorneys for Proposed Amici Curiae

Counsel for Amicus Curiae gratefully acknowledge the assistance of the following students enrolled in the Constitutional Litigation Clinic at Rutgers School of Law, Newark, for their assistance in the preparation of this brief: Dimitrios Kandylas, Julia Casteleiro, Jennifer Dearborn and Martin Kafafian.