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SUSSEX COMMONS ASSOCIATES, LLC, a limited liability company of the State of New Jersey, and HOWARD BUERKLE, Plaintiffs,	SUPERIOR COURT OF NEW JERSEY MIDDLESEX COUNTY DOCKET NO.: MID-L-8465-06
v.	Civil Action
RUTGERS, THE STATE UNIVERSITY, RUTGERS ENVIRONMENTAL LAW CLINIC and RUTGERS UNIVERSITY CUSTODIAN OF RECORDS. Defendants.	

BRIEF AMICUS CURIAE SUBMITTED ON BEHALF OF RUTGERS LAW SCHOOL/NEWARK CLINICAL PROGRAM

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I. STATEMENT OF INTEREST OF AMICUS

This brief Amicus Curiae is submitted on behalf of the Rutgers School of Law/Newark Clinical Program to address whether clinical programs of law schools at state universities are state agencies for purposes of the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1, et seq., and common law rights of access.

A determination that such clinical programs are state agencies under OPRA could deprive an under-served and disadvantaged section of society which may have no other means of obtaining representation from benefitting from the legal services such clinical programs provide. It would also infringe on the mandated educational purpose of legal clinics, and impose a disparate educational disadvantage for students in law schools at state universities vis-a-vis their counterparts at private law schools, who would have the benefit of clinical programs that are not hindered by OPRA and common law rights of access requests.

The Clinical Program at Rutgers School of Law/Newark consists of six currently functioning clinics in addition to the former Environmental Law Clinic: the Constitutional Litigation Clinic, the Urban Legal Clinic, the Special Education Law Clinic, the Family Advocacy Clinic, the Tax Clinic and the Community Law Clinic. The Clinical Program

has a vested interest in the outcome of this matter as it affects its ability to provide legal services to an under-served community and to provide hands-on legal education to its students.

In this interest, we write in support of a determination that legal clinics at state universities are not state agencies subject to OPRA and common law rights of access requests.

II. THE ENVIRONMENTAL LAW CLINIC AND LAW CLINICS AT STATE UNIVERSITIES IN GENERAL ARE NOT STATE AGENCIES FOR PURPOSES OF OPRA BECAUSE IF THEY WERE IT WOULD UNDERMINE THEIR DUTY AS MEMBERS OF THE LEGAL PROFESSION TO ADVANCE THE UNDIVIDED INTERESTS OF THEIR CLIENTS

If the Rutgers Environmental Law Clinic were considered a state agency for purposes of OPRA requests, the purpose of the clinic to provide legal services to under-served clients would be undermined. The New Jersey Supreme Court has held that where an institution such as Rutgers University would be considered a state agency for some purposes, it does not follow that a discrete unit of said institution is a state agency for all purposes, and especially not where such an interpretation would undermine the purpose of that unit.[1]

[1] There is no debate that Rutgers University is subject to OPRA and can be compelled to reveal information concerning the financial assistance, etc. it provides to the law school clinical program.

Since a purpose of the Environmental Law Clinic, like all of the Rutgers clinics, is to represent the "undivided interests of their client," and since this purpose could require an adversarial relationship with the State, an interpretation that the clinic is a State agency under OPRA would undermine the purpose and the societal value of the Clinic.

The United States Supreme Court has held that an institution's affiliation with the state, even in the form of an employee of the state, is insufficient to establish state agency for purposes of a § 1983 action where the nature of the institution requires undivided loyalty to its clients. In Polk County v. Dodson, the Supreme Court held that a public defender does not act under color of state law in her role as legal representative of a defendant in a criminal action brought by the state. 454 U.S. 312 (1981). Dodson involved a criminal defendant's § 1983 action against a public defender for alleged violation of his rights secured by the constitution. In holding that a public defender was not a state actor for this purpose, the Court reasoned that:

> Within the context of our legal system, the duties of a defense lawyer are those of a personal counselor and advocate. . . . In our system, a defense lawyer characteristically opposes the designated representatives of the State. The system assumes that adversarial

> testing will ultimately advance the public interest in truth and fairness. But it posits that a defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing "the undivided interests of his client." This is essentially a private function, traditionally filled by retained counsel, for which state authority and office are not needed.

Id. at 318-19. Notwithstanding the public defender's position as a full-time employee of the State and the fact that the State was required by the constitution to provide the services of a public defender, the Court held that the nature of the public defender's duties as counsel to an indigent criminal defendant would be undermined by an interpretation that the public defender acted as an agent of the State in such a representation. Id.

The Court clarified this rule of law seven years later in West v. Atkins. 487 U.S. 42 (1988). In Atkins, the Court determined that a doctor who works for the state is a state actor for purposes of a § 1983 action when he acts in his professional capacity by providing medical services to a citizen. The Court distinguished the doctor from the public defender by noting that unlike the public defender, a doctor's "professional and ethical obligation to make independent medical judgments did not set him in conflict with the state . . . ." Id. at 51. The Court reasoned that the reason the public defender could not be seen as acting

under color of state law was not merely because of his professional and ethical obligations to his client, but because the nature of these obligations "require[d] him to act in a role independent of and in opposition to the state." Id. at 50. A public defender is not a typical state actor because his professional responsibilities are the same as if he was a private attorney, requiring his "professional independence" from the state. Id. (citing Dodson, 454 U.S. at 325).

Although the specific issue in that line of cases is different than that in the present case, the same consequences that the Court was trying to avoid in Dodson, (i.e., undermining an institution that has as its purpose the representation of an under-served section of society) would result from holding that legal clinics at state universities are state agencies for purposes of the OPRA and common law rights of access. First, legal clinics provide legal assistance to an under-served section of society which may otherwise not have access to legal representation. Second, an interpretation that legal clinics at state universities are state agencies for purposes of OPRA would impinge on the ability of clinics to represent the "undivided interests" of their client.

Much like the public defender who represents indigent criminal defendants who would otherwise have no access to legal services, law school clinics are often the last and only lawyer in town for most of the clients they serve. The huge numbers of low and moderate-income persons with unmet civil legal needs led one commentator to argue that the need for law school clinic programs has rarely been greater. Jon C. Dubin, *Clinical Design for Social Justice Imperatives*, 51 SMU L. REV. 1461, 1475, 1505 (1998); see also id. At 1475-77 and nn. 73, 80 (quoting Justice Sandra Day O'Connor's speech to the ABA noting that "law school programs could take a big bite out of the legal services shortages" in the immediate term and that in the long run they serve the public interest by sensitizing law students to the legal needs of the poor and the importance of *pro bono* and public service work throughout their careers.). Thus, much like in the case of a public defender, impediments to a legal clinic's ability to represent the "undivided interests" of their client do not simply drive the needy client to another lawyer outside the law school, but may deny legal assistance altogether.

Further, if legal clinics are considered state agencies under OPRA, and hence required to release documents relating to the representation of clients, their ability to represent the undivided interests of their client would be impaired.

Like public defenders, a legal clinic has professional and ethical obligations to a client that might require the clinic to perform in an adversarial role to the state. As the Supreme Court held in Dodson, when a State institution acting in the scope of its duties finds itself in a position adverse to, and thus independent of the State, such an institution should not be considered a state entity in instances where its societal value would be disserved.

Additionally, since legal clinics act in the same capacity as private legal representatives in the course of their duties, this purpose would be impaired if otherwise non-discoverable documents could be discovered by an adverse party by filing an OPRA request. Legal clinics serve their function and satisfy their professional obligations by representing solely the interests of their clients, and this function would be impaired by forcing them to disclose documents related to a representation of a client under OPRA that would not otherwise be discoverable - for example, materials turned over to the clinic by the client which do not come under the definition of either work-product or lawyer-client privilege. Thus, Rutgers' clinics would have to advise potential clients that any materials turned over could be subject to a third party's OPRA request - which would surely have a devastating chilling effect on the

representational relationship.

A ruling that legal clinics are state instrumentalities, and as a consequence are covered under OPRA and common law rights of access, would have a watershed effect that could undermine literally hundreds of legal clinics and the hands-on education of thousands of student-lawyers across the country when opponents to suits conducted by clinics would utilize this adverse ruling. There are approximately 90 ABA accredited public university law schools that have legal clinics, most of which have several clinical programs. [http://www.abanet.org/legalservices/probono/lawschools/pi_pi_clinics.html] The effect of an adverse ruling to the legal clinics might effect hundreds of clinical programs, thousands of law students, and thousands of clients served by such clinics, should an adverse ruling spread beyond the State.

III. LEGAL CLINICS SHOULD BE EXCLUDED FROM "OPRA" AND COMMON LAW RIGHTS OF ACCESS TO PUBLIC RECORDS BECAUSE THEIR PURPOSE OF PROVIDING LAW STUDENTS AT STATE UNIVERSITIES WITH A CLINICAL EDUCATION WOULD BE UNDERMINED.

Covering the legal clinics at Rutgers University School of Law under OPRA and common law rights of access would be contrary to the educational purpose of the clinics, and infringe on their Constitutionally protected educational freedom. Excluding the legal clinics, instead of exempting

their activities under one of the enumerated exemptions of OPRA [N.J.S.A. 47:1A-1.1], is the appropriate decision in this case because only such a categorical exclusion protects the educational purpose of the clinics from a future case-by-case judicial analysis. Although OPRA and common law rights of access may exclude client-related records, N.J.S.A. 47:1A-1.1, other records produced in the course of the legal clinics' educational mission (e.g., legislative briefs on legal issues or internal discussion of legal and academic policy where no client is involved) would be open to review and jeopardize the educational mission of the clinics.

Compelling the former Rutgers Environmental law Clinic to divulge such records would clearly adversely impact the other six clinical programs that are a part of the American Bar Association's (ABA) required academic curriculum of the Law School. Standard 302(b)(1) (2002), Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Standards for Approval of Law Schools, available at: http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf. (last accessed April 23, 2008).

Such a ruling would also be inconsistent with the New Jersey Supreme Court's ruling that clinical attorneys at the state law schools are not to be considered state actors

under the State Conflicts of Interest Law. In re Determination of Executive Commission on Ethical Standards 116 NJ 216, 218(1989). Such a ruling would be contrary to that Court's recognition that legal clinics provide a vital educational element in preparing law students for practice Id. Therefore, we respectfully submit that this court should hold that Rutgers University's law school clinics should be excluded from OPRA and common law rights of access.

A. Legal Clinics Should be Excluded from OPRA Because They Serve a Protected and Vital Legal Educational Function and Should not be Regarded as Instrumentalities of the State.

Because the legal clinic's primary purpose is to educate law students, the legal clinics should be excluded from OPRA and common law rights of access. Legal clinics serve a vital educational function in preparing law students for practice by involving them in every level of actual litigation. Hope Babcock, Environmental Justice Clinics: Visible Models of Justice, 14 Stan. Envtl. L. J. 3, 24 (1995), (citing an American Association of Law Schools report defining clinical education as "[F]irst 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 American Legal Education, 24 Rutgers L. Rev. 1, 7 (1969). ("The activity of the clinic . . . would provide a fascinating teaching tool for probing into the most fundamental theoretical, substantive, and conceptual problems, all within the context of the throbbing excitement of reality. It would provide 'the salt and the yeast' without which everything is 'flat and tasteless.'")

In 1996, the ABA began to require that each ABA-accredited law school "offer live-client or other real-life practice experiences," and so 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: Standard 302(b)(1) (2002), Section of Legal Educ. and Admissions to the Bar, Am. Bar Ass'n, Standards for Approval of Law Schools, available at: http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf. (last accessed April 23, 2008)). Currently, the ABA lists approximately 90 accredited public university law schools that have legal clinics. http://www.abanet.org/legalservices/probono/lawschools/pi pi clinics.html (last accessed April 23, 2008).

Mirroring the ABA's recognition of the importance of hands-on legal education, the Supreme Court of New Jersey acknowledged the educational importance of legal clinics as being "one of the most significant developments in legal education," and reversed an Appellate Division ruling holding that legal clinics fall under the State's conflict of interest statue. In re Determination of Executive Commission on Ethical Standards, 116 NJ at 218. In holding that the clinics are *excluded* from the State's conflicts of interest law, the Court held that law professors and the clinics they supervise are not to be considered "state employees" in carrying out their hands-on educational mission as doing otherwise would inhibit the legal clinic's educational mission. Id. at 229. The Court emphasized that "the State University would be academically and educationally disadvantaged by the contrary interpretation," adding, that the Legislature would not "have intended to disable a clinical education program at our State University." Id.

The Court's reasoning in that case closely relates to the present dispute. The Court recognized that "[g]enerations of law students, trained on the case method, were believed to be skilled in analysis but unskilled in serving client needs." Id. at 218-19. 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 law school teaches students *about* the law, legal clinics teach law students *how to be lawyers*. See e.g., Frank Askin. A Law School Where Students Don't Just Learn the Law; They Help Make the Law, supra, 51 Rutgers L. Rev. at 860.

This educational focus is dispositive because the dispute in Executive Commission and the present case both concern the application of a statute intended to apply generally to state actors, but the application of which would have deleterious effects on the legal clinics. Using that as a determining factor, the Court in Executive Commission excluded the legal clinic from the statute. Id. at 229. Applying that same rationale in the present case, because of the similarities between these two cases, the court in this case should likewise exclude the clinic from OPRA and common law rights of access. Excluding the legal clinics is the appropriate decision because doing so prevents a case-by-case analysis that may erode the educational purpose of legal clinics and be contrary to the New Jersey Supreme Court's ruling on such issues.

B. Legal Clinics Should be Excluded from OPRA Because They Should be Free From Outside Interference That Infringes on Academic Freedom

Both the United States and the New Jersey Supreme Courts have recognized the need to protect academic programs from outside interference. Robert R. Kuehn & Peter A. Joy, An Ethics Critique of Interference in Law School Clinics, 71 Fordham L. Rev 1971, 1988 (2003). The U.S. Supreme Court ruled in NLRB v. Yeshiva University, that universities are "guilds of scholars . . . responsible only to themselves." NLRB v. Yeshiva University, 444 U.S. 672, 680, 100. Law school clinics are afforded similar protections because they are a component of the public university. See Kuehn & Joy, supra, 71 Fordham L. Rev at 1988 (Courts have generally been protective of legal clinics, their supervising attorney-professors, and student-lawyers).

In the Executive Commission case, the State Supreme Court recognized that "the university shall be and continue to be given a high degree of self-government." Id. at 224. Legal clinics were created through the ABA's mandate to provide hands-on education and so are clearly one component of the University's educational mission. Because of this, they deserve equal protection from outside interference. Ruling that OPRA and common law rights of access apply to legal clinics would infringes on academic freedom.

C. The Legislative Purpose of OPRA and Common Law Rights of Access are Not Contravened by Excluding Legal Clinics from their Purview

Excluding the Rutgers' legal clinics from OPRA and common law rights of access does not contravene the legislative purpose of OPRA to make government records accessible to citizens of the State. The protections for legal clinics enumerated in this brief are not intended to cover governmental records typically sought through OPRA or common law rights of access. For example, expenditures for the legal clinical program, such as faculty salaries, remain under OPRA's purview. On the other hand, materials that are created in the course of and a part of the educational activities of the legal clinics should be excluded based upon the arguments made above. Creating such an exclusion for legal clinics will not impair OPRA's intent and effectiveness, nor have a similar detrimental effect on common law rights of access.

Respectfully submitted,

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