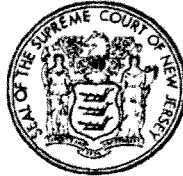


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May 12, 2011

Jon C. Dubin, Esq.
Associate Dean for Clinical Education
Center for Law and Justice
School of Law Newark
Rutgers, The State University of New Jersey
123 Washington St.
Newark, NJ 07102

Re: ACPE Docket No. 04-2011

Dear Mr. Dubin:

The Advisory Committee on Professional Ethics reviewed your inquiry. You asked whether an attorney at a Rutgers Law School clinic has an obligation under *RPC* 1.4(c) to inform a prospective client that certain information relating to representation and the legal services provided by the clinic may be subject to public disclosure under the Open Public Records Act, in light of the recent Appellate Division decision in *Sussex Commons Assocs. v. Rutgers, The State University*?

In the *Sussex Commons* case, the Appellate Division held that law clinics operated by Rutgers are not exempt from requests for documents under the Open Public Records Act (OPRA). Hence, certain information about clinic matters, such as information about public funding spent for clinic operations, may be publicly disclosed on request. Other information may also be subject to disclosure; the exact contours of required disclosure is not known at this time. The Supreme Court has granted a petition for review of the Appellate Division's decision.

You asked whether the attorneys at the clinics have an obligation to inform prospective clinic clients that certain information may be subject to public disclosure. You further asked whether the clinic attorney may first consider the likelihood

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that an OPRA request pertaining to that specific client's matter may be filed and, if the likelihood is minimal, omit such a discussion with the client. You asked whether the attorney should "consider whether OPRA mandated disclosures would have any significant effect on the quality of his representation, or is that a decision that only the client can make after disclosure?" Lastly, you asked whether the attorney should "take into account the likelihood that the prospective client would be able to find another lawyer in deciding whether disclosure is necessary?"

Rule of Professional Conduct 1.4(c) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The level of information that must be provided to the client varies depending on the circumstances of the representation and the sophistication of the client. Comment to Model Rule 1.4 ("the information to be provided is that appropriate for a client who is a comprehending and responsible adult"); *Davin, LLC v. Daham*, 329 N.J. Super. 54, 72 (App. Div. 2000) ("[t]he care exercised by the attorney must be commensurate with the risks undertaken and tailored to the needs and sophistication of the client").

Accordingly, an attorney must make appropriate disclosures to the client depending on the facts and circumstances. The Appellate Division decision in *Sussex Commons* does not alter the preexisting obligations of the attorney in this regard. The Committee finds that Rutgers clinic attorneys may, in some matters, have an obligation to explain to clients that certain documents could be disclosable under OPRA. In other matters, depending on the facts and circumstances, clinic attorneys may have no obligation to tell clients that certain documents could be disclosable under OPRA. The "needs and sophistication of the client," the likelihood that documents would be disclosable under OPRA, the sensitivity of disclosable documents, and the effect disclosure may have on the client and the matter should be weighed by clinic attorneys when determining what information is necessary to permit the client to make informed decisions regarding the representation.

Thank you for making this inquiry of the Committee.

Very truly yours,

ADVISORY COMMITTEE ON
PROFESSIONAL ETHICS



Carol Johnston
Committee Secretary
For the Committee

c: Steven C. Mannion, Chair
Committee Members